Reconciling Ireland's Bail Laws with Traditional Irish Constitutional Values

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Abstract

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Bail is a device which provides for the pre-trial release of a criminal defendant after security has been taken for the defendant’s future appearance at trial. Ireland has traditionally adopted a liberal approach to bail. For example, in *The People (Attorney General) v O’Callaghan* (1966), the Supreme Court declared that the sole purpose of bail was to secure the attendance of the accused at trial and that the refusal of bail on preventative detention grounds amounted to a denial of the presumption of innocence. Accordingly, it would be unconstitutional to deny bail to an accused person as a means of preventing him from committing further offences while awaiting trial.

This purist approach to the right to bail came under severe pressure in the mid-1990s from police, prosecutorial and political forces which, in turn, was a response to a media generated panic over the perceived increase over the threat posed by organised crime and an associated growth in ‘bail banditry’. A constitutional amendment effectively neutralising the effects of the *O'Callaghan* jurisprudence was adopted in 1996. This was swiftly followed by the Bail Act 1997 which introduced the concept of preventative detention (in the bail context) into Irish law. More recent legislative enactments have further strengthened this encroachment on the right to bail.

The combined effect of these incremental changes has been to produce a bail regime fundamentally at odds with core values of the Irish legal system as espoused in the *O'Callaghan* jurisprudence. At the very least, they entail a direct attack on the right to liberty and the presumption of innocence. However, it must be said that they are not necessarily incompatible with the European Convention on Human Rights. Nor are they peculiar to Ireland. Most of them are already established features of several other common law jurisdictions, including England and Wales, and the United States.

The primary aim of this thesis is to explore the reorientation of the Irish criminal justice system from a due process to crime control system of justice. The reform of Ireland’s bail laws and the introduction of preventative detention in the bail context will serve as the principal example to convey this contention. A related aim of this thesis is to assess how and the extent to which these bail changes have been imported hastily from other jurisdictions without being adequately assimilated to the distinctive domestic and constitutional traditions of the Irish criminal justice system.
Declaration

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

Signed

____________________________________
Kate Doran
November 2014
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A General Introduction

The object of the criminal justice system is the control of crime, but in a civilised society that object cannot be pursued in disregard of other values.¹

Bail is defined as, ‘[t]he setting of liberty of an accused person upon others becoming sureties for the accused at his trial.’² Ireland has traditionally adopted a liberal approach to bail. This approach is exemplified in The People (Attorney General) v O’Callaghan, where the Supreme Court declared that the sole purpose of bail was to secure the attendance of the accused at trial and rejected the notion that preventative detention had any place in our system of law.³ Specifically, the Court held that it would be impermissible to deny bail to an accused person as a means of preventing him from committing further offences while awaiting trial. Critically, the Court associated this aspect of bail with the fundamental human rights and due process values permeating the Irish legal system.

This purist approach to the right to bail came under severe pressure in the mid-1990s from police, prosecutorial and political forces which, in turn, was a response to a media generated panic over a perceived increase in the threat posed by organised crime and an associated growth in ‘bail banditry’. A constitutional amendment effectively neutralising the effects of the O’Callaghan jurisprudence was adopted in 1996. This was swiftly followed by the Bail Act 1997 which introduced the concept of pre-trial preventative detention into Irish law by empowering a court to refuse bail to a person charged with a serious criminal offence where it is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person. Legislative enactments in 2006 and 2007 have further strengthened this encroachment on the right to bail by: expanding the range of offences affected; imposing an obligation on accused persons to provide personal information that could be used to support a denial of bail; and giving evidential weight to the opinion of a Garda Superintendent that a refusal of bail is reasonably necessary to prevent the commission of a further offence by the accused person.

The combined effect of these incremental changes has been to produce a bail regime fundamentally at odds with core values of the Irish legal system as espoused in O’Callaghan.

¹ R v Brown (Winston) [1995] 1 Cr App R 191, 198 as per Steyn LJ.
At the very least, they entail a direct attack on the right to liberty and the presumption of innocence. It must be said, however, that they are not necessarily incompatible with the European Convention on Human Rights. Nor are they peculiar to Ireland. Most of Ireland’s bail developments are already established features of several other common law jurisdictions, including England and Wales, and the United States. Indeed, it would appear that they have been imported directly from them resulting in a more harmonised approach to bail laws across these jurisdictions.

The hypothesis of this thesis is that the development of the law of bail directly reflects a reorientation of the Irish criminal justice system from a due process to a crime control system of justice. The reform of Ireland’s bail laws and the introduction of preventative detention in the bail context will serve as the principal example to convey this proposition. This thesis will also assess how and the extent to which these bail changes have been imported hastily from other jurisdictions without being adequately assimilated to the distinctive domestic and constitutional traditions of Irish criminal justice.

This is a doctrinal thesis. It is a legal exercise so the methodology involves examining case-law, legislation, legal texts, academic articles, documents, parliamentary reports and newspaper articles.

A doctrinal thesis is valuable as it serves to convey the ‘nuts and bolts’ of the law. A doctrinal thesis is concerned with the analysis of legal propositions and doctrines. The law in theory is very different to the law in practice.

At the initial stages of my PhD I considered incorporating an empirical element in the thesis. It is undeniable that there is a dearth of material in this area. However, I decided to focus solely on the doctrinal method of analysis for my PhD as I felt more comfortable and better equipped to undertake this type of study and an empirical thesis is an entirely different form of analysis.

The thesis embodies a broad range of methodologies. In short, the thesis aims to place our understanding of Ireland's bail changes within the broader context of the struggle between the State’s interest in risk management and the individual’s interest in maximising human rights and due process protections in the criminal process. The theoretical frameworks provided by
Packer’s, *The Limits of the Criminal Sanction* and Garland’s, *The Culture of Control* are employed for this purpose.

The standard legal method will be deployed to pursue the doctrinal research on: the history and development of bail law; the changes to Ireland’s bail laws; the constitutional and human rights contexts in which it is located; and the bail laws in other jurisdictions comparable to Ireland (including those from which the Irish bail reforms were potentially derived).

When dealing with the foreign jurisdictions, the standard legal method will be complemented by the comparative legal method in order to consider relevant historical, political, social, economic, cultural and geographic differences that might impact on the interpretation and assessment of the foreign materials. Analysis of the Irish and foreign materials will also be supported by resort to secondary literature on bail and criminal justice and other sources such as: parliamentary records, reports and newspaper articles.

This thesis’ primary aim is to trace the evolution of the Irish criminal justice system from a due process to crime control system of justice. Therefore, chapter 1 will provide a theoretical framework upon which the current trajectory of the Irish criminal justice process can be placed. In order to demonstrate the reorientation of the Irish criminal justice system, it is necessary to examine the traditional constitutional values underpinning the Irish system.

For that reason, chapter 2 will explore the history of Ireland’s traditional constitutional values along with the evolution of Ireland’s fundamental rights provisions including the development of unenumerated constitutional rights. This chapter will focus on two fundamental rights, namely, the right to liberty and the presumption of innocence. Having considered these constitutional rights, the chapter moves on to contemplate whether there is a distinctive flavour to the status, interpretation and application of these rights in Ireland. This will be followed with a comparative analysis of Ireland’s fundamental rights doctrine with that of other common law jurisdictions, specifically, England and Wales, and the United States.

Chapter 3 will assess the recent changes in Ireland’s criminal justice system within the context of the theoretical frameworks outlined in chapter 1. While traditionally Irish criminal justice has centred itself on the Due Process Model, it will be contended that recently there has been a palpable shift in Ireland’s constitutional balance resulting in a crime control
centred approach. The chapter will also examine the concept of preventative detention in the bail context as it is asserted that this type of prophylactic measure is archetypal of a risk-oriented approach to criminal justice. Although it is argued that the Irish criminal justice system has shifted towards a risk-orientated system of justice, it is conceivable that it still retains some affinity to the Due Process Model. This ‘affinity’ will be addressed at this juncture and will be followed by a discussion addressing whether Ireland has actually experienced a reorientation of its criminal justice system.

As this thesis employs Ireland’s bail laws as the paradigm upon which to analyse the shift in the Irish criminal justice system, it is imperative that this thesis includes an examination of the concept of bail. Chapter 4 will charter the evolution of the bail theory from Anglo-Saxon times up to the early 20th century. As Irish law is predicated on the common law to a large extent it is necessary to sketch out the evolution of bail in the English context.

However, Irish law can be distinguished from English law due to Ireland’s constitutional obligations. Consequently, chapter 5 will provide a history of Irish bail law. When considering Ireland’s bail laws, it is necessary to focus on the O’Callaghan case. This chapter will therefore contain a detailed exposition of the O’Callaghan decision which saw the Irish Supreme Court emphatically reject the proposition that a person could be denied bail for preventative reasons. Despite the fervent stance of the O’Callaghan Supreme Court, successive governments attempted to reorient the Irish criminal justice system to reflect a strong crime control flavour.

Chapter 6 examines the reforms which were introduced and/or suggested as a means of tightening up on bail without resorting to a constitutional referendum to allow for preventative detention in the bail context. Yet the pressure for the implementation of preventative detention in the bail context remained. Thus, chapter 7 will consider the 1996 constitutional amendment which was followed by the enactment of the Bail Act 1997.

Chapter 8 will assess whether the bail amendment, which firmly installed the concept of pre-trial preventative detention into Irish law, is the product of an unwise importation of developments from other jurisdictions without sufficient and necessary attention to their fit with distinctive Irish constitutional values. In doing so, the chapter will outline the bail material from England and Wales, and the United States. It will then examine the extent to
which Irish bail laws are a lift (or not) from English and United States precedents. Lastly, this chapter will critically analyse the persuasiveness of the arguments for introducing the pre-trial preventative detention dimension in the aforementioned jurisdictions and whether (and the extent to which) those arguments do not fit in the Irish context.
Chapter 1 – Theoretical Overview

Theoretical argument enables us to talk about the real world of practice with a clarity and a breadth of perspective often unavailable to the hard pressed practitioner.4

Introduction

The current trajectory of the Irish criminal justice process can be placed within a number of theoretical frameworks, most notably Herbert Packer’s Due Process/Crime Control archetype and David Garland’s ‘indices of change’ considered in The Culture of Control. The more recent emergence of a risk management approach within criminal justice thinking also merits consideration.

When analysing the diverging values that drive criminal justice policies it is helpful to turn to Packer’s work, The Limits of the Criminal Sanction.5 In brief, Packer developed two polarised value systems that compete for precedence in the operation of the criminal process – specifically, the Due Process and the Crime Control Model. As Roach has noted, models in the general sense provide ‘an accessible language to discuss the actual operation of the criminal process, the values of criminal justice, and the way that people think and talk about criminal justice.6 While Packer never exactly proposed that the administration of criminal justice could be discretely divided into two distinctly separate categories, he did offer two opposing models of the criminal process. It is significant that Packer warns against viewing either pole as the ideal model.7 According to Griffiths, ‘[Packer] offers us an analytic structure which, he says, encompasses all possible value choices available to us in criminal procedure.’8

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7 Packer states: ‘The models are distortions of reality. And, since they are normative in character, there is a danger of seeing one or the other as Good or Bad.’ Herbert Packer, The Limits of the Criminal Sanction (Stanford University Press 1968) 153. Ashworth and Redmayne have described the models in the following terms: ‘They are designed as interpretive tools, to enable us to tell (for example) how far in a particular direction a given criminal justice system tends, and they do not of themselves suggest that one approach is preferable to another.’ Andrew Ashworth and Mike Redmayne, The Criminal Process (3rd edn, Oxford University Press 2005) 40.
In applying Packer’s two normative models to the Irish criminal justice system recent trends in the administration of justice can be analysed. Although Packer’s models are not universally acclaimed as an appropriate template for critically assessing the impact of changes in the criminal process one must not underestimate their importance.9 As Sanders and Young note, ‘Use of the models enables one to plot the position of current criminal justice practices at each stage, as well as to highlight the direction of actual and foreseeable trends along any given spectrum.’10 There are criticisms of Packer’s theory nevertheless. For example, Packer's hypothesis has been described as ‘theoretically deficient’ in that he fails to present an adequate exposition of the Due Process and Crime Control Model and the theoretical basis underpinning them.11 Further still, Packer is oftentimes described as outdated.12 For these reasons, it is necessary to include the contributions of a more contemporary theorist, namely, David Garland. Garland's indices of change provide a useful platform upon which the reorientation of the Irish criminal justice system can be analysed. According to Lyon, Garland's indicia serve as markers and signposts by which to gauge how far the culture of control has advanced in any given direction.13 One such marker is the decline of the rehabilitative ideal. This element of the criminal justice system has been subjugated by other goals such as incapacitation and risk management. Feeley and Simon have employed the term ‘the new penology’ to describe this shift in focus away from the traditional concerns of the criminal law. There is currently a fixation in identifying offenders in accordance with the risk they pose to society.14 The introduction of pre-trial preventative detention in the bail context is an example of the emergence of a risk-based approach in the Irish criminal justice system.

**Packer’s Due Process and Crime Control Models**

Packer’s Due Process Model emphasises the rights of an individual. It is reflected in key elements of the criminal process such as fair procedures, the presumption of innocence and

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9 According to Ashworth, despite the models’ ability to assist in interpreting trends and characterising systems, they are not designed to be prescriptive either generally or specifically. Andrew Ashworth, ‘Criminal Justice and the Criminal Process’ (1988) 28(2) British Journal of Criminology 111, 117.
the preservation of liberty. Such rights are considered paramount. The Due Process Model requires that guilt be proved through a fair and transparent process and any failure by the prosecution to fully adhere to procedures will result in the acquittal of the accused.\footnote{Examples of these procedural rules include the exclusion of improperly obtained evidence and the rule against double jeopardy.} Packer has likened the Due Process Model to that of an obstacle course, each stage acting as a barrier to the accused being carried any further along in the criminal process.\footnote{Herbert Packer, \textit{The Limits of the Criminal Sanction} (Stanford University Press 1968) 163. Please note for concision the male pronoun is used throughout this thesis.} The Due Process Model is characterised by a formal and adjudicative fact-finding process where the case against the individual is publicly heard, in an impartial tribunal and a determination of guilt or innocence is made only after the accused has been granted the opportunity to argue the case against him.\footnote{ibid 164.} It should be observed that the Due Process Model does not ‘rest on the idea that it is not socially desirable to repress crime’.\footnote{ibid 163.} Yet efficiency is not at the core of the Due Process Model. In fact, ‘[t]he aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty.’\footnote{ibid 165.} Finality is not a primary concern in the Due Process Model.\footnote{Herbert Packer, ‘Two Models of the Criminal Process’ (1964) 113(1) University of Pennsylvania Law Review 1, 15.} As Packer articulates, the Due Process Model rejects the ‘short-cuts around reliability’ that the Crime Control Model invariably accepts.\footnote{Herbert Packer, \textit{The Limits of the Criminal Sanction} (Stanford University Press 1968) 164.} The Due Process Model insists on the prevention of mistakes and stresses the possibility of error.\footnote{See generally, Herbert Packer, \textit{The Limits of the Criminal Sanction} (Stanford University Press 1968).} Crucially, the Due Process Model considers the loss of liberty which is embodied in the end result of the criminal process as ‘the heaviest deprivation’ a government can inflict on an individual.\footnote{ibid 165.} Equality is another strand underlying the Due Process Model.\footnote{ibid 168.} The norms derived from this premise propound that the criminal process, which is initiated by the government and containing the likelihood of ‘severe deprivations’ at the hands of said government, ‘imposes some kind of public obligation to ensure that financial inability does not destroy the capacity of an accused to assert what may be meritorious challenges to the processes being invoked
against him.'\textsuperscript{25} In short, the norm of equality prevents situations in which indigence forms a barrier to an assertion of a right. The Due Process Model also possesses an element of scepticism concerning the morality and usefulness of criminal sanctions.\textsuperscript{26}

On the other hand, Packer’s Crime Control Model appears radically different. The Crime Control Model emphasises the apprehension, prosecution and punishment of crime, ie fact-finding is the central aim.\textsuperscript{27} As Griffiths has observed:

\begin{quote}
For the Crime Control Model, the problem is effective protection of society as a whole from the threat of a breakdown of law and order posed by unrepressed criminal activities. The concern of the Due Process Model is with the need to protect individuals caught up in the criminal process from the coercive, easily abused power of society.'\textsuperscript{28}
\end{quote}

The police and prosecution are at the focal point of the Crime Control Model. The value system which underpins this model is based on the theory that the suppression of criminal conduct is the most important function of the criminal process.\textsuperscript{29} When operating most effectively a criminal justice process entrenched in the Crime Control Model will deliver a high level of apprehension and conviction. Moreover, it must accomplish this where the numbers that are being dealt with are very large and the resources available are very limited.\textsuperscript{30} Administrative or extra-judicial processes\textsuperscript{31} are preferred over judicial processes and speed and finality are integral components of this model. Packer suggests that the legislature would be more likely to support the Crime Control Model of the criminal process whereas the courts are more likely to support the Due Process Model.\textsuperscript{32} Packer has famously likened the Crime Control Model to that of a conveyor belt where constant streams of cases are moving incessantly along the line. In this model each official on the line carries out a small task or routine operation, bringing the case closer toward becoming a closed file.\textsuperscript{33} This model allows for police or prosecutors to use their expertise to come to an early

\begin{itemize}
\item \textsuperscript{25} ibid 169.
\item \textsuperscript{26} ibid 170.
\item \textsuperscript{27} As Roach has observed: ‘[I]t is clear that [Packer’s] crime control model was based on societal interests in security and order while his due process model was based on the primacy of the rights of the individual in relation to the state.’ Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89 Journal of Criminal Law and Criminology 671, 672.
\item \textsuperscript{29} Herbert Packer, \textit{The Limits of the Criminal Sanction} (Stanford University Press 1968) 158.
\item \textsuperscript{30} ibid 159.
\item \textsuperscript{31} Information can be garnered more quickly through interrogation in a police station than through the process of examination and cross examination in a court setting.
\item \textsuperscript{32} Herbert Packer, \textit{The Limits of the Criminal Sanction} (Stanford University Press 1968) 173.
\item \textsuperscript{33} ibid 159.
\end{itemize}
determination of probable innocence or guilt. Those who are innocent leave the process and those remaining are subject to what Packer describes as the ‘presumption of guilt’. It must be noted that the presumption of guilt is not the converse of the presumption of innocence. Essentially, it describes the situation where a person has been arrested and consequently a determination is made as to whether there is sufficient evidence to hold the individual for further action. Thus, a presumption of guilt arises. It is noteworthy that the presumption of guilt will arise long before the suspect becomes a defendant. Packer propounds that a suspect will become a defendant when it is decided by a judicial officer at a preliminary hearing that a formal prosecution should be initiated. At this remove, it is also decided what specific offences should be charged. The criminal investigation has thus transcended into a criminal prosecution. Another crucial difference between the two models is reflected in the sanctions implemented when the procedural rules have been breached.

Sanders and Young summarise the key conflicts between the two models:

At the risk of over-simplification, one can summarise the main conflict in values between the two models in the following way. Crime control values prioritise the conviction of the guilty, even at the risk of the conviction of some (fewer) innocents, and with the cost of infringing the liberties of suspects to achieve its goals; while due process values prioritise the acquittal of the innocent, even if risking the frequent acquittal of the guilty, and giving high priority to the protection of civil liberties as an end in itself.

**The Critical Reception to Packer’s Due Process and Crime Control Models**

Packer’s models provide us ‘with an understanding of the criminal process that pays due regard to its static and dynamic elements’ and with it we can get an idea of the ‘potentialities for change in the system.’ Furthermore, it is evident that Packer’s polarised value systems identify a number of fundamental differences between the models with regard to procedural

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34 ibid 160.
35 The presumption of guilt is a prediction of outcome whereas the presumption of innocence is an instruction to officials concerning how to proceed.
37 The question over whether the suspect should be held in custody or released on bail pending the determination of his guilt or innocence is also decided at this stage.
39 ibid.
rules in the criminal justice system. In doing this, Packer’s models provide a means of allowing recent criminal justice measures to be conceptualised and analysed.\textsuperscript{42}

Although Packer’s models have been remarkably resilient and still depict important facets of the practice and politics of criminal justice, they have been criticised since they were first presented in 1964.\textsuperscript{43} It has been contended that while Packer’s approach is heuristically valuable as an empirical mechanism it is ‘theoretically deficient’.\textsuperscript{44} Moreover, despite the potential efficacy of Packer’s archetypes, Packer’s models have been criticised as an idealised version of the law. Ericson has observed:

[T]he “rights”/due process/crime control debate is more understandable in the context of the state’s ideological work in the public culture concerning how it should proceed in relation to troublesome citizens than in terms of how it does proceed. It creates illusions,


\textsuperscript{43} Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89 Journal of Criminal Law and Criminology 671, 674. Roach describes the models in the following terms: ‘They are now inadequate law to describe the law and politics of criminal justice. Empirically, normatively and discursively, they have become impoverished. They cannot explain why women, children, minorities and crime victims claim rights to the criminal sanction and they cannot comprehend the new political case which pits due process claims, not against the community’s claims to enforce morality, but against the rights claims of crime victims and disadvantaged groups of potential victims.’ Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89 Journal of Criminal Law and Criminology 671, 674.

\textsuperscript{44} Ralph Henham, ‘Human Rights, Due Process and Sentencing’ (1998) 38(4) British Journal of Criminology 592, 593. Campbell further endorses this proposition when she states: ‘Although Packer’s dichotomously opposing models of the criminal process provide a valuable base on which an analysis of the trajectory of the Irish criminal process may be grounded, Packer fails to provide a theoretical foundation for his models.’ Liz Campbell, ‘From Due Process to Crime Control – The Decline of Liberalism in the Irish Criminal Justice System’ (2007) 25 Irish Law Times 281. Campbell also states: ‘Despite the usefulness of Packer’s thesis as an analytical tool, a number of criticisms may be raised concerning his approach. It may be argued that his analysis is superficial, and fails to present an adequate exposition of the models and for the theoretical basis for them. His work merely skims the surface of the models, and fails to present a thorough examination of the theoretical basis for them. Although Packer’s consideration may be lacking in depth somewhat, this does not undermine the worth of his models in an interpretative sense.’ Campbell continues in stating: ‘While Packer’s thesis serves as a useful heuristic framework on which an analysis of current trends may be based, he fails to present a deeper consideration of the political theories which may drive the trajectory of a justice system in a given direction, towards one of his models.’ Liz Campbell, ‘From Due Process to Crime Control – The Decline of Liberalism in the Irish Criminal Justice System’ (2007) 25 Irish Law Times 281. Roach has criticised Packer’s models for their procedural and political assumptions as most of the world employs inquisitorial procedures. Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89 Journal of Criminal Law and Criminology 671, 692. Roach was not alone in this assertion. Griffiths criticised Packer for operating within the ‘prevailing ideology’ of liberal American legal thought. John Griffiths, ‘Ideology in Criminal Procedure or a Third “Model” of the Criminal Process’ (1970) 79(3) Yale Law Journal 359, 359-360.
displacing reform talk away from social control and serving as an instrument of that control. Critics have proffered that Packer’s writing, involves a very narrow conception of what the functions of the criminal process encompass. Griffiths argues that Packer developed the two models from the alternative responses which he conceives to be the problem with the relationship of the state to the individual in the criminal process. Consequently, ‘the unarticulated major premise of [Packer’s] article is that the central nature of that problem is such as to permit only two, polar responses.’

Ashworth and Redmayne summarise their objections to Packer’s models in the following terms: Firstly, Packer neglects to give an explanation of the relationship between his two models; Secondly, Packer assumes that the system of pre-trial justice is capable of affecting the crime rate; Thirdly, Packer fails to take into account the importance of ‘resource management’ as a component of the criminal process; Fourthly, Packer’s models do not consider victims’ rights; and Lastly, the models allow for various ‘internal critiques’. Ashworth and Redmayne use the example of the premium on speed in this regard.

Current critical opinion frequently intimates that the emergence of a concept of victims’ rights has placed the Crime Control and Due Process Models on a completely new footing. For example, according to O’Malley, the introduction of the victim impact statement by s 5

47 ibid 367.
50 For more on victims’ rights see generally, Kent Roach, Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice (University of Toronto Press 1999).
of the Criminal Justice Act 1993 is yet another example of victims’ interests being taken into account at a point in the process where the offender would originally have taken centre stage.\(^{53}\) It is clear that writers such as Roach have rendered Packer’s models outdated as they fail to take into account victims’ rights.\(^{54}\) Such a contention has been further bolstered by Ashworth and Redmayne who argue that Packer’s models appear outdated as they ignore the victims of crime.\(^{55}\) Furthermore, it is often commented that while Packer’s work provides a useful basis upon which an analysis of current trends may be based, he fails to convey the reasons why a reorientation in the criminal justice system may occur.\(^{56}\)

Notwithstanding the documented lacunae in Packer’s opposing archetypes they remain extremely valuable and worthy of consideration.\(^{57}\) O’Malley observes that Packer never indicated that worldwide criminal justice systems could be neatly divided into two disparate categories.\(^{58}\) Albeit, Packer’s models remain useful, ‘for their capacity to illustrate how the animating values of the criminal process can vary across time and place.’\(^{59}\) The two models have also proved valuable when comparing criminal procedure with that of criminal justice systems in other jurisdictions.\(^{60}\)

Although Packer’s models have been persuasively criticised they are still considered by many as the ‘the most successful attempt to construct models of the criminal process’.\(^{61}\) Packer’s models have set the standard for more than a generation of observers. Roach notes that ‘[m]any have attempted to replace or add to Packer’s models, but none have enjoyed his success and durability’.\(^{62}\) Since 1964, we have become accustomed to thinking in terms of an ongoing conflict between the rights of criminal defendants and society’s interest in convicting


\(^{54}\) As Roach states: ‘Packer’s models may still strike a chord, but slowly and surely, they are becoming as out of date as other hits of the 1960s.’ Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89 Journal of Criminal Law and Criminology 671, 673.


\(^{59}\) ibid.

\(^{60}\) Louis Natali and Edward Ohlbaum, ‘Redrafting the Due Process Model: The Preventative Detention Blueprint’ (1989) 62 Temple Law Review 1225, 1226. Although Natali and Ohlbaum consider the models as useful aids when comparing the American system with European civil law systems, I would contend that the models serve as a beneficial comparative tool across the board.


\(^{62}\) ibid.
the guilty.\textsuperscript{63} It can be gleaned from this analysis that although Packer’s models are deficient in certain respects they remain ‘a guide to judge the actual or positive operation of the criminal justice system’.\textsuperscript{64} Although many have developed alternatives to Packer’s models, none have been as influential.\textsuperscript{65} For these reasons it is valuable to employ Packer’s models as the primary theoretical framework for this thesis.

**David Garland’s Culture of Control**

Although Packer’s models are an integral component of the theoretical framework of this thesis they could be considered, ‘of their time’. Therefore, it is useful to include a more contemporary theorist when analysing the reorientation of the Irish criminal justice system. The shift in criminal justice policy from a system traditionally focussed on due process ideals to one centred on crime control is commendably portrayed in Garland’s ground-breaking work, *The Culture of Control: Crime and Social Order in Contemporary Society*.\textsuperscript{66} Through describing the various indices of change Garland has furthered the study of contemporary

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According to Moffat, *The Culture of Control* ‘provides readers with a set of enticing theoretical concepts and a detailed descriptive map of the macro historical, social and penological trends that have shaped western crime control in the last half of the twentieth century.’

Zedner has observed, Garland’s approach is, ‘multi-faceted’ and replete with insight.

In *The Culture of Control*, Garland elucidates that penal welfarism, which dominated political penal policy during the early to mid-20th century, began to crumble in the United States (US) and in the UK in the 1970s. Kilcommins and others have opined, ‘the penal-welfare model collapsed because its political, economic and cultural supports gave way under the weight of massive social change.’

Garland argues that the cultural adaptations to ‘two underlying social forces’, specifically, late modernity and the free market were particularly relevant and contributory to this change. Penal welfarism was substituted with a ‘crime control complex’. This system was characterised by a decline in the rehabilitative ideal and a movement toward a more punitive, culturally inured and expressive type of justice.

Garland promulgates that the expansion of punishment and emphasis on security is conditioned by a cultural formation that he describes as the ‘crime complex’ of late modernity. He argues that the crime complex allows individuals to become more accustomed to the crime problem, identify with crime victims and adopt precautions to

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67 Liz Campbell, ‘Decline of Due Process in the Irish Criminal Justice System: Beyond the Culture of Control?’ (2006) Hibernian Law Journal 125. As Zedner has noted: ‘The extraordinary explanatory and analytic project that Garland has pursued in *The Culture of Control* and earlier work reveals him to be singularly well equipped to develop a sociologically informed penal theory that might suggest a way out of the current abyss.’


73 ibid 139.

74 David Garland and Richard Sparks, *Criminology and Social Theory* (Oxford University Press 2000) 16.
protect against victimisation. The crucial consequence of the crime complex is that society becomes more concerned with being protected from crime and from unrestrained state authority. Therefore, the public is increasingly disposed to imposing strict controls on members of society it considers to be dangerous.

Garland depicts a range of indicia of transformation in the criminal justice system, which illustrates the development of a ‘culture of control’. Garland’s analysis of this transformation provides a useful milieu upon which an examination of the changes in Irish criminal justice can be based.

The first indicium is the decline of the rehabilitative ideal. This includes the diminution of welfarist rationales and a reduced emphasis on rehabilitation in penal institutions. Rehabilitative elements of criminal justice are subsumed by other goals such as incapacitation and the management of risk. The second indicium is the re-emergence of punitive sanctions and expressive justice which is exemplified by the re-emergence of the ‘just deserts’ approach. According to Garland, this approach has ‘re-established the legitimacy of an explicitly retributive discourse, which, in turn, has made it easier for politicians and legislatures to openly express punitive sentiments and to enact more draconian laws.’ Ireland, unlike the US, has not gone down the path of chain gangs, corporal punishment and the death penalty but it will be later submitted that statements made in the Dáil, during the mid-1990s portray an increased emphasis on a punitive approach to criminal justice matters. The third indicium relates to changes in the emotional tone of crime policy. As Garland states, ‘[t]he emotional temperature of policy making has shifted from cool to hot.’ The fourth indicium is the return of the victim to centre stage. Garland propounds that the victim

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75 Roach argues that victimisation surveys can be seen as another measurement of a risk society and points out that such surveys are often used for political ends. Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89 Journal of Criminal Law and Criminology 671, 697-698.
79 Garland argues that victims should ‘have a voice – making victim impact statements, being consulted about punishment and decisions about release, [and] being notified about the offender’s subsequent movements.’ David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (Oxford University Press 2001) 12. For more on the role of the victim see generally, Rebecca Coen, ‘The rise of the victim – A path
is no longer viewed as one individual but, ‘is now, in a certain sense, a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical.’ As Kilcommins and others observe, the fate of the public and of potential victims is increasingly merged. The fifth indicium is the view that above everything the public must be protected. This requires the adoption of a Crime Control Model of justice. Procedural safeguards are reduced for reasons of security. Law and order issues are a noticeable feature of political discourse. The sixth indicium is a new populist approach to crime policy. Academic research is replaced with political bombast and rhetoric. The seventh indicium is the re-invention of the prison. Under the culture of control theory, prison is not regarded as an instrument of reform but instead as a means of incapacitation and punishment. The eighth indicium is the transformation of criminological thought. This indicium assumes that people will perpetrate crime unless deterred by effective controls. The ninth indicium is the heightened importance of crime prevention and community safety. The tenth indicium is the commercialisation of crime control exemplified by the expansion of the private security industry. As Campbell has observed – the increase of security guards in


81 Shane Kilcommins and others, Crime, Punishment and the Search for Order in Ireland (Institute of Public Administration 2004) 29. Kilcommins also notes that a number of recent occurrences in Ireland assist in rotating the ‘axis of individualisation’ to a more victim-oriented space. Such developments include: The establishment of Victim Support in 1985 and the publication of a Victim’s Charter in 1999; Statutory provision for victim impact statements; The abolition of a mandatory requirement of judges to warn juries of the danger of convicting on the basis of uncorroborated testimony; The increased use of victim surveys that bring attention to bear on typologies of crime and victimhood; The employment of intermediaries, live television links and video testimony for witnesses and victims; Separate legal representation for rape victims under the Sex Offenders Act 2001; Provisions for greater participation under the restorative justice model embodied in the Children Act 2001. Shane Kilcommins, ‘Risk in Irish Society: Moving to a Crime Control Model of Criminal Justice’ (2005) 2(1) Irish Probation Journal 20, 25.

82 For more on penal populism, see generally, John Pratt, Penal Populism (Routledge, 2007) and for an Irish perspective on penal populism see Michael O’Connell, Right Winged Ireland? The Rise of Populism in Ireland and Europe (Liffey Press 2003).


84 The re-invention of the prison is observable in the Irish context. In 1997, Ireland was recorded as having 65 prisoners per 100,000 population. In 2013, Ireland was recorded as having 88 prisoners per 100,000 population. Roy Walmsley, World Prison Population List (Research Findings 88) Home Office Research, Development and Statistics Directorate (1999) and Roy Walmsley, World Prison Population List (10th edn) International Centre for Prison Studies (October 2013) respectively.

85 Zedner notes that while the public sector is governed by extensive legal rules and theoretically the requirement of adherence to due process rights, private agencies, by contrast are governed by ‘partisan industry
shops and nightclubs in Ireland portrays the commercialisation of crime control in the Irish context. The eleventh indicium is new management styles and working practices. The aim is ‘to conserve expensive crime control resources for the more serious offences and the more dangerous individuals.’ The twelfth indicium is a perpetual sense of crisis. This is illustrated by the fact that recourse to the civil process was considered necessary in order to remedy the inadequacies in criminal procedure.

It is undeniable that Garland’s indices of change provide a useful framework for an analysis of the Irish criminal justice system. I will now turn to consider the emergence of a risk management approach which has recently become evident in the Irish criminal justice system.

**Risk Management**

Feeley and Simon have employed the term ‘the new penology’ to describe the shift in focus away from the traditional concerns of the criminal law, which focused on the individual, and redirects it to actuarial consideration of aggregates. They have observed:

> The new penology argues that an important new language of penology is emerging. This new language, which has its counterparts in other areas of the law as well, shifts focus away from the traditional concerns of the criminal law and criminology, which have focused on the individual, and redirects it to actuarial consideration of aggregates. This shift has a number of important implications: It facilitates development of a vision or model of a new type of criminal process that embraces increased reliance on imprisonment and that merges concerns for surveillance and custody, that shifts away from a concern with punishing individuals to managing aggregates of dangerous groups, and that affects the training and practice of criminologists.

This new penology involves shifts in three distinct areas. The first is the emergence of new discourses whose focus is that of probability and risk. The second is the formation of new objectives for the system, especially the increasing primacy given to the efficient control of
internal system processes in place of the traditional objectives of rehabilitation and crime control. The third is the deployment of new techniques which target offenders as an aggregate instead of traditional techniques for ‘individualizing or creating equity’. The focus of the ‘new penology’ is less on the treatment of offenders but instead on techniques to identify and manage unruly groups according to their dangerousness. According to Malcolm and Feeley the new penology:

[H]as a radically different orientation. It is actuarial. It is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness. It takes crime for granted. It accepts deviance as normal. It is sceptical that liberal interventionist crime control strategies do or can make a difference.

There is currently a preoccupation with identifying offenders in accordance with the risk they pose to society. Risk refers to probability of harm and relates to managing crime through risk technologies. This is referred to as ‘actuarial justice’. Effectively, risk assessment is an exercise in predicting the likelihood that an event will take place in the future. Malcolm and Feeley define actuarial justice in the following terms:

Actuarial justice is nebulous, but it is significant. Actuarial justice involves how we conceive of and talk about crime policy, but it is not an ideology in the narrow sense of a set of beliefs and ideas which constrain action. It involves practices, but is not reducible to a specific technology or set of behaviours. Indeed it is powerful and significant precisely because it lacks well-articulated ideology and identification with a specific technology. Its very amorphousness contributes to its power.

According to Malcolm and Feeley, the three factors that most clearly exemplify the traits of actuarial justice are: incapacitation; preventative detention and drug courier profiles. Malcolm and Feeley also detail the features of actuarial justice, one of which is ‘prevention and risk minimisation’. The authors contend that these techniques are primarily aimed at preventing future offences. Selective incapacitation and pre-trial detention form part of these ‘new techniques’.

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90 ibid 450.
91 ibid 455.
95 ibid 173.
96 ibid 178.
97 ibid.
It is undeniable that elements of Malcolm and Feeley’s ‘new penology’ are now evident in the Irish criminal justice system. It is contended that the recent changes in Ireland’s bail laws may be placed within this risk-oriented approach to criminal justice.

This chapter has provided a comprehensive sample of the theoretical frameworks that best describe the recent path of the Irish criminal justice system. For reasons I have already outlined, Herbert Packer’s Due Process/Crime Control Models and David Garland’s ‘indices of change’ are employed to aid in examining the Irish position. The next chapter seeks to examine the traditional constitutional values underpinning the Irish criminal justice system which appear to be in keeping with Packer’s Due Process Model.
Chapter 2 – Ireland’s Traditional Constitutional Values

It is the basic right of free men – basic in the sense that his other rights depend upon it – not to be subject to physical restraint except for good cause.\(^{98}\)

Introduction

This chapter examines the traditional constitutional values underpinning the Irish criminal justice system. In order to address this issue it will be necessary to explore the history of Ireland’s traditional constitutional values. For example, are they based on the positivist school of thought? Are they predicated on a ‘higher’ or natural law theory? The chapter will then analyse the evolution of Ireland’s fundamental rights provisions including the development of unwritten or unenumerated constitutional rights. The significant case of *Ryan v Attorney General* and subsequent pertinent case-law will be discussed at this juncture.\(^{99}\) The *Ryan* decision portrays judicial readiness to identify further individual rights, which are unspecified in the Irish Constitution. As this thesis is premised on the recent changes in Ireland’s bail laws, the chapter will also consider two fundamental rights which are associated with bail, namely, the right to liberty and the presumption of innocence. Having addressed these fundamental constitutional rights, the chapter will consider whether there is a distinctive flavour to the status, interpretation and application of these rights in Ireland. In pursuance of this, the chapter will compare and contrast Ireland’s fundamental rights doctrine with that of other common law jurisdictions. This thesis will focus on two jurisdictions specifically, England and Wales, and the United States.

A Brief History

Ireland is a liberal democracy. In Ireland, the exclusive authority to make law is bestowed on the Oireachtas and may not be adopted by the courts or any other agency.\(^{100}\) Democracy requires that criminal law and procedure should be developed by elected representatives of the state.\(^{101}\) This role must be carried out in accordance with the Constitution, which


\(^{100}\) Article 15.2.1° of the Irish Constitution.

\(^{101}\) In *Ryan v Attorney General*, Kenny J described Ireland as ‘a democratic State’. *Ryan v Attorney General* [1965] IR 294, 310. Similarly, in *De Burca v Attorney General*, Pringle J (obiter) defined democracy in the following terms: ‘A democracy, as I understand it, is a form of government in which the sovereign power
specifically outlines certain rights and allows for judicial interpretation of others. In this way, the Irish Constitution places restraints on the remit of political power.\textsuperscript{102}

The Irish Free State constitutional structure was based on that modelled by the British.\textsuperscript{103} The Irish Free State Constitution of 1922 included Articles pertaining to fundamental rights which represented a \textit{volte-face} from the classical English constitutional doctrine.\textsuperscript{104} However, the Irish Free State Constitution of 1922 did not, according to Binchy, ‘fulfil its potential role of transforming the legal system from one of the positivist deference to Parliament into one based on constitutional values championed by the judiciary.’\textsuperscript{105} This was due to the fact that the provisions of the 1922 Constitution could be amended by legislation thus immunising itself from judicial activism.

The Irish Constitution of 1937 was enacted as a result of a plebiscite on the 1 July 1937.\textsuperscript{106} According to De Valera, the new Constitution was created to ‘provide a firm foundation for

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resides in the people as a whole and is exercised by the people either directly or through their elected representatives.’ \textit{De Burca v Attorney General} [1976] IR 38, 47.

\textsuperscript{102} David Morgan, \textit{The Separation of Powers in the Irish Constitution} (Roundhall Sweet and Maxwell 1997) 32-34. Furthermore, note the statements of Finlay CJ in \textit{Crotty v An Taoiseach} where he stated: ‘The combined effect of these two constitutional provisions clearly is that the executive power of the State in connection with its external relations shall be exercised by or on the authority of the Government but in so exercising that power the Government is subject to the provisions of the Constitution.’ \textit{Crotty v An Taoiseach} [1987] IR 713, 773. For more on the Irish Constitution see generally, John Kelly, \textit{The Irish Constitution} (Jurist Publishing Co 1980); James Casey, \textit{Constitutional Law in Ireland} (Sweet and Maxwell 1987); Brian Doolan, \textit{Constitutional Law and Constitutional Rights in Ireland} (3\textsuperscript{rd} edn, Gill and MacMillan 1994); Gerard Hogan and Gerry Whyte, \textit{JM Kelly: The Irish Constitution} (4\textsuperscript{th} edn, Tottel Publishing 2006); Dermot Keogh and Andrew McCarthy, \textit{The Making of the Irish Constitution: Bunreacht na hÉireann} (Mercier Press 2007); Raymond Byrne and Paul McCutcheon, \textit{The Irish Legal System} (5\textsuperscript{th} edn, Bloomsbury Publishing 2009); Eoin Carolan, \textit{The Constitution of Ireland, Perspective and Prospects} (Bloomsbury Publishing 2013); Michael Forde, \textit{Constitutional Law in Ireland} (3\textsuperscript{rd} edn, Bloomsbury 2013).

\textsuperscript{103} In 1922, Ireland became the Irish Free State. It was enacted by the Westminster Parliament that subject to the extent to which they were not inconsistent with the new Constitution and to subsequent amendments, the laws in force when the Constitution came into operation should continue to have full force and effect. Effectively, the English common law decided before the end of 1922 remained part of the law of the Irish Free State. For more on Ireland’s 1922 Constitution see Leo Kohn, \textit{The Constitution of the Irish Free State} (G Allen & Unwin Limited 1932); Alfred Donaldson, \textit{Some Comparative Aspects of Irish Law} (Duke University Press 1957).

\textsuperscript{104} The Honourable Mrs Susan Denham, Chief Justice, ‘Some thoughts on the Constitution of Ireland at 75’ (2012) UCD Constitutional Studies Group, UCD School of Law, Conference on, ‘The Irish Constitution: Past, Present and Future’ Royal Irish Academy, Dawson Street Dublin, 28 June 2012, 12. Denham CJ went on to state that the drafters of the 1922 Constitution would have been conscious of the US Declaration of Independence (1776) as well as the French revolutionaries and the natural law theory contained in the Declaration of the Rights of Man and the Citizen (1789). It is likely that the US Bill of Rights (1791) was also an influence.


\textsuperscript{106} It is noteworthy that the first six state Constitutions adopted by the US were not adopted by plebiscite but instead by state legislatures. Constitutional drafting Conventions did not become the norm until 1780 and it was not until the Massachusetts Constitution of 1780 that ratification directly from the people was established. Leslie Goldstein, ‘Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law’ (1986) 48(1) The Journal of Politics 51, 58.
an ordered life and peaceful political development within the community.'

There is little doubt that the 1937 Constitution was influenced by the Catholic Church, evidence of which is still evident in the Preamble. However, as Keogh indicates, it is significant, the extent to which the Constitution also reflects secular values, evidenced by the respect for individual rights and the separation of the Church and State contained therein. Hogan endorses this proposition in stating that the Constitution also reflects, ‘secular – one might say “Protestant” – values of liberal democracy, respect for individual rights and the separation of the Church and State’. Clearly, these characteristics are not in keeping with the Catholic Church’s ideology. However, Hogan somewhat qualifies this statement by noting that such observations are rarely reflected in non-legal commentaries.

The 1937 Constitution followed the 1922 Constitution’s structure. Therefore, Ireland adopted a Westminster style parliamentary government similar to that of the British. However, unlike the 1922 Constitution and the British model, the 1937 Constitution incorporates a bill of rights that the Oireachtas is unable to cut down by ordinary legislation and which the courts are required to uphold through their jurisdiction to declare laws void, should they breach the Constitution. Therefore, there is a clear structural division between the Irish and English criminal justice systems. As Binchy points out, ‘the [1937] Constitution has transformed the mind-set of Irish lawyers from the incrementalist philosophy of the common law into a way

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107 The purpose behind the 1937 Irish Constitution was to bring to an end the 1922 Constitution. As a senior cabinet colleague of De Valera expressed: ‘Now, look here is what has to be remembered in relation to the Constitution. The purpose of the Constitution was to get rid of the oath and the Irish Free State Constitution.’ These words were expressed by Sean McEntee as cited by Dermot Keogh, The Vatican, the Bishops and Irish Politics, 1919-39 (Cambridge University Press 2004) 218.


109 ibid 16.


111 Brian Farrell (ed), Fundamental Rights and the Constitution in De Valera’s Constitution and Ours (Gill and MacMillan 1988) 163. Nevertheless, this potential for judicial activism was not endorsed by everyone. Stephen Roche, who was acting as Justice Secretary expressed concern. He said: ‘As you know, I dislike the whole idea of tying up the Dáil and Government with all sorts of restrictions and putting the Supreme Court like a watchdog over them for fear that they may run wild and do all sorts of indefensible things… I think that there is a serious inconsistency in the present Draft…’ Stephen Roche, 13 April 1937 as cited by Dermot Keogh and Andrew McCarthy, The Making of the Irish Constitution 1937: Bunreacht na hÉireann (Mercier Press 2007) 148.
of thinking that looks for the broad principle, expressed in more abstract and, at times, rhetorical language.’

Articles 40-44 of the 1937 Constitution contain a body of provisions known as ‘fundamental rights’. Hogan propounds, ‘[t]he personal rights provisions contained in Article 40.3 are probably the most important single clauses in the entire Constitution.’ Hogan contends that based on the language of earlier drafts of the Constitution, Article 40.3.1° intended to protect all rights considered ‘sufficiently fundamental’ by the courts irrespective of whether such rights were enumerated in the Constitution. It appears that the drafters considered Article 40.3 as possessing potential importance. Article 40.3 states:

1° The State guarantees in its laws to respect, and, as far as possible, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protects as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

These fundamental rights provisions were influenced by various factors, including the 1922 Constitution and Papal Encyclicals. It appears that Article 40.3 was influenced by the Encyclical *Rerum Novarum* specifically. Hogan states:

The reality probably is that the fundamental rights provision of Article 40 to Article 44 reflect a diverse jumble of sources, ranging from common law tradition, papal encyclicals, Article 16 of the Treaty, the Jesuit draft, disparate provisions of the US Constitution, the 1919 Weimar Constitution, the 1921 Polish Constitution, the 1934 Austrian Constitution, the 1922 Constitution and the recommendations of the 1934 Constitution Review Committee.

Ireland’s Traditional Constitutional Values

The source of Ireland’s traditional constitutional values is an oft-considered question. Do they derive from the positivist school of legal thought, which follows that law is an authoritative, binding, regulatory construct? Are they predicated on natural law, which uses reason to analyse human nature and deduce binding rules of modern behaviour from it? Have

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115 ibid 354.
117 ibid.
Ireland’s constitutional values indeed been driven by the Catholic Church? There is no one definitive answer to these questions.

As stated, the 1937 Constitution lays down a range of fundamental rights. These rights are generally set out in Articles 40-44 and cover an assortment of areas. These areas include: equality; the right to personal liberty; family rights; protection of marriage; rights relating to education; and ownership of private property rights. These Articles also cover matters in relation to freedom of worship; freedom of conscience; the right to habeas corpus; the right to judicial review; freedom of speech; right to assembly; and the right to non-discrimination.

The development of unspecified, unwritten or unenumerated constitutional rights began in the 1950s but really took off after 1964. These rights are considered to possess the full force of written constitutional rights, despite the fact that they are unwritten. These unenumerated rights include the right to bodily integrity; the right to health; the right to earn a living; the right to marry and have a family; the right of access to the courts; the right to legal aid; the presumption of innocence; and the right to fair procedures in decision making. Despite the important nature of these fundamental rights, they can all be qualified in some way or another. For example, the right to liberty is qualified by the saving provision, ‘in accordance with law’. In addition, the State grants an individual the right to practice religion subject to ‘public order and morality’.

It has been suggested that little significance was placed on Articles 40-44 by the framers of the 1937 Constitution. However, in practice these provisions have proved integral to individual rights. It has been postulated that the Irish judiciary has adopted a natural law

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based approach in accordance with Thomistic theory. Richard Humphreys says of the natural law theory:

It is not difficult to see why the framers of the constitutions and great charters of international rights have chosen to frame their documents in terms of natural law. Natural rights theory is poetic, overarching, mysterious, immense. It places us in awe of the wonder of the human condition. It asserts that the challenges of our condition have meaning, and that the denial of life, liberty and well-being violates an awesome moral character which pre-exists the insignificant circumstances of mere human governments and laws. Natural law is an affirmation of the significance of the human person and of his or her sacred entitlement to respect. It refutes, with the ultimate argument of the transcendent, the sometimes horrendous suffering inflicted upon our fellow men and women.\footnote{131}

Despite the potential significance of the fundamental rights doctrine outlined in the Constitution, its power was slow to take effect. Kelly has speculated that this may be due to the fact that the generation of judges who presided in the higher courts in the 1940s were those educated under the old British system which viewed Parliament as sovereign and civil liberties as being protected by the ‘good sense’ of the members of Parliament, thus espousing a more positivist outlook.\footnote{132}

Between, 1937-1950, little regard was had for the fundamental rights provisions of the Constitution. However, there were a few occasions where the view that natural justice of divine origin was considered above man-made or positive law.\footnote{133} In The State (Ryan) v

\begin{itemize}
\item According to Weinreb, Aquinas defined four types of law in the universe. There was: 1) the eternal law representing the will of God; 2) the natural law that must reconcile the eternal law with justice because free will has directed the individual from the natural inclination to follow the eternal law; 3) human law representative of positive law in its attempt to implement the natural law; 4) divine law found in the Scriptures which guides man in his formulation of the human law and interpretation of the natural law. Lloyd Weinreb, \textit{Natural Law and Justice} (Harvard University Press 1987) 56. For more on this see generally Frederick Charles Copleston, \textit{A History of Philosophy}, vol 9 (Continuum International Publishing Group 2003); John Finnis, \textit{Natural Law and Natural Rights} (2\textsuperscript{nd} edn, Oxford University Press 2011).
\item Brian Farrell (ed), \textit{Fundamental Rights and the Constitution in De Valera’s Constitution and Ours} (Gill and MacMillan 1988) 166. The author goes on to point out that even De Valera who entrenched this bill of rights in the Constitution did not envisage it to be a ‘hurdle on which the legislature would frequently stumble and fall’. According to Dicey, the principle of parliamentary sovereignty means that ‘the Parliament has the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’ AV Dicey, \textit{Introduction to the Study of the Law of the Constitution} (Indianapolis, Liberty Classics 1982). For more on the positivist school of thought, see generally, Ronald Dworkin, \textit{Taking Rights Seriously} (Harvard University Press 1978); Matthew Kramer, \textit{In Defence of Legal Positivism: Law Without Trimmings} (Oxford University Press 1993); Robert George, \textit{The Autonomy of Law: Essays on Legal Positivism} (Oxford University Press 1999); Tom Campbell, \textit{Prescriptive Legal Positivism} (Routledge 2004).
\end{itemize}
Lennon, Kennedy CJ, dissenting, agreed that the new powers authorised under Article 2A of the Constitution were ‘repugnant to the Natural Law’. The Chief Justice clearly considered natural law antecedent to, and superior to all positive law. He asserted:

The Constituent Assembly declared in the forefront of the Constitution Act (an Act which it is not within the power of the Oireachtas to alter, or amend, or repeal), that all lawful authority comes from God to the people, and it is declared by Article 2 of the Constitution that “all powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland...” It follows that every act, whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God. From this it seems clear that, if any legislation of the Oireachtas (including any purported amendment of the Constitution) were to offend against that acknowledged ultimate Source from which the legislative authority has come through the people to the Oireachtas, as, for instance, if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative.

Kennedy CJ’s fellow judges did not share this higher law endorsing attitude. Instead, Fitzgibbon J interpreted the words of the Constitution quite literally, holding:

[W]e are concerned, not with the principle which might or ought to have been adopted by the framers of the Constitution, but with the powers which have actually been entrusted by it to the Legislature and Executive which it set up.

“The Declaration of the Rights of Man and of Citizens” by the National Assembly of France... that “liberty, property, security and resistance of oppression are the natural and imprescriptible rights of man,” cannot be invoked to overrule the provisions of a statute enacted in accordance with the provisions of a written Constitution.

Murnaghan J agreed with Fitzgibbon J, repudiating Kennedy CJ’s distinction between fundamental and non-fundamental components of the Constitution. In this case, it appears that Kennedy CJ made an appeal for natural law theory based on the Preamble to the Constitution whereas his colleagues rejected this line of reasoning on positivist grounds. This ‘higher law’ approach was not to be forgotten nevertheless. In The State (Burke) v Lennon, Gavan Duffy J in declaring the internment provisions of the Offences Against the State Act 1939 unconstitutional, declared:

In my opinion, the right to personal liberty and the other principles which we are accustomed to summarise as the rule of law were most deliberately enshrined in a national Constitution, drawn up with the utmost care for a free people, and the power to intern on

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135 ibid 205.
136 ibid 231.
suspicion or without trial is fundamentally inconsistent with the rule of law and with the rule of law as expressed in the terms of our Constitution.\textsuperscript{137}

Despite statements such as these, the fundamental rights Articles only really began to take effect in the 1960s. Kelly has opined that this active period in the courts began as a result of the appointment of a different category of judiciary.\textsuperscript{138} O’Dalaigh CJ was appointed in 1961 along with two other judges, namely, Walsh J and Kenny J.\textsuperscript{139} This new generation of judicial elite contributed to a revolution in constitutional jurisprudence typified by the recognition of an indefinite range of rights outside of those specifically enumerated in the Constitution.\textsuperscript{140} In short, when the Supreme Court decides that a right has obtained constitutional status, that right is removed from the political domain and placed within the protection of the judicial branch.\textsuperscript{141} This recognition and fleshing out of the Constitution exhibited a break away from the positivism of the common law to a more Thomistic natural law approach where the significance of individual rights is emphasised. In 1962, Henchy J wrote about this departure:

From the point of view of jurisprudence, the most striking change effected by the present Constitution is the break from the positivist character of the common law which had been developed in comparatively modern times... The Irish Constitution rejects such a basis for law. Its preamble makes clear that the Constitution and the laws which owe their force to the Constitution derive, under God, from the people and are directed to the promotion of the common good. If a judicial decision rejects the divine law or has not as its objects the common good, it has not the character of law. This idea is no strange addition to the common law; it is as old as Coke.\textsuperscript{142}

\textsuperscript{137} The State (Burke) v Lennon [1940] IR 136, 156.

\textsuperscript{138} Justice Donal Barrington identified two reasons as to why the fleshing out of the Constitution did not begin sooner. The first was the effect of the 1940 Supreme Court decision regarding the constitutionality of the Offences Against the State Act. This judgment appeared to follow that of the British model of parliamentary sovereignty in finding that a person deprived of his liberty under a law which was not repugnant to the Constitution had no protection under Article 40.3. The second reason that the judicial review process did not begin earlier, according to Barrington J, was down to the fact that the judges and lawyers had all been educated in the era prior to the creation of the 1937 Constitution. Donal Barrington, ‘The Constitution in the Courts’ in Frank Litton (ed), The Constitution of Ireland 1937-1987 (Dublin Institute of Public Administration 1988) 110-127. Similarly Delaney acknowledges that judges prior to the 1937 Constitution had been, ‘trained, in the main, in an atmosphere of unlimited parliamentary sovereignty’. Vincent Delaney, ‘The Constitution of Ireland: Its Origins and Development’ (1957) 12(1) The University of Toronto Law Journal 1, 9.

\textsuperscript{139} Brian Farrell (ed), Fundamental Rights and the Constitution in De Valera’s Constitution and Ours (Gill and MacMillan 1988) 167.

\textsuperscript{140} It is arguable that this increased awareness of fundamental rights in the Irish context owes itself to the increase in the fundamental rights profile in the US in the 1960s. There is little doubt that the Irish judiciary was cognisant of the rights centred political debate that was taking place in the US around this time. As Dicey has opined: ‘Whoever travels in the United States is involuntarily and instinctively so impressed with the fact that the spirit of liberty and the taste for it have pervaded all the habits of the American people, that he cannot conceive of them under any but a Republican government.’ AV Dicey, Introduction to the Study of the Law of the Constitution (8th edn, Liberty Fund Indianapolis 1982) 109.

\textsuperscript{141} Thomas O’Malley, The Irish Criminal Process (Thompson Roundhall 2009) 3.

One cannot refer to the evolution in Irish constitutional jurisprudence without commenting on the case of *Ryan v Attorney General*.\(^{143}\) This significant decision will be examined below.

**Ryan v Attorney General**

In *Ryan*, which concerned the fluoridation of the Irish water supply, Kenny J in the High Court auspiciously held that ‘the personal rights which may be invoked to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State.’\(^{144}\)

Kenny J justified the extension of constitutional protection to include ‘unenumerated rights’ in two ways. Firstly, he looked to the text of the Constitution itself, ie seeking a textual basis for his proposal to broaden the scope of constitutional protection. The use of the phrase ‘in particular’ in Article 40.3.2°, he argued, indicates that the general guarantee contained in Article 40.3.1° extends to rights not specified in Article 40. Secondly, he noted that there are many personal rights that flow directly from the Christian and democratic nature of the State which are not mentioned in Article 40.\(^{145}\) This, he argued, also supports the conclusion that the general guarantee extends to ‘unenumerated rights’. In attempting to determine whether or not a right to bodily integrity existed, Kenny J turned to an Encyclical letter, *Pacem en Terris*, for assistance, thus invoking a theistic approach to natural rights that was to influence constitutional adjudication for many years.\(^{146}\)

It is deduced that the Constitution protects rights which are not specifically outlined in it, but which instead arise from the political and religious character of Ireland. It is clear that Kenny J did not believe that such rights were created by positive law. Kenny J’s judgment ignited Supreme Court reliance upon theocratic natural law and encouraged the Court to list additional unenumerated rights over the next several decades.\(^{147}\)


\(^{144}\) *Ryan v Attorney General* [1965] IR 294, 312.


\(^{146}\) *Ryan v Attorney General* [1965] IR 294, 314.

The Supreme Court later reaffirmed Kenny J’s decision:

The Court agrees with Mr Justice Kenny that the “personal rights” mentioned in section 3, 1 are not exhausted by the enumeration of “life, person, good name, and property rights” in section 3, 2 as is shown by the use of the words “in particular”; nor by the more detached treatment of specific rights in the subsequent sections of the Article. To attempt to make a list of all the rights which may properly fall within the category of “personal rights” would be difficult and, fortunately, is unnecessary in this present case.148

These statements could be read in two ways. Firstly, it is arguable that they espouse a higher law approach. However, it may also be suggested that they reflect the Supreme Court’s attempt to distance itself from a distinctly religious source for these rights. These statements appear to be more in keeping with Kenny J’s first justification for the extension of constitutional protection, ie seeking a textual basis for the extension of constitutional protection. This portrays a more secular version of natural law theory. Nonetheless, the Ryan judgement operated as a floodgate for the expansion of constitutional rights from the express to the implied.149 Following Ryan, there was a surge of cases which relied on natural justice. In doing so, courts have drawn on a variety of sources, such as: natural law; the Christian and democratic nature of the State; the Constitution’s Preamble, with particular references to prudence, justice and charity, the dignity and freedom of the individual and the common good; essential characteristics of the person; international conventions; and the Directive Principles of Social Policy (Article 45).150 The judiciary has appealed to both theistic and secular versions of natural law.151

In The State (Healy) v O’Donoghue, natural law theory was again embraced by the upper echelons of the Irish judiciary. Gannon J held that to proceed with the trial of the accused, (who was not represented by counsel), would amount to a deprivation of his, ‘natural and

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149 Such rights include: the right to work and earn a livelihood; the right to marital privacy; the right not to be tortured; the right of access to the courts; the right to fair procedures; the right to travel; the right to communicate; the right to beget children; the right to individual privacy; the right to independent domicile; the right to maintenance; the right to identify one’s natural mother; the right to marry; the right to bodily integrity.
150 As Hogan has stated: ‘No particular theory or method of constitutional interpretation has been applied by the courts. Indeed, this lack of consistency has been so prevalent that individual judges have from time to time adopted different approaches to this question, utilising whatever method might seem to be most convenient or to offer adventitious support for a conclusion they had already reached.’ Gerard Hogan, ‘Constitutional Interpretation’ in Frank Litton (ed), The Constitution of Ireland 1937-1987 (Dublin Institute of Public Administration 1988) 187.
151 This bifurcated approach can be evidenced in the High Court and Supreme Court judgments in Ryan. In the High Court, Kenny J relied on the Christian and democratic nature of the State to support his conclusion that the general guarantee in Article 40 extends to unenumerated rights. However, in the Supreme Court, O’Dalaigh CJ based his reasoning on the rights of citizens as human persons thus espousing a more secular approach.
constitutional rights’. Gannon J cited Walsh J in *McGee v Attorney General* when formulating his decision that certain rights do not require positive law for their enunciation. Walsh J stated:

> In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s.3 of Article 40 expressly subordinate the law to justice.

Gannon J again quoted Walsh J in *McGee* when he stated:

> Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection.

In *Healy*, O’Higgins CJ in the Supreme Court held that the right to criminal legal aid was a constitutional right. O’Higgins CJ, following Walsh J’s dictum in *McGee*, stated that the Preamble to the Constitution:

> [M]akes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment.

The *Healy* appeal raised important questions with regard to the rights of accused persons in Irish law. In essence, it highlighted the importance which the Irish Supreme Court attributed to individual rights and due process values. Notably, O’Higgins CJ in the Supreme Court addressed the words ‘due course of law’ in Article 38. O’Higgins CJ stated:

> [I]t is clear that the words “due course of law” in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.

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154 ibid 310.
156 ibid 349.
The expansion of Article 40.3 owes its development to judicial willingness to identify further rights as a corollary to those referred to in the second subsection, in particular, the life, person, good name and property rights. As this thesis is premised on the recent changes in Ireland’s bail laws, the following section will examine two fundamental rights which are associated with bail. These rights are the right to liberty and the presumption of innocence.

**The Right to Liberty**

The Irish Constitution guarantees the right to liberty. Under Article 40.4.1°, an individual cannot be deprived of his or her liberty, except ‘in accordance with law’. This means that, in general, a person is entitled to personal freedom but legislation may provide for his arrest and detention in certain instances. The State may only curtail the right to personal liberty in circumstances that come within a law that authorises arrest and/or detention. It is contended that the constitutional guarantee of the right to liberty has significantly evolved over time in Ireland. The right to liberty’s evolution can be traced over time through the meaning attributed to the phrase, ‘in accordance with law’.

There has been a range of academic debate as to whether the word ‘law’ in its constitutional context refers to ordinary legislation or reflects some higher sense. The positivist interpretation of the word ‘law’ first found its way into the courts in *R (O’Connell) v Military Governor of Hare Park Camp*. Here, Moloney CJ said that the phrase ‘in due course of law’ simply means with the law then in force. Dodd J then asserted: ‘In a land of settled government the liberty of the subject is the prevailing note. In a land unsettled and turbulent, the duty of the Legislature is to continue as far as may be to reconcile personal liberty with safety to the persons and property of the citizens.’ The judgment in this case clearly equated the word ‘law’ referred to in Article 6 with ordinary legislation. However, the Court did refer to the unsettled nature of the times. This positivist interpretation of ‘law’ was not all

160 *R (O’Connell) v Military Governor of Hare Park Camp* [1924] 2 IR 104.
161 ibid 113.
162 ibid
encompassing nevertheless. In the State (Ryan) v Lennon, Kennedy CJ, dissenting, argued that the new powers authorised under Article 2A were repugnant to natural law.\(^{163}\) He stated:

> In the Constitution... the Constituent Assembly also enunciated certain propositions, containing statements of fundamental principle in the constitutional sphere so expressed as to convey clearly the intention that they are to be accepted for the purpose of the Constitution as immutable and absolute, subject only to the specific qualifications expressed in certain cases... [Such a] declaration of principle is contained in Article 6, which lays it down that the liberty of the individual is inviolable, flowing from which there follows the concrete case, “no person should be deprived of his liberty” with the specific qualification “except in accordance with law”. An enactment to the general effect that a citizen may be taken and detained in custody, without being charged with any offence known to the law but just whenever or for so long as a soldier or policeman deems it expedient, would conflict with the principle laid down in Article 6, and in my opinion, whether purporting to be an ordinary law, or an amendment of the Constitution, would be invalid and void and could not be sustained under the power of the amendment. On the other hand, ordinary laws may be enacted validly specifying the cases in which, the causes for which, the times during which, and the persons by whom, a person may in accordance with the ordinary law be deprived of his liberty.\(^{164}\)

Although, the other judges of the Supreme Court assumed a positivist position (again referring to the unsettled nature of the times), there is little doubt that the Chief Justice interpreted the word ‘law’ as having some higher law content. Kennedy CJ was not alone in this interpretation. In the State (Burke) v Lennon, Gavan Duffy J in the High Court, considered the ministerial function, within the Offences Against the State Act 1939, unconstitutional as well as finding the Act violative of the right to liberty. He stated:

> Article 40, if I understand it, guarantees that no citizen shall be deprived of his liberty, save in accordance with law which respects his fundamental right to personal liberty, and defends and vindicates it, as far as practicable, and protects his person from unjust attack; the Constitution clearly intends that he should be liable to forfeit that right under the criminal law on being duly tried and found guilty of an offence. In my opinion, a law for the internment of a citizen, without charge or hearing outside the great protection of our criminal jurisprudence and outside even the special courts, for activities calculated to

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\(^{163}\) The State (Ryan) v Lennon [1935] IR 170. Article 2A consisted of five parts and an Appendix. Part I provided for the Article coming into force or ceasing to be in force by order of the Executive Council which the Executive Council was empowered to make whenever “of opinion that circumstances exist which render it expedient”; and it also provided that Article 3 and every subsequent Article of the Constitution should be read and construed subject to the provisions of the said Article 2A which was to prevail in the case of any inconsistency. Part II provided for the establishment of a tribunal, to be known as “the Constitution (Special Powers) Tribunal” and consisting of officers of the Defence Forces of Saorstát Éireann, with jurisdiction to try and convict or acquit all persons charged with an offence mentioned in the Appendix to Article 2A and to sentence every person convicted by the tribunal of any such offence, and with power, in lieu of the punishment provided by law, to sentence such person to suffer any greater punishment (including the penalty of death) if in the opinion of the Tribunal such greater punishment was necessary or expedient. Part III conferred special powers on the police, including power of arrest on suspicion in certain cases, power of detention on suspicion in certain cases, examination of persons detained on suspicion or in custody, power to bring detained persons before the Tribunal, and power to stop and search vehicles. Part IV defined “unlawful associations” and provided penalties for membership of, or possession of documents relating to, such associations. Part V conferred miscellaneous powers on the Executive Council, the Tribunal, the Garda Síochána, etc.

\(^{164}\) The State (Ryan) v Lennon [1935] IR 170, 208.
prejudice the State, does not respect his right to personal liberty and does unjustly attack his person...

In my opinion the saving words in the declaration that “No citizen shall be deprived of his liberty save in accordance with law” cannot be used to validate an enactment conflicting with the constitutional guarantees. The opinion of Mr Justice Fitzgibbon in Ryan’s case is relied upon by Mr Maguire, but it does not apply, in my judgment, to a Constitution in which fundamental rights and constitutional guarantees effectively fill the lacunae disclosed in the polity of 1922. The Constitution, with its most impressive Preamble is the Charter of the Irish People and I will not whittle it away. 

Despite Gavan Duffy J’s judgment he was effectively overruled by the Supreme Court in Re Article 26 and the Offences Against the State (Amendment) Bill 1940. The meaning of the phrase ‘in accordance with law’ was considered in Re Article 26 and the Offences Against the State (Amendment) Bill 1940. The Bill sought to amend Part VI of the Offences Against the State Act 1939 which concerned a government proclamation declaring that the powers conferred by the Act were necessary to preserve public peace and order. The Bill provided that whenever a Minister of State is of opinion that any particular person is engaged in activities which in his opinion are prejudicial to the preservation of public peace and order or to the security of the State, such Minister may by warrant under his hand sealed with his official seal order the arrest and detention of such person. When considering the phrase ‘in accordance with law’, O’Sullivan CJ in the Supreme Court stated:

The phrase “in accordance with law” is used in several Articles of the Constitution, and we are of opinion that it means in accordance with the law as it exists at the time when the particular Article is invoked and sought to be applied. In this Article, it means the law as it exists at the time when the legality of the detention arises for determination. A person in custody is detained in accordance with law if he is detained in accordance with the provisions of a statute duly passed by the Oireachtas; subject always to the qualification that such provisions are not repugnant to the Constitution or to any provision thereof.

Accordingly, in our opinion, this article cannot be relied upon for the purpose of establishing the proposition that the Bill is repugnant to the Constitution – such repugnancy must be established by reference to some other provision of the Constitution.

It is arguable that this approach to the right to liberty seriously encroached upon the effectiveness of Article 40.4. This standpoint allowed for arbitrary detention as long as it was based on a formally valid law. Consequently, the abovementioned quotation represents an emphatic rejection of any ‘higher law’ meaning in the word ‘law’. The Case of Re Article 26

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165 The State (Burke) v Lennon [1940] IR 136, 155.
166 Re Article 26 and the Offences Against the State (Amendment) Bill 1940 [1940] IR 470.
167 ibid.
168 Offences Against the State Act 1939, s 55.
169 Re Article 26 and the Offences Against the State (Amendment) Bill 1940 [1940] IR 470, 482.
and the Offences Against the State (Amendment) Bill 1940 is distinct from O’Connell and Ryan as the Court did not refer to the disruptive conditions of the times or the ‘exceptional circumstances’ to serve as a basis for its decision.\(^{171}\) The result, as Costello has pointed out is that, a government, with the support of a majority of the Dáil, can therefore with perfect legality remove by ministerial order the right to personal liberty, if it is done ‘in accordance with law.’\(^{172}\) This is a classic example of a positivistic approach.

Yet as Hogan and Whyte have observed, nine years later in the Supreme Court, the Court appeared to, retreat a little from the extreme positivism of Re Article 26 and the Offences Against the State (Amendment) Bill 1940.\(^{173}\) In Re Philip Clarke, the Supreme Court upheld the constitutionality of the Mental Treatment Act 1945, but went on to point out that just because it was part of the law did not mean it fell within the qualification of Article 40. 4. 1°:

The impugned legislation is of a paternal character, clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and well-being of the public generally. The existence of mental infirmity is too widespread to be overlooked, and was, no doubt, present to the mind of the draftsmen when it was proclaimed in Article 40.1… that, though all citizens, as human beings, are to be held equal before the law, the State may, nevertheless, in its enactments, have due regard to differences of capacity, physical and moral, and of social function. We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity, to remain at large to the possible danger of themselves and others... This section cannot, in our opinion, be construed as an attack upon the personal rights of the citizen. On the contrary it seems to us to be designed for the protection of the citizen and the promotion of the common good.\(^{174}\)

These sentiments were further bolstered in the seminal O’Callaghan decision.\(^{175}\) The Supreme Court in O’Callaghan was provided with an opportunity to endorse the proposition made in Re Philip Clarke, namely, that statutes abridging personal liberty would be ‘scrutinised on general constitutional principles rather than accepted as automatically validating their contents as being “in accordance with law”’.\(^{176}\) In O’Callaghan, Walsh J defined the criteria upon which a statute limiting the liberty of a convicted person would be tested:

\(^{171}\) R (O’Connell) v Military Governor of Hare Park Camp [1924] 2 IR 104; The State (Ryan) v Lennon [1935] IR 170.


\(^{175}\) The People (Attorney General) v O’Callaghan [1966] IR 501.

In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that.\(^177\)

As Hogan and Whyte have opined, the statements in *O’Callaghan* are a clear discrediting of the positivist view of law in Article 40.4.1\(^{o}\) that was previously endorsed by the Supreme Court.\(^178\) Yet in *O’Callaghan* the Court was not dealing with a specific enactment, as was the case in *Re Philip Clarke*. While the Supreme Court in *O’Callaghan* did not directly endorse the proposition in *Re Philip Clarke*, namely that statutes abridging personal liberty would be scrutinised on general constitutional principles rather than accepted as automatically validating their contents as being in ‘accordance with law’, Walsh J did appear to advocate a higher law approach. The Supreme Court held that an accused could not be denied bail on the basis of predicted future offending and firmly established a right to bail within the Meta-Constitution.\(^179\) It is evident that the Court in *O’Callaghan* gave expression to values embedded rather than those expressed in the Constitution.\(^180\)

This higher law view was also endorsed in *King v Attorney General*.\(^181\) In *King*, the Supreme Court struck down s 4 of the Vagrancy Act 1824, which provided for the offence of frequenting certain places by a suspected person with the intention of committing a felony. The Supreme Court struck down this provision as incompatible with the right to liberty and equality and the constitutional requirement in Article 40.3 to defend and vindicate the personal rights of citizens thereby espousing a higher law as opposed to a positivist approach to the issue. Henchy J declared:

> It violates the guarantee… that no citizen shall be deprived of personal liberty save in accordance with law – which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution.\(^182\)

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\(^{177}\) *The People (Attorney General) v O’Callaghan* [1966] IR 501, 516-517.


\(^{179}\) O’Mahony has described the many cases that relied on natural justice following *Ryan* as forming part of a ‘Meta-Constitution’, based on judge-made law which arises out of the Constitution. Paul O’Mahony, *Criminal Justice in Ireland* (Institute of Public Administration 2002) 76.


\(^{181}\) *King v Attorney General* [1981] IR 233.

\(^{182}\) *ibid* 257.
The foregoing paragraphs indicate that over past decades there has been a shift in judicial attitudes with regard to the right to liberty. The following paragraphs will examine the application of the presumption of innocence in Irish law.

The Presumption of Innocence

The Irish legal system has operated on the fundamental basis of the presumption of innocence. This traditional constitutional value operates on the premise that parties do not attend trial as equals as the prosecution has readily available to it all the resources of the state. Therefore, this unequal contest is only made fair by employing the rules of procedure and evidence that will afford the accused a certain amount of protection.\textsuperscript{183} Although the presumption was implicitly recognised as possessing constitutional status in a number of cases in Ireland, it was not until \textit{O'Leary v Attorney General} that it was expressly acknowledged.\textsuperscript{184} Although derived from the common law, the application of the presumption of innocence in Ireland can be distinguished from that of our common law neighbours. While it is fully accepted in England and Wales that express statutory provisions limiting the presumption exist, Ireland must tread more carefully due to the presumption’s constitutional status.\textsuperscript{185}

Ní Raifeartaigh has developed a typology to aid in establishing whether preventative detention in the bail context violates the presumption of innocence. Said typology arose out


\textsuperscript{184} In \textit{O’Leary}, Costello J in the High Court stated: ‘The Constitution of course contains no express reference to the presumption but it does provide in Article 38 that “no person shall be tried on any criminal charge save in due course of law.” It seems to me that it has been for so long a fundamental postulate of every criminal trial in this country that the accused was presumed to be innocent of the offence with which he was charged that a criminal trial held otherwise than in accordance with this presumption would, \textit{prima facie}, be one which was not held in due course of law. It would follow that \textit{prima facie} any statute which permitted such a trial so to be held would be unconstitutional.’ \textit{O’Leary v Attorney General} [1993] IR 102, 107. However, at 110 Costello J went on to state that in certain circumstances the legislature can restrict the exercise of such a right, which is not absolute. Although Costello J held that the provisions before him were not contrary to the presumption of innocence, Fennell has pointed out that the ‘series of mental and verbal gyrations’ that Costello J went through, serve to endorse the level of importance the judge attributed to the presumption of innocence. Caroline Fennell, \textit{Crime and Crisis in Ireland: Justice by Illusion} (Cork University Press 1993) 35. The importance and recognition of the presumption can also be evidenced in \textit{O’Callaghan} where Walsh J in the Supreme Court characterised the presumption as a ‘very real thing’. \textit{The People (Attorney General) v O’Callaghan} [1966] IR 501, 513.

\textsuperscript{185} Ashworth has in fact called for a reappraisal of criminal law legislation in England with regard to the presumption of innocence due to the amount of statutory infringements made to the principle in English law. Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10(4) International Journal of Evidence and Proof 241-278.
of research conducted by Ní Raifeartaigh for the Law Reform Commission in respect of its paper on bail law.\textsuperscript{186} Ní Raifeartaigh observes that in the past the Irish Supreme Court have emphatically rejected preventative detention (in the bail context) as forming any part of Irish law based on the view that such a course of action would violate the presumption of innocence.\textsuperscript{187} This thesis adopts Ní Raifeartaigh's typology as it provides a useful formula upon which one can assess the extent to which the presumption of innocence is violated by preventative detention in the Irish criminal justice system.

According to Ní Raifeartaigh, different courts have reached different conclusions with regard to the question of whether pre-trial preventative detention even prima facie violates the presumption of innocence. Ní Raifeartaigh states:

\begin{quote}
Surprisingly, in common law jurisdictions other than Ireland, the possibility of conflict between the presumption of innocence and pre-trial preventive detention has not been seen as problematic by a majority of judges. In contrast, the Irish Supreme Court has taken a somewhat absolutist position on this issue, viewing the presumption of innocence as almost totally prohibiting any provision for pre-trial preventive detention.\textsuperscript{188}
\end{quote}

It appears that there are varying conclusions as to whether pre-trial preventative detention violates the presumption of innocence as there are differing views held regarding the nature of the presumption itself.\textsuperscript{189} Firstly, one must consider when the presumption of innocence comes into play. Secondly, one must consider what the presumption of innocence actually prohibits: does it prohibit punishment in any circumstances other than that, which follows conviction; or, does it prohibit any restriction of the accused’s liberty based on the assumption that he is guilty of the offence charged, even if this restriction does not in fact constitute punishment.\textsuperscript{190} Bearing these matters in mind, Ní Raifeartaigh offers three different approaches to the application of the presumption of innocence.

The first, which she describes as the ‘Narrowest view’ proposes that the presumption of innocence has no application at the pre-trial stage. This approach views the presumption of innocence as a rule that solely applies at trial in order to ensure that an accused’s conviction

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\textsuperscript{187} For example, see \textit{The People (AG) v O’Callaghan} [1966] IR 501; \textit{Ryan v DPP} [1989] IR 399.
\textsuperscript{188} Úna Ní Raifeartaigh, ‘Reconciling Bail Law with the Presumption of Innocence’ (1997) 17(1) Oxford Journal of Legal Studies 1, 21.
\textsuperscript{189} Úna Ní Raifeartaigh, ‘Reconciling Bail Law with the Presumption of Innocence’ (1997) 17(1) Oxford Journal of Legal Studies 1, 4.
\textsuperscript{190} Ní Raifeartaigh asserts that if the former view is to prevail, it requires differentiating between punitive and non-punitive liberty depriving measures. Úna Ní Raifeartaigh, ‘Reconciling Bail Law with the Presumption of Innocence’ (1997) 17(1) Oxford Journal of Legal Studies 1, 4.
\end{flushleft}
will not be reached unless the accused’s guilt has been proved beyond a reasonable doubt. In short, under this view there can be no objection to pre-trial preventative detention.

The second approach described as the ‘Broadest view’ indicates that the presumption of innocence informs the entire criminal process (from the commencement of proceedings to sentence) and prohibits all restrictions on the accused’s liberty, which are based on the assertion that the accused is guilty of criminal conduct. Following this approach – restrictions preventing the evasion of justice or interference with justice do not offend the presumption of innocence because their purpose is to ensure that the criminal process is proceeded with and are not based on the view that the accused is guilty. However, the deprivation of liberty in order to prevent the accused from committing further offences violates the presumption of innocence because it is based on the view that the accused is guilty.

The third possible view on the relationship between the presumption of innocence and bail law is described as the ‘Intermediate view’. This view accepts that the presumption of innocence applies at the pre-trial stage but holds that it only has application to the extent of prohibiting punitive deprivations of liberty. This approach requires an investigation into whether the measure in question is a punishment, or whether it simply regulates the right to liberty of the accused for legitimate reasons.191 This view conflicts with the 'Broadest View' as the broadest view does not draw a distinction between punishment and regulation. Instead, it draws a distinction between measures which deprive an accused of liberty on the assumption that he is guilty of the offence charged, and those which do not.192

Like the right to liberty, the presumption of innocence has also experienced a shift in its application in Ireland in recent times. Later, this thesis will employ Ní Raifeartaigh’s typology to analyse whether preventative detention (in the bail context) is violative of the presumption of innocence.

The preceding paragraphs reflect the Irish position with regard to individual rights, both enumerated and unenumerated. It is now necessary to consider whether there is a distinctive flavour to the status, interpretation and application of these rights in Ireland. In pursuance of

191 Ní Raifeartaigh uses the example of the state depriving the mentally ill of their liberty in certain circumstances to highlight a regulatory measure. Una Ní Raifeartaigh, ‘Reconciling Bail Law with the Presumption of Innocence’ (1997) 17(1) Oxford Journal of Legal Studies 1, 6.
this, the next section will compare and contrast Ireland’s fundamental rights doctrine with
that of other common law jurisdictions, specifically, England and Wales, and the US.

The Constitutional Rights Doctrine in England and Wales

Irish law is comprised of constitutional, statute and common law. In Ireland, the Constitution
is superior to any other law. The Irish Constitution clearly recognises the paramount
authority of the people and not the governance of the State over its citizens. The Irish
Constitution guarantees individuals certain fundamental written rights such as there will be
no deprivation of personal liberty, except in accordance with law. This means that one is
entitled to one’s own personal freedom but legislation may provide for its being limited in
certain specified circumstances. In short, the Irish Constitution places the civil liberties of an
individual beyond the power of the Oireachtas to restrict them arbitrarily or excessively.

It is understood that the Irish legal system emerged from the system of government which is
operative in England and Wales. However, the Irish system has diverged from the British
model. One of the main areas of departure is in the area of judicial review. Article 34.3.2°
provides the High Court and Supreme Court with the power to review the constitutionality of
legislation. In Ireland, the courts are assigned the role of interpreting all constitutional

193 Mr Justice Walsh writing extra-judicially, in the foreword to James Casey’s constitutional text spoke of the
Constitution in the following terms: ‘It is not simply a composition of exhortations or aspirations which it is
hoped will be followed. It is the basic law which distributes powers and imposes obligations and guarantees
rights and which binds the People together with the strongest of moral and legal chains.’ James Casey,
Constitutional Law in Ireland (Sweet and Maxwell 1987) viii.

194 It has been stated that the driving force behind the Irish Constitution was that of national sovereignty. For
more on this theory see Byrne v Ireland [1972] IR 241.

195 As Denham J opined in A v Governor of Arbour Hill Prison: ‘Many of the principles set out in the
Constitution of 1937 were ahead of their time. It was a prescient Constitution. Thus, the Constitution protected
fundamental rights, fair procedures, and gave to the Superior Courts the role of guarding the Constitution to the
extent of expressly enabling the courts to determine the validity of law having regard to the provisions of the
Constitution. Over the succeeding decades international instruments, such as the United Nations Charter and the
Universal Declaration of Human Rights, proclaimed fundamental rights and fair procedures, and it became
established that in a democratic state constitutional courts should have the power to protect fundamental rights,
including due process, even to the extent of declaring legislation to be inconsistent with the Constitution and to
be null and void.’ A v Governor of Arbour Hill Prison [2006] 4 IR 88, 145.

196 Article 34.3.2° of the Irish Constitution reads: ‘Save as otherwise provided by this Article, the jurisdiction of
the High Court shall extend to the question of the validity of any law having regard to the provisions of this
Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court
established under this or any other Article of this Constitution other than the High Court or the Supreme Court.’
rights. This delegation allows the courts to strike down legislation on the grounds that it is unconstitutional.\footnote{Articles 26 and 34 of the Irish Constitution. It has been posited that this part of the Constitution more than any other, identified the nature of the State in its divergence from the system employed in England and Wales and the parallels which can be made with the Constitution in the US. See Séamus Ó’Tuama, ‘Judicial Review Under the Irish Constitution: More American than Commonwealth’ (2008) 12(2) Electronic Journal of Comparative Law <http://cora.ucc.ie/bitstream/handle/10468/19/SOT_JudicialReviewIrishConst.pdf?sequence=3> accessed 8 August 2013. For more on judicial review in the Irish context see generally, Vincent Delaney, ‘Constitution of Ireland: Its Origin and Development’ (1957) 12(1) The University of Toronto Law Journal 1; Brian Doolan, Constitutional Law and Constitutional Rights in Ireland (Dublin Gill and MacMillan 1984); David Morgan, Constitutional Law of Ireland (Dublin Roundhall Press 1985); James Casey, ‘Changing the Constitution: Amendment and Judicial Review’ in Brian Farrell (ed), De Valera’s Constitution and Ours (Dublin Gill and MacMillan 1988); John Kelly, ‘Fundamental Rights in the Constitution’ in Brian Farrell (ed), De Valera’s Constitution and Ours (Dublin Gill and MacMillan 1988); Francis Beytagh, Constitutionalism in Contemporary Ireland (Roundhall Sweet and Maxwell 1997).

Unlike Ireland, England and Wales have no single constitutional document outlining how the state should be governed.\footnote{Mark Garrett and Philip Lynch, Exploring British Politics (Pearson Education 2007) 84. See also David McKay and Kenneth Newton, The New British Politics (Pearson Education 2007) 75; Meena Bhamra, The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism (Ashgate Publishing 2011) 177. In the American case of Vanhorne’s Lessee v Dorrance, the Court distinguished itself from the English system: ‘[I]n England, there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In America the case is widely different…’ Vanhorne’s Lessee v Dorrance 2 US (F Cas) 2 Dall 304, 308 (1795).} Instead, its content comprises of a variety of written and unwritten sources which include statutes, case-law and ‘established patterns of political behaviour’.\footnote{Colm Ó’Cinneide, ‘The Human Rights Act and the Slow Transformation of the UK’s “Political Constitution”’ (2012) Institute for Human Rights Working Paper Series: Working Paper No: 01, 1, 1.} O’Cinneide has described the constitutional rights doctrine in England and Wales in the following terms: ‘The UK’s unwritten constitution is thus not fundamentally different in kind from its written counterparts. In fact, it is best viewed as located at one end of a spectrum of constitutional types that are differentiated according to the extent to which their substantive content is shaped by convention and practice rather than by fixed and formal legal rules.’\footnote{ibid.}

However, the UK system does differ from other constitutional systems in that there is no ‘fixed legal mechanism’ for determining whether something is or is not constitutional. As O’Cinneide articulates: ‘What is “constitutional” ultimately becomes a political question, the answer to which can shift as the “deep” political culture of the country alters over time. This...
means that the UK constitution exists in a permanent state of flux and transition: it remains a continuous work in progress, which is constantly undergoing revision, renewal and repair.\footnote{ibid 1-2.}

The central focus of the system in England and Wales is Parliament. Thus, the system of government that prevails there is that of parliamentary sovereignty.\footnote{For more on this, see generally, Andy Williams, \textit{UK Government and Politics} (Heinemann 1998); Jeffrey Goldsworthy, \textit{The Sovereignty of Parliament: History and Philosophy} (Clarendon Press 1999).} This means that Parliament has the right to create or repeal any law and that no individual or body has the right to override the legislation of Parliament.\footnote{Gardbaum refers to this model as the ‘New Commonwealth Model of Constitutionalism’, i.e. the courts have the power to question the constitutionality of provisions, but this power can be bypassed by the legislature. In essence, it is a weak form of judicial review. Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49 American Journal of Comparative Law 707.} Crucially, there is no distinction between laws that are not constitutional and laws that are constitutional and there is no supreme law upon which to test the validity of other laws.\footnote{Anthony Lester, ‘Fundamental Rights in the United Kingdom: The Law and the British Constitution’ (1976) 125 University of Pennsylvania Law Review 337, 338.} In short, there are no special procedures for proceeding with new constitutional arrangements as is the case in Ireland. All acts must pass through the Westminster Parliament in the normal legislative manner.\footnote{Lesley Dingle and Bradley Miller, ‘A Summary of Recent Constitutional Reform in the United Kingdom’ (2005) 33(1) International Journal of Legal Information 71, 73.} In England and Wales there are no fundamental rights in the sense that they do not enjoy constitutional status which are protected from being overridden by legislation.\footnote{According to Lester: ‘Human Rights may not be “fundamental” in a constitutional sense, but it is arguable that they are as well protected and that the spirit of liberty is as strong in the United Kingdom as in those democratic societies that have written constitutions, Bills of Rights, and comprehensive systems of administrative law. Anthony Lester, ‘Fundamental Rights in the United Kingdom: The Law and the British Constitution’ (1976) 125 University of Pennsylvania Law Review 337, 341.}

Although the primacy of the principle of parliamentary sovereignty is undisputed, there exists another constitutional principle, namely, the rule of law. According to O’Cinneide, three core values underpin the British system which has been laid down since the 18\textsuperscript{th} century.\footnote{Colm O’Cinneide, ‘The Human Rights Act and the Slow Transformation of the UK’s “Political Constitution”’ (2012) Institute for Human Rights Working Paper Series: Working Paper No: 01, 1, 2.} The first core value to become fixed was that of the presumption of liberty.\footnote{ibid.} The second value is the imperative of representative government (which underpins the UK’s attachment to the system of parliamentary sovereignty); and the third value is the rule of law.\footnote{ibid.} Together, these
three values lie at the centre of the UK constitutional system. O’Cinneide describes the interaction of the rule of law with the other core values in the following manner:

[The rule of law] mediates between the first two, seeking a balance between the unrestrained freedom and unrestrained governmental authority. It requires that the exercise of state power rest on a firm basis, respect the requirements of fair procedure, respect basis rights, and be rationale, consistent and non-arbitrary. Adherence to this mixed procedural/substantive concept of the rule of law is enforced by UK courts applying administrative law norms through judicial review, while even when the sovereign Westminster Parliament which remains ultimate law-making authority is expected to legislate in a manner that conforms to these norms.

Therefore, while the UK’s constitutional system may have a political character; the exercise of political power is subject to significant normative constraints. For example, if a minister or public body exceed the powers conferred by statute, misinterprets the intention of Parliament or transgresses a rule of the common law, it is the function of the courts to intervene in order to provide redress. The courts have begun to play a crucial role in ensuring that the executive and other public authorities comply with the rule of law. As O’Cinneide puts it: ‘A deeply rooted set of expectations exist that certain patterns of public behaviour are both necessary and expected in a democratic society, and these expectations are woven tightly into the UK’s constitutional fabric.’

However, these safeguards against the abuse of power by Parliament are not legally enforceable. Furthermore, despite ‘normative restraints’, the absence of constitutional standards by a constitutional court means that laws can be created in the UK that may affect

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210 This is evident from the judicial and political opposition to legislation in 2004 pertaining to asylum. Said legislation was opposed as it served as an ‘unconstitutional interference with the judicial review powers of higher courts.’ Colm O’Cinneide, ‘The Human Rights Act and the Slow Transformation of the UK’s “Political Constitution”’ (2012) Institute for Human Rights Working Paper Series: Working Paper No: 01, 1, 11.


fundamental rights yet the implications of said laws ‘tend to become apparent in Britain only if vigilant and well informed individual Parliamentarians or journalists make them so.’

Yet there are those that would argue that the UK is experiencing a slow erosion of parliamentary sovereignty. For example, consider the establishment of devolved assemblies in Scotland, Northern Ireland and Wales. This has involved a delegation of power from the Westminster Parliament. Also, there is increased recourse to referendums in the UK. Moreover, the current UK government has initiated a consultation process to consider whether the UK should consider creating its own bill of rights.

Bingham rebuts the contention that there has been an erosion of the doctrine of parliamentary sovereignty. Drawing on Professor Goldsworthy, Bingham points out that there is no recorded case in which the courts, without the authority of Parliament have invalidated or struck down a statute. Although there are examples that support the contention that the principle of parliamentary sovereignty is no longer absolute, namely, the European Communities Act 1972 and the Human Rights Act 1998, it is arguable that while the aforementioned Acts involve a curtailment of the Westminster Parliament's power to legislate, ‘that curtailment takes effect by express authority of the Westminster Parliament, which, at least theoretically, it retains the power to revoke.’ In response to the judicial pronouncements concerning parliamentary sovereignty in Jackson, Bingham states:

214 There are those who consider the doctrine of parliamentary sovereignty to be limited. For example, note the statements made in the case of Jackson v Attorney General which considered whether the Parliament Act 1949 and the Hunting Act 2004 were valid Acts of Parliament. In Jackson, three of the law lords albeit obiter suggested that in certain circumstances the courts had inherent powers to disapply legislation. Jackson v Attorney General [2005] UKHL 56. For more on this case see generally, Alison Young, ‘Case Comment: Hunting sovereignty: Jackson v Her Majesty's Attorney General’ (2006) Public Law 187; Han-Ru Zhou, ‘Revisiting the “manner and form” theory of parliamentary sovereignty’ (2013) 129 The Law Quarterly Review 610.
215 The Commission’s terms of reference were: ‘[to] investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties. It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties. It should provide interim advice to the Government on the ongoing Interlaken process to reform the Strasbourg Court ahead of and following the UK’s Chairmanship of the Council of Europe. It should consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012.’ Commission on a Bill of Rights, A UK Bill of Rights? – The Choice Before Us, vol 1 (December 2012) 5.
217 ibid 164.
I cannot for my part accept that my colleagues’ observations are correct. It is true of course that the principle of parliamentary sovereignty cannot without circularity be ascribed to statute, and the historical record in any event reveals no such statute. But it does not follow that the principle must be a creature of the judge-made common law which the judges can alter: if it were, the rule could be altered by statute, since the prime characteristic of any common law rule is that it yields to a contrary provision of statute. To my mind, it has convincingly been shown that the principle of parliamentary sovereignty has been recognised as fundamental in this country not because the judges invented it but because it has for centuries been accepted as such by judges and others officially concerned in the operation of our constitutional system. The judges did not by themselves establish the principle and they cannot, by themselves, change it.218

It is arguable that Irish law is categorically different from UK law as the notion of parliamentary sovereignty, as represented by Dicey for example, is not echoed in the Irish constitutional framework. Yet it could also be said that similarities can be drawn between Ireland's traditional constitutional values and the UK's rule of law principles. However, it is contended that the Irish system diverges from the UK system as the UK Parliament can legislate in a way which infringes the rule of law. The same cannot be said for the Oireachtas with regard to Ireland's traditional constitutional values.

The divergence between Ireland’s constitutional rights doctrine and that of England and Wales is further demonstrated by the application of the European Convention on Human Rights (ECHR) in both jurisdictions. Under the UK Human Rights Act 1998, domestic courts are required to act compatibly with the ECHR.219 In the UK, s 2(1)(a) of the Human Rights Act 1998 provides that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights (ECtHR), if relevant to the proceedings.220 Indirect incorporation via the interpretative method was preferred in the UK in order to allay fears that direct incorporation would give the judiciary too much power with a consequential negative effect on parliamentary sovereignty.221


219 Speaking at the opening of the judicial year at the European Court of Human Rights in Strasbourg in January 2003, Lord Woolf stated: ‘[W]hile previously a few experts in the United Kingdom were aware of the rich jurisprudence of this Court, now that jurisprudence is familiar to every judge and competent lawyer in the country. In the cases that I hear it is rare for a decision from Strasbourg not to be cited at some stage of the hearing.’ Lord Woolf, Lord Chief Justice of England and Wales, Speech at the opening of the judicial year European Court of Human Rights: Strasbourg <http://www.judiciary.gov.uk/media/speeches/2003/opening-judicial-year-european-courts-human-rights-strasbourg> accessed 1 May 2014.


Section 4 of the Irish European Convention on Human Rights Act 2003 provides that judicial notice should be taken of the Convention provisions and of any advisory opinion, declaration or judgment etc of the ECtHR and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations and judgments etc. In short, the courts are required to interpret national law in a manner that is compatible with the ECHR whenever possible and the superior courts are authorised to issue a declaration of incompatibility where a national law conflicts with that of the ECHR. A declaration of incompatibility does not invalidate a national legal measure. Instead, it places a demand on the Oireachtas to remedy the position to ensure alignment between Irish and ECHR requirements. As Egan has observed, the ECHR Act 2003 ‘adroitly’ avoided the use of the term ‘incorporation’ with the long title of the Act declaring that its aim is to ‘ensure further effect, subject to the Constitution, to certain provisions of the Convention.’

Therefore, although it is arguable that Ireland borrowed the UK’s method of incorporation of the ECHR, Ireland did not go as far as the UK. For example, as Lord Kerr has pointed out, ‘the UK Statute is couched in mandatory terms – “the Court must take into account” whereas the Irish statute requires only that judicial notice be taken and due account be taken of the judgments’. In addition, under the Irish Act, unlike the UK Act, the courts are excluded from the definition ‘organ of state’. Furthermore, in Ireland, unlike the UK, the Irish European Convention on Human Rights Act 2003 is subject to the provisions of a written Constitution, including the personal rights provisions enumerated under Article 40.3. It has

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222 European Convention on Human Rights Act 2003, s 4. In *Dublin City Council v Fennell*, Kearns J referred to the European Court of Human Rights Act 2003 in the following terms: ‘The Act of 2003… does not purport to incorporate the Convention directly into domestic law, but rather imposes an obligation that, when interpreting or applying any statutory provision or rule of law, a court shall, insofar as is possible, and subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions. The Act of 2003 also provides that every organ of the State shall, subject to any statutory provision or rule of law, perform its functions in a manner compatible with the State’s obligations under the Convention provisions. A party may also seek from the High or Supreme Court a declaration that a statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions, and where such a declaration is made, certain consequences as detailed in the Act then follow.’ *Dublin City Council v Fennell* [2008] IR 604, 608. For more on the 2003 Act, see generally, Suzanne Egan, ‘The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation’ (2003) Dublin University Law Journal 230; Anthony Lowry, ‘Practice and Procedure under the European Convention on Human Rights Act 2003’ (2003) 8 Bar Review 183; Lord Kerr, ‘The Conversation between Strasbourg and National Courts – Dialogue or Dictation’ (2009) The Irish Jurist 1.

223 European Convention on Human Rights Act 2003, s 2 and s 5 respectively.


been said that Ireland has been slower than that of the UK to avail of the Convention as Ireland already possesses fundamental rights provisions as well as a developed tradition of judicial review and constitutional jurisprudence. Thus, Ireland has less of a need for the Convention than the UK. In comparing both Acts, Egan says:

> At first blush, there can be little doubt that the Irish Act bears more than a passing resemblance to its British counterpart. However, it cannot be assumed that the interpretative method was chosen by the Government for the reasons that it was chosen in Britain since the principle of parliamentary sovereignty does not apply in an Irish context. On the contrary, the Irish Constitution is based on the classical model of a separation of powers, with the superior courts enjoying a robust power of judicial review of legislative action.\(^{227}\)

In sum, it is clear that the Irish legal system is distinct in a number of respects from the system which exists in England and Wales. Therefore, it may be said that Ireland did not simply inherit or transplant its fundamental rights provisions from the common law. Instead, Ireland has enshrined these rights in its constitutional text, arguably, placing them in a superior position to the positive law espoused by the common law.

**The Constitutional Rights Doctrine in the United States**

The US is similar to Ireland in that American judges also recognise unwritten rights not explicitly mentioned in the Constitution. Prior to the creation of the US Constitution in 1787, there was an evolution of constitutional theory that occurred between 1776 and the writing of the Constitution. According to Goldstein, ‘the prevailing idea in 1776 was not that we had these rights because the written constitutions embodied them; rather the idea was that we had them because right reason, as applied to human nature and as evolved through the Anglo-American position, told us they were true’.\(^{228}\) The written Constitution was considered only one out of a number of sources of fundamental law.\(^{229}\) Other unwritten sources included, ‘the laws of God, the common law (largely derived incrementally from custom and tradition), the law of nature, and natural law.’\(^{230}\) As a result, American judges enforced unwritten rights not explicitly mentioned in the Constitution.\(^{231}\)

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\(^{229}\) Suzanna Sherry, ‘Natural Law in the States’ 61 Cincinnati Law Review 171, 172.

\(^{230}\) ibid.

\(^{231}\) For example, see *Fletcher v Peck* 10 US (Cranch) 87 (1810) Here, Marshall J conveyed that there was a limit to state powers which do not explicitly appear in the Constitution.
However, by 1820, reliance on natural law began to dissipate and according to Sherry, ‘disappearing entirely within a few years’. Since 1937, the US Supreme Court has endeavoured to link its decisions to explicit clauses of the US Constitution. As Grey observes, ‘the 18th century philosophical framework supporting the concept of immutable natural rights was eroded with the growth of legal positivism, ethical relativism, pragmatism and historicism.’ The concept of a Constitution acting as a restraint on the legislature was significantly different in the 20th century than it had been in the past. The modern American approach, predicated on reliance on textualism, is reminiscent of the Irish approach to the interpretation of the Constitution in more recent years.

While Irish law has marked itself as distinct from England and Wales in a constitutional context, there is little doubt that the Irish courts have been influenced by the US Supreme Court in the area of rights. For example, although it was previously suggested that Article 40.3 of the Irish 1937 Constitution was influenced by Rerum Novarum, it is also likely that said Article was based on the Fourteenth Amendment of the US Constitution due to the obvious similarities. The Fourteenth Amendment reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

As previously articulated, the Irish 1937 Constitution introduced a novel concept, namely, granting the High Court and Supreme Court the right to review the constitutionality of legislation. It is quite likely that the drafters of the 1937 Constitution looked to the US

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233 ibid. For more on fidelity to the constitutional text in judicial review see Thomas Grey, ‘Do we have an Unwritten Constitution?’ (1975) 27(3) Stanford Law Review 703.
238 In A v Governor of Arbour Hill Prison, Denham J made the following observations with regard to judicial review: ‘Ireland led the common law world in 1937 by expressly stating in the Constitution that the jurisdiction of the Superior Courts shall extend to the question of the validity of any law having regard to the provisions of the Constitution. This, perhaps more than any other aspect of the Constitution, signalled the nature of the State, its divergence from the system of government in the United Kingdom, and the parallels which may be drawn.
when considering the inclusion of judicial review in the Irish Constitution and were aware of
the role that the US Supreme Court exercises in scrutinising legislation for compatibility with
the terms of its Constitutions.

Nevertheless, it is worth noting that the US Constitution, unlike its Irish counterpart, does not
explicitly recognise the power of judicial review. In the US, the power of judicial review is
implicit in the structure, provisions and history of the Constitution. Sherry maintains:

By the late 1780s, then, the “Constitution” of an American state consisted of its
fundamental law (both positive and natural), the inherent and inalienable rights of man
(whether declared or not), and the recipe for a governmental mixture that would best
protect and preserve the fundamental law and natural rights. This theoretical, intellectual
construction of a constitution, moreover, served as the basis for a practical exercise of
judicial review.

The introduction of judicial review in the US was not an easy process. Legislatures went so
far as to attempt to outlaw it. However, there was also stoic support in favour of judicial
review. Lawyers such as James Iredell noted the importance of judicial review when he
wrote:

Without an expressed Constitution the powers of the legislature would have undoubtedly
been absolute (as the Parliament of Great Britain is said to be) and any act passed, not
inconsistent with natural justice (for that curb is avowed by the judges even in England)
would have been binding on the people. The experience of the evils… attending an
absolute power in a legislative body suggested the property of a real original contract
between the people and their future government…

It really appears to me, the exercise of the [judicial] power is unavoidable, the Constitution
not being a mere imaginary thing, about which ten thousand different opinions may be
formed, but a written document to which all may have recourse…

with the Constitution of the United States of America. The power to review the constitutionality of legislation
expressly given by the Constitution to the Superior Courts was a novel aspect of the Constitution in 1937. No
such power existed expressly elsewhere in common law jurisdictions, such as the United Kingdom, Australia or
Canada… Consequently, Ireland, in 1937, led the common law countries by giving such a power expressly to

239 Otis Stephens and John Scheb, American Constitutional Law, Volume 1: Sources of Power and Restraint
(Cengage Learning 2007) 38.
Review 1127, 1134.
241 Leslie Goldstein, ‘Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law’
242 Leslie Goldstein, ‘Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law’
(1986) 48(1) The Journal of Politics 51, 66 citing Griffith McGree (ed), Life and Correspondence of James
Iredell (New York Peter Smith 1949). Goldstein goes on to quote Hamilton’s argument from Federalist 78:
‘Every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.
No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the
deputy is greater than his principal; that the servant is above his master; that the representatives of the people are
superior to the people themselves… If there should happen to be an irreconcilable variance between [a statute
and the Constitution], that which has the superior obligation and validity ought, of course, to be preferred…’
Judicial review finally gained acceptance in the US during the 1790s. In 1803, Chief Justice Marshall established judicial review over congressional statutes in the seminal case of *Marbury v Madison*. This case somewhat redefined judicial review as a judicial power ‘to choose one interpretation against other reasonable, conflicting ones that the legislature may have chosen.’

In both Ireland and the US, the rights that a court may uphold are not limited to those expressly enumerated in the Constitution. Instead, an individual’s rights include an array of unspecified personal rights, which are considered fundamental. As Sherry opines, ‘[t]extualism is not an inevitable concomitant of a written constitution’. It is contended that both before and after the ratification of the US Constitution and the Bill of Rights, American courts enforced unwritten rights.

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*Marbury v Madison* 11 Cranch 138 (1803).


For a detailed analysis on whether the founders of the US Constitution expected judges to enforce unenumerated as well as enumerated rights see Suzanna Sherry, ‘Natural Law in the States’ 61 Cincinnati Law Review 171.


Sherry looks to states both with and without a Declaration of Rights to convey the influence of unwritten law on judicial decisions. For example, the Virginia Constitution of 1776 was one of the earliest State Constitutions. The Virginia Constitution of 1776 contained a bill of rights. In *Curries Administrators v Mutual Assurance Society*, Roane J rejected the defendant’s argument that no authority is expressly given to judges by Virginia’s Constitution to declare a law void for being morally wrong or in violation of a contract. The judge asserted: ‘It was argued by a respectable member of the bar, that the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable. This is a position which even the courtly Judge Blackstone was scarcely hardy enough to contend for, under the doctrine of the boastful omnipotence of parliament. What is this, but to lay prostrate, at the footstool of the legislature, all our rights of person and property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted.’ *Curries Administrators v Mutual Assurance Society* 14 Va (4 Hen & M) 315, 346 (1809). South Carolina enacted three different Constitutions before 1800, none of which contained a bill of rights separate from the rest of its Constitution. The judicial employment of unwritten rights is illustrated by the case of *Bowman v Middleton* 1 SCL (1 Bay) 252 (1792). Sherry states that in *Bowman*, the Court ‘invalidated a statute on the basis of unwritten law’. Suzanna Sherry, ‘Natural Law in the States’ (1992) 61 Cincinnati Law Review 171, 215.
The importance of Article 40 of the Irish Constitution is beyond doubt. As Keogh has indicated – Article 40.3.1° of the Irish Constitution roughly corresponds to the Fourteenth Amendment of the US Constitution. Keogh goes on to point out that just like the Fourteenth Amendment, Article 40.3.1° has provided the basis upon which the Irish Courts have determined that a number of rights are implicitly protected. Yet there remains a distinction between the Irish approach and the American approach to unwritten rights, embodied in the Ninth Amendment. The Ninth Amendment of the US Constitution is directly related to the question of unwritten rights. The Ninth Amendment states: ‘The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.’ The Ninth Amendment was advanced by Mr James Madison as a solution to the problem that listing some rights would eliminate others because ‘the act of writing would undermine the unwritten natural law rights.’ As Grey explains:

> [It] was generally recognised that written constitutions could not completely codify the higher law. Thus in the framing of the original American constitutions it was widely accepted that there remained unwritten but still binding principles of higher law. The ninth amendment is the textual expression of this idea in the federal constitution.

It has been established that both the Irish Constitution and the US Constitution uphold unwritten rights. Yet there is a subtle difference between the two Constitutions. The Ninth Amendment of the US Constitution expressly states, ‘the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.’ As indicated, this clause of the Ninth Amendment is interpreted by the majority of scholars as one that protects unwritten rights. However, in Ireland, there is no express

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250 Keogh notes that parallels can be drawn between Article 40.3.2° of the Constitution (which protects the right to life, person, good name and property rights of every citizen) and the Fourteenth Amendment (which provides that no State shall deprive any person of life, liberty or property without due process of law). Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937: Bunreacht Na HÉireann* (Mercier Press 2007) 21.
253 In *Griswold v Connecticut*, Goldberg J stated: ‘[T]he Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments, and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court’s opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. The Ninth Amendment simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.’ *Griswold v Connecticut* 381 US 479, 492 (1965).
254 Indeed as Sherry has stated: ‘There is also even more significant evidence that the founding generation recognised judicially enforceable unenumerated rights. For the first thirty or forty years after the Constitution
acknowledgement of these unenumerated rights. While Article 40.3 deals with the ‘personal rights’ of the citizen, there is no express salutation to their existence, as is the case in the US.255 Kelly has propounded that the American doctrine avoids the natural rights theory and instead allows effectiveness in the Ninth Amendment through ‘judicial introspection’ on the ‘Volkgeist’ in contrast to – Ireland’s unenumerated rights doctrine which is predicated on a commitment to Thomistic natural law theory.256

Therefore, it is suggested that Ireland’s traditional constitutional values are distinct from those that prevail in both England and Wales, and the US. Unlike England and Wales, Ireland’s traditional constitutional values are enshrined in an official bill of rights doctrine. Although the US also possesses an official bill of rights doctrine, Ireland can be distinguished from the US as there is no express provision within the Irish Constitution that explicitly protects unenumerated rights. As Ó’Tuama argues, ‘In effect Irish government is a hybrid,

255 Grey describes the Ninth Amendment in the following terms: ‘It is rather a license to constitutional decision-makers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein.’ Thomas Grey, ‘Do we have an Unwritten Constitution?’ (1975) 27(3) Stanford Law Review 703, 709. For more on the Ninth Amendment, see generally, Randy Barnett, Rights Retained by the People: The History and Meaning of the Ninth Amendment (George Mason University Press 1993); Marshall De Rossa, The Ninth Amendment and the Politics of Creative Jurisprudence: Disparaging the Fundamental Right of Popular Control (Transaction Publishers 1996); Dan Farber, Retained by the People: The Silent Ninth Amendment and the Constitutional Rights Americans Didn’t Know They Have (Basic Books 2007); Bennett Paterson, The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights Under Social Conditions of Today (Lawbook Exchange 2007); Kathy Furgang, The Ninth Amendment (Rosen Publishing Group 2011).

with antecedents in the Commonwealth parliamentary model with a strong flavour of the American constitutional model.¹²⁵⁷

This chapter examined the history of Ireland’s traditional constitutional values. Following on from this, the chapter focused on whether there is a distinctive flavour to the status, interpretation and application of these rights in Ireland. The next chapter will analyse the recent changes in Ireland’s criminal justice system under the parameters of the theoretical frameworks outlined in chapter 1.

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Chapter 3 – From a Due Process to Crime Control Model

[W]e allow ourselves to forget what penal-welfarism took for granted: namely, that offenders are citizens too and their liberty interests are our liberty interests.258

Introduction

This chapter analyses the recent changes in Ireland’s criminal justice system within the context of the theoretical frameworks outlined in chapter 1. While traditionally Irish criminal justice has centred itself on the Due Process Model, it is contended that recently there has been a palpable shift in Ireland’s constitutional balance resulting in a crime control centred system of justice. It is suggested that these changes can be understood in the face of moral panic, crime control driven policies and risk management. The chapter will also examine the concept of preventative detention in the bail context as it is asserted that this type of prophylactic measure is archetypal of a risk-oriented approach to criminal justice. Although it is the contention that the Irish criminal justice system has shifted towards a risk-orientated system of justice, it is arguable that it still retains some affinity to the Due Process Model. To illustrate this affinity, it is necessary to include a brief analysis of preventative detention at the European Court of Human Rights (ECtHR) as well as the system of imprisonment for public protection in the UK. To conclude, the chapter will examine whether Ireland has actually experienced a reorientation of its criminal justice system.

From a Due Process to Crime Control Model

As one can gather from the previous chapter, Ireland possesses a constitutional bill of ights and a strong tradition of judicial activism. These are both key elements of the Due Process Model. As Walsh has observed, ‘the adoption of a written Constitution with its protection for fundamental rights has resulted, arguably, in placing Ireland ahead of its [UK] neighbour in respect of due process values in criminal justice.’259 However, it has been argued that there has been a shift in focus from the traditional due process rights of the accused to the crime

259 Dermot Walsh, Criminal Procedure (Thompson Roundhall 2002) 6.
control aims of the State, in Ireland, in recent years.\textsuperscript{260} Walsh argues that recent legislative developments have, ‘achieved a radical realignment in the balance which had characterised the Irish criminal justice system during the previous 150 years.’\textsuperscript{261} Further still, Kilcommins has commented that in terms of devaluation in due process values, ‘Ireland is now a lodestar for other jurisdictions.’\textsuperscript{262} It is thereby contended that by analysing recent developments in the Irish criminal justice system from a theoretical perspective, the growth of a culture of control is evident.

Central to the Due Process Model is the presumption of innocence, due process, fair procedures and the preservation of liberty. It is propounded, however, that recently, there has been a clear shift in Ireland’s traditional constitutional balance resulting in an attack on our due process values by a crime control driven prototype concerned with public protection and security.\textsuperscript{263} Previously, due process values were regarded as paramount. Now, the State is prioritising risk management.

\textsuperscript{261} Dermot Walsh, Criminal Procedure (Thompson Roundhall 2002) xii. Walsh refers to the recent legislative activity in the following terms: ‘On the police these [legislative changes] include a substantial growth in the nature and extent of powers regarding: stop, search and question; arrest, detention and interrogation; entry, search and seizure; the abstraction of forensic samples from the bodies of suspects; and the production of confidential information in the hands of third parties. On the procedural front, they include; inroads into the right to silence; the growth in adverse inference provisions; obligations of advance disclosure on the defence; more frequent resort to provisions which shift the evidential burden onto the accused; proof by certificate and documentary evidence; the admission of deposition and video-taped evidence; dilution of the right to bail; and the abolition of the preliminary investigation. These developments are complemented by the introduction of much stiffer custodial penalties for certain crimes. To all of this must be added the inclusion of a modified civil procedure to target property which is suspected of being the proceeds of crime. Finally reference, must be made to the growing tendency for the contents of our criminal law and procedure to be driven by developments outside the country.’ Dermot Walsh, Criminal Procedure (Thompson Roundhall 2002) xii.
\textsuperscript{263} As Walsh has observed: ‘Rapid changes in the nature and volume of certain criminal activities in the second half of the twentieth century have provoked a significant growth in the discretionary powers of Gardaí and an associated bureaucratisation of the criminal process. Some of these changes... can easily be justified as a necessary and balanced response to the crime challenge. Others, however, bear the hallmarks of an unbalanced preoccupation with crime control; a surrender to an exaggerated, media-driven perception of the levels of crime or the threat posed by certain types of crime. They are eating away at the due process foundations which have secured a reasonable balance between the state and the individual in criminal justice matters for generations.’ Dermot Walsh, ‘The Criminal Justice Act 2006: A Crushing Defeat for Due Process Values?’ (2007) 7(1) Judicial Studies Institute Journal 44, 58.
Although it is arguably simplistic, it has been posited that the legislature and the judiciary in Ireland frequently represent the division between Packer's two normative models.\textsuperscript{264} For example, the Crime Control Model in Ireland is embodied by recent legislative enactments such as the Bail Act 1997 while the Due Process Model is represented by judicially developed safeguards such as the presumption of innocence. Walsh describes the role of the judiciary in the following terms:

\begin{quote}
The judges have also made a very profound contribution to the growth of the criminal justice system. Indeed, there were long periods throughout the history of the State where their output far outstripped that of the legislature in terms of substantive impact. Even throughout the 1990s the judges have not been left behind by an overactive legislature. It is surely no exaggeration to say that the volume and quality of judgments emanating annually from the Supreme Court, the Court of Criminal Appeal and the High Court in criminal justice matters are unprecedented in the history of the State. For the most part these judgments are playing a vital role in taming some of the wilder excesses of the legislature and the executive. In that respect they are making a vital contribution to upholding the due process rights and the basic freedoms of the individual.\textsuperscript{265}
\end{quote}

Despite the judiciary’s attempts at upholding due process rights, it is arguable that the legislature has stridently assumed a crime control stance in recent times thereby shifting the balance of the Irish criminal justice system. So what prompted this ‘radical realignment’ in the balance which has characterised the Irish criminal justice system? The following section will attempt to tease out the triggers underlying this shift, from the traditional due process approach to a crime control oriented model.

\textbf{Moral Panic, the Crime Control Phenomenon and Risk Management}

The recent explosion in legislative activity can be attributed to issues such as organised crime. There is little doubt that 1990s Ireland witnessed a sharp escalation in public alarm over the perceived threat in violent and organised crime.\textsuperscript{266} This was encapsulated by the murders of Garda Detective Jerry McCabe and investigative journalist Veronica Guerin. This

\textsuperscript{264} Liz Campbell, ‘Decline of Due Process in the Irish Criminal Justice System: Beyond the Culture of Control?’ (2006) 6 (1) Hibernian Law Journal 125
\textsuperscript{265} Dermot Walsh, \textit{Criminal Procedure} (Thompson Roundhall 2002) xii-xiii.
generated the hurried introduction of a body of criminal justice measures including the constitutional and legislative changes to Ireland’s bail laws, aimed at strengthening the hand of law enforcement at the expense of individual civil liberties and due process values such as the right to liberty and the presumption of innocence. Public pressure urged the Government to offer a panacea to the perceived crime epidemic. This pressure resulted in the introduction of an array of measures, which have served to chip away at individual civil liberties and the rights of suspects. O’Donnell and O’Sullivan have characterised this period as one of, ‘a state of national emergency’, and described the aforementioned murders as, ‘a catalyst for a hardening in political attitudes.’

Meade describes the day of Guerin’s murder as a day in which the ‘seeds of an organised crime panic were being sown.’ Crime control had become a state priority. Moral panic ensued while austere policy and legislative changes were introduced in order to curb the perceived increase in organised crime.

A substantial number of reform proposals were introduced in the second half of the 1990s, such as the anti-crime package of 1996, the Bail Act 1997, and the Criminal Justice Act 1999, resulting in rapid change in Ireland’s criminal justice system. Although this thesis seeks to analyse the reform of Ireland’s bail laws and the introduction of preventative detention in the bail context, bail was not the only area of criminal justice that endured swift transformation. The bail referendum and subsequent legislation was only a portion of a large legislative campaign targeted at strengthening the criminal justice system.

Kilcommins comments on the introduction of one such legislative measure, namely, the Proceeds of Crime Bill in the following terms:

269 These were the Criminal (Drug Trafficking) Bill 1996; the Criminal Assets Bureau Bill 1996; the Proceeds of Crime Bill 1996; the Courts Bill 1996: the Criminal Justice (Miscellaneous Provisions) Bill 1996.
270 The Criminal Justice Act 1999 provided for a scheme of presumptive sentencing for possession of controlled drugs worth €13,000 or more with intent to supply.
271 Kilcommins has observed: ‘Commitment to justice and due process values is weakening, as law making increasingly becomes a matter of retaliatory gestures intended to reassure a worried public that something is being done about law and order.’ Shane Kilcommins, ‘Risk in Irish Society: Moving to a Crime Control Model of Criminal Justice’ (2005) 2(1) Irish Probation Journal 20, 21.
272 The main feature of the Proceeds of Crime Act 1996 is that it allows the Criminal Assets Bureau to secure interim and interlocutory orders against a person’s property, provided it can demonstrate that the property in question (which has a value in excess of €13,000) constitutes, directly or indirectly, the proceeds of crime. If the interlocutory order remains in force for a period of seven years, an application for disposal can then be made.
Perhaps nowhere in this results orientated penchant more palpable than in relation to the enactment of measures by which the proceeds of crime can be confiscated. The Proceeds of Crime Bill was mooted in Ireland in the mid 1990s to combat the dangers posed to society by drug-related crime. The current Act was initially proposed as a private member’s Bill, one week after the assassination of Veronica Guerin. Five weeks later, the normally sluggish and consultative legislative process was complete and the Proceeds of Crime Act was law.273

Moreover, in 1996 the Law Reform Commission recommended that Ireland’s sentencing policy should look to jurisdictions such as Britain and the US for guidance. The Commission also recommended that Irish sentencing procedure be based on a policy of just deserts.274

Based on the foregoing paragraphs, it is arguable that 1990s Ireland witnessed a move from a penal welfare State, centred on due process values toward a system centred on populist punitiveness, moral panic and the ideologies of a more crime control driven archetype. The draconian changes borne by the Irish criminal justice system can be understood in the face of moral panic, crime control and the risk management phenomenon sweeping the Western world.

The term ‘moral panic’ was popularised by Stanley Cohen in his work on the mods and rockers crisis in the early 1960s.275 He described moral panic as occurring when:

A condition, episode, person or group of persons emerge to become defined as a threat to societal values and interests; the moral barricades are manned by editors, bishops, politicians and other right-thinking people... sometimes the panic passes over and is

Kilcommins criticises this legislation on a number of fronts, namely: the fact that the legislation authorises the confiscation of property in the absence of a criminal conviction; it permits the introduction of hearsay evidence; it lowers the threshold of proof to the balance of probabilities; it requires a party against whom an order is made to produce evidence in relation to his property and income in order to rebut the suggestion that the property constitutes the proceeds of crime.

274See generally the Law Reform Commission. Report on Sentencing (LRC 53-1996). The Report states: ‘The Commission reached no conclusions as to what the object or objects of sentencing should be. Its conclusions concentrated on the issue of distribution and in this respect recommended the just deserts principle. Under this principle, the sentence to be imposed must be proportionate to the seriousness of the offending behaviour. The seriousness of the behaviour is measured in turn by reference to the harm caused or risked by the offender and his culpability. The Commission noted that the deserts approach had become influential in sentencing reform in the U.S.A., Canada, the Australian Federal jurisdiction, Victoria, Sweden, Finland and Britain.’ Law Reform Commission. Report on Sentencing (LRC 53-1996) 6. One may recall that Garland’s second indicium of change was the re-emergence of the ‘just deserts’ approach.
forgotten… and other times it has more serious and long lasting repercussions and might produce such changes as those in legal and social policy or even in the way society conceives itself.\textsuperscript{276}

Hall has described the phenomenon in similar terms:

When the official reaction to a person, groups of persons or series of events is out of all proportion to the actual threat offered, when “experts”, in the form of police chiefs, the judiciary, politicians and editors perceive the threat in all but identical terms, and appear to talk in “with one voice” of rates, diagnoses, prognoses and solutions, when the media representation universally stress “sudden and dramatic” increases (in numbers involved or events) and “novelty”, above and beyond that which a sober, realistic appraisal could sustain, then we believe it is appropriate to speak of the beginnings of a moral panic.\textsuperscript{277}

The term ‘moral panic’ is considered as belonging to late 1960s England when deviancy, drugs, vandalism and hooliganism were considered rife.\textsuperscript{278} Cohen acknowledges that labelling something as a moral panic does not imply that ‘something does not exist or happen at all and that reaction is based on fantasy, hysteria, delusion and illusion or being duped by the powerful.’\textsuperscript{279} Cohen argues that the objects of moral panic belong to seven groups of social identity: 1) Young Working Class Violent Males;\textsuperscript{280} 2) School Violence: Bullying and Shootouts; 3) Wrong Drugs: Used by Wrong People at Wrong Places; 4) Child Abuse, Satanic Rituals and Paedophile Registers; 5) Sex, Violence and Blaming the Media; 6) Welfare Cheats and Single Mothers; 7) Refugees and asylum seekers: Flooding our Country and Swamping or Services.\textsuperscript{281} Goode and Ben-Yehuda have also conceptualised criteria upon which moral panic can be measured.\textsuperscript{282} The first indicator is an observable level of concern.\textsuperscript{283} The second indicator is the presence of hostility.\textsuperscript{284} The third indicator is

\textsuperscript{278} Stanley Cohen, \textit{Folk Devils and Moral Panics} (3\textsuperscript{rd} edn, Taylor and Francis 2011) vi. It is noteworthy that Cohen focuses solely on the moral panics part of the title in the third edition of his book.
\textsuperscript{279} ibid vii.
\textsuperscript{280} Cohen places the Jamie Bulger murder in this category. This murder sparked a frenzied moral panic in England. It is noteworthy that the English Archbishop at the time, George Carey, warned about the dangers of moral panic. You will observe later in this thesis that the Irish Catholic Church had numerous reservations over the reactive legislative measures that were introduced after the Veronica Guerin murder.
\textsuperscript{281} Stanley Cohen, \textit{Folk Devils and Moral Panics: The Creation of the Mods and Rockers} (Taylor and Francis 2011) xxii.
\textsuperscript{282} Erich Goode and Nachman Ben-Yehuda, \textit{Moral Panics: The Social Construction of Deviance} (2\textsuperscript{nd} edn, John Wiley and Sons 2010) 37.
\textsuperscript{283} Examples of this are public opinion-polls, proposed legislation or public commentary.
\textsuperscript{284} Increasing levels of hostility directed at the group engaged in the behaviour should be evident.
consensus.\textsuperscript{285} The fourth indicator is disproportionality.\textsuperscript{286} The final indicator is volatility.\textsuperscript{287} These indicators along with Garland’s indices of change are observable in the Irish context.

There is also evidence to suggest that a risk management approach emerged and continues to emerge in Ireland. Since the 1990s, the Irish criminal justice system has experienced various developments in criminal justice policies and practice which convey a marked aversion to risk. For example, the establishment of the Criminal Assets Bureau in 1996 represented an admission by the State that conventional methods for preventing crime were not working and a new approach was required.\textsuperscript{288} In addition, a range of civil orders were created under the Criminal Justice Act 2006 such as behavioural orders. The Act specifies that an individual can be made subject to such an order if anti-social behaviour is established.\textsuperscript{289}

It is asserted that the concept of preventative detention is archetypal of this risk-orientated approach to criminal justice. While detention imposed after conviction aims to manage risk by incapacitating convicted offenders, detaining persons under the consideration of possible future offending seeks to eliminate risk completely. According to Campbell, this ‘encapsulates the notion of risk control.’\textsuperscript{290}

The problem of crime and the subject of ‘bail banditry’ became a major concern in the aftermath of the abovementioned highly publicised murders. In an effort to assuage public angst, the Government secured the adoption of a constitutional amendment and subsequent legislation which provided for pre-trial preventative detention in Irish law. Consequently, bail could be refused in order to prevent the defendant committing crimes while awaiting trial

\textsuperscript{285} The public should be in agreement that the threat is real.
\textsuperscript{286} Public concern must be disproportionate to the harm posed.
\textsuperscript{287} According to Goode and Ben-Yehuda, moral panics occur quickly and subside equally as quickly.
\textsuperscript{288} A new civil realm mechanism was created by the Government. As stated in the Dáil: ‘If the traditional methods fail, we must devise new ones. If we cannot punish, deter or reform these people we must set a new aim, to stop them from operating their evil trade… if we cannot arrest the criminals, why not confiscate their assets.’ Dáil Éireann, Private Members’ Business, Organised Crime (Restraint and Disposal of Illicit Assets) Bill 1996, Second Stage, Tuesday, 2 July 1995, vol 467, no 7, col 2435.
\textsuperscript{289} It is noteworthy that this ‘anti-social’ behaviour is established based on the civil standard of proof. As Walsh has observed: ‘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 publically 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.’ For more on this see Dermot Walsh, ‘The Criminal Justice Act 2006: A Crushing Defeat for Due Process Values?’ (2007) 7(1) Judicial Studies Institute Journal 44. Furthermore, one will recall that under Packer’s Crime Control Model administrative or extra-judicial processes are preferred over judicial processes.
(pre-trial preventative detention). This legislation was enacted with the intention to make it more difficult for an accused to be granted bail. It is contended that the provision of pre-trial preventative detention amounts to a fundamental reorientation of Ireland’s traditional constitutional values. As discussed in chapter 2, there has been a shift in judicial attitudes with regard to the right to liberty in Irish law. The deference afforded to the right to liberty was exemplified by the O’Callaghan decision in 1966. Pre-trial preventative detention involves a considerable limitation on this fundamental right.  

The bail referendum and subsequent legislation has necessitated the realignment of traditional constitutional values in order to incorporate pre-trial preventative detention into Irish law.

Under the Bail Act 1997, a number of factors are to be considered in the bail decision including whether the accused has any previous convictions. This has been further bolstered by the Criminal Justice Act 2007 which requires that a bail applicant charged with a serious offence must furnish the prosecutor with a detailed statement containing information regarding the accused’s past record. These legislative measures convey that past convictions are viewed as an integral consideration in the bail decision. Undoubtedly, this risk-based approach has the potential to affect traditional constitutional values. While it is conceivable that an accused’s criminal record is an important consideration during the bail decision, this volte-face in criminal justice policy could result in the unfavourable situation where an offender with an extensive criminal record is unduly targeted.

It can be garnered from the O’Callaghan decision that the traditional criminal justice method in Ireland is deterrence. A deterrence based system seeks to prevent crime by punishing it after the event. However, pre-trial preventative detention represents a revolution in Ireland’s

\[\text{291 ibid.}\]
\[\text{292 Bail Act 1997, s 2(2)(e).}\]
\[\text{293 Section 6 of the Criminal Justice Act 2007 which amends the Bail Act 1997 by inserting s 1(A) after s 1.}\]
\[\text{294 According to Packer, the use of the criminal record fits well within the Crime Control Model. Herbert Packer, ‘Two Models of the Criminal Process’ (1964) 113 University of Pennsylvania Law Review 1.}\]
\[\text{296 In O’Callaghan, Walsh J in the Supreme Court stated: ‘The accepted method of preventing the commission of future offences is the threat of conviction and punishment.’ The People (Attorney General) v O’Callaghan [1966] IR 501, 517. The O’Callaghan case will be examined in chapter 5. Furthermore, in Ryan v DPP, Finlay CJ held: ‘The criminalising of mere intention has been usually a badge of an oppressive or unjust system. The proper methods of preventing crime are long-established combination of police surveillance, speedy trial and deterrent sentences.’ Ryan v DPP [1989] IR 399, 407. The Ryan case will be examined in chapter 6.}\]
approach to criminal justice in that it seeks to incapacitate the accused in advance of perpetrating a crime.\footnote{Notably, Malcolm and Feeley have observed that the new theory of incapacitation is possibly ‘the clearest indication of actuarial justice’. Malcolm Feeley and Jonathon Simon, ‘Actuarial Justice: the Emerging new Criminal Law’ in David Nelken (ed) The Futures of Criminology (Sage Publications 1994) 174.} As Campbell has observed:\footnote{Liz Campbell, ‘The Criminal Justice Act 2007 – A Theoretical Perspective’ (2007) 3 Irish Criminal Law Journal 8.}

The strengthening of the preventative detention regime in Ireland in the [2007] Act through the restriction of the right to bail embodies the notion of incapacitation, which is paradigmatic of the new penology, given that it does not seek to alter the offender or his social context but only rearranges the distribution of individuals in society.\footnote{One will recall Garland’s first indicium of change, specifically, the decline of the rehabilitative ideal. Jock Young, The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity (Sage 1999) 66.}

The underlying principle behind prophylactic detention measures is public protection. The implementation of pre-trial preventative detention and a host of other measures serve to convey that Ireland has shifted from a criminal justice system based on deterrence and rehabilitation to one centred on incapacitation, surveillance and risk management.\footnote{In Enright v Ireland it was held in the High Court that notification requirements under the Sexual Offences Act 2001 were not a criminal penalty as the intent of the Oireachtas was not punitive. Geoghegan J stated: ‘The undisputed evidence was that sexual offenders present a significant risk to society by reason of their tendency to relapse. The statistics suggest that the rate of relapse in the year after release from prison is a little higher than later. Also that the currently widely held international view as expressed in the literature is that it is a condition which in general cannot be cured. Further, as a consequence it is not appropriate from a therapeutic point of view to think in terms of a cure but rather of risk management of the condition and the putting in place of measures which facilitate personal and social control.’ Enright v Ireland [2003] 2 IR 321, 342. However, in CC v Ireland, the Supreme Court found that such measures could be punitive. Hardiman J stated: ‘Enrolment on the register would be incompatible with admission to various professions and occupations, such as that of school teacher. One can be enrolled on the register only as a result of a conviction. In all the circumstances I have no hesitation in regarding compulsory enrolment on the register as a punitive consequence of conviction.’ CC v Ireland [2006] 4 IR 1, 76.}

Incapacitation is considered a form of damage limitation and is a method of protecting the public from the harmful minority.\footnote{Under the Criminal Justice Act 2006, notification orders can be imposed for drug trafficking offences. Under the Criminal Justice Act 2007, both monitoring orders and protection of person orders can be imposed for a number of serious offences which are outlined in Schedule 2 of the Act.} In the past, a convicted individual was no longer a criminal in the eyes of the law once his sentence was carried out. Now, an ‘innocent’ person’s movements can be monitored via electronic tagging and notification requirements\footnote{In Enright v Ireland it was held in the High Court that notification requirements under the Sexual Offences Act 2001 were not a criminal penalty as the intent of the Oireachtas was not punitive. Geoghegan J stated: ‘The undisputed evidence was that sexual offenders present a significant risk to society by reason of their tendency to relapse. The statistics suggest that the rate of relapse in the year after release from prison is a little higher than later. Also that the currently widely held international view as expressed in the literature is that it is a condition which in general cannot be cured. Further, as a consequence it is not appropriate from a therapeutic point of view to think in terms of a cure but rather of risk management of the condition and the putting in place of measures which facilitate personal and social control.’ Enright v Ireland [2003] 2 IR 321, 342. However, in CC v Ireland, the Supreme Court found that such measures could be punitive. Hardiman J stated: ‘Enrolment on the register would be incompatible with admission to various professions and occupations, such as that of school teacher. One can be enrolled on the register only as a result of a conviction. In all the circumstances I have no hesitation in regarding compulsory enrolment on the register as a punitive consequence of conviction.’ CC v Ireland [2006] 4 IR 1, 76.} as well as a range of other controlling measures which seek to continue monitoring the individual after their punishment has been carried out.\footnote{In Enright v Ireland it was held in the High Court that notification requirements under the Sexual Offences Act 2001 were not a criminal penalty as the intent of the Oireachtas was not punitive. Geoghegan J stated: ‘The undisputed evidence was that sexual offenders present a significant risk to society by reason of their tendency to relapse. The statistics suggest that the rate of relapse in the year after release from prison is a little higher than later. Also that the currently widely held international view as expressed in the literature is that it is a condition which in general cannot be cured. Further, as a consequence it is not appropriate from a therapeutic point of view to think in terms of a cure but rather of risk management of the condition and the putting in place of measures which facilitate personal and social control.’ Enright v Ireland [2003] 2 IR 321, 342. However, in CC v Ireland, the Supreme Court found that such measures could be punitive. Hardiman J stated: ‘Enrolment on the register would be incompatible with admission to various professions and occupations, such as that of school teacher. One can be enrolled on the register only as a result of a conviction. In all the circumstances I have no hesitation in regarding compulsory enrolment on the register as a punitive consequence of conviction.’ CC v Ireland [2006] 4 IR 1, 76.} For example, the Sex Offenders Act 2001 provides for notification requirements, post release supervision orders and the requirement to
disclose one’s status on employment applications.\textsuperscript{303} It is notable that a Sex Offender’s Register has been explicitly recognised by Garland as a milder version of punitive sanctions which were imposed in the US.\textsuperscript{304} Rehabilitation has been replaced with security.

It is asserted in the preceding paragraphs that by providing for pre-trial preventative detention in Irish law, Ireland has adopted a risk-orientated approach to criminal justice.

**Preventative Detention and the European Convention on Human Rights**

Be that as it may, it could also be contended that Ireland has stopped short of a complete risk-orientated approach to criminal justice. The following paragraphs outline the wide ambit afforded to preventative detention in the European Convention on Human Rights (ECHR) and in the UK. Preventative sentencing was recently examined at the European Court of Human Rights (ECtHR) in *Grosskopf v Germany*.\textsuperscript{305} Although this case does not deal with preventative detention in the bail context it is worthy of inclusion as it is representative of the stance taken by the ECtHR with regard to preventative measures.

In *Grosskopf*, the applicant was detained in a German prison having been convicted of three counts of attempted burglary. The applicant was sentenced to seven years imprisonment. At the same time, the Regional Court ordered his placement in preventative detention based on the applicant’s ‘personality’, the number of previous convictions, the applicant’s disposition to commit offences causing economic damage and consequently his danger to the public.\textsuperscript{306}

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\textsuperscript{303} The release of convicted sex offender, Larry Murphy, triggered a frenzy of debate around the potential to implement preventative measures.

\textsuperscript{304} David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001) 9. Steiker has referred to the range of prophylactic measures introduced in the US as contributing to a ‘preventative state’. She asserts: ‘[P]retrial detention of both juveniles and adults has become much more common in recent years. Many states are seeking to prevent sexual assaults, particularly those against children, by enacting sex offender registration and/or community notification statutes and by creating or reviving “sexually violent predator” statutes that permit the indefinite civil commitment of convicted sex offenders who would otherwise be released at the end of their prison terms.’ Carol Steiker, ‘The Limits of the Preventive State’ (1998) 88(3) Criminal Law & Criminology 771, 775-776.

\textsuperscript{305} *Grosskopf v Germany* App no 24478/03 (ECtHR, 21 October 2010).

\textsuperscript{306} ‘Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys’ Perspectives’ (2012) 32(3) Pace Law Review 800, 837.
Despite having served his sentence, the Regional Court decided that the applicant should be kept in preventative detention based on the view that he was likely to reoffend. It is interesting to note that the applicant’s refusal to participate in therapy, coupled with his dismissal as a journalist in the prison journal went toward the decision that there were no developments which indicated that the applicant was less likely to reoffend.\footnote{Grosskopf v Germany App no 24478/03 (ECtHR, 21 October 2010) para 16.} The decision was upheld by the Court of Appeal and the Federal Constitutional Court refused to consider the constitutional complaint against it. The applicant took his case to the ECtHR where he relied on Article 5(1) of the ECHR in objecting to his placement in preventative detention.\footnote{Article 5(1) of the ECHR reads: ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of preventing the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.’} In finding that there had been no violation of Article 5(1), the ECtHR referred to the recent decision of \textit{M v Germany}\footnote{M v Germany App no 19359/04 (ECtHR, 17 December 2009) para 88. For more on this see Kirstin Drenkhahn and others, ‘What is in a name? Preventative detention in Germany in the shadow of European human rights law’ (2012) 3 Criminal Law Review 167.} where it had found that preventative detention ordered by the sentencing court had been covered by Article 5(1)(a) as being detention ‘after conviction’ in so much as it had not been extended beyond the maximum duration permitted at the time of his offence and conviction.\footnote{Grosskopf v Germany App no 24478/03 (ECtHR, 21 October 2010) para 46.} Based on this, the Court found that Grosskopf had not been detained for a period beyond that maximum duration allowed at the time of his offence and conviction.

According to the ECtHR, the Court dealing with the execution of the applicant’s sentence (which found that the applicant was liable to reoffend due to his previous convictions and conduct in prison), had been consistent with the objective of the original sentencing Court, which had ordered his preventative detention to prevent the applicant committing further serious property offences.\footnote{ibid para 50.} The ECtHR found that the domestic Court’s decision that it was necessary to extend Grosskopf’s preventative detention could not be considered unreasonable.
in terms of the objectives of the preventative detention order. According to the Court, as the applicant refused to undergo any therapy as well as displaying no signs of regret for his past criminal conduct, there were no measures at hand that would effectively prevent him from committing further property offences.

As Campbell has commented, this is a ‘notably conservative and positivistic decision’. In Grosskopf, the applicant was detained not for past conduct but for potential future harm without a finding of guilt. In the past, this form of preventative detention was permitted in England and Wales also.

**Imprisonment for Public Protection**

In England and Wales, an order for imprisonment for public protection (IPP) provided for an indefinite sentence to be granted. IPP sentences were introduced in April 2005 by virtue of s 225 of the Criminal Justice Act 2003. Section 225 of the Act provides that preventative detention can be imposed where the ‘court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further serious offences.’

Significantly, a recent decision of the ECtHR conveyed the flaws in the IPP system.

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312 ibid para 52.
313 ibid.
316 IPP prisoners receive an indeterminate custodial sentence, with a minimum period to be served in custody. These prisoners are required to demonstrate their rehabilitation to a Parole Board through completing rehabilitative courses, before being considered eligible for release.
317 Criminal Justice Act 2003, s 225.
318 ibid. In order for s 225 to apply, the accused must be at least 18 years and must have been convicted of a serious offence committed after the commencement of the section. Initially, its application was mandatory where a risk of future offending existed. Risk was assumed where there was a previous conviction for violent or sexual offences, unless the sentencing judge considered such an assumption unreasonable. A minimum term, a tariff, was fixed by the sentencing judge. After the expiry of said tariff, IPP sentences required the Parole Board’s decision, that the prisoner was no longer dangerous, before he could be released. The IPP system was amended by s 13 of the Criminal Justice and Immigration Act 2008. The amendment provided that the Act’s application was no longer mandatory and instead only applied in cases where, if imposed, the tariff would be fixed at more than two years subject to certain exceptions. Furthermore, risk was no longer assumed. Section 13 has since been repealed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
In *James, Wells and Lee v UK*, the ECtHR unanimously held that there had been a violation of Article 5(1) of the ECHR concerning the detention of the three IPP prisoners following the expiry of their tariff periods.\(^{319}\) The ECtHR found that the lengthy periods of detention for preventative reasons, endured by the plaintiffs, became unlawful when the State authorities failed to provide real mechanisms by which the prisoners could reduce the risk that they were assumed to pose to the public.\(^{320}\) This case is important as it illustrates that a state can now be challenged whenever it detains offenders for preventative means but fails to provide real mechanisms by which said offenders can demonstrate their progress. It also conveys that domestic courts in the UK interpret Article 5 of the ECHR too narrowly.\(^{321}\) While, the ECtHR in *James* did not find IPP or other life sentences unlawful, the ECtHR does require that there are meaningful safeguards in place as well as regular assessments by a court-like body which serves to consider whether the defendant remains ‘dangerous’.\(^{322}\)

This case is significant as it conveys the ECtHR’s position with regard to preventative sentencing. As stated, while the ECtHR does not consider IPP orders unlawful, the ECtHR does require that in, ‘cases concerning indeterminate sentences of imprisonment for the protection of the public, a real opportunity for rehabilitation is a necessary element of any part of the detention which is to be justified solely by reference to public protection.’\(^{323}\) Crucially, sentences of imprisonment for public protection have been abolished as of 3 December 2012 pursuant to s 123 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.\(^{324}\) It has been revealed that it was not the IPP concept itself that was flawed but the

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\(^{319}\) *James, Wells and Lee v The United Kingdom* App nos 25119/09, 57715/09 and 57877/09 (ECtHR, 18 September 2012).

\(^{320}\) In these cases, rehabilitative courses had not been made available to the prisoners.

\(^{321}\) On 12 February 2013, the ECtHR rejected the UK request for a new Grand Chamber hearing for the case *James, Wells and Lee v The United Kingdom* App nos 25119/09, 57715/09 and 57877/09.


\(^{323}\) *James, Wells and Lee v The United Kingdom* App nos 25119/09, 57715/09 and 57877/09 (ECtHR, 18 September 2012) para 209.

\(^{324}\) Section 123 prevents IPP’s from being imposed on anyone convicted on or after 3 December 2012. However, s 122 of the new s 224A of the Criminal Justice Act 2003 restores automatic life sentences. Under the new provision, a court must impose a sentence of life imprisonment where the offender is convicted for a second
practicalities of conducting such a system of sentencing. As Rose has opined, ‘A sentence which carries no certainty as to when an offender might be released and which requires rigorous rehabilitative programmes to be undertaken in a relatively short period of time proved too difficult and too costly to work.’°°° The abolishment of the IPP system is illustrative of the fact that the proper resources need to be in place prior to the implementation of a mechanism that will inevitably lead to an increased workload for the prison system.

The foregoing paragraphs clearly show the position of both the ECtHR and the UK with regard to preventative sentencing. It is fair to conclude that imprisonment for public protection is not unlawful and was indeed employed in the UK until relatively recently.

**From a Due Process to Crime Control Model?**

A central contention of this thesis is that the Irish criminal justice system has shifted from a due process orientated approach to criminal justice matters to a more crime control orientated model. While it is clearly arguable that current developments in the Irish criminal process, such as the curtailment of the right to bail indicate a shift ‘along the continuum’°°° towards the Crime Control Model, such an assertion may not be as straightforward as it first appears.

For example, the implementation of pre-trial preventative detention into Irish law is indicative of a risk management based approach, which focuses on public protection rather than individual civil liberties. Yet it is also arguable that Ireland has stopped short of fully endorsing the Crime Control Model. Consider the concept of preventative sentencing. In short, Ireland has rejected allowing for this type of preventative detention in Irish law despite being accepted as lawful at the ECtHR. While the Bail Act 1997 allows for a form of preventative detention in the bail decision, it is restricted to bail. Therefore, it may be said that Ireland does retain some residual affinity to its due process centred origins.

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offence listed in chapter 5 of part 12 of the Criminal Justice Act 2003, unless the court decides that it would be unjust to do so. Rose describes the new provisions in the following terms: ‘The new provisions are striking in that they share the prescriptive nature of the original IPP provisions, in that the court must impose a life sentence if the statutory criteria are met, subject to the proviso that to do so must not be unjust. However, in making that assessment, there is no specific test or criteria, thus providing the sentencing judge with a wider degree of discretion.’ Christopher Rose, ‘RIP the IPP: A look back at the sentence of imprisonment for public protection’ (2012) 76(4) Journal of Criminal Law 303, 312.


This position can be evidenced from the dicta in *Lynch v Minister for Justice, Equality and Law Reform*. In *Lynch*, the Supreme Court cited Walsh J in *O'Callaghan*, where it was held that preventative justice ‘has no place in our legal system’. Crucially, the Supreme Court in *Lynch* went on to point out that although the Constitution had been amended to allow for a form of preventative detention in the bail context, this does not mean that a convicted person can be sentenced by a court or detained by an executive order for a preventative or a non-punitive purpose.

Notably, this issue was again raised in a recent High Court decision, namely, *The Minister for Justice v Nolan*. In this case the respondent contended that that his surrender to the UK on foot of an arrest warrant would constitute a contravention of Article 40.4 of the Constitution as it was preventative in nature. Edwards J, in refusing to order the surrender of the respondent held:

The Court has considered the nature and degree of the differences between the law of the requesting state and the law in Ireland in so far as preventative detention is concerned. I am satisfied that the differences are deeply rooted in principle and philosophy, and that they are not matters of mere detail, or the product of some superficial dissimilarity. Moreover, it seems to me that preventative detention in the criminal justice context is something that the Irish Constitution forbids absolutely (though of course it is permitted in the health protection context, but that is a completely different matter).

More recently again, Edwards J commented on the concept of preventative detention in Irish law. He stated:

To the extent that the Irish Constitution forbids preventative detention, the focus of the prohibition is upon the near total denial of personal freedom and self determination that is associated with incarceration, imprisonment or close confinement, such conditions of “detention” being emblematic of, and synonymous with, punishment for offending in most cases. The principle that is protected is that interferences with liberty, certainly of this profoundly intrusive type, should only be imposed for proven, as opposed to anticipated, offending. While it is true that this principle has been reversed in relation to bail by the sixteenth amendment to the Constitution, it remains fully intact in relation to sentencing.

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331 The sentence in question was an indeterminate sentence of imprisonment for public protection under the terms of the English Criminal Justice Act 2003.
333 *Minister for Justice v O'Donnell* [2014] IEHC 148. McCutcheon and Coffey comment on preventative sentencing in Ireland in the following terms: ‘Irish courts have indicated that they are governed by the principle of proportionality and it has been ruled impermissible to include a preventative element in such a sentence. In theory, at least, a discretionary life sentence in Ireland is predominantly punitive in nature, designed exclusively to protect the offender’s culpability and the gravity of the offence. The dominance of the proportionality
It is arguable that the wording and sentiment portrayed in the abovementioned case-law is reminiscent of the due process approach afforded to Ireland’s traditional constitutional values. Despite the ECtHR permitting imprisonment for public protection, Ireland has not transplanted this type of legislation due to the provisions of Article 40. While the Bail Act 1997 unquestioningly made a significant dent in Ireland’s traditional constitutional values and brought with it a more risk-orientated approach to criminal justice policy, there remains occasion where the judiciary continue to champion a more due process centred system of justice.

However, it should be noted that Irish law contains other measures that are representative of a crime control approach. Preventative detention exists in other forms in the Irish criminal justice system. It can be garnered from the case-law discussed above that Irish courts continue to assert that preventative detention, aside from the health protection and bail exception, does not form any part of Irish law. In Minister for Justice v Nolan, Edwards J explicitly expressed that preventative detention is something that the Irish Constitution strictly forbids. Yet Edwards J did concede that preventative detention is permitted in the health protection context. However, while it is conceivable that preventative detention in the health protection context is a ‘completely different matter’ as it is of a paternal character and is intended for the care and custody of persons suspected to be suffering from mental infirmity as well as the safety of the public, this is not the only form of preventative detention recognised in Irish law. For example, an order binding a person over to keep the peace could


334 Although Irish law has not provided for preventative detention for public safety reasons, it does permit mandatory minimum sentences which erode the discretion of the court in imposing sentence. Section 5 of the Criminal Justice Act 1999 provided for mandatory minimum sentencing in Irish law for the first time. This has been followed by the Criminal Justice Act 2006 and the Criminal Justice Act 2007. For example, the 2006 Act requires a minimum of ten years for a second conviction for drug trafficking. Up until then this form of sentencing was considered alien to Irish criminal justice policy. The Court of Criminal Appeal has described these measures as ‘a revolutionary alteration superimposed on the conventional principles of sentencing.’ The People (DPP) v Dermody [2007] 2 IR 622, 628.


336 Detention under the Mental Treatment Act 1945 (as amended by the Mental Health Act 2001) is considered a legitimate form of preventative detention. Furthermore, detention of persons considered a probable source of infection is permitted under s 38(1) of the Health Act 1947 (as amended). Notably, under Article 5 of the ECHR, the detention of persons suffering from mental illness is authorised. The validity of the powers granted under the Mental Treatment Act was challenged unsuccessfully in Re Philip Clarke [1950] IR 235.
be construed as being ‘at odds’ with the principle against preventative detention.\(^{337}\) However, the constitutionality of the jurisdiction of the court to make such an order was upheld in *Gregory v Windle*.\(^{338}\) According to O’Hanlon J:

> That the power vested in the courts to bind persons to keep the peace or be of good behaviour and to require them to enter into bonds or provide sureties for that purpose was a beneficial and necessary jurisdiction which, if exercised prudently and with discretion, did not conflict with the constitutional guarantee of personal liberty, and which had survived the enactment of the Constitution of Ireland, 1937.\(^{339}\)

Notably, O’Hanlon J traces the jurisdiction to bind-over back to the common law and a statute of Edward III enacted in 1360.\(^{340}\) The integral question in *Gregory v Windle* was whether the statutory jurisdiction, buttressed by the common law was inconsistent with the Constitution on the ground that it constituted preventative detention.

Other examples of constitutionally permissible preventative detention measures include: extended arrest; the committal of an accused to prison prior to trial where the accused declines to acknowledge himself bound by the terms of a bail bond or is unable to provide independent sureties as required; the committal of an accused to prison where there are substantial ground for believing that if admitted to bail the accused is likely to abscond or interfere with witnesses; imprisonment for wilful refusal to pay a debt in respect of which an instalment order has been made by the Court Orders Act 1926 and 1940 (as amended); imprisonment for contempt of court; internment; detention of persons who are a probable source of infection; detention under the Road Traffic Act 1994 (as amended); and detention under the Mental Treatment Act 1945 (as amended). With the exception of internment much of these detention provisions are not criminal offences and therefore the presumption of innocence is not activated. As internment does not fit within this categorisation it is examined below.

Hogan and Whyte describe internment as, ‘the indefinite detention without trial of citizens or others on grounds of security’.\(^{341}\) In Ireland, internment has been possible under several

\(^{337}\) According to Keane, in its original form, an order binding-over a person to be of good behaviour or keep the peace or else face forfeiting a recognizance of a defined amount, is tantamount to preventative detention. A binding-over order can be made where no offence has been committed. Ronan Keane, ‘Preventative Justice’ (1967) 2 Irish Jurist 233.

\(^{338}\) *Gregory v Windle* [1994] 3 IR 613.

\(^{339}\) ibid 613-614.

\(^{340}\) 34 Edw 3 c 1.

successful enactments since the foundation of the State. The first Irish internment law was the Public Safety (Emergency Powers) (No 2) Act 1923. Internment was subsequently provided for in the Public Safety (Powers of Arrest and Detention) Temporary Act 1924;\textsuperscript{342} the Public Safety (Emergency Powers) Act 1926; the Offences Against the State Act 1939; and the Offences Against the State (Amendment) Act 1940.

Part VI of the Offences Against the State Act 1939 provided for the power of internment. It is understood from chapter 2 that in order to bring this Part into effect it was required that the government publish a proclamation which stated that the powers conferred by Article VI were necessary to secure the preservation of public peace and order. In \textit{The State (Burke) v Lennon}, Gavan Duffy J questioned the constitutionality of Part VI of the 1939 Act.\textsuperscript{343} Consequently, the Oireachtas passed the Offences Against the State (Amendment) Bill 1940 which was referred to the Supreme Court by the President under the Article 26 procedure. The Supreme Court upheld the constitutionality of the Bill.\textsuperscript{344}

In short, this decision provided that the Irish Constitution did not expressly prohibit internment. As this was an Article 26 reference, this Act was granted immunity from further constitutional challenge.\textsuperscript{345} The Article 26 procedure is in itself problematic. As Ó'Tuama has observed:

\begin{quote}
A Bill of doubtful constitutionality is much more likely to escape the artificial test of a court without witnesses, evidence or litigation than it is to stand up to the test of actual litigation. There is every reason therefore why a President should be very reluctant to refer a bill to the Supreme Court.\textsuperscript{346}
\end{quote}

Given that the constitutionality of a Bill can only be tested once under the Article 26 procedure, preventative detention has been accepted as forming part of Irish law in this

\textsuperscript{342} Section 4 of this Act was upheld in \textit{R (O'Connell) v Military Governor of Hare Park Camp [1924] 2 IR 104.}

\textsuperscript{343} \textit{The State (Burke) v Lennon [1940] IR 136.}

\textsuperscript{344} \textit{Re Article 26 and the Offences Against the State (Amendment) Bill [1940] IR 470. The Act was also challenged on the ground that it was repugnant to the ECHR in \textit{Lawless v Ireland (1961) EHRR 15. Here, the ECHR held that although the applicant’s detention violated Article 5(1)(c) of the Convention, Ireland was permitted to derogate from its Convention obligations under Article 15.}

\textsuperscript{345} Ó’Tuama has criticised the Article 26 instrument as being ‘rigid both in its implementation and consequences and weak in terms of process’ which ‘loses most of its potential by the stipulation that a bill so tested can never again have its constitutionality reviewed.’ He goes on to suggest that the Article 26 procedure could be greatly ameliorated ‘through the use of the American procedure’ where a line of legislation can be questioned, rather than the entire Bill. Séamus Ó’Tuama, ‘Judicial Review Under the Irish Constitution: More American than Commonwealth’ (2008) 12(2) Electronic Journal of Comparative Law <http://cora.ucc.ie/bitstream/handle/10468/19/SOT_JudicialReviewIrishConst.pdf?sequence=3> accessed 18 April 2014.

\textsuperscript{346} ibid.
context. In essence, Article 26 has fossilised dubious constitutional law. Furthermore, although it is often proffered that the abovementioned internment provisions concern political offences in emergency situations and do not extend to mainstream criminal law,\textsuperscript{347} others have noted that these emergency legal responses enacted to combat the threat posed by paramilitaries ‘have proved remarkably malleable in adjusting to more normal circumstances.’\textsuperscript{348}

It is asserted that the decision in \textit{Re Article 26 and the Offences Against the State (Amendment) Bill} amounts to an explicit recognition of preventative detention in Irish law. It will be recalled that Edwards J in \textit{Minster for Justice v Nolan} declared that preventative detention is ‘something that the Irish Constitution forbids absolutely’.\textsuperscript{349} Although Edwards J considered and accepted health protection in the context of preventative detention, he made no reference to Ireland’s internment provisions. It is noteworthy that Edwards J appears to have overlooked preventative detention in the internment context.

This chapter reviewed the recent changes in Ireland’s criminal justice system under the parameters of the theoretical frameworks outlined in chapter 1. It appears that while traditionally the Irish criminal justice system has centred itself on the Due Process Model, there has been a shift in Ireland’s traditional constitutional balance resulting in a crime control centred system of justice. However, by refusing to provide for preventative sentencing, it could also be said that Ireland has retained elements of the due process approach to criminal justice.

As it is a primary aim of this thesis to critically assess the nature, extent and impact of the recent changes in Ireland’s bail laws, the next chapter will focus on the concept of bail. In short, it will trace the evolution of the bail theory up to the early 20\textsuperscript{th} century.

\textsuperscript{348} Shane Kilcommins, ‘Risk in Irish Society: Moving to a Crime Control Model of Criminal Justice’ (2005) 2(1) Irish Probation Journal 20, 27
\textsuperscript{349} \textit{Minster for Justice v Nolan} [2012] IEHC 249, para 121.
Chapter 4 – The Evolution of Bail

Bail is important... because it affects the liberty of the subject... it is the only example in peacetime, where a man can be kept in confinement for an appreciable period of time without a proper sentence following on conviction after a proper trial. It is therefore the solitary exception to Magna Carta.

Introduction

In this thesis, the changes to Ireland’s bail laws are employed to convey that the Irish criminal justice system is moving from a due process to crime control system of justice. In short, bail law is a principal consideration of this thesis. Thus, it is necessary to include a detailed historical exposition of bail law as it is crucial one understand where the concept of bail emanated from. Bail did not always exist in the form that it is presented in the Irish criminal justice system today. The concept of bail evolved and developed over time. Therefore, a historical analysis of bail is relevant to the overall thesis as it aids in conveying the meaning that has been attributed to the concept of bail over time.

Bail has considerably evolved from its origins in ancient times. The concept of ‘bail’ has developed as the answer to the difficult question: what is to be done with an accused person in the ‘dubious interval’ that exists, between commitment and trial? The term ‘bail’ is generally given a limited definition: the pre-trial release of a criminal defendant after security has been taken for the defendant’s future appearance at trial. However, it is required for the purposes of this chapter that the limits of this definition are stretched to encompass the

351 Blackstone defines bail as a ‘delivery or bailment of a person to his sureties upon their giving sufficient security for his appearance; he being supposed to continue in their friendly custody instead of going to gaol.’ Sir William Blackstone, Commentaries on the Laws of England: In Four Books, vol 4 (Clarendon Press 1770) 294; Murdoch’s dictionary of Irish law defines bail as, ‘The setting of liberty of an accused person upon others becoming sureties for the accused at his trial.’ Henry Murdoc, Murdoch’s Dictionary of Irish Law (4th edn, LexisNexis 2004); Black’s Law Dictionary defines bail as, ‘A security such as cash or a bond, security required by a court for the release of a prisoner who must appear in court at a future time.’ Bryan Garner (ed), Black’s Law Dictionary (9th edn, Thomson Reuters 2009). Sandes defines bail as, ‘Bail means sureties taken by a person duly authorised, ie a justice or peace commissioner, to ensure the appearance of the accused person at a specified time and place to answer the charge against him.’ Robert Lindsay Sandes, Criminal Law and Procedure in the Republic of Ireland (3rd edn, Sweet and Maxwell 1951) 80.
ancient position where bail for appearance was indistinguishably linked to the concept of surety for payment and pledges for good behaviour.

The word ‘bail’ originated from the French word, ‘bailer’ meaning to hand over or lease. Similarly, the term ‘mainprise’ developed from the French words, ‘main’ meaning hand and ‘pris(e)’ meaning taken. Holdsworth has opined that the difference between the two terms, ‘bail’ and ‘mainprise’, appears to be that in the situation of the former the person in the custody of one was handed over to the custody of another who had in fact ‘given bail for him’. Therefore, the person to whose custody the prisoner was transferred became liable for the prisoner’s liabilities, with his own property and body. In the situation of mainprise, the accused was never in the custody of the mainpernor. The mainpernor merely acted as surety for the debtor’s appearance. It is thought that bail involved a stricter, and mainprise a more relaxed, mode of responsibility. According to Pollock and Maitland, these distinctions eventually disappeared. Yet it is important to note that in both situations the responsibility of one person inevitably resided in another.

The purpose of this chapter is to trace the evolution of bail in England up to the early 20th century. Firstly, this chapter will explore the pseudo bail system in ancient times from its origins in the gory blood feud. Having considered the pertinent materials, the focus of this chapter will shift to the development of bail law, if any, in Norman Times. The Norman concept of the ‘frankpledge’ will be analysed at this stage. The chapter will continue to trace the progression of bail touching on significant historical markers such as the Assize de Clarendon where the relationship between arrest and release on bail first officially appeared. At this point, the chapter will move to address the role of the sheriff, the issuance of writs from Chancery, and the relevant provisions of the Magna Carta. The chapter will then analyse the seminal Statute of Westminster 1275 which was established to regulate the unprincipled practices of the local sheriffs. Following this, the chapter will attempt to ascertain the rationale behind several important Acts of Parliament in the 17th century such as the Petition of Rights Act 1627, the Habeas Corpus Act 1679 and the Bill of Rights 1689. Finally, this

353 Edward Coke and William Hawkins, Three Law Tracts: 1. The Compleat Copyholder; Being a Discourse of the Antiquity and Nature of Manors, Copyholds, &c II. A Reading on 27 Edward the First, Called the Statute De Finibus Levatis. III. A Treatise of Bail and Mainprize (His Majesty’s Law-Printer 1764) 279.
356 ibid.
chapter will move to briefly evaluate the 19th century statutes pertaining to bail in England and the early judicial pronouncements concerning England’s bail laws.

The Origin of Bail

For practical purposes, it is habitually the case that the history of English law is studied from the period beginning after the Norman Conquest. However, it is important to acknowledge and recognise the ancient law which prevailed prior to the Norman invasion. Although a thorough knowledge of these antiquated rules is not required in practice, (as they have long been discarded), it is beneficial to consider their contribution, as these traditions are often reflected in the system as it exists today.

The origin of English bail procedure has been attributed to both the Anglo-Saxons and other Germanic tribes within Europe. It has been propounded that the earliest model of the bail system was based on the formal contract, which developed in old Teutonic law. The formal contract situation applied when a debtor, bound himself contractually by giving his creditor a chattel of little value such as a pledge. With this, the debtor furnished a substantial personal security in the form of sureties. The debtor was then required to redeem the formal pledge by the fulfilment of his promise. The surety himself and not the debtor, was then directly liable to the creditor for redeeming the pledge, and the debtor was responsible to the surety. It has been suggested that this contract, comprising the transfer of an object and the furnishing of sureties, was employed in the settlement of feuds. These ancient practices of the Teutonic people were emulated and further developed upon in England. A common means of securing justice during this period in England was the blood feud. In ancient times, the killing or slaying of a man led to a blood feud between the family or clan of the victim and the family or clan of the perpetrator. It appears that the blood feud is not exclusive to English history.

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359 ibid.
361 Pollock and Maitland refer to Homerio poems which convey that the blood feud was in full operation during that era. However, by the classical period of Greek history, reference had disappeared. This position can be juxtaposed with that of the Icelandic tradition where during the period of the Norman Conquest in England,
Over time, a concept of monetary compensation evolved, known as the wergeld. Under this system, the offender in accordance with his family, offered sureties for the payment of the wergeld to the victim of the crime. The surety in providing the pledge would guarantee the appearance of the accused at trial and the payment of the fine if convicted. If this was accepted by the victim, he was required to meet with the offender and his surety. The offender often offered a symbol such as a stick to the victim, which signified a declaration of responsibility for the unlawful behaviour and intended fulfilment of legal obligation. Subsequently, this ‘symbol’ was passed on to the surety who represented that the victim recognised the surety as the trustee of the offender’s debt. As a result of this process, the debtor found himself in the hands of the surety and not the victim and consequently, the victim had relinquished his right to use force against the offender.

As Pollock and Maitland have observed, ‘… the only punishments, in the proper sense, generally applicable to freemen, were money fines and death in the extreme cases where redemption with a money fine was not allowed.’ It is contended that this operation, involving debtors, victims and sureties, can be likened to that of the formal contract advanced by the Teutonic people.

There have been varying academic suppositions made regarding the abovementioned situation. De Hass has deduced that just as the surety is expected to guarantee the presence of

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362 De Haas citing Liebermann has described the wergeld as the sum of money which constituted a pledge for the absconder which was the accepted form of reparation for a perpetrated wrong. For a more detailed discussion of the wergeld, see Elsa de Haas, ‘Concepts of the Nature of Bail in English and American Criminal Law’ (1946) 6(2) The University of Toronto Law Journal 385. Pollock and Maitland have described the wergeld as a full scale of composition where each freeman’s life had a value set upon it – the wergeld literally meant ‘mans-price’. Frederick Pollock and Frederic William Maitland, The History of English Law before the time of Edward I (2nd edn, The Lawbook Exchange 2007) 473.


365 It is notable that scholars such as Holmes contend that the origins of bail lay not with the contract theory but instead, in hostageship. Hostageship, which is considered an older institution than that of suretyship, comprised of actual bodily seizure. A bail surety on the other hand, could only be pledged through personal property as security for the debt. Beyerle disputes this theory however considering it unlikely that a person would voluntarily expose himself to the possibility of body seizure, for the sake of another. He offers a different theory, namely, where a surety requires the debtor to be responsible to him and in effect protecting the debtor from action on the part of the creditor. He has pointed out that from this ‘trusteeship’ arrangement, the modern bail theory was born. This theory is more relatable to the formal contract theory of the Teutonic era. Oliver Wendall Holmes, The Common Law (Boston 1881) 249 and Franz Beyeler, ‘Der Ursprung der Bürgschaft. Ein Deutungsversuch vom germanischen Rechte her’ Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Germanistische Abteilung, vol XLVII (Weimar 1927) as cited by Elsa De Haas, Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275 (Ams Press 1966) 4-9.
the accused at trial, where he will be punished if found guilty, the pledges, in primitive society, gave surety that the offender would be presented for the payment of the wergeld for the atonement of an injury. Alternatively, it has been asserted that under Anglo-Saxon law the amount of the pledge, for example, the amount of bail, and the possible penalty were identical. Carbone has advanced such a theory based on the proposition that if the accused fled in Anglo-Saxon times, he was presumed guilty. As a result of this, the accused’s surety was responsible for payment of the fine. Carbone has thereby deduced that the amount of the pledge was commensurate to the penalty upon conviction. This is an interesting perspective in relation to bail practices. It can be argued that the accused in Anglo-Saxon times had little incentive to flee and the surety had every incentive to guarantee the appearance of the accused, as he bore the responsibilities of the accused, should he abscond. The central practice of the Anglo-Saxon bail system was to ensure that the compensation owed to the victim and his family was paid. Carbone has posited that as long as the penalty upon conviction remained identical to that of the payment for flight, the system operated efficiently.

In Anglo-Saxon times, every type of assault had its price and outlawry was the remaining option for those who could not pay. Assaults were dealt with by a scale of fixed compensation. The offender not only had to satisfy his debt with the injured person, but also with the King. Moreover, if the accused was to escape, the surety suffered harsh consequences. As punishment for not fulfilling one’s duty, the surety was required to pay the wergeld of the absconding suspect, either to the King or to the Lord entitled to such payment, and to indemnify the injured party. De Haas has succinctly described the

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367 This is based on the assertion that he had left behind sufficient property to pay the fine. The system of outlawry was also operating during this period so it was likely this would further deter the accused from considering flight.
369 Under the laws of the Anglo-Saxon Kings, there existed long lists setting the amounts required for the loss of various limbs etc. Parallels can be drawn between this compensatory system and the modern Book of Quantum.
370 Elsa De Haas, Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275 (Ams Press 1966) 22.
aforementioned situation as an ‘orderly method of securing justice’, which replaced bodily seizure and the gory blood feud.\footnote{ibid 4. Pollock and Maitland have addressed whether there was a legal right of blood feud in ancient times. Two diverging opinions have been offered. The first theory was that the blood feud was not lawful except when the killer or his clan had defaulted in paying the dead man’s wergeld. The second theory contends that the creation of the wergeld was regarded as an advance. Following on from this, the injured kin was in a position to choose money or blood. Frederick Pollock and Frederic William Maitland, \textit{The History of English Law before the time of Edward 1}, vol 2 (2\textsuperscript{nd} edn, Cambridge University Press 1898) 450.}

Outlawry was the sentence of death given by communities who had no police constables or professional hangman.\footnote{Frederick Pollock and Frederic William Maitland, \textit{The History of Bail before the time of Edward 1} (2\textsuperscript{nd} edn, The Lawbook Exchange 2007) 476.} It appears that a law abiding individual had both the right and duty to pursue an outlaw and assault him.\footnote{It is unclear whether outlawry was employed for all types of crime. Pollock and Maitland citing Bracton convey that outlawry was only to be employed for those crimes punishable by loss of life. Bracton goes on to indicate at a later date however that there may be outlawry for ‘transgressio’ provided said crime was a breach of the King’s peace. Frederick Pollock and Frederic William Maitland, \textit{The History of Bail before the time of Edward 1} (2\textsuperscript{nd} edn, The Lawbook Exchange 2007) 476.} If an individual broke the law, he had essentially waged a war against the community. Over time the outlawry system of punishment began to diminish and instead became a means of compelling accused offenders to stand trial.\footnote{Although outlawry was utilised as a method of ensuring an accused’s appearance in court, this method was later surpassed by the ‘arresting’ process. Under this system, if a man was accused of an offence he will either have been appealed or indicted. As there was no formal police force during this period, the only person eligible to arrest the accused was the sheriff; his bailiffs and servants and the bailiffs of those lords who had the higher realtigalities. It appears that felons were required to be summarily arrested and put in gaol. All men were required to aid in the offender’s apprehension and if they neglected their duty, they were punished. Where an indictment had been issued, the sheriff was required to arrest the indicted. Frederick Pollock and Frederic William Maitland, \textit{The History of Bail before the time of Edward 1} (2\textsuperscript{nd} edn, The Lawbook Exchange 2007) 582.} It is thought that although a system was in place, it still proved difficult to obtain evidence relating to offences. It was also tricky to compel the accused to pay their fines if found guilty. It appears that the only punishment in the modern sense of the word that one could receive during this time was a monetary fine or in extreme circumstances, outlawry was employed for those who would not, or could not, pay. Imprisonment was solely a means of temporary security in Anglo-Saxon times. This system of administering justice was soon to become more sophisticated. The Norman invasion brought with it an enduring centralised judicial system, the pertinent aspects of which are outlined below.

\textbf{Bail and the Normans}

On the eve of the Norman Conquest, the criminal law of ancient England contained four elements of securing justice. According to Pollock and Maitland, these methods comprised of the following: the community could ‘make war’ upon the offender; it could leave him to the
mercy of those that he had wronged; it could require the offender to pay for his offence; it
could inflict punishment or death.\textsuperscript{375} Essentially, the law during this era was weak but if one
broke this law, there were repercussions. While the imposition of the wergeld in Anglo-
Saxon times was designed to resolve private disputes, the administration of justice began to
become a state affair after the Norman invasion.

William the Conqueror did not aim to wipe out English law and replace it with Norman
law.\textsuperscript{376} On the contrary, he requested that King Edward’s laws were to be maintained, albeit
with certain variations. According to Stubbs, William the Conqueror showed himself willing
to rule, as the West-Saxons line of Kings before him had done.\textsuperscript{377} As there was no Norman
code as such, Norman law did not present itself as a transferrable entity. English law had the
advantage that a great deal of it was documented. It is suggested that William the Conqueror
in fact adopted some of the Saxon ideals and gradually modified them.

During the period of the Norman Conquest, there was no central court in England which
consistently executed a law common to the whole country. Therefore, a customary law was
established which was administered at local courts within the various districts. According to
Holdsworth, there were three main forms of custom which corresponded to the three primary
political divisions that existed within the country at the time of the Conquest and confusingly,
customs varied within these divisions also.\textsuperscript{378} Paralleling this political division was the
national system of customary law as well as the existence of private jurisdictions pertaining
to the wealthy landowners. This complex system produced a number of competing courts and
inconsistent jurisdictions which in turn resulted in a wide diversity of laws being applied.\textsuperscript{379}

Holdsworth contends that, while the Norman Conquest increased the confusion associated
with England’s laws, it also provided a positive effect through the establishment of a

\textsuperscript{375} Frederick Pollock and Frederic William Maitland, \textit{The History of Bail before the time of Edward I}, vol 1 (2\textsuperscript{nd}
\textsuperscript{376} Frederick Pollock and Frederic William Maitland, \textit{The History of Bail before the time of Edward I} (2\textsuperscript{nd} edn,
\textsuperscript{377} William Stubbs, \textit{Select Charters and Other Illustrations of English Constitutional History from the Earliest
Times to the Reign of Edward the First} (2\textsuperscript{nd} edn, Clarendon Press 1870) 76.
\textsuperscript{378} William Searle Holdsworth, \textit{A History of English Law}, vol 1 (Menthuan Sweet and Maxwell 1956) 4. These
three bodies of custom were namely Mercian law, Dane law and West-Saxon law.
\textsuperscript{379} Professor McIlwain has characterised England following the Norman invasion as a feudal State. The law
which existed during this era was based on a body of custom. In time, these customary methods began to be
viewed as fundamental law and rules inconsistent with this fundamental law were rendered void. Charles
Howard McIlwain, \textit{The High Court of Parliament and its Supremacy: an Historical Essay on the Boundaries
powerful ruler and a Royal Court. This Royal Court served as the initial stages of a centralised judicial system which administered law throughout the entire country. Dispute resolution had now evolved from the blood feud. An effective method of ensuring the accused’s appearance at the Court was thus required.

Although the wergeld payment disappeared in Norman times, the Norman surety too suffered financial loss when he failed to produce the person to whom he had pledged. The concept of the ‘frankpledge’ developed under the Normans. Morris defines the frankpledge system as, ‘a system of compulsory collective bail fixed for individuals, not after their arrest for crime, but as a safeguard in anticipation of it’. As previously outlined, the Anglo-Saxon method of administering justice required a person to find a security who would appear to answer charges made against them, if the accused fled. It can be posited that the frankpledge system was similar to this arrangement in that it also required that the responsibility of one person lie with another. In the case of the frankpledge however, the responsibility lay with a group. The wergeld and the frankpledge differed substantially however. The wergeld was the value placed on every human life. If an offence was committed, the guilty person would have to pay the victim as restitution for the perpetrated crime. If the offender failed to compensate the victim, the responsibility fell to his surety. The frankpledge on the other hand was a system of joint suretyship characterised by the compulsory sharing of responsibility amongst members of a group.

After the Norman Conquest, all persons were enrolled in a tithing. A tithing was essentially a subdivision of the hundred and comprised of ten men, headed by a tithing man. The township discharged its duty by providing that all who were resident formed part of these

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382 Notably, the frankpledge system did not extend to the Anglo-Irish. Instead of the frankpledge, the Anglo-Irish system appeared to base itself on an older administration, namely, the responsibility of the kin and of the lord. Jocelyn Otway-Ruthven, ‘The Native Irish and English Law in Medieval Ireland’ (1950) 7(25) Irish Historical Studies 1, 13 citing Henry Richardson and George Sayles, ‘The Irish Parliaments of Edward I’ (1928-1929) 38 Proceedings of the Royal Irish Academy. Section C: Archaeology, Celtic Studies, History, Linguistics, Literature 128, 142.
384 A person could be excused from membership from said tithing for reasons such as their rank in society or the amount of property they possessed.
385 A hundred was a subdivision of the county. The size of a hundred could vary greatly. For example, Kent and Sussex at the time that the Domesday Book was compiled, contained more than sixty hundreds each.
According to Holdsworth, if one of the individuals within the group committed an offence the other nine were required to produce him to trial. The system operated in such a way that if for some reason the group did not produce the offender, they were required to atone for the damage committed by the defaulter and pay a fine. The frankpledge surety system was compulsory, unrestricted and collective. Although there is no clear evidence to advance this, it could be posited that the tithing acted as a kind of compulsory security for the offending party. Holdsworth, in holding such a theory cited the laws of William the Conqueror after the Conquest which read as follows:

Every man who wishes to be accounted as free shall be in a pledge, so that the pledge hold and produce him before the Court if he offend. And if anyone of such people escape, let the pledges see that they pay the sum claimed by the plaintiff, and prove that they were privy to no fraud committed by him that has escaped.

It can be deduced from the description that the individuals within a tithing were required to ensure the appearance of the offender at trial and if they failed in this task, they received a fine. In addition, the members were required to compensate the victim for his injury. Although, the tithing’s responsibilities included a pseudo policing component, it is clear that the other element of the tithing’s duty can be likened to that of a surety in today’s criminal justice system. A tithing was required to produce an alleged offender to trial and if they failed in this task, they suffered financial loss. Similarly, a surety, in the modern sense of the word, is required to ensure an alleged offender’s appearance at court and can be obliged to pay a sum of money to the court if the alleged offender does not appear.

It is clear that although similarities can be drawn between Anglo-Saxon and Norman mechanisms of securing justice, there was a marked shift in the system of administering justice after the Norman invasion. It had moved from the voluntary pledging of a man by his neighbours to a requirement that everyman in a tithing serve as a pseudo security for every other man in the tithing. Morris has postulated that this transition can be attributed to deliberate governmental action directly after the Norman Conquest where public peace was

388 Under the frankpledge system, if a man committed an offence such as a theft, it was required notice be given to the hundred-man and consequently the tithing-men who together were required to search for the alleged offender.
391 It is conceded that bail in the modern sense comprises of a function not associated with a policing task.
under threat. Essentially, the frankpledge made what was originally a voluntary system, compulsory, and effectively created a Norman substitute for the police.

The enforcement of the frankpledge system was administered through various means. Such methods included the infliction of amercements when the tithing had neglected or failed in its duties and inspections, known as ‘field-days’ of the frankpledges. Twice annually, the sheriffs inspected the hundred, in a full hundred court to confirm that all men that were required to be in frankpledge, were in fact included. These inspections were afforded the term, the sheriff’s ‘tourn’. In this tourn, the sheriff acted as a judge, his powers having been delegated by the King.

De Haas has suggested that while the frankpledge operated as a modern policing arrangement and a system of presenting offenders, it did not present a basis for holding the individual for trial. In support of this view De Haas cites Bracton, the eminent 13th century judge, who when addressing the subject of frankpledge, elucidated that the fine which fell on the group for failing to produce the alleged criminal was not as a result of failing to produce a person released on bail: the fine was in fact incorporated for neglecting to operate as a police mechanism in failing to locate the person in the first place. This position can be juxtaposed with that of Holdsworth. Holdsworth contends that if one member of the group committed an offence, the remaining nine were required to produce him to trial. Therefore, it is postulated that there are varying opinions as to the exact responsibilities of the tithing.

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394 An amercement is defined as a financial penalty imposed on an offender by his peers or at the discretion of the court. It is notable that an amercement, unlike a fine, is not fixed by statute.
396 ibid.
397 Clause 9 of the Assize de Clarendon refers to the sheriff’s ‘tourn’ in the following terms: 9) ‘And let there not be any one within a castle or outside a castle, or indeed in the honor of Wallingford, who shall refuse to let the sheriffs enter his court or his land to view the frank-pledges and to see that all are under pledges; and let them be sent before the sheriffs under a free pledge.’ Constitution Society <http://www.constitution.org/eng/assizcla.pdf> accessed 12 May 2013.
398 According to Hand, the sheriff’s tourn system was imported into Ireland. G Hand, ‘English Law in Ireland, 1172-1351’ (1972) 23 The Northern Irish Quarterly 393, 397.
In sum, the frankpledge system had two main components: Firstly, it operated as a type of policing mechanism in that it required the hundred and subsequently the tithing-men to search for the alleged offender. Secondly, it required that the tithing-men produce the offender to trial and if they neglected to do this, they were required to atone for the damage committed by the defaulter. While the frankpledge system is comparable to elements of the modern bail process, in that it comprised of a pledge to secure the attendance of the alleged offender in court, it can be contrasted with the modern bail definition in that there was no pre-trial release from custody. Comparisons with the modern bail arrangement can be drawn from the second scenario illustrated above. The modern bail surety suffers financial loss if he fails to produce the accused for trial. Therefore, it is arguable that the modern bail surety possesses similar traits to the tithing-men of the Norman era. Additionally, it can be suggested that the Anglo-Saxon surety possessed similar characteristics to that of the tithing-men. As previously articulated the surety in primitive times was required to guarantee that the alleged offender was presented for the payment of the wergeld and if the surety was unable to produce the offender, payment of the wergeld rested upon him. Yet the surety in primitive society voluntarily assumed the role whereas in Norman times, membership of a tithing was a compulsory obligation. As one can deduce from the foregoing analysis, both similarities and differences can be gleaned from the administration of justice in primitive times, Norman times and even the modern age.

Although a pseudo bail procedure existed in Norman times, the relationship between arrest and release on bail only first officially appeared in the Assize de Clarendon. The Assize de Clarendon will be considered below.

**The Assize de Clarendon**

The Assize de Clarendon operated as a set of instructions for the King’s judges. These instructions were issued from the King’s palace at Clarendon in 1166. In short, the Assize de Clarendon required grand juries to ‘present’ suspected criminals in their area in order that the sheriff could then have them arrested and brought for trial before royal justices in the County Courts. Gaols were required to be constructed in those counties where they did not already exist. The Assize de Clarendon has been accepted as an integral step in the development of common law devices for the public prosecution of crime and for the integration of County
Courts into a national court system.\textsuperscript{400} The Assize de Clarendon required that jurors from each locality were to state on oath, to the sheriffs or justices, the names of any persons within their locality who were suspected of homicide, robbery or theft. It then ordered arrest and detention of those suspected persons, and provided briefly for their trial by ordeal.\textsuperscript{401}

The Assize de Clarendon marked the transition from the earlier period of prosecution characterised by the relatives of the injured party, or the injured party himself ‘bringing the action’, to a time where the interests of the Crown were considered more important than individual justice. In short, the Assize de Clarendon represented three integral movements in criminal procedure. Firstly, it established a definite class of felonies which were extended by the Assize de Northampton in 1176.\textsuperscript{402} Secondly, the presentment jury was established which required that presentment jurors were to declare on oath whether there was any man in their locality accused of being a robber, murderer or thief, or whether any man was a receiver of such individuals. The final noteworthy provision developed through the Assize de Clarendon was the establishment of itinerant justices.\textsuperscript{403}

Although, there have been various disputations as to the exact origins and dates upon which the jury of presentment was first introduced, for the purposes of this chapter it is merely necessary to ascertain how the jury of presentment and the Assize de Clarendon affected bail

\textsuperscript{400} Stubbs has described the Assize de Clarendon as a ‘document of the greatest importance to our legal history, and must be regarded as introducing changes into the administration of justice which were to lead the way to self-government at no distant time.’ In describing the act as one of ‘great innovation which attempted to invigorate the local administration of justice’, he also considered the Assize de Clarendon to be a distinct advance forward in bringing royal justice within the remits of the popular local courts. See generally, William Stubbs, Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First (2\textsuperscript{nd} edn, Clarendon Press 1870).

\textsuperscript{401} Clauses 1 and 2 of the Assize de Clarendon read as follows: 1) ‘In the first place the said King Henry ordained on the advice of all his barons, for preserving peace and maintaining justice, that inquiry be made through the several counties and through the several hundreds by twelve more lawful men of the hundred and by four more lawful men of each vill, upon oath that they will tell the truth, whether in their hundred or in their vill there is any man cited or charged as himself being a robber or murderer or thief or anyone who has been a receiver of robbers or murderers or thieves since the lord king was king. And let the justices inquire this before themselves and the sheriffs before themselves.’ 2) ‘And he who shall be found by the oath of the aforesaid cited or charged as having been a robber or murderer or thief or a receiver of them since the lord king was king, let him be arrested and go to the judgment of water, and let him swear that he was not a robber or murderer or thief or a receiver of them since the lord king was king, to the value of five shillings so far as he knows.’ Constitution Society \texttt{<http://www.constitution.org/eng/assizcla.pdf> accessed 12 May 2013}.

\textsuperscript{402} The Assize of Northampton added the offences of arson, forgery, and treason to the existing list.

\textsuperscript{403} There existed a similar situation in Ireland by 1230. The judiciar acted as the principle judge and a group of itinerant justices were charged with bringing the law to the localities. G Hand, ‘English Law in Ireland, 1172-1351’ (1972) 23 The Northern Irish Quarterly 393, 395.
procedure, if at all. According to Hurnard, the presentment operation had two characteristics. The first was the reporting of offences that had been allegedly committed and the second relates to the prosecution of the alleged offenders. As outlined above, the initial clauses of the Assize de Clarendon address the presentment, imprisonment and trial of the suspected offenders.

Clauses 6 and 7 of the Assize de Clarendon address the sheriff’s duties. These provisions convey that the sheriff, having arrested the alleged offender, is required to bring the accused before the justices. It is notable that clause 7 conveys that during the period of time between arrest and production before the justices, the alleged offender is required to be incarcerated. In the counties where there were no gaols, it was required that the accused be kept in some other institution such as a castle, at the King’s expense. There is no specific mention in the Assize de Clarendon of a bail or a pre-trial release procedure being operational at this time. It appears that the alleged offender was incarcerated until presented before the justices. It is noteworthy however, that the Assize de Clarendon specifically addresses incarceration of the alleged offender. One can garner from the preceding sections of this chapter that in earlier times, no gaols as such existed and it was the responsibility of an accused’s family or tithing to produce the accused. It is propounded that under the Assize de Clarendon it was the responsibility of the sheriff to produce the accused.

There is some indication that a type of pre-trial release or bail procedure existed nevertheless. Clauses 16 and 17 allude to a situation whereby a lord can ‘pledge’ for the accused or the accused himself locates ‘good pledges’. It could potentially be inferred from these

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405 ibid 378.
406 Clauses 6 and 7 of the Assize de Clarendon read as follows: 6) ‘And let the sheriffs who have arrested them bring them before the justice without any other summons than they shall have from him. And when robbers, murdererers, thieves, or their receivers, who have been arrested through the oath or otherwise, are turned over to the sheriffs, they are forthwith to receive them without delay.’ 7) ‘And in the several counties where there are no jails, let them be made in a borough or in some castle of the king at the king’s expense and from his wood if it be near, or from some neighbouring wood, on the estimation of the king’s servants, to the end that the sheriffs may keep in them those who have been arrested by the officers whose function it is to do this and by their servants.’ Constitution Society <http://www.constitution.org/eng/assizcla.pdf> accessed 12 May 2013.
407 Clauses 16 and 17 of the Assize de Clarendon read as follows: 16) ‘And if he should stay there more than one night, he is to be arrested and held until his lord come to stand pledge for him, or until he himself secure good pledges; and he who lodged him is also to be arrested.’ 17) ‘And if a sheriff send word to another sheriff
references that an accused was arrested and held by the sheriff until such time that the sheriff received pledges for them and in receiving these pledges; the sheriff was required to provisionally release the accused. This is indicative of bail like procedure.

Clauses 17 and 19 are extremely significant in that they convey the crucial developments that the criminal justice system was experiencing at this time.\textsuperscript{408} The Assize de Clarendon required that criminal responsibility follow the alleged offender over the borders, between counties. In the past, outlawry, forfeiture of one’s goods and monetary compensation operated as the only methods of punishment. Henry II, through the Assize de Clarendon directed that his intention was to secure the capture of alleged offenders. In the past, no real attempts were made by the state to find and capture an alleged offender if they absconded. The Assize the Clarendon provided for the establishment of itinerant justices who travelled from county to county. The establishment of these itinerant justices provided that fugitives were more easily traced and captured.\textsuperscript{409} Therefore, the Assize de Clarendon provided a remedy for fugitives from justice.\textsuperscript{410} According to Langbein, the Assize de Clarendon marked an extensive advance in the existing system of dealing with criminal matters.\textsuperscript{411} This significant historical development of the criminal law allowed for suspicion to initiate prosecution rather than the sworn certainty method which had existed up to then. Its effect was for the trial procedure to be carried out in the particular area where the alleged crime had been committed.

\textsuperscript{408} Clause 19 reads as follows: 19) ‘And the lord king wills that as soon as the sheriffs receive the summonses of the itinerant justices to be before them with their county courts, they shall assemble their county courts and find out all who have recently come into their counties, since this assize; and they are to send these away under pledges to appear before the justices, or else keep them in custody until the justices come to them, and then produce them before the justices.’ Constitution Society <http://www.constitution.org/eng/assizcla.pdf> accessed 12 May 2013.

\textsuperscript{409} In 1168, Richard of Ilchester, Guy the Dean of Waltham, William Basset and Reginald Warenne visited most of the counties. Additionally in 1175, the north and east were traversed by Ranulf Glanvill and Hugh of Cressi, the south and west by William of Lanvellei and Thomas Basset. Frederick Pollock and Frederic William Maitland, The history of English law before the Time of Edward I, vol 1 (2nd edn, Liberty Fund 2010) 165.

\textsuperscript{410} According to Atkinson, ‘… if a prisoner of his own wrong, make his escape, and get into another county, the Sheriff, or his officers, upon fresh pursuit, may retake him there.’ George Atkinson, Sheriff law: Or, a Practical Treatise on the Office of Sheriff, Undersheriff, Bailiffs, Etc., Their Duties at the Election of Members of Parliament and Coroners, Assizes, and Sessions of the Peace: Writs of Trial, Writs of Inquiry, Compensation Notices, Interpleader, Writs, Warrants, Returns… (3rd edn, Longman Brown Green and Longmans 1854) 5.

\textsuperscript{411} Irwin Langbein, ‘The Jury of Presentment and the Coroner’ (1933) 33(8) Columbia Law Review 1329, 1329.
The abovementioned Assizes marked a noticeable modification in the execution of criminal justice. The criminal process could now be initiated by the suspicions of a presentment jury. Prosecution grounded on official inquisition (as opposed to the appeal from a private accuser) had thus been established. Monetary compensation for the perpetration of crime had been replaced with a system of corporal punishment and the length of time between accusation and trial lengthened as itinerant justices carried out local justice throughout the various regions within the State. It has been suggested that the sheriff’s power greatly increased around this time. However, with this power came abuses, several of which will be highlighted below.

The Sheriff

England was divided into various sections which came to be known as counties after the Norman invasion. During the 10th century and prior to the Norman Conquest, these sections of land were known as shires. During this period, the officials of the shire were known as ealdorman, the bishop and the sheriff. After the Conquest it was the sheriff who became the chief official. The sheriff had an integral role as head of the judicial system of the shire and was required to carry out a wide range of duties. A sheriff frequently had more than one county under his charge. It is thought that it was during the aftermath of the Norman invasion that the sheriff’s power was at its greatest.

The responsibility of bail lay with the sheriff. From the text of the Assize de Clarendon 1166, one can deduce that the sheriff was charged with the duty of ensuring the custody of the accused during the long period of time which often elapsed between the arrest of the accused and the arrival of the itinerant justices. In the 12th and 13th centuries the travelling justices made infrequent and inconsistent appearances at the rural courts. Therefore, it was crucial that the sheriffs were granted the right to release on bail, those accused, in order that they did not remain in custody for periods of time that were not justified by the gravity of the case.

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412 The varied duties of the itinerant justice remained until the 1280s in Ireland. Subsequently, the Bench was established from the early reign of Edward I. G Hand, ‘English Law in Ireland, 1172-1351’ (1972) 23 The Northern Irish Quarterly 393, 395.
414 Originally, it was the ealdorman that was considered the chief official of the shire but towards the end of the Saxon period they significantly diminished in numbers. Moreover, bishops were removed from officialdom as a result of the division created by the Norman Conquest between lay and ecclesiastical jurisdiction.
416 George Atkinson, A Practical Treaty of Sheriff Law; Containing the New Writs Under the New Imprisonment for Debt Bill; Also, Interpleader Act, Reform Act, Coroner’s Act & c., with Returns, Bills of Sale, Bonds of Indemnity, & c (William Crofts 1839) 3.
418 Assize de Clarendon 1166, clauses 6 and 7.
not suffer in prison for an indeterminable length of time.\textsuperscript{419} During the period between arrest and detention, a gaol facility existed which was employed to detain the accused before trial.

The sheriff was authorised to grant bail to an accused and place him in the custody of sureties if he deemed it necessary.\textsuperscript{420} An arrested accused could be mainprised provided a surety undertook the responsibility of ensuring the accused’s appearance in court. According to Pollock and Maitland, it was uncommon to detain an accused in custody as imprisonment was ‘costly and troublesome’.\textsuperscript{421} The sheriff in keeping with this theory was inclined to discharge himself of all responsibility at times by handing the accused over to the accused’s friends.\textsuperscript{422} De Haas has further endorsed this position by indicating that due to the inadequacies that persisted in the prisons during this time, the sheriff was likely to place the accused in the custody and safe keeping of their friends, thereby alleviating the sheriff of the responsibility of production of the accused at trial. As there was potential for long delays before the arrival of the King’s itinerant justices, it was important that those accused were able to obtain a provisional release from custody.

The sheriff held a significant role as the local representative of the Crown and accordingly was seized with the responsibility of releasing or holding the accused.\textsuperscript{423} The sheriff held a great amount of freedom and discretion, as no superior lay between him and the King.\textsuperscript{424} During the reign of Edward I, there were persistent complaints relating to sheriffs taking money and bailing those that were not bailable while holding persons who were in fact entitled to bail in order to extort money from them.\textsuperscript{425} Local bailiffs were given the responsibility of delivering offenders to the sheriffs in order to be imprisoned. Indeed, both the local and private bailiffs frequently complained that money was requested of them by corrupt sheriffs before they would agree to accept the prisoners.\textsuperscript{426}

\textsuperscript{419} Charles Desmond, ‘Bail: Ancient and Modern’ (1951) 1 Buffalo Law Review 245, 246.
\textsuperscript{420} William Alfred Morris, The Medieval English Sheriff to 1300 (Manchester University Press 1968) 232.
\textsuperscript{422} ibid.
\textsuperscript{424} ibid.
\textsuperscript{425} William Alfred Morris, The Medieval English Sheriff to 1300 (Manchester University Press 1968) 232.
\textsuperscript{426} ibid. 229.
Determining who should be released and who should not be released on bail under the common law was a far more complicated process than that which was employed in more primitive times. It appears from the records that those accused of homicide were denied the right to bail at this time. Glanville, in his treatise, describes the general practice surrounding the bail procedure and endorses the theory that there was a prohibition on bail in cases of homicide: ‘But, in all Pleas of Felony, the Accused is generally dismissed on pledges, except in a Plea of Homicide, where, for the sake of striking terror, it is otherwise enacted.’

Another set of guidelines relating to bail were those contained in the writ de replegiando which effectively removed from the sheriffs, the right to bail those arrested by order of the King or his justices, or those accused of forest offences. Local custom also constrained the sheriff’s authority to grant bail. Nevertheless, as local custom was not of universal application, sheriffs enjoyed boundless discretion in granting bail. According to Morris, a strong sheriff possessed the ability to exert an influence upon customary law. Over time, the sheriff’s role of granting prisoners bail was transferred to justices of the peace through a series of enabling statutes.

However, bail was not always unachievable in the situations specified as non-bailable. While the aforementioned provisions strengthened the King’s fight against crime, an additional

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427 ‘When, therefore, anyone is charged with the King’s death, or with having promoted a sedition in the Realm or Army, either a certain Accuser appears, or not. If no certain Accuser should appear, but the public voice alone accused him, then, from the first, the accused shall be safely attached, either by proper Pledges, or imprisonment.’ John Beames (tr), A Translation of Glanville (W Reed 1812) 344-346.
428 John Beames (tr), A Translation of Glanville (W Reed 1812) 348.
430 The writ de homine replegiando acknowledged these offences as, ‘any other retto for which according to English custom he is not replevisable’ as cited by Elsa De Haas, Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275 (Ams Press 1966) 65.
431 According to Blackstone, a justice of the peace could not bail prisoners accused of treason; or murder; or manslaughter if clearly guilty; or of prison break if previously committed for a felony; or persons outlawed; those who have abjured the realm or accusers or persons accused by them; persons taken in the act of a felony; persons charged with arson; excommunicated persons. Additionally, there were cases which Blackstone referred to as those ‘of a dubious nature’. In these situations a justice of the peace appeared to have discretion to bail or not bail. These instances included thieves openly defamed and known; persons charged with other felonies, or manifest offences, not being of good fame; and accessories to felony under the same want of reputation. Moreover, a justice of the peace was required to bail upon sufficient surety persons of good fame charged with a bare suspicion of manslaughter or other inferior homicide; persons charged with petit larceny or any felony not before specified; or with being an accessory to any felony. The Court of King’s Bench had complete discretion to bail or not bail for any crime whatsoever. William Blackstone and others, Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia. In Five Volumes. With an Appendix to each Volume, Containing Short Tracts Upon Such Subjects As Appeared Necessary to…, vol 4 (WY Birch and A Small R Carr 1803) 297-299.
432 Henry John Stephen, Summary of the Criminal Law (Saunders and Benning 1834) 236.
means of royal supervision soon developed. Such a practice was that of issuing writs from Chancery. Release could also be obtained through a writ issued from the King’s Court. It appears that anyone who was in the position to pay for a writ from Chancery could benefit from this procedure.

**Obtaining Release by Writ**

There were essentially three medieval writs, closely associated with the idea of liberty, which one could request from Chancery. Whenever wrongs were not remediable within the common law, they were sought to be remedied through Chancery. The courts of Chancery as we know them today emerged from several centuries practice of judicial discretion on behalf of the King. The Chancellor as ‘keeper of the King’s seal’ was regarded as the most suitable individual to give effect to any decisions redressing wrongs.

The three writs, associated with the concept of liberty were, the writ *de homine replegiando*, writ *de manucaptione* and the writ *de odio et atia*. If the sheriff refused to obey the writ, a second writ was issued which was called an alias and if this was not obeyed, a third called a pluries was subsequently issued. A further remedy often utilised for flouting said writs was an attachment. This provided that the sheriff, who had evaded his duties, was imprisoned or fined for his disobedience.

The writ *de homine replegiando*: It is thought that this writ existed from the earlier half of the 13th century. The writ, which was aimed at the sheriff, required him to release a man who was in prison or who was in the custody of a person specifically named in the writ. Essentially, the principle basis of this writ was to compel the sheriff or gaoler to release a prisoner whom he was obliged by law to release. In establishing the first written list of non-bailable offences, this writ also excluded from the list of bailable offences, ‘those arrested by our special command, or that of our chief justice, or for the death of a man, or for

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436 This discretion was delegated to the Chancellor or other officials by the King and consequently, equity ‘resided wherever there was a representative of the king’. Bertie Wilkinson, *Studies in the Constitutional History of the Thirteenth and Fourteenth Centuries* (2nd edn, Manchester University Press 1952) 198.
an offence in our forest, or for any other retto for which according to English law he is not replevisable.'

441 It is noteworthy that the sheriff was liable for attachment if said writ was flouted.

According to Fitzherbert, the writ de manucaptione or mainprise, ‘lies where a man is taken on suspicion of felony, or indicted of felony, for the which thing by the law he is bailable and he offereth sufficient sureties on the sheriff or others who have authority to bail him, and he or they do refuse to let him to bail’. 443 Holdsworth has opined that the purpose of the writ of mainprise was to allow for the release of the prisoner on mainprise just as the writ de homine de replegiando was to allow for the release of the prisoner on bail.

444 The writ de otio et atia was appropriate where a man was appealed of the crime of homicide. 445 It appears from as early as Glanville’s day that a man who was appealed for homicide was not entitled to be released on bail or mainprise. Where a man was appealed for homicide or any other felony from ‘hatred or malice’, this writ was employed. 446 If the inquest concluded that the accused was not appealed from hatred or malice, he was to remain in prison and if the contrary was concluded, he was to be released. 447 This procedure soon became obsolete as trial by jury was established and trial by battle diminished. Furthermore, the Magna Carta required that this writ could be issued as of course and no fee was required for it.

448 According to Farbey and Sharpe, the aforementioned writs were not of general application but instead, a special procedure for specific situations. 449 Unlike habeas corpus, they merely granted the prisoner temporary release before trial. Also, it has been posited that neither of

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441 This is the form that the writ takes in compiled registers and these are the same four irreplevisable categories recognised in the Preamble to chapter 15 of the Statute of Westminster 1275, where bail received its first statutory recognition.


444 ibid. As previously articulated, it appears that the actual difference between bail and mainprise is that for bail, the prisoner is actually in the custody of the person who has given bail for him so that technically he is still in prison and for mainprise, he is not in prison at all as the mainpemors merely give surety for the accused’s appearance.

445 An ‘appeal’ in the historical context was an accusation by a private subject against another of a crime. Arthur English, A Dictionary of Words and Phrases used in Ancient and Modern Law, vol 1 (Beard Books 2000) 54.


447 The writ de otio et atia is comparable to the present day tort of malicious prosecution.


the writs were applicable where an individual was imprisoned by the King’s command. They were employed to secure the pre-trial release of those accused by private accuser or an inferior officer of justice. A further remedy was thereby required for those imprisoned at the behest of the King.

The writ of habeas corpus has come to be regarded as one of the principle safeguards of personal liberty. Holdsworth has divided the establishment of the writ into two distinct periods. The first includes the medieval period in which the contest of the common law courts was primarily with the local and franchise courts. In medieval times, the writ was merely a procedural writ. The second period is that which begins at the second half of the 15th century and continues throughout the 16th century, where the contest persisted between central courts such as Chancery, Star Chamber and the Admiralty. I will briefly assess the first period as the latter is dealt with at a later stage in the chapter.

By the end of the 13th century, the words ‘habeas corpus’ represented a command issued as a means of an interlocutory process to have the defendant of an action physically brought before the court. The actual concept of producing the body and concurrently expressing the cause of the detention was not evident at this stage. The sole purpose of the writ at this time was to order the officer to produce the defendant and not to examine the basis for the detention. Therefore, it is propounded that during this time, the phrase habeas corpus was only associated with the concept of liberty of the subject to a slight degree. It would be at a later stage that the notion of habeas corpus as we know it today was formulated. Despite this, it is important to recognise where the germs of this pivotal process were sown.

451 Blackstone in defining the writ of habeas corpus declared: ‘[T]he great and efficacious writ, in all manner of legal confinement, is that of *habeas corpus ad subjiciendum*: directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ should consider in that behalf.’ William Blackstone and others, *Commentaries on the Laws of England*, vol 2 (Childs and Peterson 1860) 130.
The King continued to control whether one was detained or released by the issuance of writs through Chancery. However, the sheriffs continued to shirk their responsibilities and frequently granted bail for crimes which were considered non-bailable. The sheriffs were regarded as venal and corrupt men. At common law, an officer of law was not entitled to accept a fee for carrying out his duty. Notwithstanding, sheriffs continued to demand and receive ‘fees’ for accepting bail, as well as detaining accused persons on exaggerated charges in order to force bribes for their release on bail. Obviously, the high-handed antics of the sheriff called for a reform of existing law. The Statute of Westminster 1275 was thus established to remedy this unfavourable situation.

Before providing an analysis of the Statute of Westminster, it is necessary to draw the reader’s attention to another matter. It was mentioned above that the Magna Carta required that the writ de otio et atia be issued as of course and that no fee be required for it. While this was one provision of the Magna Carta, it is crucial that one realise the significance of the Magna Carta as a whole and the decisive role it played in the development of due process rights. It is therefore necessary that a summation of the Magna Carta be provided at this remove.

The Magna Carta

The Magna Carta often referred to as the Great Charter, has come to be regarded as the beginning of English Statute law. The Charter which was originally issued in the year 1215 was a charter of grievances directed at the King which stated in legal terms some of the leading ideas of a modern government. It has been frequently posited that the concept

456 This sentiment was later confirmed by the Statute of Westminster 1275, c 26 which states, ‘AND that no Sheriff, nor other the King’s Officer, take any Reward to do his Office, but shall be paid of that which they take of the King; and he that so doth, shall yield twice as much, and shall be punished at the King’s Pleasure.’
457 De Haas uses the example of the Hundred of Kiftesgate, Gloucestershire to illustrate the corrupt practices of the sheriff. Here the sheriff took ten shillings from an accused for ‘pledging him until the delivery of the gaol’, while the constable within the prison was paid a corresponding amount. Similarly, the sheriff of Norfolk at that time took forty shillings from two individuals for ‘sending them under pledge until gaol delivery.’ These two individuals had been falsely appealed by the same approver. Elsa De Haas, Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275 (Ams Press 1966) 89.
459 It was reissued with alterations in 1216, 1217 and 1225.
of due process of law has been derived from the Magna Carta.\textsuperscript{461} Hume succinctly described this fundamental document in the following terms:

This famous deed, commonly called the Great Charter, either granted or secured very important liberties and privileges to every order of men in the kingdom; to the clergy, to the barons and to the people.\textsuperscript{462}

It is the famed 39\textsuperscript{th} chapter of King John’s Charter of Liberties, or the 29\textsuperscript{th} of Henry III’s reissue, oft quoted as the palladium of our liberties, which concerns this chapter: ‘No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed-nor will we go upon or send upon him-save by the lawful judgment of his peers or by the law of the land’.\textsuperscript{463} This Charter conveys the aspired values of the English criminal justice system at this time. There is little doubt that these values emphasise the rights of the individual and a resultant due process flavour.

It appears that prior to the creation of the Magna Carta there were in fact some common law rules concerning the detention of an individual and bail. The Magna Carta essentially required that these common law principles were observed. At this stage in history, it remained undetermined by statute who was bailable and who was not. It was the Statute of Westminster which made this influential change.

**The Statute of Westminster**

Prior to the enactment of the Statute of Westminster 1275,\textsuperscript{464} it was not conclusively determined who was bailable and who was not.\textsuperscript{465} Coke, in his treatise spoke of the diversity of opinion concerning those that were bailable and those who were not, according to the common law at this time. However, Coke did conclude that there were rules laid down prior

\textsuperscript{461} Winston Churchill described the Magna Carta as, ‘a law which is above the King and which even he must not break. This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect in which men have held it.’ as cited by Bernard Schwartz, *The Bill of Rights: a documentary history*, vol 1 (Chelsea House Publishers 1971) 7.

\textsuperscript{462} David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688*, vol 2 (Christie & Son and others 1819) 117.

\textsuperscript{463} It is noteworthy that a variation of this clause was found in many early American States’ Constitutions. It was included for protection of individual rights. For example, the 1778 Constitution of South Carolina included the following clause: ‘That no freeman of this State shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers of by the law of the land.’ Article XLI of the South Carolina Constitution 1778.

\textsuperscript{464} 3 Edw 1 (1275).

\textsuperscript{465} Edward Coke and William Hawkins, *Three Law Tracts: 1. The Compleat Copyholder; Being a Discourse of the Antiquity and Nature of Manors, Copyholds, &c H. A Reading on 27 Edward the First, Called the Statute De Finibus Levatis. III. A Treatise of Bail and Mainprize* (His Majesty’s Law-Printer 1764) 281.
to the Statute of Westminster 1275 which concerned letting prisoners to bail. De Haas has furthered reinforced this assertion in suggesting that the Statute of Westminster 1275 was a development of the ancient bail writ.

The Statute of Westminster 1275 made a number of procedural changes aimed at protecting individuals from the King’s officers. The Hundred Inquests of 1274 revealed that the King’s officers, namely the sheriffs, were conducting an array of oppressive practices. The Statute of Westminster 1275 was introduced primarily to regulate the practices of the local sheriffs who routinely bailed non-bailable defendants and/or refused to bail bailable defendants in order to ‘extort payment’ from them. The absence of a centralised investigatory procedure allowed many abuses to go undetected.

Under the system which operated at this time, the poor often remained in prison until the arrival of the travelling justices, as they were unable to afford to bribe the sheriffs. The response to these numerous abuses was the Statute of Westminster 1275, which was essentially a reform statute aimed at the sheriffs.

Chapter 15 of the Statute of Westminster 1275 reads:

> And if the Sheriff, or any other, let any go at large by Surety, that is not replevisable, if he be Sheriff or Constable or any other Bailiff of Fee, which hath keeping of Prisons, and thereof be attainted, he shall lose his Fee and Office for ever. And if the Under-Sheriff, Constable, or Bailiff of such as have Fee for keeping of Prisons, do it contrary to the Will

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466 Coke based this assertion on the writings of Bracton who wrote at the end of the reign of Henry III: ‘… in every wrong and trespass against the peace of the king, although the offence reach to felony, every one that is appealed or indicted is wont to be bailed (except only in the case of a death of a man,) at any time until he that is imprisoned shall perceive himself guilty by inquest.’ Edward Coke and William Hawkins, *Three Law Tracts: I. The Compleat Copyholder; Being a Discourse of the Antiquity and Nature of Manors, Copyholds, &c II. A Reading on 27 Edward the First, Called the Statute De Finibus Levatis. III. A Treatise of Bail and Mainprize* (His Majesty’s Law-Printer 1764) 281-282.

467 Furthermore, there is reference made to the law of custom concerning bail in the Calendar of the Fine Rolls, 1272-1307.

468 There was a second Statute of Westminster, namely, The Statute of Westminster 1285, 13 Edw I (1285). Essentially, this Statute imposed penalties on those who accused innocent persons of certain crimes.


472 De Hass uses the example of Ranulfo de Rouceby who after 8 years paid 40 shillings to be pledged despite the fact he was bailable from the beginning, to illustrate the sheer gravity of these abuses. Elsa De Haas, *Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275* (Ams Press 1966) 92.

473 Cam lists some of the corrupt practices of the sheriff as, ‘failure to arrest, the accusation and arrest of the innocent, the release of the guilty, and the extortion of payment for replevin’. Helen Maud Cam, *Studies in the Hundred Roles: Some Aspects of Thirteenth-Century Administration: Proceedings Against the Crown* (1216-1377) (Octagon Books 1974) 155.
of his Lord, or any other Bailiff being not of Fee, they shall have three Years Imprisonment, and make Fine at the King’s Pleasure. And if any withhold Prisoners replevisable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall be in the great Mercy of the King. 474

As one can deduce from the section above, the sheriff and his subordinates were liable for three years’ imprisonment as well as a fine at the King’s pleasure if they did not comply with the Statute. The Statute did not bind the higher justices nor did it govern the King who remained fully entitled to decide a person’s fate regarding his liberty. 475 The Statute of Westminster 1275 only actually applied to the sheriffs and inferior justices. 476 It did not apply to the King’s justices or to the King himself.

The Statute offered fixed guidelines in dealing with bail. 477 In short, the Statute outlined the instances in which the sheriff was to permit bail. 478 Although the Statute clearly outlined which offences were or were not bailable, it did not follow on that bail was mandatory in these situations. 479 The Statute lists thirteen types of cases in which persons were not to be bailed, 480 namely:

1)… such prisoners as before were outlawed,
2) they which have abjured the Realm
3) Provers, and
4) such as be taken with the Manour, and
5) those which have broken the King’s prison
6) Thieves openly defamed and known, and
7) such as be appealed by Provers, so long as the Provers be living, if they be not of good name, and
8) such as be taken for house-burning feloniously done, or
9) for false Money, or
10) for counterfeiting the King’s seal or
11) Persons excommunicated, taken at the request of the Bishop, or

474 3 Edw 1 1275, c 15.
475 This contentious lacuna will be addressed at a later stage in this chapter.
476 In 1554, 1 & 2 Phil and M, c 13 extended the provisions of the Statute of Westminster to include justices of the peace.
478 De Hass has commented that although it was the sheriff who most frequently appeared in the Roll as the member of local officialdom who was involved in abuses; others such as the bailiff, constable, coroner, warden and mayor were also known to be involved in said abuses. See generally, Elsa De Haas, Antiquities of Bail: Origin and Historical Development in Criminal Cases to the Year 1275 (Ams Press 1966) 89.
479 However, the detained individual was entitled to apply for a royal writ to correct an injustice if the sheriff was mistaken and had failed to grant bail where these offences were concerned.
480 This list of non-bailable crimes extended to those specified in the writ de homine replegiando, discussed earlier.
12) for manifest Offences,\(^{481}\) or
13) for Treason touching the King himself.

The Statute also lists bailable offences upon the presentation of sufficient sureties, namely:

1) … such as be indicted of Larceny, by Enquests taken before Sheriffs or Bailiffs by their Office, or
2) of light Suspicion, or
3) for Petty Larceny that amounteth not [above the Value] of twelve pence, if they were not [guilty] of Receipt of Felons, or of Commandment, or Force, or of Aid in Felony done;
4) or [guilty of] some other Trespass for which one ought not to lose Life nor Member, and
5) a Man appealed by a Prover after the death of the Prover, if he be no common Thief, nor defamed.

Bottomley has categorised the bailable and non-bailable offences into 1) serious offences; 2) offences in which the guilt of the accused is a certainty; and 3) offences which comprise offenders of justice.\(^{482}\) It can be garnered from this categorisation that the sheriff after the Statute of Westminster 1275 not only had to consider the seriousness of the charge but also the probability of conviction. Hawkins appears to concur with this sentiment by indicating that defendants accused of serious crimes could be bailed if the evidence was premised on light suspicion whereas those caught red-handed committing a minor offence could be detained until trial.\(^{483}\) As Hawkins elucidates, ‘bail is only proper where it stands indifferent whether the person accused were guilty or innocent of the accusation against him, as it often does before his trial; but where that indiffERENCE is removed, it would, generally speaking, be absurd to bail him’.\(^{484}\)

Bottomley makes a noteworthy observation in stating that the Statute of Westminster 1275 did not attempt to set up a single standard upon which all bail decisions should be based. As

\(^{481}\) Hawkins defined manifest offenses as ‘inferior crimes of an enormous nature, under the degree of felony, as dangerous riots, (e) favouring of high treason, (f) scandalous extortions, conspiracies, (g) by justices, &c violent and exorbitant resources of persons arrested by virtue of the king’s writs, misprision (i) of treason, praemunire, (k) maim, and such like heinous offenses...’ William Hawkins, *A Treatise of Pleas of the Crown; Or, A System of the Principle Matters Relating to that Subject, Digested Under Proper Heads...* (6\(^{th}\) edn, His Majesty’s Law Printers 1787) 155.

\(^{482}\) AK Bottomley, ‘The Granting of Bail: Principles and Practice’ (1968) 31(1) The Modern Law Review 40, 45. Carbone has categorised the bailable and non-bailable offences slightly differently. She argues that the Statute of Westminster 1275 defined bailable and non-bailable prisoners by establishing three inconsistent criteria to be considered in the ‘scales of local justice’. These comprised of, the nature of the offence, the probability of conviction and lastly those who had attempted to escape or those of ill repute. June Carbone, ‘Seeing through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail’ (1983) 34 Syracuse Law Review 517, 524-526.


\(^{484}\) ibid 153.
an alternative, the Statute outlines a series of specific situations in which bail should not be granted and another list for which bail should not be refused.\textsuperscript{485}

The Statute of Westminster 1275 created broader implications for our understanding of bail law. According to Carbone, consideration of the evidence was an integral purpose and advancement of the Statute of Westminster 1275.\textsuperscript{486} It appeared that only those defendants whose alleged crime was minor or those whose guilt was uncertain were likely to be released on bail. Bail law had progressed significantly from the Anglo-Saxon era where the severity of the alleged offence was viewed as the primary consideration for bail.

To summarise, it can be submitted that bail law developed within the Statute of Westminster 1275 as part of an assertion of royal concern over the conduct of mercenary sheriffs. Although the provisions of the Statute did not bind the higher courts, the Statute served to codify the existing law and subsequently acted as a foundation for modern bail law.\textsuperscript{487} It is fair to say that there were rules which regulated bail practice prior to the enactment of the Statute of Westminster 1275. Notwithstanding, the Statute of Westminster 1275 was the first statute in English law which addressed bail law substantively. The Statute made various procedural changes targeted at protecting individuals from the abuses perpetrated by the King’s officers. Its significance to bail law as a whole was through its codification of the pre-existing law, namely, common law, local custom and the issuance of writs through Chancery.

Although the Statute of Westminster 1275 can be accredited with reforming the administration of bail governed by the sheriffs and local justices, 17\textsuperscript{th} century reforms addressed the abuses of the higher courts. From the 14\textsuperscript{th} through to the 16\textsuperscript{th} century, both the Crown and Parliament ameliorated the local administration of bail to a large extent.\textsuperscript{488} Although greatly improved, the right to bail remained uncertain and the Statute of Westminster 1275 continued to govern who should be released on bail until 1826. Bail, as


\textsuperscript{487} The Statute is not without its critics however. Foote has described it as ‘a tangled morass’. Caleb Foote, ‘The Coming Constitutional Crisis in Bail’ (1965) 113(7) University of Pennsylvania Law Review 959, 973.

\textsuperscript{488} Through 3 Hen 7 c 3 (1486), Parliament required the approval of two justices of the peace as opposed to one (which had previously been the case) to release a prisoner. Through 1 & 2 Phil & M (1554), Parliament re-enacted the 1486 Statute and required that bailment was made in open sessions, two justices of the peace be present and, that the examination of the prisoners, testimony of the witnesses and, the evidence presented would be recorded in writing prior to bailment.
with other common law and statutory law rights, was subject to the requirements of both Parliament and the King.\textsuperscript{489} It seems fair to opine that none of the statutes enacted between 1275 and 1826 made substantial changes to the doctrines which determined whether bail, be granted or refused.\textsuperscript{490} In essence, these statutes modified the procedures which governed whether bail should be granted, in an attempt to protect the bail procedure from abuse.\textsuperscript{491} Although, the statutes did not substantially advance the bail process in England, there were still some important enactments, pertinent to bail, that require brief assessment. The 17\textsuperscript{th} century gave rise to a series of statutes relevant to the evolution of England’s bail laws. The Petition of Rights, the Habeas Corpus Act and the Bill of Rights all contributed to the development of bail theory. An analysis of these integral statutes can be found below.

The Petition of Rights

The Petition of Rights 1627 was a statement of civil liberties which was sent by the English Parliament to Charles I as a reaction to the King’s unpopular foreign policy which had caused his Government to exact forced loans and to quarter troops in subjects’ houses as an economic measure.\textsuperscript{492} If anyone opposed these policies, they were subject to arbitrary arrest and imprisonment.

It was Darnel’s case (often referred to as The Five Knights’ case) that contributed to the enactment of the Petition of Rights.\textsuperscript{493} Sir Thomas Darnel, along with four other knights, was

\textsuperscript{490} An example of this can be drawn from the Bail Statute of 1554. The intention of this Statute was to deal with the problem of collusive releases. To resolve this problem, the Statute required that where an accused was bailed, depositions were to be taken from the witnesses and sent to the Court. As one can see, while the Bail Statute 1554 rectified a specific problem, it did not make any substantial inroads into the bail process as a whole.
\textsuperscript{492} On 8 May the Commons passed the following resolutions: 1) That no free man ought to be committed, or detained in prison, or otherwise restrained, by the command of the king, or the privy council, or any other; unless some cause of the commitment, detainer, or restraint, be expressed, by which, for law, he ought to be committed, detained, or restrained. 2) That the writ of habeas corpus cannot be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it by command of the King, the Privy Council, or any other, he praying the same; That if a free man be committed, or detained in prison, or otherwise restrained by the command of the King, the Privy Council, or any other, no cause of such commitment, detainer, or restraint being expressed for which by law he ought to be committed, detained or restrained, and the same be returned upon habeas corpus granted for the said party, that then he ought to be delivered or bailed.’ as cited in George Lillie Craik and others, The pictorial history of England: being a history of the people, as well as a history of the kingdom... (C Knight 1849) 131.
\textsuperscript{493} Proceedings of the Habeas Corpus, brought by Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden, at the Kings-bench, in Westminster Hall: 3 Charles 1 AD 1627 as
arrested and detained by an order of King Charles I for refusing to pay for forced loans. All five attempted to seek redress at the King’s Bench and each knight sought a writ of habeas corpus. The writs were subsequently granted and the gaol wardens were required to produce their prisoners personally at the King’s Bench and return the cause of detention for the examination by the judges. The knights demanded that the Crown show reason for their imprisonment or otherwise that they be released on bail. The five knights were essentially requesting that due course of law be applied to their case. As no cause had been shown for their imprisonment, they had been denied the right to due process.

Attorney General Heath, counsel for the Crown argued that the King’s power of discretionary imprisonment was upheld by law and precedent and that those imprisoned were not bailable. Sergeant Bramston, counsel for one of the knights argued that the writ of habeas corpus is the only means by which to secure liberty if the cause of imprisonment is unjust. He went on to argue that as the charge came before trial and conviction, bail should be allowed as the charge was merely an accusation.

This contention was firmly rebutted by the Attorney General, who argued that chapter 29 of the Magna Carta (the prisoners relied on this) did not apply to pre-trial imprisonment and therefore the pre-trial period was not within the meaning of the Statute. The judges refused...
bail in this instance but did not rule that the Crown could always commit a suspect without cause. According to Crawford, the final decision highlighted that an arrested person may not be held in custody indefinitely without having any charge brought against them. Three months later, the King in council, ordered the knights’ release. This contentious issue continued to be debated in Parliament nevertheless.

Guy has opined that the practical effect of the decision in Darnel’s case was to give the Crown the apparent right to detain the prisoners until such time as the King decided that they be released. Crucially, he goes on to indicate that although the judges of King’s Bench ruled that the knights remain in detention, they did not explicitly approve Charles’ ‘right’ of discretionary imprisonment for reasons of state. This distinction is notable as the legal effect of the decision conflicted with the Crown’s expectations.

Charles I’s Third Parliament met on 17 March 1628. The Commons professed their disdain for the abuses that had been perpetrated by the Government in the recent past. Specifically, discretionary imprisonment in the wake of Darnel’s case was the central issue. As Foote has expressed, Parliament was cognisant, during the debates, of the negative implications of the royal power of arrest without cause. Therefore, Parliament’s demands formed three defined headings. These included: no taxes on loans without consent of the Parliament; no arbitrary imprisonment; and no billeting of soldiers. A Bill based on the headings soon began to be formulated by the House of Commons Committee, championed by Edward Coke.

However, the King declined to support said Bill and instead requested the Commons to trust that he would uphold the liberty of his subjects. This was problematic as it was thought that if the decision in Darnel’s case was upheld and regarded as precedent, it would undermine the purpose of the Statute of Westminster 1275 which served to regulate bail laws. However, Charles I finally did agree to a Bill that confirmed the Magna Carta and the old laws

502 ibid.
505 A fourth was later added which opposed the use of martial law.
506 Although modern scholars such as Holt and Clarke claim that habeas corpus did not have its origins in the Magna Carta, it seems that the Petition of Right is responsible for the oft believed association between habeas
The right to due process was thought to stem from the *lex terrae clause* of the Magna Carta.

*Darnel’s* case duly established that Charles I had abused the legal procedures of the King’s Bench and subsequently defied English due process legislation. As a result, the House of Parliament passed resolutions which denied the King the ‘right’ to imprison for reasons of state. Consequently, and after much debate, the Committee of the House passed resolutions dealing with the four headings of the Petition of Right. Essentially, these resolutions amounted to a summary of rights as enshrined in English due process legislation since 1225.

The Petition which was based on earlier statutes and charters, asserted four principles, namely, that no tax may be levied without consent of Parliament; no subject may be imprisoned without causes shown (essentially, this reaffirmed the right of habeas corpus), no soldiers may be quartered upon the citizenry, and, martial law may not be used in times of peace. From a bail perspective it is important, as it prohibited detention by any court without charge.

It has been posited that s 3 and s 4 of the Petition invoke the *lex terrae* clause of the Magna Carta which essentially requires that no man is imprisoned without due course of law. Therefore, it could be argued that the Petition merely served to reassert the application of pre-existing law. The Petition did more than this however. From a bail perspective, it was significant as it acknowledged that arbitrary arrest and detention was unacceptable, even by the Crown. It further provided that an arrested person may not be detained indefinitely without charge being brought against them. Prior to this, it was the Statute of Westminster 1275 which was exclusively applied to circumscribe the abusive practices of the sheriffs and sheriffs and sheriffs and sheriffs. The 39th clause of the Magna Carta reads as follows, ‘no free man shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him or send against him, except by lawful judgment of his peers or by the laws of the land’.


The legal status of the Petition of Right remains unclear. Relf states that the Petition was merely a judicial measure whereas Reeve argues that the Petition was a legislative Act of statutory character and effect. It appears that revered authors such as Holdsworth and Pollock and Maitland have accepted Relf’s view. See generally, Frances Helen Relf, *The Petition of Right*, vol 8 (University of Minnesota 1917); LJ Reeve, ‘The Legal Status of the Petition of Right’ (1986) 29(2) The Historical Journal 257.

3 Cha 1 (1627).

local justices. It can be asserted, based on the aforementioned analysis that the Petition of Right served to extend these restrictions to the Crown.

Duker has aptly observed that while the letter of the Petition of Right could easily be observed, the spirit of the document was unfortunately denied. One such way of circumventing the Petition’s effect was for the sheriffs to delay in making return of habeas corpus.\textsuperscript{511} Thus, a further instrument was required.

**The Habeas Corpus Act**

Although the Petition of Right is considered to have made advances in the progression of liberties at the pre-trial period, the use of procedural delay devices undermined the Petition to a large extent. Such drawbacks are illustrated by Jenkes case.\textsuperscript{512} Francis Jenkes was charged with the crime of sedition after calling for an assembly of Parliament in a public speech. Several attempts were made to secure Jenkes’ release, all of which were denied.\textsuperscript{513} Eventually, having been denied bail from the Secretary, Chancellor and Chief Justice for a number of ‘reasons’, the King finally ordered that bail be accepted.\textsuperscript{514}

This case triggered consternation in Parliament. Several Bills were published seeking to guarantee better liberty for the subject.\textsuperscript{515} Finally, after a prolonged period of debate, the Habeas Corpus Act was passed by both Houses and signed by the King on 27 May 1679. Charles II, through the Act, provided that any person detained for a bailable crime, (‘unless for treason and felony plainly expressed in the warrant of commitment’), or anyone on his

\textsuperscript{512} Proceedings against Mr Francis Jenkes, for a speech made by him on the Hustings, at Guildhall, in the City of London, on Midsummer-day, 28 Charles II AD 1676 as cited in TB Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, vol VI (TC Hansard Peterborough-Court Fleet Street 1816).
\textsuperscript{513} Jenkes’ habeas corpus writ was not accepted as it was ‘outside term’. A further attempt to secure bail was denied as the case had not been calendared. In addition to these denials, a writ of mainprise was also denied on the ground that as the council board imprisoned Jenkes, they should be petitioned. See generally, Proceedings against Mr Francis Jenkes, for a speech made by him on the Hustings, at Guildhall, in the City of London, on Midsummer-day, 28 Charles II AD 1676 as cited in TB Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, vol VI (TC Hansard Peterborough-Court Fleet Street 1816).
\textsuperscript{514} Proceedings against Mr Francis Jenkes, for a speech made by him on the Hustings, at Guildhall, in the City of London, on Midsummer-day, 28 Charles II AD 1676 as cited in TB Howell, *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, vol VI (TC Hansard Peterborough-Court Fleet Street 1816) 208.
\textsuperscript{515} These Bills included a Bill in April 1668, ‘to prevent refusal of Habeas Corpus’. Additionally, in February 1674, ‘An act for the speedy relief of persons detained for criminal matters’ was promulgated. In March and April 1677, the Lords passed through ‘An act for the better security of liberty of the subject’ but it was subsequently dropped.
behalf, has the right to demand a writ of habeas corpus from the Court of King’s Bench, Common Pleas, Chancery or Exchequer, or from any of the judges of the same, if the above courts are not in session. While the existing law had provided a remedy when an appeal was made to the court, the Habeas Corpus Act provided a remedy where an appeal was made to the judges personally. If the appeal was made to the judges personally, the Act required that upon viewing the warrant of commitment, or the oath of two witnesses, that such a copy had been denied, the judge immediately issue a writ of habeas corpus to the person holding the prisoner requesting him to release the prisoner. The Act further required that the body of said prisoner be brought before the judge where reasons were required for his detention. Consequently, the judge was required to bail or remand the prisoner within a period of two days of presentment.

In sum, the Act empowered the courts to issue writs of habeas corpus even during periods when the court was not in session and allowed for substantial penalties to be issued to the judge and/or gaoler who did not act in accordance with the Act. If the judge failed to comply with the Act, he was fined a fixed sum which was subsequently forfeited to the detained person. Additionally, if the gaoler refused to act in conformity with the Act, he was also fined a sum which was later forfeited to the detained person. If a defendant was released as a result of a writ of habeas corpus, he was protected from further arrest for the same offence.

While, it must be conceded that the Habeas Corpus Act 1679 made further improvements concerning the liberty of the subject following the Petition of Right, it has been contended that the habeas corpus procedure remained defective. Crawford contends that such defects included: the lack of limitation on the amount of bail which could be demanded due to the acknowledgment of discretion. These shortcomings were somewhat remedied by the Bill of Rights 1689 enacted during William and Mary’s reign. The intention behind the Bill of Rights was: to condemn James II for misgovernment; to determine the succession to the Throne; to curtail future arbitrary behaviour of the monarch; and to guarantee Parliament’s powers in relation to the Crown, thereby creating a constitutional monarchy.

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516 31 Cha II c 2 (1679).
518 ibid.
519 ibid.
520 ibid 498.
521 For more on this see generally Lucinda Maer and Oonagh Gay, ‘The Bill of Rights 1689’ (House of Commons Library 2009).
for the purposes of this chapter, the Bill of Rights outlined that ‘excessive bail ought not to be
required’ nor excessive fines imposed, nor cruel or unusual punishments inflicted.\textsuperscript{522} Notably,
the Bill of Rights did not apply to Ireland and there was no Irish statute corresponding to it.
However, the Bill of Rights was declaratory of the common law which did apply in
Ireland.\textsuperscript{523}

Further Legislative Enactments

As stated above, the numerous bail provisions relating to specific offences, enacted during
the 17\textsuperscript{th} and 18\textsuperscript{th} centuries were fundamentally repealed by s 32 of the Criminal Law Act
1826.\textsuperscript{524} The 1826 Act was subsequently superseded by the Removal of Indictments into
King’s Bench Act 1835\textsuperscript{525} and the Indictable Offences Act 1848.\textsuperscript{526} This body of legislation
all played a crucial role in the development of bail procedure.

For example, the Criminal Law Act 1826 broke new ground. Before the 1826 Act, the law
provided that a judge had no power to bail a prisoner upon a charge of felony. Consequently,
innocent persons were often compelled to remain in prison for many months.\textsuperscript{527} The 1826 Act
abolished the Statute of Westminster 1275 and its successors. The legislature granted justices
of the peace the authority to bail in cases of felony. This significant power was only provided
if the justice was capable of a fair judgment on the subject of a defendant’s probable guilt or
innocence.

\textsuperscript{522} 1 W & M c 2 (1689).
\textsuperscript{523} The People (Attorney General) v O’Callaghan [1966] IR 501, 518.
\textsuperscript{524} 7 Geo 4 c 64 (1826). The pertinent parts read as follows: ‘... That where any Person shall be taken on a
Charge of Felony or Suspicion of Felony, before One or more Justice or Justices of the Peace, and the Charge
shall be supported by positive and credible Evidence of the Fact, or by such Evidence as, if not explained or
contradicted, shall, in the Opinion of the Justice or Justices, raise a strong Presumption of the Guilt of the Person
charged, such Person shall be committed to Prison by such Justice or Justices, in the Manner hereinafter
mentioned; but if there shall be only One Justice present, and the whole Evidence given before him shall be such
as neither to raise a strong Presumption of Guilt nor to warrant the Dismissal of the Charge such Justice shall
order the Person charged to be detained in Custody until he or she shall be taken before Two Justices at the
least; and where any Person so taken, or any Person in the First Instance taken before Two Justices of the Peace,
shall be charged with Felony or on Suspicion of Felony, and the Evidence given in support of the Charge shall,
in their Opinion, not be such as to raise a strong Presumption of the Guilt of the Person charged, such Person shall
be admitted to Bail by such Two Justices, in the Manner hereinafter mentioned.’
\textsuperscript{525} 5 & 6 Will 4 c 33 s 3 (1835).
\textsuperscript{526} 11 & 12 Vic c 42 (1848).
\textsuperscript{527} John Frederick Archbold and others, An Alphabetical Arrangement of Mr. Peel’s Acts, Lord Lansdowne’s
Act etc., etc., Relating to the Better Administration of Criminal Justice, the Consolidation of Larceny, Malicious
Injuries to Property, the Regulation of Remedies Against the Hundred; the Consolidation of Offences against
the…(2\textsuperscript{nd} edn, J and W T Clarke 1830) 31.
The 1826 Act goes markedly beyond previous legislation pertaining to bail in that it directs the judge to ‘take the examination’ of the defendant, and certify it to the court in the presence of the prisoner himself.\textsuperscript{528} It also extended this provision to cases of misdemeanour, which was not provided for by law at this point in time. The 1826 Act placed a great degree of emphasis on the fact that bail should be granted in cases where the presumption of guilt is weak and equally should seldom be given where there is a strong likelihood of conviction, based on a ‘strong presumption’ of guilt.\textsuperscript{529} Therefore, it is posited that the 1826 Act represented a change in bail decisions. Under the Statute of Westminster 1275, a series of specific situations were outlined in which bail should not be granted and another list for which bail should not be refused. It appears these two lists are based on three factors, specifically, the seriousness of the offence, the likelihood of the accused’s guilt and the outlawed status of the offender.\textsuperscript{530} Under the 1826 Act, the likelihood of conviction was the main determinant in a bail decision.

The 1826 Act was subsequently superseded by the Removal of Indictments into King’s Bench Act 1835. The 1835 Act permitted bail for any offence whether there was or was not, a strong presumption of guilt. Essentially, the 1835 Act allowed bail for any offence as long as granting bail did not ‘endanger the appearance’ of the accused at trial. The 1835 Statute is of vital importance because it established that the sole factor in deciding whether or not a person should be granted bail is the likelihood that the accused will appear for trial.\textsuperscript{531} Prior to this, a bail decision was based on a range of factors. Bottomley considered the 1835 Act to be of crucial importance to the development of bail law because for the first occasion in the history

\textsuperscript{528} The Act went far beyond that provided by 3 Edw 1 c 15; 1 Rich 3 c 3; 23 Hen 6 c 10; 3 Hen 7 c 3; 1 & 2 P & M c 13; 2 & 3 P & M c 10 repealed by 7 Geo 4 c 64.

\textsuperscript{529} If a felony merely showed sufficient grounds for judicial inquiry into the guilt or innocence of the accused, the accused upon presentation before two justices could be granted bail under s 2.


\textsuperscript{531} 5 & 6 Will 4 c 33 (1835). Section 3 reads as follows: ‘Whereas in many Cases the taking Bail for the Appearance of Persons charged with Felony may be safely admitted without endangering the Appearance of such Persons to take their Trial in due Course of Law, and it is therefore expedient in such Cases to amend and extend the Provisions in that respect of an Act passed in the Seventh Year of King George the Fourth, intitled An Act for improving the Administration of Criminal Justice in England; be it enacted, That it shall be lawful for any Two Justices of the Peace, if they shall think fit, of whom one or another shall have signed the Warrant of Commitment, to admit and Person or Persons charged with Felony, or against whom any Warrant of Commitment is signed, for Bail, in the Manner and according to the Provisions directed by the said recited Act, in such Sum or Sums of Money and with such Surety or Sureties as they shall think fit, and notwithstanding such Person or Persons shall have confessed the Matter laid to his or their Charge, or notwithstanding such Justices shall not think that such Charge is groundless, or shall think that the Circumstances are such as to raise a Presumption of Guilt.’
of bail statutes, all the factors which were originally considered relevant when making a decision whether to grant or deny bail, were undercut by the sole criterion of whether the accused will appear to stand trial. This sentiment has been echoed by Roulston who contends that the legislation concerning bail in the 1835 Act supplanted all previous legislation on the matter and culminated in the single criterion, that is, the appearance of the accused at trial.

The 1835 Act was superseded by the Indictable Offences Act 1848. Section 23 of the Indictable Offences Act 1848 gave justices of the peace the discretion to either bail or refuse bail to any person charged with a felony or specified misdemeanour provided the accused provide such surety that in the opinion of the justice, would be sufficient to ensure the accused’s appearance at trial. It is notable that persons charged with any indictable misdemeanour other than those mentioned in XXIII were required to be admitted to bail. Stephen aptly summarised the 1848 Act as follows: ‘The short result is that the justice may in his discretion either bail or refuse to bail any person accused either of felony or any common misdemeanour except libel, conspiracies other than those named, unlawful assembly, night poaching, and seditious offences.’ In these circumstances, as well as for misdemeanours created by special Acts, bail cannot be refused. Additionally, for cases involving treason, no bail can be taken except by the order of a Secretary of State or the High Court. It can be deduced from the 1848 Act that the justice was permitted substantial freedom to exercise his discretion. It appears that the only guidance a judge was afforded, in making the bail decision

534 11 & 12 Vic c 42 (1848).
535 11 & 12 Vic c 42 (1848), Section 23 reads as follows: ‘And be it enacted, That where any Person shall appear or be brought before a Justice of the Peace charged with any Felony, or with any Assault with Intent to commit any Felony, or with any Attempt to commit any Felony, or with obtaining or attempting to obtain Property by false Pretences, or with a Misdemeanor in receiving Property stolen or obtained by false Pretences, or with Perjury or Subornation of Perjury, or with concealing the Birth of a Child by secret burying or otherwise, or with wilful or indecent Exposure of the Person, or with Riot, or with Assault in pursuance of a Conspiracy to raise Wages, or Assault upon a Peace Officer in the Execution of his Duty, or upon any Person acting in his Aid, or with Neglect or Breach of Duty as a Peace Officer, or with any Misdemeanor for the Prosecution of which the Costs may be allowed out of the County Rate, such Justice of the Peace may, in his Discretion, admit such Person to Bail, upon his procuring and producing such Surety or Sureties as in the Opinion of such Justice will be sufficient to ensure the Appearance of such accused Person at the Time and Place when and where he is to be tried for such Offence.’
536 11 & 12 Vic c 42 (1848), s XXIII.
was the requirement that the accused would provide adequate sureties who will sufficiently secure the attendance of the accused at trial.\textsuperscript{538}

It can be deduced from the foregoing paragraphs that the legislative enactments of the 19\textsuperscript{th} century concerning bail were crucial to the evolution of bail laws in England as they provided justices of the peace the authority to grant bail in cases of felony and required that the guiding principle regarding bail decisions was the ability of the accused to appear for trial. It should be observed that at this point in the law’s development there has been no hint or suggestion of preventative detention in the bail context forming any part of a bail decision at common law. It appears that the abovementioned statutes established that bail should be granted as long as it did not endanger the appearance of the accused at trial. This was the principal criterion.

**The Judicial Stance**

Initially, English case-law focussed almost exclusively on the appearance at trial criterion as the main consideration in the bail decision. However, mid-20\textsuperscript{th} century case-law began to endorse the legitimacy of refusing bail on grounds that the accused was likely to commit offences if admitted to bail.

While Bottomley in his writings aptly acknowledged the paucity of precedent concerning bail decisions in the 19\textsuperscript{th} century, a few cases exist where direction was dispensed regarding the principles which should be considered by justices when granting bail. The 19\textsuperscript{th} century case-law tends to emphasise ‘the seriousness of the charge, the strength of the evidence and the punishment for the offence as considerations to be taken into account, not in their own right but as indicators of the likelihood of the defendant’s appearing to take his trial.’\textsuperscript{539} The significance of the ‘appearance at trial’ criterion as the main consideration of a bail decision was typified by Justice Coleridge in 1841 in *R v Scaife*.\textsuperscript{540} Here, Coleridge J emphasised the aforementioned criterion as the central purpose behind bail decisions.

\textbf{I conceive that the principles on which persons are committed to prison by magistrates previous to trial, is for the purpose of ensuring the certainty of their appearing to take trial.} It seems to me, that the same principle is to be acted on in an application for bailing a

\textsuperscript{538} This further endorses the proposition that the appearance at trial criterion was integral to the bail decision in the 19\textsuperscript{th} century.


person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. It is on that count alone that it becomes important to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy.\footnote{ibid.}

Coleridge J maintained his position in \textit{Re Robinson},\footnote{\textit{Re Robinson} (1854) 23 LJQB 286.} which continued to be emphatically asserted in the courts:

When you want to know whether a party is likely to take his trial you cannot go into the question of his character or his behaviour at a particular time; but you must be governed by the answers to three general questions. First, what is the nature of the crime, is it grave or trifling? ... The next question is what is the probability of a conviction? ... It does seem strange that the prisoner does not suggest any of the probable defenses which have been mentioned by his counsel, and does not venture to deny his guilt. The only question which remains, is what is, what is the probable punishment in the event of a conviction? Trying the case by these tests, I am clearly of the opinion that I ought not to interfere to bail the applicant.\footnote{ibid 287.}

Again in \textit{Reg v Rose}, Lord Russell declared that, ‘It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at the trial’.\footnote{\textit{Reg v Rose} (1898) 18 Cox CC 717, 719.}

While the 1835 Act gave judges the discretion to release defendants on bail, it did not provide a right to bail and thereby neither statute nor precedent prevented judges from denying bail where public safety was in question.\footnote{Kurt Metzmeier, ‘Preventative Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations’ (1996) 8 Pace International Law Review 399, 414.} In \textit{R v Phillips}, the Court pronounced its position on a judge’s discretion to release on bail.\footnote{\textit{R v Phillips} (1947) 32 Cr App R 47.} Here, the Court denied bail to a repeat burglar and indicated that if a court is of the belief that a person is likely to commit further offences while on bail, bail should be denied. As Atkinson J opined:

\begin{quote}
The Court feels very strongly that the applicant ought not to have been released on bail. In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there be no objection to bail, but some are, and housebreaking particularly is a crime which will very likely be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it. There were three charges against the applicant. With regard to one, there was no defense and in the case of another he was actually arrested in the act. Yet in spite of all his previous convictions the applicant was given bail, not once but twice, first pending the hearing before the magistrates and again on committal for trial. To turn such a man loose on
\end{quote}
society until he had received his punishment for... an offence which was not in dispute, was, in the view of the Court, a very inadvisable step. They wish the magistrates who release on bail young housebreakers, such as this applicant to know that in nineteen cases out of twenty it is a mistake. 547

This judicial pronouncement appears to overrule the decision in Re Robinson where it was held that the character or nature of the accused is an irrelevant consideration. However, it appears that this factor became firmly entrenched in law as it was reiterated on countless occasions that the ‘likelihood to commit further offences’ consideration should be taken into account when deciding whether to grant bail.

Atkinson J’s statements in R v Philips were clearly a nod to pre-trial preventative detention which was further bolstered by Chief Justice Lord Goddard in R v Wharton where the Court in refusing bail held that the applicant had committed the offence while on bail, and the court had said over and over again that, unless the justices felt real doubt as to the result of the case, men with bad criminal records should not be granted bail. 548

This stance was also taken in R v Armstrong 549 where it was stated by Lynskey J that:

> It is quite clear that it is the duty of magistrates when an application is made to them for bail to hear and inquire into the antecedents of the person who is applying for bail, and if they find he is a person with a bad record, particularly if that record is of a person who is likely to commit similar offences whilst out on bail, they must consider in the light of such record whether they should allow him bail. 550

It could be said that there had been a demonstrable shift in the administration of bail decisions in England. In R v Scaife, Coleridge J clearly emphasised ‘the appearance at trial’ criterion as the main consideration in the bail decision. This due process orientated approach was further bolstered in Re Robinson where it was held that ‘you cannot go into the question of [the accused’s] character or behaviour’ when determining whether an accused will show up for trial. Yet as the 19th century legislation did not provide a right to bail, judges were not precluded from denying bail where public safety was an issue. This novel preventative approach is exemplified in R v Phillips. The employment of the preventative detention criterion to deny bail was firmly ensconced in the English courts by the 1960s.

This chapter has examined the evolution of bail law from Anglo-Saxon times until the 20th century. As Irish law is predicated on the common law to a large extent it was necessary to

547 ibid 48-49.
549 R v Armstrong (1951) 35 Cr App R 72.
550 ibid 74.
charter the evolution of bail in the English context. However, as outlined in chapter 2, Irish law can be distinguished from English law due to Ireland’s constitutional obligations. Therefore, it is necessary to examine the evolution of Irish bail law in order to portray a comprehensive picture of the development of Ireland’s bail laws. The evolution of Ireland’s bail laws will be evaluated in the next chapter. This chapter will also provide a detailed exposition of the *O’Callaghan* case which saw the Irish Supreme Court emphatically reject the proposition that a person could be denied bail for preventative reasons.
Chapter 5 – The People (Attorney General) v O’Callaghan

This is a form of preventative justice which has no place in our legal system and is quite alien to the true purpose of bail.\(^{551}\)

Introduction

This chapter aims to provide a detailed exposition of the seminal O’Callaghan decision. In order to do so comprehensively, it is imperative that one examine Irish bail law before O’Callaghan. Consequently, this chapter offers an examination of the history of bail in the Irish context. Following on from this, significant jurisprudence such as The State v Purcell and Attorney General v Duffy will be addressed.\(^{552}\) The chapter will then consider the O’Callaghan case. In O’Callaghan, Murnaghan J in the High Court listed a new and more extensive range of grounds which he believed a court should take into consideration in a bail application. Significantly, this extended list of considerations included the controversial ‘likelihood of committing further offences’ while on bail criterion (pre-trial preventative detention). It is thereby necessary to attempt to discern what led Murnaghan J to develop the bail criteria. This will lead to a discussion of the Supreme Court judgment in O’Callaghan where Murnaghan J was effectively overruled. Lastly, this chapter will consider whether the implementation of preventative detention in the bail context conflicts with Ireland’s traditional constitutional values, specifically, the right to liberty and the presumption of innocence. In order to determine whether preventative detention interferes with the presumption of innocence, I will borrow Ní Raifeartaigh’s typology which was outlined in chapter 2.

The History of Bail in Ireland

For approximately 1500 years, Ireland possessed its own unique criminal justice system where the Brehon laws prevailed. The word Brehon\(^{553}\) is the English word for ‘brithem’ meaning jurist or judge.\(^{554}\) The role of the Brehon was to preserve and interpret the law. It appears that Brehon law was enforced through various mechanisms such as suretyship,

\(^{551}\) The People (Attorney General) v O’Callaghan [1966] IR 501, 516.
\(^{552}\) The State v Purcell [1926] IR 207; Attorney General v Duffy [1942] IR 529.
\(^{553}\) Brehons were thought to have been the equivalent of travelling justices and successors to the Pre-Christian Celtic druids.
pledging and distraint. Although they are commonly referred to as ‘laws’, the Brehon tradition was more of a way of life or code of conduct as opposed to a system akin to today’s strictly defined rules. As elements of the Brehon law loosely correspond with English Anglo-Saxon law with regard to ‘bail’ related issues my analysis of the Brehon law will be brief in order to avoid repetition.

A record of the ancient laws of Ireland can be found in five large volumes, which were published throughout the 19th century. The volumes include the ‘Senchus Mor’ and the ‘Book of Aicill’ along with other miscellaneous law tracts. It is the Book of Aicill that is most apposite to this thesis as it deals exclusively with the criminal law.

The development of the concept of bail in Ireland is largely a matter of conjecture. Its origins can most likely be traced back to a time when the practice of ‘an eye for an eye...’ was being displaced with the idea of compensation. When society was at its tribal stage there was no need for a bail procedure as justice was usually administered instantaneously. When the primitive concept of vengeance began to dissipate an interval in time grew between the commission of the offence and the trial process. Therefore, if an accused was released a method for ensuring that he would attend his trial was required.

Under the Brehon custom, if a person intended to take an action he sought sureties to help persuade the defendant to submit to adjudication of the dispute before a Brehon. The law of distraint may have been utilised in this situation. Such a law entailed the plaintiff seizing some movable property of the defendants and holding it until the defendant gave surety that he would submit to arbitration. If he refused to comply the community would consider him an...
outlaw and he and his property would lose the protection of the law.\footnote{Joseph Peden, ‘Property Rights in Celtic Irish Law’ (1977) 1(2) Journal of Libertarian Studies 81, 87.} As Ginnell has posited – there were no real means of escaping from justice in ancient Ireland. The only method was by fleeing, abandoning one’s property or resorting to slavery, which was viewed as a punishment in itself.\footnote{Laurence Ginnell, The Brehon Laws: A Legal Handbook (Wm S Hein Publishing 1894) 187.}

The Brehon’s role was to consider all the relevant facts, which included the nature of the offence, the surrounding circumstances, and the rank of the parties involved.\footnote{John Costello, ‘The Leading Principles of the Brehon Laws’ (1913) 2(8) Irish Quarterly Review 415, 431.} Although highly revered and respected, the Brehon had no legislative power. Furthermore, while nowadays there exists a mechanism enforcing an accused to stand trial, under the Brehon code there was no conception of the state to aid in vindicating such a right.\footnote{ibid 418.} After a Brehon had heard and subsequently decided on a case there was no machinery to force a convicted person to accept it. The only executive branch that existed was the tradition and respect for the law and the system that the people held. The only real sanction at this time was public opinion.

Moreover, there was no form of imprisonment for those who committed criminal acts.\footnote{Laurence Ginnell, The Brehon Laws: A Legal Handbook (Wm S Hein Publishing 1894) 286.} Therefore, there was no bail in the modern sense of the word in that there were no actual prisons for an accused to be released from. It appears however that the people or community acted as the gaolers at this time. As Ginnell has opined, there was no easy means of evading justice. A person who disregarded the directions of a Brehon was considered an outlaw and was dealt with accordingly.

Unlike the Irish criminal justice system today, the main principle upon which the Brehon law was based is that liability can be absolved through the payment of compensation. Resultantly, the various classification of wrongs were categorised with reference to the quantity of compensation that was required to be satisfied by the offending party.\footnote{ibid.} It was not up to the Brehon to pass judgment as such but instead to estimate the amount of the eric that should be made payable.\footnote{Eric, which means ‘separating soul from body’ was the word used for the compensation-fine payable for a number of injuries or offences in Brehon times.} The eric can be likened to that of the wergeld in Anglo-Saxon England. The compensation that was to be paid was based on both the injury sustained and the rank of the
injured person and his family or kinship. If the criminal refused or fled without paying the sum owed, his kindred were instead required to pay the eric to the injured party.\textsuperscript{569} As Cherry observes:

If the wrongdoer did not attend, there was, so far as we can learn, no means of compelling him to do so; but the principle of retaliation was again invoked here. He who refused to obey the law was deprived of its benefits. If any man refused to pay the fine imposed on him by law for any offence, he was declared henceforth incapable of recovering fines for offences against himself. In other words, he was outlawed.\textsuperscript{570}

Parallels can be made here between the Brehon law and the modern bail system. Under today’s laws if an accused has been released on bail and consequently does not show up for trial, a specified amount of money can be forfeited.\textsuperscript{571} In both systems, responsibility lies with the surety if the accused reneges on his promise.

The Brehon law also offered options whereby an individual could escape the liability of his kinsman.\textsuperscript{572} It appears that the kinship could surrender the alleged wrongdoer to the victim’s family or kin or instead they could expel the wrongdoer from the clan and subsequently banish him from their kinship.\textsuperscript{573} The exile’s kindred were still liable for the future crimes of their brethren and thus must give a pledge as security.\textsuperscript{574} The criminal then became a fugitive and his life was forfeited.\textsuperscript{575} There may be occasion when the kin is reluctant or unable to pay for a killing by one of its members. In such circumstances, the victim’s kin can hold the killer captive until such time as payment is made either by the kin or another party or may put him to death or sell him into slavery.\textsuperscript{576}

The Brehon tradition was a very practical one. While there were no prisons as such, people tended not to evade justice. This may be as a result of the surety system that was in existence or the reverence and deference for the law at that time. As previously outlined, while there

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  \item \textsuperscript{569} John Costello, ‘The Leading Principles of the Brehon Laws’ (1913) 2(8) Irish Quarterly Review 415, 434.
  \item \textsuperscript{570} Richard Cherry, Lectures on the Growth of Criminal Law in Ancient Communities (The Lawbook Exchange 2001) 13.
  \item \textsuperscript{571} The court at the original bail application may not be satisfied with your promise that you will appear in court to answer the charges made against you. The court may decide that an ‘independent surety’ is required to guarantee your appearance. An independent surety is a person who makes himself responsible for your appearance in court. In short, he promises to pay a sum of money to the court if you do not appear as agreed.
  \item \textsuperscript{572} By this I am referring to the alleged wrongdoer.
  \item \textsuperscript{573} John Costello, ‘The Leading Principles of the Brehon Laws’ (1913) 2(8) Irish Quarterly Review 415, 435.
  \item \textsuperscript{574} ibid.
  \item \textsuperscript{575} ibid.
  \item \textsuperscript{576} Fergus Kelly, A Guide to Early Irish Law, vol 3 (Dublin Institute for Advanced Studies 1988) 127.
\end{itemize}
was no structured bail arrangement in Brehon times there was a procedure in place to provide that an accused was brought to justice.

The first encroachment of the Brehon came with the Anglo-Norman invasion of Wexford in 1169. This invasion was led by Richard Fitzgilbert, known to many as Strongbow. In 1171, King Henry II followed Strongbow to Ireland. It appears that he did so to avow his royal authority. Having landed at Waterford, King Henry decided to hold a Council. This was viewed as a highly symbolic act as the King’s Council was seen as the decision making body for the feudal Anglo-Norman Kings. Following this Council, it was declared that ‘the laws of England were by all freely received and confirmed’. The English brought with them to Ireland an emerging legal system, namely, the common law. Although the English wanted the Irish people to be governed by the budding common law, the Brehon law system was allowed to remain and be utilised by the native people. For a five hundred year duration, the two legal systems coexisted and it was not until the Tudor conquest of the 17th century that Brehon law was finally eradicated.

As Mac Niocaill has stated, ‘The nature and extent of the interaction of Irish and common law is a problem which cannot yet be adequately dealt with for the simple reason that Irish law in the later middle ages is almost completely unexplored.’ The establishment of the common law in Ireland was a gradual process as the common law had not yet fully developed in England. Consequently, Irish law developed concurrently with the English common law. From King John authorising the issuing of writs by the justiciar in 1204, through to the appointment of an Anglo-Norman judge in 1221, the English common law began to evolve in Ireland. Although Irish parliamentary legislation dates from 1278, rarely did it touch on areas of substantive law. According to Hand, both Statutes of Westminster were sent to Ireland to be proclaimed and observed. In 1310, the Irish Parliament adopted English

578 ibid.
579 ibid.
580 Kenneth Nicholls, *Gaelic and Gaelicised Ireland in the Middle Ages* (Liliput Press 2003) 103.
581 ibid.
583 Gearoid Mac Niocaill, ‘Contact of Irish and Common Law’ (1972) 23 Northern Irish Legal Quarterly 16, 16.
584 Raymond Byrne and Paul McCutcheon, *The Irish Legal System* (5th edn, Bloomsbury Professional 2009) 32.
585 G Hand, ‘English Law in Ireland, 1172-1351’ (1972) 23 The Northern Irish Quarterly 393, 401.
586 G Hand, ‘English Law in Ireland, 1172-1351’ (1972) 23 The Northern Irish Quarterly 393, 400. Richardson and Sayles have also endorsed this proposition. The aforementioned authors have further proclaimed that
English law was first introduced in Ireland towards the end of the 12th century. However, it was not until the 17th century that a uniform system of English law existed in Ireland. The 18th century saw a clarification of the earlier acts which had asserted English control. The Act of Union created the Westminster Parliament as the sole legislative assembly, which reigned until the creation of the Irish Free State in 1922. The Union in 1801 required that appeals from Irish courts were heard in the House of Lords in England. From 1922-1933, appeals from the Irish Free State were heard by the judicial committee of the Privy Council in England. Therefore, it is evident that the Brehon law had been supplanted by the emerging English common law system.

It is interesting to consider whether English 19th century legislation pertaining to bail applied to Ireland. It would appear that neither the Criminal Law Act 1826 nor the Removal of Indictments into King’s Bench Act 1835 applied to Ireland. However, it seems that the
Indictable Offences Act 1848 did apply to Ireland. This can be further evidenced from recent case law such as *The Minister for Justice Equality and Law Reform v Micheál O Fallúin*. In this case Peart J refers to s 12 of the Indictable Offences Act 1848 which at the time of its passing made provision in respect of any person who may have escaped or otherwise gone to ‘that Part of the United Kingdom called Ireland’. Incidentally, the Indictable Offences Act 1848 has been referred to in a number of Irish cases.

It is notable that during the 19th century, Ireland did possess its own distinct legislation separate from the English materials that pertained to bail. Section 7 of the Dublin Police Act 1836 reads:

> It shall be lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs, and all persons who he shall find between sunset and the hour of eight in the forenoon lying in any highway, yard or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under this Act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, or may give bail for his appearance before a justice of the peace, if the constable shall deem it prudent to take bail, in the manner herein-after mentioned.

As one can glean from this, responsibility lay with the constable to decide whether to detain a suspect in the ‘watch-house’ until said accused could be brought before a justice of the peace or give bail for his appearance. Section 32 of the Dublin Police Act 1842 deals with a similar

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597 One will recall that s 23 of the Indictable Offences Act 1848 gave justices of the peace the discretion to bail or refuse bail to any person charged with a felony or a specified misdemeanour provided the accused provide such surety that in the opinion of the justice will be sufficient to ensure the accused’s appearance at trial.

598 Despite referring solely to England and Wales in its long title, the Indictable Offences Act 1848 features in the Electronic Irish Statute book. Incidentally, there is also a recent Act (2013) entitled An Act for the Removal of Defects in the Indictable Offences Act 1848 which further copper-fastens that this Act did apply in Ireland.


600 Ibid.


602 Dublin Police Force Act 1836, s 7.
situation. Therefore, it is arguable that public order legislation in the 19th century raised bail issues separate from the English materials.

Furthermore, the jurisdiction of the District Court to grant bail in cases of remand was governed by s 16 of the Petty Sessions (Ireland) Act 1851. The jurisdiction of the District Court to grant bail in Dublin was governed by s 23 of the Indictable Offences (Ireland) Act 1849. In *O’Callaghan*, Walsh J in the Supreme Court addressed these provisions and stated:

Bail cannot be granted by the District Court in treason but may, at the discretion of the Court and subject to those statutory provisions, be granted in all felonies or any attempt to commit a felony and there is also a discretion in the case of certain misdemeanours which are listed in the section. It is provided that in the case of all other indictable misdemeanours the person charged shall be admitted to bail as of right. The only power in the District Court in these later cases is with regard to the sufficiency of the bail offered and the suitability of the sureties.

Walsh J went on to state that the granting of bail in the High Court is, ‘with one curious exception, always discretionary.’ Yet as Irish law developed somewhat concurrently with the common law, Irish law also employed the common law in the determination of a bail decision. The following paragraphs will address the development of bail law in Irish courts.

**Before ‘O’Callaghan’**

Consequent to the adoption of the 1937 Constitution, the Irish Courts adopted a somewhat liberal due process centred approach to the granting of bail. *The State v Purcell* was the first significant decision concerning bail in post-independent Ireland. In this case the accused

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603 Section 32 of the Dublin Police Act 1842 reads: ‘Every person taken into custody by any constable belonging to the Dublin police without warrant, except persons detained for the mere purpose of ascertaining their name or residence, shall be forthwith delivered into the custody of the constable in charge of the nearest station house, in order that such person may be secured until he can be brought before a divisional justice, to be dealt with according to law, or may give bail for his appearance before a divisional justice, if the constable in charge shall deem it prudent to take bail, in the manner herein-after mentioned.’

604 Petty Sessions (Ireland) Act 1851, s 16.

605 Indictable Offences (Ireland) Act 1849, s 23.


607 ibid 512.

608 *The State v Purcell* [1926] IR 207. It is noteworthy that the pre-independence case of *The Queen v Stephen Butler and others* [1881] 8 LR Ir 39 was cited in *Purcell*. In *Butler*, prisoners were committed for trial on a charge of riot. May CJ and Fitzgerald J refused to admit the prisoners to bail having regard to: the serious nature of the offence; and the probability of the bailsmen being indemnified out of the funds of the illegal organisation if the defendants did not appear for trial. May CJ stated: ‘In cases of this nature two matters are in general material to be considered. One is the cogency of the evidence against the accused; another is the gravity of the offence charged: and from these two elements the probability or improbability of the traversers appearing to take their trial may be deduced. The more cogent the evidence; the more serious the consequences of conviction: the greater the probability that the accused may not appear to take their trial.’ *The Queen v Stephen Butler and
had been returned for trial on a charge of murder. Hanna J stated that the fundamental test in bail motions is the probability of evading justice. He went on to enumerate certain considerations which served as guides in determining whether the accused was likely to show up for trial. The relevance of any other evidence introduced was to be weighed against this criterion. These considerations were: 1) the seriousness of the crime charged; 2) the severity of the punishment provided by the law for the offence; 3) the strength of the case as it appears against the accused on the depositions; 4) the prospect of a reasonably speedy trial; and 5) the opposition of the Attorney General. In *Purcell*, Hanna J plainly articulated that the fundamental test pertaining to bail decisions in Irish law was the probability of the accused evading justice.

Later, in *Attorney General v Duffy*, Hanna J added a further criterion in addition to the grounds outlined in *Purcell*. In *Duffy*, it was held that, ‘if the evidence is that the accused is likely to interfere with the course of justice, the Court is likely to consider it as a material ground against bail being granted’. It is noteworthy that the offences in *Duffy* were carried out during the Emergency and the accused had been charged with an Emergency-related offence. On the evidence before it in *Duffy*, the Court did not feel able to conclude that there was evidence before it indicating that the accused was likely to interfere with the course of justice. Nevertheless, a further consideration had been added to the bail decision. The Inspector had stated that the accused, if released on bail, would have an opportunity to interfere with evidence. According to Hanna J, the Inspector’s statement indicated that the likelihood of the applicant’s interfering with evidence was a mere possibility and not a probability.

Hanna J’s approach in the cases illustrated above is interesting as he was dealing with them at a time of considerable turmoil in which the State had enacted extreme measures to deal with

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*others* [1881] 8 LR Ir 39, 40-41. Significantly, the bail decision was based on whether the accused would appear for trial. There was no mention of the likelihood of further offences criterion or anything of that nature.

*The State v Purcell* [1926] IR 207, 211.

ibid.

AG v Duffy [1942] IR 529, 534. In this case the accused had been remanded in custody charged with six demeansours contrary to the provisions of the Emergency Powers Act 1939 and the Emergency Powers (Purchase of Motor Lorries) Order 1941. It is interesting that in *Butler*, mentioned above, May CJ referred to the consideration of such a criterion, namely, the interference with witnesses. May CJ stated: ‘Having regard also to the suggested possibility that the Traversers might use their influence with the jurors, and perhaps also with the witnesses, if they were at large, I think the safer and sounder conclusion is not to admit the Traversers to bail.’ *The Queen v Stephen Butler and others* [1881] 8 LR Ir 39, 42.

*Attorney General v Duffy* [1942] IR 529, 534.
threats to its existence and stability as well as high levels of rural crime. Despite the threat to
the State, it remained that the only grounds upon which bail could be denied was where it was
believed that the accused would evade or interfere with justice. The denial of bail for public
safety reasons was not provided for notwithstanding the climate of disorder. Therefore, it is
arguable that the right to liberty and the presumption of innocence would not be abridged in
every instance where the accused committed an Emergency-related offence and the courts
continued to espouse their traditional due process approach to bail which highlights the
importance attributed to individual rights in the Irish criminal justice system during that time.

*Duffy* can be contrasted with *Attorney General v Ball*. *Ball* concerned an application for
bail made by two prisoners who had been remanded in custody for numerous felonies which
included larceny. The Garda in charge of the case believed that the accused, if released,
would interfere with the course of justice by reason of the fact that the stolen vehicles had
already been taken apart and it appeared that some of their component parts had been
disposed of by the accused. It was held in the Supreme Court (affirming Murnaghan J in
the High Court) that there was sufficient evidence before the Court that the accused was
likely to interfere with the course of justice to justify the Court in considering such evidence
as a material ground upon which to refuse to grant bail. The decision in *Duffy* was applied
but distinguished on the facts. It is notable that Murnaghan J in the High Court stated that the
judgment in *Duffy* would have been different if the evidence was that the defendants ‘would’
as distinct from ‘could’ have interfered with the course of justice. This sentiment was
reaffirmed by Maguire CJ in the Supreme Court while distinguishing *Ball* from *Duffy*.
Notably, the Chief Justice indicated that the alleged offences perpetrated in *Duffy* and *Ball*,
were of a very different nature.

It appears from both *Purcell* and *Duffy* that the criteria upon which bail could be granted or
denied were relatively well established in Irish law at this time. However, this clarity vis-à-
vis bail decisions was short-lived. *Attorney General v McCann* concerned an accused man
who had been remanded in custody. He had originally been granted bail on three charges

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613 One will recall that in the English case of *R v Phillips*, bail was denied to a repeat offender for public safety
reasons.
614 *Attorney General v Ball* [1958] IR 280.
615 ibid 282.
616 ibid 280.
617 ibid 284. It is interesting to note that Murnaghan J acted as counsel in the *Duffy* case.
618 *Attorney General v McCann* [1955] IR 163.
of obtaining cars under false pretences. Whilst on bail for the original offences, McCann was charged with an additional offence of the same type alleged to have been committed during his previous period on bail. Consequently, he was denied bail in the District Court. Relying on *Reg v Rose*, counsel for the accused argued that a District Justice was not allowed to refuse bail to a person merely because he believes that an accused is likely to commit similar offences if released on bail.619 The Attorney General countered this argument by stating that the grounds laid down by Hanna J in *Purcell* were non-exhaustive.620 The Attorney General went on to rely on the English decision of *R v Philips* where it was held that bail should be refused where the evidence shows that the accused is likely to commit similar offences while on bail.621 In fact, the Court in *R v Phillips* had gone even further and held that bail can be refused even where there is no prima facie evidence that the accused has in fact committed offences whilst on bail.622

In the High Court, Haugh J held that as there was evidence that the accused was likely to commit an offence while on bail of a similar nature to that with which he was charged, the Court was entitled to consider this evidence as a material ground against bail being granted.623 This ground was additional to those laid down in *Purcell* and *Duffy*.624 Crucially, it was held that the subsequent charge constituted ‘sufficient prima facie evidence’ of the likelihood of the commission of a similar offence by the accused while on bail. Haugh J went on to distinguish *McCann* from *Duffy’s* case. Haugh J indicated that in *Duffy* the police officer opposed bail on the basis that the accused might interfere with the course of justice. Bail was granted in this instance, as there was no evidence to support this conclusion other than the suspicions of the police officer. However, in *McCann*, there was prima facie evidence before the District Justice that the accused had committed a similar offence while on bail and this was further bolstered by the Gardaí who held a genuine apprehension that if the accused was given bail he would again commit a similar offence.

619 *Reg v Rose* (1898) 18 Cox CC 717.
620 *Attorney General v McCann* [1955] IR 163, 166.
621 *R v Philips* [1947] 32 Cr App R 47.
622 In this case a career and well established house-breaker was given bail by magistrates. There was no evidence before the magistrates of the accused having committed any break-ins while on bail. Yet the English Court of Criminal Appeal held that it was improper for the magistrates to have given the accused bail because house-breaking is an offence which tends to get into the blood of the offender to such an extent that it is likely to be repeated pending trial while the offender is out on bail. *R v Philips* [1947] 32 Cr App R 47.
623 *Attorney General v McCann* [1955] IR 163, 163.
624 In both *Purcell* and *Duffy* the bail motions were brought after the accused was returned for trial.
It is arguable that this is a highly significant judgment with regard to Ireland’s bail laws in that it clearly embraces a form of preventative detention that had been approved in England in *R v Phillips*. Until *McCann*, the fundamental test governing bail decisions was whether an accused would turn up for trial. *Purcell* laid down five criteria to aid a court in deciding on this likelihood. In *Duffy*, Hanna J added a further consideration linked to interfering with the course of justice. However, in *McCann*, Haugh J broke new ground. The judge accepted that if there was evidence that the accused was likely to commit an offence on bail of a similar nature to that with which he was charged, the court was entitled to consider this evidence as material to the bail decision. Evidently, this judgment raises some interesting questions. Firstly, it is difficult to determine whether Haugh J considered this criterion as an additional test or merely a consideration to aid in deciding whether the accused would show up for trial. The latter seems unlikely as there is no direct correlation between committing a number of offences while on bail and the likelihood of evading or interfering with justice in respect of the original charge. Secondly, it is unclear whether this criterion applied to all types of apprehended offences or is it a pre-requisite ground that the apprehended offence be similar to the alleged offence, and if so, how similar? Thirdly, it is notable that the Attorney General relied on an English common law decision, namely, *R v Phillips*, to persuade the Court to allow for pre-trial preventative detention in Irish law thereby advocating a crime control driven approach to Irish criminal justice matters. Is it possible that the Attorney General was seeking to transplant pre-trial preventative detention from our common law neighbours and if this was the case, what is the problem?

It appears that Haugh J’s position in *McCann* did not have any real lasting effect and the criteria upon which bail could be granted or denied was reaffirmed by O’Dalaigh CJ in *The People (Attorney General) v Crosbie and others*. In *Crosbie*, O’Dalaigh CJ agreed that the fundamental test regarding bail was the probability of the accused appearing for trial and went on to state that Hanna J’s enumerations were guides to aid in making a decision on that probability. In this case, the applicants were charged with murder and were returned for trial in the Central Criminal Court. Bail was refused in the District Court and subsequently by McLoughlin J in the High Court. On appeal to the Supreme Court, O’Dalaigh CJ clearly and unequivocally outlined what he considered the test for bail applications in Irish law. According to the Chief Justice, the court must ask itself, ‘Is it apprehended that the applicants

will abscond if bailed? Nor, moreover, is it apprehended that there will be any interference with witnesses. In these circumstances it is the Court’s duty to admit these untried prisoners to bail." It is significant that when outlining the test which applies to bail decisions in Irish law, O’Dalaigh CJ made no reference to the ‘likelihood of committing similar offences’ ground propounded by Haugh J in *McCann* ten years earlier. Thus, the classic due process orientated approach to bail lived on.

The aforementioned cases are illustrative of the law on bail decisions prior to the *O’Callaghan* decision. It can be deduced from this that the fundamental test in Irish bail law was whether there is a likelihood that the accused would evade or interfere with justice. This is reflected not just in the decisions outlined above, but also in the leading textbook on criminal procedure at the time. However, when describing the guidelines or considerations that a judge should observe in a bail decision, enumerated in *Purcell’s* case, Sandes failed to convey that these considerations were merely guides to assist the decision in the fundamental test. Notably, Sandes’ sixth consideration, namely, ‘whether there is reason to apprehend that if the prisoner was released on bail he would not be forthcoming at the trial’ was considered by him to be the ‘most operative’. Evidently, there is some confusion of sorts here. In *Purcell*, Hanna J clearly set out that the fundamental test regarding bail decisions is the probability of the accused evading justice. He went on to offer five considerations that would serve as a guide in deciding that probability. Significantly, Sandes included the fundamental test as a consideration in the bail decision. Therefore, it could be said that the general understanding of the approach taken to bail decisions during this time was somewhat muddled. Despite this confusion, *Purcell* and *Duffy* had outlined solid principles upon which a bail decision could be made.

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626 ibid 429.

627 Robert Lindsay Sandes, *Criminal Law and Procedure in the Republic of Ireland* (3rd edn, Sweet and Maxwell 1951) 81. Significantly, there is no mention of the ‘likelihood of committing offences’ criterion in this text.

628 Sandes states: ‘When exercising his discretion as to whether bail should be granted or not the justice should have regard to the following considerations: (1) The gravity of the offence charged; (2) The severity of the punishment to which the accused would be liable if convicted; (3) The strength of the case adduced against the accused on the depositions; (4) The prospect of a reasonably speedy trial; (5) The opposition of the Attorney General; (6) Whether there is a reason to apprehend that if the prisoner were released on bail he would not be forthcoming at the trial. In the generality of cases the last consideration (No. 6) should as a rule be the most operative.’ Robert Lindsay Sandes, *Criminal Law and Procedure in the Republic of Ireland* (3rd edn, Sweet and Maxwell 1951) 80-81.
It is now necessary to consider the seminal *O’Callaghan* case and the impact it has made on Irish bail law.⁶²⁹ *O’Callaghan* concerned a bail application by a prisoner who had been returned for trial on charges of larceny, breaking and entering, malicious damage, receiving, resisting arrest and assault, alleged to have been committed while the accused was on bail for other charges.⁶³⁰ The accused had been refused bail in the District Court and in the High Court. In the High Court, Murnaghan J listed a new and more extensive range of considerations, which he believed a court should take into consideration when deciding whether or not it is likely that the accused may evade justice. Significantly, this list was far more wide-ranging than the norm. Most controversially, it included the possibility of denying bail to prevent the commission of further offences. Although Murnaghan J was overruled in the Supreme Court, it is worth examining what led Murnaghan J to extend the considerations in a bail decision. This question will be explored below.

### Murnaghan J’s approach in *O’Callaghan*

In the High Court decision of *O’Callaghan*, Murnaghan J prescribed a new and more extensive set of criteria that should be taken into consideration by a court when deciding whether or not it is likely that the accused may attempt to evade justice. These are: 1) the nature of the accusation or in other words the seriousness of the charge; 2) the nature of the evidence in support of the charge; 3) the likely sentence to be imposed on conviction; 4) the likelihood of the commission of further offences while on bail; 5) the possibility of the disposal of illegally acquired property; 6) the possibility of interfering with prospective witnesses or jurors; 7) the prisoners failure to answer bail on a previous occasion; 8) the fact that the prisoner was caught red-handed; 9) the objection of the Attorney General or of the police authorities; 10) the substance and reliability of the bailsman offered; 11) the possibility of a speedy trial.⁶³¹ Murnaghan J also went on to indicate that in some instances, the likelihood of personal danger to the prisoner ‘from the hands of persons injured or incensed

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⁶³⁰ The offences in respect of which the applicant was awaiting trial were alleged to have been committed on the 27 and 28 September 1966. On that date, the applicant was bailed in respect of certain other charges alleged to have been committed on 30 and 31 July 1966. On 5 October 1966, the applicant was returned for trial to the Cork Circuit Court in respect of the earlier charges. The District judge allowed the applicant bail on his own recognisance of £50 and one independent surety of £50. The applicant pleaded not guilty to all of the charges pending against him.

by the crime’, ie prisoner safety may in itself be a ground for refusing bail. In effect, this is a completely different basis to evading or interfering with justice. In addition to the extended list of principles which he intended to apply in future bail applications Murnaghan J proceeded to offer three reasons for refusing to allow the applicant bail in the instant case. These were: 1) the Superintendent in charge of the case had told him that the applicant was an aggressive type, and the Superintendent was of the opinion that the applicant would interfere with witnesses if he was admitted to bail; 2) the offences of 27 and 28 September, were committed while the applicant was on bail on remand in respect of earlier charges and there was a serious risk that the applicant would commit further offences if he was granted bail; 3) the applicant’s background was not good, and he would have to look forward to a substantial sentence.

It is clear that Murnaghan J’s approach to bail reflected a significant departure from the established norm, most notably by incorporating a pre-trial preventative detention like provision. So why did the learned judge take this restrictive approach? Unfortunately, the High Court judgment appears unavailable in the records. Nevertheless, the Supreme Court judgment contains large passages from Murnaghan J’s decision so it is possible to analyse these extracts and consider them in conjunction with contemporaneous external materials.

Murnaghan J delivered his judgment on 14 October 1966. Having reviewed case-law and newspaper reports from around this time, it appears that Murnaghan J had strong objections to bail applicants representing themselves at trial. On 26 May 1966 in a High Court bail application, Murnaghan J commented that there appeared to be a departure from the days when a solicitor or counsel undertook the defence of the case and represented the accused through all stages of the proceedings. The judge’s frustration with the emerging practice can be evidenced from the statement below:

This is not the only case with which I have had to deal where I am told that counsel and solicitor have been assigned in the District Court, but as legal aid does not cover a situation for bail they just don’t appear here. This court is left in an impossible situation trying to deal with a litigant in person in which he has a solicitor and counsel somewhere in the background, whether advising on the application I don’t know, but certainly keeping away from this court – for whatever reason I don’t understand.
This statement was met with a ‘Letter to the Editor’ of the Irish Independent some two days later. The letter was written by a Mr Coyle who was acting as secretary for the General Council of the Bar of Ireland. In his letter, Mr Coyle sought to defend the Bar Council by explaining why the bail applicant before Murnaghan J had represented himself in this particular instance. According to Mr Coyle, the applicant had not instructed the solicitor and counsel assigned to defend him that he was intending to apply to the High Court for bail. In the bail application before Murnaghan J, the applicant informed Murnaghan J that he had counsel assigned to him. Murnaghan J took this to mean that counsel had been assigned in relation to the charge upon which the motion before him was brought. According to Mr Coyle, it was based on this understanding that Murnaghan J made the abovementioned comments. Despite the Bar Council’s attempt to clarify matters, self-representation by bail applicants continued to irk Murnaghan J. This can be gleaned from certain statements made by him in O’Callaghan. In O’Callaghan, Murnaghan J stated:

These applications for bail, by prisoners in person, are becoming so numerous, that I have come to the conclusion that it would be a good thing if I were to enumerate the principles upon which I have acted in the past, and on which I propose to act in the future, in the hope that a copy, or copies, of what I am going to say will be made available in the prisons, for the information and guidance of prisoners who may be contemplating making a bail application in person.

He continued:

The majority of the bail applications that come before me are unsustainable, and I would hope that a result of this judgment would be that in future the time of the Court would not unnecessarily be taken up.

It is submitted that these statements are extremely significant when one considers the development of bail law in Ireland. In O’Callaghan, Murnaghan J in the High Court set down twelve matters, which a court should take into account when deciding whether or not an accused should be granted bail. Prior to this, Irish Courts had only considered six grounds relevant to a bail decision. This begs the question – why did Murnaghan J choose to add to these considerations so extensively?

If one considers the extracts highlighted above, it is clear that Murnaghan J had grown frustrated over the number of bail applicants representing themselves in court. He was of the

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636 ibid.
637 ibid.
639 ibid.
opinion that these bail applications wasted court time unnecessarily. Therefore, it could be argued that Murnaghan J extended the considerations in order to send a message to prisoners who intended to represent themselves. In keeping with this theory, it can be propounded that it was Justice Murnaghan’s intention to deter these types of bail applicants and his method of doing so was by extending the grounds which a court should take into account when making a bail decision and consequently restricting the right to bail. In short, Murnaghan J was setting the bar for bail at a high level. Another possibility is that Murnaghan J believed he was just restating existing law and practice but that because of the frequency of personal applications he needed to spell things out unambiguously and in more detail.

It is also worth pointing out that Murnaghan J referred to the fact that O’Callaghan had taken advantage of the bail period to commit a further offence. Crucially, ground number 4 (the likelihood of the commission of further offences while on bail) potentially sought to remedy a situation where a prisoner who considered it likely that he would be imprisoned may use his time on bail to commit further crimes for the benefit of his family. Murnaghan J felt this was one of the reasons the accused should be denied bail. These sentiments can be paralleled with similar statements made in the Dáil during the debates in the run up to the bail referendum in 1996. Those in favour of the referendum called for a change in Ireland’s bail laws due to the ‘habitual bail offender’, namely, those who used the bail period to carry out ‘nest egg’ crimes. It is arguable that Murnaghan J feared that O’Callaghan was such an offender.

The Supreme Court had little difficulty in accepting the majority of Murnaghan J’s extended criteria. There is little doubt that the most controversial criterion concerned the likelihood of the commission of further offences while on bail. There had been no mention of such a ground in Crosbie, a case with similar facts, which had been decided before O’Callaghan so why did Murnaghan J decide to include it now?

In addressing this issue it is worth referring to bail law developments in England and Wales in or around this time. In England, from 1947 onwards, bail was increasingly being denied to persons with long criminal records, particularly for burglary. Atkinson J’s statements in R v Philips were clearly a nod to preventative detention which was further bolstered by Goddard

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LCJ in *R v Wharton*. Pre-trial preventative detention was in fact afforded legislative recognition in England and Wales in the Bail Act 1976.

Therefore, it is conceivable that Murnaghan J was conscious of the employment of pre-trial preventative detention by our common law neighbours and this may have influenced the inclusion of the ‘likelihood to commit further offences’ ground in his judgment. Counsel for the Attorney General in the Supreme Court (whose argument was substantially the same as that in the High Court) argued for the applicant to be held as a preventative measure. DP Sheridan for the Attorney General relied on *Attorney General v McCann* and *R v Wharton* to buttress his argument. This was not the first time this type of ground had raised its head over the years. It will be remembered that in *McCann*, the Attorney General, in opposing bail, relied on *R v Philips* when arguing that bail should be refused where the evidence shows that the accused is likely to commit similar offences while on bail. In *McCann*, Haugh J held that due to the fact that there was evidence that the accused was likely to commit an offence while on bail, of a similar nature to that with which he was charged, the Court was entitled to consider this evidence as a material ground against bail being granted.

Therefore, it can be construed that Murnaghan J in his judgment in *O’Callaghan* did not pluck the ‘likelihood of committing further offences’ criterion from the sky. This ground was a firmly established ground in English case-law since 1947 and was in fact legislated for there. Additionally, the Irish Courts had somewhat availed of this criterion ten years earlier in *McCann*.

Despite the Irish courts having hinted at embracing pre-trial preventative detention in the past, Murnaghan J did not give this much consideration in his judgment. Murnaghan J based his decision on the fact that the accused was caught red-handed and that O’Callaghan had taken advantage of his bail to commit a further offence. This led him to conclude that if released ‘the same thing may happen again’. It is arguable that Murnaghan J was not cognisant of the significance of incorporating this criterion into the bail decision.

It is worth mentioning that Murnaghan J also endorsed another aspect of preventative detention when he indicated that in certain cases the likelihood of personal danger to the prisoner from the ‘hands of persons injured or incensed by the crime’ may in itself be a

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642 *Attorney General v McCann* [1955] IR 163, 166.
643 ibid 163.
ground for refusing bail.\textsuperscript{644} This is an interesting inclusion and again begs the question – what prompted Murnaghan J to make allowance for such a provision? Its inclusion is somewhat of an oddity as it somewhat contradicts ‘the likelihood of committing further offences’ criterion. Murnaghan J, in incorporating the likelihood of the commission of further offences criterion, is indicating that an accused should be refused bail where it is likely that he or she will commit further offences. It could be garnered from this that Murnaghan J was endorsing a pseudo ‘public safety’ criterion. On the other hand, Murnaghan J also appeared to be advocating for the protection of the accused (via incarceration) from the hands of a potentially ‘incensed’ community. There seems to be a contradiction of sorts here. It is arguable that Murnaghan J was engaging in unconsidered and unprecedented propositions triggered by his exasperation over Ireland’s bail procedure. Conversely, it may also be said that Murnaghan J was simply endorsing alternate yet equally legitimate grounds for denying bail. In any event, one can discern a public safety concern underlying both propositions. In any case, this protective custody ground was emphatically rejected by Walsh J in the Supreme Court who deemed the proposition ‘quite unattainable’.\textsuperscript{645} According to Walsh J if an accused wants protective custody, he need not apply for bail or accept it. He went on to point out that ‘a bail motion cannot be used as a vehicle to import into the law the concept of protective custody for an unwilling recipient.’\textsuperscript{646}

Despite the significance of Murnaghan J’s extended considerations, he was effectively overruled in the Supreme Court. Thus, the Supreme Court decision will be examined below.

\textbf{The Supreme Court Decision in O’Callaghan}

The case was appealed to the Supreme Court where it was held by the majority, (O’Dalaigh CJ, Walsh and Budd JJ)\textsuperscript{647} reversing Murnaghan J and admitting the applicant to bail that, there was not sufficient evidence before the Court that the accused was likely to interfere with the course of justice by interfering with witnesses.\textsuperscript{648} In the Supreme Court, the Attorney General informed the Court that he was not alleging that the applicant would abscond. The

\textsuperscript{644} \textit{The People (Attorney General) v O’Callaghan} [1966] IR 501, 504.
\textsuperscript{645} ibid 515.
\textsuperscript{646} It is significant that in the English Working Committee Report on Bail, which was released prior to the enactment of the Bail Act 1976, the Committee recommended protection of the defendant from himself as one of the five considerations which justifies a remand in custody.
\textsuperscript{647} It will be recalled from chapter 2 that O’Dalaigh CJ and Walsh J were considered to have significantly contributed to the revolution in constitutional jurisprudence around this time.
\textsuperscript{648} \textit{The People (Attorney General) v O’Callaghan} [1966] IR 501, 501.
Attorney General in fact opposed bail based on the fact that the applicant may interfere with prosecution witnesses. Counsel for the Attorney General went on to support the view that the applicant, who he acknowledged was likely to stand trial, should be refused bail because the offences in respect of which he was seeking bail were alleged to have been committed while the applicant was on bail in respect of earlier charges.

The applicant was granted bail by the Supreme Court on 8 December 1966 but the members of the Court chose to reserve their judgment until 4 April 1967. It was held that the refusal of bail could only be justified on two grounds, namely: 1) where there was a likelihood the applicant may abscond; and 2) where there is a possibility the applicant may tamper with evidence or interfere with witnesses. While Walsh J recognised the importance of Murnaghan J’s criteria 1,2,3,5,6,7,8, the learned judge emphatically rejected the other criteria. Budd J was in complete concurrence with his colleagues in the Supreme Court as they unequivocally dismissed the most controversial addition, specifically, the likelihood of committing an offence while on bail.

Although the judges were in complete accord regarding the rejection of the ‘likelihood of committing further offences ground’, they were not in total agreement regarding the inclusion of the applicant’s previous convictions (ground number 3). According to Murnaghan J, if a bail applicant agrees that a list of previous convictions are correct, this can be taken into account as a factor against granting bail. However, O’Dalaigh CJ considered that a District Court judge who was trying a charge should not be told of the accused’s former convictions by the prosecution when about to remand the accused for a further hearing where an application for bail is to be made. O’Dalaigh CJ believed that an accused, who is yet to stand trial before a jury should not, on an application for bail, have a list of previous convictions announced in open court. According to O’Dalaigh CJ, this list should not be referred to ‘until after conviction’ as they are then relevant to the question of punishment.

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649 ibid 506.

650 Such sentiments intimate that bail should be withheld as a form of punishment. However, in Reg v Rose, Russell CJ held that bail cannot be withheld as a punishment. Reg v Rose (1898) 18 Cox CC 717, 719.

651 In O’Callaghan, the applicant had been handed a copy of a list of his previous convictions in open court and asked was the list correct. The judge’s opinion regarding this issue is interesting in light of s 6 of the Criminal Justice Act 2007 which requires an accused, in certain instances, to furnish a written statement to the prosecutor containing a list of the accused’s previous convictions amongst other requirements.


653 ibid.
Although Walsh J agreed with O’Dalaigh CJ, namely, that the question of the previous record of the applicant was a ‘delicate’ matter and that it was undesirable that the previous convictions of an applicant should prejudice the trial, he did indicate that in some cases it was a ‘relevant consideration’. 654 Walsh J went on to indicate that in certain cases it may be proper to introduce this type of evidence as ‘undoubtedly a prisoner with a bad previous record is likely to attract a greater sentence in the event of conviction again and to that extent the existence of a previous record of such a type may act as an inducement to flee justice and avoid the likelihood of a severe sentence’. 655 Walsh J did point out that if such evidence is to be admitted in bail applications, it would be most undesirable that the tribunal that hears such evidence should be the tribunal of trial. 656 He continued by saying that if the question of bail arose during the trial itself, the ‘interests of justice’ require that such evidence ought not to be adduced. Walsh J somewhat qualified the weight of these statements by opining that such evidence should only be adduced in respect of such previous convictions as would probably cause the trial judge to add substantially to the penalty he might otherwise have imposed in the event of conviction and that the previous record should be open to the same analysis, on the part of the accused, as it would have been had it been produced after conviction. Significantly, Walsh J concluded by stating that none of these factors, however serious, should be allowed to obscure the fact that bail ought to be allowed unless it appears likely that the accused will not turn up for trial. 657 Budd J followed Walsh J’s line of reasoning when addressing the matter of the admissibility of evidence as to previous convictions on applications for bail. 658

It is arguable that when addressing the subject of admissibility of evidence as to previous convictions in a bail application, the Supreme Court’s approach reflected Packer’s Due Process Model. One will recall that the Due Process Model is characterised by formal fact-finding where the case against the accused is publically held in an impartial tribunal. By indicating that evidence concerning the previous record of the accused should be heard by a separate tribunal to that of the trial, Walsh J, specifically, was reflecting a due process centred approach to criminal justice matters.

654 ibid 515.
655 ibid.
656 ibid 516.
657 ibid.
658 ibid 519.
It is interesting that the ‘previous convictions’ issue arose in the Dáil Debates after O’Callaghan had been released but prior to the Supreme Court’s judgment.\(^659\) In the Report and Final Stages of the Criminal Procedure Bill 1965, the Minister for Justice, Mr Lenihan,\(^660\) sought to extend the Bill to ‘cover the case of a person who commits an offence while he is on bail in respect of another offence’.\(^661\) The amendment proposed that ‘evidence of the existing bail may be given by the prosecutor in connection with any bail application the offender may make in relation to the second offence’.\(^662\) This proposal was met with some reservation from Deputy O’Higgins of Fine Gael who indicated that the court may be reluctant to hear this type of information as to its prejudicial nature against the accused.\(^663\)

Therefore, it may be said that the question of the previous record of the accused was a concern faced by both the judiciary and the legislature. The Supreme Court clearly advocated a due process approach whereas the approach of the legislature was less clear cut. Nevertheless, the focal issue raised in the *O’Callaghan* case was the consideration given to the implementation of pre-trial preventative detention into Irish law. It will be recalled that chapter 3 of this thesis contemplated whether the implementation of preventative detention into Irish law was indicative of a shift along the continuum towards the Crime Control Model. It is now necessary to consider whether the implementation of pre-trial preventative detention conflicts with Ireland’s traditional constitutional values.

**Does Preventative Detention Conflict with Ireland’s Traditional Constitutional Values?**

Pre-trial preventative detention, specifically, whether bail may be legitimately refused based on the prediction that the applicant will engage in offences if released, has been a major talking-point in Irish bail law. In *O’Callaghan*, O’Dalaigh CJ emphatically stated that the submissions of counsel for the Attorney General (specifically that the applicant should be

\(^659\) It will be remembered that the Supreme Court reserved their judgment in *O’Callaghan*.

\(^660\) Please note that when I refer to the various Ministers throughout this thesis, I will omit the term ‘then’, ie ‘the Minister for Justice Mr Lenihan’ should be read ‘the then Minister for Justice Mr Lenihan’.

\(^661\) The Bill originally read: ‘() Where an applicant for bail is already on bail in connection with another offence, information regarding such existing bail may be given by the prosecutor.’ Section 26, sub-s 5, already provides for the giving of evidence of previous convictions on an application for bail, where these previous convictions were for offences committed while on bail.’


\(^663\) ibid col 202. Deputy O’Higgins went on to point out that it would be a different situation if the accused while on bail committed the offences of which he had been convicted. He indicated that in such a situation, it would be proper for the courts to have the information. However, if the accused is simply charged with another offence while he is on bail, the accused may be found not guilty when the case comes to trial. However, he would have been unduly prejudiced in the bail application.
held as a preventative measure) was ‘a denial of the whole basis of our system of law’.\(^{664}\) O’Dalaigh CJ went on to state that said submission, ‘transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted’.\(^{665}\) This acknowledgement of such a key element of the criminal process, namely, the presumption of innocence, is a clear endorsement of Packer’s Due Process Model.

Unlike Edwards J in *Minister for Justice v Nolan* (discussed in chapter 3), O’Dalaigh CJ did concede that preventative detention was allowed for in Irish law in particular instances.\(^{666}\) To highlight this, O’Dalaigh CJ referred to Part II of the Offences Against the State (Amendment) Act 1940.\(^{667}\) O’Dalaigh CJ pointed out that although the Offences Against the State Act allowed for preventative detention to be utilised in certain situations a number of stringent conditions had to be fulfilled before the provision can operate.\(^{668}\) It is noteworthy that O’Dalaigh CJ indicated that while a Minister, under the 1940 Act, is entitled to direct the internment of an individual *engaged in* activities which are prejudicial to public peace and order, he is unable to direct the internment of an individual who if not detained *will engage* in such activities.\(^{669}\) O’Dalaigh CJ clearly distinguishes these two situations which could be perceived as a clear indication of his position concerning the denial of bail based on the likelihood that the accused is likely to commit offences while on bail.\(^{670}\) According to O’Dalaigh CJ, ‘no such power exists under the law of the Constitution’.\(^{671}\) However, it is also arguable that O’Dalaigh’s reasoning is a form of analogical interpretation which he employed in order to support his position on preventative detention. Yet it may be said that there are distinctions which can be drawn between internment and bail which could support the view that the two are conceptually quite distinct.

\(^{664}\) *The People (Attorney General) v O’Callaghan* [1966] IR 501, 508.

\(^{665}\) ibid 508-509.

\(^{666}\) In *Nolan*, Edwards J stated that ‘preventative detention in the criminal justice context is something that the Irish Constitution forbids absolutely’. *Minister for Justice v Nolan* [2012] IEHC 249, para 121.

\(^{667}\) *The People (Attorney General) v O’Callaghan* [1966] IR 501, 509.

\(^{668}\) Firstly, there must be a government proclamation declaring that the powers conferred by Part II of the Act are necessary to secure the preservation of public peace and order. Dáil Éireann may annul said proclamation however. Secondly, a Minister of State is empowered to detain a person only if he is of the opinion that a person *is engaged* in activities, which are prejudicial to the preservation of public peace and order. The Minister is not empowered to act because he is of the opinion that a person, if not detained, *will engage* in such activities.

\(^{669}\) *The People (Attorney General) v O’Callaghan* [1966] IR 501, 509.

\(^{670}\) One will recall that in *Attorney General v Duffy* it remained that the only ground upon which bail could be denied was where it was believed that the accused would evade/interfere with justice. The denial of bail on preventative grounds was not provided for despite the perceived threat to the stability of the State at the time. *The People (Attorney General) v O’Callaghan* [1966] IR 501, 509.
The rejection of pre-trial preventative detention was further bolstered by the dicta of Walsh J in the Supreme Court. He referred to Murnaghan J’s ground number 4 (the likelihood of committing further offences while on bail) as ‘quite inadmissible’. 672 Walsh J expressed his view on preventative detention in the following terms. He said:

This is a form of preventative justice which has no place in our legal system and is quite alien to the true purpose of bail. It is true that in recent years a number of decisions in England on the question of bail appear to have admitted this concept of preventative justice being applied by the refusal of bail. It has also been stated in English cases that a professional criminal, knowing that he is guilty and the probability of conviction, may be tempted to commit some more offences before imprisonment in the belief that it will probably make little difference to his ultimate sentence having regard to his record and the meanwhile may offer some present profit.

In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that.

The accepted method of preventing the commission of future offences is the threat of conviction and punishment. Apart from any of the fundamental considerations already referred to, even if one were to assume that the accused is guilty of the offence charged, that fact does not in any way establish the likelihood of the commission of another offence in the relatively short interval before his trial. In the vast majority of cases, even of persons with known criminal records, an attempt to predict who is likely to commit an offence while awaiting trial on bail can never be more than speculation.673

While this quote is quite lengthy, its inclusion is required in order to clearly depict Walsh J’s stance on the contentious pre-trial preventative detention criterion and Ireland’s traditional constitutional values. It is significant that Walsh J placed more emphasis on the Constitution and traditional constitutional values than his colleague, O’Dalaigh CJ.674 As one can glean

672 ibid 516.
673 The People (Attorney General) v O’Callaghan [1966] IR 501, 516-517. It is notable that Walsh J’s comments resonate with the statements of the US Court of Appeals for the Second Circuit in United States v Salerno. The Second Circuit reasoned that ‘our criminal law system holds persons accountable for past actions, not anticipated future actions...’ United States v Salerno 794-795 F 2d 64 (2nd Cir 1986).
674 It should be remember that O’Dalaigh CJ and Walsh J were members of the judiciary during the era which witnessed the greatest amount of judicial activism in Irish law. A leading constitutional lawyer at the time, Thomas Connelly, commented that, ‘Brian Walsh is writing the constitutional law of this country’. This was cited by Seamus Ó’Tuama in Seamus Ó’Tuama, ‘Judicial Review Under the Irish Constitution: More American than Commonwealth’ (2008) 12(2) Electronic Journal of Comparative Law <http://cora.ucc.ie/bitstream/handle/10468/19/SOT_JudicialReviewIrishConst.pdf?sequence=3> accessed 8 August 2013. Brian Walsh later commented on the presumption of constitutionality in East Donegal Co-Operative Ltd v Attorney General in the following terms: ‘...[T]he presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance
from the above, Walsh J considers the pre-trial preventative detention criterion as one that has, or should have, no place in Irish law. It is manifest from these statements that Walsh J firmly believes that preventative detention in the bail context forms no part of Irish law. While he acknowledges that some English cases have allowed for the incorporation of preventative justice, he goes on to argue that in this country such a measure would be contrary to the concept of personal liberty enshrined in the Constitution. This statement is crucially important. Effectively, Walsh J is asserting that the concept of pre-trial preventative detention contravenes Ireland’s traditional constitutional values. While Walsh J is cognisant of the fact that the English common law has oftentimes allowed for preventative detention, Walsh J holds that it has no place in Irish law. As Irish law is informed in many respects by the common law, it is arguable that Walsh J is relying on Ireland’s traditional constitutional values, ie the right to liberty and not the common law to deny pre-trial preventative detention as forming part of Irish law.

Despite Irish law developing concurrently with the English, the Irish Supreme Court would not accept pre-trial preventative detention as forming part of Irish law. This highlights the distinct nature of the Irish Constitution and how the transplantation of laws from other common law countries can potentially conflict with Ireland’s traditional constitutional values. Walsh J goes on to outline the circumstances where a person can be deprived of his liberty upon the belief that he will commit offences if left at liberty. It is critically important to observe the emphasis that Walsh J places on the fact that preventative detention in these circumstances must be rare and exceptional. In essence, Walsh J believes that preventative detention should only be allowed for in extremely limited circumstances where the security of the State is threatened. The last paragraph of the extract highlighted above is also of

with the principles of constitutional justice. In such a case any departure from these principles would be restrained and corrected by the Courts.’ East Donegal Co-Operative Ltd v Attorney General [1970] IR 317, 341.

It will be recalled from chapter 3, that former Chief Justice Ronan Keane has indicated that preventative detention has existed in Irish law for centuries. According to Keane, in its original form, an order binding-over a person to be of good behaviour or keep the peace or else face forfeiting a recognizance of a defined amount, is tantamount to preventative detention. A binding-over order can be made where no offence has been committed. Keane goes on to concede, however, that it is presumed that the form of preventative justice referred to in the O’Callaghan judgment involved the deprivation of the accused’s liberty as a direct consequence. Ronan Keane, ‘Preventative Justice’ (1967) 2 Irish Jurist 233. Furthermore, the jurisdiction to keep the peace and be of good behaviour is oftentimes employed following a conviction for a criminal offence. This marks binding-over from the bail situation as the defendant has not been convicted. For more on this see Anonymous, ‘Using abusive or insulting words with intent to provoke a breach of the peace – Whether jurisdiction of District judge to order defendant to enter into recognisance to keep the peace with imprisonment in default constitutes preventative detention in breach of the Constitution – Anthony Gregory, Christopher Burke and Cooney v District Judge Windle, Sergeant Grogan and the Attorney General’ (1994) 2 Irish Criminal Law Journal 232.
decisive importance. Walsh J points out that discounting the fundamental provisions of the Irish Constitution, preventative detention would still be an inappropriate criterion in a bail decision. Walsh J appears to base this contention on the inherent nature of the criminal justice process. According to Walsh J, the courts would be making a significant departure from criminal justice norms in allowing for preventative detention.676

In O’Callaghan, both O’Dalaigh CJ and Walsh J indicated that not only would the incorporation of a pre-trial preventative detention-like measure into Irish law contravene one’s fundamental right to liberty, it would also impede an individual’s right to the presumption of innocence. Preventative detention prior to conviction, by its very nature, is inconsistent with the right to liberty enshrined in the Irish Constitution and also interferes with the precept that each individual is presumed innocent until proven guilty. It was held in the Supreme Court that preventative detention contravened the presumption of innocence and asserted that its implementation constituted a punishment. This is how the Court was able to draw a distinction between the refusal of bail where the accused may abscond or interfere with witnesses on the one hand, and the refusal of bail on the basis that the accused may commit further offences on the other.677 It is now necessary to consider whether pre-trial preventative detention conflicts with the presumption of innocence as it was interpreted in O’Callaghan.

As stated, the O’Callaghan case represents an accused’s right to be presumed innocent at the pre-trial stage of a trial. The reasoning in O’Callaghan conveyed the absolutist position of the Irish Supreme Court regarding the interaction of bail law with the presumption of innocence. The liberal view requires that the presumption of innocence inform the entire criminal process from the start of criminal proceedings until sentence.678 Bail could only be denied for

676 It is noteworthy that around this time in the US, a group of established scholars reasserted the concept of unwritten law judicial review. According to Goldstein, both Thomas Grey and Walter Murphy contended that it was the ‘conscious intent of the framers’ that written Constitutions could not codify higher law. Both scholars claimed textual support for this view in the Ninth Amendment. Leslie Goldstein, ‘Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law’ (1986) 48(1) The Journal of Politics 51, 52. It could be posited that the Supreme Court justices were cognisant of the attitude surrounding judicial review unwritten rights in the US around this time.

677 Anonymous, ‘Using abusive or insulting words with intent to provoke a breach of the peace – Whether jurisdiction of District judge to order defendant to enter into recognisance to keep the peace with imprisonment in default constitutes preventative detention in breach of the Constitution – Anthony Gregory, Christopher Burke and Cooney v District Judge Windle, Sergeant Grogan and the Attorney General’ (1994) 2 Irish Criminal Law Journal 232.

reasons relating to the evasion of justice, namely, that the accused would not appear for trial and that the accused may interfere with witnesses or evidence. In the Supreme Court, O’Dalaigh CJ indicated that the presumption of innocence is owed more than lip service in Irish law. He stated:

The reason underlying this submission is, in my opinion, a denial of the whole basis of our system of law. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted. I say “punish” for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon... The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.679

Walsh J resolutely described the Irish position concerning bail and considered the presumption of innocence. He said:

In bail applications generally, it has been laid down from the earliest of times that the object of bail is to secure the appearance of the accused person at his trial by a reasonable amount of bail. The object of bail is neither punitive nor preventative. From the earliest times it was appreciated that detention in custody pending trial could be a cause of great hardship and it is as true now as it was in ancient times that it is desirable to release on bail as large a number of accused persons as possible who may safely be release pending trial. From time to time necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases “necessity” is the operative test. The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect at the trial.680

As outlined in chapter 2, Ní Raifeartaigh has developed a typology to aid in establishing whether preventative detention in the bail context violates the presumption of innocence. Firstly, one must consider when the presumption comes into play. Secondly, one must consider what the presumption of innocence actually prohibits: does it prohibit punishment in any circumstances other than that, which follows conviction, or; does it prohibit any restriction of the accused’s liberty based on the assumption that he is guilty of the offence charged, even if this restriction does not in fact constitute punishment.681 So is the constitutionally recognised presumption of innocence violated by pre-trial preventative detention or not?

It was depicted in chapter 2 that the ‘narrowest view’ of the presumption of innocence, according to Ní Raifeartaigh, considers the presumption of innocence as a rule that solely

680 Ibid 513.
681 Ní Raifeartaigh asserts that if the former view prevails, it requires differentiating between punitive and non-punitive liberty depriving measures. Úna Ní Raifeartaigh, ‘Reconciling Bail Law with the Presumption of Innocence’ (1997) 17(1) Oxford Journal of Legal Studies 1, 4.
applies at trial in order to ensure that an accused’s conviction will not be reached unless the accused’s guilt has been proved beyond a reasonable doubt. Under this view, there is no objection to preventative detention.

If one is to accept the broadest view of the presumption of innocence (ie the presumption kicks in at the pre-trial stage), pre-trial preventative detention violates the presumption of innocence. Typically, if an accused is denied bail based on the likelihood that he/she will commit an offence while on bail; a court will have regard to two factors in making this decision. The court will assess: 1) the current charge; and 2) the accused’s background. Ni Raifeartaigh has opined that, keeping these assertions in mind, there are two possible reasons for suggesting that the presumption of innocence is infringed by pre-trial preventative detention. Firstly, Ni Raifeartaigh indicates that the court rely on the present charge as part of the evidence that the accused will offend if released. Therefore, the accused’s right to be presumed innocent of the current charge is violated. It can be deduced from this that the current charge, can in part, supply the basis for the detention. The second proposed violation of the presumption of innocence is based on the prediction that an accused will be guilty in the future of other uncommitted offences. According to Ni Raifeartaigh, restrictions to prevent absconding or the interference with victims, do not offend the presumption of innocence because their sole purpose is to ensure that the trial takes place and are not based on the premise that the accused is guilty.

This view can be contrasted with the intermediate view of the presumption of innocence, as the broad view does not draw a distinction between punishment and regulation. Instead, it differentiates between measures, which deprive an accused of his or her liberty based on the assumption that he is guilty of the offence charged and those that do not.

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682 The dissenting opinion of Marshall J in United States v Salerno intimates that the learned judge accepts the broadest view of the presumption of innocence. Marshall J asserted: ‘Honouring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the short-cuts we take with those who we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.’ United States v Salerno 481 US 697, 767 (1987). These words were recently cited by Hardiman J in his judgment in Shortt v An Commissioner of An Garda Síochána [2007] 4 IR 587, 658.


684 ibid 4.

685 This can only be legitimate if imposed after conviction.
In *O’Callaghan*, it is evident that the presumption of innocence informed the entire trial process from the start of proceedings until the verdict was given. Therefore, it is clear that the Supreme Court in *O’Callaghan* did not apply the narrowest view of the presumption of innocence. Ni Raifeartaigh has opined that it is unclear whether the broad or intermediate view of the presumption of innocence was employed by the Court.\(^{686}\) Either way, it is obvious from *O’Callaghan* that pre-trial detention to prevent offending while on bail violates the presumption of innocence.

In *O’Callaghan*, the Supreme Court ruled that the presumption of innocence informed the entire trial process. This can be contrasted with the English application of the presumption of innocence in or around this time. Evidently, there is a marked difference between English cases such as *R v Phillips* and the Irish jurisprudence as exemplified by the *O’Callaghan* decision. As the Law Reform Commission has observed:

> The Court of Appeal [in *Phillips*] appeared to view guilt as flowing inevitably from the fact of charge in the case of a person with a long criminal record, thus placing the onus on the accused to raise doubts about his guilt at the pre-trial stage. That this was a clear violation of the presumption of innocence was not even adverted to. Whatever about the ultimate merits of pre-trial preventive detention, it is remarkable that this significant change in English practice was achieved in the questionable forum of an appeal against sentence without any discussion of fundamental principles of criminal justice and without any suggestion that the power to detain preventively should be exercised sparingly.\(^{687}\)

In sum, it may be said that the *O’Callaghan* Supreme Court were wary of transplanting English provisions regarding pre-trial preventative detention due to the repercussions said transplantation may have on Ireland’s traditional constitutional values.

This chapter has traced the history of bail in the Irish context as well as providing a detailed account of the *O’Callaghan* decision. In sum, the *O’Callaghan* Supreme Court endorsed a due process approach to criminal justice matters in emphatically rejecting the incorporation of pre-trial preventative detention in Irish law. Despite the Supreme Court’s resolute approach, Ireland’s bail laws continued to prove contentious within Ireland’s criminal justice policy. The next chapter will address the reforms which have been introduced to amend Ireland’s bail laws without resorting to preventative detention.

\(^{686}\) Ní Raifeartaigh propounds that the characterisation of pre-trial detention as punitive makes it difficult to discern whether the broad or intermediate view was adopted by the Supreme Court in *O’Callaghan*. She goes on to question – if the detention had been identified as non-punitive, would the court have reached a different conclusion. Úna Ní Raifeartaigh, ‘Reconciling Bail Law with the Presumption of Innocence’ (1997) 17(1) Oxford Journal of Legal Studies 1, 8.

Chapter 6 – Bail Reform

The criminalising of mere intention has been usually a badge of an oppressive or unjust legal system. The proper methods of preventing crime are the long-established combination of police surveillance, speedy trial and deterrent sentences.\textsuperscript{688}

Introduction

In \textit{O’Callaghan}, the Supreme Court emphatically rejected prophylactic detention as forming any part of Irish law based on the assertion that this type of detention violated the right to liberty and the presumption of innocence. It is arguable that the Supreme Court’s decision in \textit{O’Callaghan} reflected the emphatic due process orientated nature of the Irish criminal justice system and its underpinning by distinctive constitutional values. Despite the ardent stance of the Supreme Court, successive governments have attempted to reorient the Irish criminal justice system to reflect a strong crime control flavour. Explicitly, this chapter seeks to examine the reforms which have been introduced and/or suggested as a means of tightening up on bail without resorting to a constitutional referendum to provide for pre-trial preventative detention.

In order to do this, it is necessary to address the aftermath of the \textit{O’Callaghan} decision. This will be followed by an analysis of Irish crime levels from 1961 onwards. An increase in crime levels coupled with the emergence of dissident activity in the 1970s prompted the inception of a reorientation of Ireland’s criminal justice policy. Despite the surge in crime rates during the 1960s and 1970s the real pressure for bail reform did not arise until the 1980s. Therefore, this chapter includes an examination of the legislative measures that were introduced as a means of tightening up on bail without the need to resort to pre-trial preventative detention. Specifically, the Criminal Justice Act 1984 will be assessed at this juncture. Although pre-trial preventative detention formed no part of Irish law in the 1980s, the Director of Public Prosecutions (DPP) sought to neutralise the \textit{O’Callaghan} decision and incorporate pre-trial preventative detention into Irish law in the case of \textit{Ryan v DPP} in the late 1980s. Despite the DPP’s failure to incorporate a pre-trial preventative detention criterion into Irish bail law it is necessary that this chapter include a detailed examination concerning why the DPP sought to depart from the O’Callaghan principles.

\textsuperscript{688} \textit{Ryan v DPP} [1989] IR 399, 407.
After ‘O’Callaghan’

As one may recall from the previous chapter, prior to the *O’Callaghan* judgment, the Minister for Justice, Mr Lenihan proposed to include a provision in the Criminal Procedure Bill 1965 which sought to allow evidence of the accused’s previous convictions to be given in a bail application where these convictions were for offences committed while on bail.\(^689\) According to the Minister, the rationale behind this was that it had become common practice among ‘professional criminals’ to commit further offences, such as housebreaking, while on bail.\(^690\) The Minister for Justice propounded that evidence of the existing bail may be furnished by the prosecutor to the court, should the accused make a bail application connected to the second offence.\(^691\) According to Mr Lenihan, it was ‘only right’ that the court should be aware of the existing bail situation in these circumstances.\(^692\)

However, the *O’Callaghan* decision was delivered in the interim and it is arguable that this influential decision affected the proposed legislation. This disquiet can be evidenced from comments in the Seanad in May 1967 where the Minister for Justice appeared to backtrack from his previous position on the issue. In the Seanad, Mr O’Quigley described the *O’Callaghan* decision as ‘remarkable’ as it was illustrative of ‘the reality which springs from the words in the Constitution which secures the rights of citizens to their personal liberty and that they shall not be deprived of it except in accordance with law...’\(^693\) It is noteworthy that Mr O’Quigley considered the *O’Callaghan* decision as establishing that ‘bail for an accused person charged with an offence is not a mere matter of privilege but a matter of right guaranteed by the Constitution of this country to every citizen and that only in the most exceptional cases can a person be deprived of his liberty.’\(^694\) Mr O’Quigley relied on the

\(^{690}\) Comments such as these are reminiscent of the statements made by Atkinson J in *R v Phillips*. It is arguable that the Minister for Justice was looking to our neighbours in England and Wales for a transplantable framework to aid in restricting Ireland’s bail laws.
\(^{691}\) It is significant that s 14 of the Criminal Justice Act 2003 (England and Wales) substitutes paragraph 2A of Part 1 of Schedule 1 of the 1976 Act. Paragraph 2A now provides that a defendant, who is 18 or more and was on bail at the time of the alleged offence, may not be granted bail unless the court is satisfied that there is no significant risk of his committing an offence while on bail (whether subject to conditions or not).
\(^{693}\) Seanad Éireann, Criminal Procedure Bill 1965, Committee Stage, Wednesday, 5 April 1967, vol 63, no 1, col 66-67.
\(^{694}\) Ibid.
Supreme Court judgment to reject sub-s 3 of the aforementioned Bill which sought to provide for the detention of a person ‘not for an offence completed or attempted’.  

It is noteworthy that in light of Senator O’Quigley’s comments, which were grounded on the *O’Callaghan* judgment, the Minister for Justice requested for an extended time period to consider the Bill and to re-examine the law on bail. Minister for Justice, Mr Lenihan, acknowledged that the *O’Callaghan* decision explicitly rejected the likelihood of committing further offences criterion as a ground for refusing bail. In addition to this, the majority of the three Supreme Court judges considered that evidence of previous convictions (even for offences committed while on bail) could only be admitted in limited circumstances and should not prevent bail being granted unless it appeared likely that the accused would not turn up for trial. Notably, the Minister for Justice, Mr Lenihan went on to state, ‘Pending further consideration of the matter, and in order not to hold up the enactment of this legislation, I have decided to delete any of the provisions of this section which might be regarded as inconsistent with the judgment of the Supreme Court.’ Notwithstanding this retraction, Mr Lenihan pointed out that the *O’Callaghan* decision appeared to ‘go too far having regard to the basic importance of protecting the life and property of the individual and having regard to the effective enforcement of the criminal code.’ The foregoing paragraphs are indicative of the effect that the *O’Callaghan* decision had on Irish law-making. Prior to the Supreme Court’s judgment, the legislature had promulgated a Bill that sought to amend elements of the laws pertaining to bail in Ireland. Nevertheless, this provision was effectively halted as a result of the *O’Callaghan* judgment. It is thought that this is undeniable evidence of the influence *O’Callaghan* had on Irish bail law around this period.

Although *O’Callaghan* clarified Ireland’s bail laws, it was not without its critics. In *O’Callaghan*, the Supreme Court firmly rejected the installation of pre-trial preventative detention into Irish law. Despite the judiciary’s fixed stance on the matter, the Government did not necessarily share the Supreme Court’s view. Addressing general aspects of criminal justice in the Dáil in October 1968, the Minister for Justice, Mr Moran, indicated that the

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695 ibid.  
696 ibid col 85.  
698 ibid.  
699 ibid col 260.
Irish laws on bail ought to be re-examined as ‘a matter of urgency’. He went on to question whether it was necessary to ensure the protection of individual liberty that every accused person should be granted bail unless there was substantial evidence that the accused was likely to abscond or evade justice. The Minister for Justice continued to question the efficacy of the bail laws by referring to the fact that Gardaí were aware that in a great number of cases concerning persons awaiting trial, bail is utilised to commit further crimes. He expressly asserted:

To my mind, in this day and age of widespread crime, it is unreal not to take into account, in bail applications, the previous bad character of the accused and the views of responsible police officers that there is a likelihood of further criminal acts if the accused is on bail pending trial.

One can juxtapose these remarks with the due process approach taken by the O’Callaghan Supreme Court with regard to previous convictions of the accused. Furthermore, it is interesting to observe that when considering the urgent revision of Ireland’s bail laws, Mr Moran referred to a conference of the International Commission of Jurists in Lagos in 1961. Here, it was considered a fundamental component of criminal law that courts and magistrates should grant bail except in the following cases: 1) in the case of a very grave offence; 2) if the accused is likely to interfere with witnesses or impede the course of justice; 3) if the accused is likely to commit the same or other offences; and 4) if the accused may fail to appear for trial. Evidently, the Minister for Justice looked to the international community when considering the inadequacies in Ireland’s bail laws. Therefore, it is arguable that the Minister for Justice endorsed the concept of preventative detention in the bail context. It can also be deduced from the Mr Moran’s remarks that there existed manifest executive dissatisfaction with Ireland’s bail laws around this time. It is useful to question why this discontent over the efficacy of Ireland’s bail laws existed.

An Increase in Ireland’s Crime Levels

The 1960s represented the end of an era of low-level crime in Ireland. According to the Garda Commissioner Reports on Crime 1947, there were just over 15,000 indictable offences 703

700 Dáil Éireann, Committee on Finance, Vote 20, Office of the Minister for Justice, Tuesday, 29 October 1968, vol 236, no 9, col 1462.
701 ibid col 1463.
702 ibid.
703 Ciaran McCullagh, *Crime in Ireland: A Sociological Study* (Cork University Press 1996) 2. It appears that up to the mid-1960s, crime levels in Ireland were almost exiguous.
recorded. This figure remained approximately the same over the years and the number of recorded indictable crimes in 1961 was just under the 15,000 mark. It was in 1961 however that a steady increase in crime rates begun. Between 1961 and 1969, the level of recorded indictable crime increased each year with the exception of 1965 and between 1966 and 1971, the number of offences doubled. If one is to analyse crime levels in Ireland between 1966 and 1971, some interesting information emerges.

In 1966, the number of recorded indictable crime was 19,029 and the total number of offences detected was 66%. Of the recorded offences, 1,132 of these were classified as offences against the person and 94% of these were solved. Four thousand, nine hundred and fifty-seven (4,957) recorded offences were classified as offences against property with violence and 73% of these were solved. Twelve thousand, six hundred and thirty-one (12,631) of these were classified as offences against property without violence and 60% of these were solved. Three hundred and nine (309) of these were classified as other indictable offences and 94% were solved. The table on the next page displays this information in tabular form.

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709 This group includes murder, manslaughter, dangerous driving causing death and serious bodily harm, wounding assault, intimidation, cruelty and abandoning children and sexual offences.
710 This group includes offences of burglary, housebreaking and relatable offences, robbery and malicious injury to property.
711 This group includes offences of larceny, embezzlement, obtaining goods by false pretences and receiving stolen goods.
712 This group includes offences of forgery, uttering perjury, riot and unlawful assembly, offences against public decency, attempting to commit suicide and other indictable offences.
<table>
<thead>
<tr>
<th>Offence Group</th>
<th>Number of Offences Recorded</th>
<th>Percentage of Detections</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offences against the Person</td>
<td>1,132</td>
<td>94</td>
</tr>
<tr>
<td>Offences against property with violence</td>
<td>4,957</td>
<td>73</td>
</tr>
<tr>
<td>Offences against property without violence</td>
<td>12,631</td>
<td>60</td>
</tr>
<tr>
<td>Other indictable offences</td>
<td>309</td>
<td>94</td>
</tr>
<tr>
<td>Totals</td>
<td>19,029</td>
<td>66</td>
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In 1971, the number of recorded indictable crime was 37,781 and the total number of offences detected was 46 (A dramatic drop of 20 this will have conveyed an (arguably false) impression of crime being out of control). Of the recorded offences, 1,256 of these were classified as offences against the person and 90% were solved. Ten thousand, six hundred and fifty-four (10,654) of these were classified as offences against property with violence and 51% were solved. Twenty-four thousand, nine hundred and twenty-nine (24,929) of these were classified as offences against property without violence and 40% of these were solved. Nine hundred and forty-two (942) of these were classified as other indictable offences and 89% were solved. The table on the next page displays this information in tabular form.

<table>
<thead>
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</tr>
<tr>
<td>Offences against property with violence</td>
<td>10,654</td>
<td>51</td>
</tr>
<tr>
<td>Offences against property without violence</td>
<td>24,929</td>
<td>40</td>
</tr>
<tr>
<td>Other indictable offences</td>
<td>942</td>
<td>89</td>
</tr>
<tr>
<td>Totals</td>
<td>37,781</td>
<td>46</td>
</tr>
</tbody>
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Based on the figures above, it is clear that there is some disparity between offences against the person and offences against property. Over the six-year period illustrated, there was a slight increase in offences against the person (124 offences), and a slight decrease in the detection rate (4%). However, there was a marked increase in property offences (property offences with violence: 5697 & property offences without violence: 12,298) and a large decrease in the detection rate (22% and 20% respectively). Clearly, property crimes exhibited the largest increase in occurrence over the highlighted period and the largest decrease in detection rates. The number of indictable offences recorded by the Gardai in 1971 was the highest figure recorded for any year since the establishment of the State. One must question the sudden increase in crime rates in 1960s Ireland and, does it suggest that the executive’s dissatisfaction over Ireland’s bail laws could be linked to these surging crime rates?

The Annual Report by the Garda Commissioner on Crime 1971 offers some thought-provoking insight into the increasing crime rates in Irish society around this time. The Report took a different format in 1971 than it had in the past and the Commissioner’s ‘foreword’ makes for compelling reading. Here, the Commissioner indicates that the significant increase in offences against property with violence, ie larceny etc must be linked to the ‘considerable increase in the number of mechanically propelled vehicles registered’. In addition to this, the Commissioner specified the circumstances which he regarded as having contributed to the increase in crime during the year under review.

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714 ibid.
These included:

1) The commission of further crimes by criminals while on bail awaiting trial. A total of 383 persons while on bail committed 1,570 crimes against property (housebreakings and larcenies) during the crime accounting year ended on the 30 September 1971. These figures are only in respect of crimes which were solved.

2) The lack of a general security sense by some members of the public particularly in respect of property left exposed to view in motor cars parked in cities, towns and seaside resorts.

3) The growth in urbanisation and industrialisation with increased affluence of sections of the community making available more attractive goods to steal, eg colour television sets.

4) Increased mobility of criminals, most of whom make use of motorised vehicles in the course of their activities.  

As one can observe, increased industrialisation produced an increase in the level of affluence in Irish society and with that an increase in the range of goods that could be stolen. The most noteworthy point to be gleaned from the Commissioner’s appraisal of the crime rates was his open acknowledgment of the ‘commission of further offences by criminals while on bail’ proving contributory to the increasing crime levels. Until this, there had been no mention of such incidences in Garda Commissioner Reports. It may be the case that the liberal bail regime endorsed in O’Callaghan was having negative effects on Ireland’s crime levels. In keeping with this theory, it is arguable that a real problem existed and this was the reason for Government frustration over Ireland’s bail laws. On the other hand, it is also feasible that the bail issue was being used by the Gardai as a scapegoat for their failure to prevent crime. A further potential reason for the soaring crimes rates was the rise in dissident activity around this time.

Although there was concern expressed over Ireland’s bail laws in the 1960s, it never became a red-hot political issue. Criminal justice was not yet appearing prominently on the political agenda. The 1970s produced a new era of political violence in Northern Ireland and the Republic could not escape the spill over effects. 1970s Ireland witnessed an extensive violent conflict between the communities in Northern Ireland and the Irish national community and the State. Consequently, this conflict spilled over into the twenty-six county

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715 ibid.
716 McCullagh has pointed out that in 1962 there were just over 127,000 television licences available in the country. By 1971, the number had trebled to over 475,000. Ciaran McCullagh, *Crime in Ireland, A Sociological Introduction* (Stylus Pub Llc 1996) 36.
jurisdiction in the form of a sustained increase in serious violent offences against the person and property. The Troubles contributed to political instability while also placing a considerable strain on the criminal justice system.\footnote{For more on the political violence produced by 1970s Ireland, see generally, Clive Walker, \textit{The Prevention of Terrorism in British Law} (Manchester University Press 1988); Gerard Hogan and Clive Walker, \textit{Political Violence and the Law in Ireland} (Manchester University Press 1990); Kieran McEvoy, \textit{Law Struggle and Political Transformation in Northern Ireland} (2000) 27(4) Journal of Law and Society 542.}

The tension in Northern Ireland had an impact on the nature and extent of criminal offences that were dealt with by the Gardaí and judiciary south of the border. This can be evidenced from statements by the Garda Commissioner who wrote in 1975, ‘violent criminal activity designed to intimidate for political purposes in the border areas has undoubtedly influenced crime trends throughout the whole country.’\footnote{An Garda Síochána \textit{Annual Report of the Commissioner of the Garda Síochána on Crime for the year ended 31 December 1975} (Dublin Stationary Office 1975).} Armed robbery was particularly prevalent rising from 12 incidents in 1969 to 228 in 1979.\footnote{An Garda Síochána \textit{Annual Report of the Commissioner of the Garda Síochána on Crime for the year ended 30 September 1969} (Dublin Stationary Office 1969); An Garda Síochána \textit{Annual Report of the Commissioner of the Garda Síochána on Crime for the year ended 30 September 1979} (Dublin Stationary Office 1979).} O’Mahony has indicated that this increase in armed robbery was attributable to paramilitaries gathering funds to purchase weapons.\footnote{Paul O’Mahony, \textit{Criminal Justice in Ireland} (Institute of Public Administration 2002) 281.}

Both members of the Gardaí and civilians of the Republic were adversely affected by the Troubles in Northern Ireland. During this period, there were obvious concerns regarding the safety of the State. In the Dáil in 1971, Garret Fitzgerald of Fine Gael, who was in Opposition at the time, voiced his concerns over the on-going Troubles and the effect they were having on Irish law. He stated:

\begin{quote}
This government has totally failed to tackle violence in this State. We have again and again parades of uniformed men openly claiming to be illegal armies tolerated and permitted to parade and intimidate our people because the persistence of this kind of display does intimidate people when they see a government unwilling and afraid to act. We have had guns fired in cities and countryside with impunity, armed raids which have pointed to the complete breakdown not simply of the system of government but of our judicial system contributed to by the Government’s unwillingness to do anything about it.\footnote{Dáil Éireann, Committee on Finance, Vote 3, Department of the Taoiseach, Thursday, 5 August 1971, vol 255, no 19, col 3441.}
\end{quote}

These concerns were reflected in Ireland’s criminal justice policies and had the knock-on effect of pushing the Irish criminal justice system in a more crime control centred direction. During the 1970s, there were a range of crime control oriented developments made to the
Offences Against the State Acts. Criminal justice now centred on the suppression of subversive activities and the preoccupation with due process rights began to dwindle.

On 26 May 1972, the Government brought Part V of the Offences Against the State Act into operation and the Special Criminal Court was re-established on 30 May 1972. The Government made two orders listing a range of scheduled offences to form part of the 1939 Act. In addition, the Oireachtas enacted the Offences against the State (Amendment) Act 1972 in December of that year. Section 3 of this Act provided that the opinion evidence of a Garda Superintendent that an accused was a member of an illegal organisation could be treated as evidence.

The murder of the British ambassador, Christopher Ewart-Biggs, in September 1976 generated new resolutions declaring a State of Emergency and the Emergency Powers Act 1976 was passed pursuant to these declarations. This Act permitted the Gardaí to detain suspects for a period of up to seven days prior to charge. The Offences Against the State Acts coupled with the Emergency Powers Act provided the Government wide scope to defend threats to State security. While the Act was intended to ensure public safety during a time of civil unrest, it was nonetheless controversial due to its curtailment of civil liberties. It is noteworthy that when the Supreme Court was reviewing the scope of Article 28.3.3° in Re Article 26 and the Emergency Powers Bill 1976, the State conceded that seven-day detention was inconsistent with the right to personal liberty guaranteed by Article 40.4.1°. Therefore, the Bill was reliant on the emergency resolutions for its constitutional survival.

The intention of the Offences Against the State Acts were to provide the Gardaí with specific powers in cases where the security of the State was threatened. Instead, they were

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723 The Special Criminal Court was established to circumvent the fact that juries were likely to be intimidated by paramilitaries. On this occasion, the court solely comprised of judges or former judges. Nowadays, the Special Criminal Court is employed to try cases that have no paramilitary links.

724 Offences Against the State Act 1939 (Scheduled Offences) Order 1972 (SI No 142 of 1972) and Offences Against the State Acts 1939 (Scheduled Offences) Order (No 2) 1972 (SI No 282 of 1972).

725 Offences Against the State (Amendment) Act 1972, s 3.

726 This Emergency legislation was allowed to lapse in October 1977.

727 Section 2 of the 1976 Act was practically identical to s 30 of the Offences Against the State Act 1939 save where s 2 of the 1976 Act permitted 7 day detention whereas s 30 of the 1939 Act only permitted a maximum detention of 48 hours.


729 Section 30(1) provides that a member of the Gardaí may, ‘without warrant stop, search, interrogate and arrest any person’ who he suspects has committed or is about to commit a scheduled offence for the purposes of Part V of the 1939 Act or an offence under the 1939 Act itself. Also, s 30(1) provides that a Garda may arrest a person where the Garda suspects that the person concerned is, ‘… carrying a document relating to the
frequently applied in cases where the accused was suspected of having committed a non-scheduled offence. Therefore, although the Offences Against the State Acts were intended to apply to subversive crime, they were also being applied to cases of ‘ordinary crime’. As Kilcommins and Vaughan have stated, the ‘proportionate legal responses’ created to control the threat of paramilitaries proved adaptable to more ‘normal circumstances’.\(^\text{730}\) It has been submitted that the employment of s 30 to arrest persons for ‘normal offences’ not connected to subversive activity is not in keeping with the constitutional guarantee of liberty provided for under Article 40.4.1°.\(^\text{731}\)

As one can see, there were a range of crime control aligned criminal justice measures introduced in 1970s Ireland. Due to the climate of insurrection, the majority of these criminal justice measures focused on curbing terrorist activities. Although Ireland’s criminal justice system was being steered in a more crime control direction, there were no major changes made to Ireland’s bail laws during this time. In light of this, why did the Government not act more decisively on the bail issue at this time of crisis and why did it not seek to neutralise the \textit{O’Callaghan} decision? It is unclear why the Government did not attempt to amend Ireland’s bail laws. One possible answer is that even under the O’Callaghan principles subversives were unlikely to get bail – the original grounds, ie the risk of flight or witness intimidation would allow for the denial of bail. It is possible that Ireland’s bail laws were operating effectively and this was the reason the \textit{O’Callaghan} decision was not challenged. Nonetheless, it seems more likely that the Government were preoccupied with the suppression of subversive activity. As dissident violence began to dissipate the Government became more concerned with Ireland’s bail laws. This concern is evidenced by the increase in legislative activity in 1980s Ireland.

\textbf{The Pressure for Bail Reform Begins}

During the 1980s, preoccupation with ‘ordinary’ crime, especially drugs, vandalism, muggings and robberies began to rival and then surpass subversive crime on the public and

\textit{commission or intended commission of any such offence as aforesaid or whom he suspects as being in the possession of information relating to the commission or intended commission of any such offence as aforesaid.} \(^\text{730}\)


\(^{731}\) ibid 61.
Apart from the anti-subversive measures, there had been no major criminal law reform in Ireland since 1951. During Fianna Fail’s brief stint in government in 1982 a Private Members’ Bill was issued by the former Minister for Justice, Jim Mitchell. This Bill proved extremely significant as it outlined a number of the provisions that would later feature in the Criminal Justice Bill 1983.

The reason that the bail issue is particularly interesting is that Deputy Mitchell indicated in his Private Members’ Bill that there may be a constitutional amendment to Ireland’s bail laws in the latter half of 1982 due to ‘the serious problems emanating from the Supreme Court decision’. Although Deputy Mitchell did point out that the bail situation could be greatly improved through the introduction of legislation, it is salient that he considered that a constitutional amendment remedying the problems created in O’Callaghan was imminent in the not so distant future. Deputy Mitchell’s predictions regarding Ireland’s bail laws were further bolstered by Deputy Birmingham who appealed to the Minister for Justice to take advantage of the upcoming referendum dealing with the protection of the right to life of the unborn child and hold, on the same day, a referendum dealing with and ‘making sense’ of the laws of bail. Deputy Birmingham described Ireland’s bail laws after the O’Callaghan decision as ‘nonsensical’ and a cause of ‘frustration and difficulty’. This is important as it will be demonstrated at a later stage that the majority of Deputy Mitchell’s reform proposals reached fruition with the Criminal Justice Act 1984. On the other hand, a constitutional

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733 ibid.
734 According to Deputy Mitchell, a range of fundamental reforms were required. These included: 1) Affording the Gardaí increased powers in order to properly investigate crime; 2) The introduction of majority verdicts in jury cases; 3) Requiring an accused to give advanced notice to the prosecution if they intended to produce an alibi; 4) The moderation of the right to silence; 5) Amendments to Ireland’s bail laws; 6) Granting Gardaí the power to fingerprint, photograph and take other forensic samples off suspects; and 7) Reviewing the Misuse of Drugs Act with a view to strengthening it. Proposals such as the increase in police powers, amendments to Ireland’s bail laws and moderation of the right to silence were also called for in motions such as the Dáil Éireann, Dáil Reform, Motion, Wednesday, 26 January 1983, vol 339, no 4 and Dáil Éireann, Criminal Cases Sentences, Motion, Thursday, 10 March 1983, vol 340, no 12.
736 It was suggested by Deputy Mitchell in this Private Members’ Bill that the bail situation could be greatly improved by banning the courts from utilising concurrent sentences and instead insisting on consecutive sentences in those cases where one was found guilty of a crime while on bail. This point is important as it appears in the 1984 Act and seems aimed more directly at tackling offending while on bail rather than the blunderbuss approach of refusing bail in order to prevent the commission of further offences.
737 Dáil Éireann, Private Members’ Business, Crime and Vandalism in Dublin, Motion, Tuesday, 4 May 1982, vol 334, no 1, col 200.
738 ibid.
amendment providing for the installation of preventative detention in the bail context did not transpire until 1996, despite it being called for on numerous occasions.

Politicians were not alone in their disquiet over Ireland’s bail laws. The Gardaí also conveyed their concern. Garda Commissioner McLaughlin’s address to the students of King’s Inns in 1982 reflects the acute agitation experienced by the Gardaí that was informing the political debate at the time. In his address, which featured in an earlier edition of the Irish Jurist, Garda McLaughlin referred to the dramatic increase in crime levels which had occurred over the past decade.739 He also expressed concern regarding the interrogation of suspects and considered the Irish Gardaí more restricted in the conduct of their investigations than their foreign counterparts, such as those in the UK and other European countries.740 At this time, apart from the provisions of s 30 of the Offences Against the State Act 1939, the Gardaí had no power to detain anyone unless they could charge them for a specific crime. In sum, Garda McLaughlin considered the Irish legal system as one of the most ‘restrictive’ in the world and urged that the system be urgently revised. Significantly, he likened the Irish situation to that of the United States by quoting President Reagan’s address to the Chief of Police in 1982.741

It is suggested, based on the statements highlighted above, that prominent members of the Gardaí were advocating a more crime control driven approach to criminal justice. Despite the due process orientated approach of the Supreme Court in *O’Callaghan*, dissatisfaction clearly existed within the executive.

**Legislative Changes**

As previously articulated, the debate around the reform of criminal justice in the general sense was beginning to intensify in the early 1980s. The first evidence of this from a legislative perspective was with the Criminal Justice (Community Service) Bill 1983. This Bill was the result of a White Paper dealing with Community Service, published in June 1981, and supported by a Private Members’ Bill endorsing community service in June

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740 ibid.
741 President Ronald Reagan stated: ‘It is time for honest talk, for plain talk. There has been a breakdown in the criminal justice system in America. It just isn’t working. All too often, repeat offenders, habitual law-breakers, career criminals, call them what you will, are robbing, raping and beating with impunity and, as I said, quite literally getting away with murder. The people are sickened and outraged. They demand that we put a stop to it.’ This was cited by John Hagan, *Who are the Criminals?:The Politics of Crime Policy from the Age of Roosevelt to the Age of Reagan* (Princeton University Press 2012) 108.
1982.\textsuperscript{742} The Criminal Justice (Community Service) Bill 1983 sought to provide the courts with a further sanction that they might apply in appropriate cases.\textsuperscript{743}

Vandalism, car theft and mugging remained a frequent source of concern and the Gardaí continued to be frustrated with the criminal justice system and oftentimes considered themselves to be operating with ‘one hand tied behind their backs’.\textsuperscript{744} The debate surrounding this Bill depicted that both sides of the House were in agreement over certain matters. Over and over again, the Deputies welcomed the Bill but qualified their support for it by highlighting that there remained a need for further, more stringent legislation that would seek to curb the current crime problem. Fine Gael’s Deputy Mitchell clearly held this view when he stated:

\begin{quote}
We must go much further than this Bill goes. Because further legislation is anticipated, there is no need for amendments on this Bill. Were we not anticipating legislation it would be necessary to put down amendments to the Bill, to deal, for instance, with the question of the Judges’ Rules, the right to silence, consecutive versus concurrent sentencing and a number of other similar areas, such as crime being committed while people are on bail. A number of such areas will have to be considered later.\textsuperscript{745}
\end{quote}

It appears that the Government remained concerned over crimes being committed while on bail. The Government did in fact ‘go further’ and curtailments of civil liberties were deemed to be warranted. A three-pronged approach to Law and Order was taken by Fine Gael in their Programme for Government. The first aspect was the introduction of the Criminal Justice Bill 1983. Secondly, there was the recommendation that better community policing cooperation facilities be implemented.\textsuperscript{746} Lastly, there was the establishment of an independent Garda Authority.\textsuperscript{747}

Notwithstanding the \textit{O’Callaghan} decision, there were numerous calls made for the reform of Ireland’s bail laws due to the increase in crime levels from the late 1960s onwards.\textsuperscript{748} However, there was also support for tightening up Ireland’s bail laws without the need to

\textsuperscript{742} Dáil Éireann, Private Members’ Business, Crime and Vandalism in Dublin, Motion, Tuesday, 4 May 1982, vol 334, no 1, col 199.

\textsuperscript{743} One will recall Garland’s ninth indicium premises itself on crime prevention and community safety.

\textsuperscript{744} Dáil Éireann, Criminal Justice Bill 1983, Second Stage (Resumed), Wednesday, 16 November 1983, vol 345, no 12, col 2476.

\textsuperscript{745} Dáil Éireann, Criminal Justice (Community Service) Bill, 1983, Second Stage (Resumed), Wednesday, 20 April 1983, vol 341, no 7, col 1465.

\textsuperscript{746} There were proposals published by the AGSI in 1983 relating to community policing.

\textsuperscript{747} Dáil Éireann, Criminal Justice Bill 1983, Second Stage (Resumed), Wednesday, 16 November 1983, vol 345, no 12, col 2472.

resort to a constitutional referendum providing for pre-trial preventative detention in Irish law.\textsuperscript{749} Deputy Mitchell conveyed such a sentiment in the Dáil in 1982. He indicated that while he did anticipate that there would be an amendment made to Ireland’s bail laws in the not so distant future, the situation could be greatly helped by legislation. While Deputy Mitchell was not openly disparaging of the \textit{O'Callaghan} judgement he did concede that problems had emanated from it. He conveyed his frustration over the ease at which an applicant could get bail in Ireland and significantly, he voiced his dissatisfaction with the employment of concurrent sentences.\textsuperscript{750} Deputy Mitchell stated that it was in the interest of the criminal to commit as many crimes as they like as there was a great chance they would only receive concurrent sentences for their crimes. Deputy Birmingham, who went on to attack the \textit{O'Callaghan} decision, echoed this sentiment. He stated that since the \textit{O'Callaghan} decision, there has been ‘unanimous agreement’ that the law on bail is unsatisfactory.\textsuperscript{751} He followed his criticism of the \textit{O'Callaghan} decision with a critique on the legislative provisions pertaining to bail. His frustrations grew from the limited power of the District Court in only being able to impose one single sentence of twelve months’ imprisonment. Deputy Birmingham contended that such a provision encouraged an accused to commit further offences while on bail as one ‘might as well be hanged for a sheep as a lamb.’\textsuperscript{752}

One can gather from the preceding sections of this chapter that Ireland’s bail laws have frequently provoked controversy and debate. In the Dáil Debates of the 1960s, it was implied that bail should be denied if there was evidence to suggest that the accused would commit a serious offence while on bail. Although bail laws were not a top priority in 1970s Ireland, the Government did indicate that the bail situation was under ‘active consideration’ stemming from concern over the number of offences committed by persons on bail at that time. It may also be recalled that the Private Members’ Bill of May 1982 stated that there should be a constitutional amendment to Ireland’s bail laws in the latter half of 1982 due to the serious problems emanating from the Supreme Court decision.

However, the introduction of pre-trial preventative detention into Irish law was not regarded as the sole panacea in the development of Ireland’s bail laws. Constitutional alternatives were

\textsuperscript{749} Dáil Éireann, Private Members’ Business, Crime and Vandalism in Dublin, Motion, Tuesday, 4 May 1982, vol 334, no 1, col 179.
\textsuperscript{750} ibid.
\textsuperscript{751} ibid col 199.
\textsuperscript{752} ibid col 200.
also endorsed. A prime example of such an alternative was the Criminal Justice Bill 1983. Although it did not provide for the installation of pre-trial preventative detention into Irish law, it did significantly affect an individual’s civil liberties. In short, it sought to reform Ireland’s bail laws without resorting to a constitutional amendment to provide for pre-trial preventative detention.

The Criminal Justice Bill 1983

According to Minister for Justice, Mr Noonan, the aim of the Criminal Justice Bill 1983 was to restore the balance between community and criminal while at the same time ‘preserving everything that is of fundamental importance to our liberties.’ The 1983 Bill was further described by Mr Noonan as a ‘measured and reasoned’ response to Ireland’s crime problems. Deputy Birmingham characterised the Bill as the ‘most substantial piece of legislation to come before the Dáil in this session, indeed during the lifetime of this Dáil perhaps.’

The Bill focused on certain aspects of the crime problem in Ireland where crime levels were particularly high. Such areas included car theft, firearm offences, and the possession of stolen property. The total number of indictable crimes committed had risen from 38,000 in 1973 to 97,600 in 1982. There was a public fear of robbery, larceny, housebreaking and car stealing. The increased level of drug abuse also impacted the volume of crime. In the Dáil, Deputy Woods referred to a Medico-Social Research Board Study in 1982 which showed that the majority of heroin abusers ended up in prison. The Board estimated that a heroin abuser required £100-£200 a day in order to maintain their habit. The addicts stole from various types of premises in order to finance this. Deputy Woods concluded that drugs were one of

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754 ibid.  
756 It is noteworthy that the Criminal Justice Bill 1983 incorporated a majority of the reform proposals propounded by former Deputy Jim Mitchell in the Private Members’ Bill of May 1982.  
757 This area is dealt with in ss 14 and 15 of the Criminal Justice Act 1984.  
758 There had been a lacuna in this area of the law since the 1960s. This lacuna is seen to have been remedied by s 16 of the Criminal Justice Act 1984 (repealed).  
760 ibid.  
the largest single contributors to the high incidence of crime in the early 1980s. This sentiment was further bolstered by Deputy LT Cosgrave who stated:

The drug addict himself is affected as are people whose houses are burgled in order to get money to pay for the drugs that addicts need. People may be beaten up in their homes. In Dublin we all know of people whose houses have been broken into and whose goods were taken, pockets picked and bags snatched. I hope that the Bill before the House will go some way towards ensuring a greater detection rate.

Concerns over the level of drug crime and the resultant impact on crime levels were frequently raised in the Dáil during the introduction of this Bill. Deputy Brady conveyed his concerns in the following terms:

Last night highlighted in very real terms the huge problem facing the country on the drugs issue alone when £1.5 million worth of drugs were found in bales at a perimeter fence at Dublin Airport. That is drifting into almost a South American situation such as exists in Quito, Ecuador, La Paz and Bogota where the stage has been reached where people will just snatch and grab and it is not just handbag snatching. People are so desperate for a fix that they snatch wrist watches, tear jewellery off women’s necks and so on. This happens in an everyday situation.

The Criminal Justice Bill 1983 was borne out of a comprehensive review of Ireland’s criminal law. Its central purpose was to grant new powers to the Gardaí. The Bill allowed the Gardaí to investigate crimes more effectively by amending and updating specific aspects of criminal law and procedure. Up until the Criminal Justice Bill 1983, the Gardaí did not have any legal powers to detain suspected persons while they investigated an offence apart from s 30 of the Offences Against the State Act 1939.

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762 ibid col 1281.
763 ibid col 1299.
765 One of the most controversial aspects of the Bill concerned allowing the court to draw inferences from the behaviour of accused persons in certain circumstances. This area is dealt with in s 18 of the Criminal Justice Act 1984. The Bill also proposed to make an array of changes to trial procedure. Such changes included: the requirement to give notice of an intention to put forward an alibi (This area is dealt with in s 20 of the Criminal Justice Act 1984); the abolition of the accused’s right to make an unsworn statement (This area is dealt with in s 23 of the Criminal Justice Act 1984); the introduction of majority jury verdicts (This area is dealt with in s 25 of the Criminal Justice Act 1984). In addition, the Bill allowed for numerous miscellaneous provisions such as the tape recording of the questioning of suspects (This area is dealt with in s 27 of the Criminal Justice Act 1984) as well as a general power to fingerprint persons convicted of indictable offences or those dealt with under the Probation Act (This area is dealt with in s 28 of the Criminal Justice Act 1984).
767 Despite this legislation being introduced to deal with offences which threatened the security of the State, it was extensively used in the fight against ‘ordinary’ crime.
This wide-ranging review of the law had a number of sources. Minister for Justice, Mr Noonan referred to the effect the inadequacies of the law in the criminal justice arena were having on criminal investigation as a whole. Mr Noonan’s review of the case-law revealed that a number of prosecutions had failed as evidence was found to be inadmissible. This was not only the situation in minor cases but also applied to murder cases where there was evidence of the guilt of the accused resulting from confessions or other incriminating statements. Mr Noonan drew comparisons with police powers in other democratic countries when appraising Ireland’s criminal justice system. The Minister for Justice defended the Bill by indicating, ‘virtually all of what we are proposing is already common practice in other democratic countries’. He went on to state that in England the police can detain without charge for forty-eight hours, or even longer in the case of serious arrestable offences, and in Northern Ireland, the police can detain for up to forty-eight hours for all arrestable offences. He also referred to a range of other countries where the police can detain without judicial intervention for at least twenty-four hours. With regard to amending the right to silence provisions to allow for adverse inferences to be drawn in certain instances, Mr Noonan again referred to the English position on the matter. Evidently, the Minister for Justice was influenced by other European jurisdictions when arguing in favour of the Bill. Despite aiming to preserve, ‘everything that is of fundamental importance to our liberties’, parts of the Bill sought to restrict individual rights.

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768 The O’Briain Report was extensively referred to when reviewing the law in this area. The O’Briain Report referred to a Government appointed Committee, which had been established in 1978 in order to address the abuses of seven day detention under the 1976 Emergency legislation. Justice O’Briain in an addendum to the Report suggested that persons who commit offences (other than subversive offences) should also be liable to detention. O’Briain Report, *Report of the Committee to Recommend Certain Safeguards for Persons in Custody and for Members of An Garda Síochána* (Dublin Stationary Office 1978).


770 ibid.

771 Minister Noonan looked to England when addressing the period of detention after arrest. In 1981, it was stated by the Royal Commission on Criminal Procedure in paragraph 3.66, ‘... The period of detention (upon arrest) may be used to dispel or confirm... reasonable suspicion by questioning the subject or seeking further material evidence with his assistance. This has not always been the law or practice but now seems to be well established as one of the primary purposes of detention upon arrest.’ See generally, Dáil Debates, Criminal Justice Bill 1983, Second Stage, Wednesday, 2 November 1983, vol 345, no 6.


773 ibid.

774 He acknowledged that while the proposal was not implemented in England and that the majority of the Royal Commission on Criminal Procedure recommended against it, the Criminal Law Revision Committee did in fact support it. In fact the draft of s 16 was drawn from the Revision Committee.
Although the Criminal Justice Bill 1983 did not provide for the installation of pre-trial preventative detention into Irish law, the background to the Bill’s introduction is pertinent in order to convey that a reorientation in Ireland’s traditional constitutional values had begun. Minister for Justice, Mr Noonan looked to England’s police powers and right to silence provisions when arguing for change in Ireland. Therefore, it is contended that the concept of transplanting provisions from other jurisdictions is not exclusive to Ireland’s bail laws.

**The Criminal Justice Act 1984**

The Criminal Justice Act 1984 provided for three key amendments to Ireland’s bail laws. Firstly, the Act required that courts impose consecutive as opposed to concurrent sentences for offences committed while on bail.\(^{775}\) Prior to the 1984 Act, there remained a period of *de facto* immunity during which an individual who was on bail could commit further offences and subsequently be sentenced solely for the charge for which he was on bail.\(^{776}\)

Secondly, the Act provided that where two or more sentences passed by a District Court are ordered to run consecutively, the aggregate term of imprisonment shall not exceed two years.\(^{777}\) Up until this point, the aggregate term of imprisonment could not exceed twelve months.\(^{778}\) In short, the 1984 Act made it obligatory for a court to impose a consecutive sentence for an offence committed while on bail and increased the twelve-month limit in the District Court to twenty-four months. However, the effect of this change was somewhat limited when it was held that one of these sentences could be a suspended sentence.\(^{779}\)

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775 This area is dealt with in s 11 of the Criminal Justice Act 1984.
776 Section 11 of the Criminal Justice Act 1984 (as amended) reads as follows: ‘Any sentence of imprisonment passed on a person for an offence – (a) committed while on bail whether committed before or after the commencement of section 22 of the Criminal Justice Act 2007, or (b) committed after such commencement while the person is lawfully at large after the issue of a warrant for his or her arrest for non-compliance with a condition of the recognisance concerned, shall be consecutive on any sentence passed on him or her for a previous offence or, if he or she is sentenced in respect of two or more previous offence, on the sentence last due to expire, so however that, where two or more consecutive sentences as required by this section are passed by the District Court, the aggregate term of imprisonment in respect of those consecutive sentences shall not exceed 2 years.’
777 It is only in cases of consecutive sentencing that the District Court received the power to impose an aggregate sentence of two years.
778 Section 12(1) of the Criminal Justice Act 1984 amends s 5 of the Criminal Justice Act 1951, so that where two or more sentences passed by the District Court are ordered to run consecutively, the aggregate term of imprisonment shall not exceed two years.
779 In *The People (DPP) v Thomas Dennigan* [1989] 3 Frewen 253, it was held (Hederman, Egan and Barr JJ) that ‘the Court had the power under section 11 of the [1984] Act when imposing a consecutive sentence to suspend that sentence in appropriate circumstances.’ There have been further developments relating to suspended sentences following the Criminal Justice Act 2006 and the Criminal Justice Act 2007. Now, there
Lastly, the Act created the new offence of ‘failure to surrender to bail’. Prior to the 1984 Act, s 33 of the Criminal Procedure Act 1967 stated that a person about to abscond on bail may be arrested on a warrant issued on the basis of sworn information, given on oath by a Garda or the person who went surety for the bail. The offence was not committed until the person failed to answer his bail on the appointed day without reasonable excuse. The 1984 Act made absconding while on bail an offence punishable on summary conviction with a fine, imprisonment or both. In addition, failure to surrender to bail is now to be treated as an offence committed while on bail. Therefore, any sentence imposed for this offence is required to be consecutive on any previous sentence. There appeared to be an anomaly in this area of the law up until the 1984 Act. Prior to the Act, if a person failed to answer a bail bond, the person who acted as surety for the accused may be required to pay over a sum of money for which he had gone surety. However, if the accused jumped bail, the accused was not charged with any additional criminal offence for failing to appear at trial. The Minister for Justice, Mr Noonan declared that the above provisions would ‘get the message across loud and clear to bail offenders that from now on they can expect much harsher punishment.’

Although the Criminal Justice Bill 1983 was accepted by both sides of the House, it was not without its due process rights endorsing critics. Deputy MacGiolla quoted Professor Kevin Boyle who considered the Bill as ‘creating a most oppressive pre-trial criminal procedure of any democratic country that I know of’. Deputy O’Dea of Fianna Fáil described it as ‘the

exists a statutory basis for the imposition of suspended sentences. For more on this see generally, Rebecca Smith and James Dwyer, ‘Suspended Sentences following the 2006 and 2007 Criminal Justice Acts’ (2009) 14(2) The Bar Review 32.

780 Criminal Procedure Act 1967, s 33.
781 In England and Wales, s 6 of the Bail Act 1976 creates two offences: 1) Failing without reasonable cause to surrender to bail. 2) Failing to surrender to custody at the appointed place as soon after the appointed time as is reasonably practicable. The consolidated practice direction sets out two principles for courts when dealing with failure to surrender offences, namely: 1) These offences should be dealt with as soon as possible (even if the offence that lead to the grant of bail is adjourned); and 2) The Bail Act offence should result in a separate sentence from that imposed for other offences. Under para 6 of Part 1 of Schedule 1 of the Bail Act 1976 as substituted by Section 15(1) of the Criminal Justice Act 2003, a defendant who fails to surrender, may not be granted bail unless the court is satisfied that there is no significant risk that, if released on bail (whether subject to conditions or not), he would fail to surrender to custody again.
most insidious and far-reaching erosion of civil liberties since the foundation of the State. The majority of the dissatisfaction emanated from Thomas MacGiolla of the Worker’s Party who opposed many sections of the Bill which he regarded as a ‘deprivation of civil liberties with no real effect on the major upsurge in crime’. He went on to describe the Department of Justice as ‘the most backward, outdated, conservative and inept’ Department. While a lot of Deputy MacGiolla’s commentary concerning the Bill is provocative and oftentimes inflammatory, his description of the Department would not have been considered out of place in many circles at the time.

This scepticism was not groundless. Unlike the Criminal Justice (Community Service) Bill 1983, the Criminal Justice Bill 1983 was not legislated for on the basis of a White Paper. This is significant. The Government introduced a Bill which proposed extensive changes (including bail changes) in private. In addition, it appears that the Joint Committee on Crime, Lawlessness and Vandalism was not consulted during the introduction of the 1983 Bill. Deputy MacGiolla adduced that to legislate on such important issues in the absence of a White Paper or any serious study could result in a dangerously biased Bill. According to Deputy MacGiolla, this Bill had been in the pipeline during Fianna Fail’s time in government a year earlier. Therefore there had been plenty of time to produce a White Paper in order to gauge the Deputies’, the media and the public’s response to the proposed legislation. In addition, Deputy MacGiolla drew the House’s attention to the curious fact that the Law Reform Commission was not asked to make any proposals concerning this Bill to the Government.

786 ibid col 1309.
787 The Joint Committee on Crime, Lawlessness and Vandalism was established in 1983.
789 In answer to these criticisms, it has been propounded that there was no need for any pre-requisites to the Bill due to the length of time this Bill was in the pipeline. According to Deputy Yates, this Bill had been promised by ‘every government since 1976’ and was in fact loosely based on the former Minister for Justice, Mr Moran’s, aborted Bill in 1967. Dáil Éireann, Criminal Justice Bill 1983, Second Stage (Resumed), Wednesday, 16 November 1983, vol 345, no 12, col 2474. Therefore, it could be argued that as this Bill was in the pipeline for a
It can be discerned that despite the pressure for a more crime control driven approach to criminal justice matters as portrayed by the Gardaí, there remained those who continued to endorse a more due process orientated approach with regard to Ireland’s criminal justice system. This can be further evinced from the judiciary’s approach to the new bail provisions within the Criminal Justice Act 1984.

While the imposition of consecutive sentences acted as a method to deter accused persons from committing offences while on bail, the judiciary limited its effect when it held that one of these sentences could be a suspended sentence. In *The People (DPP) v Thomas Dennigan*, the Court held that it did have the power under s 11 when imposing a consecutive sentence to suspend that sentence in appropriate circumstances. Section 11 of the 1984 Act had not expressly prohibited this and therefore the Court was entitled to suspend a sentence where it thought fit. The effect of the 1984 Act was further qualified by a Court of Criminal Appeal decision which held that the totality of the sentence should be considered. In *The People (DPP) v Noel Healy*, the Court of Criminal Appeal held that in the case of serious offences, if the aggregate of consecutive sentences could be considered excessive, a court would be entitled to reduce the consecutive sentence passed by it accordingly. It is arguable that such an approach was not intended by the legislature. As the Law Reform Commission has pointed out – the obligation to consider the sentence in its totality clearly dilutes the punitive intent of the 1984 Act. This coupled with that fact that one of the sentences may be suspended reflects a due process and liberal interpretation by the judiciary to the administration of the 1984 Act.

Therefore, it appears that the legislature and the judiciary were at variance with regard to the bail provisions of the Criminal Justice Act 1984. The legislature was clearly endorsing a crime control centred approach to criminal justice matters in advocating the apprehension, prosecution and punishment of crime as the central aim. The judiciary on the other hand

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considerable amount of time, there was no need for the further debate and discussion that a White Paper would inevitably have created. Notwithstanding, there appeared to be a dearth of debate prior to this measure when one considers the debate prior to the Bail Act 1997.


792 ibid 254.

793 *The People (DPP) v Noel Healy* [1990] IR 388.

794 ibid 392.


were advocating a due process orientated approach highlighted by their misgivings over the usefulness of criminal sanctions.\footnote{ibid.}

**Ireland’s Distinctive Constitutional Values**

It is evident that the Criminal Justice Act 1984 did not provide for preventative detention in the bail context. During the debate around the 1983 Bill, Minister for Justice, Mr Noonan unequivocally accepted that there was a very serious problem regarding offences committed by persons on bail.\footnote{Dáil Éireann, Criminal Justice Bill 1983, Second Stage, Wednesday, 2 November 1983, vol 345, no 6, col 1261.} By not allowing for the likelihood of committing further offences criterion, Ireland was deemed out of line with international law as exemplified by the International Commission of Jurists in 1961.\footnote{Here, it was considered a fundamental criterion of criminal law that courts and magistrates should grant bail, except in the following cases. These cases included: a) in the case of a very grave offence; b) if the accused is likely to interfere with witnesses or impede the course of justice; c) if the accused is likely to commit the same or other offences; d) if the accused may fail to appear for trial.} Furthermore, the Mr Noonan endorsed England’s position on this issue, which provided for preventative detention in the bail context with the Bail Act 1976.\footnote{In 1984, the US Bail Reform Act provided for pre-trial preventative detention of a defendant. This Act authorises the pre-trial detention of an accused if there is clear evidence that no condition or combination of conditions of pre-trial release will reasonably assure the safety of any other person or the community.} However, the Minister for Justice qualified this endorsement by indicating that there remained a fundamental difference between England and Ireland when it came to the law. He said that in Ireland, the Constitution rules supreme and based on the \textit{O’Callaghan} decision, an Irish Court could not refuse bail on grounds that there was a likelihood that the accused would commit further offences while on bail.\footnote{Dáil Éireann, Criminal Justice Bill 1983, Second Stage, Wednesday, 2 November 1983, vol 345, no 6, col 1262.} Minister for Justice, Mr Noonan, conveyed that short of amending the Constitution, the Irish people must accept the present law in relation to the granting of bail and ‘work within it.’\footnote{ibid.} There was no call for an amendment to the Constitution made by Mr Noonan.\footnote{It will be recalled that Deputy Mitchell, in a Private Members’ Bill in 1982, made numerous proposals for reform to criminal law and procedure. The majority of these proposals were embodied in the Criminal Justice Bill 1983 but Deputy Mitchell’s call for a constitutional amendment to Ireland’s bail laws was virtually ignored by Minister for Justice, Mr Noonan. Mr Noonan did however indicate that if the bail problem continued to remain an issue, the question of a referendum would not be ruled out. Dáil Éireann, Criminal Justice Bill 1983, Committee Stage (Resumed), Thursday, 19 January 1984, vol 347, no 2, col 467.} Indeed, he directly
proclaimed that he did not envisage a situation in which he would support a referendum to amend the provisions of the Constitution.\textsuperscript{804}

Although Deputy Kelly encouraged the Minister for Justice to restrict the granting of bail by providing for a likelihood of committing further offences criterion to form part of the bail decision, the Minister for Justice refused to do so based on the danger that the Supreme Court would reject this type of legislation due to the history of the matter.\textsuperscript{805} Mr Noonan went on to point out that the Government ‘had decided’ that it was better to attempt the approach in the Bill.\textsuperscript{806} Instead of a referendum, he sought to introduce measures that would serve as a deterrent to those who commit offences while on bail.\textsuperscript{807} The Minister for Justice was not alone in recognising the gravity of a constitutional amendment to allow for preventative detention. Deputy Lenihan too acknowledged the effect of the \textit{O’Callaghan} decision, but concluded that a constitutional amendment would be a ‘rather heavy handed approach.’\textsuperscript{808}

It is evident that the Minister for Justice was restricted when considering the revision of Ireland’s bail laws. Due to constitutional constraints, Ireland was unable to follow both the US and the English approach with regard to bail matters without calling for a referendum on the matter. Therefore, it is contended that the Minister for Justice decided to work within the restrictions placed on Ireland’s bail laws. He did not call for a referendum on the matter but instead chose to improve rather than overhaul the bail system. The aim of the Criminal Justice Act 1984 was to deter people committing offences while on bail. The Act did not seek to introduce the likelihood of committing further offences criterion into Irish law. Instead, the Act attempted to amend Ireland’s bail legislation within the constitutional restrictions that existed at the time. The aim of the Act was that it serve as a deterrent to those who commit offences while on bail. The Act did not seek to restrict the granting of bail. This is an important distinction which intimates that the Minister for Justice was cognisant of Ireland’s

\textsuperscript{804} Dáil Éireann, Criminal Justice Bill 1983, Committee Stage (Resumed), Wednesday, 6 June 1984, vol 351, no 3, col 443.
\textsuperscript{805} Dáil Éireann, Criminal Justice Bill 1983, Committee Stage (Resumed), Thursday, 19 January 1984, vol 347, no 2, col 466.
\textsuperscript{806} ibid col 467.
\textsuperscript{807} According to Mr Noonan, in 1982, 7880 indictable offences were committed by such persons. Mr De Rossa disputed this figure however claiming that there were ‘virtually no statistics kept in relation to that.’ Mr De Rossa proceeded to call for more specific information to be made available on precisely what we are dealing with when we are talking about crimes committed while a person is on bail. Dáil Debates, Criminal Justice Bill 1983, Committee Stage (Resumed), Wednesday, 6 June 1984, vol 351, no 3, col 447.
\textsuperscript{808} Dáil Éireann, Criminal Justice Bill 1983, Second Stage (Resumed), Wednesday, 16 November 1983, vol 345, no 12, col 2465.
distinctive constitutional values. Instead of promoting the installation of pre-trial preventative detention in Irish law, the Minister for Justice preferred a constitutional alternative to deal with those that offend on bail.

It is significant that Minister for Justice, Mr Noonan, in bringing this crucial piece of legislation to the fore, discounted allowing for the likelihood of committing further offences criterion into Irish law. Despite it being called for on numerous occasions in the Dáil over the decades and implemented in the US and England, the Minister for Justice did not envisage its incorporation into Irish law due to the supremacy of the Irish Constitution. He went even further in proclaiming that he would not support a referendum to change the provisions of the Constitution in this regard. This stance is in complete contrast to that of Deputy Birmingham mentioned earlier who had suggested taking advantage of the upcoming referendum dealing with the protection of the right to life of the unborn child, and hold concurrently, a referendum ‘making sense’ of the laws of bail.

The Criminal Justice Act 1984 failed to silence those in favour of the installation of pre-trial preventative detention into Irish law nevertheless and it remained an oft-debated issue. Although the Criminal Justice Act 1984 sought to ameliorate the bail situation, it appeared to some that the Act did not go far enough and Ireland’s bail laws were again called into question in 1989 in the Ryan decision. Despite the DPP’s attempt to include the likelihood of committing further offences criterion as forming part of Irish law in Ryan, the judiciary continued to endorse the due process libertarian approach championed in O’Callaghan. The Ryan case will be addressed below.

The ‘Ryan’ Case

As previously expressed, the liberal approach endorsed in the O’Callaghan decision did not sit comfortably with everyone and attempts were made to have it over-turned. In Ryan v DPP, the applicant requested bail pending trial on a charge of burglary. The applicant was denied bail in the District Court and was remanded in custody on the ground that he would commit further offences if released on bail. The case was appealed to the High Court where Ryan’s application for bail was opposed by the respondent.
Bail was opposed on the ground that if the applicant was granted bail he would continue to engage in criminal activities. As there were no grounds for believing that the applicant would not turn up for his trial if granted bail, Hamilton P in the High Court, following *O’Callaghan*, was not required to consider this objection and granted bail. However, Hamilton P reserved his judgment on the likelihood of the applicant committing further offences criterion (pre-trial preventative detention).  

The respondent appealed to the Supreme Court to seek a decision departing from the *O’Callaghan* principles and it was permitted by Hamilton P to adduce evidence setting forth the respondent’s grounds that the applicant would continue to commit further offences if released. The crucial issue of the appeal was whether the Court in *O’Callaghan* were correct in deciding that the likelihood of committing an offence on bail criterion could never be a ground for refusing bail. The respondents chose to challenge the *O’Callaghan* principles on two alternative grounds: 1) The DPP asserted that the common law recognised a discretion to refuse bail based on the likelihood to commit further offences ground; and 2) The DPP asserted that the constitutionally protected right to life, bodily integrity and property which are affected by the commission of crimes confer a duty on the court to use its discretion, thereby preventing the commission of crimes.

In addressing the first ground upon which the DPP sought to challenge the *O’Callaghan* principles, Finlay CJ held that prior to 1922 there does not appear to be any decision in English or Irish case-law that the likelihood of committing further offences ground is a permissible ground for refusing bail. In fact, Finlay CJ considered the comments in *Ryan v DPP* [1989] IR 399, 404.

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810 ibid.
811 There were two appeals brought by the respondent against the decision of the High Court (The High Court had granted bail to the applicant pending trial on two separate sets of charges). According to Finlay CJ, the point of law said to arise in each case, is whether it is in the jurisdiction of the High Court to refuse an application for bail pending trial if it is satisfied that the applicant, if released on bail, would be likely to commit criminal offences before his trial. *Ryan v DPP* [1989] IR 399, 404.
812 *Ryan v DPP* [1989] IR 399, 406. It is significant that the DPP chose to rely on enumerated constitutional rights such as the right to life, bodily integrity and property in their argument to allow for pre-trial preventative detention in Irish law. It is arguable that the DPP was suggesting that the rights of the community should be placed above those of the accused. This is an interesting position for the DPP to assume and it is contended that this can be viewed as an example of a reorientation in Ireland’s constitutional values.
813 This can be contrasted with the statements of Deputy O’Donoghue when introducing the Private Members’ Fifteenth Amendment of the Constitution Bill 1995. Deputy O’Donoghue asserted: ‘[T]here was a significant body of jurisprudence in this country at the time the *O’Callaghan* decision was delivered which was of the opinion that the likelihood of further offences being committed ground was a legitimate matter to be taken into consideration by a court in deciding whether to admit an accused person to bail.’ Dáil Éireann, Private
Phillips (which considered the likelihood of committing further offences ground as a laudable consideration in a bail decision) as obiter and as comments which created no principles in Irish law. He held that there was no support for such a consideration in the common law.

In dismissing the second ground upon which the DPP sought to challenge the O’Callaghan principles, Finlay CJ stressed that ‘an intention to commit a crime, even of the most serious type, is not in our criminal law a crime itself’. He stated that, apart from the constitutional objection to any form of preventative detention, there were in fact other reasons for refusing it. Furthermore, it is significant that in his judgment, Finlay CJ, pointed out that references to the legal positions of other jurisdictions were of limited value as the court’s position derived from the Irish Constitution. He declared that as the courts were unable to create offences, they would categorically not detain an accused on suspicion of an intention which even in trial would not lead to his punishment. Finlay CJ in furthering this observation posited, ‘if such a power did exist in the courts, why should its exercise be confined to cases where the suspect is an applicant for bail’? He also referred to practical difficulties which would inevitably arise if such a ground was accepted, ie how should the intention be proved, and by what standard of proof? In addition, he questioned whether every bail application where this ground was advanced should take the form of a criminal trial. He continued in holding that:

The criminalising of mere intention has been usually a badge of an oppressive or unjust system. The proper methods of preventing crime are the long-established combination of police surveillance, speedy trial and deterrent sentences.

McCarthy J, in dismissing the respondent’s arguments held that the cases cited (which intended to convey that the common law provided for a likelihood of committing further offences ground) fell short of establishing the existence of such a common law rule. Curiously, McCarthy J indicated that although the English Court of Appeal considered that this ought to be the law, it appeared later on that they were unsure whether such a law existed in the common law and thereby enacted the Bail Act 1976.
McCarthy J held that pre-trial preventative detention ‘offends against a fundamental principle of the common law – the presumption of innocence.’\textsuperscript{820} When considering the constitutional argument, McCarthy J emphatically declared that, ‘[t]he pointing finger of accusation, not of crime done, but of crime feared, would become the test. Such appears to me to be far from a balancing of constitutional rights; it is a recalibration of the scales of justice.’\textsuperscript{821} It appears that McCarthy J considered that pre-trial preventative detention allows for the determination of guilt or innocence to be made too early in the criminal process and therefore the concept ignores the presumption of innocence. In sum, these judgments emphatically reject allowing for preventative detention in Irish law. The presumed effect of pre-trial preventative detention on the constitutionally recognised presumption of innocence played a large role in the learned judges’ arguments.

Although the installation of pre-trial preventative detention was again rejected as forming any part of Irish law in \textit{Ryan}, it is interesting to muse over why the DPP attempted to include this criterion as a consideration in the bail decision. An array of reasons could be suggested as to why the DPP appealed to the Supreme Court to depart from the O’Callaghan principles. I will offer two potential reasons why the DPP sought to depart from the O’Callaghan principles below.

\textbf{Why Depart from the O’Callaghan Principles?}

Firstly, the DPP may have been cognisant of the attitudes within the Dáil at that time. While the 1984 Act went someway to assuaging people’s concerns regarding the number of offences committed while on bail, there remained some underlying concerns.\textsuperscript{822} This can be evidenced from the Dáil debates in 1988 where it was requested of the Minister for Justice to refer the problem of crimes committed on bail to the Law Reform Commission to establish a realistic method within the Constitution of dealing with the bail situation.\textsuperscript{823} Despite the imposition of restrictive legislation pertaining to bail there were still calls for further amendments to Ireland’s bail laws by members of the Dáil.

\textsuperscript{820} ibid.
\textsuperscript{821} ibid 410.
\textsuperscript{822} In 1983 the number of offences committed by persons on bail was 8,295. In 1984 the figure was 6,338 and in 1988 the figure was 2,947. Dáil Éireann, Questions, Oral Answers, Crimes Committed by Persons on Bail, Wednesday, 30 May 1990, vol 399, no 4, col 780. Minister Burke gathered these figures from the Garda authorities.
\textsuperscript{823} Dáil Éireann, Questions, Oral Answers, Crimes by Persons on Bail, Wednesday, 14 December 1988, vol 385 no 7, col 1602.
Secondly, the DPP was aware of developing bail procedures in other common law countries, namely, England and Wales, and the US. In 1984, President Reagan signed into law the Comprehensive Crime Control Act 1984. This Act included the Bail Reform Act and the Sentencing Reform Act. The Bail Reform Act 1984 provided for preventative detention in the bail context. In short, the Act permits the pre-trial detention of an accused if there is clear and convincing evidence that ‘no condition or combination of conditions of pre-trial release will reasonably assure the safety of any person and the community.’

In *United States v Salerno*, the 1984 Act enabled a federal court to detain an accused person pending trial if the prosecution proved through clear and convincing evidence that no release provisions would reasonably ensure the safety of the community. Crucially, the majority of the Supreme Court upheld the constitutionality of the Bail Reform Act in *Salerno*. Rehnquist CJ, delivering the majority judgment held that the refusal to grant bail is not to be considered a punishment. When considering the due process clause of the Constitution, Rehnquist CJ found that punishment without trial violates substantive due process. However, he declared that Congress had not intended the Act to be punitive. Instead, the Act was to be viewed as regulatory. Through categorising the provision as regulatory rather than punitive, the Court was able to circumvent the question of due process rights.

In *Ryan*, Finlay CJ did concede that the judgment in *Salerno* would be of assistance if the Court was ever called upon to decide upon the constitutional validity of legislation which deals with the sort of extraordinary circumstances allowing for preventative detention referred to by Walsh J in *O'Callaghan*. Based on this, it could be argued that the DPP was mindful of the developments in bail law in the US around this time. Yet *Salerno* concerned itself with the constitutionality of actual legislation. This was not the situation in *O'Callaghan* or *Ryan*. Furthermore, it seems unlikely that the Irish judiciary could have

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824 Bail Reform Act 1984, 18 USC § 2142(e).
826 This decision was not without its critics with Marshall J along with Brennan and Stephens JJ dissenting. Marshall J declared that the Act violated the presumption of innocence. The judge pointed out that under the Bail Reform Act 1984, an untried indictment somehow acts to permit a detention based on other charges which, after an acquittal would be unconstitutional. He found it ‘inexcusable’ that an indictment could be turned into evidence. Marshall J’s disapproval of this punitive/regulatory dichotomy can be evinced from the following statement: ‘The absurdity of this conclusion arises, of course, from the majority’s cramped concept of substantive due process. The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority’s technique for infringing this right is simple: merely redefine any measure, which is claimed to be punishment as “regulation,” and, magically, the Constitution no longer prohibits its imposition.’ *United States v Salerno* 481 US 697, 717 (1987).
827 *United States v Salerno* will be dealt with in more detail in chapter 8.
allowed for pre-trial preventative detention in Irish law given the explicit protection for the right to liberty in the Irish Constitution.

The DPP also looked to the English approach with regard to preventative detention in the bail context when arguing for the likelihood of committing further offences ground in *Ryan*. The DPP argued that pre-trial preventative detention was indeed recognised by the common law. As depicted earlier, in English Courts from 1947 onwards, bail was increasingly being denied to persons with long criminal records, particularly for burglary. Atkinson J’s statements in *R v Phillips* were clearly a nod to preventative detention. Yet in *Ryan*, Finlay CJ considered the judgment in *R v Phillips* as extremely unsatisfactory and propounded that Atkinson J’s statements were clearly obiter. Pre-trial preventative detention was granted legislative recognition in England and Wales in the Bail Act 1976. The Bail Act 1976 provides in Part 1 of the First Schedule that for imprisonable offences the defendant may be refused bail if the court is satisfied that there are ‘substantial grounds for believing’ that the defendant, if released on bail, would commit an offence while on bail. Therefore, the Bail Act 1976 made express provision for the refusal of bail where there were reasons to believe that the accused would commit an offence while on bail.

It is posited that the DPP were aware of the legislative changes concerning bail in England and Wales as well as the heightened concern around bail banditry in Ireland. As there was a perceived increase in the number of offences committed while on bail in Ireland around this time, it is conceivable that the DPP sought to follow the English approach regarding offending while on bail in an attempt to remedy the problem.

This chapter examined the reforms in Ireland’s bail laws which were introduced as a means of tightening up on bail without resorting to a constitutional amendment to allow for preventative detention in the bail context. Yet the DPP’s approach in *Ryan* conveys that there remained manifest dissatisfaction over Ireland’s bail laws that could seemingly only be assuaged through the implementation of pre-trial preventative detention. The next chapter will provide a comprehensive discussion of the lead up to the bail referendum along with a detailed analysis of the constitutional amendment and subsequent legislation pertaining to bail.
Chapter 7 – The Bail Referendum

Some so-called civil libertarians, who live in Ivory towers somewhere in Utopia, argue there is no right to delimit personal liberty under our law.\(^{828}\)

Introduction

Chapter 6 examined how the legislature sought to amend Ireland’s bail laws without providing for pre-trial preventative detention in Irish law. Despite the introduction of legislation such as the Criminal Justice Act 1984, Ireland’s bail laws came under severe pressure in the mid-1990s from police, prosecutorial and political forces. This pressure resulted in a referendum allowing for a form of unprecedented preventative detention in Irish law.

Firstly, this chapter will examine the debates prior to the bail referendum. In order to provide a comprehensive analysis of the lead up to the referendum it is valuable to consider the range of Private Members’ Bills pertaining to bail matters that were tabled in the Dáil prior to the bail referendum. Specifically, these were: the Criminal Justice Bill 1994; the Criminal Law (Bail) Bill 1995; and the Fifteenth Amendment of the Constitution Bill 1995. Although there was major cross party support for a bail amendment providing for the installation of preventative detention, there were also those who expressed their reservation. Despite documented reservation and a display of concern over the effect said bail amendment would have on civil liberties, the bail referendum of November 1996 passed an amendment providing for pre-trial preventative detention in Irish law. Consequently, this chapter considers the constitutional amendment which was enacted in the form of the Bail Act 1997. Although the bail amendment and subsequent legislation served to restrict Ireland’s bail laws, there remained continued dissatisfaction. Lastly, this chapter will review further legislative measures which have resulted in firmly installing pre-trial preventative detention into Irish law, namely, the Criminal Justice Act 2006 and the Criminal Justice Act 2007.

The Referendum Debate

It is worth reiterating that the perceived inadequacy over Ireland’s bail laws was not an issue that first raised its head after the murder of Veronica Guerin. The Government on many

occasions in the Dáil had stridently articulated that Ireland was distinguished as having the most lax bail laws in the world. This laxity or liberal approach was attributed to the O'Callaghan decision. Indeed, in 1991, the Garda Representative Association called to have Ireland’s bail laws restricted.

Yet during the early 1990s, despite members of the Gardaí and the Dáil proclaiming that Ireland was distinguished for having the most lenient bail laws in the world, the Minister for Justice, Ray Burke, continued to rely on the positive impact that the Criminal Justice Act 1984 was having on bail offending and thereby promised to ‘monitor the situation’ instead. In short, he appeared to be apprehensive of going down the constitutional amendment route to provide for the installation of pre-trial preventative detention.

In 1993, Fianna Fail remained in power albeit with Maire Geoghegan-Quinn as Minister for Justice. The Minister for Justice was asked on a number of occasions whether she had any plans to modify Ireland’s bail laws in view of reports that habitual offenders where exploiting the existing bail regime. It is noteworthy that the Minister’s response to such questions was attentive to Ireland’s traditional constitutional values. In response to a question regarding Ireland’s bail laws in 1994, the Minister for Justice responded:

> While there are clear disadvantages with the operation of our present bail laws, I am sure most Deputies would accept that it would be equally unsatisfactory, in terms of principle, to bring about a situation where, irrespective of the seriousness of offences likely to be committed, a general presumption would exist against the granting of bail. This could result in the highly undesirable situation where a large number of unconvicted persons, many of whom may subsequently be found not guilty, would be incarcerated. In this

829 Dáil Éireann, Questions, Oral Answers, Crimes Committed by Persons on Bail, Wednesday, 30 May 1990, vol 399, no 4, col 780. Here, Deputy O’Keeffe of Fine Gael can be observed asking the Fianna Fail Minister for Justice, Ray Burke, for a constitutional change to Ireland’s bail laws to be implemented in order to deal with Ireland’s lax bail laws. The Minister for Justice admitted that crimes committed on bail were a concern but stated that there would be no constitutional amendment to Ireland’s bail laws within the suggested timescale. The Minister for Justice appeared to be of the opinion that the Criminal Justice Act 1984 was operating effectively as there had been a drop in the number of offences committed by persons on bail from 8,295 in 1983 to 2,647 in 1989. Deputy Durkan of Fine Gael also called for a constitutional amendment ‘as a matter of urgency.’ Dáil Éireann, Estimates 1990 (Resumed), Vote 19, Office of the Minister for Justice (Revised Estimate), Thursday, 12 July 1990, vol 401, no 6, col 1850. Deputy Durkan’s disquiet over Ireland’s bail laws can be further gleaned from a later debate where he stated: ‘I referred earlier to the bail laws. Is anybody in this House satisfied with our bail laws? Can anybody honestly say to themselves that it is alright for a multiplicity of crimes to be committed by an individual and each time the individual goes back to court he is released on bail? Long ago people should have asked if the Garda are expected to pursue such an individual. We can blame the judges and the Garda. Where is the sense of going before judges if, under the law, we say: “Given this particular situation and having regard to the Constitution, your case history and so forth, it is proper that you shall be released to carry on until such time as you are proved guilty”? Surely there has to be a better way.’ Dáil Éireann, Criminal Justice (No. 3) Bill, 1993, Second Stage, Thursday, 9 December 1993, vol 437, no 1, col 70-71.


831 ibid col 1961.
context, it is worth mentioning that other European countries are endeavouring to reduce the number of unconvicted persons in custody on the grounds of basic human rights.832

The Minister for Justice did reveal some concern regarding the mechanics of Ireland’s bail laws nevertheless. This can be evinced from the fact that she requested the Attorney General to urgently secure the advice of the Law Reform Commission on the options available in order to bring about a change to the laws on bail.833 During this time the Opposition made numerous calls to amend Ireland’s bail laws. Significantly, they argued that the Government of the hour was employing a ‘soft liberal approach’.834 During a Private Members’ Motion in May 1994, Deputy Jim Mitchell (who tabled the motion) proposed that the Government should hold a referendum on bail in order to ‘restore the courts the discretion they had before the Supreme Court decided otherwise’.835

**The Criminal Justice Bill 1994**

In 1994, the Progressive Democrats (PD) (Opposition) introduced a Bill which sought to amend Ireland’s bail laws in a novel way by circumventing the need for a constitutional amendment. Deputy McDowell (who moved the Bill) conceded that it was not possible as a result of *O’Callaghan* and the Irish Constitution to deny a person bail based on a suspicion that he will commit a further offence while on bail. He went on to acknowledge that without a referendum there was no scope for preventative detention of this kind.836 The PD’s Bill propounded that courts should be allowed to make bailsman sureties for the good behaviour of persons admitted to bail pending trial.837 The effect of this was to render the bailsman liable to forfeit his bail where the accused who has been admitted to bail abused his liberty to commit further serious offences. The rationale behind this was that people, who were habitual offenders, would find it difficult to obtain surety for their good behaviour and would therefore find themselves under pressure from their bailsman not to commit further crime.

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833 ibid col 712. It appears that Minister for Justice, Mrs Geoghegan-Quinn was wary of introducing legislative provisions which would amend Ireland’s bail laws due to the complexities in the overall area of the granting of bail. The Minister for Justice was cautious to introduce legislation where she had serious doubts over its constitutionality. Therefore, the Mrs Geoghegan-Quinn referred the issue to the Law Reform Commission as it was felt that that the Commission was uniquely placed to advise on the matter.
835 ibid col 438.
837 ibid.
Alternatively, the accused would find it difficult to get a bailsman in the first instance, ie if the bailsman believed that the accused was likely to commit further crime he was unlikely to act as bailsman. Although Deputy McDowell argued for a change in Ireland’s bail laws he was ‘dubious about the desirability of a Referendum.’ He considered it a more sensible approach to deny bail when someone will not go bail for a person whom he believes will commit an offence while on bail rather than denying bail based on Garda evidence that there is a fear the accused would commit a further offence while on bail. It is posited that Deputy McDowell appeared to be advocating for a more due process orientated approach to criminal justice matters. Yet there remained those who continued to endorse a more crime control directed position.

Fine Gael Deputy, Gay Mitchell welcomed the provisions put forward in the PD’s Private Members’ Bill. However, Deputy Mitchell argued that the provisions did not go far enough. He went on to state that ‘[t]he objective of the Fine Gael Fifteenth Amendment of the Constitution (No 1) Bill, 1994 which was recently put forward, proposes to allow courts greater discretion to admit or refuse to admit any person or persons to bail pending trial.’

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838 Deputy O’Donnell of the PD’s made some interesting observations during this debate. She pointed out that the ‘principles which were meant to support the criminal justice system and protect human rights and civil liberties are an obstruction to real justice.’ It is arguable that such rhetoric smacks of a crime control orientated approach.

839 Dáil Éireann, Private Members’ Business, Criminal Justice Bill, 1994, Second Stage (Resumed), Wednesday, 15 June 1994, vol 443, no 8, col 1946. It is evident throughout the bail debate that the majority of the Dáil were pushing for a crime control orientated agenda. Crime control was presented as the panacea to curbing increasing crime rates and this result orientated approach appeared to trump Ireland’s traditional due process approach. For example, consider the words of Deputy Flood during the Fianna Fáil Bail Bill in 1995: ‘Because of the changing trends and the complexity of criminal activity we must be prepared to sacrifice some of our hard won freedoms if we are to support the institutions and bodies whose responsibility it is to provide law and order and protect society.’ Dáil Éireann, Private Members’ Business, Criminal Law (Bail) Bill, 1995, Second Stage (Resumed), Tuesday, 9 May 1995, vol 452, no 5, col 1172.


841 This sentiment was further bolstered by Deputy Lenihan who indicated that: ‘No amount of thinking in regard to the amount of bail required or no amount of mechanical devices in legislation can get over the fundamental proposition in the Supreme Court judgment under the direction of the late Cearbhall O’Dalaigh as Chief Justice. It has proved to be the wrong decision. A constitutional amendment would be required to rectify it. That is the only way we can approach the problem at this stage’. It is noteworthy that Deputy Lenihan goes on to state that a constitutional amendment would require that the matter should be within the discretion of the courts. According to Deputy Lenihan, such was the law until the Supreme Court decision in 1966. It can be deduced from this that Deputies were insinuating that prior to O’Callaghan the courts could deny bail on the basis that the accused was likely to reoffend while on bail. There appears to be a slight amount of confusion here. Dáil Éireann, Private Members’ Business, Criminal Justice Bill, 1994, Second Stage, Tuesday, 21 June 1994, vol 444, no 1, col 186.

842 Dáil Éireann, Private Members’ Business, Criminal Justice Bill, 1994, Second Stage, Tuesday, 14 June 1994, vol 443, no 7, col 1678. The Bill introduced by Fine Gael sought to amend Article 38.1 of the Constitution by
Indeed, Deputy Mitchell referred to a recent case where according to press reports, a ‘notorious bail bandit’ charged with over twenty separate robberies was back on the streets after being caught during a brutal raid. Deputy Mitchell stated that as it was clear that this man was a danger to society courts should have the power to remand such a man in custody. It is clear that through referencing anecdotal evidence which depicted the exploits of ‘notorious’ bail bandits, Irish criminal justice policy was pursuing a populist approach to crime measures as exemplified by Garland.

The 15 December 1994 saw a change in government and with that a change in Opposition. This new Government was a rainbow coalition Government, featuring Fine Gael, Labour and Democratic Left. Fianna Fail and the Progressive Democrats took up the Opposition seat. The laxity of Ireland’s bail laws continued to be called into question with Deputy John O’Donoghue, the justice spokesman for Fianna Fail, assuming the law and order mantle. In occupying this role, he questioned the efficacy of the Criminal Justice Act 1984. It had begun to emerge that courts were not always imposing consecutive sentences on those offenders who committed an offence while on bail.\(^843\)

**The Criminal Law (Bail) Bill 1995**

In April 1995, Deputy O’Donoghue moved the Criminal Law (Bail) Bill.\(^844\) Despite Deputy O’Donoghue’s unreserved calling for a bail referendum, the Fianna Fail Bill (like that of the PD Bill) aimed to deal with bail reform within its constitutional parameters.\(^845\) Deputy O’Donoghue used the perceived increase in crime as a propellant in seeking to amend Ireland’s bail laws.\(^846\) Deputy O’Donoghue declared that the *O’Callaghan* decision was adding three new sections. It was intended that the amended Article would read: ‘The courts in their discretion may admit or refuse to admit any persons to bail pending trial. Article 38.1.3º: In exercising the discretion given to it by this section, a court may take into account such matters as it thinks fit. However, nothing in this Constitution shall operate to prevent a court from refusing to admit any persons to bail where, in the opinion of the court, such person is likely to commit further offences while on bail. Article 38.1.4º: Where bail has been refused to any person pending trial, that person shall have the right to an early trial.’ *Dáil Éireann, Private Members’ Business, Criminal Justice Bill, 1994, Second Stage, Tuesday, 14 June 1994, vol 443, no 7, col 1681.*

\(^843\) *Dáil Éireann, Questions, Oral Answers, Court Statistics, Wednesday, 8 February 1995, vol 448, no 7, col 2701/95.*


\(^846\) The year 1994 saw for the first time in the history of the State more than 100,000 indictable crimes committed.
‘outdated’ as the nature of crime had changed since 1966. He employed the example of drug crime to convey this. According to Deputy O’Donoghue, the concept of drug addiction was foreign in the age of O’Callaghan. He argued that 1980s and 1990s Ireland had witnessed the menace of evil drug addiction stretch its way into every city, town and village in Ireland. Deputy O’Donoghue attempted on countless occasions to discredit and denigrate the rainbow coalition Government by intimating that there was a division in opinion regarding Ireland’s bail policy. In calling for change in Ireland’s bail policy, Deputy O’Donoghue rarely relied on any empirical data instead relying on colourful tales of

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848 The Garda Síochána Committee on the family published a Report in October 1995. The Report found that drugs had replaced terrorism as the number one threat to the security of the State. Dáil Éireann, Private Members’ Business, Misuse of Drugs Bill, 1996, Second Stage (Resumed), Tuesday, 6 February 1996, vol 461, no 1, col 285.
849 Deputy O’Donoghue referred to the Minister for Justice, Nora Owen’s appearance on RTE’s ‘Farrell’ programme. Here the Minister for Justice had said that there would be a referendum on bail in the autumn of 1995. Deputy O’Donoghue asked the Minister for Justice whether she had the official backing of her Government colleagues when announcing the referendum. Deputy O’Donoghue stated: ‘The absence of the Minister from the “Prime Time” programme has reinforced the view held by many in this House that since she embarrassed the Government by announcing an unauthorised referendum, she has been muzzled – and the Tánaiste appears to hold the key. The people deserve better – whatever about the Tánaiste – than a Minister for Justice who is on political probation, guarded by a division of handlers, manager and advisors lest she upstage the Tánaiste or give an unattributable interview as to the full extent of her admiration of the Tánaiste and his methods.’ Dáil Éireann, Private Members’ Business, Criminal Law (Bail) Bill, 1995, Second Stage, Wednesday, 3 May 1995, vol 452, no 3, col 655. Later Deputy Ahern of Fianna Fail made similar disparaging remarks. He said: ‘I commend Deputy O’Donoghue on introducing this Bill which is a major contribution on two levels, first in addressing the issue of bail which the Minister for Justice handled disastrously. Without adequate preparation or even the courtesy of seeking the opinion of her Cabinet colleagues, she promised to hold a referendum on the issue of bail but not long afterwards she realised the blunder and since then she has tended to remain silent on the issue. I hope this is not indicative of her actions behind the scenes. ‘Dáil Éireann, Private Members’ Business, Criminal Law (Bail) Bill, 1995, Second Stage (Resumed), Tuesday, 9 May 1995, vol 452, no 5, col 1188. Deputy O’Keeffe later echoed similar sentiments: ‘What are people to think when the Minister states publically that she intends to hold a referendum on this matter and is then silenced by the lord and master, the Tánaiste and Minister for Foreign Affairs, Deputy Spring? How can the people have confidence in a Government in which there is so much dissention of the basic measures which need to be taken to reduce the level of crime on our streets? There is no cohesive effort being made by the Government to deal with this problem, it has no outspoken and unanimous view on it. The public is well aware of this and that is why this Bill assumes such importance. Since the Government have come into office five months ago we have heard nothing but announcements about reviews, hiring specialists and carrying out research programmes, all of which lead to procrastination rather than urgently required determined action. In many ways the Government has failed to take a lead in the fight against crime, to implement proposals, to take initiatives or put together any cohesive policy.’ Dáil Éireann, Private Members’ Business, Criminal Law (Bail) Bill, 1995, Second Stage (Resumed), Tuesday, 9 May 1995, vol 452, no 5, col 1192-1193. During a Crime Prevention Prison Accommodation Motion in June 1995, Deputy O’Donoghue again criticised the Government for its apparent lack of consensus: ‘The Minister has publically promised to introduce vital legislation in the area of bail without even consulting with Cabinet. Perhaps not surprisingly her Cabinet colleagues have responded badly to her acting in this manner and have largely isolated her. As a result she has been forced to withdraw her only meaningful policy which was to increase the number of prison places by setting up a new facility in Castlerea. What has happened to that project? The rug has been pulled out from under the Minister by her fellow Ministers and we are told that the project is now on hold.’ Dáil Éireann, Private Members Business, Crime Prevention, Prison Accommodation, Motion (Resumed), Wednesday, 28 June 1995, vol 455, no 2, col 644-645.
inveterate bail offenders such as ‘Tony Felloni’. It could be argued that Deputy O’Donoghue presented the revision of Ireland’s bail policy as the panacea to the growing crime rates and his planned modification of Ireland’s bail laws served as a path to his political success. It is arguable that Deputy O’Donoghue introduced this Bill with a certain amount of scaremongering and reliance on anecdotal evidence. When introducing the bail Bill he boldly stated:

Since it cannot lead I invite the Government to at least follow. I invite it to consider the plight of tens of thousands of people who have become prisoners of terror in their own homes. I invite it to consider the thousands of small businesses whose existence is threatened by the ever escalating costs of theft and vandalism. I invite it to think of the victim rather than the perpetrator and to support Fianna Fail’s initiative.

When introducing this Bill, Deputy O’Donoghue continually referred to the Government’s ‘inertia’ over bail reform. In short, Deputy O’Donoghue attempted to push through the Fianna Fail bail Bill by vilifying his opponents. He considered the only reason his Bill was

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850 These statements are buttressed by comments made by Deputy Flanagan in the Fianna Fail Fifteenth Amendment to the Constitution Bill 1995. Mr Flanagan stated: ‘In the context of criminal law, it is extraordinary that for the fifth time in 12 months we are discussing a motion or a Bill on the question of bail. One would think that solving the bail difficulties would be the solution to the problem of serious crime. The issue of bail is a serious one, but it is a very small component of the criminal law. I am becoming weary of speaking on bail in Private Members’ time…. I do not believe that Deputy O’Donoghue or his colleagues are so naïve as to think that a change in the bail laws will solve the problem of crime. If we accept that Deputy O’Donoghue and his colleagues are so naïve, we must examine the political motivations behind their Private Members’ Bill.’ Dáil Éireann, Private Members’ Business, Fifteenth Amendment of the Constitution Bill, 1995, Second Stage (Resumed), Tuesday, 3 October 1995, vol 456, no 3, col 849-850. Deputy Ferris in a Private Members’ Bill in 1996 echoed similar sentiments: ‘The last person the Minister would like to go into battle on her behalf is Deputy O’Donoghue. The reality is that Deputy O’Donoghue cares little about any of these issues. The issue of bail is his path to political stardom.’ Dáil Éireann, Private Members’ Business, Prosecution of Offences and Punishment of Crimes Bill, 1996 Second Stage (Resumed), Wednesday, 6 March 1996, vol 462, no 6, col 1730.

851 Fianna Fail used these scare-mongering tactics on a number of occasions. On the 16 October 1996, Deputy Sean Haughey colourfully described the ‘Tony Felloni’ case: ‘I draw Members’ attention to the Tony Felloni case where it emerged that he was repeatedly granted bail over a three year period before finally being jailed earlier this year for 20 years for heroin offences. He was a major heroin dealer and the litany makes for shocking reading... The trial is over now and he has been jailed for 20 years, but it shows how the major organised criminals and drug barons are abusing our liberal bail regime. It is obvious that during the time that major drug dealers are out on bail, they continue to plan and execute some of their major crimes. That is a situation that any decent society cannot tolerate. Examining that example alone, we can see how necessary it is for an extension to the bail law regime and the occasions when a judge can refuse it.’ Dáil Éireann, Sixteenth Amendment of the Constitution Bill, 1996, Second Stage (Resumed), Wednesday, 16 October 1996, vol 470, no 2, col 252. Also, in the ‘Letters to the Editor’ section of the Irish Times, Austin Kenny, editor of the Garda News, The Association of Garda Sergeants and Inspectors, proclaimed that Tony Felloni ‘enjoyed the full liberty of our crazy bail situation in spite of being hauled before the courts on several occasions by garda officers who could be forgiven for reflecting angrily on the asinine situation they were forced to endure.’ Austin Kenny, ‘Powers and Safeguards’ The Irish Times, (Dublin, 10 July 1996) 13.

852 This is clearly illustrative of a victim-orientated approach and a reorientation in Ireland’s approach to criminal justice.
rejected was down to ‘mean spirited political opportunism’. Deputy O’Donoghue’s bombast and political fustian was copious.

While it is evident that Deputy O’Donoghue employed a certain level of scare tactics and political bombast in introducing the Bail Bill, it is important to note that the debate around Ireland’s bail laws was honestly intended (for the main part at least) and responding to a real or perceived problem. There was a significant increase in crime levels in 1990s Ireland. One will recall that the year 1994 saw for the first time in the history of the State more than 100,000 indictable crimes committed. Moreover, Ireland’s bail laws were considerably more liberal than their common law counterparts. The danger of drugs and drug-related crime was relatively unknown in the O’Callaghan era. Therefore, while it may be suggested that Deputy O’Donoghue was guilty of politic posturing, some truth lay behind his vociferous statements.

Despite Deputy O’Donoghue’s best efforts, Minister for Justice, Nora Owen, like her predecessor, Máire Geoghegan-Quinn, rejected the Criminal Law (Bail) Bill. Minister for Justice, Nora Owen indicated that the Government was awaiting the Report from the Law Reform Commission on the law on bail. Moreover, the Minister for Justice stated that all advice available to her pertaining to bail issues suggested that any effective changes would require a constitutional amendment.

**The Fifteenth Amendment of the Constitution Bill 1995**

The disquiet over Ireland’s bail laws remained nonetheless. In response, Fianna Fail introduced another Private Members’ Bill entitled the Fifteenth Amendment of the Constitution Bill on the 27 September 1995. It was that same day the long awaited Law Reform Commission Report was published. The Report noted that ‘by international

853 Dáil Éireann, Private Members’ Business, Criminal Law (Bail) Bill, 1995, Second Stage (Resumed), Wednesday, 10 May 1995, vol 452, no 6, col 1460. After declaring that the Government rated political expediency and opportunism over the welfare of individuals in society, Deputy O’Donoghue went on to proclaim: ‘This is not acceptable for the Minister or Government Parties and it is something of which they should be ashamed. I wish to make very clear that this will not be the last constitutional Bill Fianna Fail will bring before the House to deal with crime. We are sick and tired of indolence, lethargy and flimsy excuses.’ Dáil Éireann, Private Members’ Business, Criminal Law (Bail) Bill, 1995, Second Stage (Resumed), Wednesday, 10 May 1995, vol 452, no 6, col 1460. Deputy O’Donoghue continued his lengthy attack on the Government in a Private Members’ Crime Prevention Bill. He declared: ‘The Government has sought to fight crime with an excuse in one hand and a committee in the other. It has become a collective Billy Bunter forever waiting for a postal order from the Law Reform Commission, a perpetual Godot stranded in a barrel of indecision, awaiting the arrival of a policy it can plagiarise.’ Dáil Éireann, Private Members’ Business, Crime Prevention/Prison, Accommodation, Motion, Tuesday, 27 June 1995, vol 455 no 1, col 246.
standards, Ireland remands few persons in custody pending trial.’ The Commission considered the Irish approach to bail as unusual in comparison with other common law jurisdictions, characterising Irish law as ‘unusually restrictive’ in respect of matters that may constitute grounds for refusing bail. On the same day the Law Reform Commission Report was introduced, Deputy O’Donoghue introduced the aforementioned Private Members’ Bill. He stated:

Any decision to seek an amendment of the Constitution cannot be taken lightly or without substantial cause. The Constitution is the fundamental law of this State. It has the authority of the people. It is a statement by them of the manner in which they wish their society to be ordered. Since 1937, this House has considered seeking the approval of the people to have their Constitution amended on only 14 occasions. The rarity of Bills of this nature is powerful evidence of the fact that the Constitution has served us well. Any person moving a Bill which proposes an amendment of the Constitution carries an onus to establish to the satisfaction of this House, and ultimately the people, that the present constitutional position is defective or deficient to an extent that causes a real and substantial injustice in society.

Fianna Fail introduced the Bill in a manner which conveyed that the Constitution, as it then stood, was deficient in some way. Deputy O’Donoghue propounded that the body of constitutional jurisprudence that had accumulated over the past thirty years was centred on the rights of accused persons. He advocated for a more victims’ rights based approach and declared that an amendment to Ireland’s bail laws would provide this.

Deputy O’Donoghue called for the balance to change in favour of a more victim-oriented approach which he considered struck, ‘the correct balance between protecting rights of individuals and safeguarding the common good.’ In a way, Deputy O’Donoghue sought to turn the right to liberty, as it was then perceived, on its head. He stated that the right to liberty was not a permit to plunder and pillage and that it carried with it duties and responsibilities. In short, he was clearly intimating here that the right to liberty as it then stood was solely applicable to the perpetrators of crime and not to the victims. Deputy O’Donoghue appeared

856 ibid.
857 Deputy O’Donoghue stated: ‘The Constitution is a document which exists for the protection of citizens and society; it does not exist exclusively for the benefit of persons charged with criminal offences. The Constitution ought to exist as a sword for the advancement of righteousness and justice as well as a shield for the protection of the accused.’ Dáil Éireann, Private Members’ Business, Fifteenth Amendment of the Constitution Bill, 1995, Second Stage, Wednesday, 27 September 1995, vol 456, no 1, col 242. This is clear evidence of the demonstrable shift that Ireland’s criminal justice policy was experiencing.
to be implying that the amendment would effectively ‘give back’ the rights that law-abiding citizens once had.

It can be deduced from the foregoing commentary that Deputy O’Donoghue advocated a more victims’ rights oriented approach to criminal justice measures. One will recall from chapter 1 that Packer’s typology is considered outdated in certain respects as it fails to consider victims’ rights. In short, Packer’s models are largely premised on the relationship between the citizen and the state and not between two citizens that is mediated by the state. Garland on the other hand specifically refers to victims’ rights within his indicia of transformation.\(^{859}\) Therefore, while Deputy O’Donoghue’s approach cannot be presented as crime control in flavour within Packer’s models, it can be perceived as falling within the ‘crime control complex’ as elucidated by Garland. Kilcommins has described the emergence of victims’ right in the Irish criminal justice system in the following terms:

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\text{[T]he Irish criminal process is increasingly having to accommodate the voices of victims/witnesses within a complex matrix of competing tensions that include the state, society and accused/offenders. Of course, upgrading the status of the victim from “nonentity” to “thing” is a laudable and necessary tactic. The danger is, however, that the momentum of this more inclusionary strategy will contribute to a reprioritisation of commitments, to a “pendulum swing” between offender orientated and offence oriented sentencing policies.}\]

Furthermore, Deputy O’Donoghue correctly indicated that the law as it then stood did not permit a court to remand a person charged with a criminal offence in custody even if the court is satisfied that the accused person is likely to commit a criminal offence if released (pre-trial preventative detention). What is interesting however is the significance Deputy O’Donoghue placed on Murnaghan J’s judgment in \textit{O’Callaghan}. In \textit{O’Callaghan}, Murnaghan J had included the likelihood of committing further offences criterion as one of the grounds a court could take into consideration when ruling on a bail decision. In fact, Deputy O’Donoghue cited Justice Murnaghan’s judgement in order to ‘demonstrate that there was a significant body of jurisprudence in this country at the time the \textit{O’Callaghan} decision was delivered which was of the opinion that the likelihood of further offences being committed ground was a legitimate matter to be taken into consideration by a court in

\(^{859}\) One will recall that Garland’s indicium number 4 refers to the return of the victim to centre stage.

deciding whether to admit an accused person to bail.  

Deputy O’Donoghue was effectively stating that Irish courts, prior to the O’Callaghan judgment, allowed for pre-trial preventative detention and that Murnagahan J was simply following precedent when including it as a consideration in the bail decision. Deputy O’Donoghue appeared to be arguing that a constitutional amendment would merely provide the courts with a bail restriction that it had previously employed. While Deputy O’Donoghue may have genuinely believed that Irish courts prior to O’Callaghan consistently employed the likelihood of committing further offences criterion in a bail decision, it is understood from previous chapters that this was not exactly the case. Although Murnagahan J did in fact state, in the High Court in O’Callaghan, that he was enumerating the principles upon which he had acted upon in the past, there was no mention of such a criterion in Purcell or the leading criminal textbook at that time. Therefore, it is submitted that, outside of Murnaghan J’s judgment, there was little endorsement for a likelihood of committing further offences criterion in Irish law pre-O’Callaghan and Deputy O’Donoghue was somewhat mistaken in his assertion.

Despite Deputies expressing their doubt over a constitutional amendment during the debate over the Bill, Deputy O’Donoghue paid these reservations little attention. Instead, he proclaimed that there were plentiful amounts of precedent that delimited the right to personal liberty in Irish law. He used examples such as s 30 of the Offences of the State Act 1939 and the Mental Treatment Act to further bolster his argument. It is notable that Deputy O’Donoghue referred to the dictum of Walsh J in O’Callaghan where he indicated that personal liberty could be curtailed ‘in the most extraordinary circumstances carefully spelled out by the Oireachtas’. Deputy O’Donoghue likened these ‘extraordinary circumstances’ to the increasing crime rates Ireland was experiencing. It is arguable that Deputy O’Donoghue

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862 Deputy O’Donoghue referred to those who cast doubt in the following terms: ‘Some so-called civil libertarians, who live in Ivory towers somewhere in Utopia, argue there is no right to delimit personal liberty under our law.’ Dáil Éireann, Private Members’ Business, Fifteenth Amendment of the Constitution Bill, 1995, Second Stage (Resumed), Wednesday, 4 October 1995, vol 456, no 4, col 1165.
863 Parallels can be drawn between these statements and the judgment in United States v Salerno. In Salerno, the Supreme Court noted that there are other situations in which the Court has held that public safety trumps civil liberties. These situations include; detaining enemies in times of war; detaining persons in times of insurrection; detaining resident aliens prior to deportation; detaining mentally unstable individuals; and detaining dangerous defendants who are incompetent to stand trial. United States v Salerno 481 US 739, 748 (1987).
864 The People (AG) v O’Callaghan [1966] IR 501, 517.
implied that Walsh J had envisaged a time when pre-trial preventative detention would form part of Irish law, and the time was now. 865

**Due Process v Crime Control**

Despite Minister for Justice, Nora Owen rejecting the Fianna Fail Bill, it is fair to say that there was large cross party support for action to remedy the ‘deficiencies’ in Ireland’s bail laws. As previously mentioned, soon after Minister for Justice, Nora Owen was appointed she announced that there would be a bail amendment. However, there appeared to be some dissention among her Cabinet colleagues regarding the matter. For example, representatives in the Labour party were concerned that the presumption of innocence was too fundamental a right to tinker with – thereby advocating a more due process oriented approach to criminal justice policy. 866

While such discord was vociferously denied by the Minister for Justice, there were occasions in the Dáil where members expressed their reservation over a bail amendment. For example, Deputy Walsh spoke instead of a ‘long term solution’:

> If we make our bail laws stricter there is no guarantee that crime committed by persons released on bail will be reduced significantly. In Britain where the bail regime is stricter, a higher proportion of crime is committed by persons on bail than is the case here. The Garda estimate that 9 per cent of all detected crime in Ireland is carried out by persons while on bail. Concern has also been expressed about the early release of prisoners serving long sentences and the crimes committed by them. Regulating bail is not the only solution to the problem. Nothing less than a radical overhaul of the prison service and measures to speed up the criminal court process will be the long term solution. 867

Deputy McDowell cast doubt over the impact a constitutional amendment would have on the presumption of innocence. He said:

> I suspect there is a danger of throwing out the baby with the bathwater. Our legal system, for that matter, our concept of democracy, rest on the presumption of innocence for the accused. In the words of the Supreme Court, punishment starts with conviction, not beforehand. To deny people bail on the recommendation of the Garda treads on this concept. In France and Italy and many other mainland European jurisdictions, upwards of 40 per cent of people in prison have not been convicted of any offence. We will be aware from our experience of Irish prisoners abroad that many prisoners spent a lengthy period

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Deputy Lynch questioned the potential efficacy of a bail amendment:

There is no doubt that our bail laws are being abused, but to what extent is the abuse of bail a significant factor in the mounting crime figures, and to what extent have we latched on to the bail issue as an easy answer? The rate of offences committed by people on bail has stabilised at around 9 to 10 per cent, yet in England, which has far tighter bail restrictions, the rate is about 17 per cent. We should bear that in mind, because we like to quote statistics from England in connection with all our other ills but refuse to recognise statistics such as those I quoted. The objective evidence is that restricting bail laws has little effect in crime figures.

Deputy Lynch offered a different solution to solve bail offending which culminated in reducing the delays between charge and the accused’s appearance at trial. The rationale behind this was that if people were tried quickly they would be less likely to reoffend while on bail. Deputy Lynch concluded in stating:

In an era of spiralling crime rates we are forced to weigh individual liberties against the public good, but there is no evidence that the introduction of preventative custody would have any effect on the crime rates. In the absence of such evidence I am not prepared to endorse any further restrictions on the granting of bail.

Deputy Flanagan of Fine Gael also expressed some uncertainty with tampering with Ireland’s bail laws. He declared that before the Government consider changing the bail laws they should first provide a remand centre and deal with the delays in the trial process. Like Deputy Walsh, he pointed out that, ‘Although changing our bail laws is important, it represents but a small component in the overall programme to tackle increasing rates of crime. There is no

868 Deputy McDowell went on to look to the laws in Britain to further illustrate his reservations: ‘To quote my Labour colleague in Britain, Tony Blair, the leader of the Labour Party, there is no point just being tough on crime; we also have to be tough on the causes of crime. We would do well to look to Britain to appreciate their experience. Their laws on bail are more stringent than ours. The rate of offending while out on bail is also higher than ours.’ Dáil Éireann, Private Members’ Business, Fifteenth Amendment of the Constitution Bill, 1995, Second Stage (Resumed), Wednesday, 4 October 1995, vol 456, no 4, col 1134. However, Deputy McDowell later changed his mind: ‘In regard to the point made in this Bill, I would have been one of those who, until recently, would have said we should jealously guard our civil libertarian record and that we should not make any amendment to the bail laws. I confess I have changed my mind and having examined it carefully I believe there are certain limited circumstances where we should increase the powers of the courts to refuse bail.’ Dáil Éireann, Private Members’ Business, Fifteenth Amendment of the Constitution Bill, 1995, Second Stage (Resumed), Wednesday, 4 October 1995, vol 456, no 4, col 1136-1137.
870 ibid col 1144.
simple solution. If there were we could have drawn from the best in the Fine Gael, Fianna Fail and PD Bills.\footnote{Dáil Éireann, Private Members’ Business, Fifteenth Amendment of the Constitution Bill, 1995, Second Stage (Resumed), Tuesday, 3 October 1995, vol 456, no 3, col 851.}

It is evident from the foregoing paragraphs that while there were those who were in favour of the installation of pre-trial preventative detention into Irish law there also were those who preferred more constitutional alternatives, which was more in keeping with the approach of the Supreme Court in \emph{O’Callaghan} and \emph{Ryan}. In reaching this opinion, it appears that such persons were cognisant of Ireland’s traditional constitutional values such as the right to liberty and the presumption of innocence. Notwithstanding this due process approach, pre-trial preventative detention was soon to form part of Irish law.

On the 26 June 1996, Veronica Guerin was murdered. Guerin’s murder was viewed as a defining moment in the battle against organised crime and the Government of the hour was placed under ferocious pressure to remedy the perceived crime problem. The period following the murder of Veronica Guerin has been referred to as a textbook case of moral panic.\footnote{This can be evidenced from the statements of Deputy Harney in July 1996: ‘There is evidence of ambivalence at the top. Let me document some of it. Six times since the Dáil resumed after Christmas I asked the Taoiseach when the Government would finalise its consideration of the bail issue. On 31 January he said that the Government’s failure to act in the wake of the publication of the Law Reform Commission report on bail was regrettable and that the Government would make up its mind within about six weeks. I allowed six weeks to elapse and on 26 March I again asked the Taoiseach about the issue. He was, as always, evasive. He said that the Government had not completed its consideration of the matter, but he assured me that it was at an advanced stage of consideration. On 14 May I asked the Taoiseach about the issue. He was, as always, evasive. He said that the Government had not completed its consideration of the matter, but he assured me that it was at an advanced stage of consideration. On 19 June last, just 13 months ago, there was still no sign of movement and I again raised the matter with the Taoiseach. On that occasion I told him that I was blue in the face asking him about bail. He repeated that the Government had not yet concluded its deliberations on the matter. A brave young journalist has been murdered and, without even a cabinet meeting, the Government last Friday night announced that it would hold a referendum on bail. Is it any wonder the public are cynical about politics and politicians?’ Dáil Debates, Private Members Business, Measures Against Crime Motion (Resumed), Wednesday, 3 July 1996, vol 468, no 7, col 2296-2297. Deputy McDowell echoed similar sentiments: ‘It makes me cynical that the people who write speeches and advise the Minister can bat down propositions because they come from the Opposition benches and suddenly, when two horrific events take place, all those doubts disappear like the early morning dew.’ Dáil Debates, Private Members Business, Measures Against Crime Motion, Tuesday, 2 July 1996, vol 467, no 7, col 2296-2297.}

While there is no doubt that Guerin’s assassination may have been the catalyst behind the imposition of various criminal justice measures, bail reform had been an on-going issue in the Dáil.\footnote{Ian O’Donnell, ‘Crime and Justice in the Republic of Ireland’ (2005) 2(1) European Journal of Criminology 99, 106.} Nevertheless, it could be said that Guerin’s murder acted as the straw that broke the camel’s back and a bail referendum was planned for November that same year.
Meade has observed that ‘criminal law reform has the potential to affect the life and liberty of all citizens and should not be undertaken in an attempt to answer a problem perceived to exist in a time of panic or other emotional distress.’ It is interesting to look at this comment in light of the discussion which took place in the Dáil on 2 July 1996 in the aftermath of Veronica Guerin’s murder. It is arguable that matters of public importance were swiftly forgotten in order to assuage public angst and for the Government to gain political ground with the public. Crime control had become a state priority. The repressive legislation introduced in the aftermath of Veronica Guerin’s murder appears to sit comfortably with Packer’s Crime Control Model. Furthermore, Garland’s indicia are even more obvious in the aftermath of a highly publicised murder such as that of Veronica Guerin. Zedner has observed, ‘In the name of security, things that would ordinarily be politically untenable become thinkable.’

On the other hand it is also arguable that oftentimes circumstances make it possible to introduce change that has been signalled in the past but was not possible politically at that time. For example, the Proceeds of Crime Act 1996 was premised on an earlier Law Reform Commission Report. Like Ireland’s bail laws, the Government sought to invoke change incrementally with regard to the proceeds of crime. Consider the Criminal Justice Act 1994 for instance. The Criminal Justice Act 1994 contained detailed provisions on the confiscation of the proceeds of crime following conviction. The Proceeds of Crime Act 1996 went even further than this. In short, there were incremental changes made to Ireland’s criminal assets laws. It is conceivable that like Ireland’s bail laws, criminal assets legislation would have lain dormant but for the murder of Veronica Guerin. In sum, although the anti-crime package of 1996 and the bail referendum and subsequent legislation may be the result of a moral panic, statements such as these reinforce the contention that in the wake of Veronica Guerin’s death Ireland experienced a moral panic.

4. There are notable distinctions between the Criminal Justice Act 1994 and the Proceeds of Crime Act 1996. For example: 1) The confiscation provisions of the 1994 Act are employed following the conviction of the accused. Under the 1996 Act, the application may be made without such a conviction; 2) The 1996 Act applies to property which is worth at least €13,000 and which is the proceeds of any crime; and, 3) The 1996 Act pursues the proceeds of crime rather than the individual concerned. Since the process relates to civil forfeiture, the standard of proof required to determine the proceedings or any issue relating to the proceedings under the Act is the ‘balance of probabilities’ standard, rather than the standard applicable to criminal proceedings of ‘beyond all reasonable doubt’.
often a tragic event is required before a polity can feel it is in a position to act. Veronica Guerin’s murder may well have been that trigger. Is this not strangely ironic? Despite the political posturing on bail that existed prior to Veronica Guerin’s murder, politicians were cognisant of the restrictions that a concern for civil liberties imposed on them. Furthermore, it is possible that politicians were apprehensive of going too far in terms of draconian legislation.

**The Installation of Pre-Trial Preventative Detention into Irish Law**

The bail referendum of November 1996 passed an amendment providing for pre-trial preventative detention in Irish law. The constitutional referendum allowed for a new sub-s 7 to be inserted into Article 40.4 of the Constitution. Article 40.4.7° reads:878 ‘Provision may be made by law for the refusal of bail to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person’.879 Effectively, the amendment neutralised the *O’Callaghan* judgment. In *O’Callaghan*, the Supreme Court ruled that bail could only be refused where it was thought that the accused would evade justice or interfere with victims and witnesses. The aim of the bail referendum was to counteract this judgment, which was framed around the Articles in the Constitution that seek to protect the personal freedom of the individual. The bail amendment restricted the right to bail by providing that bail can be refused if the accused had committed a serious offence and it was thought that, if released, the accused would commit a further serious offence while on bail. The bail referendum and subsequent legislation, namely, the Bail Act 1997, addressed a perception that accused persons were being released from court and continuing to carry out further crimes until their case came to trial.880

Those in favour of the bail amendment proclaimed that its introduction would eliminate the practice of ‘nest egg’ crimes committed while on bail, which clearly suggests a risk management approach to criminal justice matters. Furthermore, those in favour of the amendment indicated that Ireland’s bail laws, as they then stood, actually provided an

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878 This Article was originally inserted into the Constitution as Article 40.4.7°. However, the Twenty-First Amendment of the Constitution Act 2001 provided for the deletion of Article 40.4.5°. Consequently, Article 40.4.7° was renumbered Article 40.4.6°.
879 Article 40.4.6° of the Irish Constitution.
accused with an incentive to commit further crime. In addition, Ireland was cited as being out of line with its foreign counterparts as several common law countries had already introduced measures whereby bail can be refused on the grounds that the accused is likely to commit further offences if released on bail. Those in favour of the amendment felt that it struck a reasonable compromise between individual rights and the rights of a society to protect itself from serious crime. The Association of Garda Sergeants and Inspectors, and the Prison Officers Association joined the majority of the Government in a ‘Yes’ campaign. John Durkan, the President of the AGSI, made the following statements when referring to the criminal fraternity:

> There are many reasons for this “untouchable” feeling but a majority factor has been the bail situation. Ruthless, hardened, repeat criminals are walking free from our courts on a daily basis to continue their crime careers and to build up a nest egg during a time on holiday granted by the State.

Moreover, Tom Hoare, spokesman for the Prison Officers Association passionately declared: ‘If even one victim can be spared the trauma of crime because of the changes, the union believes the referendum should be passed.’ Opponents of the amendment espoused a classic due process orientated approach in arguing that as a matter of principle it is wrong to deprive an individual of their liberty without that person having been convicted of any offence. However, those in favour of the amendment pointed out that given the modern realities of crime the right to liberty could no longer remain absolute. In fact, those in favour of a yes vote argued that treating the right to liberty as an

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881 It is notable that there is no empirical evidence in Ireland which indicates that the provision of bail encourages some individuals to commit offences on bail in order to create a nest egg.

882 You will recall from previous chapters that in England and Wales, the Bail Act 1976 states that bail can be refused if there are substantial grounds for believing that the accused will commit an offence if released on bail. Similarly, in the US, the Bail Reform Act 1984 allows for pre-trial preventative detention. This Act allows the pre-trial detention of an accused if there is clear and convincing evidence that no condition or combination of conditions of pre-trial release will reasonably assure the safety of any person and the community.

883 Deaglan de Breadun, ‘Garda, prison officers urge yes vote: Criminals “feel untouchable” because of the bail situation’ The Irish Times (Dublin, 27 November 1996) 7.

884 ibid.
absolute one meant that there would be no circumstances in which a person is deprived of his liberty on remand, no matter how strong the evidence that an offence will be committed by that person if granted bail. Under the law as it then stood, courts were allowed to detain a person in custody pending trial based on predicting the accused’s likely behaviour if released. This situation arises where the court has to decide whether there is a likelihood that the accused will evade justice or interfere with witnesses or evidence. Therefore, according to the pro-amendment camp, the theory of predicting an accused’s future behaviour in deciding whether bail should be granted was not novel. The referendum was merely proposing whether the question of offending if granted bail should also be a matter which the court could take into account. In addition, the amendment was in complete conformity with the European Convention on Human Rights (ECHR). It was claimed that the amendment was based on Article 5(1) of the ECHR, which allows for the deprivation of liberty when it is reasonably considered necessary to prevent [a person] committing an offence. It is arguable that the Government chose to base the amendment on the ECHR as it would thereby withstand any challenge which may be made in the European Court of Human Rights. One may argue that if the ECHR countenances pre-trial preventative detention how does the bail amendment and subsequent legislation represent a restrictive infringement of a citizen’s rights. In other words, as the bail amendment and subsequent Act are ‘ECHR compatible’, what is the problem with the implementation of pre-trial preventative detention into Irish law?

It was submitted in chapter 2 of this thesis that there is a distinctive flavour to the status, interpretation and application of Ireland’s traditional constitutional values. Chapter 2 also

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885 This was justified in the past on the basis that it related directly to the administration of justice and the ability of the accused to be tried for an offence for which he had been charged, ie it was a limited and acceptable form of preventative detention.

886 This position seems to be consistent with the provisions of the ECHR, which in Article 6(2) affirms the presumption of innocence, but in Article 5(1)(c) provides for custody pending trial on the grounds of reasonable suspicion provided the trial is prompt.

887 According to Minister for Justice, Nora Owen: ‘Much consideration went into the task of devising a suitable amendment to the Constitution. On the one hand, we did not want to bring about a situation where people would be refused bail in relation to relatively trivial offences. On the other hand, we wanted to produce a wording that would make a genuine difference in practice to the bail regime where serious offences were at issue. We finally settled on a proposed wording which we believe strikes the balance and has two practical advantages. First, it is relatively straightforward and it will be easily understood by the people. Second, in the longer term it has the advantage that it is based on the relevant part of the European Convention on Human Rights, Article 5(1), which allows for the deprivation of liberty “when it is reasonably considered necessary to prevent [a person] committing an offence.”’ Dáil Debates, Sixteenth Amendment of the Constitution Bill, 1996: Second Stage, Tuesday, 15 October 1996, vol 470, no 1, col 183-184.
conveyed that there was a distinction to be made between Ireland’s fundamental rights
doctrine and that of its foreign counterparts. Therefore, although it may be said that there
should be no issue with the implementation of pre-trial preventative detention into Irish law,
one is forgetting the deference which has been afforded to the right to liberty and the
presumption of innocence in Ireland’s constitutional jurisprudence. In Ireland, the European
Convention on Human Rights Act 2003 is subject to the provisions of a written Constitution,
including the personal rights provisions enumerated under Article 40.3. It is evident that in
the event of a conflict between Convention provisions and the Constitution, the Constitution
will succeed.888 As Fennelly J expressed in Mahon v Keena, ‘Although no issue arises in the
present case of conflict between the Convention provisions and the Constitution, it is
important to recall that, in the event of such a conflict, it is the Constitution which must
prevail.’889 In sum, it is contended that although pre-trial preventative detention is provide for
in the ECHR, Irish law must accede to the Irish Constitution. Lord Kerr has observed,
‘[W]hile human rights are universal at the level of abstraction, they are national at the level of
application’.890

Despite the bail amendment’s conformity with the ECHR, it had its naysayers.891 Those
against the amendment maintained that the proposed installation of pre-trial preventative
detention presented practical problems and lacked any empirical basis. For example,
O’Mahony’s article in the Irish Law Times raised some interesting points.892 He noted that a
large proportion of accused persons are refused bail every year. He based this assertion on the
Department of Justice’s Annual Report on Prisons. In addition, O’Mahony indicated that the
Department of Justice maintained no real statistics regarding the number of remand prisoners
who were later found, ‘not guilty’. O’Mahony looked to Britain where 14 of remand

Irish Jurist 1.
Irish Jurist 1.
891 A number of editorial pages and articles which featured in the Irish Law Times around this period indicate
that the proposed bail amendment was nothing short of a reactionary and knee-jerk reaction to the widely
publicised high profile murders and the perceived increase in serious crime. See Editorial, ‘Bail Reform: Expediency
before Principle’ (1995) 13(10) Irish Law Times 233; Paul O’Mahony, ‘The Proposed Constitutional Referendum on Bail:
Pragmatism’ (1996) 14(11) Irish Law Times 249; Editorial, ‘Bail Reform, Might we think before we leap?’ (1996) 14(2)
Irish Law Times 29.
Law Times 234.
prisoners were found not guilty or their cases were dropped. This figure does not even take into account those given a suspended sentence or a community service order. O’Mahony also argued that the amendment to Ireland’s bail laws would require extra prison spaces. However, the prison-building programme did not plan to accommodate for all the additional spaces and therefore it is inevitable that convicted prisoners would be offered early release in order to accommodate those unconvicted remand prisoners. O’Mahony also drew from American researchers who have conceded that it is impossible to create a reliable method of predicting who will, and who will not, offend on bail despite the availability of sophisticated statistical techniques.\(^{893}\)

It could be said that the proposals to allow for pre-trial preventative detention in Irish law serve as a model example of taking a populist approach to crime policy.\(^{894}\) The pro-change camp were characterised by the lack of empirical evidence to back up their claims. The dearth of academic research surrounding the run-up to the bail referendum was remarkable. Bail reform was presented as the solution to the recent spate of serious crime.\(^{895}\) The most unsettling criticisms of the referendum were those that viewed bail reform as an ‘extraordinary attack not just on the formally very liberal Irish bail laws but also on the system by which the Supreme Court acts as the ultimate guardian of our civil liberties.’\(^{896}\) To amend Ireland’s bail laws was regarded by some as throwing the ‘baby out with the bathwater.’\(^{897}\) It is arguable that this type of bail reform would erode traditional Irish constitutional values such as the presumption of innocence and the right to liberty.\(^{898}\)

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\(^{893}\) O’Mahony cited Michael Gottfredson, *Decision Making in Criminal Justice: Toward the Rationale Exercise of Discretion* (New York Plenum 1998). Moreover, O’Mahony points out that American research exhibits that there is a big correlation between offending while on bail and not showing up for trial. Therefore, he argued that the bail system that existed in Ireland prior to the bail amendment was effective as it was already targeting those most likely to commit an offence while on bail. Paul O’Mahony, ‘The Proposed Constitutional Referendum on Bail: An Unholy Grail?’ (1995) 13(10) Irish Law Times 234.

\(^{894}\) See Garland’s sixth indicium of change.

\(^{895}\) See generally, Editorial, ‘Bail Reform, Might we think before we leap?’ (1996) 14(2) Irish Law Times 29.


\(^{898}\) Editorial, ‘Bail Reform: Expediency before Principle’ (1995) 13(10) Irish Law Times 233. It is worth considering the comments of Representative Kastenmeier in the US Congress. He spoke about the bail legislation containing the 1984 Act in the following terms: ‘Title I of this bill radically changes bail practices in this country by authorizing preventive detention. While I recognize that fear of crime and the public concern about crimes committed by persons on pre-trial release motivate these provisions, these changes are ill-founded and possibly unconstitutional.’ 130 Cong Rec (daily edn, 2 October 1984) H10811.
Practical explanations were also cited as reasons for rejecting the concept of pre-trial preventative detention in Irish law. For example: a remand in custody can frequently impede the accused’s defence preparation; the very fact that the accused was remanded in custody can result in discrimination against the accused at trial; remand prisoners are at a higher risk of suicide; and there is a possibility that a bail application may take the form of a mini-trial.

The opposition to the amendment came mostly from civil libertarian groups such as the Irish Council for Civil Liberties (ICCL). Michael Farrell, who was acting as co-chairperson for the ICCL at the time of the bail referendum, took the initiative of establishing the ‘Right to Bail Campaign’. This campaign included the Irish Penal Reform Trust, the church-supported Irish Commission for Justice and Peace and the Irish Commission for Prisoners Overseas, and Free Legal Advice Centres. In addition, the ICCL were supported by a number of criminal defence lawyers, two of whom have subsequently become judges (Garrett Sheehan, who is now a High Court judge and Mary Ellen Ring, who is now a judge of the Circuit Court).

The ICCL’s concern stemmed from the fact that the bail changes would result in large numbers of accused persons, at least some of whom were likely to be innocent, being

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899 One will recall the statements of Walsh J in *O’Callaghan*: ‘In the modern complex society in which we live the effect of imprisonment upon the private life of the accused and of his family may be disastrous in its severe economic consequences to him and his family dependent upon his earnings from day to day or even hour to hour. It must also be recognised that imprisonment before trial will usually have an adverse effect upon the prisoners prospect of acquittal because of the difficulty, if not the possibility in many cases, of adequately investigating the case and preparing the defence.’ *The People (Attorney General) v O’Callaghan* [1966] IR 501, 513. Moreover, the Sixth Amendment of the US Constitution guarantees a defendant the right to assist in his own defence. However, if a defendant is denied bail, his ability to assist his lawyer is limited. As Kalhous and Meringolo have propounded: ‘Despite all efforts to provide copies of pre-trial discovery to detained clients, inefficient mail delivery, and a lack of adequate electronic equipment such as computers on which to listen to recordings, make it impossible for a client to fully examine all of the evidence produced by the government.’ Clara Kalhous and John Meringolo, ‘Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defence Attorneys’ Perspectives’ (2012) 32(3) Pace Law Review 800, 845. For more on this see generally, Fiona Brookman and others, ‘Access to Justice: Remand Issues and the Human Rights Act’ (2001) 48(3) Probation Journal 195.


903 ibid.

904 E Oliver, ‘Labour lawyers against bail poll’, *The Irish Times* (Dublin, 14 November 1996) 9. This article describes how the seventy member Labour Party Lawyers Group said that the Minister for Justice had not ‘produced any evidence to suggest that the amendment would reduce crime levels.’ According to the paper a spokesman from the group had expressed that the proposals were ‘populist’.
imprisoned for long periods, before they were actually tried for the offences for which they were accused. The ICCL, clearly endorsing a due process approach to criminal justice matters, viewed the bail amendment as an austere measure, which would not serve in addressing the root causes of crime or attempt to rehabilitate prisoners. It considered the bail changes draconian and that they would force the early release of convicted criminals in order to create room for the increase in remand prisoners. A further criticism referred to the fact that due to the lack of prison spaces, the increased number of remand prisoners would in fact be housed with convicted prisoners.905

The National Union of Journalists also had its concerns about further restricting the right to bail.906 Those against the bail referendum contended that the amendment sought to mislead the public as it appeared that the bail amendment was presented as a solution to the growing crime problem. As Gerard Hogan indicated, only a small number of cases would be affected by what was proposed.907

The Church also raised a number of concerns over the bail amendment proposal.908 Bishop Eamonn Walsh highlighted a number of these concerns around this period.909 Bishop Walsh

905 For more on the differences in detention between convicted and remand detainees see Raymond Byrne and others, ‘Innocent Till Proven Guilty: Criminal Justice, pre-trial liberty and the presumption of innocence’ (Irish Council for Civil Liberties 1983) 63.
906 Anonymous, ‘Warnings against extreme reaction to murder’ The Irish Times (Dublin, 2 July 1996) 6.
907 Anonymous, ‘Bail reform will affect only marginal cases’ The Irish Times (Dublin, 9 October 1996) 14.
908 Archbishop Connell having consulted with the late Supreme Court judge, Justice Brian Walsh, supported the interventions by Bishop Walsh and the Justice and Peace Commission at the Mater Dei Graduation Ceremony on 16 November 1996. The media reported Archbishop Connell as calling for a ‘No’ vote which he corrected in a letter to the Irish Examiner on 2 December 1996. This controversy resulted in Bishop Walsh’s decision not to furnish an article which he had agreed to submit to the Irish Times before the referendum. This article was later published on 27 December 1996. In this article Bishop Walsh referred to victims and their families not wanting to know about the background of their perpetrators. He suggested that victims may just want the perpetrators caught, punished and forgotten about. It seems ironic that Bishop Walsh went on to caution the victims of crime to avoid this ‘eye for an eye and tooth for a tooth’ mentality. Dr Eamonn Walsh, ‘Treating Everyone with Dignity...’ The Irish Times (Dublin, 27 December 1996) 10.
909 See generally, Homily of Bishop Eamonn Walsh at the Mass for Prisoners’ Sunday on 10 November 1996. During this Homily, Bishop Walsh directly addressed the issue of the bail referendum. An excerpt from the Homily reads as follows: 'The context of Prisoner Sunday raises questions about the upcoming bail referendum and the effect this may have in terms of overcrowding in an already stressed prison system. These questions deserve thorough examination. As a first step, and before any referendum takes place, surely we have to ask: have the existing powers available to the legislature been fully exhausted? For example, the proposal to strengthen the Criminal Justice Act of 1984 by imposing consecutive sentences for offences committed on bail, might be a better way forward. Also the proposal to require persons going to bail, to guarantee the good behaviour of the accused while on bail, and allow for forfeiture of bail in their regard is also one that deserves consideration. At a later date we could consider whether an amendment to the Constitution is necessary or wise. Certainly, it has a quick fix appeal, but it may well result in an influx of remand prisoners into already overcrowded prisons. Sentenced prisoners will have to be released earlier to make way for someone who may not be found guilty. As a people, we have not thought this proposal out sufficiently, and we may well be judged in time
(who is a trained barrister) argued that the bail referendum was unnecessary as the present laws were adequate if implemented properly. He elucidated that as the law then stood, bail could be refused, bail conditions could be set, and consecutive sentences could be imposed for those who offended while on bail. The Bishop pointed out that it was the ‘ordinary criminals’ from the inner city and deprived areas that would be affected most by the proposed referendum. He further indicated that the threat to withhold bail can be a powerful weapon against a suspect. Like the ICCL, Bishop Walsh conveyed concern over the gradual erosion of personal rights that was creeping into the Irish criminal justice system.910

The Irish Commission for Justice and Peace also expressed concern that the proposed change would lead to people being interned without trial for a limited period on the word of a senior Garda Officer.911 The Commission expounded that anyone refused bail under the proposed legislation would be incarcerated, ‘not for something they had done, but for something they had not done’ and went on to liken the situation to ‘being interned without trial’.912 Those in favour of the bail referendum frequently looked to our common law neighbours to highlight that pre-trial preventative detention had been legislated for in England and Wales since the 1970s. Yet the Commission made an interesting observation with regard to comparing the Irish situation to that of England and Wales. The Commission stated that the Irish courts did not have the option, as is the case in England and Wales, of requiring people to reside in bail

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910 The ICCL commented on the proposed bail amendment in the following terms: ‘To be detained under the proposal, an accused must be recognised as having criminal propensities. This would treat an accused as a member of a class thought likely to commit crime if released pending trial. Detention would be based on a determination of the quality of the accused, about the kind of person the accused is, rather than his alleged acts. This would violate the fundamental requirement, affirmed in King, that punishment be imposed only if it is made clear in advance precisely what one must do to become subject to the criminal law and how one might avoid doing so. A preventative detention system would permit punishment to be imposed on individuals on the basis of circumstances other than convincing proof of conduct whose criminal consequences the accused would have foreseen.’ Raymond Byrne and others, ‘Innocent Till Proven Guilty: Criminal Justice, pre-trial liberty and the presumption of innocence’ (Irish Council for Civil Liberties 1983) 61.


912 Andy Pollak, ‘Hierarchy advisory body strongly criticises move to change laws on bail’ The Irish Times (Dublin, 14 November 1996) 9.
hostels during the pre-trial period.\textsuperscript{913} The Commission further bolstered their argument by questioning whether there existed any empirical evidence to show that changing the bail laws would be effective as a crime prevention measure.\textsuperscript{914} The Commission submitted that relying on anecdotal evidence was not enough to justify a constitutional change which would not only make a ‘serious dent in the presumption of innocence’ but would also cost the taxpayer a significant amount of money in the provision of extra prison spaces.\textsuperscript{915}

Despite the abovementioned objections, 74.83\% of the electorate voted yes in the bail referendum.\textsuperscript{916} Although the bail amendment was accepted by the Irish people, it is questionable whether bail reform was introduced in a reactionary and ill-considered manner. The right to bail affects an accused’s right to liberty and the presumption of innocence. It is arguable that any curtailment of these fundamental rights should not be decided in a climate of panic and highly wrought emotion. There was a paucity of empirical research regarding pre-trial preventative detention in the Irish context, pre-amendment. This can be juxtaposed

\textsuperscript{913} Traditionally bail hostels in the UK provided a network of accommodation for defendants across the country. Nowadays, hostels are almost exclusively used for high risk sentenced offenders. The UK’s National Bail and Support System, which was established in 2007, aims at providing accommodation for those defendants who have no suitable bail address and provides support to those defendants who require support in complying with their bail.

\textsuperscript{914} Andy Pollak, ‘Hierarchy advisory body strongly criticises move to change laws on bail’ The Irish Times (Dublin, 14 November 1996) 9.

\textsuperscript{915} An array of other church groups agreed with Bishop Walsh and the Irish Commission for Justice and Peace. Catholic prison chaplains pointed out that with the present numbers in custody, Ireland was already in breach of the UN’s minimum rules for the treatment of persons in custody. The Franciscans argued that the current change would work against some of the most vulnerable people in Irish society, specifically, the homeless and drug-users. Michael Taylor of the Quakers expressed the fear that ‘very serious issues of individual liberty will be put at risk by the proposal, while other more feasible and flexible options to tackle the problem are available’. Andy Pollak, ‘Hierarchy may have missed chance to regain some credibility’ The Irish Times (Dublin, 27 November 1996) 9. According to an Irish Times article, Bishop Christopher Jones of Elphin also agreed with Bishop Walsh. Although he stressed his abhorrence of crime, he stated that numerous people, who were usually informed, knew little about the detail of the bail changes being proposed. Andy Pollack, ‘Most Bishops may be against bail changes’ The Irish Times (Dublin, 14 November 1996) 9.

\textsuperscript{916} Referendums, Sixteenth Amendment Bail, Referendum of 28 November 1996, ElectionsIreland.org <http://electionsireland.org/results/referendum/refresult.cfm?ref=1996R> accessed 15 July 2013. For more on the bail referendum debate see: Mary Holland, ‘Lessons of the past show hard cases make bad law’ The Irish Times (Dublin, 4 July 1996) 14; Anonymous, ‘81% want bail law changed’ The Irish Times (Dublin, 1 October 1996) 1; Chris Glennon ‘Bail reform, a boost for public safety says Bruton’ The Irish Independent (Dublin, 25 October 1996) 5; Andy Pollack ‘Most bishops may be against bail changes’ The Irish Times (Dublin, 14 November 1996) 9; Anonymous, ‘Tighter Bail is Needed’ The Irish Times (Dublin, 23 November 1996) 1; Anonymous, ‘The bail proposal: internment or common sense?’ The Irish Times (Dublin, 23 November 1996) 9; Deaglan De Brheadun ‘Garda, prison officers urge Yes vote’ The Irish Times (Dublin, 27 November 1996) 7; Chris Glennon ‘Three to one Yes vote clears the way for bail reform’ The Irish Independent (Dublin, 30 November 1996) 1; Stanilaus Kennedy, ‘Bail Referendum should not be the end on the debate on crime’ The Irish Times (Dublin, 5 December 1996) 15. Here the author argues that the low turnout by the electorate for the referendum was due to the Government’s confusion throughout the campaign. It is noteworthy that very few articles published around this period conveyed any reservation over the proposed bail referendum. However, there were some who were cognisant of the effect said amendment could have on Ireland’s civil liberties.
with the available empirical data and academic research into pre-trial preventative detention conducted in the US before the Bail Reform Act 1984. Although the American material was available to the Irish Government prior to the bail referendum, it appears our legislators were oblivious to it. Consequently, on 28 November 1996, pre-trial preventative detention was provided for in Irish law.

The Bail Act 1997

The constitutional amendment was enacted in the form of the Bail Act 1997, described by the Minister for Justice, Nora Owen, as ‘one of the most important anti-crime measures introduced since the foundation of the State.’ The Act was signed into law by the President on 5 May 1997. Notably, s 2 did not come into operation until 15 May 2000. Section 2 of the Bail Act 1997 reads:

When an application for bail is made by a person charged with a serious offence, the court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.

For s 2 of the Bail Act to apply, three conditions must be fulfilled. Firstly, the applicant must be charged with a serious offence. Secondly, the court must be satisfied that refusal of...

919 Bail Act 1997, s 2.
920 At the time of the amendment, the Government took a dual approach in specifying the offences to which the new bail law would apply. Firstly, a serious offence was defined as an offence carrying a maximum penalty of five years imprisonment or more. Secondly, a Schedule was included with the legislation which outlines the wide range of offences covered. Specifically, Minister for Justice, Nora Owen stated: ‘A dual approach is taken to specifying the offences to which the new bail regime can apply. First, a ‘serious’ offence is defined as an offence carrying a maximum penalty of five years imprisonment or more. Second, a Schedule is included setting out the wide range of offences covered by the legislation. This approach means that, while all offences to which the legislation will apply must carry a maximum penalty of five years or more, not all such offences will be covered by the legislation, primarily on the grounds that some of the offences in our current law carrying such a penalty are archaic or unlikely to be ones where the question of reoffending is relevant.’ Dáil Debates, Sixteenth Amendment of the Constitution Bill, 1996: Second Stage, Tuesday, 15 October 1996, vol 470, no 1, col 184. The offences listed in the schedule must now be read in conjunction with later statutes and legislative developments such as: the Non-Fatal Offences Against the Person Act 1997; the Criminal Justice (Theft and Fraud Offences) Act 2001; the Criminal Law (Sexual Offences) Act 2006 and many more. A recent Law Reform Commission Report has described the test of a serious offence under the Act as ‘twofold’. The Report states: ‘The test of “serious offence” under the 1997 Act is, therefore, twofold: the offence must be a scheduled offence and it must also carry five years imprisonment on conviction. Thus, not all the scheduled offences in the 1997 Act always carry five years imprisonment on conviction and this necessarily excludes some scheduled offences from being “serious offences”. Correspondingly, not all offences that carry five years imprisonment or more on conviction have been scheduled under the 1997 Act and therefore cannot be considered as “serious offences” for the purpose of the 1997 Act merely because they carry that penalty.’ Law Reform Commission, Report on Aspects of Domestic Violence (LRC 111-2013) 11. This report deals with suggestions of the Legal Issues Sub-Committee of the National Steering Committee on Violence Against Women, that the breach of a
bail is reasonably considered necessary to prevent the commission of a serious offence. Thirdly, the apprehended offence must also be considered a serious offence. The Act requires that when a judge is considering whether a refusal of bail is reasonably considered necessary to prevent the commission of a serious offence, it shall not be necessary that the commission of a specific serious offence is apprehended.

Bail can only be refused under s 2 where the accused was charged with a serious offence. This is defined in the 1997 Act as an offence listed in the Schedule to the Act and one that attracts a sentence of 5 years imprisonment or more. If a s 2 objection is raised, the court under s 2(2) is required to take the following considerations into account and may, if needed, receive evidence or submissions pertaining to them:

(a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,

(b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,

(c) the nature and strength of the evidence in support of the charge,

(d) any conviction of the accused person for an offence committed while he or she was on bail,

(e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,

(f) any other offence in respect of which the accused person is charged and is awaiting trial, and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug.

domestic violence order should be considered a ‘serious offence’ for the purposes of Article 40.4.7° of the Constitution (as amended) and the Bail Act 1997.

In addition, it has been held that if the prosecution wishes to raise a s 2 objection, applicants should be put on notice as a matter of fairness. In McDonagh v Governor of Cloverhill Prison, McGuiness J stated: ‘There is no provision either in the Act of 1997 or in the District Court Rules that such an application should be made on notice on advance of the actual bail hearing. Nevertheless, it would seem to be essential, as a matter of natural and constitutional justice that an accused person should be made aware that an objection to bail of so serious a nature was to be brought forward by the prosecution. In the same way it is also a matter of natural and constitutional justice that the accused person should be given a proper opportunity either by means of evidence or through submissions to challenge such an objection.’


However, addiction alone is not sufficient to justify the refusal of bail. The consideration of whether the accused has a substance addiction was a novel provision. It has been propounded that in the days of
The 1997 Act also contains a number of safeguards. For example, s 3 of the Act states that if a bail application is refused under s 2 and the trial has not begun within 4 months, the application may be renewed on the grounds of prosecutorial delay. It is noteworthy that in the US, the Bail Reform Act 1984 does not include any definite time limits for pre-trial detention. Speedy Trial legislation is considered a sufficient safeguard against lengthy detention. In addition, s 3(1) of the Bail Act 1997 states that when a renewed application is made, the court shall, if satisfied that the interests of justice so require, release the applicant on bail. Furthermore, s 4 expressly precludes the press from reporting the fact that the accused has a past criminal record if this evidence is given in the course of the bail application. As Gerard Hogan has pointed out, such a provision could lead to somewhat peculiar results. For instance, the general public will be denied important information concerning why bail was refused in certain cases. Section 5 of the Act provides that a person admitted to bail should not be released until an amount equal to at least one third of the recognisance, or such greater amount as the court may determine, is paid into court and the person admitted to bail must undertake to appear before the court at the expiry of the remand period, to refrain from committing any offence, and to be of good behaviour. Also, under s

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925 O’Callaghan, drug addiction was not a major concern. Such was the concern over the perceived increase in reoffending on bail by drug addicts that during the Committee and Final Stages of the Bail Bill 1997, Deputy O’Donoghue attempted to include dual objectives in the Bail Act that sought to prevent the accused consuming illegal drugs. These were: 1) if an accused comes before the court and is granted bail, the court, if it deems it necessary, could make an order as a condition of the person’s bail, that he or she must abstain from the possession of illegal drugs; and 2) the person would be required to attend a specified location on certain days for the purpose of providing a urine sample which could be analysed in order to ascertain whether the accused was in breach of the abovementioned provision. According to Deputy O’Donoghue such provisions would ‘innovatively link’ the solving of the crime problem to the solving of an individual’s drug addiction. Dáil Éireann, Bail Bill, 1997, Committee and Final Stages, Thursday, 17 April 1997, vol 477, no 7, col 1457. Minister for Justice, Nora Owen, later rejected Deputy O’Donoghue’s proposals as a ‘bail hearing is not an appropriate time to decide how people can be helped to overcome a drug habit as there is a danger that their drug addiction could be criminalised’ Dáil Éireann, Bail Bill, 1997, Committee and Final Stages, Thursday, 17 April 1997, vol 477, no 7, col 1459. Deputy O’Donoghue’s proposals were clearly illustrative of a crime control orientated approach to criminal justice. Also, it is noteworthy that the US Senate Judiciary Report, which analysed the Bail Reform Act 1984, reported that ‘drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pre-trial recidivism.’ US Senate Report, No 98-225, 98th Congress, 1st Session (1983) 20.

926 In Maguire v DPP the Supreme Court held that the right to reapply for bail under s 3 is not confined to circumstances where the delay is solely attributable to the prosecutor. Maguire v DPP [2004] 3 IR 241, 261.

927 Gerard Hogan, ‘Bail reform will only affect marginal cases’ The Irish Times (Dublin, 10 October 1996) 14.

928 In the past much criticism had been levelled at the apparently small amounts of bail money that was estreated when an accused failed to turn up for trial. This section was included to remedy this situation.

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6(1) where an accused person is admitted to bail on his entering into a recognisance, the recognisance may be subject to such conditions as the court considers appropriate.\footnote{928}{Under s 6(b) of the Bail Act 1997, such conditions include: (i) that the accused person resides or remains in a particular district or place in the State; (ii) that the accused person reports to a specified Garda Síochána Station at specified intervals; (iii) that the accused person surrenders any passport or travel document in his or her possession or, if he or she is not in possession of a passport or travel document, that he or she refrains from applying for a passport or travel document; (iv) that the accused person refrains from attending at such premises or other place as the court may specify; (v) that the accused person refrains from having any contact with such person or persons as the court may specify. These conditions apply to any offence for which an accused is granted bail, including a summary offence.}

The 1997 Acts also addresses the electorate’s concerns regarding the perception that persons released on bail tend to commit further crimes. One may recall that s 11(1) of the Criminal Justice Act 1984 provides for the imposition of consecutive sentences where the accused commits an offence while on bail, and is convicted of both the original charge and the new offence.\footnote{929}{This has been amended by s 22 of the Criminal Justice Act 2007.} The effect of this provision is that the accused will serve a greater length of time in prison. This rationale was further extended in the 1997 Act. Section 10 of the 1997 Act inserts a new s 11(4) in the Criminal Justice Act 1984. The section provides that a court, which is required to impose consecutive sentences shall, in deciding the sentence to be imposed, treat the fact that the offence was committed while the person was on bail, as an ‘aggravating factor’.\footnote{930}{For more on consecutive sentencing see DPP v Abdulakim Yusuf [2008] IECCA 37 and DPP v Cole (CCA, 31 July 2003).} The court is thereby required to impose a sentence that is greater than that which would have been imposed in the absence of such a factor.\footnote{931}{This does not apply where the sentence imposed on the accused for the offence in respect of which he was released on bail is life imprisonment or where the court considers that there are exceptional circumstances justifying it in disregarding the fact that the second offence was committed while on bail.} It is noteworthy that there is no mention of the \textit{O’Callaghan} principles in the 1997 Act. Therefore, it is assumed the \textit{O’Callaghan} principles continue to apply alongside s 2 and provide the test for bail for non-serious offences.

As outlined above, s 2 of the Bail Act 1997 was not commenced until the 15 May 2000. It appears that the immediate full implementation of the Bail Act was not possible as the prison accommodation which existed was unable to deal with the additional demand.\footnote{932}{Dáil Éireann, Written Answers, Bail Laws, Wednesday, 2 February 2000, vol 513, no 4, col 1107.} This is a significant point. The Bail Act 1997 was rushed through in the aftermath of Veronica Guerin’s murder as a result of moral panic. The reform of Ireland’s bail laws was seen as the panacea to aid in decreasing crime levels. Despite this, s 2 of this ‘much needed’ Act did not
become operable until May 2000. There appears to be a contradiction of sorts here. On the one hand, the implementation of pre-trial preventative detention was considered necessary to aid in stymieing the activities of the habitual offender yet the implementation of this aspect of the legislation took three years to come into effect. Following the commencement of s 2 of the Bail Act 1997 in 2000, the number of remand prisoners increased from 322 in 2000, \(^{933}\) 519 in 2006 \(^{934}\) and 609 in 2011. \(^{935}\) It is significant nonetheless that the crime rate fell before the commencement of s 2 of the Act.

The bail referendum and Bail Act 1997 significantly eroded a portion of Ireland’s constitutional values, specifically, the right to liberty and the presumption of innocent. The installation of pre-trial preventative detention into Irish law represented a *volte-face* on the Irish constitutional perspective on bail as illustrated by *O’Callaghan*. The changes made to Ireland’s bail laws with the Bail Act 1997 reflect the development of a risk management and crime control orientated approach to criminal justice policy.

It is arguable that the enactment of the Bail Act 1997 is representative of the fact that the approach to criminal justice in Ireland had shifted. The 1990s witnessed the most extensive prison building programme in the history of the State. \(^{936}\) Following the general election in 1997, Fianna Fail gained power and a ‘zero tolerance’ approach to criminal justice was championed by the Minister for Justice, John O’Donoghue. \(^{937}\) This zero tolerance policy was predicated on a New York anti-crime initiative, which applied to the most minor of crimes in order to send a message to criminals that crime would not be tolerated. \(^{938}\) The policy resulted in an increase in the number of arrests for minor crimes including prostitution and begging. \(^{939}\)

Concerns over Ireland’s bail laws were not assuaged with the Bail Act 1997. It appeared that the constitutional amendment which allowed for the installation of pre-trial preventative

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\(^{934}\) Irish Prison Service Annual Report 2006, 16.  
\(^{936}\) One will recall that Garland’s seventh indicium of change relates to the re-invention of the prison.  
\(^{937}\) For more on Mr O’Donoghue’s approach see MO, ‘Recovering from “Zero Tolerance”’ *The Irish Times* (Dublin, 22 March 2002) 15.  
\(^{939}\) One will recall that under Packer’s Crime Control Model, the judicial process delivers a high level of apprehension and conviction.
detention into Irish law was not operating as effectively as the legislature would have wished. The bail issue again became prevalent in the aftermath of a murder trial in 2003 where witnesses refused to testify and fell prey to ‘collective amnesia’ when on the stand. The trial resulted in the accused’s acquittal and literally a two-fingered salute to the people of Ireland. There was public outcry over the inability of the criminal justice system to deal with crime. In addition, a number of murders in 2006 engendered widespread media commentary and more calls for criminal justice reform were made. During this time, the Minister for Justice, Michael McDowell, accused members of the judiciary as being ‘soft on bail’. On 14 December 2006, the Minister for Justice stated:

Regarding Operation Oak, 24 associates of Mr Martin Hyland have been arrested and 23 have been granted bail. I have stated on a number of occasions that I regard this as very deeply unsatisfactory and have been criticised for doing so because it has been seen as disparaging of the Judiciary… It is not acceptable that 23 out of 24 serious drug criminals are at liberty after being granted bail… gardaí testify in the cases and oppose bail, yet they constantly find people who have been charged with serious offences are granted bail. I strongly contend that the practice is wrong and must be addressed.

The continued dissatisfaction over Ireland’s bail laws led to the enactment of a further range of legislative measures which firmly installed pre-trial preventative detention into Irish law. The measures most relevant to this thesis, namely, the Criminal Justice Act 2006 and the Criminal Justice Act 2007 will be examined next.

**The Criminal Justice Act 2006**

Although the Criminal Justice Act 2006 does not directly deal with bail provisions per se, it is worthy of inclusion as the Criminal Justice Act 2006 like the Bail Act 1997 could be viewed as representative of a subversion in Ireland’s traditional constitutional values in favour of a crime control orientated criminal justice system. As Walsh has propounded, ‘the Criminal

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941 Liz Walsh, ‘Murder trial witnesses put in jail to cure their amnesia’ *The Irish Independent* (Dublin, 31 October 2003).
942 This problem of ‘collective amnesia’ was later remedied by s 16 of the Criminal Justice Act 2006 which makes provision for witness statements to be admitted as evidence of any fact stated in them where the witness refuses to give evidence, denies making the statement or gives evidence which is materially inconsistent with his prior statement.
943 In March 2006, the murder of Donna Cleary by an armed gunman at a house party in Coolock was labelled a ‘watershed event’. That same month, a second incident occurred which captured the attention of the media and politicians. The ‘M50 shooting’ involved a high speed chase between two cars containing Dublin based criminals. During this chase a number of shots were fired between the two vehicles on the M50 motorway in broad daylight.
Justice Act 2006 is a culmination of a sustained and successful attack on due process values by a dominant crime control ideology over the past 22 years.  

As outlined above, a range of murders in 2006 provoked extensive media commentary and more calls for criminal justice reform were made. The 2006 Act aimed to alleviate the mounting concern over gangland criminality. This is reflected in Part 7 of the 2006 Act, which creates three new offences relating to organised crime. These include: s 71 which creates the offence of conspiracy to commit a ‘serious offence’ (the individual convicted of this offence is liable to being punished on the same terms as the principle offender); s 72 creates an offence of ‘participation in organised crime’; and s 73 creates an offence of the ‘commission of an offence for a criminal organisation’. An individual convicted under this section may receive a potential sentence of up to ten years imprisonment. The Minister for Justice, Michael McDowell, explained the provisions of the Act in the following terms:

Part 7, which includes sections 70 to 79, inserts new provisions to deal with organised crime. This is becoming an increasingly serious issue both domestically and internationally. The Bill’s provisions will enable Ireland to give effect to commitments arising from the UN Convention on Organised Crime, as well as in the European Union’s joint action on this same subject. This part of the Bill creates a number of new offences relating to participation in or assisting in the carrying out of criminal activities by organised gangs. It also extends the definition of “conspiracy” to cover conspiracies to carry out criminal acts, not only in Ireland or against Irish citizens but also conspiracies to carry out criminal acts abroad.

As I stated in regard to these provisions, it will be very difficult to successfully bring proceedings thereunder given the nature of the activity and the methods used by criminal gangs. However, that should not stop us from providing the law enforcement agencies with all the legal powers necessary to counteract these gangs. It is equally important that we be in a position to take our place internationally in the fight against organised crime.

Furthermore, the 2006 Act inserts three new organised crime offences into s 29 of the Criminal Procedure Act 1967. The effect of this is that persons charged with one of the new three offences must apply to the High Court for bail. This is a notable point. The legislature has deliberately decided to treat these organised crime offences as distinct from crimes such as rape, drug or firearm offences (bail can be applied for in the District Court for such offences). It is contended that organised crime existed long before the 2006 Act. Therefore,

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946 The Minister for Justice in a presentation to the Joint Committee on 7 September 2005 stated that the proposed offence will be based on s 467.11 of the Criminal Code of Canada but is also compatible with the definitions in the international instruments. Criminal Justice Bill 2004: Ministerial Presentation, Joint Committee on Justice, Equality, Defence and Women’s Rights Debate, Wednesday, 7 September 2005.
why was previous legislation concerning these crimes deemed inadequate? As Groelimund and Durac have opined – the 2006 Act is circumspect for two reasons. Firstly, the requirement that those charged with these organised crime offences must apply for bail in the High Court is likely to lead to the bizarre situation that suspects could be tried for offences in a court which was previously considered unsuitable for their bail application. Secondly, as Walsh indicates, the creation of these new organised crime offences was unnecessary in that the criminal law legislation in place before the 2006 Act was sufficient. Essentially, there has been unnecessary duplication of the law which signals a shift toward a highly regulated and crime control orientated criminal justice system.

The other important change this Act provided for relates to defining a ‘serious offence’. The 2006 Act redefines a serious offence as one punishable by a term of imprisonment of four or more years. The Bail Act 1997 defines a serious offence as one punishable by a term of imprisonment of five or more years. Therefore, there is a discrepancy of sorts as there are varied definitions of a ‘serious offence’. This redefining of the term ‘serious offence’ is noteworthy as the 2006 Act offers no explanation for this departure.

It appears from the foregoing paragraphs that Ireland’s bail laws were further restricted by the Criminal Justice Act 2006. The Criminal Justice Act 2007 also succeeded in limiting Ireland’s bail laws.

**The Criminal Justice Act 2007**

Within a number of months, the 2006 Act was deemed inadequate and another comprehensive anti-crime package was proposed. The Criminal Justice Act 2007 was enacted to send a ‘clear and unambiguous message’ that Ireland as a society was not prepared to allow organised crime gangs set about the destruction of families and communities. The Act’s fundamental goal was to tackle the ‘scourge’ of gangland crime. The Act was

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949 For more on this see, Carol Coulter, ‘Changes seem to be prompted by pressure’ The Irish Times (Dublin, 23 November 2005) 7.
introduced in the run up to the general election campaign. According to the Minister for Justice Michael McDowell, the purpose of the new Act was to provide the prosecution with the opportunity to mount a ‘strong challenge’ to bail applications, thereby further restricting Ireland’s bail laws. It was intended that this strong challenge would result in fewer bail applications and when bail applications were in fact made, they could be opposed more effectively. It could be said that this reasoning resonates with the rationale behind Murnaghan J’s extended list of bail criterion in O’Callaghan.

Section 6 of the 2007 Act inserts s 1A into the Bail Act 1997 and requires that a bail applicant charged with a serious offence must furnish the prosecutor with a detailed statement. The statement must provide information relating to the accused’s previous convictions and must state whether any of these convictions related to offences committed while on bail. The statement must also specify whether the accused has previously applied for bail. The statement must also contain information concerning the accused’s financial situation as well as any property or assets held, in excess of a specified sum.

In addition, s 7 of the 2007 Act allows for the admissibility of opinion evidence of a senior Garda that it is necessary to refuse bail to prevent the commission of a further serious offence. Section 7 is only applicable where the State has objected to bail under s 2 of the Bail Act 1997. Section 7 of the 2007 Act reads as follows:

Where a member of the Garda Síochána not below the rank of chief superintendent, in giving evidence in proceedings under section 2, states that he or she believes that refusal of the application is reasonably necessary to prevent the commission of a serious offence by that person, the statement is admissible as evidence that refusal of the application is reasonably necessary for that purpose.

The 2007 Act also makes provision for electronic monitoring of persons granted bail.

953 Fine Gael Justice Spokesman, Jim O’Keeffe, said that the Bill which was published in the aftermath of the latest gangland shooting was ‘a frantic move by a failing Minister’. Anonymous, ‘Opposition claims crime legislation “too late”’ (RTE News, 15 March 2007) <http://www.rte.ie/news/2007/0315/86830-crime/> accessed 18 July 2013. Labour party Justice Spokesman, Brendan Howlin complained that only a week had been allowed for parliamentarians to examine ‘some of the most serious proposals to be put before the Dáil in terms of the criminal law.’ Anonymous, ‘Dáil must get time to discuss most serious proposals in Justice Bill’ (Labour, 15 March 2007) <http://www.labour.ie/press/2007/03/15/dail-must-get-time-to-discuss-most-serious-proposa/> accessed 18 July.

955 ibid.
956 The listed scheduled offences in the Act include all the offences associated with gangland crime including drug trafficking and firearm offences. Notably, the inspiration behind the amended Schedule was the racketeering-influenced corrupt organisation (RICO) legislation in the US.
957 Criminal Justice Act 2007, s 7.
It is noteworthy that unlike the 1997 Act, there was not broad cross party support for the enactment of the Criminal Justice Act 2007. One will recall that bail reform had generally been demanded by the majority of the Dáil for a number of years prior to the bail referendum. Despite the bail amendment being ‘rushed through’ in the aftermath of Veronica Guerin’s murder, bail reform had been debated on countless occasions in the Dáil since the O’Callaghan decision. The 2007 Act, however, was not preceded by lengthy debate. The Criminal Justice Bill 2007 was described as a rushed attempt to produce legislation that was not ‘robust and watertight.’ It was stated on countless occasions in the Dáil that the Criminal Justice Bill 2007 was produced as a last stitch effort to appear tough on crime in the weeks running up to a general election. Members of the House labelled the Minister for Justice a ‘serial legislator’ and implored him to ‘slow down.’ Deputy O’Keeffe commented on the hasty enactment of the Criminal Justice Bill 2007 in the following terms:

The original proposal the Tánaiste [Mr McDowell] presented was that the Committee, Report and Final Stages would be taken on one day next week in five hours, without even a break for a cup of tea – wham bam that was to be it. There is no opportunity for the views of groups outside the House to be heard. The Human Rights Commission is preparing a comprehensive response to this but it will not be available until next week. The commission, which has a role to play, particularly in considering criminal legislation, will give its view after the House has passed Second Stage and after the closing date for amendments to this Bill. This is a sham and a fraud, a travesty of proper legislative procedure.

The Bill was also met with reservation from the Irish Council for Civil Liberties. The Council expressed concern about the way in which the Bill was aimed at targeting gangland crime.

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958 As Deputy O’Donnell has stated: ‘If ever there was an issue which has been well debated in this House, it is bail. Not a week goes by, not a Justice Question Time is taken, and not an Order of Business is debated without a question on the law of bail and the need to reform it.’ Dáil Éireann, Private Members’ Business, Measure Against Crime Motion, Tuesday, 2 July 1996, vol 467, no 7, col 2367.
959 Dáil Éireann, Criminal Justice Bill 2007, Second Stage, Thursday, 22 March 2007, vol 634, no 2, col 392. The rushed nature of the 2007 Bill was raised on a number of occasions. Deputy O’Keeffe commented that the time allocated for Committee and Report Stages of the Bill, which contained more than sixty sections, amounted to less than ten minutes per section. Dáil Éireann, Criminal Justice Bill 2007, Second Stage, Thursday, 22 March 2007, vol 634, no 2, col 394.
961 ibid col 412.
962 ibid col 401. For further commentary on the hurried nature of the Bill see generally, Conor Lally, ‘Crime package leaves gangland untamed’ The Irish Times (Dublin, 14 February 2007) 16; Anonymous, ‘Responding to gangland crime’ The Irish Times (Dublin, 15 February 2007) 19; Stephen Collins, ‘Legal bodies urged to oppose justice Bill timing’ The Irish Times (Dublin, 12 March 2007) 5; Miriam Donohoe, ‘New Bill to end judges’ discretion in serious drug cases’ The Irish Times (Dublin, 13 March 2007) 6; Deaglan De Bredun, ‘Groups criticise “rushing through” of crime Bill’ The Irish Times (Dublin, 16 March 2007) 8; Grainne Malone, ‘No relief victims in flawed Bill’ The Irish Times (Dublin, 14 April 2007) 13; Mark Hennessy, ‘President may intervene on Act’ The Irish Times (Dublin, 3 May 2007) 7; Sean MacConnell, ‘Council of State to meet over new justice Bill’ The Irish Times (Dublin, 7 May 2007) 5; Stephen Collins, ‘Bail loophole criticised’ The Irish Times (Dublin, 20 October 2007) 6.
The Irish Times quoted the then Director of the ICCL, Mark Kelly, who stated that, ‘[r]ecent events should have shown the folly of rushing criminal justice legislation through the Dáil, and the ICCL hopes that the adoption of these poorly conceived measures will be postponed until their merit can be fully debated.’ The Law Society of Ireland also expressed concern at the proposals contained in the 2007 Bill. The Law Society commented that, ‘[i]n the view of the society, changes of such a fundamental nature should only be considered after a proper opportunity for informed public debate and not after a careful analysis of the real need for change’. The Society went on to proclaim that ‘[t]here is a great danger to the rights of citizens if this legislation is rushed into law. Previous experience in all jurisdictions, including our own, is that legislation enacted in haste leads to undesirable and unforeseen consequences.’ There sentiments can be further bolstered by the Irish Human Rights Commission (ICHR), which stated, ‘The IHRC considers the limited time-frame within which the Criminal Justice Bill 2007 is being brought forward to be unfortunate.’ The Commission went on to state that the ‘[d]esire to change the law should be balanced by the need to discuss, analyse and reflect on provisions which involve a significant restriction on long established rights’.

The provisions in the 2007 Act pertaining to bail proved particularly contentious. As outlined, s 6 of the 2007 Act inserts s 1A into the Bail Act 1997 and requires that a bail applicant charged with a serious offence must furnish the prosecutor with a detailed statement. The IHRC questioned the efficacy of this provision. It asserted:

[T]he applicant’s source of income and possession of assets do not have any direct bearing on his or her likelihood to stand trial, interfere with witnesses or commit offences while on bail. Moreover, on a practical level, the time needed to gather such personal information creates difficulties for a detained applicant where information is not readily available or accessible... The IHRC believes this raises serious concerns for the applicant’s right to

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963 Deaglan De Breadun, ‘Groups criticise “rushing through” of crime Bill’ The Irish Times (Dublin, 16 March 2007) 8.
964 Stephen Collins, ‘McDowell clashes with law society over reform’ The Irish Times (Dublin, 28 February 2007) 7. Ken Murphy, Director General of the Law Society said, ‘Consideration of this Bill by the Oireachtas should be postponed until after the general election... The Law Society believes it is dangerous to make law in this complex and important area at this pace... Both technical and policy errors will almost inevitably result from rushing this Bill through without an opportunity for it to be properly examined and evaluated’. Deaglan De Breadun, ‘Groups criticise “rushing through” of crime Bill’ The Irish Times (Dublin, 16 March 2007) 8.
966 ibid.
personal liberty and adherence to the principle that everyone is presumed innocent until proven guilty.\textsuperscript{967}

Furthermore, the Act provides for the admissibility of opinion evidence of a senior Garda that it is necessary to refuse bail to prevent the commission of a further serious offence. It is arguable that the rationale behind this provision is questionable. It is posited that s 7 undermines a basic distinction between a function of the court and that of the executive. The Constitution requires that it is the function of the court to decide on its own objectives who should be denied bail. The 2007 Act allows for a Garda to play a larger role in the bail decision and it is debateable whether this role encroaches on the separation of powers.\textsuperscript{968}

Although those in favour of this provision stipulate that this provision is comparable to s 3 of the Offences Against the State (Amendment) Act 1972, there are obvious distinctions. For example, s 3 of the Offences Against the State (Amendment) Act 1972 provides that a member of the Gardai, not below the rank of superintendent, in giving evidence of a charge of membership of an unlawful organisation to state his or her belief that the accused was, at a material time, a member of that organisation and that opinion is admissible that the accused was such a member. However, this section was and remains concerned with the opinion as to fact and the courts have the opportunity to test the factual basis on which the opinion was formed. When IRA members began to engage actively in their defence, any form of cross-examination of the Garda was often enough to rebut evidence of a Garda that the opinion was reasonable. However, s 7 of the 2007 Act can be distinguished from this as a Garda opinion under the 2007 Act is not just evidence of the opinion but also of fact and the Garda is not obliged to provide a reason to the court why the opinion is held.\textsuperscript{969} However, it can be advanced that there is a safety valve in that the opinion of the Garda does not interfere with the ultimate discretion of the court in deciding whether or not to grant bail. Michael Farrell of the ICCL in considering the 2007 Act made the following comments:

It is a curious irony that in an era when we are more committed than ever before to the protection of human rights and when forensic science has made extraordinary advances in

\textsuperscript{967} ibid.
\textsuperscript{968} This sentiment is further buttressed by a recent Irish Penal Reform Trust Paper concerning remand detainees. This paper propounds that ss 6 and 7 of the Criminal Justice Act 2007 are inconsistent with an accused’s right to liberty and the presumption of innocence as the refusal of bail is a responsibility which lies with the judiciary alone. Irish Penal Reform Trust, \textit{Discussion document on the rights and needs of remand detainees} \texttt{<http://www.iprt.ie/files/130708_Discussion_Document_on_remand_detainees_for_law_seminar_v_final_8_July_13.docx>} accessed 21 November 2013.
the identification of suspects and the detection of crime, we are simultaneously chipping away at some of the basic protections of the rights of defendants that were put in place by a much less rights-oriented society and that have endured in some cases for over one hundred years.\footnote{970}{Michael Farrell, ‘The Right to Silence and the Criminal Justice Bill 2007’ (The Criminal Justice Bill 2007: Implications for Law and Practice, 9 May 2007) \<http://www.flac.ie/download/pdf/mfarrell_right2silence_paper_24may07.pdf> accessed 18 July.}

There is little doubt that the Bail Act 1997, the Criminal Justice Act 2006, and the Criminal Justice Act 2007 have all contributed to a ‘chipping away’ of fundamental rights such as the right to liberty and the presumption of innocence.\footnote{971}{Despite the attempts of the Criminal Justice Act 2007, bail law remains a contentious and oft-debated issue in the Dáil. In November 2009, Minister for Justice Dermot Ahern stated: ‘I will be asking the Government to approve my proposal to commence work on a new Bail Bill. The purpose of the Bill is to consolidate and update bail law with a view to presenting a clear, accessible and modern statement of the law. In preparing this Bill I will address a number of weaknesses in the current law to ensure that the bail regime can operate in as tight and effective a way as possible. I will also examine the extent to which the law can be restated to better guide the courts on the need to protect the public against those that present an acceptable risk of committing a serious offence while on bail.’ Dáil Éireann, Written Answers, Proposed Legislation, Tuesday, 10 November 2009, vol 694, no 1, col 40159/09.}

Although there were those who advocated a due process approach to Ireland’s bail laws, the crime control oriented concept of pre-trial preventative detention was firmly implanted in Irish law. The next chapter will examine whether this installation was an ill-considered transplantation of bail provisions from other jurisdictions without adequate assimilation for Ireland’s traditional constitutional values.
Chapter 8 – A Transplantation of Bail Laws

If it be asked why an accused person is presumed to be innocent, I think that 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 very much more harm on the individual than the individual as a rule can inflict on society, so that it can be afford to be generous.972

Introduction

This chapter aims to consider whether the bail amendment, which firmly installed the concept of pre-trial preventative detention into Irish law, is the product of an unwise importation of developments from other jurisdictions without sufficient and necessary attention to their fit with distinctive Irish constitutional values. Firstly, the chapter will outline the bail material from the two other common law jurisdictions which have been referred to throughout this thesis, namely, England and Wales, and the United States. This will contain an analysis of the introduction and content of pre-trial preventative detention legislation in both jurisdictions. Secondly, this chapter will examine the extent to which Irish bail laws are a lift (or not) from English and American precedents. Thus, it will be necessary to compare and contrast Ireland’s bail provisions with those of England and Wales, and the US at this juncture. Lastly, this chapter will critically analyse the persuasiveness of the arguments for introducing the pre-trial preventative detention dimension in the aforementioned jurisdictions and whether (and the extent to which) those arguments do not fit in the Irish context.

Pre-Trial Preventative Detention in England and Wales

As outlined in chapter 4, the central purpose behind the bail decision in 19th century England was the appearance of the accused at trial.973 However, English courts began to consider the likelihood of committing further offences (pre-trial preventative detention) as a reason for denying bail from 1947 onwards. In R v Phillips, the Court of Criminal Appeal outlined its position regarding a judge’s discretion to release on bail.974 Here, the Court denied bail to a repeat offender and directed that if a court is of the belief that a person is likely to commit

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973 For example, Re Robinson (1854) 23 LJQB 286.
974 R v Phillips (1947) 32 Cr App R 47.
further offences while on bail, bail should be denied.\textsuperscript{975} This decision was confirmed in subsequent cases and pre-trial preventative detention was legislated for in England and Wales, with the Bail Act 1976.\textsuperscript{976} Prior to the Bail Act 1976, there was no statutory provision defining the criteria to be applied in determining a bail application, although there was case-law on the subject.\textsuperscript{977} According to the UK Working Party Report on bail, the principle criterion in a bail decision is the appearance of the accused at trial. The Report goes on to note that it is generally accepted that there are two other main reasons for refusing bail – the likelihood of the defendant’s committing serious offences and the likelihood of his interfering with the court of justice by, for example, intimidating witnesses. It is noteworthy that the Report observed that these three factors were ‘those usually given in the textbooks on criminal law and they were also accepted as the main grounds for refusing bail in the debates

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\item Atkinson J stated: ‘The Court feels very strongly that the applicant ought not to have been released on bail. In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there be no objection to bail, but some are, and housebreaking particularly is a crime which will very likely be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it. There were three charges against the applicant. With regard to one, there was no defence and in the case of another he was actually arrested in the act. Yet in spite of all his previous convictions the applicant was given bail, not once but twice, first pending the hearing before the magistrates and again on committal for trial. To turn such a man loose on society until he had received his punishment for… an offence which was not in dispute, was, in the view of the Court, a very inadvisable step. They wish the magistrates who release on bail young housebreakers, such as this applicant to know that in nineteen cases out of twenty it is a mistake.’ \textit{R v Phillips} (1947) 32 Cr App R 47, 48-49.
\item This Act will be examined at a later stage in the chapter. It is noteworthy that s 18(5) of the Criminal Justice Act 1967 also contains a pre-trial preventative detention element. The Act as originally enacted reads: ‘The foregoing provisions of this section shall not require a magistrates’ court to remand or commit a person on bail – (a) where he is charged with an offence punishable by that court with imprisonment for a term of not less than six months and it appears to the court that he has been previously sentenced to imprisonment or borstal training; (b) where it appears to the court that, having been released on bail on any occasion, he has failed to comply with the conditions of any recognizance entered into by him on that occasion; (c) where he is charged with an offence alleged to have been committed while he was released on bail; (d) where it appears to the court that it is necessary to detain him to establish his identity or address; (e) where it appears to the court that he has no fixed abode or that he is ordinarily resident outside the United Kingdom; (f) where the act or any of the acts constituting the offence with which he is charged consisted of an assault on or threat of violence to another person, or of having or possessing a firearm, an imitation firearm, an explosive or an offensive weapon, or of indecent conduct with or towards a person under the age of sixteen years; (g) where it appears to the court that unless he is remanded or committed in custody he is likely to commit an offence; or (h) where it appears to the court necessary for his own protection to refuse to remand or commit him on bail.’ Furthermore, s 21 of the Criminal Justice Act 1967 which concerns ‘special conditions of bail’ appears to indicate that the prevention of crime was a consideration that could be taken into account in deciding a bail application. This section was repealed by the Bail Act 1976.
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in both Houses of Parliament on the Bills which became the Criminal Justice Acts 1967 and 1972.\footnote{Ibid 18.}

The Bail Act 1976 was enacted in light of the Working Party’s Report. In short, the Bail Act 1976 introduced a statutory framework for bail decisions.\footnote{Anthea Hucklesby, ‘Keeping the Lid on the Prison Remand Population: The Experience in England and Wales’ (2009) 21 Current Issues Criminal Justice 3, 3.} The Act provided a presumption in favour of bail so that all defendants have a right to be released before trial unless specific exceptions apply. Section 4(1) of the 1976 Act provides that a person shall be granted bail in cases covered by s 4(2) except as provided for under the First Schedule to the Act.\footnote{Section 4(2) reads: ‘This section applies to a person who is accused of an offence when – (a) he appears or is brought before a magistrates’ court or the Crown Court in the course of or in connection with proceedings for the offence, or, (b) he applies to a court for bail in connection with the proceedings. This subsection does not apply as respects proceedings on or after a person’s conviction of the offence or proceedings against a fugitive offender for the offence.’} In these situations, there is no statutory right to bail and bail is at the discretion of the court. The exceptions to the right to bail are divided into categories namely imprisonable offences and non-imprisonable offences. The category concerning imprisonable offences is pertinent to this thesis as it incorporates the likelihood of committing further offences consideration (pre-trial preventative detention).\footnote{In relation to all offences, an accused may be denied bail where: a) he has been released on bail for the offence and has been arrested for absconding or breaching bail or a surety has withdrawn; b) the court is satisfied that the accused should be kept in custody for his or her own protection (or if a juvenile, for his or her welfare); or c) he is in custody pursuant to sentence (These provisions are contained in the First Schedule to the Act). Part 2, para 2 of the First Schedule states that with respect to non-imprisonable offences, bail may only be refused, in addition to the categories common to all offences where the defendant has previously been granted bail in criminal proceedings, has failed to answer bail, and the court believes that in view of that failure the accused would again fail to surrender to custody if given bail.} With regard to imprisonable offences – the defendant need not be granted bail if the court is satisfied that there are ‘substantial grounds for believing’ that the defendant, if released on bail (whether subject to conditions or not) would:

a) fail to surrender to custody, or  
b) commit an offence while on bail, or  
c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.\footnote{Bail Act 1976, Schedule 1, Part 1, para 2(1).}

Furthermore, the defendant need not be granted bail where:

a) the offence is an indictable offence or an offence triable either way; and  
b) it appears to the court that he was on bail in criminal proceedings on the date of the offence.\footnote{ibid 18.}
The defendant can be denied bail for other reasons, one of which includes, where the court is satisfied that the defendant should be kept in custody for his own protection.\textsuperscript{984}

It is notable that the court must have ‘substantial grounds’ for believing that the defendant will commit an offence if granted bail in order to deny bail yet the range of offences the defendant may potentially commit is not limited.\textsuperscript{985} However, the offence for which the defendant is charged must be an imprisonable offence. When the court is deciding whether or not to grant bail for an imprisonable offence it is required that the court take the following considerations into account:

\begin{itemize}
\item[a)] the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),
\item[b)] the character, antecedents, associations and community ties of the defendant,
\item[c)] the defendant’s record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,
\item[d)] except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted,
\end{itemize}

as well as to any others that appear to be relevant.\textsuperscript{986}

There has been a range of changes made to England and Wales’ bail laws which further restrict the right to bail. For example, s 5(2A) of the Bail Act 1976, as inserted by s 129(1) of the Criminal Justice and Police Act 2001, provides that where a magistrates’ court or the Crown Court grants bail in criminal proceedings to a person to whom s 4 of the Bail Act 1976 applies, after hearing representations from the prosecutor in favour of withholding bail, then the court shall give reasons for granting bail.\textsuperscript{987} In addition, s 26(a) of the Criminal Justice and Public Order Act 1994 inserted paragraph 2A into Part 1 of Schedule 1 of the Bail Act 1976. Effectively, this section allows a court to deny bail if it appears to the court that the defendant was on bail at the date of the commission of the alleged offence, thereby making

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\item[984] ibid para 2A.
\item[985] ibid para 3.
\item[986] It is noteworthy that the UK Law Commission Report on Bail and the Human Rights Act 1998 considered the possibility that UK bail legislation relating to the risk of offending on bail may not be ECHR compatible. Specifically, Strasbourg case-law required that the apprehended offence a defendant may commit while on bail is a ‘serious’ one. Yet under UK legislation the range of offences a defendant may potentially commit is unlimited. Having analysed the law, the UK Law Commission concluded that pre-trial detention for the purpose of preventing the defendant from committing an offence while on bail can be compatible with Article 5(1)(c) and (3) of the ECHR provided that it is a necessary and proportionate response to a real risk that, if released, the defendant would commit an offence while on bail. The Law Commission, \textit{Bail and the Human Rights Act 1998}, Item 10 of the Seventh Programme of Law Reform: Criminal law (Law Com No 269) 27-30.
\item[987] Bail Act 1976, Schedule 1, Part 1, para 9.
\item[988] Bail Act 1976, s 5(2A) as inserted by s 129(1) of the Criminal Justice and Police Act 2001.
\end{itemize}
alleged offending on bail an explicit exception to the right to bail. However, the Law Commission has recommended that a court should not exercise its discretion to deny bail solely on the basis of paragraph 2A. Furthermore, s 25 of the Criminal Justice and Public Order Act 1994 provided that no bail should be granted for defendants charged with or convicted of offences such as homicide or rape if previously convicted of such offences. However, in Caballero v UK, the UK Government conceded that the application of s 25 had violated the applicant’s rights under Article 5(3) of the ECHR and ECtHR accepted that concession. Section 25(1) was subsequently amended by s 56 of the Crime and Disorder Act 1998. This section substituted the words ‘shall not be granted in those proceedings’ for ‘shall be granted bail in those proceedings only if the court or, as the case may be, the constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it’.

Significantly, England and Wales’ bail laws have undergone extensive changes that appear to coincide directly with addressing the problem of offending while on bail. For example, the Criminal Justice Act 2003 reverses the presumption of bail for those defendants who are on bail at the time of the alleged offence unless the court is of the opinion that there is no significant risk of offences being committed while on bail. The Criminal Justice Act 2003 also provides that if an offence is committed while on bail, this is to be considered an aggravating factor for the purpose of sentencing. In addition, s 114(2) of the Coroners and Justice Act 2009 inserts paragraph 6ZA into Part 1 of Schedule 1 of the Bail Act 1976. Section 114(2) provides that bail may not be granted to someone charged with murder unless the court is of the opinion that there is no significant risk that, if released on bail, that person

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988 This has been substituted by Schedule 11, para 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
989 The Law Commission has indicated that a decision to refuse bail solely because the circumstances set out in paragraph 2A exist would not only infringe Article 5, but would also be unlawful under ss 3 and 6 of the Human Rights Act 1998. The Law Commission, Bail and the Human Rights Act 1998, Item 10 of the Seventh Programme of Law Reform: Criminal Law (Law Com No 269) 33.
990 The original s 25(1) reads: ‘A person who in any proceedings has been charged with or convicted of an offence to which this section applies in circumstances to which it applies shall not be granted bail in those proceedings. Section 25(2) lists the range of offences to which this provision applies.’
991 Caballero v UK App no 32819/96 (ECtHR, 8 February 2000).
992 Crime and Disorder Act 1998, s 56.
993 Criminal Justice Act 2003, s 14.
994 ibid s 143(3).
would commit an offence that would be likely to cause physical or mental injury to another person.  

It is arguable that pre-trial preventative detention was provided for in the common law as far back as 1947. Yet it was clearly legislated for with the Bail Act 1976. US bail laws have also endured substantial modification. The following section will address the US bail material.

**Pre-trial Preventative Detention in the United States**

The US Bail Reform Act 1984 (BRA) authorises and sets forth the procedures for a judicial officer to order the release or detention of an arrested person pending trial, sentence, and appeal. Prior to the BRA, pre-trial detention was predominantly only available where the judicial officer determined that the defendant posed a risk of flight. However, under the BRA, pre-trial preventative detention became available, based on a determination by a judge that the defendant was dangerous. The US Court of Appeal has consistently upheld the constitutionality of the BRA under the Fifth and Eighth Amendments. The BRA authorises judicial officers to detain a defendant before trial if the officer finds that the defendant is likely to commit a crime while on release pending trial. This detention order

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995 Coroners and Justice Act 2009, s 114(2).
996 However, one may recall the observations of Finlay CJ in Ryan where he stated that the comments made in R v Philips (which considered the likelihood of committing further offences ground as a laudable consideration in a bail decision) as obiter and as comments which created no principles in Irish law. Ryan v DPP [1989] IR 399, 406.
998 Stack v Boyle 342 US 1 (1951).
1000 United States v Portes 786 F 2d 758 (7th Circuit 1985); US v Delker 757 F 2d 1390 (3rd Circuit 1985); United States v Perry 788 F 2d 100, 118 (3rd Circuit 1986); United States v Rodriguez 803 F 2d 1390 (3rd Circuit 1986); United States v Simpkins 801 F 2d 520 (DC Circuit 1986); United States v Walker 805 F 2d 1042 (11th Circuit 1986).
1001 Bail Reform Act 1984 18 USC § 3142(a)(4). Section 3142(f)(1) provides that a detention hearing shall be held upon the Government’s motion in cases involving (1) a crime of violence; (2) an offence carrying a penalty of life imprisonment or death; (3) a federal drug offence carrying a penalty of ten years or more; or (4) any felony following convictions for two or more of the above three offences, two or more comparable state or local offences, or a combination of such offences. In addition, under s 3142(f)(2), the court may hold a hearing on its own motion or the Government’s motion in a case that involves serious risk of flight or serious risk that the person will attempt to obstruct justice. Although the BRA gives judicial officers the right to consider the risk a defendant poses to the community, it is unclear when a judge may do so, ie even if none of the circumstances outlined in § 3142(f) exist, some judges set detention hearings based solely on danger to the community whereas other judges do not consider community safety to be a basis to hold a hearing. For more on this see Krista Ward and Todd Wright, ‘Pretrial Detention Based Solely on Community Danger: A Practical Dilemma’ (2006) 1 Federal Courts Law Review 625.
can only be entered after an adversarial hearing. During this hearing, the defendant has a right to counsel and can call and cross-examine witnesses.

Prior to the BRA, the law did not provide for the consideration of danger to the community, except for in capital cases. The federal Bail Reform Act 1966 required that every defendant, save those charged with an offence punishable by death, be released on his own recognisances unless the court determined that ‘such a release will not reasonably assure the appearance of the person as required.’ The drafters outlined that:

This legislation does not deal with the problem of the preventative detention of the accused because of the possibility that his liberty might endanger the public... It must be remembered that under American criminal jurisprudence pre-trial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.

A defendant’s dangerousness did not remain exempt from bail decisions nevertheless. Shortly after his election, President Richard Nixon advocated amending the 1966 Act to allow for detention for criminal defendants whose pre-trial release presented a clear danger to the community. This sentiment paved the way for a preventative detention statute for the District of Columbia (DC Statute). The DC Statute was thereby enacted in 1970. It

1002 As stated in United States v Salerno, the Act not only requires the Government to have first shown probable cause that a defendant committed the charged offence but, '[i]n a full-blown adversary hearing, the Government must convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.' United States v Salerno 481 US 679, 750 (1987).


1004 Bail Reform Act 1966, 18 USC § 3146(a). This Act was enacted following concerns over the discriminatory use of bail. Its aim was to discourage reliance on money bail by encouraging release on recognisance instead of monetary bonds. It is notable that at the time of its enactment, Congress did consider pre-trial preventative detention but refused to provide for it.


1007 The District of Columbia’s preventative detention statute was codified in 1983. DC Code Ann § 23-1321-32. The District of Columbia was the first state to enact such a statute. The Statute’s validity was confirmed by the US Court of Appeals for the District of Columbia Circuit in United States v Edwards 430 A 2d 1321 (DC 1981) (en banc) cert denied 455 US 1022 (1982). It has been stated that after Edwards, attention began to move away from the question of the constitutionality of preventative detention to the question of what procedural safeguards would make preventative detention constitutional. For more on state statutes that provide for pre-trial preventative detention and which were introduced before the BRA see John Goldkamp, ‘Danger and Detention: A Second Generation of Bail Reform’ (1985) 76 Journal of Criminal Law and Criminology 1. This article states that by 1983, thirty-four states had provisions relating to dangerousness to the public as a consideration in the bail decision.
authorised pre-trial preventative legislation in non-capital cases on the grounds that the accused was likely to cause a danger to the community or a risk of flight.\textsuperscript{1008}

Twelve states followed the DC Statute during the 1970s. President Nixon was not the only president to endorse pre-trial preventative detention. In an address before the International Association of Chiefs of Police in 1981, President Ronald Reagan stated:

We will push for bail reform that will permit judges – under carefully limited conditions – to keep some defendants from using bail to return to the streets, never to be seen in court again until they are arrested for another crime.\textsuperscript{1009}

The DC Statute effectively paved the way for the BRA. Significantly, the BRA marked the first federal Act where bail could be denied for non-capital offences on the basis of dangerousness.\textsuperscript{1010} Yet there was a difference between the original DC Statute and the BRA in that the DC Statute allowed detention only when at the conclusion of an adversarial hearing a trial judge found a ‘substantial probability’ that the defendant committed the charged offence.\textsuperscript{1011} The BRA, on the other hand, requires a showing of ‘probable cause’ only.\textsuperscript{1012} Furthermore, unlike the DC Statute, no time limits on the length of detention are included in the BRA. However, both Acts required that a judicial officer only impose pre-trial detention if no condition or combination of conditions would serve to protect bail abuses. Section 3142(e)(1) of the US Criminal Code provides:

If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the

\textsuperscript{1008} For more on this see HR Rep No 98-1121, 98th Congress, 2d Session, 7-8.
\textsuperscript{1010} It can be gleaned from the Senate Report that the concept of danger to the community is to be broadly interpreted: ‘The reference to safety of any other person is intended to cover the situation in which the safety of a particularly identifiable individual, perhaps a victim or witness, is of concern, while the language referring to the safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community. The Committee intends that the concern about the safety be given a broader construction than merely danger of harm involving physical violence.’ Senate Report, 98\textsuperscript{th} Congress, 1\textsuperscript{st} Session (1983) 12. It is noteworthy that Congress considered drug-taking a danger to the community. Senate Report, 98\textsuperscript{th} Congress, 1\textsuperscript{st} Session (1983) 12-13. This is further bolstered in \textit{United States v Williams} where it was held that the District Court had erred in failing to take into account drug-dealing as a danger to the community. \textit{United States v Williams} 753 F 2d 329, 335 (4\textsuperscript{th} Cir 1985). Harwin describes the word ‘danger’ as ‘the likelihood that the accused will engage in criminal activity, including non-violent criminal activity, if released.’ Michael Harwin, ‘Detaining for Danger under the Bail Reform Act 1984: Paradoxes of Procedure and Proof’ (1993) 35 Arizona Law Review 1091, 1091.
\textsuperscript{1011} District of Columbia Court Reform and Criminal Procedure Act of 1970, DC Code § 23-1322(b)(2)(C). DC law 18-88, in sub-s (C) substituted ‘probable cause’ for ‘a substantial probability’.
\textsuperscript{1012} Bail Reform Act 1984, 18 USC § 3142(e).
Therefore, a showing of either the defendant’s likelihood to flee or dangerousness to others requires detention.\textsuperscript{1014} The list of factors to be considered when determining whether there are conditions of release that will reasonably assure the appearance of the accused as required and the safety of the community are:

1) the nature and circumstances of the offence charged, including whether the offence is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

2) the weight of the evidence against the person;

3) the history and characteristics of the person, including-
   (A) the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
   (B) whether, at the time of the current offence or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offence under Federal, State, or local law; and

4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.\textsuperscript{1015}

The BRA also provides for two rebuttable presumptions of dangerousness. Firstly, the ‘previous violator’ presumption arises where the defendant is charged with a crime of violence, a capital offence, or a drug–related felony with a minimum ten-year penalty, who was previously convicted of, or released from prison for a similar offence not more than five years before the judicial finding.\textsuperscript{1016} Secondly, the ‘drug and firearm’ presumption arises when the defendant is charged with a crime of violence, a capital offence, the use or possession of a firearm in connection with a crime of violence or a drug offence where a

\textsuperscript{1013} ibid \S 3142(e)(1). The specific conditions which are outlined in 18 USC \S 3142(c)(1)(B)(i)-(xiv) include release to custody of a designated person who will assure the defendant’s appearance; that the defendant maintain or seek employment; maintain or seek education; abide by specific restrictions on personal associations, place of abode, or travel; avoid all contact with alleged victims and potential witnesses; report regularly to pre-trial services; comply with an imposed curfew; refrain from possession of a firearm, destructive device, or other dangerous weapon; refrain from excessive use of alcohol or any use of narcotic drugs without a prescription; undergo medical, psychological, or psychiatric treatment as mandated; agree to forfeiture of property or money for failure to appear as required; execute a bail bond with sufficient sureties to reasonably assure the court of appearance; return to custody for specified hours following release for employment, education or other limited purposes; and satisfy ‘any other condition that is reasonably considered necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.’

\textsuperscript{1014} The Bail Reform Act 1984 (2nd edn, Federal Judicial Center 1993) 7.

\textsuperscript{1015} Bail Reform Act 1984, 18 USC \S 3142(g).

\textsuperscript{1016} ibid \S 3142(e)(1)-(3).
sentence of ten years or more is required under Title 21 of the US Code.\textsuperscript{1017} Persons falling within these categories are deemed to be flight and/or danger risks and the burden of proof is shifted to the defendant in order to show otherwise. The prosecution can invoke the rebuttable presumption if the judicial officer finds that ‘probable cause’ exists that the defendant committed the crime charged. According to the Law Reform Commission, ‘It is generally felt that the potential protection offered by this safeguard has been diluted, if not lost, by the fact that most courts have held that an indictment itself establishes probable cause to believe that the defendant committed the offence charged, and therefore triggers the presumption.’\textsuperscript{1018}

In May 1987, the US Supreme Court addressed the constitutionality of adult pre-trial preventative detention for the first time. This formative decision will be examined below.

\textit{United States v Salerno}

In the \textit{United States v Salerno}, the Supreme Court upheld the BRA against the claim that pre-trial detention based on the defendant’s dangerousness violates due process.\textsuperscript{1019} Although in \textit{Salerno}, the Court of Appeals for the Second Circuit found s 3142(e) unconstitutional,\textsuperscript{1020} every other Court of Appeal that considered this measure upheld its constitutionality.\textsuperscript{1021} On appeal to the Supreme Court, the majority of the Court held that the BRA did not violate substantive or procedural due process under the Fifth or the Eighth Amendment. The Supreme Court in a 6:3 decision reversed the Second Circuit and found the BRA’s preventative detention provisions constitutional.\textsuperscript{1022} Although \textit{Salerno} was the first major challenge made to the BRA, it is worth examining a handful of significant cases that precede \textit{Salerno}.

In \textit{Kennedy v Mendoza Martinez}, the Supreme Court considered a challenge to an immigration law providing for the automatic forfeiture of citizenship if an individual evaded

\textsuperscript{1017} ibid § 3142(f)(1).
\textsuperscript{1020} The US Court of Appeals for the Second Circuit agreed that the preventative element of the BRA was unconstitutional on its face. \textit{United States v Salerno} 794 F 2d 64 (2\textsuperscript{nd} Cir 1986).
\textsuperscript{1021} For example see \textit{United States v Rodriguez} 803 F 2d 1102, 1103 (11\textsuperscript{th} Cir 1986) and \textit{United States v Zannino}, 798 F 2d 544, 546 (1\textsuperscript{st} Circuit 1986).
\textsuperscript{1022} \textit{United States v Salerno} 481 (US) 697 (1987).
The Supreme Court held that such a provision constituted a punishment and was thereby unconstitutional. It was held that the punishment was not allowed without the procedural safeguards of the Fifth and Sixth Amendment. In *Kennedy v Mendoza Martinez*, the Court outlined the test to be employed to determine whether a governmental act serves a regulatory or penal purpose. The Court held that in the absence of an express legislative intent to punish, courts must consider seven factors in order to formulate whether a governmental act is penal or regulatory. These factors were:

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

These factors must only be examined where it is shown that congressional intent is non-punitive. Therefore, it can be promulgated that this test has eight components.

In *Bell v Wolfish*, this regulatory/punitive dichotomy again came under Supreme Court scrutiny. Rehnquist J delivered the majority opinion in this case, which concerned a number of pre-trial detainees challenging the conditions of their confinement. Although referring to the *Mendoza* test in detail, Rehnquist J chose to narrow the criteria into a three-pronged test in order to discern whether a measure was punitive or regulatory. In the absence of showing an express intent to punish, the factors which formed part of this test were:

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1024 Ibid 201.
1025 Ibid 168-169.
1026 *Bell v Wolfish* 441 US 520 (1979).
1027 Ibid 539. Eason has criticised this abridgement of the test as it results in a situation where the analysis of the measure’s objective criteria has been abandoned and the court now examines subjective congressional intent only. According to Eason, if the original eight-pronged test had been applied in *Salerno*, the provision appears to be a punitive one. Michael Eason, ‘Eighth Amendment: Preventative Detention – What will become of the innocent?’ (1973-1988) 78(4) Journal of Criminal Law and Criminology 1048, 1064.
• whether an alternative purpose to which the restriction may be rationally connected is assignable for it;
• whether the detention appears excessive in relation to the alternative purpose.\textsuperscript{1028}

This abridged test was applied by Rehnquist CJ in the Supreme Court in \textit{Salerno}. In \textit{Salerno}, the respondents had argued that the BRA imposed punishment before trial and thus violated the due process guarantee. In an opinion delivered by Rehnquist CJ along with White, Blackman, Powell, O’Conner and Scalia JJ, the majority of the Court held that the challenged provisions did not violate substantive and procedural due process under the Fifth and Eighth Amendments. Rehnquist CJ held that preventative detention was regulatory rather than punitive. One will recall that such a conclusion was the complete opposite to that reached in \textit{O’Callaghan}.\textsuperscript{1029} Rehnquist CJ formed this opinion by applying the three-fold test established in \textit{Bell} to the measure. He asserted:

\begin{quote}
We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pre-trial detention provisions as punishment for dangerous individuals. … Congress instead perceived pre-trial detention as a potential solution to a pressing societal problem. … There is no doubt that preventing danger to the community is a legitimate regulatory goal. … Nor are the incidents of pre-trial detention excessive in relation to the regulatory goal Congress sought to achieve. The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. … The arrestee is entitled to a prompt detention hearing, and the maximum length of pre-trial detention is limited by the stringent time limitation of the Speedy Trial Act. … Moreover… the conditions of confinement envisioned by the Act appear to reflect the regulatory purposes relied upon by the Government. … As in \textit{Schall}, the statute at issue here requires that detainees be housed in a “facility separate to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal”. We conclude, therefore, that the pre-trial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.\textsuperscript{1030}
\end{quote}

The legislative history of the Act indicated that Congress did not have punitive intent. Instead, Congress considered that pre-trial detention was the solution to a particular social problem. As well as addressing Congress’ legislative intent, the Court also looked to whether the restrictions that the measure imposed were ‘excessive in relation to’ that non-punitive purpose. The Court found that they were not. Rehnquist CJ went on to expound that there were numerous examples of where the Government’s interest in community safety

\textsuperscript{1028} \textit{Bell v Wolfish} 441 US 520, 539 (1979).
\textsuperscript{1029} It is noteworthy that the \textit{Salerno} Court did not attempt to define the line which distinguishes between when pre-trial detention meets regulatory due process considerations and when it becomes a punitive measure. This was also the case in \textit{United States v Melendez-Carrion} where the Court asserted: While it may be true that we never before have sanctioned pre-trial detention lasting nineteen months, it is equally true that we have never set an absolute limit on such detention, and we decline to do so now. \textit{United States v Melendez-Carrion} 820 F 2d 56, 59 (2\textsuperscript{nd} Cir 1987).
\textsuperscript{1030} \textit{United States v Salerno} 481 US 697, 747-748 (1987).
outweighed an individual’s right to liberty.\textsuperscript{1031} Such occasions include: the detention of individuals believed to be dangerous in times of war; the detention of dangerous aliens pending deportation proceedings; and the detention of the mentally ill.\textsuperscript{1032} He said:

> Given the well-established authorities of the government, in special circumstances, to restrain individuals’ liberty prior to or even without criminal trial and conviction, we think that the present statute providing for pre-trial detention on the basis of dangerousness must be evaluated in precisely the same manner that we evaluated the laws in [these other cases].\textsuperscript{1033}

While the respondents considered the abovementioned examples as exceptions to the rule of substantive due process, Rehnquist CJ conveyed that due to the number of exceptions to the rule, pre-trial preventative detention could not be considered completely ‘novel’.\textsuperscript{1034} With regard to the Act violating procedural due process, Rehnquist CJ citing Schall v Martin, held that ‘there is nothing inherently unattainable about a prediction of future criminal conduct.’\textsuperscript{1035}

Marshall J emphatically dissented and said:

> This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usage of tyranny and the excesses of what bitter experiences teaches us to call the police state, have long been thought incompatible with the fundamental rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.\textsuperscript{1036}

Marshall J also cast severe reservation over the majority’s analysis of due process. He asserted:

> The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority’s technique for infringing this right is simple; merely redefine any measure that is defined to be punishment as “regulation”, and magically, the Constitution no longer prohibits its imposition.\textsuperscript{1037}

\textsuperscript{1031}ibid 748.
\textsuperscript{1032}ibid.
\textsuperscript{1033}ibid 749.
\textsuperscript{1034}ibid.
\textsuperscript{1035}ibid 751 citing Schall v Martin 467 US 253, 278 (1984).
\textsuperscript{1036}United States v Salerno 481 US 697, 755-756 (1987).
\textsuperscript{1037}ibid 760. Marshall J was not alone in his criticism of the Salerno decision. For more on this see Michael Eason, ‘Eighth Amendment: Preventative Detention – What will become of the innocent?’ (1973-1988) 78(4) Journal of Criminal Law and Criminology 1048; Marian Lupo, ‘United States v. Salerno: A Loaded Weapon
It is notable that the Salerno case related to the facial constitutionality of the BRA.\textsuperscript{1038} Therefore, it is possible that future challenges to the Act could be made.\textsuperscript{1039}

The foregoing paragraphs outlined the introduction and content of pre-trial preventative detention legislation in England and Wales, and the US. The next section will examine whether Ireland imported its bail laws from its common law neighbours.

**A Transplantation of Bail Laws?**

While it cannot be irrefutably stated that Ireland directly transplanted its bail laws, it seems fair to say that Ireland’s bail laws may have been influenced by its common law neighbours. For instance, in *Attorney General v McCann*, the Attorney General sought to rely on the English decision of *R v Philips* where it was held that bail should be refused where the evidence shows that the accused is likely to commit similar offences while on bail.\textsuperscript{1040} In *McCann*, Haugh J held that ‘as there was evidence that the accused was likely to commit an offence while on bail of a similar nature to that with which he was charged, the Court was entitled to consider this evidence as a material ground against bail being granted’.\textsuperscript{1041} Significantly, Haugh J went on to hold that the subsequent charge constituted ‘sufficient prima facie evidence’ of the likelihood of the commission of a similar offence by the accused while on bail.\textsuperscript{1042} Although *McCann* was decided prior to the seminal *O’Callaghan* case (where pre-trial preventative detention was emphatically rejected as forming part of Irish law), the *McCann* case clearly conveys that English precedent pertaining to pre-trial preventative detention was relied on in Irish courts. Likewise, in *Ryan v DPP*, Finlay CJ conceded that the *Salerno* judgment may be of assistance to the Court if the Court was ever called upon to decide upon the constitutional validity of legislation which deals with the sort

\textsuperscript{1038} There are two ways in which a law can be considered unconstitutional. A law can be unconstitutional as applied or it can be unconstitutional on its face. In short, a law can be constitutional on its face, but unconstitutional as applied. Such a law may not be struck down, but the government will have to change how it applies the law in order to conform to the Constitution. However, a law that is unconstitutional on its face can never be constitutional, under any circumstances. In *Salerno*, Rehnquist CJ noted that a facial challenge to an Act is the most difficult challenge to bring successfully because it must show that there are no circumstances in which the Act could be considered constitutional.

\textsuperscript{1039} In *Salerno*, it was stated: ‘We intimate no view on the validity of any aspects of the Act that are not relevant to respondents’ case. Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case.’ *United States v Salerno* 481 (US) 697, 755 (1987).

\textsuperscript{1040} See generally, *R v Philips* (1947) 32 Cr App R 47.

\textsuperscript{1041} *Attorney General v McCann* [1955] IR 163, 163.

\textsuperscript{1042} ibid.
of extraordinary circumstances allowing for preventative detention referred to by Walsh J in *O’Callaghan*.\(^{1043}\) Although US bail provisions were not directly employed in *Ryan*, Finlay CJ’s comments reveal that Irish courts were mindful of the approach being taken toward pre-trial preventative detention in the US around that time.

Although it was claimed that Ireland’s pre-trial preventative detention provisions were based on Article 5(1) of the ECHR, they appear to more closely mirror pre-trial preventative detention provisions in England and Wales, and the US.\(^ {1044}\) There are ostensible similarities between English and Welsh, American and Irish bail laws which indicate that Ireland may have lifted its bail laws from its common law neighbours. For example, a court must consider a range of factors if denying bail based on preventative grounds in a bail decision. Significantly, the Irish considerations are very similar to that of England and Wales, and the US. In short, the three jurisdictions are required to take into account factors such as the nature and seriousness of the alleged offence, the nature and strength of the evidence in support of the charge, the previous convictions of the accused and the defendant’s record, if any, for any offences committed while on bail in the past. The only fundamental difference between the English and Welsh, and Irish factors is that under the Irish bail provisions, a court shall consider the nature and degree of seriousness of the apprehended offence.

In addition, an Irish court can consider whether an accused person is addicted to a controlled drug when it has taken into account one or more of the foregoing considerations. It is noteworthy that the US legislation contains a rebuttable presumption with regard to drug and firearm offences. As one will recall, the ‘drug and firearm’ presumption arises when the defendant is charged with a crime of violence, a capital offence, the use or possession of a firearm in connection with a crime of violence or a drug offence, where a sentence of ten years or more is required under Title 21 of the US Code. English and Welsh legislation has now also considers drug addiction.\(^ {1045}\)

\(\text{\(^{1043}\) Ryan v DPP [1989] IR 399, 408.}\)
\(\text{\(^{1044}\) One will recall the statements of the then Minister for Justice, Nora Owen, when considering the bail amendment. Dáil Debates, Sixteenth Amendment of the Constitution Bill, 1996, Second Stage, Tuesday, 15 October 1996, vol 470, no 1, col 183-184.}\)
\(\text{\(^{1045}\) Section 58 of the Criminal Justice and Court Services Act 2000 inserted s 4(9) into the Bail Act 1976. This section provides that in taking any decisions required by Part I or II of Schedule 1 to this Act, the considerations to which the court is to have regard include, so far as relevant, any misuse of controlled drugs by the defendant. Also, s 19 of the Criminal Justice Act 2003 amends the Bail Act 1976 by placing on the courts a new qualified obligation when considering bail applications in cases where a defendant has tested positive for a specified}\)
There are also a range of similarities across the three jurisdictions with regard to general bail provisions. A further potential importation of English and Welsh bail provisions can be inferred from s 6 of the Bail Act 1976 which creates an offence of absconding on bail.\textsuperscript{1046} Section 13 of the Irish Criminal Justice Act 1984 contains a similar provision which provides that if a person released on bail fails to appear before a court in accordance with his recognisance, he shall be guilty of an offence.\textsuperscript{1047} There are also patent similarities between the Bail Act 1976 and the Bail Act 1997 vis-à-vis the suitability of bailspersons. Both s 8(2)\textsuperscript{1048} of the Bail Act 1976 and s 7(2)\textsuperscript{1049} of the Bail Act 1997 consider a similar range of factors. Based on the near identical wording of the ‘absconding on bail’ and ‘sufficiency of bailspersons’ provisions, it seems fair to assume that Ireland most likely looked to England and Wales when legislating in these specific areas.

Despite the apparent similarities between Ireland’s bail legislation and that of our common law neighbours, there are also distinct differences which intimate that the Irish legislature did not just copy and paste Ireland’s bail legislation. For example, in order for bail to be denied for preventative reasons under the Bail Act 1997, the Bail Act 1976 and the Bail Reform Act 1984, the defendant must be charged with a certain category of offence.\textsuperscript{1050} For example, an

\textsuperscript{1046} Section 6(1) reads: ‘If a person who has been released on bail in criminal proceedings fails without reasonable cause to surrender to custody he shall be guilty of an offence.’

\textsuperscript{1047} Section 13(1) of the Criminal Justice Act 1984 (as amended) reads: ‘If a person who has been released on bail in criminal proceedings fails to appear before a court in accordance with his recognisance, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding twelve months or to both.’ Absconding while on bail is provided for in the US in 18 USC § 3146 of the US Criminal Code. While this section does not explicitly define failure to appear for trial as an offence, it does order that those who fail to appear shall be punished and that any term of imprisonment imposed shall be consecutive to the sentence of imprisonment for any other offence.

\textsuperscript{1048} Section 8(2) of the Bail Act 1976 reads: ‘In considering the suitability for that purpose of a proposed surety, regard may be had (amongst other things) to – (a) the surety’s financial resources; (b) his character and any previous convictions of his; and (c) his proximity (whether in point of kinship, place of residence or otherwise) to the person for whom he is to be surety.’

\textsuperscript{1049} Section 7(2) of the Bail Act 1997 reads: ‘In determining the sufficiency and suitability of a person proposed to be accepted as a surety, a court shall have regard to and may, where necessary, receive evidence or submissions concerning: (a) the financial resources of the person, (b) the character and antecedents of the person, (c) any previous convictions of the person, and (d) the relationship of the person to the accused person.’

\textsuperscript{1050} The Bail Act 1997 provides that bail can only be refused under s 2 where the accused was charged with a ‘serious offence’ within the meaning of the Act. Under the Bail Act 1976, the likelihood of committing an
Irish court may only consider denying bail for preventative reasons where an application for bail is made by a person charged with a ‘serious offence’. However, for preventative detention to apply under the Irish provisions, the apprehended offence must also be a ‘serious offence’ within the meaning of the Act. In England and Wales, the range of offences the defendant may potentially commit is unlimited. It appears that under US bail legislation the apprehended offence need not fall within a specific category, ie the seriousness of the apprehended offence is not considered. As Harwin explains, ‘the term “danger” includes the likelihood that the accused will engage in criminal activity, including non-violent criminal activity, if released.’ Furthermore, the English and Welsh, and US bail provisions reverse the presumption of bail for a certain class of defendants. Therefore, it is arguable that, on its face, it is more difficult to deny bail for preventative reasons under Irish bail legislation than it is to do so in England and Wales, and the US. It is also noteworthy that the Irish provisions provide a number of safeguards that its common law counterparts do not.

Furthermore, in England and Wales, the exceptions to the right to bail under the 1976 Act are more extensive than the Irish provisions. For example, in England and Wales, the provisions provide that bail can be denied if the defendant should be kept in custody for his own

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1051 In order to detain a defendant for preventative reasons in the bail context in the US, the emphasis is placed on whether there is ‘probable cause’ that the defendant committed the charged offence. Then a judicial officer can only impose pre-trial detention if no condition or combination of conditions would serve to protect bail abuses.


1053 Section 14 of the Criminal Justice Act 2003 and 18 USC § 3142(e)(1)-(3) of the US Criminal Code respectively.

1054 For example, s 3 of the Bail Act 1997 Act states that if a bail application is refused under s 2 and the trial has not begun within 4 months, the application may be renewed on the grounds of prosecutorial delay. Section 4 of the 1997 Act expressly precludes the press from reporting that the accused has a past criminal record if this evidence is given in the course of the bail application. The US BRA does not include any definite time limits for pre-trial detention. Speedy Trial legislation is considered a sufficient safeguard against lengthy detention. Yet as a result of excludable time provisions, defendants may potentially be detained far beyond the ninety day maximum under the Speedy Trial Act. The Bail Reform Act 1984 (2nd edn, Federal Judicial Center 1993) 29. In *Salerno*, the Supreme Court left open the possibility that detention could become so long that it would violate the defendant’s due process rights. *United States v Salerno* 481 (US) 697 (1987). No definite time limits appear in the UK Bail Act 1976. The law on custody time limits in England and Wales is to be found in s 22 of the Prosecution of Offences Act 1985 (as amended) and the Prosecution of Offences (Custody Time Limits) Regulations 1987 (as amended).
It is noteworthy that no such provision is contained in the Bail Act 1997. Its exclusion from the Irish bail legislation is in keeping with the statements of Walsh J in *O’Callaghan* where he held that ‘a bail motion cannot be used as a vehicle to import into the law the concept of protective custody for an unwilling recipient.’ It can be deduced that the Irish and the English stance regarding protective custody remain at odds in this regard.

A further divergence can be construed from the fact that the bail legislation in England and Wales has no specific statutory provision making it mandatory for the court to impose a consecutive sentence for an offence committed while on bail, as is the case in Ireland. This is in spite of the fact that bail offending proved a substantial problem in England and Wales in the 1990s. However, there is English case-law which suggests that consecutive sentences should normally be imposed where the offender commits an offence on bail, which was granted in respect of another offence. Yet there are no statutory provisions providing for this in England and Wales. Therefore, one may muse over where Ireland sought inspiration for its consecutive sentencing provisions as provided for in the Criminal Justice Act 1984. One could look to the US for the answer. The BRA provides that where a term of imprisonment is imposed for an offence committed while on bail, the term of imprisonment shall be consecutive to any other sentence of imprisonment. As the BRA was enacted the same year as the Criminal Justice Act 1984, it is unlikely that Ireland imported its consecutive sentencing provisions directly from the BRA. However, the BRA was modelled

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1055 Para 3 of Part 1 of Schedule 1 of the Bail Act 1976 reads: ‘The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.’

1056 Similarly, it appears that no such provision appears in the BRA. However, in *United States v Clarke*, the defendants requested to remain in custody for their own protection. Consequently, the magistrate did not carry out an evidentiary hearing or make written findings. However, the defendants later requested their immediate release based on the assertion that they had an unwaivable right to a detention hearing. The panel majority agreed and held that the defendants could not waive the detention hearing. However, the en banc Court held that defendants may waive both the time requirements and the detention hearing itself. *United States v Clark*, 865 F 2d 1433, 1436 (4th Cir 1989) (en banc).


1058 This is dealt with in s 11 of the Criminal Justice Act 1984.

1059 See *R v Whittaker (Barrington)* [1998] 1 Cr App R (S) 172. This is reinforced by the guidelines issues by the sentencing council. Section C(ii)(33) reads: ‘Where a custodial sentence is imposed for the original offence and a custodial sentence is also deemed appropriate for a Bail Act offence, a court should normally impose a consecutive sentence. However, a concurrent sentence will be appropriate where otherwise the overall sentence would be disproportionate to the combined seriousness of the offence.’ Sentencing Guidelines Council, Failure to Surrender to Bail <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm> accessed 20 October 2013.

1060 Under 18 USC § 3147 of the US Criminal Code, a person convicted of an offence while released under the Bail Reform Act shall receive up to a ten-year term of imprisonment if the offence is a felony and up to one year if the offence is a misdemeanour, to run consecutively with the sentence imposed for the original offence.
on the District of Columbia Statute 1970. The DC Statute also contains a provision providing that, for an offence committed while on bail, the term of imprisonment shall be consecutive to any other sentence of imprisonment.⁴⁶¹ Therefore, it is plausible that Ireland may have transplanted its consecutive sentencing provision directly from the US.

Ireland’s bail laws are very similar to that of England and Wales, and the US in some respects. I have offered examples that suggest that Ireland may have transplanted elements of England and Wales’ pre-trial preventative detention material. There is also evidence which suggests that Irish judges were cognisant of American courts’ decisions pertaining to pre-trial preventative detention and open to employing the American courts’ reasoning in Irish courts if required. Yet Ireland did not simply lift its bail laws verbatim. This can be evidenced from the fact that for pre-trial preventative detention to apply under Irish bail law; the apprehended offence must be a ‘serious offence’. Whereas, in England and Wales, the range of apprehended offences the defendant may potentially commit is unlimited. Moreover, it is propounded that Ireland enacted bail provisions that have no corresponding statutory provision in England and Wales, specifically, a statutory provision making it mandatory for the court to impose a consecutive sentence for an offence committed while on bail. However, it is conceivable that Ireland looked to the DC Statute in the US for guidance in enacting this provision.

The foregoing paragraphs discussed the extent to which Ireland has lifted its bail laws, particularly its pre-trial preventative detention legislation from its common law neighbours. The following section aims to critically analyse the persuasiveness of the arguments for introducing pre-trial preventative detention in England and Wales, and the US.

**Why Introduce Pre-Trial Preventative Detention in England and Wales?**

It has been established that the UK Bail Act 1976 was enacted in order to provide for a more streamlined and transparent bail system. Crucially, its creation was a result of a number of

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⁴⁶¹ DC Code § 23-1328 reads: ‘(a) Any person convicted of an offence committed while released pursuant to section 23-1821 shall be subject to the following penalties in addition to any other applicable penalties: (1) A term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while so released; and (2) A term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanour while so released. (b) The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to the application of this section (c) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.’
empirical studies made prior to its enactment.\textsuperscript{1062} The Irish Law Reform Commission Report on bail further confirms this.\textsuperscript{1063} The rationale behind the Bail Act 1976 was the implementation of a uniform bail procedure.\textsuperscript{1064} Furthermore, there was evidence available which conveyed that persons were being detained unnecessarily and consequently pre-trial detention was having negative effects on defendants.\textsuperscript{1065} Hucklesby points out that the general climate surrounding bail laws in England and Wales around this time, along with other aspects of the criminal justice system, concerned itself with due process rights and the civil liberties of suspects and defendants.\textsuperscript{1066} Therefore, it is arguable that the English criminal justice system in the 1970s, like that of Ireland in the 1960s, was concerned with maintaining the civil liberties of suspects.\textsuperscript{1067}

The excessive detention levels in England prior to the enactment of the Bail Act 1976 can be evidenced from studies which indicate that persons were being needlessly imprisoned without sentence each year. One such study was carried out by Davies in 1971. Davies engaged in a study which attempted to shed light on three particular issues pertaining to bail. These were: 1) The factors, in practice, which influence bail decisions; 2) Whether more defendants could safely be allowed bail; and 3) Whether accused persons were adversely affected by being remanded in custody.\textsuperscript{1068} Davies attempted to address these questions by carrying out a project which involved 418 defendants from Liverpool. Davies conducted his study in a format similar to that used in the Manhattan Bail Scheme in the US.\textsuperscript{1069} Based on the questionnaire; Davies deduced that 40-45,000 defendants were being needlessly imprisoned

\textsuperscript{1065} AK Bottomley, Prison Before Trial: A Study of Remand Decisions in Magistrates’ Courts (G Bell and Sons 1970) 31.
\textsuperscript{1067} It will be recalled that the O’Callaghan judgment was delivered in 1967.
\textsuperscript{1068} Clive Davies, ‘Pre-trial Imprisonment: A Liverpool Study’ (1971) 11 British Journal of Criminology 32, 35.
\textsuperscript{1069} This method was pioneered in the early 1960s by the Vera Institute of Justice. It was designed to test a person’s eligibility for bail by evaluating the strength of their community ties.
without sentence each year.\textsuperscript{1070} It appeared that: many pre-trial detainees did not receive custodial sentences upon conviction; little information was made available at bail hearings; police opinion tended to dictate the bail hearing; bail hearings were notably short with little reasons offered; and the remand population was contributing to prison over-crowding.\textsuperscript{1071} Therefore, it seems fair to assume that the Bail Act 1976 was enacted in order to redress the abovementioned issues as well as providing for a more streamlined and transparent bail procedure.

The establishment of the Working Party on Bail Procedures was announced by the Minister of State, Home Office, in July 1971 in reply to a written question by Mr Clinton Davis MP.\textsuperscript{1072} The terms of reference of the Working Party required that the Party, ‘review practice and procedure in magistrates’ courts relating to the grant or refusal of bail and to make recommendations’.\textsuperscript{1073} At paragraph 6, the Report’s introduction reads:

\begin{quote}
Our main aim has been to consider means of enabling courts to release more persons on bail without significantly adding to the burdens of the police or diminishing the protection afforded to the public by a remand in custody. This objective is desirable both in the interests of the defendant himself and in order to reduce the pressure on the prisons, which is particularly severe in those establishments which receive prisoners on remand.\textsuperscript{1074}
\end{quote}

It can be deduced from this, that the Working Party went somewhat outside its terms of reference and took a more activist stance than that which was required of them in seeking to increase the number of persons released on bail.\textsuperscript{1075} Indeed, the primary concern of the Report was improved procedures for bail decisions. The Report at paragraph 7 states:

\begin{quote}
[O]ur recommendations are designed to help courts make this difficult selection on a more informed and systematic basis than at present… we do not yet believe that the stage has yet been reached where those remanded in custody form a reducible minimum, none of whom could safely be released on bail.\textsuperscript{1076}
\end{quote}

\textsuperscript{1070} He based this finding as though the Liverpool men were representative of pre-trial detainees throughout the country. Clive Davies, ‘Pre-trial Imprisonment: A Liverpool Study’ (1971) 11 British Journal of Criminology 32, 40.
\textsuperscript{1073} ibid.
\textsuperscript{1074} ibid.
\textsuperscript{1075} ibid 58.
\textsuperscript{1076} ibid 2.
These statements are further bolstered at a later stage of the Report where it states:

It seems to us unprofitable, however, to discuss in general terms whether more or fewer persons should be granted bail. Each case has to be considered individually. What is important is to provide procedures which will ensure that it is considered fully, in accordance with appropriate criteria and in the light of all the relevant information.\textsuperscript{1077}

While the 1976 Act legislated for preventative detention in the bail context, little attention was paid to this provision. As Galligan has noted, the Working Party offers ‘no argument to support the use of the bail decision for the wider purposes of crime prevention and protection.’\textsuperscript{1078} In fact, Galligan goes on to point out that ‘this would seem a matter of fundamental principle to be reasoned and justified, not simply stated.’\textsuperscript{1079}

In short, the aim of the Working Party was to find a means of enabling courts to release more persons on bail. This is the antithesis of the rationale behind the introduction of pre-trial preventative detention legislation in Ireland. It is important to question why the reasoning behind the introduction of pre-trial preventative detention in England and Wales and the introduction of pre-trial preventative detention in Ireland was completely different. For instance, it is interesting to consider how a state concerned with due process rights can be squared with the inclusion of pre-trial preventative detention legislation. This could be offered as an example of the distinctiveness of the Irish approach to due process values.

The Irish Constitution places the civil liberties of an individual beyond the powers of the Oireachtas to restrict them arbitrarily or excessively. In England and Wales, there is no fixed legal mechanism for determining whether something is or is not constitutional. There is no supreme law. What is ‘unconstitutional’ is somewhat of a political question.\textsuperscript{1080}

However, while Parliament has the right to make or repeal any law, the exercise of political power is subject to normative restraints which include the rule of law principles. In short, Parliament is the ultimate law-making authority but it is expected to legislate in a manner that conforms to rule of law principles. These rule of law principles can be somewhat likened to Ireland's traditional constitutional values. However, these safeguards against the abuse of
power by Parliament are not legally enforceable. Bingham eloquently describes the relationship between parliamentary sovereignty and the rule of law in the following terms:

We live in a society dedicated to the rule of law; in which Parliament has power, subject to limited, self-imposed restraints, to legislate as it wishes; in which Parliament may therefore legislate in a way which infringes the rule of law; and in which the judges, consistently with their constitutional duty to administer justice according to the laws and usages of the realm, cannot fail to give effect to such legislation if it is clearly and unambiguously expressed.1081

This is a marked difference between England and Wales, and Ireland in this respect. As a result, it is arguable that the Irish approach to due process values is decidedly different to that of England and Wales.

In England and Wales, the pre-trial preventative detention provision in the 1976 Act triggered little, if any, debate. A reason for this could be that the likelihood of committing further offences criterion had already been employed in the English bail decision since 1947. Therefore, its legislating for did not stimulate debate as pre-trial preventative detention had been employed long before 1976.1082 It may also be said that a further reason as to why the introduction of pre-trial preventative detention in England and Wales provoked little debate is due to the fact that there is no written Constitution or bill of rights in England and Wales.1083

While the UK Parliament is expected to legislate in a manner that conforms to rule of law principles, it can legislate in a way that infringes the rule of law. This is not the case in Ireland. Consequently, the introduction of pre-trial preventative detention provisions in Ireland had to accord with constitutional values such as the right to liberty and the presumption of innocence. As pre-trial preventative detention did not adhere to these fundamental principles, a referendum was required in Irish law in order for the implementation of pre-trial preventative detention to be legal.

It has been submitted in earlier chapters that the introduction of pre-trial preventative detention in Ireland can be attributed to the climate of fear after the murder of Veronica Guerin. Despite pre-trial preventative detention legislation being debated for many years, it

1082 Notably, the Working Party Report refers to the fact that ‘the effective operation of the bail system, depends more on good practice and appropriate attitudes on the part of the courts than on statutory provisions.’ *Bail Procedure in Magistrates’ Courts, Report of the Working Party* (Her Majesty’s Stationary Office 1974) 2.
1083 However, the current UK government has initiated a consultation process which considers whether the UK should create its own bill of rights either alongside or replacing the Human Rights Act 1998.
was the high profile murder that triggered its actual introduction. Therefore, it is also arguable that the introduction of pre-trial preventative detention was rooted in political opportunism with the referendum passing in the emotionally charged aftermath of a widely publicised murder. This was not the case in the England and Wales. It appears that the introduction of pre-trial preventative detention legislation in England and Wales cannot be attributed to a particular time or incidence of moral panic. Based on this contention, it is proffered that the Bail Act 1976 represented better law-making as it was premised on evidence and empirical research.

Notwithstanding the fact that pre-trial preventative detention was already legislated for in England and Wales, 1990s England began to witness an increase in the problem of offending while on bail. It was a widely held belief that a small group of persistent offenders were responsible for the increase of offences committed while on bail. This group were labelled bail bandits.

In a study carried out by Hucklesby in the early 1990s, it was shown that the main reasons proffered by the Crown Prosecution Service (CPS) for denying bail corresponded with the three exceptions to bail under the Bail Act 1976, the most common of which being the risk of further offences. In an analysis of the cases where reasons were offered, in 46 cases, (which was the largest single category), the risk of further offences criterion was the only reason submitted to the court for withholding bail. Furthermore, this preventative detention criterion appeared as a reason, in some combination, in 76 per cent of cases (145 cases). Hucklesby compared this result with the incidence of grounds for believing that a defendant will not turn up for trial. This ground was only submitted on 7 occasions and in 55 per cent (105 cases) of these instances as part of a combination of grounds offered by the CPS. Hucklesby points out that these findings indicate that the risk of further offences criterion is the main reason, in the

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1084 According to Huckleby and Marshall, several events caused the issue of bail offending to be brought into the public domain. The first of these was the publication of two research projects conducted by the police force, specifically, Avon and Somerset Constabulary 1991 and Northumbria Police Force 1991. The second reason was several high profile cases where defendants who were already on bail for serious offences committed further serious offences. Anthea Huckleby and Emma Marshall, ‘Tackling Offending on Bail’ (2000) 39(2) The Howard Journal of Criminal Justice 150, 150.

1085 During the debates concerning the Criminal Justice and Public Order Bill 1994, Michael Shersby referred to these ‘bail bandits’ in the following terms: ‘… the scandal of the so called bail bandits is to come to an end. The bill rightly removes the right to bail for someone charged with an offence allegedly committed while on bail. That should stop the so-called revolving door, by which persons are arrested, charged with an offence and granted bail and then offend again and again.’ House of Commons, Hansard Debates, 11 January 1994, col 76.
opinion of the CPS, bail should be denied. This highlights the concern about the incidence of offending while on bail which existed in England and Wales around this time.\textsuperscript{1086}

The crucial point which can be gleaned is that Ireland was not the only country to endure the effects of the ‘habitual bail offender’. Despite legislating for pre-trial preventative detention decades before Ireland, England and Wales also experienced a problem of offending while on bail in the 1990s. It is valuable to consider why the Irish Government did not study England and Wales’ position with regard to pre-trial preventative detention in more detail prior to the bail referendum in 1996. England and Wales had seemingly allowed for pre-trial preventative detention since 1947 and subsequently legislated for it.\textsuperscript{1087} Notwithstanding the fact that pre-trial preventative detention was legislated for in 1976, England and Wales experienced increasing problems with bail offending in the 1990s. The Irish Government was cognisant of the fact that pre-trial preventative detention was provided for in England and Wales, yet bail offending remained a significant problem. Therefore, it seems nonsensical that the Government would legislate for something which had already proved relatively unsuccessful in another jurisdiction. Furthermore, the introduction of pre-trial preventative detention was a much bigger consideration in the Irish context in light of Ireland’s traditional constitutional values, ie the UK Working Party did not have to work within the parameters of a written Constitution.

It was declared by Irish politicians time and time again in the run up to the bail referendum how Ireland’s bail laws were ‘out of line’ with its common law neighbours in England. It is contended that had the Irish Government been less preoccupied with keeping up with the Jones’, it may have noticed that pre-trial preventative detention legislation had done little to curb the habitual bail offender in England and Wales. Unlike Ireland, legislating for pre-trial preventative detention in England and Wales produced little if any debate. While the

\textsuperscript{1086} Anthea Hucklesby, ‘Bail or Jail? The Practical Operation of the Bail Act 1976’ (1996) 23(2) Journal of Law and Society 213, 220-221. Hucklesby also addresses the reasons given by the judges when refusing unconditional bail. The reasons were divided into six categories. Of a total of 244 reasons, 106 (43\%) concerned the risk of further offences; 68 (28\%) concerned failure to appear; 27 (11\%) related to possible interference with witnesses or the administration of justice; 24 (10\%) related to the seriousness of the offence; 3 (1\%) concerned the defendants being of no fixed abode and ‘other reasons’ were given in 16 (7\% of cases). The most common cited reason for the refusal of unconditional bail was the risk of further offences. Hucklesby quoted a solicitor saying, ‘You hardly ever see a case where [risk of further offending] is not used. The other two come into it [absconding and interference with witnesses], but that’s the one they normally say.’ Anthea Hucklesby, ‘Bail or Jail? The Practical Operation of the Bail Act 1976’ (1996) 23(2) Journal of Law and Society 213, 226.

\textsuperscript{1087} However, unlike Ireland, a number of empirical studies on bail were conducted in England and Wales prior to the 1976 Act’s enactment.
introduction of pre-trial preventative detention legislation in Ireland made a significant dent in Ireland’s criminal justice values and represented a crime control approach to criminal justice policy, pre-trial preventative detention legislation was provided for in England and Wales within an Act that aimed to enable courts to release more persons on bail. The rationale behind the introduction of pre-trial preventative detention legislation in these two jurisdictions could not be more opposed. The thesis will now address the persuasiveness of the arguments for introducing the pre-trial preventative detention dimension into US bail law.

**Why Introduce Pre-trial Preventative Detention in the United States?**

It is important to consider the rationale behind the development of pre-trial preventative detention in the US in order to address the consequences of transplanting the alien roots to Ireland. According to Goldkamp, the evolving political climate played a crucial role in the introduction of pre-trial preventative detention in the US. Goldkamp submits that ‘[t]he social and historical shift in recent decades, away from poverty and civil liberty concerns and toward a climate marked more by heightened public fear of crime and “law and order” politics may explain the evolution of the danger-orientated agenda of bail and pre-trial detention practices.’

In the 1980s, the US experienced a significant crime problem. For example, according to a Department of Justice Report in 1962, the murder rate per 100,000 was 4.6. In 1980, this figure had increased to 10.2. There was a perception that a crime wave, relating to crimes committed on bail was sweeping the country. Like Ireland, the legislature was more

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1088 Historically, there was a statutory right to bail for people accused of non-capital offences. In *Williamson v United States* it was stated: ‘Imprisonment to protect society from predicted but un consummated offences is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offences as those of which defendants stand convicted.’ *Williamson v United States* 184 F 2d 280 (2nd Cir 1950).


receptive to the installation of pre-trial preventative detention in a time of perceived crisis.\textsuperscript{1092} The climate at the time can be evinced from an address by President Reagan on proposed crime legislation. The President stated:

> It’s hard to imagine the present system being any worse. Except in capital cases, Federal courts cannot consider the danger a defendant may pose to others if released. The judge can only consider whether it’s likely the defendant will appear for trial if granted bail. Recently, a man charged with armed robbery and suspected of four others was given a low bond and quickly released. Four days later he and a companion robbed a bank, and in the course of the robbery a policeman was shot. This kind of outrage happens again and again, and it must be stopped. So, we want to permit judges to deny bail and lock up defendants who the government has shown pose a grave danger to their communities.\textsuperscript{1093}

It is thought that statements such as the above reflected the increasing fear of crime within American communities.

The US Senate Committee on the Judiciary stated that the ‘broad base of support for giving judges the authority to weigh risks in community safety to pre-trial release decisions is a reflection of the deep public concern... about the growing problem of crimes committed by persons on release.’\textsuperscript{1094} In a House of Representatives’ Report, Representative Kastenmeier observed:

> In 1966, the Congress made an explicit decision not to permit the courts to assess directly whether the defendant was dangerous… Since 1966, there has been continued pressure for the use of pretrial detention based on predictions of dangerousness. During this [fifteen] – year period, some additional evidence has emerged which may help resolve the issues outlined above. The pressure for preventative detention has produced changes in the bail laws in a number of states and passage of a bail reform bill by the Senate.\textsuperscript{1095}

Another reason offered as to why preventative detention became a consideration in a bail decision was that even though the Bail Act 1966 did not provide for the consideration of dangerousness, judges did so anyway when setting bail. The Senate Committee picked up on this sub rosa operation and commented in the following terms:

> Providing statutory authority to conduct a hearing focused on the issue of the defendant’s dangerousness and to permit an order of detention where a defendant poses such a risk to

\textsuperscript{1092} In Salerno, Rehnquist CJ cited the 98\textsuperscript{th} Congress Senate Report which indicated that the 1984 Act had been enacted in response to ‘the alarming problem of crimes committed by persons on release’. United States v Salerno, 481 US 739, 742 (1987) citing Senate Report, 98\textsuperscript{th} Congress, 1\textsuperscript{st} Session (1983) 3.


\textsuperscript{1094} Senate Report, 98\textsuperscript{th} Congress, 1\textsuperscript{st} Session (1983) 6.

\textsuperscript{1095} HR Rep No 98-1121, 10 as cited by Clara Kalhous and John Meringolo, ‘Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys’ Perspectives’ (2012) 32(3) Pace Law Review 800, 816.
others that no form of conditional release is sufficient, would allow the courts to address
the issue of pre-trial criminality honestly and effectively.1096

Prior to the enactment of the 1984 Act, the US Senate Committee on the Judiciary held three
days of hearings concerning bail reform. The Committee sought expert opinion from the
Judicial Committee of the US, the Pretrial Resource Centre, the Reagan Administration, the
American Bar Association, the American Civil Liberties Union as well as other academic
reports.1097 Bail reform was generally welcomed. The following statements from Senator
Kennedy convey such attitudes:

The most important provision is the change that at last permits judges to take into account
the potential dangerousness of defendants in deciding whether they should be released on
bail. No longer will judges be faced with the Hobson’s choice of granting bail to a
demonstrably dangerous defendant, or subverting the law with a baseless finding that the
defendant is likely to flee. No longer will any judge feel compelled by a foolish law to
releases a dangerous defendant into a community to rape or rob or mug or kill again.

In sum, this legislation embodies a unique national consensus that more can be done and
must be done to combat crime in our society. The bill we offer today is a giant step
forward for the safety of our communities, for the preservation of our freedoms, and for
every law enforcement officer, every criminal justice official, and every citizen in
America.1098

When drafting the Bail Reform Act 1984, Congress referred to case-law decided under the
District of Columbia Statute which allowed for pre-trial preventative detention.1099 The DC
Statute was also referred to in the US Senate Committee on the Judiciary Report which
principally concerned itself with the Comprehensive Crime Control Act of 1984 but included
a discussion on the BRA.1100 In this Report, the Judiciary Committee recommended the pre-
trial detention Statute for Senate approval. The Committee pointed out:

[T]here is a small but identifiable group of particular defendants as to whom neither the
imposition of stringent release conditions nor the prospect of revocation of release can

Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys’
1099 For example, Congress referred to United States v Edwards which was considered earlier in the chapter.
1100 When considering the Edwards case, the US Senate Committee on the Judiciary Report stated: ‘With respect
to the Due Process issue, the [Edwards] court concluded, correctly in the view of the Committee, that pre-trial
detention is not intended to promote the traditional aims of punishment such as retribution or deterrence, but
rather that it is designed “to curtail reasonably predictable conduct, not to punish for prior acts,” and thus, under
the Supreme Court’s decision in Bell v Wolfish, is a constitutionally permissible regulatory, rather than a penal
sanction. Based on its own constitutional analysis and its review of the Edwards decision, the Committee is
satisfied that pre-trial detention is not per se unconstitutional.’ Senate Report, 98th Congress, 1st Session (1983)
8.
reasonably assure the safety of the community or other persons. It is with respect to this limited group that the courts must be given the power to deny release pending trial.  

Clearly, the approach to pre-trial preventative detention taken by the US can be distinguished from the approach taken in England and Wales. In England and Wales, preventative detention was legislated for on the basis of a Working Party Report which sought to increase the number of persons released on bail. This objective was considered desirable both in the interests of the defendant himself and in order ‘to reduce the pressure in the prisons’.  

On the other hand, pre-trial preventative detention was introduced in the US during a time when due process rights were considered less important, and instead where a crime control and risk management approach was beginning to emerge. Therefore, it appears that the development of pre-trial preventative detention legislation in Ireland had similar origins to the development of pre-trial preventative detention legislation in the US. In both jurisdictions there was a public fear of bail offending prior to the introduction of the preventative detention legislation. As articulated in *Salerno*:

> The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pre-trial detention provisions as punishment for dangerous individuals… Congress instead perceived pre-trial detention as a potential solution to a pressing societal problem.  

In short, the introduction of pre-trial preventative detention in the US was similar to the reasoning behind its introduction in Ireland. However, when considering the introduction of pre-trial preventative detention in the US, a range of empirical data was relied upon, some which supported the adoption of preventative detention and other data that questioned its efficacy. For example, the 98th Congress Report referred to a study which found that in the District of Columbia, twenty-eight percent (28%) of the murders, thirty-one (31%) of the robberies, thirty-two per cent (32%) of the burglaries, and eleven percent (11%) of the assaults were committed by individuals on some form of conditional release.  

Conversely, in *Edwards*, Justice Mack referred to a study by the American Psychiatric Association, which found that even psychiatrists could not accurately predict criminal

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behaviour. He also referred to a Harvard Study concerning the rearrest rate of persons in the Boston area during a six-month period in 1968. In this study, the researchers used the DC Statute as a framework. The study focussed on 427 released defendants who had been charged with violent or dangerous crimes who would have been eligible for pre-trial preventative detention had the DC Statute been operative in Boston in 1968. Of the 427 defendants in the survey, 41 were rearrested and later convicted of crimes perpetrated during the pre-trial period. 22 of the 41 convictions were for dangerous or violent crimes as defined by the Act. The researchers concluded that in order to prevent all 41 offences it would have been necessary to detain 357 persons, ie for every one recidivist detained, eight non-recidivists would also have to be detained. Furthermore, there exists a range of academic commentary in the US predicated on the subject of pre-trial preventative detention. Legal scholars such as Charles Ewing have carried out detailed examinations on the potential for predictions of criminal behaviour.

Thus, it can be propounded that Congress had a rational basis (conducted its assessment of the need for reform on an empirical as well as normative basis) for drafting the BRA. Prior to the BRA, there existed a state law that provided for pre-trial preventative detention, namely, the District of Columbia Statute. Therefore, Congress and federal judges were already familiar with the operation of pre-trial preventative detention prior to its implementation. Unlike Ireland, pre-trial preventative detention was legislated for on a federal basis in the US after a considerable amount of reasoned academic debate and empirical analysis.

In Edwards, Justice Mack stated: ‘The American Psychiatric Association has suggested that “[n]either psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or dangerousness.”’ Justice Mack went on to state: ‘The American Bar Association, has deemed detention under our statute “constitutionally dubious at best”, noting that ten years of experience had demonstrated that the experts’ doubts as to the inability to predict dangerousness were well founded. Moreover, the Bar Association has noted that the statute is virtually useless in reducing recidivism.’ United States v Edwards 430 A 2d 1321, 1370 (DC 1981). Justice Mack refers to a range of empirical evidence which casts doubt over the ability to predict future dangerousness. For example, see the American Psychiatric Association, Task Force Report on the Clinical Aspects of Violent Individuals 28 (1974); Commentary to the American Bar Association Standards Relating to Pretrial Release (2nd edn Approved Draft. 1979, following Standard 10-5.9) 10-106; ABA Report; Vera Institute of Justice, Preventive Detention in the District of Columbia (1972) 72-73.


For example see Charles Ewing, ‘Schall v. Martin: Preventative Detention and Dangerousness Through the Looking Glass’ (1985) 34 Buffalo Law Review 173. In this article, Ewing examines the Supreme Court’s reasoning regarding the due process issue in Schall v Martin in light of the available empirical data regarding predictions of dangerousness. The article also addresses the use of predictions of dangerousness in the criminal and juvenile justice systems and the implications of Schall v Martin for the use of such predictions in future efforts to prevent crime. See also, Charles Ewing, ‘Preventive Detention and Execution’ (1991) 15(2) Law and Human Behaviour 139.
Consequently, Congress was cognisant of the pitfalls and advantages of pre-trial preventative detention when drafting the BRA and therefore made an informed decision when deciding upon its introduction.

The persuasiveness of the arguments for introducing the pre-trial preventative detention dimension in US bail law can be gleaned from the above. Like Ireland, it appears that the perceived increase in bail offending was the impetus behind the introduction of pre-trial preventative detention legislation in the US. However, unlike Ireland, US pre-trial preventative detention provisions were based on an already operational State statute. Furthermore, like in England and Wales, a range of empirical studies predicated on pre-trial preventative detention had been conducted prior to the installation of preventative detention in the bail context.

**Ireland’s Distinctive Constitutional Values**

Based on the foregoing sections of this chapter, it seems fair to say that Ireland may have imported some of its bail provisions from England and Wales, and the US. This section seeks to convey how the transplantation of bail laws from England and Wales, and the US did not make adequate accommodation for the constitutional differences between jurisdictions. I will address the inherent dangers in importing bail provisions from other jurisdictions below.

Although the Irish legal system emerged from the British legal system, the Irish system has deviated from the British model. It is understood from chapter 2 that the Irish Constitution contains a bill of rights that the Oireachtas is unable to cut down by ordinary legislation. It is required that the courts uphold these rights through their jurisdiction to declare laws void, should they breach the Constitution. Consequently, when the Irish Supreme Court decides that a right has obtained ‘constitutional’ status, that right is removed from the political domain and placed within the protection of the judicial branch. This can be evidenced from the treatment of the presumption of innocence in *O’Leary v Attorney General* where it was held by the Supreme Court that the presumption of innocence was implicitly protected by
Article 38.1. Further still, in Ireland fundamental rights can only be amended by the people of Ireland through a referendum.

The system of government that operates in the UK is parliamentary sovereignty. The constitutional role of the judges in protecting fundamental rights remains limited due to the legislative supremacy of Parliament. As O’Cinneide describes it: ‘[T]he political orientation of the British constitution lives on, symbolised and embodied by the continuing sovereignty of Parliament.’ While Parliament must legislate in a manner that conforms to rule of law principles, it can legislate in a way that infringes the rule of law. The same cannot be said for the Oireachtas.

Consequently, Ireland and the UK have starkly different legal systems. Although Ireland employs the common law in its decision making, in Ireland, the Constitution rules supreme. Furthermore, Ireland’s recognition of unwritten rights reveals a clear departure from the positivism of the common law. Therefore, it is risky to transplant England and Wales’ bail provisions directly, based on the effect said transplantation could have on Ireland’s traditional constitutional values.

Article 40.4.1° of the Irish Constitution specifically states, ‘No citizen shall be deprived of his personal liberty save in accordance with law.’ The importance of this fundamental right was acknowledged by Walsh J in O’Callaghan. In O’Callaghan, Walsh J acknowledged that some English cases allowed for the incorporation of preventative justice in the bail context. However, Walsh J went on to argue that in Ireland, such a measure would be contrary to the concept of personal liberty enshrined in the Constitution. According to Walsh J, pre-trial preventative detention opposes Ireland’s traditional constitutional values. In England, the Working Party on bail did not have to work within the limitations of a written Constitution or a bill of rights. Therefore, it is submitted that Walsh J identified that the importation of pre-trial preventative detention provisions from the English common law could cause deep ramifications for Irish constitutional values. In O’Callaghan, both judges indicated, not only

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1109 In Ireland, ‘the referendum process remains an active channel for the expression of popular sovereignty’. Colm O’Cinneide, ‘The People are the Masters: The Paradox of Constitutionalism and the Uncertain Status of Popular Sovereignty within the Irish Constitutional Order’ (2012) 17 The Irish Jurist 249, 272.
would the incorporation of a preventative detention-like measure into Irish law contravene one’s fundamental right to liberty, it would also impede an individual’s right to the presumption of innocence. In Ireland, the only way in which an individual’s rights can be amended is through the referendum process. Therefore, it is problematic to look at the English approach to preventative detention as their laws do not operate under the same constraints as Ireland’s.

As Ó’Tuama says, ‘In effect Irish government is a hybrid, with antecedents in the Commonwealth parliamentary model with a strong flavour of the American constitutional model’. Although the Irish legal system is based on the British system, it is distinct in terms of its traditional constitutional values. Unlike Britain, the US does contain a bill of rights. However, despite the obvious similarities that can be drawn between the Irish and US legal system, the following paragraphs will endeavour to convey the risk associated with importing US bail provisions.

In the US, like Ireland, the Constitution rules supreme. Any federal law that conflicts with the Constitution is invalid, ie where Congress enacts a statute which conflicts with the Constitution, the Supreme Court may find that law unconstitutional and thereby declare it invalid.

However, one must note the complexity of the relationship that exists between federal law and state law. In short, federal law is uniform in its application throughout the US whereas state law varies from state to state. Both federal courts and state courts may apply federal law and state law (depending on the issues presented in the particular case). Federal procedure is applied in the federal courts and state procedure in the particular state court. Therefore, the relationship between federal and state law involves a nuanced co-existence. For example, many American states may grant their citizens broader rights than the Constitution itself provides as long as they do not conflict with federal constitutional rights. This can be evidenced from the fact that the DC Statute provided for pre-trial preventative detention in the District of Columbia prior to pre-trial preventative detention being legislated for on a

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federal basis. In fact, by 1983, thirty-four states had provisions relating to preventative detention as a consideration in the bail decision.

This shows that pre-trial preventative detention legislation was operating in the US long before the *Salerno* decision where the majority of the Supreme Court upheld the constitutionality of the Bail Reform Act 1984. The installation of preventative detention in both jurisdictions, namely, Ireland and the US was patently different. In the US, pre-trial preventative detention legislation was already in place when the question of the constitutionality of the BRA arose. Pre-trial preventative detention did not exist in the Irish context until a referendum was held on the issue. It seems unlikely that the Irish judiciary could have allowed for any form of pre-trial preventative detention in Irish law prior to the referendum given the explicit protection afforded to the right to liberty in the Irish Constitution. The Irish Constitution can be distinguished from the US Constitution in this respect. Although Articles 5 and 14 of the US Constitution refer to ‘liberty’, it does not appear to explicitly guarantee the right to liberty, as is the case in the Irish Constitution.

Furthermore, there are also varying approaches to the application of the presumption of innocence in both jurisdictions. In *Coffin v United States*, it was held that accused persons were considered innocent until proven guilty on the basis of evidence at trial. Significantly, in *Coffin* the Supreme Court found that the presumption of innocence was distinct from the rule regarding the onus of proof on a criminal charge. Instead, the Court considered it an item of evidence which had been withheld from the jury.

Like the Irish Constitution, the US Constitution does not explicitly refer to the presumption of innocence. In the US, the presumption of innocence has been held to be grounded in the due process clause, requiring release on bail for defendants charged with non-capital offences.

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1113 The DC Statute was enacted in 1970. It is codified at DC Code Ann § 23-1321-32 (1983). The DC Court of Appeals confirmed the constitutionality of a DC law that allowed detention based on predictions of dangerous in two separate appeals, namely, *De Veau v United States* 454 A 2d 1308 (DC 1982) and *United States v Edwards* 430 A 2d 1321 (DC 1981).


1115 One may recall the earlier comments concerning the onerous nature of the amendment process in the US provided for in Article 5. For more on this generally see Stephen Griffen, ‘The Nominee is... Article 5’ in W William Eskridge and Sanford Levinson (eds) *Constitutional Stupidities, Constitutional Tragedies* (New York University Press 1998).

1116 *Coffin v United States* 156 US 432 (1835).
and furthermore requiring that a determination of guilt not occur until trial. Moreover, in *Stack v Boyle*, the US Supreme Court plainly made a connection between the right to bail and the presumption of innocence:

From the passage of the Judiciary Act of 1789… to the present Federal Rules of Criminal Procedure… federal law has unequivocally provided that a person arrested for a non-capital offence shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defence and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

However, changes in both US state and federal law between the 1960s and the 1980s represented a shift in the meaning of the presumption of innocence. As previously outlined, prior to the introduction of pre-trial preventative detention in the US, judges presumed bail for non-capital offences and were only entitled to deny bail where there was a risk of flight. However, as Baradarin points out, while the 1966 Act favoured release, ‘it inadvertently paved the way for limits on defendant’s release rights’ in that it allowed a court to consider additional factors in the release decision besides risk of flight.’ This coupled with mounting concerns over public safety resulted in a change in tack regarding the application of the presumption of innocence in the US. For instance, in *Taylor v Kentucky*, the Court held that the *Coffin* Court was incorrect in finding that the presumption of innocence and the prosecution bearing the burden of proof beyond a reasonable doubt were two distinct principles. It is understood that in equating these two principles, the Court in *Taylor* emphasised the importance of the presumption of innocence and due process at the

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1117 In *Estelle v Williams*, the Court explicitly linked the presumption of innocence to the due process clause. The Court stated that, ‘[t]he presumption of innocence, though not articulated in the Constitution, is a basic component of a fair trial under our system of justice’. *Estelle v Williams* 425 US 501, 503 (1976). In *Coffin v United States*, White J cited Blackstone who referred to the presumption of innocence in the following terms: ‘[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer.’ White J citing Blackstone (1753-1765) at 358 in *Coffin v United States* 156 US 432, (1895).
1118 *Stack v Boyle* 342 US 1, 4 (1951).
1120 One will recall the federal Bail Reform Act 1966 which favoured pre-trial release.
1122 Powell J delivering the opinion of the Court stated: ‘The *Coffin* Court traced the venerable history of the presumption [of innocence] from Deuteronomy through Roman law, English common law, and the common law of the United States. While *Coffin* held that the presumption of innocence and the equally fundamental principle that the prosecution bears the burden of proof beyond a reasonable doubt were logically separate and distinct… sharp scholarly criticism demonstrated the error of that view…’ *Taylor v Kentucky* 436 US 478, 483 (1978).
trial stage rather than the pre-trial stage.\textsuperscript{1123} Thereby, Taylor removed the importance of the presumption at the pre-trial stage. Thus, a shift in attitudes had begun.

This stance was reiterated in \textit{Bell v Wolfish}.\textsuperscript{1124} In \textit{Bell}, the Supreme Court held that the presumption of innocence ‘has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun.’\textsuperscript{1125} In short, the Supreme Court's decision in \textit{Bell} indicated that the presumption of innocence does not apply at the pre-trial phase.

Despite the Bail Reform Act 1984 explicitly outlining that nothing in the Act intended to modify or limit the presumption of innocence,\textsuperscript{1126} the impact that pre-trial preventative detention could have on the presumption of innocence was not even considered by the majority in the \textit{Salerno} decision which upheld the constitutionality of the Bail Reform Act 1984.\textsuperscript{1127} As stated in the dissenting judgment of Marshall J:

\begin{quote}
Honouring the presumption of innocence is often difficult: sometimes we must pay substantial costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the short-cuts we take with those whom we believe to be guilty injure only those wrongfully accused and ultimately ourselves.\textsuperscript{1128}
\end{quote}

It is clear from the foregoing paragraphs that the application of the presumption of innocence has undergone significant change in the US. It appears that the presumption of innocence has been removed for pre-trial defendants and consequently is only employed at the trial stage.

Let us now reflect upon the application of the ‘fundamental postulate’ that is the presumption of innocence in Ireland. In Ireland, the presumption of innocence was implicitly recognised

\textsuperscript{1123} Shima Baradarin, ‘Restoring the Presumption of Innocence’ (2011) 72(4) Ohio State Law Journal 1, 22.
\textsuperscript{1124} Bell v Wolfish 441 US 520 (1979). This case concerned a constitutional challenge to the conditions at a temporary detention centre. The conditions required that the detainees share a room, were prohibited from receiving certain books and, were subjected to mandatory body cavity searches after outsider visits. Bell v Wolfish 441 US 520, 530 (1979).
\textsuperscript{1125} Bell v Wolfish 441 US 520, 582 (1979). In Bell v Wolfish it was stated: ‘The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused’s guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.’ Bell v Wolfish 441 US 520, 533.
\textsuperscript{1126} Bail Reform Act 1984, 18 USC § 3142(j).
\textsuperscript{1127} It is noteworthy that the Salerno Court relied on Bell despite the fact that Bell concerned the conditions of detention rather than the detention itself.
\textsuperscript{1128} United States v Salerno 481 US 697, 721 (1987). Notably, Marshall J distinguished the presumption of innocence from the burden of the prosecutor to prove guilt beyond a reasonable doubt. He stated that both are ‘implicit in the concept of ordered liberty’ established under the due process clause. United States v Salerno 481 US 697, 763 (1987).
as possessing constitutional status in an array of cases. However, it was not until the High Court decision of *O’Leary v Attorney General* that it was expressly acknowledged in Ireland.\(^{1129}\) Decisively, in *O’Callaghan*, it was held that it was the accused’s right to be presumed innocent at the pre-trial stage. This liberal view was typified with the Court finding that the presumption of innocence informed the entire criminal process, ie from the start of criminal proceedings until the verdict is given. These sentiments were further buttressed more recently in *Gregory v Windle* where O’Hanlon J stated:

> A person charged with a criminal offence can be, and usually is, allowed out on bail, with sureties being taken to ensure the appearance of the accused person at a specified time and place to answer the charge against him. However, if the accused person declines to acknowledge himself bound by the terms of a bail bond or is unable or unwilling to provide independent sureties as required by the order admitting him to bail, his only alternative is to remain in custody while awaiting trial, notwithstanding the presumption of innocence which exists in his favour until conviction.\(^{1130}\)

Therefore, it is revealed that the application of the presumption of innocence in the US and Ireland is markedly different. In *Bell*, the US Supreme Court clearly established that the presumption of innocence does not apply at the pre-trial stage. This was further reiterated in *Salerno*. However, Irish Courts around this time continued to proclaim that the presumption of innocence informs the entire criminal process. Thus, by transplanting pre-trial preventative detention legislation from the US, Ireland neglected to make adequate accommodation for the differences in constitutional values between the two jurisdictions – in this instance, the application of the presumption of innocence.

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\(^{1129}\) In *O’Leary*, Costello J stated: ‘The Constitution of course contains no express reference to the presumption but it does provide in Article 38 that “no person shall be tried on any criminal charge save in due course of law.” It seems to me that it has been for so long a fundamental postulate of every criminal trial in this country that the accused was presumed to be innocent of the offence with which he was charged that a criminal trial held otherwise than in accordance with this presumption would, *prima facie*, be one which was not held in due course of law. It would follow that *prima facie* any statute which permitted such a trial so to be held would be unconstitutional.’ *O’Leary v Attorney General* [1993] IR 102, 107.

\(^{1130}\) *Gregory v Judge Windle* [1994] 3 IR 613, 622. This can be juxtaposed with *Blunt v United States* where it was stated: ‘The presumption of innocence, however, has never been applied to cases other than the trial itself. To apply it to the pre-trial bond situation would make any detention for inability to meet conditions of release unconstitutional.’ *Blunt v United States* 322 A 2d 579, 584 (DC 1974).
Conclusion

‘Our’ security depends upon ‘their’ control.\footnote{David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001) 182.}

This thesis employed Herbert Packer’s Due Process/Crime Control archetype in order to trace the current direction of the Irish criminal justice process. It is contended that Packer’s models provide an accessible mechanism to discuss the operation of the criminal process. As Sanders and Young have observed, ‘Use of the models enables one to plot the position of current criminal justice practices at each stage, as well as to highlight the direction of actual and foreseeable trends along any given spectrum.’\footnote{Andrew Sanders and Richard Young, *Criminal Justice* (3rd edn, Oxford University Press 2007) 19.} Nonetheless, Packer’s models have been criticised as being ‘theoretically deficient’ and ‘outdated’. Notwithstanding the documented lacunae in Packer’s opposing archetypes they remain extremely valuable. For example, if one applies Packer’s two normative models to the Irish criminal justice system recent trends in the administration of criminal justice can be witnessed. The models act as a useful tool for policy-makers as they reflect underlying ideologies about criminal justice. Therefore, it is arguable that a knowledge and understanding of theoretical frameworks such as Packer’s Due Process/Crime Control dichotomy are worthwhile as they remain valid and applicable. Furthermore, there are lessons to be drawn in employing these models. For instance, as the Irish criminal justice system evolves, it oscillates between the Due Process and Crime Control Model. Yet the trajectory of the Irish criminal justice process is unplanned.

This thesis sought to trace the current trajectory of the Irish criminal justice system from a due process to crime control system of justice. Ireland’s bail laws served as the paradigm upon which to analyse the proposed shift in the Irish criminal justice process. One may recall the comments of Steyn LJ which were cited in the first few lines of this thesis. They read, ‘The object of the criminal justice system is the control of crime, but in a civilised society that object cannot be pursued in disregard of other values.’\footnote{R v Brown (Winston) [1995] 1 Cr App R 191, 198.} It is the arguable that the recent changes to Ireland’s bail laws serve as an example to elucidate that Ireland’s traditional constitutional values have been ‘disregarded’ in favour of a crime control approach to criminal justice matters. However, it could also be asserted that there remains a
gravitational pull to traditional constitutional values and due process rights within the Irish criminal justice system.

Consequent to the adoption of the 1937 Constitution, the Irish courts adopted a liberal due process centred approach to the granting of bail. In People (Attorney General) v O’Callaghan, Murnaghan J in the High Court listed a new and more extensive range of grounds which he believed a court should take into consideration in a bail application. Significantly, this extended list of considerations included the controversial ‘likelihood of committing further offences’ criterion (pre-trial preventative detention). However, on appeal the Supreme Court declared that the sole purpose of bail was to secure the attendance of the accused at trial and that the refusal on the grounds of preventative detention amounted to a denial of the whole basis of our system of law.\textsuperscript{1134} Furthermore, the Supreme Court refused to transplant bail laws from other common law jurisdictions which provided for preventative detention as said bail laws were contrary to Ireland's traditional constitutional values. It is submitted that the Supreme Court’s decision in O’Callaghan reflected the emphatic due process orientated nature of the Irish criminal justice system and its underpinning by distinctive constitutional values.

Notwithstanding the Supreme Court’s zealous stance, there were numerous calls made for the reform of Ireland’s bail laws due to the increase in crime levels from the late 1960s onwards. The debate around the reform of criminal justice in the general sense began to intensify particularly in the 1980s. Originally, the changes made to Ireland’s bail laws were relatively minor and adhered to constitutional obligations. For example, the introduction of pre-trial preventative detention into Irish law was not regarded as the sole panacea to the reform of Ireland’s bail laws. In fact, a number of legislative measures were introduced as a means of tightening up on bail without the need to resort to pre-trial preventative detention. For instance, the Criminal Justice Act 1984 provided for three key amendments to Ireland’s bail laws: Firstly, the Act required that courts impose consecutive as opposed to concurrent sentences for offences committed while on bail; Secondly, the Act provided that where two or more sentences passed by a District Court are ordered to run consecutively, the aggregate term of imprisonment shall not exceed two years; Lastly, the Act created the new offence of ‘failure to surrender to bail’. It is significant that Minister for Justice, Mr Noonan, in bringing

\textsuperscript{1134} The People (Attorney General) v O’Callaghan [1966] IR 501.
this crucial piece of legislation to the fore, discounted providing for the likelihood of committing further offences criterion into Irish law. Despite it being called for on numerous occasions in the Dáil over the decades and implemented in the US and England, the Minister for Justice did not envisage its incorporation into Irish law due to the supremacy of the Irish Constitution.

Despite the introduction of legislation such as the Criminal Justice Act 1984, Ireland’s bail laws came under severe pressure in the mid-1990s from police, prosecutorial and political forces. The murders of Garda Detective Jerry McCabe and investigative journalist Veronica Guerin prompted the hurried introduction of a body of criminal justice measures aimed at strengthening the hand of law enforcement at the expense of individual civil liberties and due process values such as the right to liberty and the presumption of innocence. The period following the murder of Veronica Guerin has been referred to as a textbook case of ‘moral panic’. Crime control had become a state priority.

The repressive legislation introduced after Veronica Guerin's murder included a constitutional amendment to allow for an unprecedented form of preventative detention in Irish law. The bail amendment restricted the right to bail by providing that bail can be refused to those charged with a serious offence where it was thought that, if released, the accused would commit a further serious offence while on bail. The bail referendum and subsequent legislation, namely, the Bail Act 1997, addressed a perception that accused persons were being released from court and continuing to carry out further crimes until their case came to trial. Effectively, the amendment neutralised the *O'Callaghan* judgment. In *O'Callaghan*, the Supreme Court ruled that bail could only be refused where it was thought that the accused would evade justice or interfere with victims and witnesses. In short, the *O'Callaghan* judgement was framed around the Articles in the Constitution that seek to protect the personal freedom of the individual. The bail amendment resulted in counteracting this judgment. It is asserted that the bail amendment served to erode traditional Irish constitutional values such as the presumption of innocence and the right to liberty. Also, the amendment reflects the development of a risk management and crime control orientated approach to criminal justice policy.
Moreover, it is submitted that the implementation of pre-trial preventative detention legislation is the product of an unwise importation of developments from other jurisdictions without sufficient and necessary attention to their fit with distinctive Irish constitutional values. While it cannot be irrefutably stated that Ireland directly transplanted its bail laws, it seems fair to conclude that Ireland’s bail laws were influenced by its common law neighbours, specifically England and Wales, and the US. By importing the relevant legal provisions directly from foreign jurisdictions, Ireland has failed to tease out the deeper ramifications that such an approach is having on our traditional constitutional values such as the right to liberty and the presumption of innocence.

The perceived inadequacy of Ireland’s bail laws was not an issue that first raised its head after the murder of Veronica Guerin. Successive opposition parties and various Dáil deputies on many occasions in the Dáil had stridently articulated that Ireland was distinguished as having the most lax bail laws in the world. This laxity or liberal approach was attributed to the *O'Callaghan* decision. Despite twenty years of rhetoric concerning the shortcomings in Ireland’s bail laws, pre-trial preventative detention continued to be denied as forming any part of Irish law. It is noteworthy that when the aforementioned opposition parties did in fact come to power they too were apprehensive of tampering with Ireland's bail laws. Thus, it is arguable that the political posturing over the inadequacy of Ireland's bail laws was not just political opportunism (although it is arguable that there was an element of this). Instead, it is conceivable that said politicians were cognisant of Ireland's traditional constitutional values and the deference afforded to them within the Irish criminal justice system.

There is little doubt that Veronica Guerin’s murder served as the catalyst for the implementation of pre-trial preventative detention into Irish law. Therefore, it is plausible that the reform of Ireland’s bail laws would have lain dormant but for the murder of Veronica Guerin and it could be said that her murder served as the impetus for change. In keeping with this contention, it is suggested that oftentimes a dramatic or unexpected event can trigger a shift in criminal justice policy and consequently circumstances make it possible to introduce change that has been signalled in the past but was not possible politically at that time. However, notwithstanding the moral panic triggered by Veronica Guerin's murder, the changes that were made to Ireland's bail laws were conducted in a very transparent way, specifically, a constitutional referendum. It could be said that during a time of moral panic
the legislature continued to respect constitutional values. Ironically, the introduction of pre-trial preventative detention was scrupulously constitutional.
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