

# The Absence of Regulatory Crime from the Criminal Law Curriculum

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*‘Criminal lawyers focus on the traditional sphere of ‘real crime’ – roughly equating to those offences requiring proof of mens rea or fault – whilst treating regulatory offences of strict liability, often enforced by specialist agencies rather than the public police, as a marginal and, perhaps, embarrassing exception to the general methods and principles of criminal law’.* (Lacey 2004, p. 144)

*‘Regulatory criminal law is all but ignored by most criminal law texts and journals’.* (Chalmers and Leverick 2014, p. 75)

## Introduction

In examining the contours of the penal complex, lawyers, penologists and criminologists are often drawn to traditional ‘real crime’ (homicides, violent assaults, organised crime, sexual offences, requirements of *mens rea* and *actus reus*, and general defences) whilst ignoring regulatory offences which are often enforced by specialist agencies. They have tended to be preoccupied with the punitive regulation of the poor—a project closely tied to a police-prosecutions-prisons way of knowing—that focuses on ‘crime in the streets’ rather than ‘crime in the suites’ (Ashworth 2000; Braithwaite, 2003). As Scott (2010) notes: ‘[L]egal professionals schooled largely in appellate decisions relating to indictable offences, but also a broader society and media, [are] interested and often obsessed with homicide, sexual offences, robbery and theft. Much of the teaching of criminal law in universities also shares this focus’ (p. 64). The narrow exclusivity of this approach is a mistake because regulatory criminal law is becoming increasingly influential, not least because criminalisation is now more than ever viewed as a panacea for almost any social problem. More and more we are witnessing the increasing and extensive use of regulatory strategies

by the Irish state. In areas such as competition law, environmental protection, health and safety law, and consumer and corporate affairs, there has been a move towards using criminalisation as the last-resort strategy when compliance through negotiation and monitoring has failed.

Distinctions have traditionally been drawn between regulatory crimes and ordinary crimes on the basis that the former are *mala prohibita* (prohibited wrongs) and the latter are *mala in se* (moral wrongs). Regulatory crimes, it was suggested, should be thought of in ‘instrumental means-ends terms’, as not embodying quasi-moral ‘values such as ‘justice, fairness, right, and wrong’ (Lacey 2004, p. 145) They were viewed as a ‘quasi administrative matter’ that did not attract significant moral opprobrium or stigmatise those convicted (McAuley and McCutcheon 2000, p. 341). It has also been argued that regulatory crimes are more likely to be victimless (or at least not have a readily identifiable victim). Thirdly, it is suggested that regulatory offences for the most part do not embody a punitive or sanctioning model of justice, preferring instead to favour compliance strategies.

The main argument of this chapter will be that understanding the differences between criminal and regulatory offences along these lines no longer makes sense, particularly given the changing nature and perception of security risks, and the emergence of more ‘networked governance’ strategies that employ civil, administrative and regulatory mechanisms alongside criminal law instruments. This extended, somewhat fluid, institutional arrangement is very different from the traditional bifurcated representation of wrongs in either civil or criminal harms, two almost mutually exclusive formal processes with their own ways of

knowing and handling conflicts. In *The King v Kidman*<sup>1</sup> Griffiths J explained the dichotomy as follows:

‘In primitive societies there is no distinction in principle between criminal and civil actions. In more developed societies the redress of civil wrongs is in practice required to be sought by the party aggrieved, while in the case of violations of the law entailing penal consequences the proceedings are instituted in the name or on behalf of the sovereign authority.’

Unfortunately the latter conceptualisation remains in the ascendancy, as evident in many criminal law textbooks and syllabi. It is time to abandon traditional divisions of this kind which have so structured our thinking and teaching. The teaching of criminal law should be extended beyond a focus on a relatively narrow taxonomy of offences and contestable principles - such as subjective culpability - to incorporate regulatory criminal wrongdoing. Rather than being afforded exceptional or epiphenomenal status, its extensive use, infrastructural arrangements and modes of operation requires us to reconsider the purposes, principles and boundaries of criminal law, and how it is taught.

## **Public Protection**

Our ordinary criminal justice system is founded on the notion that public protection and security are ‘essential goods’ that are necessary for our self-preservation, well-being, and happiness. This is hardly contentious. Most people would agree that we need a system of justice that will enable us to flourish and go about our lives free from the threat of injury or harm (such as robberies, rapes, assaults, burglaries, etc). What is striking, however, is that the perception stills exists in Ireland that regulatory crime does not threaten our security in the

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<sup>1</sup> (1915) 20 CLR 425 at 437, as quoted in Van Krieken 2006, p. 1.

same way that street crime does. This is a fallacy. Though it may appear more remote, more victimless and may often be less dramatic, misconduct in the banking and corporate sectors, in the workplace, in the environment, and in the distortion of competition in the market poses as much, if not more, of a threat to our everyday lives as ordinary crime (with the potential to impact on more people). Our security can be affected in a myriad of different ways by misconduct of this nature including, among other things, workplace injuries, loss of jobs, loss of reputation and the consequent devaluation of share prices and pension funds, threats to the environment, increased taxation, and increased costs for consumers. Habermas noted that our legal system needs to move away from ‘personal references and towards system relations’ (2008, pp. 432-435). These include: ‘protection from environmental destruction, protection from radiation poisoning or lethal genetic damage; and, in general, protection from the uncontrolled side effects of large technological operations, pharmaceutical products, scientific experimentation, and so forth’ (Habermas, 2008, pp. 432-435). Most criminal law syllabi in Ireland continue to focus on ‘personal references’ – assaults, homicides, sexual offences, criminal damage - and remain rooted in ‘crime in the street’ harms to individuals. By ignoring the ‘systems risks’, they facilitate a very narrow understanding of what constitutes a threat to our security, fastened to a very traditional outlook that views regulatory wrongdoing as having rather benign effects. This outlook remains deeply embedded, despite increased awareness of the threat posed. For example, as far back as 1984, the Whitaker Committee estimated that the losses incurred through white-collar crime in Ireland were more than ten times the value of all stolen property recorded by the Gardaí (Kilcommins et al 2004, p. 131). More recently, the Chief Executive of anti-corruption agency Transparency Ireland John Devitt noted:

Ten years ago, it was estimated that Ireland was losing about €2 billion a year to white collar crime and that doesn't take into account the cost of the criminality in our banks prior to the collapse of the economy. In spite of the huge cost of fraud and corruption to taxpayers, this problem has never been, and still isn't, a high priority for the Government.<sup>2</sup>

Criminal law modules that continues to focus exclusively on crime in the street offences as the paradigm of criminal law perpetuate a narrow construction of security risks posed in society, and also fail to capture the increasing criminalisation of all kinds of regulatory wrongdoing.

### **Compliance and Sanctioning strategies**

One of the principal difficulties with only teaching criminal law through a 'police-prosecutions-prisons' prism is that it assumes that sanctions are a point of first resort for all types of offending behaviour. Though such an assumption works well in relation to most serious ordinary crime, it does not properly capture the possibilities available in respect of regulatory wrongdoing where there is an emphasis on promoting an entrepreneurial spirit. Compliance rather than sanctioning techniques will often be called for in this setting. They are orientated towards persuasion and dialogue, and are designed to promote good working relationships (Hamilton 2010, p. 17; Lynch-Fannon 2010, p. 127; Macrory, 2008). A sanctioning approach to all regulatory wrongdoing would, it is argued, have very negative consequences:

‘...it undermines the coercive power of the criminal law, dilutes its expressive power, over-deters otherwise desirable business activities, conflates blameworthiness with imprisonment, creates incentives for prosecutors to abuse their powers, fuels an appetite for enhancing prison terms, increases social costs and punishes people for actions that in some

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<sup>2</sup> Available at: <http://www.thejournal.ie/white-collar-crime-1727927-Oct2014>.

instances are not even civil wrongs, let alone undertaken with the taint of moral wrongfulness.’ (Gopalan 2010, p. 2)

It can also be argued that if the cost of imprisonment is the same for offenders with different earning capacities, imprisoning those with very high earning capacities is a waste of social capital, especially if the objectives of incarceration can be achieved through other means. (Gopalan 2010, p. 2)

There is significant merit in the adoption of compliance strategies. The line between poor business decision-making and criminal activity is far from clear cut. Moreover, white collar crime is hard to detect because it often occurs in private, behind closed corporate doors. It is also the case that proof is difficult in these cases, and often resource intensive. It is for this reason that area of regulatory crime still, by and large, remains predominantly orientated towards a compliance model of enforcement (McGrath, 2015). This is facilitated by a wide range of strategies that favour the employment of negotiation, consultation and persuasion, rather than an exclusively sanctioning approach that would potentially polarize the various parties involved. These strategies include audits, warning letters, notices, injunctions, guidance, binding directions, and the suspension and revocation of licences (O’Neill 2008; Appleby 2010). As Scott (2010) has recently noted:

The enforcement strategies of enforcement agencies have been arrayed in a pyramidal approach to enforcement in which the object is to maintain as much enforcement activity as possible at the base of the pyramid....This approach is said to be effective not only with businesses which are orientated to legal compliance, but also with the ‘amoral calculators’ for whom compliance becomes the least costly path when they know there is a credible threat of escalation to more stringent sanctions. (p. 73)

The nuances and circuits that run through this pyramidal structure - with compliance at the bottom and sanctioning at the apex - is not currently captured in criminal law syllabi in universities in Ireland. It is in this regard quite one dimensional and divorced from the ‘action’ and practice of criminal law. It also fails to capture the breadth of criminal law purposes. A compliance model of justice, for example, speaks primarily to the ‘good man’ who seeks to act in good faith and employs the law as a normative guide to conduct and action, and not to the ‘bad man’ who seeks to evade the strictures of the law. In order to encapsulate both forms of conduct, the compliance model must also be supported by a sanctioning model which can act as a platform for the expression of collective outrage. The criminal law is designed to uphold moral sensibilities and it permits a powerful message to be conveyed in relation to the anger felt by ordinary citizens about the commission of certain crimes. It also acts as an important safety valve, limiting the ‘demoralising effects’ on society of the consequences of serious misconduct (McGrath 2012, p. 72; Robinson 2014).<sup>3</sup>

Traditionally it had been said that the focus of the sanctions for many of these regulatory offences was more ‘apersonal’ in nature than their ordinary counterparts. The argument was that ‘these were not real crimes to which stigma should attach, but were rather in the nature of administrative regulations with non-stigmatising penalties such as fines’ (Lacey 2004, p. 161). The traditional lack of a mens rea requirement operated as the ‘doctrinal marker of these defendants less than fully criminal status from a social point of view’ (Lacey 2004; Baldwin 2004). But regulatory agencies have increasingly grown considerable teeth as regards prosecution. For example, Section 78 of the Safety, Health and Welfare at Work Act, 2005 now imposes on conviction on

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<sup>3</sup> See *DPP v Duffy and Duffy Motors* (Unreported, Central Criminal Court, 23<sup>rd</sup> March 2009); *DPP v Manning* (Unreported, High Court, 9th February, 2007); *DPP v. Paul Murray* [2012] IECCA 60; *Paul Begley v. DPP* [2013] IECCA.

indictment for an offence under the Act a fine not exceeding €3 million or imprisonment for a term not exceeding two years, or both. On conviction on indictment for competition law offences, undertakings are liable to a fine not exceeding whichever of the following amounts is the greater, namely €5 million or ten per cent of the turnover of the undertaking in the financial year ending in the 12 months prior to conviction. Individuals are subject to the same fine limits and/or a term of imprisonment not exceeding ten years. Further, following an extensive review by the Company Law Review Group and the Director of Corporate Enforcement of the several hundred criminal offences contained in the Companies Acts, the Companies Act 2014 now creates a four-tier categorisation of company law criminal offences in Ireland. This categorisation encompasses the majority of criminal offences. Both Category 1 and 2 offences, may be prosecuted summarily or on indictment and when prosecuted on indictment category 2 offences are punishable by a fine of up to €50,000 and/or imprisonment for up to five years and category 1 offences will be punishable by a fine of up to €500,000 and/or a sentence of imprisonment of up to ten years. The apex of the pyramid now occupies a space which views regulatory wrongdoing as ‘real crime’, with serious individual consequences. In late March of 2009, McKechnie J., in a judgment in the Central Criminal Court which considered competition law abuses by an association of Citroen car dealers, noted:

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



the code have to attract serious punishment [which included imprisonment]’.<sup>4</sup>

## **Governance**

Criminal law teaching remains predominantly focused on offences that are pursued exclusively by centralised policing (the Gardai) and prosecuting authorities (Director of Public Prosecutions). This tends to ignore the emergence of new mechanisms and modes of governance for dealing with criminal wrongdoing. Since the 1990s, we have increasingly witnessed the extensive use of regulatory criminal and civil strategies in areas such as competition law, environmental protection, health and safety law, and consumer and corporate affairs (Scott 2010, p. 69). These strategies are supported by a wide range of criminal sanctions available summarily and on indictment. Durkheim neatly captures this expansion in criminalisation, juxtaposing it with the decline in severity in penal punishments:

‘Seeing with what regularity repression seems weaker the further one goes in evolution, one might believe that the movement is destined to continue without end; in other words, that punishment is tending towards zero...For there is no reason to believe that human criminality must in its turn regress as have the penalties which punish it. Rather everything points to its gradual development; that the list of acts which are defined as crimes of this type will grow, and that their criminal character will be accentuated. Frauds and injustices, which yesterday left the public conscience almost indifferent, arouse it today and this insensitivity will become more acute with time.’ (Durkheim 1992, pp. 46-47)

The emergence of this regulatory criminal framework is significantly different from the unified monopolies of centralised control underpinning policing and prosecution in the modern State. Arguably these new techniques and strategies

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<sup>4</sup> *DPP v Duffy and Duffy Motors* (Unreported, Central Criminal Court, 23rd March 2009).

can be seen as part of a pattern of more, rather than less, governance, but taking ‘decentred’, ‘at-a-distance’ forms. Prior to the nineteenth century, the institution of local policing was heavily orientated towards the ‘creation of an orderly environment, especially for trade and commerce’ (Braithwaite 2005, pp. 13-14). It did not focus exclusively on offences against persons and property, but also included the regulation of ‘customs, trade, highways, foodstuffs, health, labour standards, fire, forests and hunting, street life, migration and immigration communities’ (Braithwaite 2000, p. 225). Throughout the nineteenth century, however, the State very gradually began to monopolise and separate the prosecutorial and policing functions, particularly for serious crimes. In terms of policing, this meant that uniformed paramilitary police were preoccupied with the punitive regulation of the poor to the almost total exclusion of any interest in the constitution of markets and the just regulation of commerce, became one of the most universal of globalised regulatory models.

From the mid-19th century, factories inspectorates, mines inspectorates, liquor licensing boards, weights and measures inspectorates, health and sanitation, food inspectorates and countless others were created to begin to fill the vacuum left by constables now concentrating only on crime. Business regulation became variegated into many specialist regulatory branches (Braithwaite 2005, pp. 15-16). In Ireland, these specialist agencies included the Bacon Marketing Board, the Irish Tourist Board, the Racing Board, the Health Authorities, CIE, Bord na gCon, and the Opticians Board. Similarly during the course of the nineteenth century conflicts were no longer viewed as the property of the parties most directly affected. Previously strong stakeholder interests in the prosecution process, such as victims and the local community, were gradually colonised in the course of the nineteenth century by a State apparatus which acted for rather than with the public.

Now, however, the Office of the Director of Public Prosecutions is, to some extent, increasingly losing its monopoly role. The number of administrative agencies that have entered the criminal justice arena, colonising the power to investigate regulatory crimes in specific areas and to prosecute summarily, has increased dramatically in Ireland in recent years. They include: the Revenue Commissioners, the Competition Authority, the Director of Consumer Affairs, the Environmental Protection Agency, the Health and Safety Authority, and the Office of the Director of Corporate Enforcement. Significantly, these agencies have both investigative and prosecution functions, with each pursuing their own agendas, policies and practices. Moreover, very wide powers of entry, inspection, examination, search, seizure and analysis are given to some of these agencies (Considine and Kilcommins 2006).<sup>5</sup>

All of this represents more criminal regulation by the State (as well as of the State), rather than any ‘hollowing out’ of the State. This enlargement in scope, however, is fragmented in nature, occupying diverse sites and modes of operation. Despite extensive powers to share information, there is no unifying strategy across the agencies or with other law enforcement institutions such as the DPP or Gardaí.<sup>6</sup> Staffing levels, resources, workloads and working practices vary from agency to agency. Indeed, and apart from respective annual reports, there is little in the way of an accountability structure overseeing the policy choices of the various regulatory agencies, the manner in which they invoke their considerable investigative and enforcement powers, or the way in which information is shared between them and with the Gardaí.

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<sup>5</sup> See section 64 of the Health and Safety Act, 2005; section 779 of the Companies Act 2014.

<sup>6</sup> Irish Police Force.

Another striking feature of this regulatory infrastructure is the proliferation of hybrid enforcement mechanisms that can be employed by the agencies or, on occasion, by private parties. These mechanisms have also contributed to a more general ‘blurring of legal forms’ (Ashworth 2000, p. 237), conflating the functional distinctions that exist between criminal and civil law, and between regulatory wrong-doing and ordinary wrong-doing (McGrath, 2015). For example, and apart from the possibility of a criminal prosecution by the Competition Authority, private parties can seek to initiate civil enforcement of competition law. Indeed, the Competition Authority itself can also seek to bring a civil action. . Similarly, the Office of the Director of Corporate Enforcement can take civil or criminal enforcement actions. Civil enforcement actions include the use of restriction and disqualification orders. This fragmentation in responses to a breach of a regulatory offence can give rise to difficulties having regard to the principled protections generally afforded to those accused of crime. The potential for blurring of the boundaries, for example, was addressed by the Irish Supreme Court, *In the Matter of Tralee Beef and Lamb Ltd (In Liquidation) Kavanagh v. Delaney & ors*<sup>7</sup>, in which it described a restriction order, which prohibits a person from being involved in the management of a company for five years, as highly stigmatising and “gravely damaging to the reputation of a person thus afflicted”. This would accordingly need to be taken into account in any subsequent criminal sentencing decision relating to the same misconduct.

## **Causation**

One of the difficulties of teaching criminal law with a focus on a relatively narrow range of offences is that it implicitly paints a picture of the types of persons committing crimes. It will inevitably contain a ‘disproportionate

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<sup>7</sup> [2008] I.E.S.C. 1.

number of those who are poor, uneducated and unskilled' (McCullagh 1995, pp. 411-412). Criminal law teaching can in part help inculcate a set of attitudes towards the legal system in society, exhorting in particular its legitimacy on the basis of its neutral nature, whilst ignoring the underlying structural inequalities of power which are imbricated in the cross-currents of society. The ideology of objectivity, egalitarianism and the strict application of rules can mask and mystify law's partiality, particularly its capacity to preserve and maintain the status quo for those in power (Horowitz 1992, p. 266). As Norrie (2001) suggests: 'The cunning of the law lies in its ability to mask the one-sidedness of its instrumental content through its formal character as a logic of universal individualism' (p. 23). Hiding behind the 'false consciousness' of black-letterism are the variety of hierarchical interests that it serves. Apart from legal education (Kennedy 1990, p. 45), this also has implications for legal practice, particularly the notion that what lawyers actually do is apolitical and independent, merely following the inner technical logic of the law. This might be reassuring, but it is a denial of the political and social realities of legal practice:

[B]lack-letterism works as a convenient mode of denial. It enables legal academics and lawyers to engage in what is a highly political and contested arena of social life – namely, law – and to pretend that they are doing so in a largely non-political way. The main advantage of this is that they can go about their daily routines without assuming any political or personal responsibility for what happens in the legal process. However, the insistence that lawyering is a neutral exercise that does not implicate lawyers in any political process or demand from scholars a commitment to any particular ideology is as weak as it is woeful. Such an image is a profoundly conservative and crude understanding of what it is to engage in the business of courts, legislatures and the like. (Hutchinson 1999, p. 302)

In addition to difficulties with the portrayal of criminal law as neutral and value free, criminal law teachers can, in excluding regulatory crime from the curriculum, implicitly construct a very narrow view of criminal typology, giving the impression that it is only certain socio-economic classes that commit crime. The crimes of the powerful remain at the margin of attention. This is in spite of considerable change in criminological discourse in relation to White Collar Crime and State Crime. Edwin Sutherland (1949), for example, is reported to be the pioneer of white collar criminology. He suggested in the 1940s that white collar crime was ‘a crime committed by a person of respectability and high social status in the course of his occupation’ (p. 9), thus challenging the stereotypical assumptions about all crime being committed by the lower classes. He went on to note that the ‘...financial cost of white collar crime is probably several times as great as the financial cost of all the crimes which are customarily regarded as the ‘crime problem...’ (Sutherland 1940, p. 5). More significantly, Sutherland also emphasised the impact of such crime on society: ‘The financial loss from white collar crime, great as it is, is less important than the damage to social relations. White-collar crimes violate trust and therefore create distrust, which lowers social morale and produces social disorganisation on a large scale. Other crimes produce relatively little effect on social institutions or social organisation’ (pp. 11-12). A key point for Sutherland was to emphasise the idea that white collar criminality was real criminality. It may not feature in debates about the crime problem or on the law and order agenda, but this was a mere labelling matter: ‘...white collar criminality differs from lower class criminality principally in an implementation of the criminal law which segregates white-collar criminals administratively from other criminals...’ (ibid).

## **Paradigmatic Criminal Law**

At a more technocratic level, many aspects of regulatory crime operate in opposition to the general trend of paradigmatic criminal law which permits general defences, demands both a conduct element and a fault element, and respects procedural standards such as a legal burden of proof beyond reasonable doubt. Pure doctrines of subjective culpability and the presumption of innocence are increasingly abandoned within this streamlined regulatory framework to make up for difficulties of proof in complex cases. The increasingly instrumental nature of criminal legal regulation is evident, for example, in the introduction of ‘reverse onus’ provisions that require the accused to displace a presumption of guilt.<sup>8</sup> The system of justice that applies in the regulatory realm is thus more exculpatory in orientation than its ordinary criminal counterpart. It is also evident in the instrumental fault element requirements of criminal regulation. The attachment of subjective mental element to wrongdoing in conventional criminal law is often severed in the regulatory criminal arena where objective standards of culpability apply.<sup>9</sup> Moreover, any defences that might exist in the regulatory area are also more specialised than might be the case in the general defences that apply in criminal law. For example, in competition law, it is a specific defence to show that the agreement, decision or concerted practice complained of, benefited from a declaration from the Competition Authority that the practice complained of contributes to improvement in the production or distribution of goods and services; or promotes technical or economic progress. Similarly some of the general duties placed on employers under the 2005 Safety, Health and Welfare

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<sup>8</sup> Section 271(2) of the Companies Act 2014, for example, provides that where the defendant was aware of the basic facts it ‘shall be presumed that the defendant permitted the default’ unless s/he can establish that s/he took all reasonable steps to prevent it or that by reason of circumstances beyond his control s/he was unable to do so. For other similar provisions, see section 81 of the Safety, Health and Welfare at Work Act, 2005; Section 8(6) of the Competition Act, 2002.

<sup>9</sup> See, for example, section 223(1) of the Companies Act 2014; section 58 of the Criminal Justice (Theft and Fraud Offences) Act, 2001; and section 80 of the Health, Safety and Welfare at Work Act, 2005.

at Work Act are qualified by the term ‘reasonably practicable’. This means that employers have exercised all due care when, having identified the hazards and assessed the risks at their workplaces, they have put into place the necessary protective and preventive measures, and where further measures would be grossly disproportionate (having regard to unusual, unforeseeable and exceptional circumstances).

Aside from reverse onus provisions, the privilege against self-incrimination may also give rise to difficulties, particularly given the hybrid enforcement mechanisms that many agencies employ. This is something that Irish legislators are increasingly grappling with as regulatory practices become more embedded.<sup>10</sup> In *Re National Irish Bank*,<sup>11</sup> for example, inspectors were appointed under the Companies Acts, 1990 to examine the affairs of National Irish Bank. Section 10 of the Act placed a duty on officers of the company to cooperate with inspectors and to produce documents and answer questions. Section 18 provided that an answer given by a person ‘may be used in evidence against him’. In the Supreme Court it was held that section 10 did not allow evidence obtained in such circumstances to be admitted in a subsequent criminal trial as it would breach the constitutional right of an accused party not to incriminate himself or herself. Section 29 of the Company Law Enforcement Act 2001 subsequently immunised the answers given to an authorised officer from being used in any subsequent criminal proceedings.<sup>12</sup> Another difficulty is the emphasis that the law traditionally places on oral testimony. This may sometimes pose a dilemma in the arena of regulatory wrongdoing where documentary trails may form a central part of an investigation. Though the

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<sup>10</sup> See *Saunders v UK* (1996) 23 EHRR 313.

<sup>11</sup> [1999] 3 IR 145.

<sup>12</sup> See also section 15(10) of the Criminal Justice Act 2011; Section 881 of the Companies Act 2014; and sections 392(5) and section 393(3) of the Companies Act 2014 for further examples.



Criminal Evidence Act, 1992 provides for an inclusionary approach to documentary evidence in criminal proceedings, this has not as of yet been extended to civil proceedings.<sup>13</sup>

In defining a crime<sup>14</sup>, the Irish courts have adopted a very traditional approach, emphasising indicia such as procedural characteristics (powers of arrest, detention, bail etc.), due process safeguards (the presumption of innocence, the right to liberty, the right to a jury trial), and punitive elements. As McGrath notes, these:

‘...features are often associated with traditional criminal offences. This analysis has marginalised corporate criminality, often enforced by regulatory law, from the crime debate... [The Irish] cases speak to real crime so attempting to make conventional crime indicia fit into regulatory contexts is inappropriate. The jurisprudence needs to be re-evaluated and a new approach must be found.’ (McGrath 2010, p. 60-61)

Employing instrumentalist reasoning can also give rise to difficulties, particularly in relation to constitutional justice and due process safeguards. These difficulties have manifested themselves in relation to the imposition of administrative sanctions;<sup>15</sup> definitions of a crime and double jeopardy;<sup>16</sup> the privilege against self incrimination;<sup>17</sup> the burden of proof;<sup>18</sup> proportionality of sentencing;<sup>19</sup> and *mens rea* requirements.<sup>20</sup> As these regulatory criminal

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<sup>13</sup> It should also be noted that the principles and rules of the law of evidence traditionally apply to hard-copy, paper-based documents. Electronic and automated documentary evidence currently poses more difficulties. A recent Consultation Paper on Documentary and Electronic Evidence (LRC CP 57 – 2009) recommends that documentary evidence should be admissible in civil and criminal proceedings where the court is satisfied as to its relevance and necessity. It also recommends that a technology-neutral approach should be adopted so that the term documentary evidence should, in general, apply to traditional paper-based documents and to electronic documents.

<sup>14</sup> *Melling v O’Mathghamhna* [1962] IR 1.

<sup>15</sup> *McDonald v Bord na Gcon* [1965] IR 217.

<sup>16</sup> *Registrar of Companies v District Judge David Anderson and System Partners Limited* [2005] 1 IR 21

<sup>17</sup> *DPP v Collins* (Unreported, Circuit Court, 27 September 2007) reported in Duggan 2008, 70.

<sup>18</sup> *PJ Carey Contractors Limited v DPP* [2012] IR 234.

<sup>19</sup> See *DPP v Hughes* [2012] IECCA 85; *Paul Begley v. DPP* [2013] IECCA.

practices become more embedded, they are increasingly tested in the courts given their instrumental desire to maximise efficiency, enhance control and minimise risk. The flow of power into these civil and regulatory spheres is challenging for a due process system that emphasises the primacy of individual rights. The institutionalised nature of accused rights has ensured that they cannot be easily ‘trumped for collective policy reasons such as risk management, security and public protection (Dworkin 1977, pp. 93-4). They remain very much part of the topography in the Irish criminal process, carrying a ‘threshold weight’ ‘which the government is required to respect case by case, decision by decision’ (Dworkin 1988, p. 223).

When due process and regulatory values and outlooks meet, as they increasingly do, it makes for an interesting battleground, a site for struggle and competing claims about security, instrumental effectiveness, governance, and liberal principles. These tensions are often however not captured in criminal law teaching which continues to perpetuate the myth of regulatory exceptionalism (usually in relation to strict liability offences only). The practice and operation of regulatory criminal law needs to be more fully embraced to highlight its growth and the tensions it creates for a traditional criminal law model rooted in an 1861 Offences against the Person conception of wrongdoing.

### **Information sharing and mandatory reporting**

Current criminal law teaching often assumes that investigation and prosecution of any ‘crime conflict’ is the exclusive preserve of centralised police and prosecution force. Prior to this, the old system of law enforcement was heavily reliant on a network of rewards, victims, thief-taking and accomplice driven

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<sup>20</sup> *CC v Ireland and Others* [2006] IESC 33; *The Employment Equality Bill 1996* [1997] 2 IR 321). In *Brady v Environmental Protection Agency* [2007] IEHC 58.

prosecutions. In an industrialised setting, this system of enforcement was increasingly viewed as a ‘badly regulated system of power’ (Foucault 1991, p. 79). The state increasingly in the course of the nineteenth century began to monopolise investigative and prosecutorial functions, and to enforce the law on behalf of the ‘people’. As much as possible recourse would not be had to local networks; where these practices continued – for example with informants – they were downplayed. The centralised state apparatus – as expressed through the police and public prosecutors – thus completely monopolised the crime conflict. Commitment to this way of doing justice still informs criminal law teaching in Ireland. Though it remains largely true of the investigation and prosecution of ‘ordinary’ offences, it fails to adequately capture new circuits of information gathering in the regulatory sphere. New regulatory approaches are beginning to throw up investigative and prosecutorial networks that in part rely on information gathering beyond the traditional reach of the police and prosecution agencies.

What appears to be emerging in recent years is the increasing adoption of a more variegated approach straddling both civil and criminal jurisdictions to the detection, investigation and punishment of offences. For example, the organisational make-up of the Criminal Assets Bureau comprises Revenue Commissioners, Department of Social Community and Family Affairs officials and Gardaí, all directing their respective competencies at proceeds from criminal activities. More specifically, legislation increasingly permits authorities including the Competition Authority, An Garda Síochána, the Revenue Commissioners, the Insolvency Service of Ireland, the Director of Corporate Enforcement and the Irish Takeover Panel to share information with each other. In some instances individuals are required to become ‘information reporters’ (Horan 2011, pp. 1529-1540). Auditors, tax advisers, lawyers,

accountants and liquidators are all bound by various statutory requirements to report information to relevant authorities.<sup>21</sup> Very broad and generic obligations to disclose information have also recently been enacted.<sup>22</sup>

The difficulties of prosecuting regulatory crime are well documented. In addition to facilitating exchange of information and compelling certain parties to become information reporters, the authorities are increasingly also seeking to protect and encourage witnesses to come forward and provide evidence. ‘Whistleblowers’ have been crucially important in Ireland on lifting the lid on various abuses such as the care of the elderly and corruption in banks. Encouraging such witnesses to provide information ordinarily takes two forms: protection<sup>23</sup> and/or immunity. The Protected Disclosures Act 2014, for example, provides extensive protection for public sector workers in Ireland in respect of wrongdoings such as health and safety threats, misuse of public monies, mismanagement by a public official, damage to the environment, or concealment or destruction of information relating to any of the foregoing. The Competition Authority, in conjunction with the office of the Director of Public Prosecutions, also operates a Cartel Immunity Programme, which provides immunity from criminal prosecution for suspected individuals who are willing to cooperate and testify on behalf of the prosecution (Gorecki and McFadden 2006, pp.631-640; Talbot 2015, pp. 178-181).

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<sup>21</sup> Section 447 of the Companies Act 2014; Section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001

<sup>22</sup> Section 19 of the Criminal Justice Act 2011, for example, makes it an offence for a person to fail to disclose information to An Garda Síochána as soon as practicable and without reasonable excuse, which the individual knows or believes might be of material assistance in “(a) preventing the commission by any other person of a relevant offence, or (b) securing the apprehension, prosecution or conviction of any other person for a relevant offence”. It includes offences relating to banking and finance, company law, money laundering, theft, fraud, bribery, corruption, competition, consumer protection, cybercrime and tax collection.

<sup>23</sup> Section 6 of the Unfair Dismissals Act 1977; section 27 of the Safety, Health and Welfare at Work Act 2005, section 87 of the Consumer Protection Act 2007, and section 26 of the Employment Permits Act 2006 section 20 of the Criminal Justice Act 2011.

All of this involves a trend away from a hierarchical command and control apparatus of State policing. As Bayley noted: '[This involves] the reconstruction of criminal justice in decentralised ways so that it responds to local needs, reflects local morality, and takes advantage of local knowledge' (Bayley 2001, pp.211-212). It constitutes a new form of 'networked governance' involving the increasing 'regulation of civil society' (Crawford 2006, pp.449-479). It stands in marked contrast to the traditional view that criminal law and prison isolates a small group who can be controlled, 'a delinquent milieu, closed in upon itself, but easily supervised' (Foucault 1991, p. 281). Criminal law, under this style of governance, forms part of a 'hybridisation of techniques' (Rose 2008, p. 142), that involve 'a multiplication of possibilities and strategies deployed around different problematisations in different sites and with different objectives' (Rose 2008, p. 240).

## **Conclusion**

It is clear that the traditional preoccupation in criminal law syllabi with well-accepted forms of criminal activity (e.g. assault, theft, murder, sexual offences), to the exclusion of regulatory crime, promotes a myopic vision of criminality amongst students. When students do not learn about regulatory crime alongside "real crimes" their understanding of regulatory crime as less harmful and less threatening is re-enforced. Given the available evidence of the threat posed to society by "systems risks" and the proliferation of regulatory offences in recent decades, a criminal law syllabus which focuses exclusively on traditional criminal offences fails to paint a complete picture for students. Moreover, their learning is fragmented as their understanding of this form of criminal activity is relegated to learning within commercial or company law context where the appreciation of this activity as a crime is lost. Particularly problematic in this regard is the failure to teach students how our traditional understanding of the

structure of criminal offences (requiring conduct and fault elements), criminal defences and procedural safeguards differ when applied to regulatory crime. A departure from the traditional approach to exploring the contours of the criminal law is required, encompassing the broad sweep of offences and enforcement agencies and recognising the variegated approach to the detection, investigation and enforcement of offences in the twenty-first century.

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