

# **‘Defining corporate, white-collar and regulatory crime: Offences, Defences and Procedure’**

**Shane Kilcommins and Eimear Spain**

## **Introduction**

New approaches adopted to tackle white collar crime have unsettled traditional commitments and assumptions about the operation of the criminal process. To begin with, more nuanced understandings of harm and ‘systems risks’ are emerging.<sup>1</sup> A new governmental approach has emerged in light of the changing nature and perception of security risks and the emergence of more ‘networked governance’ strategies, employing a variety of mechanisms (civil, administrative and regulatory) in tandem with criminal law instruments. Technological changes and a recognition that the disequilibrium in power between the State and the accused is no longer as pronounced are also impacting. New investigative and prosecutorial networks are also emerging that in part rely on information gathering and information transfer beyond the traditional reach of the police and prosecution agencies. These changes are occurring against the backdrop of a delegation of power to an extensive range of specialist agencies with wide investigative powers and supported by a wide range of criminal sanctions available summarily and on indictment. There is also evidence of an increasing willingness to imprison individuals convicted of serious corporate crime.<sup>2</sup> In this chapter we begin by examining the concept of white collar crime, including its scope, cause and consequences, before exploring some of the changes which are impacting upon traditional understandings of the criminal process and the changing nature of the power used by the state in its battle against white collar crime.

### **1. Identity**

The concept of white-collar crime is ill-defined with attempts to accommodate white collar crime within the traditional discourse on crime proving challenging

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<sup>1</sup> Jurgen Habermas, *Between Facts and Norms* (Polity Press, 2008 repr), 432-35.

<sup>2</sup> Joe McGrath, 'Sentencing White-Collar Criminals: Making the Punishment fit the White-collar Crime' [2012] 3 Irish Criminal Law Journal 71-79, p75, D. Robinson, Collared [2014] 180(1) Gazette of the Law Society Ireland 40-43.

in light of the contested nature of the concept and the tendency to define crime “according to a ‘real crime’ perspective”.<sup>3</sup> Edwin Sutherland, a pioneer of white collar criminology, suggested that white collar crime was ‘a crime committed by a person of respectability and high social status in the course of his occupation’,<sup>4</sup> thus challenging the stereotypical assumptions about all crime being committed by the lower classes. This understanding of white collar crime maintains currency today, despite criticism.<sup>5</sup> Shapiro suggests that it “rests on a spurious correlation between role-specific norms and the characteristics of the occupants of these roles”,<sup>6</sup> conflating the perpetrators with their misdeeds and ultimately leading to “an unfortunate mixing of definition and explanation”.<sup>7</sup> While Sutherland’s definition focuses on four elements, other elements might be ‘a violation of trust’<sup>8</sup> and the ‘organisational’ or ‘economic’ attributes of white collar crime. It is clear that considerable disagreement exists about the range of misconduct that would fall within the definition. In order to avoid the straight-jacket of overly prescriptive accounts, some commentators have accordingly attempted to develop typologies of the forms of crime that may fit under the general penumbra of white collar crime. These include: financial offences (from share dealing to bribery to tax evasion); offences against consumers (price fixing, illegal sales, unfit goods); crimes against employees; and crimes against the environment.<sup>9</sup> Green has suggested that the uncertainty surrounding this group of crimes can be attributed to the moral complexity and ambiguity in such offenses:

“what is interesting and distinctive about this group of crimes is that, in a surprisingly large number of cases, there is a genuine doubt as to whether what the defendant was alleged to have done was in fact morally wrong...the question is whether the conduct engaged in was more or less acceptable behavior, at least in the realm in which it was performed, and

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<sup>3</sup> Joe McGrath, *Corporate and White Collar Crime in Ireland: A New Architecture of Regulatory Enforcement*, (Manchester University Press 2015), Chapter 1

<sup>4</sup> Edwin Sutherland, *White Collar Crime* (Dryden Press 1949), p. 9

<sup>5</sup> See David Friedrichs, *Trusted Criminals: White Collar Crime In Contemporary Society* (2d Ed. 2004) 4-12; Stuart P. Green, ‘Moral Ambiguity In White Collar Criminal Law’ (2014) 18 (2) *Notre Dame Journal Of Law, Ethics And Public Policy* 501-520

<sup>6</sup> Susan P. Shapiro, ‘Collaring the Crime, not the Criminal: Reconsidering the Concept of White-Collar Crime [1990] 55(3) *American Sociological Review* 346-365, p346.

<sup>7</sup> John Braithwaite ‘White Collar Crime’ [1985] 11 *Annual Review of Sociology* 1-25, p. 3.

<sup>8</sup> See Katherine Williams, *Criminology* (OUP 2001), p64

<sup>9</sup> See Steve Tombs, ‘Corporate Crime’ in C Hale et al, eds *Criminology*, (OUP 2013) 267-287, p269

therefore, should not have been subject to criminal sanctions in the first place.”<sup>10</sup>

If there are tensions in relation to the definition of white collar crime, it is also the case that there is no settled agreement on causation. Whilst there is consensus that 'theories of crime' that focus on poverty or poor socialisation cannot account for the phenomenon of white collar crime, no criminological approach has emerged to dominate the landscape. Instead, a variety of approaches can be employed, the merits of which may vary depending on ideological standpoint or the circumstances of individual cases. To begin with, one can refer to 'classicism or rational choice theory'. This approach presupposes that crime is based on calculative reasoning, in which the actor coldly weighs up the perceived benefits and ranges them against the expected costs (likelihood and consequences of detection). As Charles Murray, for example, notes: '...offenders are extremely pragmatic. Their calculations seemed to be based on a hard headed appreciation of the facts'.<sup>11</sup> Proponents of this theory suggest that weak regulation or non-enforcement provides a fertile ground for white collar criminality. Some criminologists would suggest that white collar crime can be explained by 'differential association' i.e. criminal behaviour is learnt behaviour. If an individual is in an environment where there is a surplus of favourable dispositions to law violation over unfavourable dispositions, this may contribute to his or her involvement in crime.<sup>12</sup> Sykes and Matza, argue that criminals also learn 'techniques' that enable them to 'weaken' the hold society places over them, and to justify their wrongdoing. These techniques act as defence mechanisms that discharge the wrongdoer from the constraints associated with moral order.<sup>13</sup> Some also support the view that white collar crime is caused by 'strain'. Structurally induced strain in society is created through an emphasis on economic success, the pursuit of individual self-interest, competitiveness, and materialism. Aware of the disjunction between institutionalised aspirations (pressures to maximise profit, growth, efficiency)

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<sup>10</sup> Stuart P. Green, 'Moral Ambiguity In White Collar Criminal Law' (2014) 18 (2) *Notre Dame Journal of Law, Ethics And Public Policy* 501-520, p502

<sup>11</sup> Charles Murray, 'The Physical Environment and Community Control of Crime' in J Wilson, ed, *Crime and Public Policy* (ICS Press 1983), p. 115.

<sup>12</sup> See Edwin Sutherland 'White Collar Criminality' [1940] 5(1) *Am. Sociol. Rev.* 1-12, pp. 10-11.

<sup>13</sup> See Gresham M. Sykes and David Matza 'Techniques of Neutralisation: a theory of delinquency' 1957 22 *Am. Sociol. Rev.* 664-670.

and the availability of legitimate opportunities, white collar criminals will ‘innovate’ in order to achieve institutional goals.<sup>14</sup>

Another distinguishing feature of white collar crime is the impact of such crime on society. It is accepted, and recent experience in Ireland would support the contention, 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...’.<sup>15</sup> The costs of crime investigated by the Revenue Commissioners far exceed the costs of street crime. The Whitaker Committee estimated that the losses incurred through white-collar crime in 1984 were more than ten times the value of all stolen property recorded by the Gardaí. The total value of property stolen in burglaries, larcenies and robberies in 2002 was €97 million. In the same year, seven times as much money was collected as a result of investigations into just three waves of illegal activity involving some of Ireland’s most influential citizens.<sup>16</sup> More significantly perhaps, 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.’<sup>17</sup>

Despite this, it has long been felt that the rich and powerful are relatively immunised from the full reach of criminal law. Carson notes: ‘...The behaviour of persons of respectability and upper socio-economic class frequently exhibits all the essential attributes of crime but it is only very rarely dealt with as such. Systems of criminal justice favour certain economically and politically powerful groups and disfavour others, notably the poor and unskilled who comprise the bulk of the visible criminal population’.<sup>18</sup> The crimes of the powerful remain at the margin of attention with censure aimed at a ‘disproportionate number of

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<sup>14</sup> Ibid.

<sup>15</sup> Edwin Sutherland ‘White Collar Criminality’ 1940 5(1) Am. Sociol. Rev. 1-12 at 5

<sup>16</sup> Shane Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland* Dublin (IPA 2004), p. 131.

<sup>17</sup> Edwin Sutherland ‘White Collar Criminality’ [1940] 5(1) Am. Sociol. Rev. 1-12, pp. 10-11.

<sup>18</sup> W.G. Carson ‘White Collar Crime and the Enforcement of Factory Legislation’ 10(4) B.J.Crim. 1970, 383-390 at 384)

those who are poor, uneducated and unskilled'.<sup>19</sup> As Norrie 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'.<sup>20</sup>

## **2. The Hegemony of State-Accused relations and 'Crime in the Streets' Justice.**

New approaches to tackling white collar crime unsettle traditional commitments and assumptions about the operation of the criminal process. These commitments and assumptions focused largely on 'street crime', emphasising a 'police – prosecutions – prisons' way of knowing the justice system. Such an understanding has a long history. Beginning in the nineteenth century, a State-accused model of justice emerged which significantly shaped how crime conflicts were presented, addressed, legitimated and concluded. It had a number of telling features. To begin with, it was organised around a *centralised (constitutional) state* and the 'institutionalised fiction' of the 'public sphere as the central principle of its organisation',<sup>21</sup> both of which helped to promote the sense of 'civilized association' and an 'objectivated' criminal process.<sup>22</sup> The adversarial criminal trial – involving 'a contest morphology' that included oral presentation of evidence, lawyer led questioning, cross-examination by counsel, relative 'judicial passivity' during the guilt determining phase of the trial, and informational sources secured by both the prosecution and defence – exemplified this objective representation.<sup>23</sup>

The crime itself was no longer viewed as a *personal altercation*, but a phenomenon that required an institutional response demarcated from emotive, subjective and personal references. In creating this 'buffer zone between system and person [by establishing a] zone of indifference'<sup>24</sup> between the lived

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<sup>19</sup> Ciaran McCullagh, 'Getting the Criminals We Want: the social production of the criminal population' in Patrick Clancy (ed), *Irish Society: Sociological Perspectives* (IPA 1995), pp411-412.

<sup>20</sup> Alan Norrie (2001) *Crime, Reason and History: a critical introduction to criminal law* (Cambridge University Press 2001), p. 23.

<sup>21</sup> Jurgen Habermas, *The Structural Transformations of the Public Sphere: an inquiry into a category of Bourgeois Society* (Polity Press 2010 repr) 125.

<sup>22</sup> Jurgen Habermas, *The Theory of Communicative Action: reason and the rationalisation of society* (Polity Press 2004 repr), 148.

<sup>23</sup> Mirjan Damaska, *The Faces of Justice and State Authority* (Yale University Press 1986) 88.

<sup>24</sup> Jurgen Habermas, *The Theory of Communicative Action: the critique of functionalist reason* (Blackwell 2006 repr), 308.

ontological experiences of the crime conflict and its effective administration, new imperatives could be foregrounded, particularly those that emphasised procedure, the ideological neutrality and rationality of the process, and its objectivated nature.<sup>25</sup> Facticity, objectivity, rationality, and neutrality – coalescing with the filtering fiction of the ‘public interest’ – facilitated this drive from personal to institutional referents.<sup>26</sup>

In addition the focus of *criminal law* moved away from the notion of ‘manifest criminality’ based on the disposition of the accused to a more formalised conception of criminal liability. As Habermas noted: ‘[t]he positivization, legalization, and formalization of law meant that the validity of law can no longer feed of the taken-for-granted authority of moral traditions’.<sup>27</sup> This more codified approach to law also impacted on the image of the human subject who increasingly came to be constituted as a rational, autonomous and self-governing being.<sup>28</sup>

The State could draw upon the *power* of a centralised police force and a public prosecutor’s office which would gather and present evidence in the public interest. As states grew stronger in relation to the criminal process, an increased emphasis was placed on centralised bureaucracy and on the fairness and objectivity of the investigation, prosecution and adjudication. Garland succinctly captures this phenomenon:<sup>29</sup>

The offender is defined as a legal subject, a citizen inscribed with rights and duties, entitled to equal treatment before the law. The State which punishes does so by contractual right in accordance with the terms of a political agreement. Its power to punish has its source in the offender’s action - it is the agreed consequences of a contractual breach. The State has here no intrinsic or superior right. It meets the citizen on terms of equality and must not encroach upon his or her rights, person or liberty except in circumstances which are rigorously and politically determined in advance - *nulla poena sine lege*.

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<sup>25</sup> For a fuller analysis, see Shane Kilcommins, “The victim in the Irish criminal process: a journey from dispossession towards partial repossession” (2017) 68(4) NILQ 505.

<sup>26</sup> More generally, see Shane Kilcommins, Susan Leahy, Eimear Spain, and Kathleen Moore Walsh, *The Victim in the Irish Criminal Process* (Manchester University Press, 2018).

<sup>27</sup> Jurgen Habermas, *The Theory of Communicative Action: reason and the rationalisation of society* (Polity Press 2004 repr), 148.

<sup>28</sup> Martin Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England: 1830-1914* (Cambridge University Press 1990) 54-5.

<sup>29</sup> David Garland, *Punishment and Welfare: a history of penal strategies* (Gower, 1985), 18.

As a consequence, in part, of this process of State monopolisation, a discourse and practice of liberal legalism emerged (emphasising the universality, liberty and sameness of the individual person) to rebalance power relations in the justice arena. For the accused, this meant that the justice network was restructured to incorporate a clearer and more substantive body of due process rights that would guarantee, as far as practicable, both substantive and procedural justice. It also ensured that the State increasingly dissociated itself from local and informal networks of power.

A State-accused logic of action thus came to cast a long shadow over criminal process relations in the nineteenth and twentieth centuries. It defined the accused as the primary (exclusive) rights-bearer, with institutional practice heavily coordinated in accordance with this feature. The criminal law itself increasingly focused on a *relatively narrow range of offences*, constructing a very narrow view of criminal typology, giving the impression that it is only certain socio-economic classes that commit crime. This inevitably contained a ‘disproportionate number of those who are poor, uneducated and unskilled’.<sup>30</sup> Indeed it has long been felt that the rich and powerful are relatively immunised from the full reach of criminal law.<sup>31</sup> Criminal law teaching itself helped to 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.<sup>32</sup>

The modern State-accused model of justice might also be described, in part, as an *1861 Offences against the Person* way of knowing criminal wrongdoing. Such an approach focuses ‘personal references’ – assaults, homicides, sexual offences, criminal damage . It was therefore very much rooted in ‘crime in the street’ harms to individuals. Regulatory wrongdoing was more ‘apersonal’ in

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<sup>30</sup> Ciaran McCullagh, ‘Getting the Criminals We Want: the social production of the criminal population’ in Patrick Clancy (ed), *Irish Society: Sociological Perspectives* (IPA 1995), 411-12.

<sup>31</sup> See WG Carson , ‘White Collar Crime and the Enforcement of Factory Legislation’ (1970) 10(4) B.J.Crim. 383 at 384; Michel Foucault, *Discipline and Punish: the birth of the prison* (Penguin, 1991 repr), 276.

<sup>32</sup> See Martin Horowitz, *The Transformation of American Law, 1780-1860*, (Oxford University Press 1992) 266; Alan Norrie (2001) *Crime, Reason and History: a critical introduction to criminal law* (Cambridge University Press 2001), 23. More generally, see Shane Kilcommins, Susan Leahy and Eimear Spain ‘The Absence of Regulatory Crime from the Criminal Law Curriculum’ in Kris Gledhill, (ed) *Criminal Law Pedagogy* (Routledge 2016), 195-206.

nature, and thus construed as having comparatively benign effects.<sup>33</sup> 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’.<sup>34</sup> Late modernity is challenging many of these assumptions. In the next section we explore some of the changes which are impacting upon traditional commitments and understandings of the criminal process.

### (i) Perceptions of Harm

To begin with, more nuanced understandings of harm and ‘systems risks’ are emerging.<sup>35</sup> As a result, distinctions traditionally drawn between crimes which are *mala prohibita* and *mala in se* are not as clear cut.<sup>36</sup> Misconduct in the banking and corporate sectors, in the workplace, in the environment, in the political arena and in the distortion of competition in the market poses as much, if not more, of a threat to our everyday lives as ordinary crime, with the potential to affect more people. Our security can be affected in a myriad of different ways by misconduct of this nature including, among other things, workplace injuries, loss of equal opportunity, loss of competition, loss of jobs, loss of reputation and the consequent devaluation of share prices and pension funds, threats to the environment, increased taxation, and increased costs for consumers.

### (ii) New modes of governance

There is also a new governmental approach involving 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 as either civil or criminal harms, with almost mutually exclusive formal

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<sup>33</sup> R.A. Wright, D.O. Friedrichs, ‘White-collar crime in the criminal justice curriculum’ (1991) 2 *Journal of Criminal Justice Education* 95, 105.

<sup>34</sup> Nicola Lacey, ‘Criminalization and Regulation: the Role of Criminal Law’ in Christine Parker, Colin Scott, Nicola Lacey, John Braithwaite (eds), *Regulating Law* (eds) (Oxford University Press 2004), 161

<sup>35</sup> Jurgen Habermas, *Between Facts and Norms* (Polity Press, 2008 repr), 432-35.

<sup>36</sup> Joe McGrath, ‘The Colonisation of Real Crime in the Name of All Crime’ in Shane Kilcommins and Ursula Kilkelly (eds) *Regulatory Crime in Ireland* (First Law, 2010) 60-61; Steve Tombs and David Whyte, ‘Crime, harm and corporate power’ in John Muncie, Deborah Talbot, and Reece Walters, (eds.) *Crime: Local and Global*. Willan Publishing, 2009) 137–172.



processes for knowing and handling conflicts.<sup>37</sup> 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:<sup>38</sup>

‘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.’

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 can be seen as part of a pattern of more, rather than less, governance, but taking ‘decentred’, ‘at-a-distance’ forms.<sup>39</sup> 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, National Employment Rights Authority, the Director of Consumer Affairs, the Environmental Protection Agency, the Food Safety Authority, the Health and Safety Authority, and the Office of the Director of Corporate Enforcement. Moreover, very wide powers of entry, inspection, examination, search, seizure and analysis are given to some of these agencies.

This enlargement in scope, however, is fragmented and heterogeneous in nature, occupying diverse sites and modes of operation. Governance therefore is no

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<sup>37</sup> Colin Scott, ‘Regulatory Crime: History, Functions, Problems, Solutions’ in S. Kilcommins and U. Kilkelly, (eds), *Regulatory Crime in Ireland*, (First Law, 2010), 69.

<sup>38</sup> Emile Durkheim, ‘Two Laws of Penal Evolution’ in Mike Gane, (ed,) *The Radical Sociology of Durkheim and Mauss*, Routledge 1992 repr), 46-7.

<sup>39</sup> John Braithwaite, “Neoliberalism or Regulatory Capitalism”, Occasional Paper 5, (National University of Australia, 2005); John Braithwaite, ‘The New Regulatory State and the Transformation of Criminology’ (2000) 40 *Brit J Criminol* 225.

longer defined by centralising tendencies. Rather it is much more dispersed: 'it flows through a network of open circuits that are rhizomatic and not hierarchical'.<sup>40</sup> Information trails and information gateways cut across civil, administrative, criminal and regulatory domains of action, no longer limiting or fixing the reach and potential for effective intervention. In the same way that these new governance strategies seek to move beyond the limiting effects of over centralisation in policing and prosecution functions – and the fixity of traditional criminal law - they also cut across territorial boundaries. All of this involves a trend away from a hierarchical command and control apparatus of State policing and prosecution. It constitutes a new form of 'networked governance' involving the increasing 'regulation of civil society'.<sup>41</sup>

### **(iii) The decline in power of the Leviathan State**

The perception of the strong State ranged against a weak accused is also no longer as clear cut. When the State came to dominate the crime conflict, positioning itself as the only legitimate means of coercion, it imbalanced the equilibrium in power relations. Monopolisation of this kind recalibrated the circuits of governance, resulting *inter alia* in the construction of *l'égalité des armes* to rebalance dissymmetries in power relations. The focus of the power - the subject accused of particular types of crime - was seen as vulnerable in that he or she was pitted against the unlimited resources of the Leviathan State. In this context, it is not surprising that a whole corpus of exclusionary rules and fairness of procedure rights emerged to ensure that the accused was afforded the best possible defence against unfair prosecution and punishment. Since, and to paraphrase Stephen, the State was so much stronger than the individual citizen, and was capable of inflicting so very much more harm on the individual than the individual could inflict upon society, it could afford 'to be generous'.<sup>42</sup>

This disequilibrium in power is no longer as pronounced. Sovereign nations are no longer the only large influential entities in the geo-political sphere. The rise of technology, the effects of globalisation and the relative autonomy of transnational corporations has also limited their power to have the last word on policy and strategic choices.<sup>43</sup> Moreover, when the State accuses a corporation or corporate actor of white collar wrongdoing, it is often facing a party that is

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<sup>40</sup> Nikolas Rose, *Powers of Freedom: reframing political thought* (Cambridge University Press, 2008 repr), 234.

<sup>41</sup> Ibid. See also Andrew Crawford, 'Networked Governance and the post regulatory state?: steering, rowing and anchoring the provision of policing and security' (2000) 10 *Theoretical Criminology* 449-479.

<sup>42</sup> J.F. Stephen, *A History of the Criminal Law of England* (Vol I. Routledge/Thoemmes Press, 1883), 354.

<sup>43</sup> Martin Van Creveld, *The Rise and Decline of the State* (Cambridge University Press, 1999), 419-420.

possessed with excellent resources, often better than the State investigation/prosecution unit itself.<sup>44</sup> There is therefore a resource parity that is not accounted for in traditional constructions of State-accused relations.

#### (iv) Information Leverage and Information Access

Prior to the centralisation of power in State police and prosecution forces, the old system of law enforcement was heavily reliant on local networks involving rewards, victims, thief-taking and accomplice driven prosecutions. As the State increasingly began to monopolise investigative and prosecutorial functions during the nineteenth century, recourse to local networks was minimised. Where these practices continued – for example with informants – they were downplayed. In an industrialised setting, this system of enforcement was increasingly viewed as a ‘badly regulated distribution of power’.<sup>45</sup> It was replaced with ‘public power’ which could be ‘distributed in homogeneous circuits capable of operating everywhere, in a continuous way, down to the finest grain of the social body’.<sup>46</sup> The centralised state apparatus – as expressed through the police and public prosecutors – thus completely monopolised the crime conflict. Though it remains largely true of the investigation and prosecution of ‘ordinary’ offences, new regulatory approaches are beginning to throw up investigative and prosecutorial networks that in part rely on information gathering and information transfer beyond the traditional reach of the police and prosecution agencies.

Aside from the fact that many regulatory agencies have very strong powers to compel the production of information,<sup>47</sup> legislation increasingly permits authorities including the Competition Authority, 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 also required to become ‘information reporters’.<sup>48</sup>

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<sup>44</sup> Vincenzo Ruggiero and Michael Welch, ‘Power Crime’ (2008) 51 (3-4) *Crime Law Social Ch* 297-301; Michael Benson and Francis Cullen, *Combating Corporate Crime* (NorthEastern University Press, 1998), 27.

<sup>45</sup> Michel Foucault, *Discipline and Punish: the birth of the prison* (Penguin, 1991 repr), 79.

<sup>46</sup> *ibid* 80.

<sup>47</sup> Very wide powers of entry, inspection, examination, search, seizure and analysis are given to some of these agencies. See, for example, section 64 of the Health and Safety Act, 2005; section 779 of the Companies Act 2014; Section 787 of the Companies Act 2014; section 30 of the Competition Act 2002; section 905 Tax Consolidation Act 1997; Section 905(2A) of the same Act provides for the issuance of search warrants to search any premises and section 900 provides very broad powers to require the production of books, records, other documents, which may contain information relevant to liability

<sup>48</sup> Shelley Horan, *Corporate Crime* (Bloomsbury Professional, 2011); Barry Vaughan and Shane Kilcommins, *Terrorism Rights and the Rule of Law* (Willan Publishing, 2008), 138-146.

Auditors, tax advisers, lawyers, accountants and liquidators are all bound by statutory requirements<sup>49</sup> to report information to the relevant authorities.<sup>50</sup> As McGrath notes:<sup>51</sup>

The use of legal and accounting professionals reflected a significant orientation of who is expected to police corporate and white collar crime. Auditors, for example, were traditionally required to realign information asymmetries by providing investors with independent verification of the companies' financial information....Recent initiatives, however, suggest that accounting and other professionals have transitioned from private watchdogs, reporting shareholders and directors, to public information shareholders, private police who either prevent wrongdoing or report it after the fact for public protection.

Very broad and generic obligations to disclose information have also recently been enacted in Ireland.<sup>52</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 preventing the commission or securing the apprehension of any other person for offences relating to banking and finance, company law, money laundering, theft, fraud, bribery, corruption, competition, consumer protection, cybercrime and tax collection

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 and/or immunity. The Protected Disclosures Act 2014, for example, provides extensive protection for public sector workers in Ireland in respect of

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<sup>49</sup> See section 447 of the Companies Act 2014, section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001. Certain persons involved in administering a Pensions Scheme are required to report to the Pensions Board reasonable suspicions of fraud or misappropriation as provided for under the Pensions Act 1990

<sup>50</sup> See, for example, section 42 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010; section 931(4) of the Companies Act 2014; section 392 of the Companies Act 2014 Act; section 447 of the Companies Act 2014; and section 59 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

<sup>51</sup> McGrath, J. (2015) *Corporate and White Collar Crime in Ireland: A New Architecture of Regulatory Enforcement*, (Manchester University Press, 2015), 128.

<sup>52</sup> Section 57 of the Criminal Justice Act 1994.

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.<sup>53</sup> Immunity programmes also exist.<sup>54</sup>

These new circuits of information gathering are designed to overcome the challenges posed by white collar crime, which overwhelmingly occurs in private.<sup>55</sup> They rely on new techniques and strategies – particularly the emphasis on legal compulsion – which are often beyond the reach of traditional State/accused relations. There is an increasing tendency through these strategies to compel or facilitate disclosure. They are supported by the less restrictive information access that is available to many regulatory agencies via the civil process<sup>56</sup> which also brings significant pressure to bear on the production of information.

#### **(v) The flow of power in to the civil sphere**

Finally, another striking feature of the changes occurring in the late modern criminal process is the proliferation of hybrid enforcement mechanisms that can be employed by the agencies or, on occasion, by private parties. These mechanisms have conflated the functional distinctions that exist between criminal and civil law.<sup>57</sup> 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 under section 14(1) of the Competition Act, 2002. Section 8(10) of the same Act provides that an action under section 14 may be brought whether or not there has already been a criminal prosecution in relation to the matter concerned and, in addition, a section 14 action will not prejudice the initiation of any future prosecution. Similarly, the Office of the Director of Corporate Enforcement can take civil or

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<sup>53</sup> Other relevant statutes include 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, section 26 of the Employment Permits Act 2006; s. 50 of the Competition Act 2002, s. 24A of the Communications Regulation Act 2002, ss. 55A-55T of the Health Act 2004, s. 61 of the Charities Act 2009, s. 222 of the National Asset Management Agency Act 2009, and section 20 of the Criminal Justice Act 2011.

<sup>54</sup> Paul Gorecki and David McFadden, 'Criminal Cartels in Ireland: The Heating Oil Case' (2006) 11 *European Competition Law Review* 631-640; Conor Talbot, 'The Protected Disclosures Act 2014 and the Cartel Immunity Programme' (2015) 7 *Commercial Law Practitioner* 178-181.

<sup>55</sup> Daryll Brown, 'The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement' *Ohio St. J. Crim. L.* (2004) 521-549.

<sup>56</sup> McGrath, J. (2015) *Corporate and White Collar Crime in Ireland: A New Architecture of Regulatory Enforcement*, (Manchester University Press, 2015), 140.

<sup>57</sup> Andrew Ashworth, 'Is the Criminal law a lost cause?' (2000) 116 *Law Quarterly Review* 225-256.

criminal enforcement actions. Civil enforcement actions include the use of restriction and disqualification orders.<sup>58</sup>

The increasing use of the civil jurisdiction as part of an array of strategies for contending with misconduct is well illustrated through the following vignette involving Thomas ‘Slab’ Murphy.<sup>59</sup> Though never convicted of terrorist activity, he was allegedly an important figure in the South Armagh Brigade of the IRA in the 1970s and 1980s before being elected Chief of Staff of the IRA in 1997.<sup>60</sup> His farm straddles County Armagh and County Louth, the border between Northern Ireland and the Republic of Ireland. The British army observation towers along the Border hills were allegedly constructed, in part, to keep surveillance on Murphy’s IRA operations.<sup>61</sup> In March 2006, it took 400 British and Irish soldiers, PSNI and Garda officers and officials from the Criminal Assets Bureau and the British customs and excise to mount a dawn raid on his farm which is located on both sides of the border. The fortune he allegedly amassed through fuel laundering and smuggling pigs, cattle, grain and cigarettes has been estimated by the BBC’s Underworld Rich List at between £35 million and £40 million. Almost £200,000 in mixed currencies had been found on the land, in the house and in sheds, along with 30,000 cigarettes and 8,000 litres of fuel. It also emerged that black bags hidden among hay bales in a cow shed contained cash of €256,235 and £111,185 and uncashed cheques worth €579,270, £80,000 and 24,000 in old Irish Punts. More than 30 archive boxes of documents, ledgers and cheques were seized on the farm along with computers and separate hard drives. In the yards, three tankers and a truck with a fourth tanker concealed inside it were impounded along with an oil laundering unit. Ultimately more than €625,000 in cash and cheques confiscated by Revenue chiefs in Ireland. Nine properties in north-west England, worth £445,000, were recovered by UK authorities. An agreed legal settlement took place in October 2008.<sup>62</sup> In December 2015, Murphy was found guilty on nine

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<sup>58</sup> McGrath, J. (2015) *Corporate and White Collar Crime in Ireland: A New Architecture of Regulatory Enforcement*, (Manchester University Press, 2015).

<sup>59</sup> For a fuller analysis, see Raymond Friel and Shane Kilcommins, ‘Taxing Crime: a new power to control’ in Colin King, Clive Walker, and Jimmy Gurule (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave 2018). See also Barry Vaughan and Shane Kilcommins, *Terrorism Rights and the Rule of Law* (Willan Publishing, 2008), 134.

<sup>60</sup> Ed Moloney, *A Secret History of the IRA* (Penguin Books, 2007), 160.

<sup>61</sup> Toby Harnden, *Bandit Country: The IRA and South Armagh* (Hodder and Stoughton, 2000).

<sup>62</sup> Gerry Moriarty, ‘Thomas ‘Slab’ Murphy jailed over tax like Chicago gangster’, Irish Times, 26 February, 2016 (<http://www.irishtimes.com/news/ireland/irish-news/thomas-slab-murphy-jailed-over-tax-like-chicago-gangster-1.2550298>); accessed 1 March 2018; Elaine Carty, ‘Thomas ‘Slab’ Murphy’s conviction began with enormous CAB operation’ Irish Independent, 26th February, 2016, <http://www.independent.ie/irish->

counts of tax evasion following a lengthy investigation by the Criminal Assets Bureau. In February 2016, he was jailed and sentenced to 18 months in prison.

What is evident in this vignette is a mix of enforcement mechanisms, but with the civil tool acting as a very powerful instrument of control. It is premised on efficiency and as few restrictions as possible on fact finding.<sup>63</sup> In raising a tax assessment, authorities in various jurisdictions have developed considerable powers to require a taxpayer to furnish details of earnings and assets, to obtain orders freezing monies and assets, and to seek information from third parties and financial institutions.<sup>64</sup> Its appeal lies in its permanency and low visibility efficiency. This is copper fastened by the disequilibrium in power relations – the onus is very much on the subject of a tax audit to demonstrate compliance.

The Murphy vignette also, however, displays another important difference from traditional criminal law and correctionalist criminology outlooks. Provisions that employ civil techniques – such as confiscation or taxation of the proceeds of crime - are not designed to re-orientate human behaviour or to reintegrate those that are deviant. The civil tools employed against him dismantled the enterprise by removing money, property, laundering units, and equipment. This was further buttressed by a tax demand. Taxation practices in a criminal setting are largely agnostic to the wrongdoer's personality, environment, associations, family background, opportunities, or to the State's complicity in his or her wrongdoing.<sup>65</sup>

This approach to wrongdoing manages disturbances according to risk principles. It attempts to permanently alter the social, financial and physical structures around the individual – the enterprise, its financial structures, its working capital, and the proceeds arising therefrom. It assumes that the transformative individual effects of criminal law are quite limited. It is in this sense an adaptive response, a recognition that traditional crime enforcement agencies can no

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[news/background-thomas-slab-murphys-conviction-began-with-enormous-cab-operation-34488827.html](https://www.irishtimes.com/news/background-thomas-slab-murphys-conviction-began-with-enormous-cab-operation-34488827.html)  
accessed 1 March 2018.

<sup>63</sup> Jonathan Simon, 'The Ideological Effects of Actuarial Practices' (1988) 22 *Law and Society Review* 771-800; Malcolm Feeley and Jonathan Simon 'Actuarial Justice: the emerging new criminal law' in David Nelken, ed, *The Futures of Criminology* (Sage, 1994) 173-201; Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

<sup>64</sup> Michelle Gallant, 'Tax and the proceeds of crime: a new approach to tainted finance' (2013) 16(2) *Journal of Money Laundering Control* 123.

<sup>65</sup> Nikolas Rose, *Powers of Freedom: reframing political thought* (Cambridge University Press, 2008 repr), 234; see Raymond Friel and Shane Kilcommins, 'Taxing Crime: a new power to control' in Colin King, Clive Walker, and Jimmy Gurule (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave 2018).

longer win the ‘war on crime’.<sup>66</sup> It accepts that crime is a normal social phenomenon, something which is with us, and which needs to be managed as efficiently as possible. Moreover, by not seeking to change the individual, and by using civil and regulatory strategies, there is minimal potential for resistance.<sup>67</sup>

This approach to wrongdoing also bypasses professional social expertise. Taxing the proceeds of crime does not require the knowledge of social experts such as probation officers, psychiatrists, counsellors, psychologists, educationalists, correctionalist criminologists, or social workers.<sup>68</sup> It embraces instead new forms of expertise - accountants, auditors, tax consultants, lawyers, estate agents, data analysts, bankers, and financial consultants. None of these forms of expertise are orientated to ‘normalising’ the wrongdoer.<sup>69</sup>

### 3. The Expressive Power of the Leviathan State

Another feature of the transformation has been the creation and increased use of specialist agencies in the detection and prosecution of white collar crime and the grant of extensive powers to such agencies. Despite the existence of an extensive catalogue of criminal offences focused on white collar crime in Ireland in the twentieth century,<sup>70</sup> perpetrators had “little reason to fear detection or prosecution. As far as enforcement is concerned, the sound of the enforcer’s footsteps on the beat is simply never heard.”<sup>71</sup> The state response has been varied and has included the delegation of power to a wide range of specialist agencies. These agencies have been endowed with wide investigative powers, including very wide powers of entry, inspection, examination, search,

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<sup>66</sup> See David Garland, *The Culture of Control* (Oxford University Press, 2001), 113-131.

<sup>67</sup> Raymond Friel and Shane Kilcommins, ‘Taxing Crime: a new power to control’ in Colin King, Clive Walker, and Jimmy Gurule (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave 2018).

<sup>68</sup> For the use of experts in the modern criminal process, see David Garland, *The Culture of Control* (Oxford University Press, 2001).

<sup>69</sup> Raymond Friel and Shane Kilcommins, ‘Taxing Crime: a new power to control’ in Colin King, Clive Walker, and Jimmy Gurule (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave 2018).

<sup>70</sup> For example, over 280 separate offences contained in the Companies Acts 1963-2000.

<sup>71</sup> Working Group on Company Law Compliance and Enforcement, Report of the Working Group on Company Law Compliance and Enforcement (1998) Para [2.4- 2.5] <<https://djei.sharefile.eu/share/view/9a19aab0ab64297>> accessed 2 February 2018; See also Company Law Reform Committee, Report of the Company Law Reform Committee (1958) <<http://www.clrg.org/publications/cox%20report.pdf>> accessed 2 February 2018; Joe McGrath 'The Prosecution of White-Collar Crime in a Developing Economy: A Case Study of Ireland in the 20th Century' in Van Erp, J.; Huisman, W.; Vande Walle, G (eds), *The Routledge Handbook of White-Collar and Corporate Crime in Europe*. (Routledge 2014), p399.



seizure and analysis to some of these agencies. For example, under the 2014 Companies Act 2014 the Director of Corporate Enforcement has the power to require a company to produce for inspection specified books and documents in circumstances which suggest that fraud, illegality, or prejudice may have occurred<sup>72</sup> and to obtain a search warrant to enter and search premises and seize and retain any material information found on the premises or in the custody or possession of any person found on the premises.<sup>73</sup> This expansion of power to decentralised and powerful specialist administrative agencies is occurring at a time when the sanctions available for regulatory breaches also appear to be gaining strength.

There is some evidence of a possible drift towards a more punitive approach to regulation in this jurisdiction.<sup>74</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’.<sup>75</sup> 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’.<sup>76</sup> 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 indictment for an offence under the Act a fine not exceeding €3 million or imprisonment for a term not exceeding two years, or both.<sup>77</sup> 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, Section 871 of the Companies Act 2014 created a four-tier categorisation of company law criminal

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<sup>72</sup> Section 779 of the Companies Act 2014. The constitutionality of a similar provision in section 19 of the Companies Act 1990 was upheld in *Dunnes Stores Ireland Co v Ryan* [2002] 2 IR 60.

<sup>73</sup> Section 787 of the Companies Act 2014.

<sup>74</sup> Robert Baldwin, ‘The New Punitive Regulation’ [2004] 67(3) MLR 351-383

<sup>75</sup> Nicola Lacey, ‘Criminalisation as Regulation: The Role of Criminal Law’ in C Parker et al, eds, *Regulating Law* (OUP 2004), p161.

<sup>76</sup> Nicola Lacey, ‘Criminalisation as Regulation: The Role of Criminal Law’ in C Parker et al, eds, *Regulating Law* (OUP 2004), p161.

<sup>77</sup> In *DPP v O’Flynn Construction Company Limited* [2007] 4 IR 500 the Circuit Court imposed a fine of €200,000 on O’Flynn Construction Company Limited which pleaded guilty to two offences contrary to the Safety, Health and Welfare at Work Act, 1989. Similarly, 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.

offences.<sup>78</sup> 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.<sup>79</sup> The approach evidences both a streamlining of the process and a strong punitive response.

However, the trends towards the extension of state power and increased punitiveness are not universal as demonstrated by the failure of successive governments to implement legislation on corporate manslaughter despite calls for legislation for over a decade. The Law Reform Commission published a report on corporate killing in 2006 and called for the introduction of two new offences: a statutory offence of corporate manslaughter for corporate entities; and, a secondary offence (grossly negligent management causing death) for corporate officers who play a role in the commission of the offence.<sup>80</sup> Despite successive attempts,<sup>81</sup> the legislature has yet to enact legislation giving effect to this recommendation, signalling that the commitment of the legislature to the punitive ideal is not complete.<sup>82</sup>

While the general trend has been towards an increase in the sanctions available against those guilty of crime of this nature, there is also evidence of a change in judicial attitudes to the application of those sanctions, particularly the imposition of custodial sentences upon those convicted. McGrath noted in 2012 that “[c]orporate crime is rarely considered to be as harmful as ordinary crime”,<sup>83</sup> however, a series of recent cases may indicate an increasing

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<sup>78</sup> This categorisation encompasses the majority of criminal offences, to the exclusion of just the most serious offences relating to market abuse, transparency and the law of prospectuses.

<sup>79</sup> Category 3 and 4 offences will be prosecutable on a summary basis only.

<sup>80</sup> Deirdre Aherne, 'Corporate Killing in Ireland – a new paradigm' [2004] 22 Irish Law Times 235-239.

<sup>81</sup> Corporate Manslaughter Bill 2001; Criminal Justice Bill 2004; Corporate Manslaughter Bill 2007; the Corporate Manslaughter Bill 2011; the Corporate Manslaughter Bill 2013; and the Corporate Manslaughter Bill 2016. See Joe McGrath, David Doyle 'Attributing Criminal Responsibility for Workplace Fatalities and Deaths in Custody: Corporate Manslaughter in Britain and Ireland' in Kate Kitz-Gibbon and Sandra Walklate (eds). *Homicide Gender and Responsibility: International Perspectives*. (Routledge 2016).

<sup>82</sup> Corporate Manslaughter and Corporate Homicide Act 2007 in the UK created a new homicide offence in 2007.

<sup>83</sup> Joe McGrath, 'Sentencing White-Collar Criminals: Making the Punishment fit the White-collar Crime' [2012] 3 Irish Criminal Law Journal 71-79, 72.

willingness to imprison individuals convicted of serious corporate crime.<sup>84</sup> In late March of 2009, Mr Justice McKechnie, in a judgment in the Central Criminal Court which considered competition law abuses by an association of Citroen car dealers, noted: ‘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>85</sup> In the case of *Paul Begley v. DPP*<sup>86</sup> the CCA rejected the contention that cases involving tax evasion should be categorised separately from other offences for sentencing purposes.<sup>87</sup> Instead, “there will be some cases where an immediate sentence is justified and others where it will not be.”<sup>88</sup> Ultimately, Mr. Begley’s 6 year sentence for offences relating to the fraudulent evasion of customs duty was reduced to two years by the CCA.<sup>89</sup> There have been other notable high profile cases in recent times in which lengthy custodial sentences have been imposed including a case involving former solicitor, Thomas Byrne, who was convicted of 52 offences including theft, forgery and using a false instrument and sentenced to 16 years imprisonment, with four years suspended.<sup>90</sup> More recently, in 2015, three former Anglo Irish Bank officials were jailed for between three years and 18 months for conspiring to conceal or alter bank accounts being sought by the Revenue Commissioners.<sup>91</sup> In reaching his decision, the judge noted the difficulty in dealing with defendants of previously

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<sup>84</sup> Joe McGrath, 'Sentencing White-Collar Criminals: Making the Punishment fit the White-collar Crime' [2012] 3 Irish Criminal Law Journal 71-79, 75, D. Robinson, Collared [2014] 180(1) Gazette of the Law Society Ireland 40-43.

<sup>85</sup> See *DPP v Duffy and Duffy Motors* (Unreported, Central Criminal Court, 23rd March 2009). See also *DPP v Manning* (Unreported, High Court, 9th February, 2007)

<sup>86</sup> [2013] IECCA 32

<sup>87</sup> [2013] IECCA 32, [44]. Following a consideration of the case of *DPP v. Paul Murray* [2012] IECCA 60, a case concerning social welfare fraud, Finnegan J, delivering judgment for the court, emphasized the importance of deterrence in sentencing decisions in cases involving revenue fraud. It was suggested “for the future guidance of sentencing courts that significant and systematic frauds directed upon the public revenue - whether illegal tax evasion on the one hand or social security fraud on the other - should generally meet with an immediate and appreciable custodial sentence”.

<sup>88</sup> [2013] IECCA 32 [43].

<sup>89</sup> As the trial judge had failed to properly consider or weigh the mitigating factors in respect of which Mr. Begley was entitled to credit. In a subsequent case, *DPP v Campbell* [2014] IECA 15, the CCA applied the principles set out in the Begley case and sentenced the defendant to twelve months imprisonment in respect of each of nine sample counts representing various revenue and VAT offences, each sentence to run concurrently.

<sup>90</sup> Irish Times, 2nd December 2013

<sup>91</sup> Irish Times, 31st July 2015

impeccably good character and stated that the challenge to the court was to balance the interests of the accused and the public interest.

Despite this trend towards imprisonment, a custodial sentence was not imposed in the high profile case in 2014 involving two former Anglo Irish Bank directors, Pat Whelan and Willie McAteer. Upon conviction of offences relating to the illegal purchase of Anglo Irish shares under section 60 of the Companies Act 1963 the men were sentenced to 240 hours community service.<sup>92</sup> Similarly, in Ireland's first bid-rigging cartel case, the Central Criminal Court imposed a fine of €7,500 (or three weeks wages) on an individual responsible for a bid-rigging cartel in the commercial flooring industry which continued for over two years. The undertaking was also fined €10,000 in circumstances where the value of the rigged tenders were over €500,000. The maximum fine available to the court was €5 million or 10 per cent of turnover (whichever was the higher) and/or a maximum gaol sentence of 10 years. The DPP has lodged an appeal against these sentences on grounds of undue leniency and Groneki has suggested that the "sentences seriously undermines the effective enforcement of competition law in Ireland...If the sentences imposed by the Central Criminal Court are not successfully appealed as being unduly lenient and appropriate sentencing guidelines developed, then the prospect for competition law enforcement in Ireland is grim."<sup>93</sup>

Though all of this constitutes evidence of a drift towards the greater use or threatened use of criminal sanctions, it should not be pushed too far. The area of regulatory crime still, by and large, remains predominantly orientated towards a compliance model of enforcement.<sup>94</sup> 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

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<sup>92</sup> Irish Times, 31st July 2014. Judge Nolan decided that "[i]t would be most unjust to jail these two men when I feel that a State agency [the financial regulator] had led the two men into error and illegality" Irish Times, April 30th 2014.

<sup>93</sup> Paul Gorecki, 'Sentencing in Ireland's First Bid-Rigging Cartel Case: An Appraisal' (MPRA, 11 August 2017) <[https://mpra.ub.uni-muenchen.de/80787/1/MPRA\\_paper\\_80787.pdf](https://mpra.ub.uni-muenchen.de/80787/1/MPRA_paper_80787.pdf)> accessed 17 February 2018.

<sup>94</sup> Joe McGrath, *Corporate and White Collar Crime in Ireland: A New Architecture of Regulatory Enforcement*, (Manchester University Press 2015)

suspension and revocation of licences. The Consumer Protection Act 2007, for example, permits the National Consumer Agency to issue prohibition orders to businesses, to take undertakings of compliance, to issue compliance notices and fixed payment penalties, in addition to prosecution functions.<sup>95</sup> Many agencies resolve most issues of non-compliance without the need for further enforcement actions. For example, in the years 2009-2012, there were on average 900 court prosecutions brought and 12,000 enforcement actions each year by the Environmental Protection Agency (EPA).<sup>96</sup> All of these ensure that prosecutions remain relatively rare, employed as a last resort mechanism. As Professor Colin Scott has recently noted:

The enforcement strategies of 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.<sup>97</sup>

## **Conclusion**

It is clear that the landscape has changed almost beyond recognition. Our understanding of white collar crime as relatively benign, with weak enforcement mechanisms and little will to investigate or punish, has not survived. A wide variety of civil, administrative and regulatory mechanisms are now being utilised alongside criminal law instruments in the prosecution of such crimes, crimes which are being investigated and prosecuted by specialist agencies. In addition to a growing decentralisation of investigative and prosecutorial powers, there has also been a decline in the relative power of sovereign nations when ranged against large and/or sophisticated corporations and this has reshaped how we understand the state/accused relationship. Sharing

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<sup>95</sup> See Ailbhe O’Neill, ‘The Consumer Protection Act 2007 – Enforcing the New Rules’ (2008) 26 Irish Law Times 46.

<sup>96</sup> EPA, *Focus on Environmental Enforcement in Ireland: a report for the years 2009-2012* (EPA 2014), 2. In 2008, the Office of the Director of Corporate Enforcement (ODCE) issued 24,000 copies of their publications, closed 850 cases on an administrative basis, made a final determination on 280 initial liquidator reports, secured 20 summary convictions, secured 20 disqualifications, and one case was successfully prosecuted by the DPP following an ODCE investigation. See Paul Appleby, ‘Compliance and Enforcement – the ODCE perspective’ in Shane Kilcommins and Ursula Kilkelly, eds, *Regulatory Crime in Ireland* (Firstlaw 2010), 186.

<sup>97</sup> Colin Scott, ‘Regulatory Crime: History, Functions, Problems, Solutions’ in Shane Kilcommins and Ursula Kilkelly, eds, *Regulatory Crime in Ireland* (Firstlaw 2010), 73.

of information between government agencies involved in the investigation of crime and the ability of investigative agencies to compel the production of information, alter the investigation of such crimes and mark them out for the investigation and prosecution of 'traditional' crime. All of this has occurred at a time when the evidence of a more punitive approach to regulation in this jurisdiction has emerged and suggests that the white collar criminal will not be able to escape notice and sanction quite so easily in the future.