

***Risk in Irish Society: Moving to a Crime Control Model of Criminal Justice******Dr. Shane Kilcommins, Lecturer at Law UCC***

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**1. Introduction**

David Garland, in his book, *The Culture of Control*, has recently set out the following indices of change which he believes are evident in the criminal justice systems of many western countries. They are as follows:

- the Decline of the rehabilitative ideal
- the re-emergence of punitive sanctions and expressive justice
- changes in the emotional tone
- the return of the victim
- the public must be protected
- the politicization of law and order
- the reinvention of the prison
- the transformation in criminological thought
- the Expanding Infrastructure of crime prevention
- the commercialization of control
- new management styles
- a perpetual sense of crisis

**2. Not true of Ireland?**

Given that criminology as an academic discipline was not evident in Ireland until relatively recently, it is difficult to be persuaded by the argument that intellectual currents in the criminological arena have helped to entrench the culture of control and re-orientate Irish sentencing practices. Low levels of recorded crime, the lack of resources and data, and difficulties of access to existing data ensured that crime causation in Ireland remained, by and large, a peripheral issue until the 1990s. The Department of Justice, for example, only established a research budget in 1997. Correctionalist criminology, therefore, is not as vulnerable in Ireland today as it might be in other jurisdictions where the discipline has exhausted itself more over the past four decades. This absence of correctionalist criminological debate in Ireland for the greater part of the twentieth century, and government apathy regarding the commission of research, stands in marked contrast

to developments in other jurisdictions such as the US and England and Wales. As a result, the tendency has been for penal policymakers in Ireland to focus more on pragmatism and expediency than on long term criminologically orientated strategy goals. If nothing else, the lack of a commitment to the discipline in Ireland indicates a significantly different energy and momentum being generated between the various jurisdictions. Of course, policy and intellectual transfer can still take place despite the yawning gap in criminological outputs between different countries. For Ireland at least, however, changing sentencing and punishment practices are not by any means attributable to a home based criminological rejection of the 'project of solidarity'.

**3. What of Criminal Law**

It might specifically be true in respect of the deprioritisation of due process values. The thrust of the current trend in Ireland has, I would argue, very much been towards the crime control model of justice as prescribed by Herbert Packer, with a focus on efficiency and outputs, an instrumental logic that emphasises the repression of criminal conduct as a primary concern, an emphasis on administrative fact finding processes, and a dislike of "equality of arms" values such as the presumption of innocence and the privilege against self-incrimination. In particular, where biographical knowledge was employed under the modern penal welfarist framework to socialise the deviant, produce new kinds of knowledge about the origins of crime that would facilitate intervention and displace a "common law polity which presupposed a homogeneous dangerous class", now it is increasingly employed, as in the extra-ordinary realm, not to normalise but to neutralize the threat posed. Knowledge is now increasingly premised on the maintenance of fragile borders of exclusion through "risk thinking," disciplinary law, a politics of safety and the management of the dangerous, and the perception that due process standards (such as beyond reasonable doubt) are inconvenient legal mantras. Commitment to justice and due process values is weakening, as law making increasingly becomes a matter of retaliatory gestures intended to reassure a worried public that something is being done about law and order. As some commentators have suggested: "the values of the unsafe society increasingly displace those of the unequal society."<sup>1</sup>

The collapse of the Liam Keane murder trial in November 2003 led, for example, to claims about a:

- 'crime crisis'
- suggestions that the 'fabric of society was at risk'
- calls for more 'anti-terrorist type laws'
- and a recognition by our Taoiseach that the Gardaí cannot 'take on a crowd of gangsters with their peann luaidhes'

Yet the perception presented by those involved in crime control is very different. The President of the Association of Garda Sergeants and Inspectors attended a meeting of the Joint Committee on Justice, Equality, Defence and Women's Rights where he stated: "the overwhelming feeling of members is that the criminal justice system has swung off balance to such an extent that the rules are now heavily weighted in the favour of the criminal, murderer, drug trafficker and habitual offender. At the same time, the system is oppressive on the victims of crime, the witness who

<sup>1</sup> R Ericson and K Carriere, 'The Fragmentation of Criminology' in D. Nelken, ed., *The Futures of Criminology* (Sage, 1994), pp. 102-103

comes to the defence of the victim and the juror whose role it is to ensure justice is done and seen to be done. Much of the blame for this can be laid at the door of the system. The State has an equal duty of care to the victim, witness and juror as to the accused.”<sup>2</sup> The President went on to call, *inter alia*, for the removal of the right to silence in relation to the investigation of serious crimes. Equally telling is the suggestion in April 2003 by the Minister for Justice, Equality and Law Reform, Michael McDowell, that Ireland was the only “member state of the EU in which individual citizens are guaranteed the constitutional right to due process, exclusion of illegally obtained evidence, to trial by jury in all non-minor cases, to fair bail, to the presumption of innocence, to habeas corpus, and the right to have any law invalidated in the courts which conflicts with his or her rights - and the right not to have any of these rights altered except by referendum.”<sup>3</sup>

#### 4. The Irish experience of control culture

Many of the ‘structural properties’ identified by Garland vis-à-vis sentencing are discernible in Ireland. To begin with, as the level of recorded crimes has increased, Irish society has experienced bouts of anxiety about insecurity and disorder. Such a phenomenon is also facilitated and shaped by the progressively politicised nature of law and order and the employment of sound-bite criminal discourse. The outcome of such dynamics in the penal field - in broad terms - has been a series of increases: in the strength of attitudes to crime; the use of imprisonment; the sentence lengths for serious crimes; the commitment to prison expansionism; the targeting of the poor, disorderly and homeless; and in the maximum penalties allowed by statute for various types of offences.

More specifically, the dynamics have begun to alter relations in the sentencing domain, changing the settled modern paradigm. For example, in 1996 the Law Reform Commission recommended that sentencing policy should be founded upon a policy of just desserts, citing its influence in jurisdictions such as the US and the UK. Such a coherent and reasoned strategy would operate in marked contrast to the disjointed ‘instinctive synthesis’ approach utilised in many Irish criminal courts. This demand for fixity of purpose in sentencing requires that the severity of the punishment match ever more closely the seriousness of the offence, which would in turn be determined by two factors - the level of harm caused by the offender and his or her degree of culpability.

A scheme of presumptive sentencing in Ireland has been provided for under the Criminal Justice Act 1999. The Act, *inter alia*, created a new offence, the possession of controlled drugs worth €13,000 or more with intent to supply. Any person convicted of the new offence, other than a child or young person, shall have a term of at least imprisonment of 10 years imposed on him or her unless there are exceptional circumstances that would permit a derogation.

In addition, section 4 of the Criminal Justice Act 1994, as amended by section 25 of the Criminal Justice Act, 1999, imposes what is effectively a mandatory requirement on judges to

<sup>2</sup> (Joint Committee on Justice, Equality, Defence, and Women’s Rights 8 December, 2003, per Mr Dirwan, President of the Association of Garda Sergeants and Inspectors.)

<sup>3</sup> The Irish Times

follow a particular investigative procedure for confiscation of an offender’s assets in circumstances where the offender has been convicted on indictment and sentenced for drug trafficking offences. The standard of proof required in any such proceedings is based on the balance of probabilities. There is also a statutory rebuttable presumption under section 5(4) of the 1994 Act that any property appearing to the court to have been received by the offender within a period of six years prior to the proceedings being instituted constitutes proceeds from drug trafficking offences. Section 9 of the Criminal Justice Act 1994 extends this procedure to all serious crimes. In such circumstances however, an application must be made by the Director of Public Prosecutions stating that the person in question has benefited from the crime before the court can determine whether or not to make a confiscation order.

A number of other subtle, but significant, alterations in specific sentencing practices have also occurred in recent years which fit, or have the potential to fit, into the more punitive trajectory depicted by Garland. First, section 2 of Criminal Justice Act 1993 empowers the Director of Public Prosecutions (DPP) to appeal to the Court of Criminal Appeal against unduly lenient sentences imposed on conviction on indictment. Though intended to be used sparingly, particularly given the provision’s potential capacity to be utilised to pander to populist and emotive sentiment, one commentator noted that, by early 1999, such appeals “were coming forward at a rate of one a week.”<sup>4</sup>

Secondly since 2000, the practice of inserting review dates into sentences has been stopped. Prior to this, it was common for a trial judge in imposing a custodial sentence to insert such a date. On this date, the balance of a custodial sentence could be suspended provided sufficient progress, from a rehabilitative perspective, had been made by the offender. In the *People (DPP) v. Sheedy*, for example, Denham J noted:<sup>5</sup>

“The review structure is a process by which a judge is able to individualise a sentence for the particular convicted person. It is a tool by which the judge may include in the sentence the appropriate element of punishment (retribution and deterrence) and yet also include an element of rehabilitation. For example, it may be relevant to a young person or a person who has an addiction or behavioural problem and at least some motivation to overcome that problem, it may well be appropriate as part of a rehabilitation aspect of the sentence to provide for a programme or treatment within the sentence as a whole and then to provide for a review of the process at a determinate time”.

The Supreme Court, however, in *Finn* suggested that the practice was in conflict with the power of the executive to commute or remit sentences under section 23 of the Criminal Justice Act 1951.<sup>6</sup> Furthermore it was suggested that the practice breached the constitutional doctrine of separation of powers. Though such curtailment was founded on a juristic rather than a punitive logic, one of the unintended consequences may have been to restrict offenders’ opportunities

<sup>4</sup> T O’Malley, *Sentencing Law and Practice* (Roundhall, 2000), p.384.

<sup>5</sup> (2000) 2 IR 184.

<sup>6</sup> (2001) 2 IR 25.

to have their rehabilitation facilitated, individualised, assessed and encouraged.

More generally, the Sex Offenders Act 2001 exemplifies the priority currently given to the control of groups of offenders and the discourse of risk. This is evident in the increase in the maximum sentences available for sexual assault offences, the introduction of a tracking system with notification requirements, provisions for the making of sex offender orders where *reasonable grounds* exist for the protection of the public, mandatory obligations to provide employers with information on previous sexual offence convictions in certain circumstances, and the lack of treatment programmes or places.

In holding that the registration requirements under the Sex Offenders Act 2001 are constitutional, Geoghegan J., delivering the judgment of the court in *Enright*, stated the following: *"The undisputed evidence was that sexual offenders present a significant risk to society by reason of their tendency to relapse. The statistics suggest that the rate of relapse in the year after release from prison is a little higher than later. Also that the currently widely held international view as expressed in the literature is that it is a condition which in general cannot be cured. Further, as a consequence, it is not appropriate from a therapeutic point of view to think in terms of curing but rather risk management of the condition and the putting in place of measures which facilitate personal control and social control. The further undisputed evidence was that from a therapeutic point of view a commitment to register was the lowest level of any interventional programme in relapse prevention. It was stated that sexual offenders thrive on secrecy and have a propensity to move around. The commitment to registration by an individual may have the effect of facilitating personal control and in providing the Garda Síochána with knowledge of the persons whereabouts is a first step in social control."*<sup>7</sup>

The inclusion of post-release supervision orders in the Act, in particular, is of interest from a sentencing perspective. Such an order provides that a sex offender may be required after release from prison to remain under the supervision of the Probation and Welfare Service and comply with such conditions as are specified in the sentence. The combined duration of a custodial term and the period of supervision may not exceed the maximum sentence applicable to the offence in question. However, and echoing the felt societal need for more protection and more control, the custodial term should not be less than the term the court would have imposed if it had determined the matter without considering the order. In other words, no allowance for the secondary supervisory punishment should be made when considering the primary custodial sanction, albeit that the maximum sentence for the offence cannot be exceeded. Indeed, O'Malley has suggested that the constitutionality of the order, specifically having regard to its proportionality, might be in doubt given that it is a 'collateral hardship.' Such a provision together with the others cited - which are often justified and reinforced by archaic images of 'otherness' - bear testimony to Garland's notion that there is no such thing today as an 'ex-offender'. For sex offenders in Ireland, at least, the following sentiments appear to ring true:

<sup>7</sup> *Enright v. Ireland* and the Attorney General (Unreported, Supreme Court, 18 December, 2002).

<sup>8</sup> T. O'Malley, 'Principles of Sentencing: Some Recent Developments' *Judicial Studies Institute Journal* (2001) 1 (1): 55-56

"Today the interests of convicted offenders, insofar as they are considered at all, are viewed as fundamentally opposed to those of the public. If the choice is between subjecting offenders to greater restriction or else exposing the public to increased risk, today's common sense recommends the safe choice every time. In consequence, and without much discussion, the interests of the offender and even his or her legal rights are routinely disregarded."<sup>9</sup>

In addition, and as part of this reorientation in sentencing practices, a growing consciousness has emerged in Ireland of the need for victims of crime, and witnesses, to be more prominent actors in the theatres of prosecution and sentencing. This nascent pro-victim/witness momentum has ensured a more responsive support structure preceding crimes, more empathetic treatment by criminal justice agencies in the detection and prosecution of crimes, and a more conducive courtroom environment regarding the provision of information on crimes. All of the following relatively recent occurrences assist in rotating the 'axis of individualisation' in Ireland to a plot which is more victim orientated:

The establishment of Victim Support in 1985 and the publication of a Victim's Charter in 1999. Statutory provision for victim impact statements.

The abolition of a mandatory requirement on judges to warn juries of the dangers of convicting on the basis of uncorroborated testimony.

The increased use of victim surveys that bring attention to bear on typologies of crime and victimhood.

The employment of intermediaries, live television links and video testimony for witnesses and victims.

Separate legal representation for rape victims under the Sex Offenders Act 2001.

Provisions for greater participation under the restorative justice model embodied in the Children Act 2001.

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

In September, 2003 Mr Justice Hugh Geoghegan, a Supreme Court judge, noted: *"it is an absurd idea that because a judge or other powers-that-be, demonstrate concern for the rehabilitation of the criminal, they are thereby showing lack of respect or lack of concern for the victim."*<sup>10</sup>

The possibility of such a recalibration in the scales of justice is illuminated by Fennell in the

<sup>9</sup> D Garland, *The Culture of Control* (Oxford University Press, 2001), p.180

<sup>10</sup> *The Irish Times* September 8, 2003.

context of the prosecution of sex abuse cases where there has been a delay in making the complaint.

Such cases often reveal a competing dynamic: on the one hand, the right of the victim to pursue justice in circumstances where the delay was attributable to the alleged dominion exercised by the accused; on the other, the right of the accused to a fair and expeditious hearing. In a thorough trawl through the cases, she cogently argues that the decisions reveal an accommodation, and pursuit, of victims' interests over the competing interests of the accused to a fair trial: *"The triumphing of victims rights on almost every occasion transposes the previous position of non-belief of victims to absolute and automatic belief."* In addition, she suggests that the judgments reveal an alignment of society's interests with the<sup>11</sup> victims. In effect, the criminal process is witnessing the emergence of a society/victim coalition ranged against the increasingly dissociated accused whose rights are not identified as societal interests. She quotes the following passage delivered by Keane J. in *E.O'R v. DPP*: *"Whatever decision a court arrives at in a case such as this, there is the possibility of injustice; injustice to the complainants and the public whom the court must protect if the proceedings are stayed where the accused was indeed guilty of the offences, and injustice to the accused if he is exposed to the dangerous ordeal of an unavoidably unfair trial."*

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To some extent, the wheel in such emotive cases has turned full-circle, from non-recognition of victims in the past, to greater facilitation today, but with the consequence that, in some instances, the rights of the accused are de-prioritised. This very point was picked up upon by McGuinness J in *P.C. v. D.P.P.*: *"In years gone by, accusations of rape or any kind of sexual assault were treated with considerable suspicion. The orthodox view was that accusations of rape and sexual assault by women against men were 'easy to make and hard to disprove' and judges were required to give stern warnings in their charge to the jury of the need for corroboration and the dangers attached to convicting on the evidence of the complaint alone. No one today would support the orthodoxy of the past and there has been a great increase in the psychological understanding of sexual offences generally. Nevertheless it would be unfortunate if the discredited orthodoxy of the past was to be replaced with an increasingly orthodox view that that in all cases of delay in making complaints of sexual abuse the delay can automatically be negated by dominion."*

### 5. From an adversarial to inquisitorial model of criminal investigation

In recognising the practice of sentencing to be part of a wider trial process, it is possible to unearth further evidence of this changing trajectory. The ratification of increasingly coercive tactics in information gathering techniques?what Keane refers to in Ireland as the movement from an adversarial to a more inquisitorial model of criminal investigation?and the de-prioritisation of the fairness of procedure rights of accused persons also signpost this more punitive 'logics of action.' Indeed the strongest evidence of the possibility of a drift towards a control model of justice in Ireland is manifest in the dissolution of fairness of procedure safeguards.

11 C. Fennell, "The Culture of Decision-Making: A Case for Judicial Defiance Through Evidence and Fact Finding Judicial Studies Institute Journal (2001) 2 (1), p 54

12 (1996) 2 I.L.R.M. 128

13 (1999) 2.I.R. 25.

If anything, it could be said that in terms of a devaluation in due process values, Ireland is now a lodestar for other jurisdictions. This marks a complete reversal in Ireland's usual practice of criminal justice policy imitation from other western countries. Much, though not all, of the impetus for the tooling down of accused/offender rights must be construed against a backdrop of the "extra-ordinary" circumstances posed by the conflict in Northern Ireland. The "proportionate", "emergency" legal responses drawn up to combat the threat posed by paramilitaries have proved remarkably malleable in adjusting to more normal circumstances.

### 6. The normalisation process of a culture of control

#### (i) Wider use of extraordinary powers of arrest and detention

This overspill from the paramilitary realm into the ordinary realm is evident in the Supreme Court's sanctioning of the wider use of the extra-ordinary powers of arrest and detention permitted under section 30 of the Offences Against the State Act 1939. Under section 30 of the Act, a member of the Gardaí is authorised to arrest any person suspected of the commission of an offence under the 1939 Act or an offence which is "scheduled." Section 36 of the Offences against the State Act 1939 empowers the government to declare offences to be scheduled whenever it is satisfied that the ordinary courts are inadequate to secure the effective administration of justice. As noted, a suspect arrested under section 30 may be detained for an initial period of 24 hours followed by a further 24 hours provided a certain direction is given.

#### (ii) The Retention of the Non-Jury Special Criminal Court for non-paramilitary activities

Further support for this normalisation process can also be gleaned from the retention of the non-jury Special Criminal Court (re-established in 1972) and its use for non-scheduled, non-terrorist offences. The introduction of the Court in 1972, at the height of "the Troubles in Northern Ireland", was justified on the basis that juries were likely to be intimidated by paramilitaries. It continues to be employed today despite little in the way of a risk assessment as to whether or not there was a possibility of continued paramilitary intimidation. Moreover, the Special Criminal Court is increasingly being employed to try cases that have no paramilitary connections. Offences without subversive connections which have been tried in the Special Criminal Court include the supply of cannabis, arson at a public house, theft of computer parts, kidnapping, the murder of Veronica Guerin, receiving a stolen caravan and its contents, the unlawful taking of a motor car, and the theft of cigarettes and £150 from a shop. Such cases appear to verify Mary Robinson's concern, made in 1974, that the continuation of the Special Criminal Court would abolish the "jury trial by the back door."

Perhaps even more alarmingly, the decision to have such offences tried before the non-jury Special Criminal Court are not subject to any checks or safeguards. Under sections 46 and 47 of the Offences Against the State Act 1939, the DPP has the power to have any case heard in the Special Criminal Court where s/he is of the opinion that the ordinary courts are inadequate to secure the effective administration of justice.

**(iii) Supergrass testimony**

A witness protection programme was set up following the murder of Veronica Guerin, to assist the Gardaí in the fight against organised crime. The type of witnesses protected by the programme are not simply run-of-the-mill self-confessed accomplices, but fall into a definitional category more in keeping with supergrass testimony, a term made infamous following a series of paramilitary trials in the Diplock Courts in Northern Ireland in the 1980s. The damning information which such witnesses have provided has been utilised by the State to apprehend and prosecute a series of high profile individuals operating in the world of organised crime. In return for such information, the witnesses, who themselves had also repeatedly partaken in criminal activities, were given the opportunity of an improved lifestyle.

For example, one witness, Charles Bowden, in return for information on members of the so-called Gilligan gang and their alleged involvement in the murder of Veronica Guerin and drug trafficking, was given a series of privileges. They included: an undertaking from the DPP that he would not be prosecuted for his part in the murder of Veronica Guerin; a very modest prison sentence having pleaded guilty to serious drugs and firearms charges; special concessions while serving the sentence; his wife and children all received the benefit of the witness protection programme and were completely dependent on the State for financial support while Bowden served his sentence; and, it was promised that he and his family would be set up with new identities in a foreign country on his release from prison. All of these tactics - immunity from prosecution, lenient sentences, and resettlement under new identities - were also very evident in the supergrass trials that took place in Northern Ireland.

In *The People (DPP) v. John Gilligan*,<sup>15</sup> it was pointed out that these witnesses, who were later referred to in court as “perjurers and self-serving liars”, were often interviewed by the Gardaí without any record being kept as to the contents of the interviews. Moreover, it was also alleged that payments were made to the same witnesses by the Gardaí, which purported to belong to the witnesses, but which, to all intents and purposes, appears to have been the proceeds of crime. On appeal, McCracken J. noted the following about the witness protection programme:

“There are certainly some very disturbing factors in the way in which the authorities sought to obtain the evidence... This was the first time that a witness protection programme had been implemented in this State, and one of the most worrying features is that there never seems to have actually been a programme. There ought to have been clear guidelines as to what could or could not be offered to the witnesses. This was not done, and instead there was an ongoing series of demands by the witnesses, most of which, it must be said, were rejected, but the position was kept fluid almost right up to the time when they gave evidence... [T]he authorities appeared at all times to be open to negotiation, but is something which certainly ought not to have been allowed to happen.”<sup>16</sup>

<sup>15</sup> Unreported, Special Criminal Court, March 15, 2001.

<sup>16</sup> *John Gilligan v DPP* (Unreported, Court of Criminal Appeal, 8 August, 2003).

In the same court it was noted: “A further worry arises from the evidence of... an official in the Department of Justice who wrote a memorandum in relation to granting overnight temporary releases to the witnesses which included the following: “*The question of an overnight TR was also discussed. And this was not ruled out by the Gardaí. The granting of an overnight would only be considered for a very special occasion and would be dependent on his performance in court.*” He gave that memo to an Assistant Secretary in the Department to be shown to the Minister and the memo came back with the words ‘*and would be dependent on his performance in court*’ crossed out.”

Current ambivalence about such testimony and the “fluidity” in the operation of the programme is even more surprising when one considers that only 20 years ago Irish politicians and the general public condemned with gusto the adoption of similar extraordinary practices in Northern Ireland. For example, on 17 May 1984 Fianna Fáil TD, Ben Briscoe, stated in the Dáil: “*The whole concept of the supergrass seems to go against human rights... It is important that we are seen to be on the side of justice.*” In the same sitting, another Fianna Fáil TD, Gerry Collins, referred to the supergrass system as “not only a travesty but a corruption of justice.” Similarly, the Minister for Foreign Affairs in 1986, Mr Peter Barry, in response to a question in the Dáil about the supergrass system in Northern Ireland, could suggest that he was committed, through inter-governmental conferences, to seeking the “*introduction of measures to increase public confidence in the administration of justice in Northern Ireland.*”<sup>17</sup>

In the space of two decades, however, arguments about the right to a fair trial, the protection of the innocent, transparent management, and basic human rights have been displaced by the need for a more efficient “truth seeking” criminal justice system.

**7. Moving into the wider criminal justice system**

More generally, and in the ordinary criminal justice realm, the past 20 years have witnessed increased powers of detention for the Gardaí and a substantial growth in their powers of stop, entry, search and seizure. It has also witnessed modifications on the right to silence and presumption of innocence. In respect of the right to silence, sections 18 and 19 of the Criminal Justice Act 1984, for example, allow adverse inferences to be drawn from an accused person’s failure to account for objects, marks, or substances in his or her possession, and a failure to account for one’s presence at a place at or about the time a crime was committed. Similarly, section 7 of the Criminal Justice (Drug Trafficking) Act 1996 enables inferences to be drawn from a failure to mention certain facts when questioned which are later relied upon in defence at trial. All of these inferences have corroborative value only.

The ordinary criminal justice realm has also recently witnessed judicial validation for shifting the legal onus of proof in criminal trials. Indeed it has led one commentator to suggest that it can no longer “*be confidently asserted that the burden of proof rests with the prosecution or that criminal trials proceed on the basis that the accused enjoys a presumption of innocence.*”<sup>18</sup> In addition, the

<sup>17</sup> See Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland* (IPA, 2004), p.172.

<sup>18</sup> A Ryan *The Sriminal Justice (Drug Trafficking) Act, 1996: Decline and Fall of the Right to Silence* *Irish Criminal Law Journal* (1997) 7 (1). p.22.

system has witnessed restrictions on the right to bail, non-recognition of the right of the accused to confront his or her accuser in court, and, an increasingly complacent attitude towards the right of a detained suspect to access to a lawyer. This right of access is worth further consideration, given that it is one of the most basic of all procedural fairness rights. The legal and constitutional right of access to a lawyer is well established in Ireland. It is not, however, absolute and is limited to 'reasonable access'. This has been interpreted by the Gardaí to mean that a detained suspect has a right of access to his or her solicitor for one hour during every six hours of detention.

Moreover, and provided the Gardaí have made *bona fide* attempts to contact a solicitor, they are entitled to proceed to question the detained suspect. Given that no duty solicitor scheme operates in Ireland, and given that there is anecdotal evidence to suggest that the Gardaí arrest suspects during weekends in cases where it may have been possible to effect the arrests during 'office hours', securing the services of a solicitor may be more difficult than would otherwise be expected. Even if contact is made with a solicitor, and assuming he or she is available to come to the station, there is nothing to prohibit the Gardaí questioning the detained person until such time as the solicitor arrives. Furthermore, even when the solicitor presents himself or herself at the station, he or she is not entitled to sit in on the interrogation – the right to reasonable access does not extend to having a solicitor present during the interrogation. Nor is the solicitor entitled to have an audio-visual recording of the interviews or to see the interview notes during his or her client's detention. The stark lack of protection afforded to a detained person regarding access to a solicitor - and narrow judicial and Garda constructions as to what constitutes reasonable access - raises, as one commentator noted, questions about the commitment of the institutions of the Irish State 'to the protection of basic human rights and to the dignity of its citizens as human persons.'<sup>19</sup>

Though the fairness of procedures provisions inherent in the Constitution can act, to some extent, as a counterpoint to the rising tide of punitiveness, increasing authoritarianism and a swingeing disregard for procedural safeguards are also palpable in Ireland. Encroachments into the right to silence and presumption of innocence, restrictions on the right to bail, the virtually unchecked ability of the Director of Public Prosecutions to have ordinary crimes listed in the non-jury Special Criminal Court, the capacity of the Gardaí to employ emergency provisions in the ordinary criminal justice realm, the state's seeming indifference to international human rights provisions and decisions, increased powers of detention, search and seizure for the Gardaí, and illiberal interpretations of what constitutes reasonable access to a lawyer, all facilitate the reconfiguration of power relations between the State and the accused. This overspill from the subversive domain into the ordinary criminal justice realm and the expanding powers of law enforcement and prosecutorial agencies is part of a long-term, often unnoticed, shift in the civil liberties landscape, to one more closely aligned with the state's result oriented needs and its desire to control more effectively. As one of the leading commentators on criminal procedure in Ireland recently noted:

<sup>19</sup> JPM White, *The Confessional State - Police Interrogation in the Irish Republic* *Iris Criminal Law Journal* (2000) 10(1), 17-20.

"The heavy emphasis on due process values which imposed a heavy burden on the State to prove guilt against a passive defendant has been replaced by a model in which, at the very least, the State can coerce a much greater degree of co-operation from the suspect, both directly and indirectly, in the investigation of his or her own guilt than had been the case previously."<sup>20</sup>

Perhaps nowhere is this results orientated penchant more palpable than in relation to the enactment of measures by which the proceeds of crime can be confiscated. The Proceeds of Crime Bill was mooted in Ireland in the mid 1990s to combat the dangers posed to society by drug-related crime. The current Act was initially proposed as a private member's Bill, one week after the assassination of Veronica Guerin. Five weeks later, the normally sluggish and consultative legislative process was complete and the Proceeds of Crime Act was law. The Act's cardinal feature permits the Criminal Assets Bureau to secure interim and interlocutory orders against a person's property, provided that it can demonstrate that the specified property - which has a value in excess of €13,000 - constitutes, directly or indirectly, the proceeds of crime. If the interlocutory order survives in force for a period of seven years, an application for disposal can then be made. This extinguishes all rights in the property that the respondent party may have had.

The speed with which the legislation was introduced is a cause of concern, not least because of the manner in which it seeks to circumvent criminal procedural safeguards guaranteed under Article 38 of the Constitution. In particular, the legislation authorises the confiscation of property in the absence of a criminal conviction; permits the introduction of hearsay evidence; lowers the threshold of proof to the balance of probabilities; and, requires a party against whom an order is made to produce evidence in relation to his or her property and income to rebut the suggestion that the property constitutes the proceeds of crime. This practice of pursuing the criminal money trail through the civil jurisdiction raises all sorts of civil liberty concerns about hearsay evidence, the burden of proof, and the presumption of innocence. Moreover, and given the revenue producing capacity of the Criminal Assets Bureau, the temptation, as Lea notes, "*to displace concerns of justice with those of revenue flows cannot be ruled out.*"<sup>21</sup> Indeed, and in something of a reversal of the established position in Ireland of political imitation and policy transfer from other jurisdictions, the "*structure and modus operandi of the Criminal Assets Bureau have been identified as models for other countries which are in the process of targeting the proceeds of crime.*"

### 8. A more variegated approach

What appears to be emerging 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.

<sup>20</sup> D Walsh, *Criminal Procedure* (Roundhall, 2002), p. xii

<sup>21</sup> J. Lea 'Crime Control and Civil Liberties' available at <http://www.bunker8.pwp.blueyonder.co.uk/>.

Moreover, the number of agencies with the power to investigate crimes in specific areas and to prosecute summarily has increased dramatically in recent years and now includes the Revenue Commissioners, the Competition Authority, the Health and Safety Authority, and the Office of the Director of Corporate Enforcement.

Alongside this multi-agency approach, greater levels of responsibility are being assigned to a variety of agencies and institutions to report criminally suspicious conduct and activities. Under the Company Law Enforcement Act 2001, for example, an auditor who unearths information during the course of an audit that reasonably leads him or her to believe that an indictable offence may have been committed under the Companies Acts is mandatorily required to notify that information to the office of the Director of Corporate Enforcement, which in turn can refer it to the Director of Public Prosecutions (DPP). Similarly, the Criminal Justice Act 1994, as amended, provides that designated bodies such as banks and building societies are obliged to prepare reports for the Gardaí and the Revenue Commissioners where they suspect that offences of money laundering or offences dealing with customer identification or record retention have been committed.

The Criminal Justice Act 1994 Regulations of 2003 provide that solicitors are also bound by the provisions. They too are now required to take measures to identify new clients and maintain records of their identities; maintain records of all relevant financial transactions of clients; and report suspicious transactions to the Gardaí and Revenue Commissioners. This latter obligation strikes at the very heart of the solicitor/client relationship. Indeed so great is the infringement of this relationship that the Law Society of Ireland recommends that solicitors who make such reports should immediately cease to act for the clients in question for any purpose. Obliging professionals and institutions to become "information reporters", is, as Lea has noted, all part of an emerging "continuum of surveillance" in which there is "increasingly a need perceived by the authorities to *proactively establish* forms of surveillance and communications under *their direction and control*."<sup>22</sup>

Many of the phenomena highlighted point to a "downwards pressure" on standards of proof, indicative perhaps of increased support for a risk management standard as opposed to the more traditional criminal standard that was designed to afford accused persons every possible benefit of law. This criminal standard, which imposed a rigorous burden of proof on the state, was traditionally justified on the basis of the great disparity in resources between the state and the accused. Today the gap in state-accused relations has grown ever wider, whilst burdens and safeguards which were designed to remedy the imbalance are increasingly being dismantled. Provisions for the imposition of sex offender orders where there are *reasonable grounds* for believing that they are necessary; refusal of bail where it is *reasonably considered necessary* to prevent the commission of further offences; confiscation of a criminal's assets post-conviction on the *balance of probabilities*; seizure of the proceeds of crime in the absence of a criminal conviction on the

<sup>22</sup> Ibid

*balance of probabilities*; and the imposition of an obligation on a variety of institutions and professions to report *suspicious* financial transactions are all designed to identify and manage perceived crime risks. Such measures are no longer driven by respect for due process values and civil liberty safeguards that guarantee some element of parity between the state and the accused. Instead, they are organised around a desire to maximise efficiency, enhance control and minimise risk. Moreover, the sanctions referred to - such as sex offender orders, confiscation orders, and injunctions to seize assets thought to be the proceeds of crime - are not designed to re-orientate human behaviour or to reintegrate those that are deviant. Instead, they employ techniques which will neutralise rather than alter deviant behaviour.

## 9. Conclusion

Public protection and security are, as commentators like Andrew Ashworth have noted, extremely important and are essential goods in a society. What we want for ourselves, our families, our friends and wider society is to be able to flourish in our lives without risk of assaults on our persons or property. This is clear. But in a society premised on respect for human rights and civil liberties, a reasonable balance must be maintained between the individual's right to liberty and freedom and society's right to protection. As Garland has noted:

"We allow ourselves to forget what penal-welfarism took for granted: namely that offenders are citizens too and their liberty interests are our liberty interests. The growth of a social and cultural divide between 'us' and 'them', together with new levels of fear and insecurity, has made many complacent about the emergence of a more repressive state power. In the 1960s, critics accused penal-welfare institutions of being authoritarian when they wielded their correctional powers in a sometimes arbitrary manner. Today's criminal justice state is characterised by a more unvarnished authoritarianism with none of the benign pretensions."

We also allow ourselves to forget that the appeal of risk thinking in relation to due process values often underplays the problems of effectively identifying and dealing with risk and has also led to a neglect of discussions of values and principles. In focusing on the technologies of protection, we tend to forget that this highly pragmatic risk thinking is also value laden - we tend to ignore the moral dimensions of the debate. Even if risk thinking was neutral and apolitical in design, it has not been established that there is a simple hydraulic effect between toughening the rules against the accused and better protection for victims: any curtailments and restrictions should be evidenced based, but they are not at present. What does appear to be clear today is that the old adage that it is better that 10 guilty persons should go free than for one innocent person to be convicted seems to have very few adherents now.

<sup>23</sup> Op. cit., pp. 181 - 182

## References

- R Ericson and K Carriere**, 'The Fragmentation of Criminology' in *D. Nelken, ed., The Futures of Criminology* (Sage, 1994), pp. 102-103.
- (Joint Committee on Justice, Equality, Defence, and Women's Rights** 8 December, 2003, per Mr Dirwan, President of the Association of Garda Sergeants and Inspectors.) *The Irish Times*, 24 April, 2003.
- T. O'Malley**, *Sentencing Law and Practice* (Roundhall, 2000), p. 384. [2000] 2 IR 184.[2001] 2 IR 25.
- Enright v. Ireland and the Attorney General* (Unreported, Supreme Court, 18 December, (2002).
- T. O'Malley**, 'Principles of Sentencing: Some Recent Developments' *Judicial Studies Institute Journal* (20001) 1(1): 55-56.
- D Garland**, *The Culture of Control* (Oxford University Press, 2001), p. 180. *The Irish Times* September 8, 2003.
- C. Fennell**, 'The Culture of Decision-Making: A Case for Judicial Defiance Through Evidence and Fact Finding' *Judicial Studies Institute Journal* (2001) 2(1), p. 54 [1996] 2 I.L.R.M. 128 [1999] 2 I.R. 25
- See D Keane**, 'Detention without charge and the Criminal Justice (Drug Trafficking) Act, 1996: Shifting the Focus of Irish Criminal Process away from Trial Court to Garda Station' *Irish Criminal Law Journal* (1997) 7(1), 1-17.
- Unreported**, Special Criminal Court, March 15, 2001. *John Gilligan v DPP* (Unreported, Court of Criminal Appeal, 8 August, 2003)
- See S Kilcommins et al**, *Crime, Punishment and the Search for Order in Ireland* (IPA, 2004), p. 172.
- A Ryan** The Criminal Justice (Drug Trafficking) Act, 1996: Decline and Fall of the Right to Silence *Irish Criminal Law Journal* (1997) 7(1), p. 22.
- JPM White**, The Confessional State – Police Interrogation in the Irish Republic, *Irish Criminal Law Journal* (2000) 10(1), 17-20.
- D Walsh**, *Criminal Procedure* (Roundhall, 2002), p. xii.
- J. Lea** 'Crime Control and Civil Liberties' available at <http://www.bunker8.pwp.blueyonder.co.uk/>.
- Ibid.** Op. cit., pp. 181-182.

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*Art of the Possible:  
The Place of Art Therapy in Work with High Risk Offenders*

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## Summary

The paper outlines the aims of art therapy in relation to working with high-risk offenders acknowledging the need for research to establish whether and how it can impact upon re-offending behaviour. A short vignette of practice is provided followed by a discussion of the necessity to find a language which is understood by all practitioners. It concludes with further information on the possibility of links between art and probation practice. In the article, the offender is referred to as "he" and the Art Therapist as "she". The principles of Therapeutic practice are equally applicable in the case of male therapists and female offenders.

**Keywords** Art therapy, symbolic communication, research, effective practice.

## Introduction

Offending can be seen as a destructive and habitual response – a known method of finding relief from conflicting feelings. If commitment can be secured to explore other aspects or parts of what the personality has to offer, a different kind of experience is then met, one which confirms change and adaptability. To make a sustained change, the offender requires a degree of flexibility – the ability to meet the demands of situations in life in a new and responsive way instead of reverting to a rigid set of rules, habits, attitudes and behaviours.

When direct, verbal communication seems insufficient or is of limited worth, an alternative is the visual and nonverbal method of art therapy.

Art therapy has been available within Probation Board for Northern Ireland since 1987 when a seconded probation officer returned from full-time training as an art therapist. Although the service was available to all categories of offenders over the years, it is now targeted at high-risk and potentially dangerous offenders. For an art therapy service to develop within the context of the probation service, it is imperative that practice is research-led, evidence-based and that it is seen as a method which can contribute towards reduction of offending behaviour through being able to affect criminogenic needs ie, those factors which have a direct link to re-offending. These include anti-social attitudes, beliefs and values; anti-social associates; lack of pro-social role models; dependence upon alcohol and drugs; a sense of achievement and community integration; employment; social isolation and mental health.

In their listing of these Chapman and Hough (1998) state: 'Drama, art therapy .... if purposefully and carefully designed and delivered can address .... criminogenic needs ... These activities should be carefully marketed and evaluated to convince the public that they are effective in reducing re-offending' - (emphasis added by author).