

Regulatory Crime: History, Functions, Problems, Solutions

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

1. Introduction

This paper offers a response to the a concerns that have been expressed concerning the growth in the use of criminal law as an instrument for empowering state agencies to investigate and prosecute breaches of regulatory rules in Ireland. This criticism of the implications of a growth in the regulatory state in Ireland is most forcibly expressed in a recent book by Barry Vaughan and Shane Kilcommins *Terrorism, Rights and the Rule of Law* (2008). Their complaints about this trend include a threat to the centralised monopoly over policing and prosecution and the shift away from a fault basis to criminal law because of the instrumental deployment of criminal law in regulatory settings on a strict liability basis. It is suggested that the worrying trend towards assigning criminal law enforcement functions to other statutory bodies engaged in economic and social regulation risks destroying the fabric of the criminal law system (Vaughan and Kilcommins 2008: 138-139).

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Vaughan and Kilcommins' complaint implies that it is possible to identify a traditional realm of criminal law enforcement which is fault-based, focuses on crimes against property and persons, is subject to investigation only by the Garda Síochána, and for which the main or sole legitimate prosecuting authority is the Director of Public Prosecutions. In issuing their complaint Vaughan and Kilcommins may represent a large constituency, not only of legal professionals schooled largely in appellate decisions relating to indictable offences, but also a broader society and media, interested and often obsessed with homicide, sexual offences, robbery and theft. Much of the teaching of criminal law in universities also shares this focus.

Yet, in statistical terms the vast majority of criminal offences are prosecuted summarily. Furthermore and distinctly we may hypothesize that the majority of criminal offences on the statute book comprise technical or regulatory offences, often with principles of strict liability, and so no requirement to prove intent to commit the offence on the part of prosecuting authorities. And we should not assume that this panoply of technical offences is novel. In England criminal law regulation of market offences can be traced back to the medieval common law. Whilst these offences were repealed in the nineteenth century they were supplemented by a vast array of new regulatory crimes during this period, addressing such matters as occupational health and safety, public health, environmental protection and food safety. England was not unusual in its deployment of criminal law for regulatory purposes. It reflected an eighteenth century view that criminal enforcement consisted of two distinct branches – police science and law. Police science comprised the state's responsibility to understand and to regulate a wide range of social and economic problems, deploying discretionary powers, including powers of prosecution through agencies. Conversely the law was, until the middle of the nineteenth century, a largely private affair in which the state's courts were made available for citizens to prosecute each other, seeking punishment or retribution. Concerns with

rehabilitation of offenders are comparatively recent, and linked to both the massive reduction in numbers of capital offences and nationalization of prisons in the nineteenth century.

In this chapter I suggest first, and having regard to the *longue durée* of criminal law history, that if there are novel elements in contemporary criminal enforcement they do not comprise the prosecution of strict liability offences by statutory agencies, but rather the centralization of criminal law enforcement and the emergence of *mens rea* as a central component of certain serious criminal offences. Second there is both a statistical and social significance to the enforcement of regulatory offences that makes them distinct from the indictable offences against property and person that comprise the main remit of the DPP. But this distinction is not a clear-cut one, nor is the basis for such a distinction the subject of consensus. Neither of these points is to suggest that this bifurcation of criminal law is ideal, nor that the long tradition of regulatory enforcement is an argument for a continuation of the *status quo*. In the last main section of the chapter I evaluate some of the arguments for reform which might involve greater centralization of regulatory enforcement or, conversely, greater fragmentation through the wider use of administrative penalties and appeals tribunals as the basis for regulatory enforcement. The central problem, from a regulatory perspective, is that enforcement agencies have too little autonomy in the application of sanctions for regulatory infractions. Any reform should prioritize enhancing agency control over penalties.

2. History

The complaint discussed in the introduction to this chapter is animated by a concern about the growth of regulation and regulatory bureaucracies in Ireland (Vaughan and Kilcommins 2008: 139). Regulation through criminal enforcement, however, is far from new. The regulation through criminal law of market behaviour dates back to the middle ages. In England the offences of engrossing,

forestalling and regrating were concerned to protect the integrity of markets (Atiyah 1979)², and were only abolished in 1844 (7 & 8 Vic. c.24). The distinction between regulation and law is not novel. A very similar dichotomy can be found in eighteenth century political economy in the distinction between police science and law (Dubber 2007:117-124). Police science is the state's practices in ordering social and economic conduct. Blackstone links 'offences against the public health' with the 'public police and oeconomy'.³ These offences are concerned with such matters as failing to quarantine persons with certain classes of infection, the adulteration of food, clandestine marriage and bigamy, maintenance of disorderly inns and bawdy-houses, the operation of lotteries, and the range of sumptuary laws which sought to regulate excesses of dress and diet (on sumptuary laws see {Hunt, 1996 #1538}).

Police science has been compared to the kinds of rules and enforcement practices that might be deployed by the head of a household concerned that all necessary tasks in support of the household activities are carried out (Dubber 2007:119). It is a governmental function *par excellence*. In Prussia it comprised the principal functions of the *Polizei*, engaged in local enforcement of planning and environmental rules, long before the establishment of the more narrowly focused police forces in Dublin and London (Palmer 2003 (orig publ 1975)). The eighteenth century police science came to be associated with the exercise of absolutist power and was substantially rejected in nineteenth century England (Valverde 2003)., its place being taken by variety of governmental strands including the emergence of central government boards, a growing importance for a reformed municipal government and assignment of tasks such as alcohol licensing to the lay magistracy.

² Blackstone suggests that these were common law offences, but legislated for by 5 & 6 Edw. VI. c. 14. *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1765-9), vol 4, Chapter 12. Blackstone details many offences against public trade.

³ Ibid, chapter 13.

A central theme of 19th century regulatory legislation was that the setting down of regulatory norms, in such domains as occupational health and safety and food safety, often preceded the provision of institutional machinery for monitoring and enforcement. Consequently there was a degree of catch-up as legislators discovered that further provision was needed if the norms they had set down were to be properly implemented through bureaucratic arrangements going beyond the ordinary enforcement of civil and criminal law (Innes 2002; Paulus 1974). Thus, for example, the Factories Inspectorate was only established 31 years after the earliest factories legislation was passed in 1802. Thus there is a highly instrumental feel to such legislation.

In contrast, the enforcement of criminal laws concerned with offences against property and person was, in the eighteenth century, substantially regarded as a matter for private enforcement. The reasons for this distinction may be explained in a number of ways. First, until the legislative reforms of the second half of the nineteenth century the vast majority of offences against person or property remained common law offences – and thus no legislative attention to the question of enforcement was ever required. On the other side, whilst some of the regulatory offences had originated in common law, the vast majority originated in statute and were instrumental in character – targeting some identified mischief such as the adulteration of bread or the giving of short measure. Accordingly whilst the state had no obvious stake in the enforcement of crimes against person and property, with regulatory offences it was not simply a matter of declaring certain conduct to be wrongful, but also necessary to institute a mechanism to enforce the law.

The importance of private prosecution in the criminal justice system was common to Ireland and England. Though the ‘myth of private prosecution’ in England has been challenged recently by historians who have noted that there was some

state enforcement of offences against property in the eighteenth century,⁴ this observation does not significantly undermine the idea that regulatory enforcement in this period was substantially a public matter, whilst enforcement relating to crimes against people and property was substantially a private matter.

In Ireland the criminal justice system evolved somewhat differently, in particular in response to the difficulties surrounding securing witnesses and prosecutors to address agrarian crime. In the early nineteenth century crown solicitors were appointed to undertake prosecutions in more serious cases (Bridgeman 2003 (orig publ 1994): 113-114). It has been noted that 'prosecutions for virtually all offences brought to trial at assize and quarter sessions were undertaken by the state, and had been processed by a comprehensive prosecution system' (Bridgeman 2003 (orig publ 1994): 115). The private origins of prosecutions and the long-standing practice of police officers and gardai prosecuting in their own names in the summary jurisdiction continues to shape the form (if not the substance) of prosecutions brought by members of the Garda Síochána.⁵

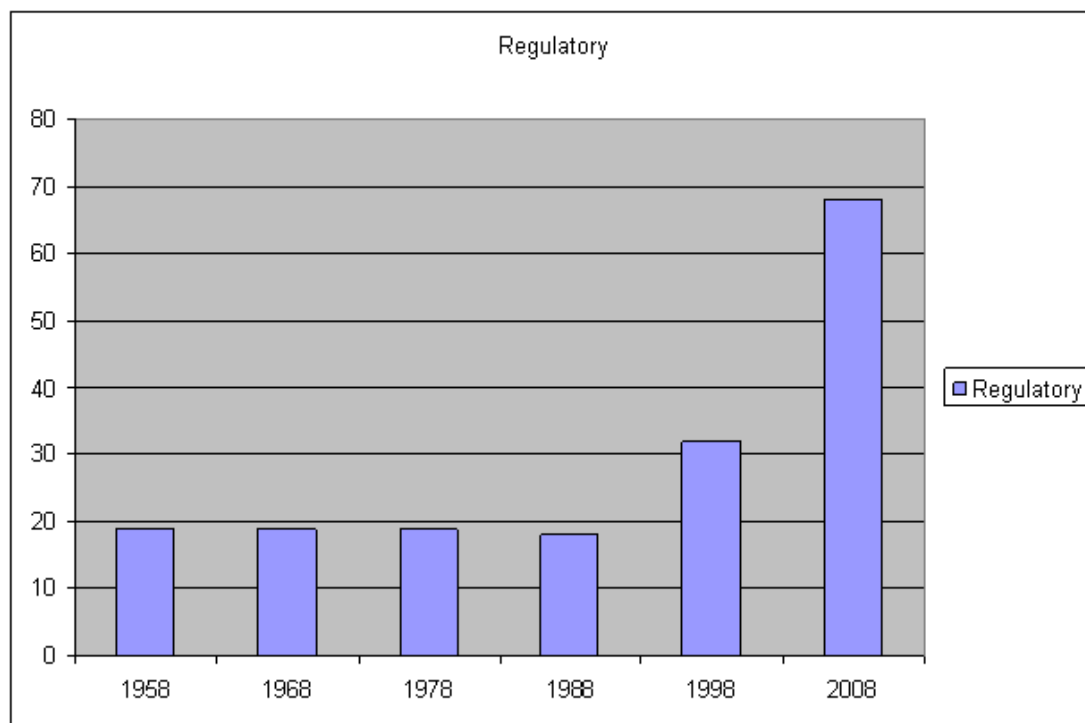
3. Functions

⁴ Smith, Bruce P. 2007. "The Myth of Private Prosecution in England, 1750-1850." in *Modern History of Crime and Punishment*, edited by Markus D. Dubber and Lindsay Farmer. Stanford, CA: Stanford University Press. focuses on offences concerning the theft of lead created by 4 Geo IV c.33 (1731) which, by their nature were difficult to prosecute if an individual had to identify the particular lead of which they had been deprived in order to ground a prosecution. The legislation anticipated proceeds of crimes legislation in that it created a presumption that persons carrying such items as roofing lead during hours of darkness had stolen it, unless they could otherwise account for their possession of it

⁵ . Since 2005 summary prosecutions instituted by officers of the Garda Síochána have been made in the name of the Director of Public Prosecutions, are subject to the direction of the DPP and may be taken over by the DPP. Garda Síochána Act 2005, s.8.

The contemporary focus on regulatory governance in Ireland is part of a wider international trend sometimes labelled ‘the rise of the regulatory state’ (Majone 1994). Whilst regulatory agencies have existed from before the foundation of the State it is clear that there has been an exponential growth in the numbers of such agencies in Ireland, many of which have criminal law responsibilities (Figure 1). In terms of enforcement of regulatory crime these seventy or so agencies for which regulation is a primary function merely scrape the surface. An official report found that there 213 bodies in Ireland with statutory regulatory powers of which 205 are public sector bodies (Better Regulation Unit 2007). This figure includes 114 local authorities.

Figure 1: Number of regulatory bodies in Ireland



Source: IRCHSS Mapping the Irish State Database, UCD Geary Institute

The rise of the regulatory state in England is said to have affected the procedures and institutions of the criminal justice system to a greater extent than legal doctrine (Lacey 2004: 167). Indeed regulatory cases seem to appear rarely

in the higher courts. Nevertheless there is a sense of unease about the bifurcation of criminal law between 'real crime' and 'regulatory crime'. Arguably the increasing stringency of enforcement of competition law in the criminal courts of Ireland contributes to the unease (Competition Authority 2009), part of a broader international pattern towards more punitive regulatory penalties and enforcement (Baldwin 2004).

This bifurcation is one aspect of a wider, though porous, distinction between law and regulation – the modern version of the distinction between law and police science. Whilst casual thinking might conceive of the distinction between private and public law or between common law and legislation, there is something more fundamental. Law is associated with generally applicable and universal norms and it generally lacks an orientation towards particular outcomes. Conversely regulation is frequently targeted at particular groups and for instrumental purposes (Parker et al. 2004: 4-5). When courts invoke instrumental objectives in dealing with the law, as classically understood, this may be deemed inappropriate. Equally attempts to apply the universalistic and principles-based reasoning of the law to the application of a regulatory statute may be problematic.

In the sphere of criminal law we can see two contrasting understandings of criminalization and enforcement (see table 1). This is broadly the distinction between offences which are *mala in se* and *mala prohibita*, though the implication that the latter offences lack connotations of moral responsibility has been criticised (Green 1988: 1574). In a legal model, criminal law is about the attribution of guilt and responsibility on the basis of universal norms, and, linked to that the punishment and rehabilitation of offenders. Within this perspective one of the key bases for determining responsibility and punishment is through balancing consideration of harm caused and culpability and this underlies a criminal law theory based on the idea of 'just deserts' (Yeung 1999: 451-2). This theory has a strong appeal to fairness and tends to emphasise the proportionality

of penalties to wrongdoing. Vaughan and Kilcommins themselves go so far as to assert that these features characterise ‘paradigmatic criminal law’ (Vaughan and Kilcommins 2008: 140).

	‘real crime’	‘regulatory crime’
Basis of Liability	Action and Intent	Strict
Investigation	Gardai	Agencies
Prosecution	Gardai/DPP	Agencies/DPP
Enforcement Style	Insistent	Persuasive
Sentencing	Stringent	Variable
Orientation	Moral	Instrumental
Function	Retribution, Rehabilitation	Compliance Deterrence
Defences	Limited	Due Diligence
Formal Sanctions	Imprisonment/Fines	Predominantly Fines

Table 1: Contrasting Features of Real and Regulatory Crime

By contrast regulation is typically evaluated by reference to more utilitarian concepts of efficiency and effectiveness of regulatory regimes, typically prioritising the understanding of enforcement, over the normative complexity of the legal concepts such as intent (Lacey 2004: 144-5). Such an approach gives a greater role to deterrence and makes possible the attribution of criminal responsibility in circumstances where no harm has been caused (Yeung 1999: 446).

With regulatory crimes the focus is not on the consequences of the actions. The penalty is attached to failure to hit the target whether or not anyone was harmed by the breach in the particular instance (H.L.A.Hart 1968). Accordingly it is sometimes suggested that conviction for regulatory offences carries none of stigma of conviction for traditional crimes. Celebrated dicta of Wright J. refer to ‘a class of acts which...are not criminal in any real sense, but are acts which in the

public interest are prohibited under a penalty.¹⁶ This claim is contested by others (Lacey 2008). More generally the labelling of criminal acts as non-crime may be thought to legitimate wrong-doing, particularly when offenders are powerful businesses (Pearce and Tombs 1990). Inevitably the issue of harm can affect both decisions to prosecute and decisions on conviction and sentence in practice. With 'real crimes' this issue of harm is generally central to the offence and the limited range of exceptions (the inchoate offences - for example conspiracy) are sometimes viewed as problematic. The orientation to harm places intent-based crimes closer in character to the law of tort than to regulatory crimes, and is a reminder that no sharp distinction existed between crime and tort in the period when private prosecution was to the fore and cases were often resolved through payment of damages (Lieberman 2002: 141).

Within regulatory regimes where prosecution is available for the application of sanctions, the incidences of prosecution are highly variable. A Scottish study found that there were some areas where incidences of prosecution were high (more than 200 prosecutions in Scotland per annum) – these included vehicle licensing, car parking and social security. There was also a small group with a medium level of prosecutions (50-200 hundred prosecutions) – which included consumer protection, occupational health and safety and companies registration. By far the largest number of regimes exhibited low incidences of prosecution (fewer than fifty prosecutions). These included pollution, consumer safety, noise control, income tax, advertising, conservation, water supply and so on (Rowan-Robinson, Watchman and Barker 1990: 185). This data is supportive of the broader observation that the priority given to the efficient promotion of compliance with the regulatory rules has led many enforcement agencies to develop practices in which prosecution is very much the exception or 'last resort' in an array of strategies for promoting compliance (Hawkins 2002). Australian research found that regulatory agencies are 'of manners gentle' partly for reasons of eking out limited resources and partly because shared

¹⁶ *Sherras v de Rutzen* [1895] 1 QB 918 at 921.

understandings of regulatory problems tended to move agencies towards less stringent enforcement (Grabosky and Braithwaite 1986) .

The enforcement strategies of enforcement agencies have been arrayed in a pyramidal approach to enforcement in which the objective is to maintain as much enforcement activity as possible at the base of the pyramid (Ayres and Braithwaite 1992: chapter 2) (figure 2 below). This approach is said to be effective not only with businesses which are oriented 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. Whilst these practices have emerged as a matter of expedience within enforcement agencies, they have received the approval not only of scholarly accounts of regulation, but also within official documents, such as the UK Enforcement Concordat (1999) and the statutory Compliance Code (2007) introduced in the UK following the Hampton Review of UK regulation (Hampton 2005).⁷

⁷ Legislative and Regulatory Reform Act 2007, s.23.



Figure 2 Example of an Enforcement Pyramid
Adapted from Ayres and Braithwaite 1992

The responsive approach to regulatory enforcement is conceived of differently from a paradigm of criminal law enforcement in which we might expect all offences investigated and with sufficient evidence to result in a charge being laid. Even with 'real crimes' the idea of non-discretionary and automatic enforcement is contested (Sarat and Clarke 2008). The selective approach to enforcement, oriented towards the instrumental objectives of an enforcement agency, may even be at odds with common understandings of the rule of law as requiring universal application of law to all (Freigang 2002).

Tensions between regulatory approaches to enforcement and more traditional legal approaches are also to be found in formal enforcement proceedings. A

central problem in the enforcement of strict liability offences is that the courts are inclined to look for fault within offences that are nominally criminal and may be reluctant to convict where fault cannot be proven (Connery and Hodnett 2009: 448-450). Put another way, courts are liable to read into statutory provisions concerning strict liability offences a mental element (Lacey 2001: 353).⁸ A further dilution in the enforcement autonomy of regulatory agencies occurs where agencies are required to pass on evidence relating to a specialist prosecuting agencies for decisions about and the conduct of the prosecution itself. The question of the extent of understanding of and approach to regulatory offences within specialised prosecuting authorities is, of course, a matter for empirical investigation in any particular case. To the extent that enforcement agencies perceive prosecuting authorities to emphasise a traditional over a regulatory approach to crime, they are likely to exercise caution, restricting the cases they pass to prosecuting authorities to those that resemble 'real crimes' in terms of evidence of harm and culpability (Lacey 2001:356), by-passing prosecuting authorities, where possible, by prosecuting themselves in lower courts, and deploying alternative formal and informal sanctions where available. The absence of a credible capacity to escalate sanctions up the pyramid may be expected to reduce the effectiveness of sanctions lower down the pyramid.

Criminal law is taught within both university and professional schools in a manner that accords utmost significance to the *mens rea* element of an offence, but frequently fails to notice that this emphasis is a relatively recent development, reflecting the emergence of more sophisticated approaches to criminal responsibility in both courts and legislature (Lacey 2001). Lacey suggests that historically the English criminal courts worked from a basis that a person proven to have engaged in an act was guilty of an offence, unless exculpatory factors could be adduced. Only in the early twentieth century did a system emerge 'in

⁸ *CC v Ireland* [2005]IESC48. Geoghan J. gives express approval to the doctrine that in the interpretation of criminal legislation there should be a [rebuttable] 'presumption of *mens rea*'. However, it should be noted that the context of this strong support for the doctrine concerned a sexual rather than a regulatory offence.

which the criminal trial was geared to providing a full case for the defendant's inculcation as individually responsible' (Lacey 2004: 159).

The contemporary prioritization of the mental element, even where it does not preclude conviction for strict liability offences, may temper the sentencing decision. It has often been noted that courts in the common law systems are reluctant to incarcerate white collar criminals, or to use the full range of financial penalties available to them (Black 2007:70-71). A tension has been highlighted in the Australian courts' treatment of penalties under the Australian competition legislation. French J asserted that that 'principal, and I think the only, object of the penalties imposed by s.76 [of the Trade Practices Act 1974] is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.'⁹ At least two of French J's brethren questioned these dicta in subsequent cases, indicating that the determination of penalties for breach of the act should be determined by moral considerations, and in particular 'the deliberateness and wilfulness of the contravention'.¹⁰ Yeung has suggested that French J conflated the issue of breach (determined without reference to moral culpability) with the quantification of penalty (which may properly be related to indicators of moral culpability such as intent) (Yeung 1999: 472).

Such instances provide an example of the two perspectives clashing with each other as the values and assumptions of modern criminal law are superimposed over the objectives of long-standing regulatory measures and their successors. It is an issue of some significance within regulatory enforcement because it creates uncertainties surrounding outcomes of regulatory prosecutions which affect the capacity of agencies to credibly threaten prosecution as a means of securing compliance without legal enforcement. It leads to what might be referred to a

⁹ *TPC v CSR Ltd* [1992] ATPR 41-076, 52, 152. Yeung, Karen. 1999. "Quantifying Regulatory Penalties: The Australian Competition Law Penalties in Perspective." *Melbourne University Law Review* 23:440-475.

¹⁰ *ACCC v Australian Safeway Stores* [1997] ATPR 41-562, 43, 810 (Goldberg J). *Ibid.*.

'broken pyramid' of regulatory enforcement and reduces the effectiveness of sparingly applied formal enforcement.

How does the dichotomy between law and regulation play out in the criminal law landscape in Ireland today? Criminal law is of considerable importance in many regulatory regimes. This is a product of the constitutional provisions (Art 30.3) which have been interpreted to require that the application of substantial penalties indicate a criminal matter which requires the decision of a court (Casey 2000: 315-324; Connery and Hodnett 2009: 429).

One obvious question is what is the balance between traditional and regulatory crimes as set down in legislation? To answer the question fully is both methodologically challenging and liable to be extremely time-consuming (Lacey 2008). Methodologically it would require a classification system which clearly distinguished 'regulatory' from 'real' crime and in some spheres this is likely to be problematic. One indicator of the number of real crimes is the contents of the Consolidated Criminal Legislation which, at October 2007, contained 528 offences categorised under ten headings, including offences against person, offences against property, drugs and customs, and sexual offences (Goldberg 2002-). I do not think it possible to declare simply that every other offence created in legislation is a 'regulatory offence' and even were this so it would be challenging to count them. Even to count the number of regulatory regimes in which criminal offences are created is likely to involve an extensive search. One could start with regimes overseen by the nearly seventy regulatory agencies (some of which involve criminalization and some of which do not), but would need to extend the search to cover offences investigated and or enforced by others such as government departments, by local government and by others such as harbour commissioners, state owned enterprises (such as Iarnród Éireann and the Electricity Supply Board). Accordingly a systematic analysis of all primary and secondary legislation would be necessary to quantify the instances of regulatory offences. Whatever the number may prove to be, were

the research to be undertaken, I am confident that it would dwarf the 528 offences found in the Consolidated Criminal Legislation.

A particular concern in the investigation and prosecution of regulatory offences in Ireland involves prosecutorial powers. The paradigm of criminal process for serious crimes involves investigation of wrong-doing by the gardai and the sending of a file to the Department of Public Prosecutions or the local state solicitor for decision on whether and what to prosecute. In respect of indictable offences the same process is followed for regulatory crimes, since only the DPP may initiate prosecutions for indictable offences.¹¹ The difference is that the investigations may be carried out by agencies such as the Competition Authority, the Health and Safety Authority or the Office of the Director of Corporate Enforcement. However the DPP and state solicitors do retain a monopoly over rights to prosecute. For indictable offences prosecution is a highly centralised state function.

In respect of non-indictable offences the position is more diffuse. Gardai may prosecute offences (now in the name of the people) in the lower courts, and many regulatory agencies have statutory powers to prosecute offences. This diffusion is reminiscent of the earlier system in which prosecution was a private matter for victims of crime to pursue.

We have no empirical evidence of the approach taken to regulatory crime by the office of the DPP. The office has been keen to highlight the ways in which it cooperates with regulatory agencies generally (for example (Director of Public Prosecutions 2008: 6), and specifically, for example working with the Environmental Protection Agency and the gardai in the training of local authority enforcement officers (Director of Public Prosecutions 2008: 12). Set against this the DPP's stated position in the *Guidelines for Prosecutors* (nd) that 'it will

¹¹ Criminal Justice (Administration) Act 2004 s.9; Prosecution of Offenders Act 1974, s.3.

generally be in the public interest to prosecute a crime where there is sufficient evidence to justify doing so' (para 4.6) is clearly at odds with contemporary doctrines of regulatory enforcement, discussed above. The National Consumer Agency, for example, dealt with thousands of complaints in 2007, had contacts with hundreds of retailers over alleged pricing offences, but issued only three fixed penalty notices and made sixteen prosecutions (National Consumer Agency 2008: appendices 2 and 3). Similarly, for the Competition Authority, its 23 prosecutions in 2008 clearly represent a major part of their strategy in promoting broader compliance with competition law norms, for example relating to cartelization (Competition Authority 2009: 5).

The whole tenor of the *Guidelines for Prosecutors* suggest that they are chiefly directed at the prosecution of offences against the person and property within the 'real crime' paradigm. This focus may readily be explained by reference to the very small number of cases being prosecuted on indictment for regulatory offences. Fewer than one per cent of such cases were in the 'other' category in 2006. By contrast, however, in the case of summary prosecutions courts service data shows that while the vast majority of cases relate to road traffic offences nearly a fifth of all cases (85,688 out of 436,617) fall into the second largest or 'other' category (Courts Service 2008: 74). This catchall group includes breach of bail conditions, littering offences, television licensing offences, trading offences and offences prosecuted by government departments and other state agencies. There is no breakdown of the different categories in this group.

As with many other common law jurisdictions the creation of strict liability offences in legislation in Ireland is often accompanied by the creation of statutory defences. The leading text on regulatory law in Ireland discusses defences in terms of the common law but, in laying this emphasis, neglects the significance of statutory defences (Connery and Hodnett 2009: 452-454). Such statutory defences are significant for qualifying a liability which might otherwise be

regarded as absolute.¹² Typical of the statutory defences is section 78 of the Consumer Protection Act 2007 which provides a defence where the accused 'exercised due diligence and took all reasonable precautions to avoid commission of the offence' and where, in a variety of ways, the matter was not wholly within the control of the accused.¹³ The due diligence defence is highly significant as it incentivises businesses to put in place systems of training and oversight such that even where a strict liability offence is committed they are able to exculpate themselves through showing they took the appropriate steps to avoid committing the offence. The emergence of hazard analysis at critical control points within food production has been partly attributed to the incentive provided by this defence. The issue of whether appropriate systems comprise due diligence in any particular case is likely to require expert evidence (Scott 1995:163-167). The other limb of the defence, one aspect of which involves the fault of 'another person' has been discredited in the UK following a notorious

¹² *CC v Ireland* [2005] IESC 48, (Geoghegan J.); *CC v Ireland* [2006] IESC 33 (Hardiman J.).

¹³ 78.— (1) In proceedings for an offence under this Act, other than an offence under section 65 (2), it is a defence for the accused to prove both of the following:

(a) commission of the offence was due to a mistake or the reliance on information supplied to the accused or to the act or default of another person, an accident or some other cause beyond the accused's control;

(b) the accused exercised due diligence and took all reasonable precautions to avoid commission of the offence.

(2) If the defence provided by subsection (1) involves the allegation that the commission of the offence was due to reliance on information supplied by another person or to the act or default of another person, the accused shall not, without leave of the court, be entitled to rely on that defence unless, not less than 7 working days before the hearing, the accused has served on the prosecutor written notice providing information identifying or assisting in the identification of that other person.'

See also Employment Equality Act 1998 s15(3); *CC v Ireland* [2006] IESC 33; Fisheries Consolidation Act 1959 s142(2); Mines and Quarries Act 1965 s.136, etc.

House of Lords decision in which a supermarket chain was able to argue successfully that its own employee was another person for these purposes.¹⁴

4. Problems and Solutions

The parallel regimes of regulatory crime and 'real crime' within the criminal law system clearly create a degree of difficulty. I have already noted some of the difficulties relating to enforcement and in particular the risk of mismatches between instrumental approaches to enforcement in agencies and more traditional understanding of criminal penalties in the courts causing enforcement pyramids to be foreshortened or even broken. More generally, if paradigmatic crime involves serious offences against person and property, and involves intent and the possibility of imprisonment then a perception that regulatory offences have been overlaid on the system clearly creates risks both to the integrity of the criminal justice system and to the pattern of regulatory enforcement. One way of understanding this is as seeing the legislature placing burdens and expectations on the criminal law system that it cannot sustain through the proliferation of regulatory offences. This creates a regulatory trilemma in which the integrity of the legal system may be damaged, or the legislated rules may be ineffective, or the targeted social or economic activities may be adversely affected through uncertainties in regulatory enforcement (Teubner 1998 (orig. pub 1987)). There are concerns that 'paradigmatic criminal law' may be diluted by seepage of the instrumental concerns of regulation into its enforcement (Vaughan and Kilcommins 2008: 140) or its moral authority undermined (Coen 2007). However an equally significant risk is that neither prosecuting authorities nor courts

¹⁴ *Tesco v Natrass* [1972] AC 153 (HL). A new form of statutory defence in respect of the pricing offence charged in the *Tesco* case abandoned one limb of the defence to retain only a simple due diligence defence and to make it clear that employees could not be subjected to prosecutions for offences committed in the course of their employment and that criminal liability lay with the employer. Consumer Protection Act 1987, s.24; *Warwickshire CC v Johnson* [1993] 1 ALL ER 299 (HL); Scott, Colin. 1993. "Consumer Sales and Credit Transactions: Pricing Offences And Statutory Interpretation After *Pepper v Hart*." *The Journal of Business Law*:490-498.

understand the instrumental objectives of regulatory offences and dilute their stringency, reducing the enforcement capacity of the applicable agencies.

But, the dichotomy between regulatory and real crime is far from being black and white. A significant proportion of wrong-doing targeted by regulatory regimes relates to matters which have an unequivocal degree of fault and/or harm and seriousness about them. Offences that maim or kill employees, that cause injury or death to passengers, that cause substantial financial losses to businesses and consumers (and are tantamount to fraud) might all be categorised in this way. That they are strict liability offences is chiefly about making the gathering of evidence and process of prosecution easier rather than implying that there is no culpability attached to such wrong-doing. How are we to regard road traffic offences, many of which require no proof of intent for conviction? Whilst many of these are regarded as technical in character, nevertheless they may create risk or harm to other road users. These include driving at speeds in excess of speed limits, parking offences and use of hand held mobile phones while driving. On the other side, broad prosecutorial discretion is exercised even with serious 'real crimes', notably in respect of choice of offences to prosecute, but even with regard to decisions not to prosecute. The issue of prosecutorial discretion is accordingly a general problem of criminal prosecution and not restricted to regulatory crimes (Sarat and Clarke 2008). Rather than a strict dichotomy between regulatory and real crime we have something of a continuum. Maintenance of the full range of offences within this continuum of the criminal law creates a sense of unease amongst some judges and practitioners. To the extent that the paradigm of criminal wrong-doing is the serious offences against person and against property with a mental element, this also creates a problem for regulatory governance, since the strict liability offences may be difficult to understand and to process, causing uncertainty in regulatory enforcement.

The fundamental question, from a regulatory perspective, concerns the appropriate means and measures for the application of sanctions to those who

breach regulatory rules. A range of alternative measures to criminalization are possible (Fisse 1990). A broader approach is already evident in Ireland in the Consumer Protection Act 2007 which empowers the National Consumer Agency (NCA) to issue prohibition orders to businesses, to take undertakings of compliance, to issue compliance notices and fixed payment penalties, in addition to prosecution. It is striking that in 2008 the NCA took undertakings from a number of car dealers that they would refrain from selling clocked cars and give compensation to consumers affected by the practice {National Consumer Agency, 2009 #1537: Appendix 1}. The clocking of cars is generally regarded as a serious offence, but it is nevertheless deemed appropriate and effective to proceed using an alternative route to prosecution.

A number of jurisdictions are addressing the issue of alternatives to prosecution through proposals to strip a good deal of regulatory crime out of the criminal law system through the creation or enhancement of systems of administrative penalties. This emergent model has a number of significant characteristics. First the power to apply administrative sanctions is typically given to the enforcing agency, without the requirement of litigation. Clearly this is a very significant streamlining of enforcement processes. It is likely to bolster the enforcement pyramids, in the sense that it gives to agencies tighter control over the sanctions which they may threaten to deploy in order to promote compliance. However the allocation of this new discretion to agencies to impose sanctions without recourse to a court is not unproblematic. Accordingly, though the power to apply sanctions lies with the agency it is common to create a structure of appeal to a tribunal in respect of sanctions.¹⁵

The report of Richard Macrory on the UK system of regulatory sanctions exemplifies the attempt both to broaden the range of available sanctions and to

¹⁵ The Australian Law Reform Commission recommends that there should be a threefold system of internal review, external merits review and judicial review: Australian Law Reform Commission. 2002. "Principled Regulation: Federal Civil and Administrative Penalties in Australia." Sydney, NSW: Australian Law Reform Commission.

better structure their application (Macrory 2006). The review was conducted following a recommendation to extend the broader sanctioning capacity assigned to the so called 'new millennium regulators', established since 2000 (Black 2007: 61, 69; Hampton 2005). The Macrory recommendations extend beyond the wider use of administrative penalties, to include greater use of enforceable undertakings and restorative justice processes as responses to regulatory wrongdoing. As Julia Black has noted these proposals, together with proposals for more extensive and specialised review of decisions by tribunals are likely to accelerate the development of administrative law in the UK (Black 2007: 71). The Macrory Review has been substantially implemented by the Regulatory Enforcement and Sanctions Act 2008. New provisions include the power for ministers to assign to enforcement agencies powers to issue both fixed and variable monetary penalties, stop notices (akin to injunctions) and to seek enforcement undertakings. The fixed monetary penalties are directed at lower level offences and are capped at £5000 whereas the variable monetary penalties are subject to the discretion of agencies and targeted at mid to high level offences, and include the possibility of targeting the gains to businesses from the alleged breach.

New systems of regulatory penalties are designed, in part, to address a perceived unfairness in attributing criminal responsibility to both legal and real persons who engage in regulatory wrongdoing but lack the requisite intent – thus addressing a risk that such unfairness may bring the law into disrepute (Yeung 1999:462). How would the development of a system of administrative sanctions play in Ireland?

In Ireland there are already precedents for the application of administrative penalties. Best known is the regime of the Financial Regulator, introduced by the Central Bank and Financial Services Authority Act 2004.¹⁶ (Connery and Hodnett 2009: 430). The amended legislation provides for extensive penalties to be

¹⁶ Central Bank Act 1942 s33AQ (as amended).

applied to firms and individuals by the agency – up to €5M for firms and €500,000 for individuals. The introduction of this power was accompanied by the creation of a right to appeal to the Financial Services Appeals Tribunal and to the High Court (Connery and Hodnett 2009: 142).¹⁷ By contrast the fixed penalty notices issued by the National Consumer Agency¹⁸ and the Revenue Commissioners involve much lower penalties. For example the fixed penalty applicable by the NCA for pricing offences is €300.¹⁹ More generally a number of regulatory regimes, including financial services, already have provision for appeal either to a dedicated tribunal, *ad hoc* panel or the High Court (Department of An Taoiseach 2006). The constitutional limits to extending administrative powers to apply sanctions are discussed more extensively in other chapters in this volume. If there were widespread adoption of administrative sanctions it would be possible to establish a general tribunal for the hearing of regulatory appeals.

In those areas where administrative penalties are not thought appropriate, and where a bifurcated criminal law is likely to remain, then it is important to secure a better understanding of prosecutorial discretion in regulatory offences. The matter has been highlighted judicially in the UK in the form of an acceptance of strict liability offences, but an expectation that they will only be prosecuted where there is fault, demonstrable or not.²⁰ Such an approach would be assisted by stronger guidance and training for regulatory agencies on enforcement and by more inclusive guidance for prosecutors in respect of indictable offences (Australian Law Reform Commission 2002:10.1). There needs to be a mutual

¹⁷ Central Bank Act 1942 Part VIIA (as amended)

¹⁸ Consumer Protection Act 2007, s. 85

¹⁹ The status of penalty notices is a matter of debate. The Australian Law Reform Commission distinguishes true administrative penalties as 'automatic, non-discretionary monetary administrative penalties' Australian Law Reform Commission. 2002. "Principled Regulation: Federal Civil and Administrative Penalties in Australia." Sydney, NSW: Australian Law Reform Commission.

Legislating for administrative penalties is only likely to address part of the problem associated with the bifurcation of law. It may be possible to define a range of areas in which this comprises an appropriate solution

²⁰ *Wings v Ellis* [1985] AC 272 (AC); *Smedleys v Breed* [1974] AC 839 (per Lord Hailsham); Scott, Colin. 1995. "Criminalising the Trader to Protect the Consumer." in *Frontiers of Criminal Law*, edited by Ian Loveland. London: Sweet & Maxwell..

understanding and confidence between prosecutors and agencies, such that prosecutors are able to understand and to support the enforcement strategy of agencies.

More generally there is a considerable emphasis in other jurisdictions on regulators being transparent about the enforcement options open to them and how they are applied and relate to each other in practice. The Australian Law Reform Commission recommended that all regulators should publish enforcement guidelines setting out:

- (a) the types of action available to the regulator;
- (b) the principles behind each of these actions;
- (c) the criteria involved in the decision to pursue one or more of these actions; and
- (d) the regulator's relationship with other regulators and enforcement agencies.

(Australian Law Reform Commission 2002: para10.1)

In the UK a centralized approach is favoured, under which there is a both a soft law instrument, the Enforcement Concordat, and a statutory Compliance Code for regulators.²¹

5. Conclusions

The big questions addressed by this paper are concerned with understanding the reasons for a bifurcation between 'real' and 'regulatory' crime and then to begin the process of asking whether the contemporary boundaries of criminalization are appropriately drawn. Within Ireland it has been relatively straightforward to assert that if penalties are to be applied then the criminal law must be deployed. Following the assignment to the Financial Regulator of the capacity to assign substantial financial penalties the position is no longer clear and it possible that an avenue has been opened down which we may see further use of

²¹ Legislative and Regulatory Reform Act 2006, s 22.

administrative penalties within regulatory regimes. But a strict demarcation is unlikely to be achievable. Non-payment of administrative penalties is liable to be criminalised and for many regulatory offences the moral disapproval attaching to the actions would appear to necessitate criminalization – and in particular where substantial financial or personal harm is caused (with or without evidence of intent). Thus whatever may happen with the development of administrative penalties we are likely to be stuck with the presence of a range of serious strict liability offences, policed by specialized agencies. Accordingly a richer mutual understanding of the traditional and regulatory worlds of criminal law will be required.

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