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**Theorising Asset Forfeiture in Ireland**

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*Abstract Various alterations to the Irish legal system have been effected in a bid to counter organised crime, the most radical of which was the introduction of civil forfeiture in 1996. This article examines the forfeiture process carried out by the Criminal Assets Bureau and seeks to analyse it from a theoretical perspective. Civil forfeiture may be regarded as embodying a move away from due process towards crime control, given the avoidance of traditional protections in the criminal process by its location in the civil realm. Moreover, the process may be characterised as an 'apersonal means of tackling crime', in which emphasis is laid on the non-moral and regulatory aspects of the law. This article further contends that civil forfeiture represents an adaptation to reality in which the State reconfigures the legislative framework so as to facilitate more readily the suppression of organised crime.*

The phenomenon of crime is a fundamental and ineluctable concern in contemporary Ireland, as it is in all late-modern Western societies, and its avoidance and prevention represents a pivotal organising factor in day-to-day life. The centrality of crime in Ireland in 2007 may be explained primarily by reference to the exponential increase in crime rates in the last number of decades: while crime rates reached unprecedented levels in the last 20 years, they have not diverged in any substantial sense from that position in recent times and remain at relatively stable levels.<sup>2</sup> Moreover, notwithstanding any fluctuations in statistics, the general popular impression is that the problem of crime is an ever-worsening one.

In particular, the 1990s in Ireland heralded an unprecedented wave of concern about serious and organised crime, with a concomitant surge of legislative action. The notable rise in 'gangland' killings in that decade, which are characterised by their planned nature and the use of firearms,<sup>3</sup> coupled with the low conviction rate for such crimes,<sup>4</sup> precipitated a widespread belief that organised criminals were evading justice.<sup>5</sup> Furthermore, a pervasive sentiment that considerable wealth was being accrued and enjoyed by a number of notorious criminals, and that the State was impotent in this regard, took root. These popular and political perceptions gathered momentum during the early 1990s, until action was fomented in 1996 as a result of two high-profile murders.

Sustained outcry about organised crime in Ireland came in June 1996 in the wake of the murders of Garda Jerry McCabe in the course of an armed robbery, and of investigative journalist Veronica Guerin. These murders expedited the introduction of a number of legislative measures that significantly enhanced the capabilities of the State, and fundamentally revised its strategy in tackling organised criminality. Popular and political will converged in a desire to undermine the power of the 'overlords'<sup>6</sup> and 'godfathers'<sup>7</sup> of organised crime, and to recoup their assets. As one member of the Dáil (legislature) insisted, if we 'as a community [are] prepared to tolerate the continued unhindered existence in our midst of people who have accumulated vast and unexplained wealth ... Veronica Guerin died in vain'.<sup>8</sup>

Following these two murders, a series of legislative provisions was introduced in a bid to further the State's ability to prosecute and control organised crime. For example, the Criminal Justice (Drug Trafficking) Act 1996, which facilitates the detention of suspected drug-traffickers for seven days,<sup>9</sup> and which allows inferences to be drawn from the failure of accused to mention in police interview particular facts on which he later seeks to rely in court,<sup>10</sup> was enacted. In addition, the Proceeds of Crime Act 1996, which provides for a mechanism of civil asset forfeiture that is implemented by the Criminal Assets Bureau (CAB),<sup>11</sup> was introduced. Remarkably, this Act was passed within a mere five weeks, in marked contrast with the generally slow legislative process in Ireland.<sup>12</sup> Indeed, such expedition may stem from the perceived importance of such a mechanism: prior to its enactment it was claimed that the Proceeds of Crime Bill was necessary to protect democracy.<sup>13</sup>

While the workings of the Criminal Assets Bureau and the notion of asset forfeiture in Ireland have been examined previously,<sup>14</sup> this article seeks to expand on the extant literature by exploring this mechanism from a conceptual perspective. By placing forfeiture in a theoretical setting, it is hoped that its underlying rationales will be clarified. As Garland notes, 'theoretical argument enables us to think about that real world of practice with a clarity and a breadth of perspective often unavailable to the hard-pressed practitioner'.<sup>15</sup> Moreover, while this article uses the Irish forfeiture model as the basis for its theoretical study, the analysis is applicable to equivalent or related tactics in other jurisdictions.

However, before undertaking a theoretical exploration of asset forfeiture, it is useful to revisit its procedural aspects and the different templates for this tactic in the Irish context. Then, the nature and effects of asset forfeiture in Ireland will be examined to determine if the process is criminal or civil. The remainder of the article will focus on a number of theoretical insights which may clarify the development and implementation of this innovative approach to tackling organised and serious crime.

## **Procedural aspects of asset forfeiture in Ireland**

The introduction of civil forfeiture represented a radical alteration to the tactics adopted by the Irish State in tackling organised crime. While legislation facilitating the confiscation of a convicted offender's property was already in place prior to 1996,<sup>16</sup> the model introduced by the Proceeds of Crime Act 1996 allows for the seizure and forfeiture of property deemed to be the proceeds of crime<sup>17</sup> in the absence of a criminal conviction.

Upon an application by CAB, the High Court may issue an interim order that prohibits any person from disposing of or dealing with property worth at least €13,000, which is believed to be the proceeds of crime, for 21 days.<sup>18</sup> This interim order lapses after 21 days unless an application for an interlocutory order is made,<sup>19</sup> and the court must make an interlocutory order unless the respondent refutes the contention that the property is the proceeds of crime, or if there would be a serious risk of injustice. Finally, where an interlocutory order has been in force for not less than seven years, the High Court may make a disposal order under s. 4 of the 1996 Act which deprives the respondent of his rights in the property and transfers the property to the Minister for Finance.<sup>20</sup> Significantly, the standard of proof required in an application for an order under the Proceeds of Crime legislation is the civil burden of proof, and hearsay evidence is admissible in an application for an order under the Act if the court is satisfied that there are reasonable grounds for that belief.<sup>21</sup>

Next, two important exemplars for forfeiture in Ireland will be examined. While the American forfeiture process is frequently highlighted as the template from which the current Irish model derives, a measure introduced to combat subversive crime in Ireland also provided a valuable model for the present approach.

## **Templates for the Irish model of asset forfeiture**

In the early 1970s the US Congress passed a number of legislative measures which sought to undercut the influence and power of organised crime by removing the assets of those involved in such criminality,<sup>22</sup> the most well known of which is the Racketeer Influenced Corrupt Organisations Statute (RICO).<sup>23</sup> Prior to the enactment of the Proceeds of Crime Act 1996, RICO was expressly cited in the Dáil as a model on which comparable Irish legislation should be based.<sup>24</sup>

However, the present forfeiture scheme is not based solely on the experience of the US, but is also influenced by a provision on the Irish statute book which authorised the forfeiture of the assets of an illegal organisation. Section 2 of the Offences Against the State (Amendment) Act 1985 allowed the Minister for Justice to freeze moneys held by a bank which he believed to be the property of an unlawful organisation, and cause the moneys to be paid to the High Court.<sup>25</sup> After a period of six months, the Minister could make an *ex parte* application to the High Court directing that the moneys be paid to him. However, the person claiming to be the owner of the property could also within six months apply to have the moneys paid to him, but the onus of proof was on him to establish ownership.<sup>26</sup> When the Act was challenged in *Clancy v Ireland*, the Supreme Court concluded that it amounted to a permissible delimitation of property rights in the interests of the common good, and therefore was constitutional.<sup>27</sup>

The model of forfeiture in the 1985 Act provided a useful example for the mechanism currently in place. Indeed, the 1985 Act was seen to establish a framework for dealing with any future cases of this nature,<sup>28</sup> and it was also described as a 'clear and direct precedent' for the Proceeds of Crime Act 1996.<sup>29</sup> Moreover, judicial approval of the 1985 Act in *Clancy* paved the way for the subsequent upholding of the constitutionality of the 1996 Act in the Irish courts.<sup>30</sup>

Now that the procedural aspects of asset forfeiture and the models on which it was based have been outlined, whether the mechanism is truly civil or criminal in nature will be considered.

## 'An ersatz civil proceeding'?

Asset forfeiture may be justified on the basis that an individual should not be allowed to profit from his crime. At common law and equity, it is well established that no criminal has a right to benefits which accrue to him from crime,<sup>31</sup> and this maxim has been cited as the rationale behind the Proceeds of Crime legislation.<sup>32</sup> However, it is questionable whether this aphorism is applicable in the context of forfeiture under the 1996 Act, given that a conviction is not necessary for forfeiture to be imposed, and given that the standard of proof which the State must satisfy is the civil standard. Therefore, it is arguable that the forfeiture mechanism is in fact 'an ersatz civil proceeding' which is 'really a disguise for what [is] truly an attempt by the Oireachtas to impose a criminal sanction in a civil context.'<sup>33</sup>

In determining whether the means of asset forfeiture authorised by the Proceeds of Crime Act 1996 is truly criminal in nature, or whether it merits its title of a civil process, jurisprudence from the superior courts of Ireland will be considered below, in addition to that of the US Supreme Court.

### *Irish jurisprudence*

When assessing the nature of the forfeiture proceedings under the Proceeds of Crime Act 1996, the Irish courts concluded that the procedures do not have 'all the features of a criminal prosecution', as there is no question of the arrest of a respondent or his remand in custody or on bail and there is no specific penalty or fine or imprisonment.<sup>34</sup> The Irish courts have held, using somewhat circular logic, that a procedure is not a criminal process if it does not involve certain characteristics, such as arrest and detention. However, it is arguable that it is the very avoidance of these characteristics which facilitates the depiction of forfeiture as civil in nature. For example, while the fact that an individual may not be detained under the Proceeds of Crime Act 1996 may be cited as evidence that the proceedings are not criminal in nature, it is arguable that the classification of the process as civil in nature by the legislature has resulted in the fact that an individual may not be detained.

In addition, the courts followed previous Irish cases which regarded forfeiture in the context of other statutory proceedings as civil,<sup>35</sup> and thereby concluded that 'legislation providing for forfeiture is not necessarily criminal in nature'.<sup>36</sup> Furthermore, the Irish courts portrayed the process of assets confiscation as an *in rem*, rather than *in personam*, action, following the decision of the US Supreme Court in *Various Items of Personal Property v United States*.<sup>37</sup>

Notwithstanding the support of the Irish judiciary for the legitimacy of the civil asset forfeiture, it will now be argued that such a tactic should more appropriately be classified as a punishment and as a criminal sanc-

tion, and therefore should operate in the criminal realm with its associated due process rights and protections. In determining the true status of asset forfeiture it is useful to adopt the test delineated by the US Supreme Court in *United States v Ward*, which establishes whether a legislative measure is civil or criminal in nature.<sup>38</sup>

### ***US jurisprudence: the Ward test***

In *Ward*, the US Supreme Court outlined a two-part test which is of use in determining the status of the Irish process of asset forfeiture. First, the court must establish whether the legislature, in introducing the mechanism, 'indicated either expressly or impliedly a preference' for the label of civil or criminal. Secondly, if an intention to establish a civil penalty is established, the court must determine if the statutory scheme was so punitive either in purpose or effect as to negate that intention.<sup>39</sup>

The application of part one of the *Ward* test to the Proceeds of Crime Act 1996 reveals that a punitive intent is not explicitly manifest on the part of the Irish legislature. As noted in *Enright v Ireland*, the intention of the legislature may be ascertained from the long title of a statute.<sup>40</sup> According to the long title of the Proceeds of Crime Act 1996, the Act enables the High Court to make orders for the preservation and the disposal of the proceeds of crime, and to provide for related matters: a punitive intention is not discernible in this regard. In addition, no punitive intent may be detected in the language or wording of the legislation itself, given that there is no use of vocabulary such as 'guilty', 'offence' or 'conviction'.<sup>41</sup>

However, it is plausible that an implicit punitive intention was evident on the part of the legislature. This contention is supported by reference to comments in the Dáil, such as the 'ultimate aim is not to seize the profits of drug trafficking: it is to put drug traffickers out of business altogether'.<sup>42</sup> Nevertheless, such a remark does not conclusively establish that the intent of the legislature was to accord a criminal label to the process of asset forfeiture.

As the application of part one of the *Ward* test does not indicate that the Irish legislature intended to establish a criminal sanction when the Proceeds of Crime Act 1996 was enacted, the second facet of this test, which centres on the purpose and effect of the measure and seeks to determine if it is so punitive as to negate the civil intentions of the legislature, must be considered to determine the nature of the forfeiture scheme. The second branch of the *Ward* test represents a condensed version of that previously elaborated in *Kennedy v Mendoza*, where the US Supreme Court specified various factors which determine whether legislation is penal or regulatory in character: whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as a punishment; whether it comes into play only on a finding of *scienter*; whether its operation will promote the traditional aims of punishment, namely retribution and deterrence; whether the behaviour to which it applies is already a crime; whether an alternative purpose for it exists to which it may be rationally connected; and whether it appears excessive in relation to the alternative purpose.<sup>43</sup> It is arguable that the application of these criteria to the seizure of criminal assets in Ireland suggests that the process is a penal, or criminal, measure. The different factors will now be considered in turn.

### ***Affirmative disability or restraint***

The first factor of the *Mendoza* test, namely whether the sanction imposed by the legislation involves an affirmative disability or restraint, has been compared to Hart's condition that punishment must involve 'pain or some consequence normally considered unpleasant'.<sup>44</sup> It appears that this criterion is satisfied in the context of the Proceeds of Crime Act 1996, given that the confiscation and forfeiture of one's assets by definition involves a disability or restraint, as it prevents a person from dealing with his assets, and eventually serves to erase any interest he has in them. Nevertheless, serious social and economical consequences for the person concerned do not necessarily imply that the measure must be regarded as a punishment,<sup>45</sup> and indeed, it has been held that the fact that forfeiture is experienced as a punishment is irrelevant to the determination of its status.<sup>46</sup>

Although the effect of the measure on the individual is not decisive in determining whether it is criminal or civil, the imposition of a disability or restraint is nevertheless an important factor when taken in conjunction with other elements which may indicate that the forfeiture process is criminal rather than civil. It may there-

fore be contended that the requisite degree of disability or restraint is evident in the asset forfeiture mechanism in Ireland. The second element of the test focuses on whether the sanction has historically been regarded as a punishment.

### ***Historical approach***

Historically, forfeiture has been characterised as a civil remedy, rather than as a criminal punishment, in Ireland.<sup>47</sup> However, a more ambiguous approach is evident in the US context. As the Irish courts have relied on US authorities to support the forfeiture mechanism, recent jurisprudential developments in that jurisdiction are particularly pertinent.

While forfeiture was initially deemed to be a remedial rather than a punitive sanction by the US Supreme Court,<sup>48</sup> in *Austin v United States* the US Supreme Court concluded that forfeiture is punitive in nature, relying on the presence of the 'innocent owner' defence to substantiate its conclusion.<sup>49</sup> This emphasis on the culpability of the owner was seen to reveal an intent on the part of the legislature to punish only those involved in drug trafficking.<sup>50</sup> Similarly, in the Irish context, orders under ss 3 and 4 of the Proceeds of Crime Act 1996 may not be imposed or may be lifted if there is a serious risk of injustice. This may be compared to an innocent owner defence, for if an innocent person can prove that he was unaware of the criminal origins of property, he may retain the assets and have the order lifted. Moreover, the logic behind the seven-year waiting period before a disposal order could be granted under s. 4 (as it originally was enacted) was to ensure that any person who jointly owned property with an individual who was allegedly involved in criminal activity would have the opportunity to make a claim that the property was his, rather than belonging to the targeted individual.<sup>51</sup> This suggests that the focus of the order is not the property, but rather the allegedly culpable individual, thereby refuting the contention that the orders are *in rem*.<sup>52</sup> In other words, guilt is arguably an issue in the context of forfeiture in Ireland, given that individuals who are perceived to be guilty are treated differently to innocent people.

While the historical approach in Ireland has been to regard forfeiture as remedial rather than punitive, the decision in *Austin* is of significance, as there is a comparable innocent owner defence in Ireland. Therefore, while the forfeiture process in Ireland does not strictly satisfy this facet of the *Mendoza* test, it is arguable that the change in emphasis in the US is persuasive in this regard. The third factor in *Mendoza* considers whether the sanction only comes into play upon a finding of *scienter*.

### ***Finding of scienter***

This element concerns the intent of the respondent, and correlates to the requirement of *mens rea* for a criminal offence. As Bishop observed in 1858:

[D]isguise the matter as we may, under whatever form of words, if the intent which the owner of the property carries in his bosom is the gist of the thing on which the forfeiture turns, then the question is one of the criminal law, and forfeiture is a penalty imposed for crime.<sup>53</sup>

It is arguable that the *scienter* criterion is satisfied in the context of the Proceeds of Crime Act 1996, given that the alleged criminal behaviour of the respondent is at the core of the matter. Evidence that the assets were accrued as a result of criminal activity or conduct is required before the High Court may make an order under the Act, and although the court does not need to establish to the criminal standard of proof that the respondent is responsible for criminal behaviour or for a specific criminal offence, this is not fatal to the *scienter* factor as the blameworthiness of the respondent remains fundamental to the seizure of assets. The moral responsibility and social blame that accrue as a result of a determination by the High Court that property represents the proceeds of crime indicates that the culpability of the respondent is of import in this regard, thus arguably satisfying the third requirement.<sup>54</sup>

The next criterion in *Mendoza* focuses on whether the operation of the legislation promotes punishment's traditional aims of retribution and deterrence.

### ***Promotion of punishment's traditional aims***

It is questionable whether the forfeiture process in Ireland evidences retributive or deterrent objectives, given that neither the statutorily defined objectives of CAB<sup>55</sup> nor the long title of the Proceeds of Crime Act 1996 reveal any such aims.<sup>56</sup> Moreover, it may be claimed that the legislation merely seeks to redress an imbalance by seizing assets accrued as a result of criminal activity and therefore is regulatory in nature. As McGuinness J observed in *Gilligan*, the removal of property that represented the proceeds of crime 'could well be viewed in the light of reparation rather than punishment or penalty'.<sup>57</sup> However, the definition of 'proceeds of crime' in the Proceeds of Crime Act 1996 extends beyond mere profit from crime and rather encompasses any property received at any time as a result of or in connection with the commission of an offence, and therefore seems to reach beyond a purely remedial or reparative approach.<sup>58</sup> As noted above, it was claimed in the Dáil that the ultimate aim of forfeiture is not to seize the profits of drug trafficking but rather 'to put drug traffickers out of business altogether'.<sup>59</sup> This arguably reveals a retributive sentiment on the part of politicians

Furthermore, forfeiture seems to display deterrent effects, thus fulfilling one of the traditional aims of punishment. While it has been contended that forfeiture does not act as a deterrent because it merely recoups what was not legitimately owned and therefore does not render the individual any worse off than before the criminal conduct,<sup>60</sup> the seizure of the earnings of alleged criminal activities serves as a general deterrent as it removes the incentive to commit crime. The possible seizure of one's assets because of a suspicion of criminal behaviour represents an effective deterrent to the commission of crime. Moreover, asset forfeiture may also serve as a specific or individual deterrent to any individual whose property has been seized by CAB.

In addition to the traditional objectives of retribution and deterrence, asset forfeiture also serves punishment's aims of censure and incapacitation. As Hart contends, criminal sanctions 'take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction'.<sup>61</sup> Steiker reiterates this, emphasising that 'blaming' distinguishes criminal from civil measures.<sup>62</sup> It is clear that the process of forfeiture carried out by the Criminal Assets Bureau stems from and embodies the censure of politicians and society as a whole towards the suspected actions of the individual who is the target of the action. Furthermore, although forfeiture under the Proceeds of Crime Act 1996 does not incapacitate offenders in the sense that punishment usually does by removing individuals from society, it does seek to incapacitate criminal organisations and 'reduce their power and influence' by 'divesting major criminals of their ill-gotten gains'.<sup>63</sup>

It is arguable that the fourth element of the *Mendoza* test is satisfied, given that asset forfeiture in Ireland promotes punishment's traditional aims of retribution and deterrence, and that it demonstrates censure and serves incapacitative ends. The fifth factor in *Mendoza* concerns whether the behaviour to which the legislation applies is already a crime.

### ***Behaviour to which the process applies is a crime***

Forfeiture proceedings in the Irish context do not require a conviction, but rather may be applied without a finding of culpability in court. Nevertheless, it must be established that the property is the proceeds of crime, thereby requiring proof of criminality, albeit on the lower civil burden of proof. This suggests that the behaviour to which forfeiture proceedings pertain must be a crime. However, it is not necessary for particular assets to be related to a particular crime, as this would make the Act 'useless and unworkable'.<sup>64</sup> The activities which the Act seeks to combat are primarily the sale and trafficking of drugs, and money laundering, which are on the Irish statute book as criminal offences.<sup>65</sup> It is therefore suggested that the fifth element of the test is satisfied in the context of the Proceeds of Crime Act 1996.

The remaining elements of the *Mendoza* test concern the existence of an alternative purpose for the process which does not have punitive aims, and whether the process appears excessive in relation to this alternative objective.

### ***Alternative non-punitive purpose***

The final two considerations concern whether there is a non-punitive purpose that can rationally be connected to the measure, and whether the measure appears excessive in relation to this alternative purpose. It must be conceded that forfeiture does serve non-punitive aims, by seeking to recoup assets unjustifiably and illegally acquired as a result of criminal activity. Whether the forfeiture process is excessive in relation to this objective is examined below.

When applying these criteria to an American forfeiture provision, Stahl noted that for a measure to be seen as remedial or regulatory, it must not burden property owners any more than is reasonably necessary to achieve regulatory ends.<sup>66</sup> It is arguable that in the Irish context the infringements on the respondent's rights to private property are not justifiable, given that his interest in the property may be completely erased by means of a disposal order under s. 4 of the Proceeds of Crime Act 1996 after seven years, without a hearing to the standard required by the criminal law. However, the Irish courts have held that forfeiture does not breach the constitutional right to private property, on the basis that any erosion of the right must be balanced against the public interest inherent in the legislation.<sup>67</sup> In addition, the exigencies of the common good, which allow for limitations on the right to property, were interpreted as permitting the use of measures designed to prevent the accumulation of assets deriving from criminal activities.<sup>68</sup> The Act was not seen to attack property rights unjustly, given that the State must first demonstrate that the property is the proceeds of crime and that an order shall not be made if there is a serious risk of injustice.<sup>69</sup>

It is questionable whether the infringement on the right to private property is justified, given that such a determination is made on foot of a civil hearing. Moreover, the 'serious risk of injustice' caveat, which has been described as a 'vague and intangible yardstick', may not effectively protect the rights of the individual, given its imprecise and malleable nature.<sup>70</sup> Therefore, it is arguable that the forfeiture process is excessive, having regard to its aims, as it does not afford the respondent the rights which accrue in the context of a criminal trial.

### ***Concluding remarks on the US tests***

The approach adopted by the US Supreme Court in *Ward* and *Mendoza* assists analysis of the true nature of the process under the Proceeds of Crime legislation. Examination of the forfeiture process under this approach suggests that it is in fact a criminal rather than a civil or regulatory mechanism, and therefore should attract criminal due process rights. Indeed, 'civil labels and good intentions do not themselves obviate the need' for criminal procedural protections.<sup>71</sup> Nevertheless, as the US Supreme Court noted in *United States v Ursery*, only the 'clearest proof' of a punitive effect could overwhelm a non-punitive purpose.<sup>72</sup> While Rehnquist CJ conceded that the forfeiture provisions in question had certain punitive aspects, he stressed that the provisions served important non-punitive goals, such as ensuring that an individual does not profit from his illegal acts.<sup>73</sup> It is arguable that the satisfaction of the *Ward* inquiry, in addition to six of the seven parts of the *Mendoza* test, provides the requisite proof of the punitive effect of the forfeiture process, and therefore indicates its true nature as a criminal rather than civil process.

### **Placing forfeiture in a theoretical setting**

The development of the CAB and asset forfeiture will now be placed in a theoretical context, in order to illuminate the underlying rationale of this tactic. Three theories will be considered in a bid to explain and contextualise the introduction and implementation of this approach. First, the issue of whether asset forfeiture denotes a shift from due process to crime control imperatives will be examined, using the work of Herbert Packer. Next, the possibility that this approach to combating crime represents a move away from criminal justice *per se* to what may be described as criminal administration will be explored. Finally, the categorisation of forfeiture as an adaptive response of the State to the phenomenon of crime and the reality of crime control in late-modern society will be considered, drawing on David Garland's culture of control thesis.

### ***From due process to crime control?***



The first element of the theoretical facet of this article focuses on the possibility that civil forfeiture implies a favouring of crime control precepts to the detriment of due process. The classic work of Herbert Packer is of significant value in this regard. In *The Limits of the Criminal Sanction*, Packer presents two normative models of the criminal process--the crime control model and the due process model--which represent the two separate value systems which vie for superiority in the criminal process, and which may be used as a framework on which an analysis of civil forfeiture may be grounded.<sup>74</sup>

### ***The crime control model***

The crime control model views the suppression of criminal conduct as the most significant function of the criminal process.<sup>75</sup> According to this model, efficiency, speed and finality are of primary importance: therefore the criminal process should not involve ceremonious rituals that delay the progress of a case. Indeed, Packer portrays this model of criminal justice as 'an assembly-line conveyor belt down which moves an endless stream of cases'.<sup>76</sup> Furthermore, the crime control model regards the screening process operated by the police and prosecutors as a reliable indicator of probable guilt, and sees expert administrative fact-finding mechanisms as more reliable and efficacious than formal and adjudicatory processes.<sup>77</sup> Therefore, minimum restrictions should be placed on extrajudicial, informal processes.

### ***The due process model***

In contrast, the due process model resembles an obstacle course hindering the progress of the accused through the criminal process.<sup>78</sup> While accepting that the repression of crime is socially desirable, the due process model highlights the possibility of error in informal adjudicative fact-finding. According to this model, the aim of the criminal process is as much to protect the factually innocent as it is to convict the factually guilty: therefore formal adjudicative adversary fact-finding is central, and reliability is of greater consequence than efficiency. As official power is susceptible to abuse, a diminution in the efficiency of the criminal process is accepted to prevent oppression and to protect the individual.<sup>79</sup> Furthermore, for the due process model, an individual is only guilty if he is found to be factually likely on the basis of reliable evidence to have committed the criminal act, and if that determination is made in a procedurally regular fashion by competent authorities. Even if the facts indicate that the person is likely to be guilty, he is not deemed to be so if certain rules designed to protect him and to preserve the integrity of the process are not adhered to.<sup>80</sup>

### ***Applying Packer's thesis***

Packer's models are valuable as interpretive devices which allow the introduction of civil forfeiture to be conceptualised and analysed. However, despite the usefulness of his thesis as an analytical base, a number of problematic issues must be noted. First, it may be argued that his approach is superficial, and that he fails to present a thorough examination of the theoretical basis for his opposing models. It has also been claimed that the due process and crime control models are not comparable, given that crime control is the overarching aim of the criminal process, while due process values are procedures which temper that objective.<sup>81</sup> As Smith argues, due process is not a goal in itself, and only acquires a meaning in the context of the pursuit of other goals, such as crime control.<sup>82</sup>

Although Packer's thesis may lack depth to a certain extent, this does not undermine the worth of his models in an interpretive sense. Similarly, although the claim that the due process model is not a true procedural model has merit, it is submitted that Packer's depiction of the overarching ideologies in the criminal justice system surmounts this theoretical shortcoming. Notwithstanding the aforementioned criticisms, Packer's normative models provide a useful framework on which an assessment of asset forfeiture may be grounded. As Henham notes, Packer's approach is theoretically deficient but heuristically valuable as an empirical tool.<sup>83</sup>

Packer's thesis arguably reveals that the Irish forfeiture model involves a shift away from due process values towards the imperatives of crime control. Civil forfeiture, by definition, operates outside and independently of the criminal process, but is treated by the State as a further means by which organised criminality may be

undermined and tackled. The Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996 (as amended), which operate in the civil realm with the concomitant lower burden of proof, indicate a realignment of the approach adopted by the agents of the State in the fight against organised crime, and demonstrate a preference for the needs of the State over the individual's right to due process. By adopting a civil process to tackle criminal matters, the State neatly circumvents the need for and demands of due process rights.

Packer argues that while the validating authority of the crime control model is ultimately legislative and proximately administrative, the due process model's validating authority is judicial.<sup>84</sup> It is evident from recent legislative enactments in Ireland and from political discourse that the crime control model represents the ideological basis on which contemporary Irish criminal justice policy is founded, while the tenets of the due process approach are more carefully protected by the judiciary.<sup>85</sup> However, in the context of asset forfeiture judicial imprimatur has been granted to a technique which serves to erode due process values, thereby suggesting a capitulation by the judiciary to the imperatives of crime control. Challenges to the constitutionality of the forfeiture process on the grounds that it breached the due process right of the individual against self-incrimination<sup>86</sup> which is protected by virtue of Article 38.1 of the Irish Constitution, and that it represents a criminal action in the guise of a civil one,<sup>87</sup> failed in the Irish courts, thereby permitting the circumscription or evasion of the rights which would usually accrue to an individual in a criminal trial.

The Irish courts' depiction of asset forfeiture as civil in nature indicates a clear preference for crime control over the due process rights of the accused. Consequentially, the needs of the State are favoured to the detriment of the individual, with a fundamental alteration of the traditional norms of the criminal justice system. Current trends indicate a shift in thinking: no longer is the State the entity from which individuals must be protected, rather it is the State that protects us from each other. While due process safeguards sought to defend the individual from the might of the State, civil forfeiture circumvents these protections, implying a more benign view of State power.

In addition to the application of Packer's thesis to the tactic of civil forfeiture, which supports the contention that due process values are being subsumed by crime control demands, the forfeiture mechanism may be explored by reference to the concept of criminal administration.

### ***Criminal administration***

The CAB's means of tackling crime under the Proceeds of Crime Act 1996 has been described by Kilcommins as 'criminal administration'<sup>88</sup> rather than criminal justice, in which the notion of *mens rea* is skirted in the drive to tackle crime.<sup>89</sup> Indeed, as Kilcommins first highlighted, the Irish forfeiture procedure is reminiscent of the proliferation in the UK and the US in the early 20th century of public welfare offences, which are punishable regardless of the state of mind of the actor.<sup>90</sup> As long ago as 1933 Sayre claimed that the modern conception of criminality was shifting from a basis of individual guilt to one of social danger, and he questioned whether this signified the abandonment of the *mens rea* requirement as an essential element of criminality.<sup>91</sup> It is arguable that similar developments are evident in the use of civil forfeiture. Harm, rather than culpability, seems to be the focus in this context. Sayre further asked: 'Are we to look forward to a day when criminality will be based upon external behaviour alone irrespective of intent?'<sup>92</sup> It may be argued that civil forfeiture, which purports to act *in rem* rather than *in personam*, and so focuses on the property rather than on the intent of the respondent, indicates a move towards the state of affairs predicted by Sayre.

Civil forfeiture may be described as a quintessentially apersonal means of tackling crime, in which emphasis is laid on the non-moral and regulatory aspect of the law, indicating a shift in focus away from the individual. This mechanism does not focus on individual rights, but rather on societal interests. Indeed, in this context, persons may appear only as nuisances to be abated or as objects of regulation.<sup>93</sup> The fundamental aim of the forfeiture process is to neutralise the threat posed to society by organised criminals, rather than seeking to rehabilitate or reintegrate individuals according to the traditional principles of criminal justice.

A further way of conceptualising civil forfeiture is to regard it as an adaptation by the Irish State to the reality of crime control in late-modern Western societies.

### ***Adaptation to reality***

In his seminal work, *The Culture of Control*, David Garland argues that criminal justice authorities are now facing a criminological predicament which influences all policy decisions,<sup>94</sup> namely that high crime rates are now a normal social fact, and that the criminal justice state is seen as limited and ineffective to a great extent. The recognition that the sovereign state is not capable of delivering law and order and of controlling crime on its own results in a predicament for government authorities: while there is a need to withdraw or reassess the claim that the State is the primary provider of security and crime control, doing so could be disastrous politically.<sup>95</sup> Garland regards this predicament as resulting in the formation of 'volatile and ambivalent' policies, each of which may be classified as either an adaptation to reality or denial.<sup>96</sup>

Adaptive responses include the professionalisation and rationalisation of justice, in addition to more systematic information gathering and better caseload management.<sup>97</sup> Furthermore, in an adaptive measure justice may be privatised and commercialised, criminal justice agencies may develop a managerialist ethos with new incentives and interests, and the aim of the criminal process may be altered, so that stress is placed on incapacitation rather than rehabilitation. In contrast, the non-adaptive response is manifested in a denial of the situation, with a reassertion of the myth of the sovereign state and its power to punish.<sup>98</sup> Reasoned action is abandoned by the State, which retreats into expressive mode in a bid to re-establish public confidence.

The establishment and operation of asset forfeiture in Ireland may be classified as an archetypal adaptive response to the problem of organised crime.<sup>99</sup> The rationale behind the adoption of such a radical tactic stemmed from the perception that leaders of organised crime gangs were insulating themselves from the traditional methods of prosecution or conviction in the justice system by transferring responsibility for the criminal acts to lower-level criminals. Furthermore, the methods adopted by organised criminals were seen to have become more advanced and impenetrable to law enforcement agencies, thereby necessitating the adoption of a 'radically new and thorough approach' on the part of the State.<sup>100</sup> As Keane J emphasised in *Murphy v GM*:

this unquestionably draconian legislation was enacted by the Oireachtas because professional criminals had developed sophisticated and elaborate forms of what had become known as 'money laundering' in order to conceal from the authorities the proceeds of their criminal activities.<sup>101</sup>

The introduction of a measure which requires evidence on the civil burden of proof eases the difficulty of achieving a successful conviction against an organised criminal. In the Dáil it was stated that:

[i]f traditional methods fail we must devise new ones. If we cannot punish, deter or reform these people we must set a new aim, to stop them from operating their evil trade ... If we cannot arrest the criminals, why not confiscate their assets?<sup>102</sup>

This remark encapsulates the rationale underpinning the adaptive response of the Irish State to the problem of organised crime. As the conventional means of criminal prosecution was deemed to be ineffective in the face of organised criminality, a new mechanism was devised which eased the burden on the State, and which facilitated the control of organised crime in a novel sense.

Furthermore, the multi-agency nature of the CAB indicates the adaptations made by the State in the fight against organised crime. The CAB represents a hybrid of a number of State agencies, including members of the Garda Síochána, officials of the Revenue Commissioners and of the Department of Social, Community and Family Affairs,<sup>103</sup> and each member retains the powers that accrue from his original role in carrying out CAB business.<sup>104</sup> The expertise and powers of each member from his particular field is brought to bear on the work of the CAB, thereby enhancing the body's capabilities. This represents a further adaptation on the part of the State, indicating a recognition of the benefit of innovative measures in tackling organised crime.<sup>105</sup>

The process of asset forfeiture has the potential to usurp ordinary police work and investigation in the context of organised criminality. The approach espoused by the CAB represents a softer option to the normal investigative process, due to the lower standard of proof, and the admissibility of hearsay evidence.<sup>106</sup> Nevertheless, in *Gilligan*, the Deputy Commissioner of the Gardaí stressed that the work of the CAB operated in parallel to the normal investigating procedures of the Gardaí.<sup>107</sup> Despite these intentions, it is conceivable that the adaptive response of asset forfeiture will become the preferred tactic, given the relative ease with which such orders may be granted, when contrasted with the prosecution and conviction of crime.

## Conclusion

Asset forfeiture in Ireland, which was heavily influenced by the RICO provision in the US, in addition to the model under the Offences against The State (Amendment) Act 1985, may rightly be described as a de facto criminal tactic, on the basis of its satisfaction of the *Ward* and *Mendoza* tests. This mechanism arguably implies a change in emphasis from due process to crime control, with a diminution of concern for individual liberties in the bid to recoup the assets allegedly accrued from criminal activities. Moreover, the growing use of asset forfeiture may be categorised as a paradigm shift from criminal justice to criminal administration in the context of crime control. Furthermore, the forfeiture process may be classified as an adaptation to reality, in which the State seeks to overcome its shortcomings in the realm of criminal justice by the adoption of an innovative technique in the form of the civil forfeiture process to combat crime.

Notwithstanding the potential infringements on the rights of the individual, and the possible imposition of a punitive measure in the guise of a civil process, it is unlikely that asset forfeiture will be dislodged from its position in the Irish legal topography. It is evident from media reports and political discourse that civil forfeiture is seen as the most effective means of tackling the problem of organised crime in Ireland. For example, the Minister for Justice, Equality and Law Reform in 1998 spoke of 'the outstanding performance and success of the Criminal Assets Bureau' in hitting 'serious criminals where it hurts most--in their pockets, bank accounts, fancy houses and fast cars'.<sup>108</sup> Similarly, it was claimed in the Dáil that:

[t]he establishment of the Criminal Assets Bureau has been one of our success stories in tackling crime... . We have for the first time ever, a mass exodus of criminals from this jurisdiction. Criminals are on the run as never before. They have gone to ground overseas and elsewhere because their assets are being seized and their ill gotten gains, their motivation for committing crime, are being taken from them.<sup>109</sup>

Furthermore, the Irish Times claimed in 2002 that the CAB has 'virtually eradicated the top echelon of organised crime' in this jurisdiction.<sup>110</sup> The resounding popular and political support for civil forfeiture, which has also received judicial approval in the face of constitutional challenges, indicates that this process will continue to be a key weapon in the State's arsenal against organised crime.

<sup>1</sup> I would like to thank Dr Shane Kilcommins for his helpful comments on this article. This article is based on a paper presented at the 2006 Annual Conference of the Socio-Legal Studies Association, University of Stirling, Scotland, 28-30 March 2006.

<sup>2</sup> For a useful compilation of crime statistics in Ireland see I. O'Donnell, E. O'Sullivan, and D. Healy (eds) *Crime and Punishment in Ireland, 1922 to 2003: A Statistical Sourcebook* (Institute of Public Administration: Dublin, 2005).

<sup>3</sup> While from 1972 to 1991 18.9 per cent of homicides in Ireland were committed with a firearm, this figure increased to 27.3 per cent in the period between 1992 and 1996. See E. Dooley, *Homicide in Ireland 1972-1991* (Stationery Office: Dublin, 1995) 26; E. Dooley, *Homicide in Ireland 1992-1996* (Stationery Office: Dublin, 2001) 15, table 10.

<sup>4</sup> In Dooley's study of homicides from 1992 to 1996, there was a 20 per cent conviction rate (all for murder) for the homicides which were related to gangland/organised crime, in comparison with 57.6 per cent for the study as a whole: above n. 2 at 16-17, table 12.

<sup>5</sup> Ibid. at 15, table 10.

<sup>6</sup> *Dáil Debates*, 2 July 1996, vol. 467, col. 2473, per Mr O'Dea TD.

<sup>7</sup> *Dáil Debates*, 3 July 1996, vol. 468, col. 376, per Mr Haughey TD.

<sup>8</sup> *Dáil Debates*, above n. 5, col. 2406, per Mr O'Donoghue TD.

<sup>9</sup> Criminal Justice (Drug Trafficking) Act 1996, s. 2.

<sup>10</sup> Criminal Justice (Drug Trafficking) Act 1996, s. 7.

<sup>11</sup> Criminal Assets Bureau Act 1996.

<sup>12</sup> The Proceeds of Crime Act 1996 was first proposed by Fianna Fáil as a Private Member's Bill in the week following Veronica Guerin's murder, and arguably indicated Fianna Fáil's assumption of the mantle of the 'law and order' party, heralding an increase in the politicisation of law and order in Ireland. See I. O'Donnell and E. O'Sullivan, 'The Politics of Intolerance--Irish Style' (2003) 43 *British Journal of Criminology* 41.

<sup>13</sup> *Dáil Debates*, 2 July 1996, vol. 467, col. 2409, *per* Mr O'Donoghue TD.

<sup>14</sup> See J. Meade, 'The Proceeds of Crime Act, 1996: An Overview' (1998) *Irish Law Times* 52; P. McCutcheon and D. Walsh, *The Confiscation of Criminal Assets: Law and Procedure* (Round Hall Sweet & Maxwell: Dublin, 1999); P. McCutcheon and D. Walsh, 'Seizure of Criminal Assets: An Overview' (1999) 9 *Irish Criminal Law Journal* 127; F. Murphy and B. Galvin, 'Targeting the Financial Wealth of Criminals in Ireland: The Law and Practice' (1999) 9 *Irish Criminal Law Journal* 133; S. Murphy, 'Tracing the Proceeds of Crime: Legal and Constitutional Implications' (1999) 9 *Irish Criminal Law Journal* 160; J. Meade, 'The Disguise of Civility--Civil Forfeiture of the Proceeds of Crime and the Presumption of Innocence in Irish Law' (2000) 1 *Hibernian Law Journal* 1; J. Meade, 'Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture' (2000) 10 *Irish Criminal Law Journal* 11.

<sup>15</sup> D. Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press: Oxford, 1990) 277.

<sup>16</sup> Criminal Justice Act 1994, ss 4 and 9.

<sup>17</sup> Proceeds of Crime Act 1996, s. 1.

<sup>18</sup> Proceeds of Crime Act 1996, s. 2.

<sup>19</sup> Proceeds of Crime Act 1996, s. 3.

<sup>20</sup> Proceeds of Crime Act 1996, s. 4. Section 7 of the Proceeds of Crime (Amendment) Act 2005 allows a disposal order to be made where an interlocutory order has been in force for a period of less than seven years with the consent of all the parties concerned.

<sup>21</sup> Proceeds of Crime Act 1996, s. 8

<sup>22</sup> See S. Jaipaul, 'Assets Forfeiture in the United States' (1999) 9 *Irish Criminal Law Journal* 191.

<sup>23</sup> Racketeer Influenced and Corrupt Organisations Statute, Title IX to the Organised Crime Control Act 1970, 18 USC §§ 1961 *et seq.* While RICO required a conviction before asset forfeiture, the Comprehensive Drug Abuse Prevention and Control Act 1970, 21 USC § 848, allowed property to be forfeited in a civil court without a criminal conviction.

<sup>24</sup> *Dáil Debates*, 2 July 1996, vol. 467, cols 2372-2373, *per* Mr Ahern TD; col. 2444, *per* Mr Shatter TD; and col. 2473, *per* Mr O'Dea TD.

<sup>25</sup> The Offences against the State (Amendment) Act 1985 was limited in its lifespan, as it was brought in on a temporary basis and operated for a mere three months unless renewed by government order, and was only implemented in one particular instance.

<sup>26</sup> Offences against the State (Amendment) Act 1985, s. 3.

<sup>27</sup> *Clancy v Ireland* [1988] IR 326.

<sup>28</sup> *Dáil Debates*, 19 February 1985, vol. 356, col. 132, *per* Minister for Justice, Mr Noonan TD.

<sup>29</sup> *Dáil Debates*, 2 July 1996, vol. 467, col. 2409, *per* Mr O'Donoghue TD; also see col. 2374, *per* Mr Ahern TD; and col. 2473, *per* Mr O'Dea TD.

<sup>30</sup> See *Murphy v GM* [2001] 4 IR 113; *Murphy v Flood* (1 July 1999, unreported, HC); *M v D* [1998] 3 IR 175; *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185.

<sup>31</sup> *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156, *per* Fry LJ.

<sup>32</sup> S. Murphy, 'Tracing the Proceeds of Crime: Legal and Constitutional Implications' (1999) 9 *Irish Criminal Law Journal* 160.

<sup>33</sup> *O'Keeffe v Ferris* [1997] 3 IR 463 at 470, per O'Flaherty J, referring to a submission by counsel for the plaintiff.

<sup>34</sup> *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 at 217. In *Murphy v GM* [2001] 4 IR 113 at 147, the Supreme Court followed *Melling v O'Mathghamhna* [1962] IR 1 in which various indicia of a crime were elucidated. In *Melling*, the Supreme Court highlighted that a proceeding which involves detention, search, charge, bail and the imposition of a pecuniary penalty with liability to imprisonment if the penalty is not paid has all the indicia of a criminal charge. *Ibid.* at 9, *per* Lavery J; at 23, *per* Kingsmill Moore J; at 40-1, *per* O'Dalaigh J. Furthermore, Kingsmill Moore J stated that crimes are 'offences against the community at large and not against an individual' which attract a punitive sanction and which require *mens rea*: *ibid.* at 24.

<sup>35</sup> For example, in *AG v Southern Industrial Trust Ltd* (1957) 94 ILTR 161 at 167 both the High Court and the Supreme Court rejected the argument that the Customs (Temporary Provisions) Act 1945, which empowered the court to order the forfeiture of goods that had been illegally exported from the State, was unconstitutional on the grounds that it constituted a criminal procedure without the safeguards of due process. Similarly, in *McLoughlin v Tuite* [1989] IR 82 the Supreme Court held that the penalty imposed for failure to make tax returns under the Income Tax Act 1967 was a deterrent or incentive, and not a criminal sanction. It reached this conclusion because, besides the provision of a penalty, none of the characteristics of a criminal offence described in *Melling* were present. The court emphasised that, in particular, there was no element of *mens rea* present in the section as there was in other provisions which specifically created criminal offences. *McLoughlin* was followed in *Downes v DPP* [1987] IR 139.

<sup>36</sup> *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 at 223. This conclusion was followed by the Supreme Court in *Murphy v GM* [2001] 4 IR 113 at 153.

<sup>37</sup> *Various Items of Personal Property v United States* (1931) 282 US 577. Sutherland J stated that '[This] forfeiture proceeding ... is *in rem*. It is the property which is proceeded against, and, by resort to legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense': *ibid.* at 581.

<sup>38</sup> *United States v Ward* (1980) 448 US 242.

<sup>39</sup> *Ibid.* at 248-9.

<sup>40</sup> *Enright v Ireland* [2003] 2 IR 321.

<sup>41</sup> The absence of terminology such as 'guilty' and 'conviction on indictment' was seen as significant in *Downes v DPP* [1987] IR 139 where Barr J found that a statutory provision concerning revenue matters was coercive rather than punitive. He noted that such concepts were used in other provisions which created revenue offences. Moreover, in *DPP v Boyle* [1994] 2 IR 221 the High Court relied on the presence of the words 'an offence' and 'on summary conviction' in ss 24 and 25 of the Finance Act 1926 to determine that the wrongdoing referred to constituted a criminal matter.

<sup>42</sup> *Dáil Debates*, 9 July 1997, vol. 480, col. 166, *per* Mr O'Donoghue TD.

<sup>43</sup> *Kennedy v Mendoza* (1963) 372 US 144 at 168-9.

<sup>44</sup> J. Clark, 'Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis' (1976) 60 *Minnesota Law Review* 379 at 455. See H. L. A. Hart, *Punishment and Responsibility* (Clarendon Press: Oxford, 1968) at 4-5.

<sup>45</sup> *Conroy v AG* [1965] IR 411 at 433, *per* Walsh J.

<sup>46</sup> *Department of Revenue v Kurth Ranch* (1994) 511 US 767 at 777, n. 14, quoting *United States ex rel. Marcus v Hess* (1943) 317 US 537 at 551: '[w]hether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the "sting of punishment"'. This view was reiterated by the European Court of Human Rights in *Welch v United Kingdom* (1995) 20 EHHR 247 at para. 32, noting that the severity of the order is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned.

<sup>47</sup> See text above accompanying n. 33 *et seq.*

<sup>48</sup> *Helvering v Mitchell* (1938) 303 US 391 at 401. *Helvering* was followed in *United States ex rel. Marcus v Hess* (1943) 317 US 537 at 549-50; *Rex Trailer Co v United States* (1956) 350 US 148 at 151-4 and *One Lot Emerald Cut Stones and One Ring v United States* (1972) 409 US 232 at 237.

<sup>49</sup> *Austin v United States* (1993) 509 US 602 at 618-19.

<sup>50</sup> *Ibid.*

<sup>51</sup> See the comments of the former Minister for Justice, Equality and Law Reform, Mr McDowell TD, to the Select Committee on Justice, Equality, Defence and Women's Rights, 30 June 2004, vol. 37.

<sup>52</sup> See text above accompanying n. 36.

<sup>53</sup> J. Bishop, *Criminal Law*, 2nd edn (1858) 703, cited in T. Piety, 'Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process' (1991) 45 *University of Miami Law Review* 911 at 942.

<sup>54</sup> M. Stahl, 'Asset Forfeiture, Burdens of Proof and the War on Drugs' (1992) 83 *Journal of Criminal Law and Criminology* 274, text accompanying n. 176.

<sup>55</sup> Criminal Assets Bureau Act 1996, s. 4.

<sup>56</sup> See text above accompanying n. 39.

<sup>57</sup> *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 at 218.

<sup>58</sup> Proceeds of Crime Act 1996, s. 1. See Meade, 'The Disguise of Civility', above n. 13 at 17.

<sup>59</sup> See above n. 41.

<sup>60</sup> D. Fried, 'Rationalizing Criminal Forfeiture' (1988) 79 *Journal of Criminal Law and Criminology* 328 at 371-2.

<sup>61</sup> H. L. A. Hart, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401 at 405.

<sup>62</sup> C. S. Steiker, 'Twenty-Sixth Annual Review of Criminal Procedure: Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide' (1997) 85 *Georgetown Law Journal* 775 at 804.

<sup>63</sup> *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 at 217. See Meade, 'The Disguise of Civility', above n. 13 at 17.

<sup>64</sup> *McK v F* and *McK v H* [2005] 2 IR 163 at para. 15, per Geoghegan J, following *McK v F* (24 February 2003, unreported, HC).

<sup>65</sup> The possession of controlled drugs for sale or supply is an offence by virtue of s. 15 of the Misuse of Drugs Act 1977 (as amended) while Part IV of the Criminal Justice Act 1994 (as amended) provides for the offence of money laundering

<sup>66</sup> Stahl, above n. 53, text accompanying n. 185.

<sup>67</sup> *M v D* [1998] 3 IR 175 at 184.

<sup>68</sup> *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 at 237.

<sup>69</sup> *Ibid.*

<sup>70</sup> M. O'Higgins, 'The Proceeds of Crime Act 1996' (1996) 2(1) *Bar Review* 12.

<sup>71</sup> *Re Winship* (1970) 397 US 358 at 365-6.

<sup>72</sup> *United States v Ursery* (1996) 518 US 267 at 278.

<sup>73</sup> *Ibid.* at 290-1.

<sup>74</sup> H. Packer, *The Limits of the Criminal Sanction* (Stanford University Press: California, 1968) 153.

<sup>75</sup> *Ibid.* at 158.

<sup>76</sup> Ibid. at 159.

<sup>77</sup> Ibid. at 160-2.

<sup>78</sup> Ibid. at 164.

<sup>79</sup> Ibid. at 166.

<sup>80</sup> Ibid. at 167.

<sup>81</sup> See A. S. Goldstein, 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure' (1974) 26 *Stanford Law Review* 1009 at 1016; P. Arenella, 'Rethinking the Functions of Criminal Procedure' (1983) 72 *Georgetown Law Journal* 185 at 211.

<sup>82</sup> D. Smith, 'Case Construction and the Goals of Criminal Process' (1997) 37 *British Journal of Criminology* 319 at 335-6. Ashworth proposes a reconstruction of Packer's models so as to articulate that crime control is the underlying purpose of the system, the pursuit of which is qualified by respect for due process, while Duff suggests that the crime control model should be renamed the efficiency model, given that crime control may refer to both the goal of the system and a set of values underpinning that goal: A. Ashworth, *The Criminal Process: An Evaluative Study* (Clarendon Press: Oxford, 1994) 28; P. Duff, 'Crime Control, Due Process and "The Case for the Prosecution"' (1998) 38 *British Journal of Criminology* 611 at 614.

<sup>83</sup> R. Henham, 'Human Rights, Due Process and Sentencing' (1998) 38 *British Journal of Criminology* 592 at 593.

<sup>84</sup> Packer, above n. 73 at 173.

<sup>85</sup> The upholding of the due process model by the Irish courts is evident in the exclusion of evidence obtained in breach of constitutional rights (*People (AG) v O'Brien* [1965] IR 142; *People (DPP) v Kenny* [1990] 2 IR 110); the strict rules governing the admissibility of confession evidence (*People (AG) v Cummins* [1972] IR 312); the exclusion of compelled statements in later criminal trials (*Re National Irish Bank Ltd and the Companies Act 1990* [1999] 3 IR 145); and the avoidance of presumptive sentences for drug trafficking under s. 5 of the Criminal Justice Act 1999 (*People (DPP) v Botha* [2004] 2 IR 375; *People (DPP) v Vardacardis* (unreported, 20 January 2003, Court of Criminal Appeal)).

<sup>86</sup> The argument that s. 9 of the Proceeds of Crime Act 1996, which allows the High Court to direct the respondent to file an affidavit specifying his property and income, breaches the right of the individual against self-incrimination, was rejected in *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185, *Murphy v GM* [2001] 4 IR 113 and *M v D* [1998] 3 IR 175, on the basis that the privilege against self-incrimination is not absolute. Incursions on the right to silence and the right against self-incrimination were held to be constitutional and proportionate in *Heaney v Ireland* [1996] 1 IR 580, in the context of a provision which sought to investigate and punish serious, subversive crime.

<sup>87</sup> See text above accompanying n. 33.

<sup>88</sup> See S. Kilcommins, 'The Primacy of Crime Control in Ireland' *Irish Jurist* (forthcoming, 2007).

<sup>89</sup> M. D. Dubber, 'Policing Possession: The War on Crime and the End of the Criminal Law' (2001) 91 *Journal of Criminal Law and Criminology* 1 at 93.

<sup>90</sup> Ibid. See Steiker, above n. 61 at 792.

<sup>91</sup> F. B. Sayre, 'Public Welfare Offences' (1933) 55 *Columbia Law Review* 35.

<sup>92</sup> Ibid. at 35.

<sup>93</sup> Dubber, above n. 87 at 93.

<sup>94</sup> D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press: Oxford, 2001) 105 et seq.

<sup>95</sup> Ibid. at 110.

<sup>96</sup> Ibid.



<sup>97</sup> Ibid. at 113 *et seq.*

<sup>98</sup> Ibid. at 131-2.

<sup>99</sup> The introduction of extended detention periods for suspected drug traffickers under s. 2 of the Criminal Justice (Drug Trafficking) Act 1996 and presumptive sentences of 10 years for convicted drug traffickers under s. 15 of the Misuse of Drugs Act 1977 (as amended) may be classified as a form of acting out.

<sup>100</sup> *Seanad Debates*, 27 June 1996, vol. 148, col. 420, *per* Mr Mulcahy.

<sup>101</sup> *Murphy v GM* [2001] 4 IR 113 at 136.

<sup>102</sup> *Dáil Debates*, 2 July 1996, vol. 467, col. 2435, *per* Ms O'Donnell TD.

<sup>103</sup> Criminal Assets Bureau Act 1996, s. 8(1).

<sup>104</sup> Criminal Assets Bureau Act 1996, s. 8(8). This provision was upheld in *DPP v Gantely* (25 February 2000, unreported, High Court).

<sup>105</sup> Indeed, the most recent report of the CAB expresses its belief in the benefits of a 'multi agency, multi disciplinary and partnership approach to tackle the proceeds of criminal conduct': Criminal Assets Bureau, *Annual Report 2005* (Criminal Assets Bureau: Dublin, 2006) 47. Moreover, in contrast with the typical policy-transfer in which the Irish legislature adopts the developments of other states, the CAB's structure and modus operandi has been heralded as an example for other jurisdictions, with its multi-agency approach in particular attracting considerable international attention. See Criminal Assets Bureau, *Annual Report 1999* (Criminal Assets Bureau: Dublin, 2000) at 5, para. 3.2.

<sup>106</sup> J. Lea, 'Hitting Criminals Where It Hurts: Organised Crime and the Erosion of Due Process' (2004) 35 *Cambrian Law Review* 81.

<sup>107</sup> *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 at 205.

<sup>108</sup> *Dáil Debates*, 19 November 1998, vol. 497, col. 122, *per* Minister for Justice, Equality and Law Reform, Mr O'Donoghue TD.

<sup>109</sup> *Dáil Debates*, 8 October 1997, vol. 481, col. 276, *per* Mr Higgins TD.

<sup>110</sup> 'Election 2002, The Issues: Crime', *Irish Times*, available at [www.ireland.com/focus/election\\_2002/issues/crime.htm](http://www.ireland.com/focus/election_2002/issues/crime.htm) (last accessed 22 July 2007).