

A CRITICAL ANALYSIS OF THE MANY MANIFESTATIONS OF THE CRIMINAL JUSTICE SYSTEM AND THE PRINCIPLES THAT UNDERLIE THE CURRENT IRISH SYSTEM

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A INTRODUCTION

In order to analyse the current criminal justice system, it is necessary to reflect on what systems have gone before it. The structures and principles that define our system of criminal justice are complex and have evolved over many centuries. These principles have manifested themselves into a number of different forms and it is from these principles that the foundations for the current criminal justice system have been created. Therefore, it is necessary to examine these principles carefully in order to provide a detailed analysis of the current systems in place.

This paper shall essentially be broken into two parts; first, the historical development of the criminal justice system and second, the current Irish system. The first section will deal with the transitions between the pre-modern, modern and late-modern eras. To aid this discussion, the essential and extensive works of David Garland and Michel Foucault will be explored, with a view to explaining the reasons underlying the evolution of penal policy.

The second part of this paper, which discusses the current Irish position, will be broken down into two sections. The first section will discuss specific examples of late-modern penal policy in the Irish domain. The second section will critically analyse sentencing policy in Irish law and attempt to explain the current attitudes and guidelines that underlie sentencing in Ireland. There is a definite link between these two notions and an in-depth analysis of both constituents will hopefully shed light on the current Irish criminal justice system.

It is essential to look at this particular topic in a detailed, analytical manner as there have been significant changes in penal policy over a number of centuries. This author hopes to come to a conclusion regarding the system of justice which exists in Irish law today, following a detailed account of the factors that have influenced it.

B THE HISTORICAL DEVELOPMENT OF THE CRIMINAL JUSTICE SYSTEM

Michel Foucault's book, *Discipline and Punish*¹ is an ideal starting point for this discussion. The relationship between power and knowledge is central to Foucault's work and *Discipline and Punish* essentially charts the reorganisation of the power to punish and how changing power relations affected punishment. The original practice of punishment, which is now known as the 'pre-modern' era of punishment, was administered exclusively by the sovereign and focused on inflicting pain to the body of the accused. The execution was a public spectacle and the whole economy of power was

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¹ M Foucault and A Sheridan (tr) *Discipline and Punish: The Birth of the Prison* (Vintage New York 1979).

invested in the excesses of torture, which was a deliberate strategy.³ The effectiveness of this type of punishment came from its visible intensity in front of the main characters, which were the viewing public, and illustrated the power of the sovereign to inflict 'authorised violence' to regulate its domain.⁴

However, the disappearance of public executions marked the decline of the spectacle and the birth of a new manifestation of the criminal justice system. Physical pain, the pain of the body itself, no longer constituted the element of punishment.⁵ The system of punishment loosened its hold on the 'body' and instead focussed its attention on the 'soul' and a whole new morality concerning the act of punishing was therefore created.⁶ From being an art of unbearable sensations, punishment has become an economy of suspended rights⁷ and 'punishment, if I may so put it, should strike the soul rather than the body'.⁸

This change in direction is towards an era known as modernity. A new strategy of punishment emerged and the mechanisms of power adjusted to problems that the 'pre-modern' system encountered. Problems such as the abstract will of the sovereign, which was generally accepted as universal, the lack of adequate supervision of the sovereign's actions and also the notion that torture was seen as a method of punishment, were all reconstructed and looked at in a different light.⁹ These problems emphasised the need for change in the system. The reformers, such as Baccaria and the Ideologues, advocated what Foucault calls 'the gentle way in punishing'.¹⁰ It was submitted by this group, that the sentence should attack the source of crime, by punishing precisely those interests and desires that prompted the offence in the first place and that punishments and their implicit messages should be publicly displayed for all to see. However, the generalised use of the prison, with its characteristic secrecy and isolation, was at odds with the theories of reformers. Foucault illustrates that the prison could accommodate the needs of the criminal justice system and he presents to the reader the political significance of the prison in 'a way that has never previously been done'.¹¹ The prison is still the universal mechanism of punishment in society today, therefore it is necessary to give a brief outline of the notions that Foucault presents to the reader to justify the introduction of the prison.

³ *ibid* 35

⁴ D Garland 'Review: "Foucault's "Discipline and Punish" – An Exposition and Critique' (Autumn 1986) 11(4) *American Bar Foundation Research Journal* 847, 850.

⁵ Foucault (n 1) 11.

⁶ Foucault (n 1) 12.

⁷ *ibid*.

⁸ G de Mably *De la Legislation Œuvres Completes* IX (1789) 326.

⁹ D Garland 'Frameworks of Inquiry on the Sociology of Punishment' (March 1990) 41 *British Journal of Sociology* 1, 5.

¹⁰ Foucault (n 1) 104.

¹¹ Garland (n 3) 858.

Individualisation seemed to be the ultimate goal of this precisely adapted 'modern' code. There was a general acceptance that the same punishment does not have the same effect on different people and that there is a need to adapt punishments. It is submitted that this notion is linked with the new respect for the humanity of the condemned that was emerging in this 'modern' period. Foucault refers to this notion as the 'rule of optimal specification'¹² which emphasises the need for individualisation of sentences in accordance with the particular circumstances of each criminal. 'The duration of the penalty has meaning only in relation to possible correction'¹³ according to Foucault, and this ties in with another main premise of the 'modern' criminal justice system and also the prison, which was the notion of normalisation.

The theory behind normalisation was to make a body efficient or as Foucault states, docile, by means of disciplinary punishment. This method is essentially corrective, rather than punitive in orientation. It individualises by making it possible to measure gaps and thus normalises by reducing these gaps by specific training.¹⁴ However, this theory of normalisation would not have been possible without the concept of supervision. The theory of supervision can be seen throughout the 19th century in the architecture of prisons and hospitals, so as to create a better observation of both criminals and patients. The disciplinary institutions secreted a machinery of control that functioned like a microscope of conduct where 'eyes that must see without being seen'.¹⁵ It was this discreet and constant supervision that served the purpose of observing individuals and helping to correct their ways.

The concept of the examination, which was highly ritualised, also combined with the above techniques to maintain discipline and to exercise power discreetly. It was based on the premise that if one was always seen and placed in a field of surveillance, it would result in a disciplined individual. The theory of the examination and disciplinary power is exercised through its invisibility, but conversely it gains its power from the fact that its subjects are always visible.

Garland examined these findings and following his detailed analysis, the result was the 'penal welfare' system, which was in essence a hybrid system and similar to Foucault's concept of modernity but its time period differed slightly.¹⁶ It combined the liberal ideals of the due process model and proportionate punishment with a correctionist commitment to rehabilitation and welfare. These ritualised disciplines combine to illustrate that individual difference is relevant and they 'mark the moment when the reversal of the axis of individualization takes place'.¹⁷ These are the main contributions of the

¹² Foucault (n 1) 98.

¹³ Foucault (n 1) 122.

¹⁴ Foucault (n 1) 179.

¹⁵ Foucault (n 1) 171.

¹⁶ D Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press London 2001).

¹⁷ Foucault (n1) 192.

‘modern’ criminal justice system but there are countless other minor assertions, which will be compared and contrasted later in the paper, with elements of the system of justice which exists today.

It is necessary to map these changes from the ‘pre-modern’ to ‘modern’ systems as it is submitted that derivatives of these early principles are seen in the criminal justice system that exists today. However, more importantly, there is evidence to suggest that the modernizing process looks like it has been thrown in reverse. It is submitted that there is a ‘re-appearance in official policy of punitive sentencing and expressive gestures that appear oddly archaic and downright anti-modern.’¹⁸ This writer agrees with Garland’s assertion that the ‘late-modern’ penal regime that we live in today, has a certain resonance with the pre-modern ‘bloody’ principles of criminal justice, that have been discussed briefly already.

Throughout *The Culture of Control*, Garland is careful not to argue that the changes he sees in late 20th century policy signal the end of modernity and the blossoming of late modernity. Instead, he suggests that recent crime control initiatives, especially on both sides of the Atlantic, represent a ‘reconfigured complex of interlocking structures and strategies that are themselves composed of old and new elements, the old revised and re-orientated by a new operational context’.¹⁹

It is interesting to note the rapid and remarkable shift in penal ideas and philosophy, which began to happen in the 1970s. This assault began, according to Garland, from within the system. This lack of confidence was fuelled by a number of reports and commentators, expressly endorsing a retributive philosophy of punishment over the rehabilitative model of the penal welfare system and also expressing scepticism about the treatment approach.²⁰ Therefore, it is essential now to discuss the specific aspects of the ‘late-modern’ system of justice, to illustrate what similarities or differences exist with the ‘modern’ system of justice that Garland presents in *The Culture of Control*.

State agencies of crime control and criminal justice had become increasingly imbued with the spirit of ‘penal welfarism’ and the ideal of rehabilitation at the end of the 19th century and up until the last third of the 20th century. However, since then, they have become dominated by the pursuit of risk management. Risk is becoming a centralised generalised preoccupation and the worrying element of identifying offenders according to the risk they pose to society, is creeping into the criminal justice domain.²¹ This risk management concept is undeniably linked to a model advanced by

¹⁸ Garland (n 15) 3.

¹⁹ Garland (n 15) 23.

²⁰ See generally, *Report of the Working Party of the American Friends Service Committee – Struggle for Justice*, (Hill and Wang San Francisco 1971) and A von Hirsh, *Doing Justice: The Choice of Punishments – Report of the Committee for the Study of Incarceration*, (Hill and Wang New York 1976).

²¹ B Hudson *Justice in a Risk Society: Challenging and Re-Affirming Justice in ‘Late Modernity’* (Sage Publications London 2003) 203

Packer, known as ‘crime control’.²² It is submitted that these two principles are the underlying features of the post-modern criminal justice system.

C THE CURRENT IRISH SYSTEM

Packer notes that the repression of criminal conduct is by far the most important function to be performed by the criminal process. It is evident that the criminal sanction is now used to cover an increasingly wide spectrum of behaviour that would be defined as anti-social. This can be seen evidently in Irish law today. The first part of this chapter will extract a number of current examples to illustrate the changing face of the Irish system, towards a much more punitive and expressive form of justice. The second part of this chapter will investigate sentencing law in Ireland and address the question whether this particular area has been affected by the apparent introduction of late-modern ideals.

1 Examples of Late-Modernity in Ireland

Anti-Social Behaviour Orders (ASBOs) are a prime example of the crime control model in action. ASBOs were first introduced in legislation in England and Wales in 1999 and have since been introduced in Scotland, Northern Ireland and the Republic of Ireland, by former Minister for Justice Michael McDowell in 2007, amid considerable controversy.²³ Although an ASBO is a civil order, a breach is a criminal offence. This illustrates the legislature’s willingness to create laws that favour the incarceration of criminals; firstly, to limit any risks and secondly, to protect society in general. This is in contrast to the rehabilitative, corrective and discipline-based measures seen during the ‘penal welfare’ regime. There is evidence to suggest that risk-based techniques are a more effective means of control than discipline based ones, because one does not need to resort to the inefficient methods of direct coercion of individuals.

It is submitted that this crime control culture, when coupled with the framework of a risk-based society, is a very powerful tool. Exceptionally repressive laws, which delimit the rights of the accused, can be passed to protect the public from these outside risks, without adequate consideration of what they mean for the rights of the accused. For example, the widening of the powers of arrest under section 30 of The Offences Against the State Act 1939, illustrates that what appears to be emerging is the increasing normalisation of emergency terrorist legislation in the ordinary criminal justice realm. In addition to this, the presumption of innocence, which protects the accused by ensuring that he/she is innocent until proven guilty, has also been diminished by a number of Acts. For example, the Bail Act 1997²⁴ essentially allows preventive justice, as under section 2(2), an individual charged with a serious offence may be refused bail if it is reasonably considered necessary to prevent

²² H Packer ‘Two Models of the Criminal Process’ (Nov 1964) 113 U Pa L Rev 1.

²³ C O’Brien, ‘Headline Grabbing or Problem Solving?’ The Irish Times (Dublin Ireland 29 December 2006).

²⁴ The Bail Act 1997 as amended by The Courts and Court Officers Act 2002 s 33 and the Criminal Justice Act 2007 Part 2.

the commission of a serious offence by that person. A number of commentators have criticised these laws, as in essence they enforce the principles of crime control. For example, it is noted that:

American courts feel that preventive detention does not trigger the same level of protection as other penal detention decisions because pre-trial release is intended to manage risks rather than punish... it fits in with the notion that actuarial justice invites 'the underclass' to be treated as a higher-risk group that must be managed for the protection of the larger society.²⁵

It allows incarceration and detention without guilt being proven at the expense of the accused's rights. It is also submitted, that the burden of proof has shifted, to put the onus on the defendant to prove that he is not a risk to society.²⁶

Further support for this normalisation process can be seen in the willingness of the non-jury Special Criminal Court being used for non-scheduled criminal offences, like in the case of *Kavanagh v Ireland*.²⁷ These actions resemble the notion of 'moral panic', which Meade and Hamilton have widely discussed.²⁸ It is defined as a disproportionate social reaction to a threat or behaviour and it is especially seen in Ireland in relation to organised crime. For example, the Proceeds of Crime Act 1996 was enacted due to public pressure for action to be taken following the Jerry McCabe and Veronica Guerin murders. This shows the moral panic that Irish society experiences in relation to criminal activity and the lack of thought given to the rehabilitation of these criminals.

Management of risk can also be seen in recent attempts to attribute increasing responsibility to a variety of agencies, thus showing the diffusion of power in Irish society which, is in direct contrast with the exclusive sovereign power identified in *Crime and Punishment*. The Director of Public Prosecutions, the Criminal Assets Bureau and the Office of the Director of Corporate Enforcement are all examples of this diffusion of responsibility in a multi-agency approach rather than a hierarchical structure, as they are all entrusted with the ability to criminally prosecute.

2 Sentencing

It is now necessary to look at rationales behind judicial sentencing, as this is crucial to assessing how the judiciary come to a decision in criminal cases. It appears that the sentencing system has become more results orientated with the introduction of presumptive sentencing by the Criminal

²⁵ M Feeley and J Simon, 'Actuarial Justice: the Emerging New Criminal Law' D Nelken (ed) *The Futures of Criminology* (Sage Publications London 1994)

²⁶ M P O'Higgins 'Bail - a privilege or a right' (1998) 7(3) Bar Review 318. See also R. Keane, 'Preventative Justice' (1967) 2 Ir Jur 234.

²⁷ [1996] 1 IR 321.

²⁸ J Meade 'Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture.' (2000) 10(1) ICLJ 11, C Hamilton 'Moral Panic Revisited- Part 1' (2005) 15(1) ICLJ 8 and 'Moral Panic Revisited - Part 2' (2005) 15(2) ICLJ 9.

Justice Act 1999 (although only used five times since 1999, it is still operable) and mandatory sentencing, like provisions in the Road Traffic Offences Act 1961.²⁹ These types of provisions demonstrate the intention of the legislature to control crime and provide security in our society at the cost of the due process rights of the accused.

However, despite the legislature's attempt to entrench the risk management culture in Irish criminal justice, there is a glimmer of hope for the ideals of reformation and correction of offenders. As a result of the vital information provided by the Probation Service, judges can make more informed decisions about the best possible sentence in relation to the circumstances of the accused.³⁰ This glimmer of hope is reinforced by the Law Reform Commission Paper on Sentencing in 1996, that rejected the 'just deserts' principle in Irish law as they did not 'agree with this prioritisation or necessary inclusion of retribution as an aim of a particular sentence',³¹ again agreeing with penal welfare ideals.

There is also considerable case law to support the idea that the personal circumstances of the accused can be taken into account when sentencing. In the case of *State (Healy) v Donoughue*,³² Henchy J states that an appropriate sentence takes into account 'his degree of guilt and his relevant personal circumstances'. Both the cases of the *People (DPP) v McCormack*³³ and the *People (DPP) v WC*,³⁴ lend considerable weight to the accused's right to have his personal circumstances considered at the sentencing stage but it is submitted that the most important case in this realm, is the case of *People (DPP) v N Y*.³⁵ Here the Court of Criminal Appeal overturned a judgment of Carney J in the Central Criminal Court, which failed to acknowledge the personal circumstances of the accused and illustrated that individualised justice is still a respected principle in the Irish criminal justice system.³⁶ Foucault also reinforces this notion by showing that knowledge of the individual's personal circumstances and history was also vital to the sentencing procedures in the penal welfare era when he stated that:

²⁹ This Act provides for a number of offences when a court *must* (emphasis added) make a consequential disqualification order.

³⁰ T O'Brien 'Powers of Social Workers' Irish Times (Dublin Ireland 1 September 2006) 10 and the *Annual Report of An Garda Síochána 2006* (Stationary Office: Dublin 2006). See generally for debate on inter-agency co-operation and its beneficial impact on the crime/criminal rate.

³¹ Law Reform Commission, *Report on Sentencing* LRC 53-1996 (Law Reform Commission Dublin 1996) 2.34.

³² [1976] IR 325, 353.

³³ [2000] 4 IR 356.

³⁴ [1994] IRLM 321.

³⁵ [2002] 4 IR 309.

³⁶ T Healy and D McDonald 'Top Judge Rebuked by Court of Criminal Appeal Over Rape Case Court Remarks' The Irish Independent (Dublin Ireland 24 November 2007).

The observance of the delinquent should go back not only to the circumstances, but also to the causes of the crime; they must be sought in the story of his life... this biographical investigation is an essential part of the preliminary investigation for the classification of penalties.³⁷

Although this shows a minor deviation from the crime control/risk management society, the ideals of the risk society return when one looks at the role of the victim in the Irish criminal justice system. Garland cites the 'return of the victim' as one of his 12 indices of change³⁸ and this topic is evident in Irish jurisprudence. In the penal welfare model,³⁹ individual victims hardly featured at all but there has been a significant change in recent years. With the introduction of Victim Impact Statements,⁴⁰ video link technology and numerous victim support groups, the victim is becoming a much more representative character in the field of criminal justice. This is in contradiction to the principles that underlined the penal welfare model as it is shifting the emphasis of the criminal justice system onto the crime and away from the criminal, thus decreasing the aspects of the system aimed at reforming the individual. O'Malley notes that there appears to be a 'victim/society coalition' that can scupper any chances of an accused receiving a fair, corrective sentence.⁴¹ However, it is important to note that some judges have not forgotten the principles of penal welfarism and their duties to the rehabilitation of the accused although it is clear that the criminal justice system has a new affinity with victim's rights.⁴²

Andrews states 'criminal sanctioning without the delivery of correctional treatment services does not work'.⁴³ Some commentators such as O'Mahoney⁴⁴ would agree with this opinion, however, the recent developments, particularly in Irish Criminal Justice, would suggest otherwise. O'Mahoney states that:

[M]uch of this inadequacy can be attributed to the low value placed by the system on caring for any sort for the individual offender and

³⁷ Foucault (n 1) 252.

³⁸ Garland (n 15) 11.

³⁹ Foucault (n 1). See generally for an explanation of the penal welfare model.

⁴⁰ The Criminal Justice Act 1993, s 5(1).

⁴¹ T O'Malley, 'Punishment and Moral Luck: The Role of Victims in Sentencing Decisions' [1993] *Irish Criminal Law Journal* 3/1 40, 49.

⁴² M O'Halloran *The Irish Times* 'Lack Of Concern For Victim Denied' (Dublin Ireland Sept. 8 2003) Mr Justice Geoghegan noted: 'It is an absurd idea that because a judge or other powers-that-be, demonstrate concern for the rehabilitation of the criminal, they are thereby showing a lack of respect or a lack of concern for the victim.'

⁴³ D Andrews 'The Psychology of Criminal Conduct and Effective Treatment' in J McGuire (ed) *What Works: Reducing Offending* (Wiley Chichester 1995).

⁴⁴ P O'Mahoney 'Recent Penal Policy is Losing Touch with the Goal of Rehabilitation' (2005) 23(10) *ILT* 154.

to the authorities' failure to prioritise correction, or more appropriately rehabilitation, as the key principle underpinning the system.⁴⁵

The Probation Service or Welfare Service does most of the work and very little planning is attributed to helping former prisoner reintegrate into society.⁴⁶

The Irish Criminal Justice system cannot plead blind ignorance to this major problem due to a number of reports, including one very recent report by Irish prison chaplains, which have highlighted these critical shortcomings, yet nothing has been done to improve the situation.⁴⁷ Garland notes that at the beginning of the 20th century the prison was decentralised in Ireland with the introduction of borstals, Industrial schools and Magdalens to name but a few, but we have returned to the prison culture in recent times. It is suggested that the tipping point for the return to this culture was the public outcry following the murders of Veronica Guerin and Jerry McCabe. The Proceeds of Crime Act 1996, which was initiated by a Private Members Bill, was rushed through the Dáil and gave extensive powers of arrest to Gardaí, which in turn had a knock-on effect and increased the numbers of criminal prosecutions and penal sentences. This established the prison culture, which exists today in Irish society and is emphasised by the ever-increasing numbers of individuals in Irish prisons every year.⁴⁸

Incapacitation is a form of damage limitation and harm minimisation⁴⁹ and it is a mechanism designed to protect the public by segregating a harmful minority. It simultaneously serves as an expressive satisfaction of retributive sentiments and an instrumental mechanism for the management of risk and the confinement of danger.⁵⁰ It is accepted that incapacitation does not alter the individual nor does it decrease the likelihood of recidivism, it merely rearranges the distribution of offenders in society. However, this is not a recent admission, as Foucault notes that this was present in the penal reform

⁴⁵ *ibid* 154.

⁴⁶ See also, Oscar Traynor, Dail Debates 9 April, 1959 p 60, on Penal reform in our prisons in 1959 'Penal reform has been continuous... . [I]f you went into Mountjoy now [you] would be supplied with a spring bed.'

⁴⁷ *Whitaker Report of Committee of Inquiry into the Penal System* (Stationery Office Dublin 1985), *Re-integration of Prisoners Forum Report* (National Social and Economic Forum Dublin 2002 No 22) and *Prison Chaplain's Report 2006-2007* (Jesuit Centre for Faith and Justice Dublin 2007) which states that the 'current prison system has very little reformative vision and criticised attempts to rehabilitate prisoners as "totally inadequate."' The report also criticises the building of more prison places and says imprisonment has been virtually the only response to crime. It paints a picture of a 'Dickensian prison system where significant numbers of inmates walk aimlessly around prison yards or sleep through the best part of the day in violent drug infested institutions with little hope of rehabilitation' *The Irish Times* (30th November 2007).

⁴⁸ *Irish Prison Service – Annual Report 2003*, 4659 males committed and *Irish Prison Service – Annual Report 2004*, 4993 males committed.

⁴⁹ J Young *The Exclusive Society* (Sage Publications London 1999) 66.

⁵⁰ Garland (n 15) 199.

discussions of the 19th century.⁵¹ It further illustrates that the ideals of correction and reformation that were established by the penal welfare regime, have given way to a detention and incarceration based society with little thought for the offender's welfare.⁵²

D

CONCLUSION

In conclusion, it is submitted that the culture of crime control is extremely evident in the Irish criminal justice system. Although Garland's theories are not airtight,⁵³ nor were they specifically researched by Garland with the Irish criminal justice system in mind, there is evidence to suggest that this criminal justice system displays similar attributes to the 'pre-modern' regime. For example, the main method of punishment is the prison, which targets the body of the offender, as he is incarcerated and his movements restricted. Also, the state continues to emphasise the need for risk management, and Garland explores these notions in *The Culture of Control*. In addition, penal welfare attributes, such as individualisation and reformation, exist in limited supply. They can be seen in the way personal circumstances of the accused are taken into account by the judiciary when sentencing and the attempts of the probation service to reform individuals following incarceration. However, this author suggests that the period of late modernity is now upon us and there is a definite shift in attitude towards procedures that favour incarceration of offenders and the security of the general public, while still retaining minor elements that are favourable to the ideals of correction and rehabilitation.

It is submitted that the shift towards late-modern attitudes is welcomed in some cases and in other instances it is very much discouraged. The fact that the specific circumstances of an individual can be taken into account at sentencing stage is a very helpful and intelligent inclusion and one that this author believes is refreshing and helps protect the interests of the defendant. Conversely, punitive sanctions such as presumptive and mandatory sentencing for drug trafficking offences are repressive and burdensome on the defendant but they may have a positive overall impact on society as serious drug offences are prosecuted heavily. It is submitted that the natural progression for the Irish system was to follow other jurisdictions and introduce measures in line with the late modern attitudes of criminal justice. Although they may appear to be punitive and less rehabilitative than notions advanced by modernity, this author believes these measures are necessary to maintain order. The risk society that clearly exists today, coupled with the notion that crime is a phenomenon that cannot be halted, creates a society that is in need of heavy regulation and it is submitted that the late-modern ideals of justice and punishment fills this void.

⁵¹ Foucault (n 1) 265.

⁵² See generally, R Martinson 'What Works? - Questions and Answers About Prison Reform' (1974) 35 Public Interest 22, 54.

⁵³ Garland's theory is based on criminal statistics but it is generally accepted that a large number of crimes, such as sexual crimes or domestic violence offences, are not reported therefore his theory cannot give a precise view. Also, although Garland does not specifically refer to the Irish criminal justice system, his theory does not allow for the fact that prisoner populations can reduce, as it had done on a number of occasions in the 1990s in Ireland.