

**SPECIAL ISSUE**

# Beyond 'stagnation and change'?: Path dependency, translation and the 'layering' over time of Irish penal policy

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**Abstract**

In the past decade or so a significant body of work on 'Hibernian exceptionalism' to broader punitive trends has emerged. The dominant argument and characterisation of Irish penality within this broad schema is that it is exceptional for having been largely stagnant. This article takes issue with the stagnation or 'stickiness' that is often supposed to characterise the Irish penal system arguing that stagnation as a form of 'path dependency' fails to adequately account for key moments of penal change and downplays the temporal dynamics that are often apparent in policy development. Using two key 'policy windows' as case studies – the 1996 'moral panic' over crime and the post-2011 turn to a more progressive penal politics – it argues that greater consideration should be given to the 'translation' and 'layering' of policy decisions and the growing complexity of policy space that may result.

**KEYWORDS**

Hibernian exceptionalism, Ireland, path dependency, penal policy

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## 1 | INTRODUCTION

Originally developed by economists to explain the adoption of new technologies, path dependency has become a key concept in explanations of why institutions in political life do not change as much as might be expected. At its most basic, it denotes the idea that ‘history matters’ or, more verbosely, ‘what has happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time’ (Sewell, 1996, p.262). Much of the work based on this concept is premised on what historical institutionalists term the ‘punctuated equilibrium’ model that emphasises long periods of stasis interrupted by rare moments of change that become ‘critical junctures’ or ‘policy windows’ for future developments (Mahoney, 2000). The logic of this view holds that the internal, self-reproducing properties of institutions tend to produce stability over time, so that transformation can only really result from ‘exogenous’ or external shocks to the system (Mahoney & Thelen, 2010).

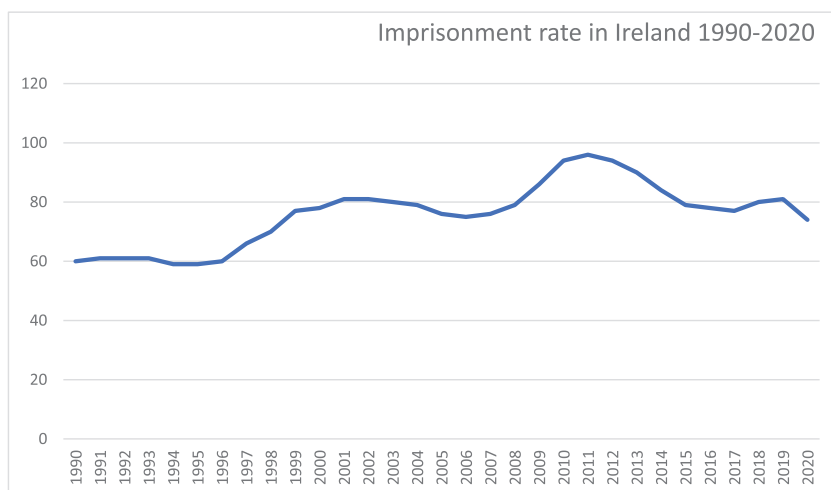
Applying these ideas to the penal field, Rubin (2023) has argued for the usefulness of path dependency as an analytic framework to understand periods of *stasis*, as well as *change*. Noting the clear bias in the sociology of punishment literature towards moments of change and innovation, she convincingly argues that perhaps the most significant contribution of the path dependency concept is in shifting our focus from ‘the beginning and end of the story to the underexplored middle’ (p.269). Rubin does not overlook the limitations of the path dependency approach, however, including the rather deterministic approach taken by conventional path dependence theorists to the role of institutions, which either persist or are abandoned. Another issue is that the emphasis on internal (endogenous) reproduction or continuity, on the one hand, and external (exogenous) change on the other renders it difficult to conceptualise and theorise gradual processes of *endogenous* change (Rubin, 2023). More recent contributions have sought to overcome these problems by moving away from a simplistic alternative between periods of crisis on the one hand, and periods of stasis on the other, and allowing for a theorisation of change from within the system itself (Djelic & Quack, 2007). Leading the way in this area is political scientist Kathleen Thelen (2003) whose work on the post-war political economy of skills in Germany, Britain, the US and Japan shows that German training institutions, for example, barely changed during periods of crisis, while the most dramatic changes actually occurred during periods of ‘stasis’. Together with Jim Mahoney, Thelen has developed a theory of *gradual* institutional change arguing that, ‘[institutions] not only emerge and break down; they also evolve and shift in more subtle ways across time’ (Mahoney & Thelen, 2010, p.2). In an important theoretical contribution, Thelen (2003) identifies a number of mechanisms of gradual institutional change such as: conversion (the redeployment of existing institutions for new purposes); drift (the changed impact on existing institutions because of shifts in the institution’s environment and a lack of adjustment to them); and ‘layering’. The latter, in particular, is a useful concept that can aid understanding of the modes and mechanisms through which institutional evolution and change occur. Drawing on the work of Schickler (2001), Thelen (2003) defines this as a ‘partial renegotiation of some elements of a given set of institutions while leaving others in place’ (p.225). In later work, she described this as occurring ‘when new rules are attached to existing ones, thereby changing the ways in which the original rules structure behaviour’ (Mahoney & Thelen, 2010, p.16). Other mechanisms that fit this reasoning include ‘bricolage’ (‘the rearrangement or recombination of institutional principles and practices in new and creative ways’) and ‘translation’ (‘the blending of new elements into already existing institutional arrangements’) (Campbell, 2004; Crouch, 2005).<sup>1</sup>

This article applies this broader, more flexible approach to path dependency to contemporary (post-1990) penal politics in Ireland, focusing solely on the *translation* and *layering* concepts. Among Western jurisdictions at least, the Irish penal literature appears as an outlier to the criminological preference for penal change over stasis (Rubin, 2023). In the past decade or so a significant body of work on ‘Hibernian exceptionalism’ to broader punitive trends has emerged, within which the dominant characterisation of Irish penalty is that it is exceptional for having been ‘largely stagnant from the middle to late twentieth century’ (Brangan, 2022, p.142). As a jurisdiction that appears synonymous with ‘stagnation’ or ‘inertia’ (O’Donnell, 2008) rather than change it appears as a particularly apposite case study for the examination of processes of path dependency across time. The article proceeds as follows. The next section provides a brief overview of received wisdom regarding the broad trajectory of Irish penal policy in recent decades. This is followed by a more detailed examination of two case studies of penal change in Ireland which provide the article’s empirical focus. The final section discusses the implications of the case studies for the theory of path dependency. It argues for the utility of the translation and layering concepts for drawing attention to the way in which policy accretes over time and, most significantly, for providing a bridge between seemingly conflicting ideas on incremental change and punctuated equilibrium.

## 2 | IRISH PENAL POLICY: STAGNATION AND CHANGE

Like many smaller jurisdictions in the West and around the world, the Republic of Ireland has often escaped the criminological gaze. When the spotlight has fallen on the penal landscape, however, it has often served to complicate existing analyses (Hamilton, 2016). The Republic of Ireland’s rate of imprisonment remains low by international standards (75 per 100,000 population) (International Centre for Prison Studies (ICPS), 2021); rehabilitation and individuated justice remain core aims of the sentencing system (Healy & O’Donnell, 2005); formal risk-assessment tools are less in evidence than in other jurisdictions (Fitzgibbon, Hamilton & Richardson, 2010); and the penal system, for all its flaws, retains strong remnants of humanity (Kilcommins et al., 2004; O’Donnell & Jewkes, 2011). These, and other idiosyncratic features of the Irish criminal justice landscape, have often led to the term ‘Hibernian exceptionalism’ being used to describe contemporary Irish penal history (Griffin & O’Donnell, 2012).

This account has not escaped criticism, however. One of a new generation of Irish criminologists, Louise Brangan (2021, 2022) adopts a postcolonial or southern theory lens to launch a swingeing critique of the exceptionalism argument. Her basis for doing so is that Ireland’s exceptionalism is premised on ‘the belief that when it came to punishment and penal culture in the second half of the twentieth century, not much happened here at all’ (Brangan, 2022, p.145). Taking aim at characterisations of the period as one of ‘neglect’, ‘stagnation’ and ‘calcification’ (Behan, 2018; Griffin, 2018; Kilcommins et al., 2004; O’Donnell, 2008), she argues that theorising Irish penalty in a more appreciative manner renders visible its ‘pastoral’ characteristics, among them a concern with family, community and a clear suspicion of the prison as socially disruptive. Linked with these views of a stagnant penal culture is the conception of change. Much like the path dependency literature, this occupies a less prominent place in the scholarly literature in Ireland, although critical accounts of the ‘new punitiveness’ variety do exist (see, e.g., Hamilton, 2014a, 2014b; Warner, 2021). In much of the literature, however, change, when it occurs, is seen as being of a ‘staccato’ (O’Donnell, 2011), stop-start, nature, largely the result of political opportunism and the proclivities of individual ministers (O’Donnell & O’Sullivan, 2001; Rogan, 2011).



**FIGURE 1** Prison population rate per 100,000 population in Ireland 1990–2020

Sources: O'Donnell, O'Sullivan & Healy (2005); Irish Prison Service, *Annual reports* (various years). Rates calculated using population estimates from the Central Statistics Office, Republic of Ireland.

While the stagnation versus change narrative has often been applied to Ireland in the period spanning the 1930s–1970s, as an analytical frame it is frequently extended to contemporary events, as O'Donnell's (2008) article 'Stagnation and change in Irish penal policy', in this journal attests. While acknowledging (akin to several Western jurisdictions in the 1990s/early-2000s) a commitment to penal expansionism in Ireland at that time, he also refers to a 'unique degree of tardiness' in the development of criminal justice policy. Likewise, Rogan's (2011, p.214) detailed analysis of prison policy from 1922 to 2010 speaks of 'drifting along' as a 'recurrent feature of Irish prison policy', with 'penal inertia' punctuated only by 'highly emotional moments such as high-profile crimes'.

The following sections take as their focus two periods of significant change in Irish penal politics, namely, the 'moral panic' over crime in the summer of 1996 and the post-2011 turn to a more progressive penal politics. It goes without saying that these have not been the only crises in Irish criminal justice in the post-1990 period,<sup>2</sup> but, it is ventured, they are two of the most impactful, heralding 'punitive modernisation' (Brangan, 2021) and 'penal moderation' (Bennett, 2013, p.2) respectively. This is evidenced in Figure 1, where both years mark key points of departure for the prison population, with imprisonment rates increasing by 35% in the period from 1997 to 2002 and decreasing by 23% between 2011 and 2016 (Hamilton, 2022). While Figure 1 also suggests a brief period of penal expansionism between 2007 and 2010, this can best be understood as the culmination of the financial largesse of the Celtic Tiger era (O'Donnell, 2011). As such, the political fallout from this period, in terms of the fate of the controversial Thornton Hall superprison, significantly overlaps the second post-2011 case study.

### 3 | THE 'MORAL PANIC' OVER CRIME IN IRELAND IN SUMMER 1996: IRELAND'S 'PUNITIVE MOMENT'

It is not difficult to identify the first 'critical juncture' in contemporary Irish penal politics, one widely regarded as a watershed moment in Irish criminal justice (O'Donnell & O'Sullivan, 2003),

and which, as Rogan (2011) notes: ‘casts a long shadow’ (p.11). On 26 June 1996, investigative journalist Veronica Guerin was shot in broad daylight by a group of major Dublin criminals who had been linked to illegal drugs trafficking. Her murder followed the shooting dead of policeman Jerry McCabe by the Irish Republican Army (IRA) during an armed robbery, further adding to the general sense of lawlessness. The reaction of the political establishment to these murders was swift. Following intense media coverage of the crime issue, the Dáil was recalled from its summer recess for a special debate on crime on 25 July. In a remarkably short space of time after the journalist’s murder, the government of the day had met public concern with a £54 million ‘anti-crime package’, described by the *Bar Review* (1996) as ‘the most radical single package of alterations to Irish criminal law and procedure ever put together’ (p.5). Among the reforms proposed were revisions to the basic principles underlying bail; significant incursions on the right to silence; seven-day detention for those charged with serious drugs offences; and a novel civil forfeiture process aimed at sequestering the proceeds of crime. In addition, the package provided for the recruitment of 400 extra gardaí; more prison spaces; a new remand prison at Wheatfield; and new powers to provide for the eviction of known drug dealers from housing estates (Hamilton, 2014b). As O’Donnell & O’Sullivan (2003) observed:

These killings were defining moments in the debate about law and order in Ireland. They were the catalyst for a hardening in political attitudes. Crime control became a national priority and for a time it was almost as if a state of national emergency had been declared . . . This was a textbook case of ‘moral panic’. (p.48)

In sharp contrast to the low priority accorded crime in previous soundings, opinion polls now showed crime to be a key issue for the public. In 1997, an election year, 41% of people polled indicated that ‘crime, law and order or justice’ should be the main issue on which the parties should fight the campaign. A further 88% felt that the government was losing the fight against crime (MRBI, 1997). The high level of public concern was doggedly exploited by Fianna Fáil in opposition. The shadow Justice Minister John O’Donoghue promised to ‘wage war on crime’ and ‘to give the streets of the country back to the Irish people’. His party’s election manifesto contained promises on mandatory sentencing for those dealing in drugs over a certain value, reform of the bail laws, extra gardaí and prison places and – the jewel in the crown of the opposition strategy – zero tolerance policing. Having won the election, the new Minister delivered on his promises with some gusto. Between 1996 and 2000, the Garda Vote was increased by 42% and in 1999 legislation was enacted providing for a presumptive minimum sentence of ten years for the offence of trafficking drugs worth over £10,000 (€13,000). In a dramatic policy change, projections as to the number of additional prison places required were also revised upwards by a factor of ten in the space of three years, from 210 in 1994 to 2,000 in 1997 (Department of Justice, Equality and Law Reform, 1994; O’Donnell & O’Sullivan, 2003).

While tumultuous and epoch-defining,<sup>3</sup> it is important not to place too much significance on this period as a moment of penal rupture. For one thing, public concern on crime was not sustained. The public concern which had swept the country during the 1997 election quickly dissipated and by the 2002 general election crime was once again off the electoral agenda (Kilcommins et al., 2004, p.139). This was Ireland’s ‘punitive penal *moment*’ (Brangan, 2022, p.146, italics added), not ‘punitive *turn*’. For another, the impact of these measures on the justice system was quite mixed. While the prison population leapt from 2,124 in 1995 to over 3,000 persons in 2000, zero tolerance policing, despite an initial increase in ‘zero tolerance’ type prosecutions, did not take hold in Ireland, as in other jurisdictions (Jones & Newburn, 2006; O’Donnell & O’Sullivan, 2003). There is also an important sense in which the events of the summer of 1996 can be regarded as a catalyst, or perhaps even culmination of a longer-term hardening of the political climate on

crime, what O'Mahony (1996) described as a 'new penal militant tendency' (p.3). This is revealed through close attention to the late-1980s and early-1990s, periods often described by commentators as 'stagnant' or characterised by 'uninspired pragmatism' (Brangan, 2022, p.146). Hamilton's (2014b) examination of the number of hits for 'crime' in the Dail and Seanad debates, for example, shows the increased salience of crime as an issue, with references to crime more than trebling in the six years between 1990 and 1996. This was reflected in the pace of legislative change, described by one leading commentator as going from a 'gentle breeze' in the 1980s to 'a hurricane which shows little sign of abating' (Walsh, 2002, p.x). Analysis of the evolution of political thinking on crime over the longer term also points to a gradual coarsening of crime policy (Kilcommins et al., 2004). References to constitutional rights and promises to uphold the law of the land '*without recourse to repressive measures*' in the 1976 and 1981 election manifestos disappear in the later election programmes which also feature the occasional draconian policy proposal. One such example is Fianna Fáil's pledge in 1987 to introduce 20-year mandatory sentences without remission for drug traffickers, an echo of the ten-year presumptive sentence for drug trafficking enacted in 1999 (Hamilton, 2014b).

The same may be said of other key policies forming part of the government response to the murders, such as Ireland's reputedly liberal bail laws. Bail reform had been on the political agenda for long time, a 'perennial source of political heat' (Rogan, 2011, p.184), with plans afoot as far back as 1967 to reverse the seminal *O'Callaghan*<sup>4</sup> decision on bail (which prevented the possible admission of an offence while on bail as a ground for refusing bail). As Rogan's (2011) policy study shows it was only the requirement to hold a referendum, rather than simply enact legislation, that held back this initiative. A final, but crucial, point concerns the delivery of extra prison spaces, a cornerstone of the Fianna Fail election platform on crime, but one which was largely achieved through 'taking credit for plans already in place and counting prison openings as additional places it had provided' (Rogan, 2011, p.190). After all, a shortage of prison places, overcrowding and the 'revolving prison door' were problems that had dogged the Irish penal system long before the summer of 1996, and it was logical that the institutional response to this problem had a longer gestation.

Finally, the 1996 Irish case study represents a good example of 'penal layering' (Rubin, 2016) with the co-existence since the foundation of the state of a 'special' justice regime, targeted at 'subversives', alongside the ordinary criminal justice system. In this respect it is certainly relevant that the right to silence was first abolished and the civil asset forfeiture procedure first introduced in the context of the struggle against subversive crime. According to Vaughan & Kilcommins (2008) the 'primary impetus' for the novel 1996 Proceeds of Crime legislation derived from the Offences Against the State (Amendment) Act 1985, which allows for forfeiture of property of unlawful organisations and its vesting in the Minister. Indeed, in introducing the legislation Minister O'Donoghue actually referred back to the 1985 Act and the decision in *Clancy v. Ireland*, upholding its constitutionality, as providing a 'clear and direct precedent for legislation of this type'.<sup>5</sup> In like manner, it is no coincidence that the wide-ranging measures, such as incursions on the right to silence and seven-day detention, introduced to combat organised crime in the Criminal Justice (Drug Trafficking) Act 1996, were first pioneered under the Offences Against the State Act 1939 (Hamilton, 2021). The Irish criminal justice system is thus no stranger to draconian measures, having adopted these in the past to counter paramilitary activity, and returning to them again as 'tried and tested' solutions in its response to serious crime (Hamilton, 2021).

## 4 | THE POST-2011 TURN TO A MORE PROGRESSIVE PENAL POLITICS

The second discernible ‘critical juncture’ on the contemporary penal landscape in Ireland assumes a very different political complexion to the first case study, with this period seeing a shift to a more progressive, and reductionist, penal politics. The exogenous shock in this instance is the ‘electoral earthquake’ (Little, 2011) precipitated by the 2011 general election, described by Mair (2011) as the third most volatile in Western Europe since 1945. The election saw Fianna Fáil, long the dominant party in Ireland’s political landscape, severely punished by the electorate for their poor handling of the post-2008 economic crisis, and a concomitant increase in the proportion of the vote going to left-leaning parties. The fallout in terms of criminal justice policy was similarly momentous. Rogan (2013, p.12) discerns in this period ‘some of the most significant changes since the 1960s’ (Rogan, 2016, p.443), among them new legislation requiring judges to consider community service when a sentence of up to twelve months may be imposed; the elimination of ‘slopping out’ from Mountjoy Prison (the main prison in Dublin); and the introduction of a ‘community return’ scheme allowing prisoners on early release to carry out work in the community (Rogan, 2016). Reflecting on the shift away from the ‘bullish’ (Rogan, 2013, p.12) penal politics of the 1990s, Rogan argues that it was the tumultuous 2011 general election, and the resultant leftward shift in Irish politics, that provided ‘political cover for policymakers to say tough things about the prison system’ (Rogan, 2016, p.445).

Much of this ‘tough talk’ emanated from the then Minister for Justice, Alan Shatter, who assumed the portfolio following the election. While Shatter himself belonged to Fine Gael, sometimes described as the traditional party of ‘law and order’ in Ireland (O’Donnell and O’Sullivan, 2003), he was also an energetic reformer who very much sided with the liberal, rather than the conservative, wing of his party (McGee, 2014). Shatter’s period in office also came at a rather unusual time in Irish politics. The extent of the banks’ exposure to the Irish property bubble meant that the global recession had hit Ireland hard and the country formally entered recession in September 2008. In November 2010, after weeks of official denials, the government confirmed that Ireland had requested financial support from the International Monetary Fund (IMF), European Union (EU) and European Central Bank (ECB). The ‘troika’, as they came to be known, imposed severe constraints on the spending of successive governments, and the loss of economic sovereignty and recriminations that followed ensured that political and institutional reform remained high on the political agenda (Stafford, 2011). Perhaps sensing this, Shatter, in an unprecedented move, established a series of commissions and reports into the operation of the penal system such as a strategic review group of penal policy, a review group examining the question of mental health and the criminal justice system, and a review group to examine the plans for a ‘super-prison’ (Thornton Hall) proposed by a former Minister for Justice. Adding to this chorus was the all-party Joint Oireachtas Committee on Justice, Equality and Defence, which in October 2011 established a subcommittee on penal reform to examine alternatives to the use of imprisonment (Houses of the Oireachtas, 2013). The tone struck by all of these reports was overwhelmingly progressive. The Oireachtas subcommittee on penal reform, for example, unanimously called for a ‘decarceration strategy’ advocating for the reduction of Ireland’s prison population (then just over 4,200) by one-third over ten years (Houses of the Oireachtas, 2013). The Strategic Review of Penal Policy, which reported in the following year, similarly recommended a reduction in the prison population, expansion in the use of alternatives to custody and an increased use of open prisons (Penal Policy Review Group, 2014). Indeed, the shift in tone has been such that even long-term

(and perhaps justifiably cynical) observers of the Irish penal scene have allowed themselves to express 'cautious optimism' about the changed penal policy environment (see, e.g., Hamilton, 2019; O'Donnell, 2021). Perhaps even more astonishing, the commitment to penal reductionism evident across all of these reports, and subsequent decline in imprisonment rates between 2011 and 2016 (O'Donnell, 2017), were largely met in Ireland with a significant degree of cross-party consensus (Rogan, 2013, p.13).

There is an important sense in which the above narrative *does* tell the story of contemporary Irish penal politics. Assuredly, a large number of progressive penal policy recommendations have been made in Ireland in recent years. There is also little doubt that when Alan Shatter became Minister for Justice reducing prison numbers was a top priority and this reduction has been achieved, along with significant improvements in the physical infrastructure of Irish prisons (Guilfoyle, 2017). Moreover, as noted below, the legacy of this period continues into the present, through, for example, 'in some quarters increased sensitivity to the overuse of imprisonment' (Irish Penal Reform Trust, 2021, p.9). Tempting as it is, however, to view Ireland's post-2011 penal policy as emerging into a sunlit upland of understanding, a closer look reveals a more complex picture, one characterised by both change and continuity (Hutchinson, 2006). Perhaps the first, and most obvious, point concerns the degree to which the system has experienced real change 'on the ground', something that holds particular significance in Ireland where policy and practice do not always chime (Hamilton, 2014a). As noted, imprisonment rates fell in Ireland during the period under examination, from a peak of 96 per 100,000 of the population in 2011 to 78 per 100,000 in 2016. However, O'Donnell (2021) has argued that 'it would be misleading to interpret these trends as evidence of a national commitment to leniency or a coherent strategy of penal parsimony' (p.245), and, in the absence of any clear agreement as to why this occurred, he expresses doubt as to whether the reduction will be sustained. O'Donnell's arguments are supported by the comments of the chairperson of the Implementation Oversight Group established to monitor progress on the Strategic Review Group's recommendations. In the letter accompanying the *Seventh report* in 2019 the chairperson acknowledged that the group represented 'a step-change' in thinking about penal policy in Ireland, but went on to express concern about the failure to enact legislation regarded as essential to its blueprint, such as the enshrining in statute of the principle that imprisonment be a measure of last resort (Penal Policy Review Group Implementation Oversight Group, 2019). As such, much of the Penal Policy Review Group's vision remains unfulfilled. An additional point made by Warner (2021, p.133) is that some of the policies identified by Rogan as evidence of the new penal zeitgeist, such as the incentivised regimes and the community return schemes, remain accessible only to 'the few not the many', with the Irish Prison Service (IPS) struggling to meet its own targets in 2019 (Irish Penal Reform Trust, 2019).

A second aspect, which speaks more directly to Thelen's concept of 'layering', concerns the degree to which penal policy was already moving in a more progressive direction prior to the 'critical juncture' of the 2011 general election and the appointment of Alan Shatter as Minister for Justice. Rogan (2013) cites the Criminal Justice (Community Service) Act 2011 as a flagship piece of legislation in this regard, yet this bill was actually the second bill on community service published in 2011. The first, proposed by former Minister for Justice, Dermot Ahern, also sought to amend the Criminal Justice (Community Service) Act 1983 requiring courts to consider imposing a community service order in lieu of a sentence of imprisonment, but with a lower threshold of six months rather than twelve months. This bill, in turn, can be traced back to the *Value for money and policy review of the community service scheme* published in October 2009 (Irish Probation Service, 2009) and which recommended increasing the use of the community service scheme. Similarly, while Minister Shatter is credited with major reform of the fine payment and recovery



system in Ireland through the Fines (Payment and Recovery) Act 2014, this development was foreshadowed in the Fines Act 2010 which aimed at reducing dependence on imprisonment for default on payment of fines. Indeed, the main difference between the two acts is the inclusion in the 2014 Act of a scheme to provide for attachment of earnings. Less significant in practical terms, but also important, is the expansion in 2011 of two restorative justice pilot schemes in Dublin and Nenagh following a report from the National Commission on Restorative Justice (2009), decisions also taken by Minister Ahern. All of these developments suggest a government concerned with delivering financial savings to the Exchequer through the diversion of offenders from the prison system, even some years prior to the seismic events of 2011.

The same incremental approach can also be detected in relation to the much-touted rollback on the proposed Thornton Hall 'superprison' in 2011, a project described by Rogan (2016) as a 'symbolic manifestation of a distinctly punitive turn in Irish penal policy' (p.442). The plan to build this gargantuan prison with the potential to hold 2,200 prisoners at Thornton Hall on a green field site in north county Dublin has been described as the 'swansong' (Rogan, 2013, p.12) of the Celtic Tiger era, announced in January 2005 when balance sheets were much healthier. The aim, as stated by the government, was to replace a cluster of prisons, including a dilapidated Victorian prison (Mountjoy), holding about 850 prisoners in Dublin and save costs on staffing through the deployment of modern penal technologies (Brangan, 2009). The plan was finally mothballed following a recommendation from a review group set up by Minister Shatter that a smaller prison be built on the site, a view accepted by the government at the time but not progressed since. The report of the Thornton Hall Project Review Group (2011) is significant, both for its stated desire to reduce reliance on imprisonment, and for its recommendation that an all-encompassing strategic review of penal policy should be carried out. As with the community service legislation, however, the groundwork for this stunning, and costly, volte-face in Irish penal policy was laid some years in advance. In May 2009 the government announced that, despite costs of over €41 million on the site, it would not be going ahead with the project as originally envisaged, namely, as a public private partnership and the public private partnership (PPP) competition was abandoned. Plans were further watered down in July 2010 when, in light of the economic circumstances, the then government decided that the development of the prison campus at Thornton Hall should proceed on a phased basis. Go-ahead was given for the first phase of the development (400 cells) but no decision was taken in relation to proceeding with future phases of the project.

## 5 | ANALYSIS: BEYOND 'STAGNATION AND CHANGE'?

The Irish case studies discussed above provide good illustrations of the more dynamic conception of path dependency advanced by Thelen, Mahoney and others, as well as criminological arguments that the appearance of significant change hides a near-permanent state of contestation underneath the surface (Goodman, Page & Phelps, 2017). Drawing on the above analysis, this section argues that, taken together, these accounts suggest two, related but distinct, mechanisms of incremental institutional change, namely, *translation* and *layering*.

As noted, translation, or 'the blending of new elements into already existing institutional arrangements' (Campbell, 2009, p.99), is a concept that is closely related to the layering concept in its emphasis on gradual change. Moreover, this is an approach that can account for change that is path dependent: '[t]hrough ... translation actors create new institutional combinations, but combinations that still resemble their predecessors to a significant degree in so far as they are made up of institutional principles and practices that entrepreneurs have inherited from the

past' (Campbell, 2004, cited in Campbell, 2009, p.99). Translation is evident in both the post-1996 and post-2011 case studies discussed above, with radical shifts in the direction of punitiveness (1996) or lenience (2011) strongly mediated by existing institutional arrangements. Thus, Minister John O'Donoghue's radical plans for 2,000 additional prison spaces never materialised, and were largely folded into pre-existing plans for prison openings, while much of the promise of the Penal Policy Review Group's vision remains unfulfilled. With regard to the former, Rogan (2011, p.190) may well be correct that the Department of Justice 'put something of a dampener' on Minister O'Donoghue's punitive ardour on assuming office. Looking to the latter, suspicions must also abound that the Department exerted a similar dampening effect on the – admittedly quite radical – plans for penal contraction outlined in the post-recessionary period. Whether this derives from a form of fiscal conservatism, or even a liberal reformist agenda, remains an open question, although it almost certainly links with a heavily unionised and conservative Civil Service where mistakes 'get carried around with you' (Beesley, 2022) and 'the degree of resistance to innovation is marked' (O'Donnell, 2011). Writing recently on Civil Service reform, Arthur Beesley (2022) quotes a former Minister on the slow pace of decision making in government departments: 'there's so many hurdles to get over before you can get anything done that's it's very hard to get anything done. ... the problem is that they can think up so many ways of preventing you from doing what you want to do, some of them good reasons' (p.9). To be clear, this is not to say that these policies had no effects; the increase to 515 spaces in the Midlands prison, which Minister O'Donoghue did achieve on his own initiative, in itself represented a significant expansion of the penal estate. Similarly, the unprecedented level of scrutiny and critique of the penal system in the post-2011 period has resulted in a number of progressive changes to the prison infrastructure as well as legislative commitments to penal reform that continue to resonate in the 2020 Programme for Government (Hamilton, 2019; Irish Penal Reform Trust, 2020). It has also coincided with a fall in the prison population. In some ways, of course, this history is still unfolding, and the more radical effects of a given policy path may only be felt post-hoc, as Farrall & Hay (2010, 2014) have argued in relation to Thatcherism.

The second mechanism of gradual penal change is layering. Unlike translation, which occurs in the implementation phase, layering occurs when new, potentially transformative, arrangements are added to older ones over time. This is evidenced in a variety of ways in both the Irish cases. The 1996 Summer Anti-Crime package can be regarded *both* as the culmination of many years of heightened concern and increased legislative activity about crime *and* the steady accretion of exceptional legislation introduced in the context of the struggle against subversive crime. In relation to the latter, Hamilton (2019) has described this as a form of 'contagion' from the 'special' to the 'normal' criminal justice system that occurs when such exceptional policies become the yardstick against which legislators and the public measure their ability to counteract other serious crime (see also Kilcommins & Vaughan, 2004). Important here also is the bureaucratic tendency to return to old law and order solutions, evident also in relation to the law on bail (Bigo, 2002; Cahn, 2010). In 2011, too, we have seen that some of the flagship legislation heralded by commentators as emblematic of a new progressive penal era, was in fact already in train, driven largely by economic imperatives. This leads on to the next point, which is the relationship between the incremental penal change discussed above and exogenous shocks.

It will be recalled that the traditional institutional change literature views major change as resulting predominantly from exogenous shocks, such as financial crises or war. Indeed, in her examination of penal change, Rubin (2023) identifies war – the American Revolution, the Civil War, the Second World War, etc. – as a recurring catalyst for sudden shifts in American penal history. In the Irish context, as we have seen, received wisdom has understood change as precipitated

by, respectively, the murders of Veronica Guerin and Garda Gerry McCabe, and the tumultuous 2011 general election. Closer analysis, however, places the impetus for reform earlier than these accounts acknowledge, strongly influenced by the state of the national finances or what O'Donnell (2011) has described as 'the bottom line'. Incremental reforms diverting offenders away from the prison system and moves to delay and dilute the building project at Thornton Hall were in place some years before the 2011 general election, reflecting Ireland's dire financial straits at that time. Similarly, an increasingly 'bullish' approach to law and order is also evident long before the Guerin and McCabe murders in June 1996, although when these events catapulted crime to the top of the public's concerns, the buoyant state of the public finances allowed the state to 'move quickly to reassert control' (O'Donnell, 2021, p.250).

## 6 | CONCLUSION

While often synonymous with stagnation or 'stickiness', the Irish criminal justice system is far from impervious to change (Hamilton, 2016). In a critical engagement with the inertia that is often supposed to characterise the Irish penal system, this article has re-examined two key turning points in Ireland's penal history, namely, the 'moral panic' over crime in the Summer of 1996 and the post-2011 turn to a more moderate penal politics. By tracing the *translation* of new policies into existing arrangements and the steady accretion of institutional *layers* in the years prior to these events, the cases draw attention to less visible, but significant processes of endogenous change, as well as to the critical role played by external factors. Mirroring the criticisms of the static nature of the punctuated equilibrium model, it is clear that stagnation as a form of 'path dependency' together with the 'staccato' nature of Irish penal policymaking, fails to adequately capture key moments of penal change and downplays the temporal dynamics that are often apparent in penal policy development. While the passage of time clearly affords a different perspective from that of contemporary commentators, a stadal view of criminal justice history, tying particular times to specific types of control (in this case, stagnation – change – stagnation), neglects the ways in which 'currents of past regimes of control flow in the river of the now, such that several streams of time wash and run together' (Churchill, 2019, p. 484; see also Churchill, Yeomans & Channing, 2022).

From the perspective of historic institutionalism, it is argued that these mechanisms form an important bridge between the punctuated equilibrium model of exogenous shocks, which in Ireland appear closely tied to the economy, and theories of incremental change (Van der Heijden, 2011). Within criminology, a parallel debate has taken place between those advancing pendular-style accounts, emphasising sudden ruptures with the penal past (Garland, 2001; Simon, 2007), and those who prefer a more 'agonistic perspective', seeing ongoing conflict among different actors or groups as the primary mechanism for change (Goodman, Page & Phelps, 2017). Yet, as Rubin (2019) argues, the choice may not be as stark as this. By putting empirical flesh on the bones of exogenous and endogenous change, the Irish case studies illustrate *both* the downstream effects of grand penal narratives *and* 'subdermal contestation' of radical swings in penal policy in either direction (Rubin, 2019). As in Scotland, where an apparent consensus on (welfarist) probation practice masked considerable heterogeneity and conflict, clear elements of continuity in the Irish penal narrative coexist with continuous contestation (McNeill, 2019).

Moreover, for Irish penal scholars, it serves the additional purpose of providing a more nuanced understanding of penal trajectories than the 'stagnation vs. change' dualism and the narrative of Hibernian exceptionalism that appears to accompany it. As a theory of the 'middle-range'

(Merton, 1949), incorporating (in its current guise) both exogenous and endogenous institutional change, path dependence retains much utility as a means of challenging (Anglocentric) meta narratives. The application of portable, transposable concepts such as layering and translation from the path dependence literatures casts Ireland less as 'exceptional', a penal outlier, and more as an institutional system struggling (like many others) to navigate both external shocks and change from within the system itself. As such, it may avoid the (somewhat paradoxical) situation observed by Brangan (forthcoming) whereby in highlighting the 'exceptions' to the mainstream – and thereby accepting its dominant tropes – we end up reproducing, and reinforcing, 'contemporary academic imperialism'.

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## ENDNOTES

<sup>1</sup>For further discussion of 'conversion' and 'drift' see Mahoney and Thelen (2010, pp.17–18); for further discussion of the concept of 'bricolage', see Campbell (2009, pp.98 et seq.).

<sup>2</sup>Periods of intense public concern over crime in Ireland have tended to follow killings by members of organised crime groups. See, for example, discussion by Daly and Jackson (2016, p.282) and Hourigan et al. (2018) who identify 1996 and 2008 as key moments in this regard.

<sup>3</sup>The murder is the subject of a 2003 biographical crime film, *Veronica Guerin*, directed by Joel Schumacher and starring Cate Blanchett in the title role.

<sup>4</sup>*People (Attorney General) v. O'Callaghan* [1966] 1 IR 501

<sup>5</sup>Dail Eireann, vol. 467, col. 2409, 2 July 1996.

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