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Organised Criminals as "Agents of Obligation": The Case of Ireland

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Abstract Relying on Brown's (2005a, b) thesis that contemporary shifts in penal policy are best understood as a reprisal of colonial rationality, so that offenders become "non-citizens" or "agents of obligation", this article argues, firstly, that this framework (with certain important refinements and extensions) finds support in developments in Irish criminal justice policy aimed at offenders suspected of involvement in "organised crime". These offenders have found themselves reconstituted as "agents of obligation" with duties to furnish information about their property and movements, report to the police concerning their location and, importantly, refrain from criminal activity or face *extraordinary* sanctions. Secondly, it is submitted that this draconian approach to the control of organised crime is built on false premises; specifically the idea that "organised crime" as such exists and is best controlled through restrictions on the freedom of key groups or "core nominals".

Keywords "Agents of obligation" · Organised crime · Punitiveness

Introduction

The debates surrounding the advent of a "new punitiveness", "new penology" or "populist punitiveness" in Western jurisdictions are by now familiar to many criminologists (Feeley and Simon, 1992, 1994; Garland, 2001; Bottoms, 1995; Pratt, 2007). Latterly, however, the concept of the "new punitiveness" (Pratt *et al*. 2005) has come in for increasing criticism. Commentators have pointed to the weak empirical base for such claims and the lack of specificity associated with terms such as "punitiveness" and "populism" (*eg* Matthews 2005; Daems 2008). Against this background, it is well to consider the arguments of those advancing a more limited conception of the changes which have taken place in the last quarter century and it is one such approach which forms the subject of this article. Relying

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on Brown's (2005a, b) thesis that contemporary shifts in penal policy are best understood as a reprisal of colonial rationality, so that offenders become "non-citizens" or "agents of obligation", this article argues that this framework finds support in developments in Irish criminal justice policy directed at those associated with organised criminality. To date, legislation targeting organised criminals in Ireland has been conceptualised solely in terms of the move towards a "crime control" model of criminal justice (Walsh 2004), an increasingly regulatory state or (following Garland 2001) as an "adaptive response" to the stubborn problem of organised crime gangs (see, for example, Campbell 2007). This paper falls in three parts. Having elaborated further on Brown's arguments in Part 1, it is intended in the second part to examine recent law reforms in Ireland directed at "organised criminals" drawing on this framework and to propose some refinements and extensions to Brown's thesis in light of the Irish experience. In the final section, the article proceeds to examine recent literature which is critical of the concept of "organised crime" on which much of this legislation is based. It concludes by arguing for a shift in the analytical focus away from "organised crime" *per se*, to the organisation of serious crimes (plural).

Liberalism, Exclusion and Colonial Rationalities

Taking issue with those who propose an overly broad conception of "exclusion" and punitiveness, Brown (2005a) argues that it is only those developments signifiying a *radical* reconfiguration of the relationship between the offender and the state which truly herald the advent of a new penal harshness. The "new punitiveness" (Pratt *et al*. 2005) is therefore characterised as policies and practices which permanently displace penal subjects from the field of political citizenship, rather than effecting (*per* Foucault 1977) a limited suspension or attenuation of their liberty rights. The principal criterion which he employs in identifying such policies and practices concerns the notion of the offender as an "agent of obligation". He poses the question as follows:

> Does this penalty or measure tinker with the rights of political subjects, or does it radically transform the status of the individual, thus revising the relationship with the state into one structured around obligation?

Thus, the offender is reconstituted as an "agent of obligation" rather than as a recipient of rights. In a relatively brief application of his ideas to the contemporary penal field, Brown (2005a, b) proposes three forms of contemporary punishment which meet this criterion, namely, civil commitment statutes, sex offender notification requirements and mass imprisonment. All three, he argues, result in the radical exclusion of individuals or a whole community (in relation to mass imprisonment) from society and political citizenship. Civil commitment statutes do so by removing from society (on a civil standard of proof) an offender who has served his sentence on the basis that the individual no longer has the capacity to govern their behaviour and thus live freely in society. Such removal is in many cases permanent given the severe difficulties faced by an offender in establishing that a change in their dispositions or capacities has occurred. Similarly, sex offender registration and notification schemes require the offender to provide accounts of their movements and avoid certain areas in a manner which significantly circumscribes their freedom. The role of the sex offender as primarily an "agent of obligation" rather than "recipient of rights" is revealed in him or her becoming subject to a range of obligations which no ordinary citizen could be required to bear (Brown 2005b). Brown also views the mass imprisonment of ethnic minorities and indigenous groups in countries such as the US and Australia as a more

indirect form of exclusion aimed at limiting their full participation in civic and political life. As he also notes, similar trends can be observed in Europe in the much higher rates of imprisonment to which migrant communities are exposed.

Contemporary developments which he considers do not fit within this paradigm include zero-tolerance policing, boot camps, mandatory sentencing and other penal austerity measures. On this view, such penal innovations fail to confer special obligations upon offenders and may therefore been seen as commensurate with Foucault's (1977: 11) "economy of suspended rights". There is arguably a tension here between characterising mass imprisonment of ethnic minority groups as a function of the "new punitiveness" *qua* tool of political exclusion while simultaneously excluding from its ambit those policies such as mandatory sentences which have significantly contributed to the problem and this is a point to which we will return later.

Brown bases his argument on the changes which have taken place in the political relationship between government and offender; changes which he claims recall a colonial model of state-subject relationship. In this model, the relations between the subject and the state are structured around assessments of character and virtue. Colonial subjects were permitted to access (limited) rights associated with citizenship only upon displaying certain virtues and demonstrating that they were able to live in a certain, new way. Brown (2005b) gives the example of the Vernacular Press Act 1878 which sought to restrain the activities of the vernacular press in India but which, as one Bengal governor noted, merely imposed the prerequisites of "responsibility" and "restraint" necessary for civic and political participation. Colonial subjects therefore existed within a realm of obligation for which there were no corresponding rights to be claimed. It is the burden of Brown's (2005b: 47) argument that certain serious offenders exist in a similar realm where contemporary penal policies have reinstated "the superordination of virtue". In his view, it is precisely because the character and virtue of sex offenders is so much in doubt that these offenders are physically removed or subjected to notification requirements.

Interestingly, Brown has not only sought to connect contemporary developments with colonial governance strategies but also with exclusionary themes inherent within the structure of liberal doctrine. He draws attention to the conditional nature of political liberty as originally formulated by Mill (1972). "Barbarous" or "rude peoples", for example, were considered incapable of self discipline and "autonomy" was thus recognised by Mill as a precondition to full political participation. Colonial rule conceptualised in this way within the bounds of liberalism facilitated the constitution of a distinct type of political subject: the colonial subject of exclusion. These features of liberal doctrine, Brown argues, are crucial to understanding contemporary liberalism's inheritance and thus assist us in understanding the "punitive turn" (Garland 2001) in Western society. Although a significant part of Brown's work is concerned with drawing analogies between colonial and contemporary strategies of exclusion, this is not its central concern. It is worth quoting at some length the following passage (2005a: 284) given the assistance it offers the reader in understanding the interaction between liberalism, colonialism and the new punitiveness:

> …what I seek to demonstrate here is… that certain contemporary penal practices render individuals or, in the case of mass imprisonment, groups, outside the realm of political critizenship. It might even be said that these practices represent something like a hangover of medieval "civil death", wherein individuals were stripped of all rights so as to be effectively legally dead, that has travelled through some wormhole within the structure of liberalism, appearing again first in colonial practices and now in an emerging ser of contemporary penal strategies.

Brown's arguments find a resonance in other theories which, like him, seek to emphasise the diminished or secondary status of offenders as rights holders. Brown himself in a later piece (2008) draws on Arendt's (1951) work on totalitarianism and the process of "othering" through the gradual stripping of political rights from subjects. He cites the uncertain legal status allocated to Guantanamo Bay detainees as "illegal enemy combatants" as an example of how modern day laws can result in the "death" of the juridical figure (Brown 2008). In a similar manner, Spencer (2009), also drawing on Arendt (1951) has written of the abandonment of the sex offender by the law and his or her exclusion into a "lawless space". Cruft (2008: 60) too, responding to Ashworth and Zedner (2008), expresses concern that a simple liberal individualism may lend support to what he terms the "them and us" view of the criminal law "where the law is conceived as imposed on people who, by their criminal behaviour, have opted out of our community of law-abiding ordinary people." Brown's account differs from these in that he is more specific about what forms of exclusion constitute, in his view, the new penal realm *viz.* only those which confer special obligations on their subjects.

Irish Law and the Organised Criminal

The problem of organised criminality and the appropriate response to it represents a principal concern in twenty-first century Ireland (Campbell 2007). Since the murder of journalist Veronica Guerin in June 1996[1] the Oireachtas (Irish Parliament) has passed a welter of legislation aimed at controlling the criminal activities of organised gangs and their assets (Hamilton 2007; Campbell 2007). Measures have ranged from a novel civil forfeiture mechanism aimed at seizing assets derived from criminality (Proceeds of Crime Act 1996) to the enactment of presumptive sentences for offences involving the use of firearms and trafficking drugs over a certain value (Criminal Justice Acts 1999 and 2006). Many of these reforms represent significant innovations in legal terms reflecting the fact that "the state views gun crime as portending a state of emergency or crisis that merits extraordinary legal measures" (Campbell 2010: 417). Indeed, as Bacik (2007) has observed, while our English cousins have busied themselves since 9/11 with enacting legislation aimed at combatting the Muslim terrorist, Ireland's national bogeyman has taken the more familiar form of the "overlords" and "godfathers" of organised crime. Three areas in which "organised criminals" are required by legislation to discharge special obligations will now be discussed employing Brown's (2005a, b) paradigm of the serious offender as an "agent of obligation".

Notification and Monitoring Schemes

The highly circumscribed existence of sex offenders following their release has been described by Brown (2005a, b) as an instantiation of their secondary citizenship. In certain Western jurisdictions, these offenders find themselves post-conviction "monitored, confined, restricted in activity and movement" (Brown 2008: 261). Ireland has adopted similar policies via the Sex Offenders Act 2001 which makes provision for convicted sex offenders to notify the Gardaí (Irish police) of their movements (the so-called "sex offender register"). The period for which offenders are subject to such requirements depends on the

[1] Although no one stands convicted of this crime, her killers were suspected to be among a group of major Dublin criminals who had been linked to illegal drugs trafficking and were said to be led by a man named John Gilligan.

length of the sentence imposed. Those who are sentenced to a period of more than two years' imprisonment will be required to provide this information for the duration of their lifetime. The 2001 Act also introduced a post-release supervision order whereby the Probation Service is charged with monitoring the offender over a given period. In addition to supervision, section 30 of the Act allows a sentencing court to impose a number of conditions on the offender, prohibiting him/her from doing certain things which the court considers necessary for public protection as well as engaging in counselling or other form of treatment. Failure to comply, without reasonable excuse, with the notification requirements or any of the supervision conditions is an offence attracting on summary conviction a fine of up to €3,000, or 12 months imprisonment, or both.

Two major pieces of legislation, namely, the Criminal Justice Acts 2006 and 2007, have now extended such provisions to other categories of offender associated with organised crime. Part 9 of the Criminal Justice Act 2006 creates a drugs offender (more correctly "drugs trafficking") "register" akin to the sex offender "register" allowing the movements of convicted drug dealers to be recorded in a similar fashion. Offenders must furnish the same type of information to the police, namely, name, date of birth, address and any changes thereto and address at which they will be resident if they intend to leave the State for longer than seven days. As with the sex offender provisions, the length of time for which the period lasts is commensurate with the length of sentence imposed. A sliding scale operates with the minimum period starting at one year (where the offender has received a suspended sentence) and the maximum being twelve years. There is a facility to apply for discharge after eight years (or four where the offender is a juvenile). Non-compliance with the notification requirement or the provision of false or misleading information constitutes an offence punishable by a fine of up to €3,000 or 12 months imprisonment or both.

Section 26 of the Criminal Justice Act 2007 empowers the court to apply similar monitoring provisions to those offenders sentenced to imprisonment in respect of certain serious offences associated with organised crime which are listed in Schedule 2 of the Act. The offender must notify an Inspector of the Gardaí of his/her address, any change thereto and any proposed absence for a period of more than seven days. A second order, called a "protection of persons" order, can also be made under the section. This order, unlike the requirements under Part 9 of the 2006 Act, lasts for a fixed term of seven years with the purpose of the section being stated as "the protection of the victim of the offence concerned or any other person named in the order from harassment by the offender". Its effect is wide-ranging and to a large degree contingent on the reaction of other persons as it prohibits the offender "from engaging in any behaviour that, in the opinion of the court, would be likely to cause the victim of the offence concerned or any other person named in the order fear, distress or alarm or would be likely to amount to intimidation of any such person."[2]

In light of the instant argument, it is notable that in the bill as originally presented it took the form of one all-encompassing order termed a "crime prevention order" which empowered the court to impose an unlimited number of conditions on an offender upon release for the purposes of ensuring "that persons that are likely to be affected by the presence of the offender are protected" and the offender will not commit any further offences. As former Attorney General, John Rogers SC, wrote in the *Irish Times* (4.4.07) the orders were unconstitutionally broad: "the power conferred on the courts in this instance is vague and uncertain. Apart from duration, *there is no limitation on the nature and extent of the conditions* the court will be empowered to impose on an offender who has already

[2] Section 26(5), Criminal Justice Act 2007.

been punished by serving what was considered to be the appropriate sentence of imprisonment."

While the criticisms levied by Rogers and others in the legal community forced the Minister to modify his proposals in a later draft of the bill, the section as originally conceived is interesting for what it reveals about the way in which offenders convicted of "organised crime" type offences are viewed by the Irish executive. The orders were constructed so that such offenders could be made subject to almost *any* condition (Brendan Howlin TD, Dail Debates, 24.4.07). As noted by opposition TD, Dan English, there was no provision for review within the ten year period and therefore no provision was made for ex-serious offenders "who made a good effort to behave" (Dail Debates, 23.3.07). As with the colonial subject, the character of these offenders was so suspect that their incapacity to function as a political subject was assumed. Even with regard to the two, more focussed orders which were eventually passed into law, it is notable that variation is only possible where the court is convinced by circumstances or "matters that have arisen or occurred since the making of the order".[3] While this requirement is also vague, the import appears to be that a change in the offender's dispositions or character must occur which will allow them to be reinstated to the realm of political citizenship.

Legal Requirements to Furnish Information

Further obligations imposed on the "organised criminal" in Ireland relate to the provision of information to Gardaí about their activities and property. This is evident in two controversial policy developments over the last fifteen years: first, the requirement to justify legal ownership of property through legislation providing for the civil forfeiture of assets and secondly, in aspects of the Criminal Justice Acts of 2006 and 2009 relating to the right to silence.

As noted above, the Proceeds of Crime Act 1996 was hurriedly enacted into law in a special sitting of the Dáil (Irish lower house of parliament) in the days following the murder of journalist Veronica Guerin. In the debating chamber, comparisons were drawn between Irish criminals and the Mafia in Italy, despite the huge discrepancies in the scale and complexity of the criminal gangs, and indeed, analogies were drawn between the Irish Republican Army (IRA) and organized crime (Hamilton 2007). There can be little doubt that in passing the legislation, the Oireachtas sought to target organised criminality in particular, even though the provisions of the Act apply to all crime (subject to the requirement that the value of the property is worth at least £10,000 or €13,000). It was claimed in the Dáil that the aim of the legislation was to "put drug traffickers out of business" (Minister of Justice, Dail Debates, 9.7.97). The structure of the Act serves to illustrate the way in which those suspected of involvement in organised crime are now characterised as "agents of obligation". The legislation allows for the seizure and forfeiture of property deemed to be the proceeds of crime in the absence of a criminal conviction and on the *civil* standard of proof, namely, the balance of probabilities. Significantly, hearsay evidence is admissible under section 8 of the Act and such evidence may include statements of (reasonable) belief by a Chief Superintendent that the property derives from the proceeds of crime and, more recently, documentary hearsay evidence.[4] The burden of proof is also reversed as, once the order has been made confiscating the property, the owners of the property in question are required to show it was obtained legally. Given that a successful

[3] Section 26(8), Criminal Justice Act 2007.
[4] Section 16A, Proceeds of Crime Act as inserted by s.12 of the Proceeds of Crime (Amendment) Act 2005.

application under the Act will lead to the wholesale expropriation of a citizen's property, the procedure under the Act can be described as "an appreciable quantum leap" (Moriarty 2001: 158) from proof beyond all reasonable doubt on admissible evidence. All of these provisions ensure for those defending such proceedings, as Brown (2005a) has argued in relation to civil commitment statutes, a high bar is placed before them prior to their rights (in this case, property rights) being re-instated.

Turning now to reforms relating to the right to silence, for many years there have been provisions in place in Ireland compelling suspects charged with subversive activity to speak. Section 52 of the Offences Against the State Act 1939 allows a Garda to demand an account of a suspect's movements and actions during any specified period and all information in his or her possession in relation to the commission of specified offences. As observed by Campbell (2010) it has been the practice of the Gardaí for many years to detain those suspected of "gangland crime" under anti-terrorist legislation such as the Offences Against the State Act 1939. This practice has been endorsed by the courts despite the fact that those detained do not have any subversive links so that "it remains a powerful tool against gun crime" (Campbell 2010: 418). The significance of this provision is the degree of compulsion involved: failure to comply does not result in adverse inferences being drawn at trial but constitutes a criminal offence punishable by up to six months imprisonment. While this provision has passed constitutional muster with the Irish courts,[5] it has been declared incompatible with the protections afforded the accused person in Article 6 of the European Convention of Human Rights. In *Quinn v. Ireland*,[6] the European Court of Human Rights held that the "degree of compulsion . . . destroyed the very essence of [the accused's] privilege against self-incrimination and his right to remain silent" and could not be justified by the security and public order concerns of the Irish state. While clearly the provision differs to the notification requirements imposed on sex offenders and those convicted of gangland crime, the similarities lie in the radical renegotiation of the relationship between state and citizen from one defined by respect to one defined by obligation. As Galligan (1988) has argued, the right to silence in many ways goes to the fundamental concepts of personhood and individual autonomy. Given that the Irish state normally respects its citizens through the non application of pressure to speak while in police custody (save where circumstances clearly require an explanation),[7] the *level of compulsion* applied here to certain citizens associated with subversive and organised criminal activity is indicative of an important shift in governmental strategy.

The introduction of the Criminal Justice (Amendment) Act 2009 has also seen additional obligations imposed on those suspected of organised crime offences under Part 7 of the Criminal Justice Act 2006. Section 9 of this Act inserts a new section 72A into the Criminal Justice Act 2006 so that adverse inferences can be drawn by a jury against such suspects where they fail to answer any question "material to the investigation of the offence" during the pre-trial period. This is defined very broadly to include any question requesting the defendant to give a full account of his or her movements, actions, activities or associations during any specific period as well as questions relating to evidence that the accused may be directing a criminal organisation. As observed by the Irish Human Rights Commission

[5] *Heaney v. Ireland* [1996] 1 IR 580.
[6] (2001) 33 EHRR 264.
[7] The only exception to this rule being citizens who are charged with offences which attract a penalty of five years imprisonment or more where the accused fails or refuses to account for objects or marks etc. on his or her person etc.; where the accused fails or refuses to account for his or her presence in a particular place; or where the accused fails to mention particular facts subsequently relied upon in his or her defence (ss. 18, 19 and 19A of the Criminal Justice Act 1984 as inserted by ss. 28-30 Criminal Justice Act 2007).

(2009: para. 30) "The definition of a "material question" … could apply to a very broad range of questions that could arise during police questioning, if not potentially *all* questions" (own emphasis). Additionally, unlike other adverse inference provisions in Irish law, there is no provision that the circumstances at the time clearly called for an explanation from the accused.

Mandatory and Presumptive Sentences

The inclusion of mandatory or presumptive[8] sentences within Brown's framework appears at first blush counterintuitive. These sentences do not appear to impose any special obligations on offenders over and above the prison terms they are required to serve. As Brown (2005a: 286) has written they represent merely the "partial, temporary and occasional suspension of citizens' liberty rights". Yet, the spread of "two" and "three-strike" mandatory sentencing laws across several western jurisdictions over the past twenty five years has been widely viewed as one of the prime contributors to, and indices of, the "new punitiveness" (Pratt *et al*. 2005). It can be said with some degree of confidence that the introduction of such laws in the US, particularly mandatory sentences relating to drugs offences, has played a highly significant role in the rapid growth of the prison population there since the mid-1970s (Zimring *et al*. 2001; Tonry 2004). Further, in some states, their effect has been has been to fill the prisons with expensive to manage and *permanent* prisoners who will more than likely end their days in captivity (Simon 2010).

In Ireland, we have witnessed a proliferation of presumptive statutes relating primarily to drug trafficking and firearms offences and other offences connected with organised criminal activity. Up until the introduction of the Criminal Justice Act 1999, there were relatively few mandatory sentences in Ireland, namely, the life sentence for murder, aggravated murder, treason and disqualification from driving for the offence of drunk driving. The 1999 Act amended the law to create a presumptive sentence of ten years for possession of drugs with a value of over approximately €13,000[9] thereby effectively introducing a "one strike" presumptive sentence. Similar provisions were enacted in the Criminal Justice Act 2006 in respect of several firearms offences such as possession of a firearm with intent to endanger life.[10] Very importantly, the 2006 Act also provided for true mandatory sentences (*ie* where judicial discretion is completely curtailed) for those who had committed a second or subsequent offence contrary to the above provisions. The *Criminal Justice Act 2007* represented another significant shift towards presumptive and mandatory sentencing in Ireland. Section 25 of the 2007 Act provides that if an individual commits a second or subsequent "serious offence" in the seven year period following a first "serious offence" (and that person received a sentence of five years imprisonment or more for that offence) then the presumptive sentence is three quarters of the maximum sentence provided by law or 10 years if the maximum is life imprisonment. These "serious offences" have been

[8] Presumptive sentences are here defined as those which set up a legal presumption that a particular sentence will apply, while also providing for certain exceptional circumstances in which this presumption may be disapplied.

[9] Section 15A of the Misuse of Drugs Act 1977 as inserted by the Criminal Justice Act 1999.

[10] Other offences include: possession of a firearm while taking a vehicle without authority (s.57, *Criminal Justice Act 2006*; 5 years); use of a firearm to assist or aid an escape (10 years; s. 58 *Criminal Justice Act 2006*); possession of a firearm or ammunition in suspicious circumstances (5 years; s.59, *Criminal Justice Act 2006*); carrying a firearm with criminal intent (5 years; (s.60 *Criminal Justice Act 2006*); shortening the barrel of a shotgun or rifle (5 years; s.65 *Criminal Justice Act 2006*).

described by the government as "linked to organised crime"[11] and include murder, threats to kill, causing serious harm, false imprisonment, extortion, aggravated burglary, and various explosives, drug trafficking and firearms offences.[12] Section 33 of the Act also tightened up the provisions concerning the ten year presumptive sentence for possession of drugs over €13,000 providing for a more restrictive reading of the "exceptional circumstances" proviso.

The result of this legislative activity has been for certain offenders a dramatic move away from the principle of proportionate sentencing in a jurisdiction where this principle has been elevated to near-constitutional status (O'Malley 2006). As the Court of Criminal Appeal has recently observed, these changes represent "a revolutionary alteration super-imposed on the conventional principles of sentencing" (DPP v. Dermody).[13] While Campbell (2010) has interpreted the main aims of the legislation as deterrence and incapacitation, predicated on a rational actor model, it is also possible to view the legislation in another light. In seeking to impose such harsh penalties on the offender the state appears to be placing a *special* obligation on the offender not to commit *certain types* of crime beyond the obligation all citizens hold to comply with the law. If this warning is not heeded, such offenders face *extraordinary* consequences through the application of a presumptive or mandatory sentence. In effect, they are placed outside of the realm of citizenship through excessive and disproportionate punishment. Ashworth and Zedner (2008: 43) put it well when they say "the drastic diminution in the rights of those subject to these sentences is implicitly justified on the grounds that these are offenders whose actions are so heinous as to take them outside citizenship and the protections that ordinarily adhere thereto…". Recognition of the exclusionary nature of these penalties also avoids the anomaly apparent in Brown's (2005a, b) original schema where mass imprisonment of ethnic minorities is recognised as a strategy of subordination yet the very policies (*eg* mandatory sentencing as part of the Reaganite "war on drugs") which have resulted in the disproportionate imprisonment of ethnic minority groups are not.

Re-examining the "Agents of Obligation" Thesis

Prior to offering some fresh perspectives on Brown's thesis, its limitations must be acknowledged. These relate, in an Irish context, primarily to a certain failure of implementation which acts as an important counterpoint to the introduction of more punitive measures. For example, there remains significant doubt about the extent to which sex offenders on the Garda "register" are actively policed (Hamilton 2010) and there has been some controversy over the delay in introducing the drug offenders' "register" (*Irish Independent*, 17.5.09). Similarly, it is also important to note that few ten year sentences have actually been handed down by the judiciary under the 1999 Criminal Justice Act owing to their reluctance to depart from the traditional principles of sentencing (O'Donnell 2005), albeit that the legislation has had an inflationary effect on the length of sentences for drugs offences. Observations such as these concerning the critical mediating role played by local factors serve as a salutary reminder against over-generalisation.

The above qualification aside, it is submitted that the paradigm proposed by Brown (2005a, b) holds some value in seeking to interpret innovations in organised crime control in Ireland. The diminished status of these offenders is often revealed in the rhetoric which accompanies such policies. In Ireland, "organised criminals" have been described as

[11] Government of Ireland, *Explanatory Memorandum on the Criminal Justice Bill 2007*, p.4.
[12] Schedule 2, *Criminal Justice Act 2007*.
[13] (2006) IECCA 24.

"animals" who "have stepped outside the bounds of humanity" (*Irish Times*, 10.4.09) and who have "no place in society" (Campbell 2010: 419). They are also frequently "othered" by Irish politicians through differentiating them from "decent people" (Campbell 2010). Indeed, as will be apparent from the above discussion, I have advanced an argument for a broader conceptualisation of Brown's "agents of obligation" thesis including mandatory or presumptive sentences and also policies which he would consider "temporary" or "occasional" such as those which place obligations on the accused person at the pre-trial or trial stage. The effect of this more expansive approach is to apply Brown's framework to criminal justice *procedures* as well as *punishments*. As argued by both Whitman (2003) and Kutatedlaze (2007) state punitiveness concerns the treatment given to a wide range of objects, including "those suspected of the commission of a crime, then charged or discharged, convicted or acquitted, incarcerated or punished in any other way, released from custody after finishing sentence or released on parole, and so on." In other words, punitiveness should be viewed holistically in line with the experience of the offender and this may include their treatment during the criminal investigation and trial. Perhaps, in attempting to restore some integrity and credibility to the concepts of exclusion and the "new punitiveness" (both of which he viewed as overbroad) Brown has drawn the line too neatly?

It could of course be argued that I have attempted to impose cohesion on an array of developments where none exists. It is also possible, as Ashworth and Zedner (2008) have done, to view contemporary developments in criminal justice policy as reflective of competing models of state function, namely, the regulatory, preventive and authoritarian state. Monitoring and protection orders under the 2006 Act fit neatly within the conception of the state as public protector or the "preventive state", civil forfeiture fits with the "regulatory state" model, while the erosion of the right to silence and the removal of judicial discretion tallies with the trend towards a more authoritarian state. It is certainly not my aim here to claim that Brown's argument accounts for *all* criminal justice innovations over the last thirty years. The "volatile and contradictory" (O'Malley 1999) field of criminal justice in many ways defies such simple characterisation. My argument is simply that an additional way of understanding recent developments may be found in what Cruft (2008) terms the "them and us" view of criminal law. It is clear that some Western jurisdictions such as the US, England and Wales and New Zealand, have pursued exclusionary policies against serious or dangerous offenders such as sex offenders, organised criminals or terrorists. In the process, they have arguably transformed the status of the suspect/offender from one based on rights to one structured around obligation. Brown (2008) gives the example of a New Zealand sex offender who found himself subject to a ten year extended supervision order despite living freely in the community for three and a half years. Looking to England and Wales, it is also possible to see the heuristic value of Brown's model in initiatives such as control orders and the erosion of procedural rights such as the rule against double jeopardy. Once certain serious offenders are caught up in the criminal justice net, the juridical figure is replaced by a second class citizen or "other" who is also an agent of obligation. These obligations can range from, at one end of the scale, effective house arrest (via control orders) to, at the other, the less onerous but nevertheless troubling prospect of a retrial, having already been tried and acquitted.

Reconceptualising "Organised Crime"

If serious concerns exist about the justice of such developments in combatting the problem of "organised crime", such problems are compounded by questions surrounding the efficacy

of the measures relating to the concept of "organised crime" itself. It is clear that in, for example, creating the drugs offender "register" and the new monitoring and protection orders the Irish government was aiming to tackle "organised" or "gangland" criminal activity through the gathering of intelligence on known drug dealers. Deputy Brown, a representative from the ruling party (Fianna Fail), noted as follows during the debates on the Criminal Justice Bill 2004 (which became the 2006 Act): "The link between gangland crime and drugs is inextricable. The sale and importation of drugs is clearly fuelling gangland crime which has had devastating consequences in communities across the country" (Dail Debates, 29.3.06). The intention with regard to the orders introduced in the 2007 Act is also made clear upon a survey of the types of offences to which they apply (Rogan 2008). Those listed in schedule 2 of the Act include murder, threats to kill, explosives and firearms offences, drug trafficking and the new "organised crime" offences[14] created under the 2006 Act. The orders were specifically presented by the Minister as innovative measures to meet the challenge presented by "organised crime" (Dail Debates, 22.3.07).

Despite its importance as a rallying cry for increased police powers and driver of the legislation discussed above, the precise meaning of the term "organised crime" is highly problematic. Criminologists have experienced grave difficulty in arriving at a satisfactory scientific definition of the concept given its varying public meaning and links with drugs, sex and violent crime and corruption (Hagan 1983). In Ireland, Davey (2008:np) observes from an analysis of the Oireachtas (Irish Parliament) debates that the terms "organised crime" and "gangland activity" are often used interchangeably: "When the politicians speak of Veronica Guerin and other gangland style murders they are attributing blame to organised criminals." She goes on to observe that up until the introduction of organised crime offences into legislation in 2006 law enforcement efforts centred on the involvement of criminal gangs in certain criminal offences *viz.* drugs trafficking, firearms offences and murder and predicts that this will continue, given the unworkability of the definition of organised crime contained in the 2006 Act.

The enshrining of offences relating to "organised crime" in Irish criminal justice legislation makes explicit an assumption in the political response to the problem which is not confined to Ireland. The assumption is not simply that the proclaimed targets necessitate these new forms of control but, further, that "organised crime" can and should be defined primarily in terms of "organised crime groups" or "core nominals" (in the language of British law enforcement). This actor-centred framing of the problem has been seriously challenged in the criminological literature for the contradictory outcomes it produces for both analysis and policy development (Levi and Naylor 2000; Standing 2003; Levi 2007; Edwards and Levi 2008). By granting "organised crime groups" analytical primacy, other criminal activities which may or may not be accomplished in parallel by looser networks of criminal associates (perhaps with shifting memberships and temporary alliances) are downplayed or ignored (Edwards and Levi 2008). Similarly, Felson (2006) rejects the term for its understatement of the diversity of criminal co-operation, underestimation of the interdependence of criminal and legitimate activities and overestimation of the exceptionality of serious crime activities, particularly the alleged degree of planning and sophistication needed for their accomplishment. In his view, the term "conveys a specific

[14] Section 70 of the Criminal Justice Act 2006 defines a "criminal organisation" as a structured group, however organised, that (a) is composed of 3 persons or more acting in concert (b) is established over a period of time and (c) has as its main purpose or main activity the commission or facilitation of one or more serious offences in order to obtain, directly or indirectly, a financial or other material benefit.

image popularized by television, not one substantiated by scholarship and experience" (2006: 1). According to Standing (2003: 64) "the distinction between organised crime and other types of crime is incoherent and based on popular stereotypes rather than persuasive arguments as to why conventional organised crime is qualitatively different from white-collar crime, government crimes and terrorist activities". Lea (2004) too draws attention to the difficulty in drawing boundaries between "organised" and "non organised" criminality. Given the interpenetration of criminal and legitimate activity he argues that it is time we faced up to the structural normalisation of organised crime and the concomitant fact that all too often it is not possible to disaggregate criminal and legal activities (see further Gilligan 2007).

The strength of the criticism has been such that there have been calls for the concept to be abandoned entirely. In light of the disorganised and often chaotic aspects of serious criminal activity, Levi and Naylor (2000, following Block and Chambliss 1981) argued for the replacement of the words "organized crime" with "organising crime". More recently, Levi (2007: 799) has argued that "we need to be clearer about what segments of the criminal market we are referring to when we use the term 'organised crime'. In fact, it might be better not to rely on the term or alternatively to rely on the fact that it does not have a stable meaning." The abolition of "organised crime" and "organised criminality" as criminological concepts raises serious questions about its worth as legal concept as it would appear that the draconian policies pursued by the Irish state are built on false premises *viz.* the idea that "organised crime" as such exists.

Conclusion

It has been the burden of this paper to argue that Brown's arguments (2005a, b) concerning the contemporary serious offender *qua* twenty first century colonial subject find an application in recent Irish criminal justice innovations directed towards the problem of "organised criminality". There is admittedly a certain irony in discussing similarities between colonial and contemporary strategies of governance in a jurisdiction which has to some degree sought to distance itself from its colonial past. Yet, an examination of recent innovations in Irish criminal law serves to remind us of the strong links between political theory, citizenship and the criminal law (*cf.* Ashworth and Zedner 2008; Vaughan 2000). Legislation which seriously attenuates the rights of certain serious offenders in the same manner as nineteenth century colonial subjects raises questions about the propriety of our response to the (admittedly grave) problem of serious criminal activity. Equally, strong concerns must be voiced about the wisdom of policies which take as their point of departure a conceptual view of "organised crime" as being under the "control" of a number of highly structured, identifiable groups engaged in activities which are entirely separate from the world of licit business. In so far as the problem of "organised crime" has any meaning in the criminological literature, it is better viewed as the organisation of serious crimes (plural) perpetrated by loose and potentially shifting networks. The distinction is important as a shift in investigative and analytical focus away from *groups* to *behaviour* would create a space in which other conceptions of the routine activities and social relations through which serious offences (like drugs trafficking) are accomplished could be discussed. Alternative control strategies such as opportunity reduction and routine activity can address such crimes by means of less draconian interventions focussing on reducing the markets for illicit goods/services and reducing opportunities for exchange and consumption (Ekblom 2003; Edwards and Levi 2008). Both from the point of view of the effectiveness of current serious

crime control strategies and the problematic consequences which they engender for the citizenship of certain individuals in liberal democratic polities such alternatives are strongly to be preferred.

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