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Regulating white-collar crime in Ireland: an analysis using the lens of governmentality

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Abstract

A new way of governing corporate wrongdoing has emerged to address Ireland's changed social, political and economic context. Traditional methods of laying blame, forged in the agrarian Irish State, are no longer capable of dealing with the contemporary challenges of an advanced industrial economy which is more willing to recognise the risks posed by increased corporate activity. The conventional crime monopoly became fragmented as specialist regulatory enforcement agencies were established to enforce the law. Moreover, contemporary enforcement became much more sophisticated, moving away from the "command and control" model to a "responsive" model of enforcement. Also, paradoxically, this model is explicitly cooperative and employs sanctions as a last resort but, also can actually be more instrumental and punitive in addressing corporate wrongdoing. More recently, however, since the financial crisis, the architecture seems to have shifted again. Corporate and financial crimes become politicised and new laws were passed to make it easier to hold wrongdoers to account. In addition to resolving problems in enforcing the law, they also had ostentatiously political purposes. They reflect the political desire to "tool up" executive power and "act out" for public approval, to "govern through" white-collar crime.

Introduction

Following a decade-long series of investigations into Irish banks at the heart of the financial crisis, the final prosecutions of some of Ireland's most senior banking executives have just concluded [1]. The intense international scrutiny of these trials was, perhaps, understandable, given that "Ireland had such disproportionate exposure through the derivatives market to U.S. housing mortgages that they suffered a bigger crisis than the United States" [2], resulting in "one of the most catastrophic experiences of financial crisis in the developed world" [3]. Some polemicists suggested Ireland had joined the "new third world" [4]. However, the sudden surge of interest in these prosecutions has, to date,

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been mostly journalistic in nature, lacks any deep scholarly or contextual analysis, and neglects to analyse how contemporary practices depend on historical conditions. Regulatory criminality, enforced by specialist agencies, remains under-analysed though some valuable textbooks and collections have emerged since the financial crisis [5–7] while others predate many of the trials which took place [8], address definitional issues relating to white-collar crime [9], or are normative, reform-orientated analyses critiquing the institutions of enforcement in Ireland [1]. This article is distinctive because it is a socio-legal analysis of the enforcement of white-collar crime in Ireland from the foundation of the State, through the financial crisis in 2008, to the present. It argues that a new "logic of action" has emerged to address white-collar crime. This consists of new ways of thinking about white-collar wrongdoing, new legal structures, and their enforcement in practice. In order to demonstrate this, it constructs a socio-legal, "history of the present" [10], taking an analytical rather than archival approach to "understand the historical conditions of existence upon which contemporary practices depend" ([11]: 2).

Legal instruments and regulatory responses are ordered into contrasting traditional and contemporary models to reveal broad structural patterns in corporate enforcement that might not otherwise be examined. It is shown that Ireland traditionally addressed corporate wrongdoing with the State's strongest weapon of moral censure, the criminal law, through the regular enforcement institutions of the conventional criminal justice system, but, paradoxically, remained remarkably lenient because the law was rarely enforced in practice. However, as Ireland transitioned from a closed, agrarian economy to much more open centre for commerce and finance, a transition which crystallised in the 1990s, that model changed. The conventional crime monopoly became fragmented as specialist regulatory enforcement agencies were established to enforce the law. Moreover, contemporary enforcement became much more sophisticated, moving away from the "command and control" model to a "responsive" model of enforcement. This model is explicitly cooperative and employs sanctions as a last resort but, also can actually be more instrumental and punitive in addressing corporate wrongdoing. More recently, however, since the financial crisis, the architecture seems to have shifted again. When the State bailed out Irish banks at significant cost to Irish taxpayers, politicians accused bankers of "economic treason", accusing them of causing more harm than the IRA to the State. Reflecting developments in the US and UK [12], corporate and financial crimes become politicised and new laws were passed to make it easier to hold wrongdoers to account. In addition to resolving problems in enforcing the law, they also had ostentatiously political purposes. They reflected the political desire to "tool up" executive power and "act out" for public approval, to "govern through" white-collar crime [13]. Instrumental justice was colonised for expressive purposes, not just to control wrongdoing but to make a statement for political gain [14]. The Irish experience is of significant interest to a wide international readership because it provides a context-sensitive, institutional analysis of a state at various critical stages of its economic development, trying to cope with the negative effects of increased corporate activity, having experienced an economic boom and depression in a remarkably condensed period of time.

Moreover, this article demonstrates that these white-collar crimes are being governed in new ways combining both dimensions of thought and action in a form of "governmentality". Foucault developed the foundational principles for this conceptual framework in the late 1970s [15]. Moving away from state-centred theories of

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power at a time when the French economy was performing poorly and economic liberalism was in ascendency [16], he attempted to distinguish governmentality from the exercise of sovereign power or discipline. While sovereign power was associated with demonstrating authority, controlling territory and the self-preservation of the sovereign, disciplinary power acted on individuals, through prisons, schools and other institutions, to survey, normalise, and regulate their bodies and souls, rendering them docile and productive. Governmentality, however, elides somewhat with Foucault's views on bio-power/bio-politics, and was not exercised merely to guide individual conduct, but to influence behaviour and advance causes for the population as a whole [17]. The techniques and objectives of governmentality overlap and integrate with disciplinary forms of power, rather than replace them. Dean [18], analysing the "governing of crime" through the lens of neoliberalism, states that this "is a form of regulation that is not one of sovereign power exercised through law, or of a disciplinary society with its norms, or even of the general normalisation of a biopolitics of the population"; it also encompasses the "internal subjugation of individuals". As explained by O'Malley [19], it "shifted away from a focus simply on command and obedience, toward regarding the central issue as the optimal harnessing of these self-governing capacities". There is, accordingly, a consensual aspect to this exercise of power [20]. As Rehmann ([21]: 135) observes, "The way in which people organise their lives and the techniques they apply to themselves, to their attitudes, their bodies, and their psyche became an important component of Foucault's late conception of power". Governmentality, so understood, is concerned with the "conduct of conducts" [20]. Governance is a continuum, ranging from regulating conduct to influencing self-regulation, extending deeper into the governance of the self and the soul [22]. Moreover, as Simon [23] observes, "Many non-State-institutions play a governance role … business has become a governmental power to a considerable extent." In the commercial and regulatory context, audits, for example, illustrate governmental tendencies and further the goals of monitoring checking and reporting, so that "The motif of 'control of control' is … useful in characterising a regulatory system with a greater accent on internal self-inspection" ([24]: 118).

Drawing some of these threads together, Foucault ([27]: 102) states that governance is shaped "by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principle form of knowledge political economy, and as its essential technical means apparatuses of security". Governmentality, thus explained, is a broad conceptual tool for analysing how the State recognises problems and how it exercises power in response to these problems through institutions, procedures, and knowledge in order to achieve certain goals, like the prosperity and the security of the State. Scholars have been keen to point out the empirical defects in this work [18, 25], to critique the extent to which he "theorised law" [17], and to argue that the "concept of 'governmentality' covered a multitude of very different meanings so that it can hardly be put to work as an analytical concept" ([21]: 134). Foucault, however, never intended his work to be monolithic, reserved his right to change his mind, and encouraged researchers to draw upon his scholarship as a "toolkit" for inquiry [26, 27]. It is in this spirit that governmentality is adopted methodologically. The purpose of this piece is not to synthesis all possible understandings of governmentality; neither to advance typologies nor definitions. It does not seek to exhaustively explain

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governmentality but to move beyond that to apply and develop it in the field of white-collar crime, to empirically map governmentality rationalities and techniques. Unlike this work, the existing international literature analysing the impact of neoliberal governance strategies on the criminal justice system, while valuable, has tended to concentrate on "ordinary crime" or the "punishment of the poor" project to the neglect of white-collar criminality [11, 13, 23, 25, 28–31].

This paper goes some way to answering the call for governmentality studies to pay attention to context [32], mapping the Irish regulatory experience onto three key features of this theoretical framework. Firstly, it argues technologies of governance develop so that they are concerned less with the assertion of sovereign power and more with solving problems and achieving particular ends. This is the "art of government": influencing and shaping people's behaviour for instrumental reasons to achieve particular results [20]. Regulatory power was initially exercised to enshrine protectionism and resist British influence as an assertion of economic sovereignty in the fledgling Irish State but was subsequently used to open up the economy and boost prosperity. Secondly, it argues that regulation is increasingly exercised through numerous centres of power and "traces multiple sites of governing beyond the traditional boundaries of the State apparatus" ([33]: 469). The conventional crime monopoly addressing white-collar criminality in Ireland has become fragmented and is exercised through newly created regulatory agencies, with enhanced powers, employing a diverse range of tactics and sanctions. Thirdly, it is argued regulation should ideally result in the internalisation of governance norms, whereby, for example, regulatees may observe the law not merely because they may otherwise be sanctioned, but because they recognise it is the right thing to do. In this way, "The subjects so created would produce the ends of government by fulfilling themselves rather than being merely obedient" ([34]: 89). A compliance-orientated "responsive" regulatory enforcement approach has been adopted in Ireland which encourages companies and their officers to obey the law because it is in their best interests. Moreover, governmentality needs to be understood not just in terms of regulatory intervention; governmentality shows that Ireland's way of solving problems is political [22]. It is a "way of knowing" that affected how the State recognised harm and therefore how it enforced the law. "Knowing", in this context, "does not simply mean 'ideas', but refers to the vast assemblage of persons, theories, projects, experiments and techniques that has become such a central component of government" ([35]: 177). It is shown that Ireland's ability to perceive risk was culturally contingent; that differing regulatory responses to white-collar criminality reflected the level of knowledge and political objectives of Government, as informed by the economic, social, and cultural contexts at various points in time. The employment of this methodological lens for the socio-legal analysis in this paper is important because the "governmentality approach may also shed valuable light on the way political-economic, cultural and governmental forces interact" ([23]: 247).

The conventional crime model

In the traditional period, from the foundation of the Irish State in 1922, corporate obligations in the Companies Acts were often underpinned by criminal sanctions, using conventional crime methods. The Companies Consolidation Act 1908, enacted in

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Westminster prior to Irish independence, provided for the prosecution of companies and company officers ([36]: 3). This was part of a longer trajectory in which the Factories Acts in the nineteenth century had also criminalised corporate wrongdoing [37, 38]. Subsequent Companies Acts continued to enforce corporate obligations using criminal sanctions. The Report of the Working Group in Company Law Compliance and Enforcement [hereinafter the McDowell Report] determined that the Companies Acts 1963–1990 specified 280 distinct criminal offences ([39]: para. 10). Excluding those sanctions which imposed individual personal liability for the debts of the company, the main civil sanction was arguably the disqualification order, stipulated by section 184 of the 1963 Act, which provided the "power of court to restrain certain persons from acting as directors or managers of companies". However, until 1990, the disqualification order could only be triggered by the criminal conviction of the accused, on the application of a prosecutor. Breach of the order was also a criminal offence, thereby also demonstrating the primacy of the criminal law during this period. Moreover, the traditional approach to corporate criminality in Ireland was based on principles of paradigmatic criminal law because the accused could avail of a panoply of due process rights, including the right to liberty, a fair trial, the right to silence, the presumption of innocence, and if convicted, to proportionate punishment, among many others [40]. The commitment to due process in the Irish Companies Acts was evidenced by its general requirement that the prosecution had to prove that the accused had acted intentionally to break the law, as a precondition to criminal liability. For example, section 383 of the Companies Act 1963 defined the meaning of "officer in default" for the purposes of criminal liability. It specified that if a company had broken the law, then the officers of the company had to have "knowingly and wilfully" permitted the default, as a precondition to criminal liability, thereby imposing a blanket subjective culpability requirement, unless otherwise stated for a particular offence. Indeed, many specific offences not employing the "officer in default" construction in the 1963 Act, like the offences of failing to keep proper books of account (s.147(6)), making a false statement to an auditor (s.197), and fraudulent trading (s.297), among many others, all required subjective culpability.

This is not to say that strict liability offences were not also present in the legislation. Though considered exceptional, their presence in criminal law has often been greater than usually conceded [41]. Moreover, they have a long history, emerging to address breaches of the Factory Acts ([42]: 106–108). The structural location of the factory owner as a powerful and well respected member of society made it very difficult for inspectors and prosecutors to prove fault before judges who were the factory owners' peers. It was also too easy for the factory owner to deny that he was involved in the wrongdoing when due to the organisation of his business he could show that an employee had committed the fault in question. Accordingly, this form of "no-fault" liability emerged when "[t]he practical problem of proof merged with the general ideological problem of prosecuting factory owners. The presentation of the offence as 'regulatory' or 'strict' permitted the subtle negotiation of the criminal label ... to provide some mode of regulation, however ineffective [or illusory] of respectable men". In this sense, strict liability emerged to enforce laws against powerful individuals but also helped serve their interests by refusing to label them as true criminals. Moreover, what is significant about all such strict liability offences in Irish company

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law is that "invariably … their liability is provided for on a specific basis or subject to a specific defence" ([43]: 926). Moreover, even in company law offences which were silent as to culpability, there was a presumption of *mens rea* (*DPP v Byrne* (CC, 24 March 2002, Lynch J)). Therefore, the traditional commitment to subjective culpability requirements was clear even when onerous for the prosecution ([5]: 1116).

It was also a conventional crime model because the ordinary police and prosecutors, An Garda Síochána (Gardaí) and the Director of Public Prosecutions (DPP), monopolised most of the responsibility for addressing corporate crime in Ireland, particularly serious crimes, like fraudulent trading and offences related to insolvency [39]. However, the composition, education and training of the Gardaí suggested they were not ideally placed to detect and investigate sophisticated forms of wrongdoing. Almost two thirds of all Garda recruits between 1922 and 1952 had been in the Irish Republican Army (IRA) and approximately half of recruits in this period were farmers or labourers ([44]: 39, 47). Most recruits had received only primary school education ([44]: 51). In addition, the primary duties of the force in this period were enforcing licencing laws, detecting illicit distillation, detecting agrarian crime, and detecting ordinary crimes against person and property, particularly larceny (Interdepartmental Inquiry [45]). Though information on Garda activity in this period is minimal because the Gardaí did not start publishing annual reports until 1950 ([46], 66), it seems likely that this model of policing was not suited to the corporate context because soldiers and farmers, rather than accountants and lawyers, were investigating technical breaches of the Companies Acts, and policing the corporate sector was not a significant priority for the force.

A specialist subgroup, the Garda Fraud Squad, subsequently policed less conventional, more complicated forms of crime. Even then, fraud was still relatively unsophisticated. The Squad did not produce annual reports but an examination of the newspapers suggests that it was mainly concerned with cheque fraud, embezzlement, and conmen absconding with bogus investments [47]. The Fraud Squad was also significantly under-resourced. In 1971, the nationwide force consisted of 17 men and by 1990 it was still operating with fewer than 30 officers working a shift system that left as few as five Gardaí on duty at any one time [47]. The Minister for Justice acknowledged that the Squad did not retain any full-time accountancy or legal staff to help them analyse and interpret company accounts and papers (Burke, Dáil Deb. 5 February 1991, vol. 404, col. 1480). It was later also suggested that the Squad was reluctant to consult outside accountants and auditors for help, feeling it unprofessional to ask civilians to aid them in law enforcement [47]. Meanwhile, the Minister for Commerce and Industry, which had the power to prosecute summary offences in the Companies Acts, also under-resourced enforcement because it had allocated "the manpower equivalent of about one half of one full time staff member of the Department to discharge this vital function. In the UK, such functions are discharged by many hundreds of full time public servants" ([39]: paras. 2.21–2.22). If company officers sought professional advice they would have been advised that if they broke the law, they would probably go unpunished ([48]: 267). Unsurprisingly, compliance was low and the law was rarely enforced. Already in 1958, the Company Law Reform Committee ([49]: 53) concluded that some Irish companies exhibit "a complete disregard of the requirements of the Companies Acts". It noted (20) that "in most cases … there is a tendency to regard the offences as being trivial or technical". Forty years

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later, the McDowell Report ([39]: para. 1.2) determined (para. 2.4–2.5) that Ireland was "characterised by a culture of non-compliance". It concluded that "the great majority of the hundreds of summary offences have never been the subject of any criminal proceedings, and there have only been a handful of occasions on which the indictable offences have been prosecuted."

Gathering these threads together, the Irish legal system addressed corporate wrongdoing using the criminal justice system in accordance with conventional crime methods, standing as barriers to easy conviction and represented "powerful curbs on unwise, sweeping use of the criminal sanction" ([50]: 139). This approach prevented the adoption of a wholly utilitarian stance, by espousing and enshrining values that transcended the goal of crime prevention. It reflected traditional ways of knowing and governing in the legal system; this approach legitimised the criminal law, "not merely as an institutionalised system of coercion but, rather, a system which is structured around certain principles of justice or morality" ([51]: 187). It is recognised, of course, that the law sometimes departed from these conventional methods because they were "ideal rather than invariable features of criminal justice, but they set norms against which departures can be observed" ([52]: 305). In addition, institutional impediments curtailed an effective response to addressing white-collar crime because those enforcing the law lacked the skills, training and resources to do so effectively. It is also likely that the social construction of crime also reinforced this approach. As Kilcommins et al. [46] surmise, Irish "[s]ociety tends to be more concerned about the potential harms caused by drug addicts wielding knives or syringes than by businessmen signing dodgy deals". These perceptions were reinforced by the under-resourcing of enforcement agencies, by rarely subjecting white-collar criminals to official criminal justice responses in the same way as conventional crimes, and by rarely placing white-collar criminals in the public spotlight, like in courts, where they had to explain their behaviour [53, 54].

The fragmentation of the conventional crime monopoly

The traditional failure to effectively regulate and enforce company law may be understood as a reflection of the wider social, political, and economic conditions which prevailed in Ireland for most of the twentieth century [47]. Ireland enshrined its protected economy in the Control of Manufactures Acts 1932 and 1934 [55]. Unless Irish people owned more than half the equity of companies, they had to receive a special licence from the Minister for Industry and Commerce to operate in Ireland, a process which both regulated foreign businesses, while also legitimating both them and the State ([56]: 287). Agriculture was the primary source of income ([57]: 18) and "national development was synonymous with agricultural development" ([58], 313). Immigration was high ([59]: 156), the level of corporate activity was relatively low ([49]: 15), and politicians rarely reviewed company law because they considered it "as dry as dust" (Deputy Norton Dáil Debates 5th November 1963 col. 821). Moreover, the legislature tended to copy and paste the Company Acts from England and Wales into Irish law, reflecting a culture of policy imitation and the lack of expertise in corporate matters [48]. From the late 1950s, however, the State embraced free trade and competition [60], and eventually joined the EEC in 1973, promoting

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itself as an attractive place in which to do business due to its ease of access to the European market [61]. It implemented the lowest corporation tax rate in Europe ([62]: 8), opened up access to education to deliver a highly educated workforce so that six times as many students attended third level in 1994 than in 1964 ([63]: 4), negotiated pay agreements to ensure relative stability of labour through fewer strikes, a process known as "social partnership" [64, 65], and became "by the end of 1997, … one of the less regulated OECD countries in terms of barriers to entry and entrepreneurship, market openness, and labour markets" ([57]: 7).

McGrath [8] argues that it was understandable that Ireland did not develop an appropriate infrastructure to address the risks posed by corporate and white-collar criminality but there were distinct reasons militating against enforcement in both the early and latter halves of the twentieth century. The socio-economic context in Ireland in the decades following independence was one which had idealised rural living, frugality and isolationism, which had resisted foreign investment and industrialisation as an assertion of sovereignty. Understandably, in this context, white-collar criminality did not animate a State that was largely agrarian in orientation and had low levels of corporate activity. Accordingly, corporate misbehaviour was addressed by the existing conventional crime machinery without reflection as to whether this was appropriate. Subsequently, when the State advanced policies which were pro-competition, pro-industry, and pro-European integration, increased corporate activity was associated with purely positive concepts such as wealth creation, employment, and as a way to escape economic depression. Getting tough on white-collar crimes was clearly not a strategic governance issue when the State was actively courting foreign investment on the basis of its light-touch regulatory regime. Instead, increased employment and increased prosperity were the chief concerns ([46]: 136). Moreover, changed social, political and economic conditions prompted different regulatory interventions. The State initially governed under the cover of protectionism, to resist British influence as an assertion of sovereignty, but it subsequently employed "the art of government" to escape economic stagnation, embracing competition and light-touch regulation to promote itself as an attractive place for foreign investment ([27]: 87). Moreover, these changing efforts were not merely the consequences of government intentions, they were assertions of knowledge about economic problems and exercising the power to govern, manage and improve the economy legitimated the State ([56]: 280). Articulating the need for protectionism and embedding processes to oppose British intervention shored up and centralised political power through the machinery of the State. Similarly, promoting competition, openness and industrial development moved it beyond consolidating new power, translating it into the activity of government and building relationships with markets.

This process was fully realised when Ireland experienced a significant economic boom in the 1990s, the so-called 'Celtic Tiger'. Unemployment fell, immigration replaced emigration, and living standards were boosted considerably [57]. Ireland became "the fourth largest European funds centre; the eighth largest global banking centre; the fourth largest reinsurance centre; and the leading European cross-border centre for life insurance" ([66]: 7). Summarising the composition of the work force in 2005, McWilliams ([67]: 22) noted, "manufacturing is on the way out. Only 16% of us make anything anymore. Less than one in 20 works the land. One in ten works in construction ...The rest of us, which is just under three in every five, toil away at the

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water cooler in office jobs .... We are all white-collar...". However, as more workers became white-collar in the 1990s, more opportunities to commit white-collar crimes emerged and "a series of scandals shook confidence in sectors of the business world" ([68]: 390). Public Tribunals of Inquiry chronicled the corporate corruption of politics at the highest levels [69]. Ireland had competed internationally to attract some of the biggest players in the global financial markets, flaunting its lax regulatory regime ([70]: 190) but now this had come back to haunt it, particularly when the *New York Times* (1 April 2005: C1) dubbed the Irish Financial Services Sector (IFSC) the "wild west of European finance".

It is important to understand that these scandals were not de facto accidents of Irish history and experience, or merely "things that happened to Ireland", they were the natural consequences of deliberate and calculated Irish political policy choices. For example, when Ireland advertised itself as a good location in which to do business, it sent senior State representatives from the Revenue Commissioners, the Central Bank and the Government (the so-called "three wise men") to reassure businesses that if they to operate in Ireland, the system would be flexible, light-touch and favourable to business [61]. Ironically, however, though under-regulation had been used to sell Ireland as an attractive location for investment, it was now damaging its reputation. As part of the approach to protect Ireland's reputation as an attractive place in which to do business, the State created specialist regulatory agencies, some of which have significant powers of investigation and prosecution. These agencies proliferated since the 1990s in Ireland [71, 72], but also reflected international trends related to the rise of the regulatory state [73] and regulatory capitalism [74, 75]. They included the establishment of the Competition Authority in 1991, the Office of the Director of Corporate Enforcement (ODCE) in 2001, the Irish Auditing and Accounting Supervisory Authority (IAASA) in 2003, the Irish Financial Services Regulatory Authority in 2003, and the Central Bank of Ireland in 2010 (amalgamating the Central Bank and Financial Regulator). In a striking departure from previous arrangements, the ODCE, created by the Company Law Enforcement Act 2001, was the first agency since the foundation of the State dedicated to enforcing the Companies Acts and it was staffed by teams of civil servants, lawyers, accountants and the Gardaí. Under this Act, the ODCE has the power to compel companies and third parties to produce and explain any documents it requires if it believes companies are being run to defraud creditors (s.29). It could secure search warrants which were valid for up to a month, which was considered at the upper end of the scale ([76]: 414). The unusually long duration of the warrant and the fact that it can be exercised repeatedly has prompted Cahill [77] to question whether the legislation was disproportionate to the ends it sought to achieve. The ODCE also colonised the power previously possessed by the Minister to summarily prosecute all offences under the Companies Acts though it referred cases for prosecution on indictment to the DPP. The Minister was still responsible for drafting Company Law and, to a limited extent, was empowered to devise policy for the ODCE and the CRO ([77]: 561). However, the authority possessed by the Minister to petition the High Court to appoint an inspector to a company, and to make decisions relating to the qualification and recognition of auditors, were transferred to the ODCE and the Irish Auditing & Accounting Supervisory Authority (IASSA) respectively. Therefore, specialist interdisciplinary agencies were given significant powers to make it easier to hold white-collar criminals to account.

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In addition, though the State retains a central role in governing, business regulation is not purely a domestic or national matter because it is increasingly shifted to global institutions [78], reflective, in part, of a movement which Rose [79] terms the "death of the social". The OECD, the Council of Europe, the EU, FAFT, GRECO, and the IMF, among others, have been drivers for the international standardisation of instruments for corporate crime control [80]. The ability to detect white-collar crime, for example, was greatly enhanced by new "information reporting" rules, often mandated by closer international collaboration and EC membership ([46, 81]: 166). Under section 6 of the Criminal Justice Act 1994 (section 32) Regulations 2003 on the Prevention of the use of the Financial System for the Purpose of Money Laundering, solicitors were obliged to report their clients' suspicious transactions to the Revenue Commissioners and the Gardaí if it was suspected that they involved money laundering. Similarly, under section 1079 of the Taxes Consolidation Act 1997, the company auditor was obliged to report suspected breaches of the Tax Acts to the Revenue Commissioners if the company did not remedy these breaches. Under section 74 of the Company Law Enforcement Act 2001, auditors were obliged to report to the ODCE if they suspected that a company, its officers or agents had committed an indictable offence under the Companies Acts and give reasons for this opinion. Section 37 of the Companies (Auditing and Accounting) Act 2003 provided they must also give further information such as books and documents to assist with an investigation if required. These recent initiatives suggest that accounting and other experts were transitioning from private watchdogs, reporting to shareholders and directors, to something closer to private policing professionals, who either prevent wrongdoing or report it after the fact for public protection [82]. The audit became a significant tool to further the causes of transparency, detection, and accountability [24, 83]. Moreover, it "reflects a departure from traditional forms of hierarchical state control, towards an enabling state" which engages the private sector in "active citizenry" and "co-governance" ([33]: 469). As part of this fragmentation and diversification, "instead of seeing any single body – such as the State – as responsible for managing the conduct of citizens, this perspective recognises that a whole variety of authorities govern in different sites, in relation to different objectives" [34]. This reflected a "transformation in regulatory style, which is moving away from a command and control mode of operation. The intention is to regulate target organisations indirectly 'from below'" ([24]: 113).

The enforcement arsenal also diversified. The State further criminalised corporate wrongdoing, increasing the number of criminal offences in the Companies Acts from 280 to approximately 400 offences ([84]: para. 8.1.1). Most significantly, these offences more frequently employed regulatory strategies like strict liability and reverse onus provisions [5]. These mechanisms are useful in avoiding the more onerous issue of proving subjective culpability in order to streamline accountability. For example, section 383, noted previously, placed the burden of proof on the prosecution to prove that the officer in default of his obligations had acted knowingly or wilfully to break the law as a precondition to culpability. However, Section 100 of the 2001 Act repealed and replaced this provision, removing the need to prove that company officers have acted intentionally in over 90 offences that applied to both companies and to every officer in default ([85]: 660). Moreover, as noted by Cahill [77], section 383(3) specified that "whenever a company fails to comply with a requirement of the

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Companies Acts, every director has automatically committed a breach of duty. This heightens considerably the likelihood of enforcement of the provisions of the Companies Acts against individual directors". It may also represent a particular trend towards looking beyond the corporate veil and the "responsibilisation" of individual directors.

In addition, there was a parallel tendency to civilise enforcement by channelling wrongdoing into the civil jurisdiction of enforcement ([86]: 134). Company officers could be disqualified entirely from managing companies even if they had not been convicted of a criminal offence (s.160(2)). Restriction orders were also used to protect the public from dishonest and irresponsible directors (s.150). These orders restricted company officers in their participation in the management of a company which was not sufficiently capitalised. Liquidators were obliged to take restriction proceedings unless relieved of this obligation by the ODCE, even if they didn't believe that such proceedings were justified and the courts had to grant the orders unless the respondent proved that he acted honestly and responsibly and refuted the negative proposition that there was no just or equitable reason why he ought to have been restricted (Re Tralee Beef and Lamb Ltd. (In Liquidation) Kavanagh v Delaney and others [2008] 3 I.R. 347). The liquidator was not obliged to produce any evidence of wrongdoing. He was merely required to show that the company was in insolvent liquidation and that the respondent was a director of the company in the twelve months prior to it entering insolvent liquidation. The protective rather than punitive rationale appears to have permitted these instrumental mechanisms, which avoid the adversarial process, evaded due process safeguards for the accused, boosted executive discretion, and limited judicial input. Unlike criminal prosecutions, these orders are more instrumental than expressive, less severe, but more certain in their application. Similar steps were also taken to bypass the criminal justice system in the financial sector, creating what some commentators have called "low visibility justice" ([86]: 125). For example, the Financial Regulator was also empowered by the Central Bank and Financial Services Authority of Ireland Act 2004 to impose administrative fines of up to €5 million on companies and unincorporated bodies and individuals may be fined €500,000 (s.10). The Financial Regulator acknowledged in its Outline of Administrative Sanctions Procedure (2005, para. 2.2.5) that this streamlined administrative system was more punitive than the criminal justice system "[i]n light of the limited penalties available pursuant to summary criminal prosecutions [so] … [o]nly in exceptional circumstances will the Financial Regulator pursue a prescribed contravention via the criminal courts." Even so, these fines were subsequently doubled by the Central Bank (Supervision and Enforcement) Act 2013. Clearly, these civil and administrative sanctions are useful in securing enforcement and compliance while avoiding the high level of proof and evidence that are sometimes required in criminal trials.

Gathering these developments together, this fragmentation and enhancement of regulatory enforcement did not mean that the State was divested of its power, or "hollowed out" in some way ([74]: 28). Instead, the State amassed more enforcers to do its bidding, more instruments of control, exercised through new sites of power [27, 20]. The State was being "rolled out" rather than "rolled back" ([87]: 56). There was, however, a greater separation between government and enforcement. The transfer of Ministerial enforcement powers to regulatory agencies, for example, suggested that the Government was now more concerned with devising general policy but did not want to be as directly involved in enforcement. The State chose to "govern at a distance" ([22]: 9),

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preferring to steer rather than row when fighting corporate and white-collar crime ([88]: 25). Thus conceived, the State was "acting from a center of calculation such as a governmental office … on the desires and activities of others who were spatially and organizationally distinct" [34]. In reality, of course, regulatory agencies have significant capacity to pursue their own objectives, manage their discretion and report their performance, while also implementing Government or Departmental policies. As Sparrow ([89]: 4) notes, "Regulatory agencies exercise discretion as a matter of course – and at many different levels. At the higher managerial levels, executives have considerable latitude in allocating resources, constructing programs, assigning personnel, focusing inspection and enforcement programs, choosing where and how to expend the agency's efforts, and settling the nature and style of their interactions with the regulated community." Accordingly, perhaps multiple centres of power exist (27: 102), which both steer and row ([90]: 80), "to govern through regulated choices made by discrete and autonomous actors" ([79]: 328). Taken together, these features of the new enforcement architecture were significant departures from the old regime in which the ordinary police complained that they were hamstrung by limited resources and archaic laws. Specialist interdisciplinary agencies were given significant powers to make it easier to hold white-collar criminals to account with greater ease. The next section of this article examines how the departure from the conventional criminal model also had a significant impact on the enforcement process.

From responding to "governing through" crime

Irish regulatory agencies, like the ODCE, have explicitly moved away from the sanctioning, "command and control" model to a graduated, responsive or compliance-orientated model of enforcement ([91]: 187), originally developed by Ayres and Braithwaite [92], as shown in Fig. 1. This "responsive" model is an internationally influential model, popular with practitioners because it was developed and mapped onto the existing practices of regulators, popular with academics who could empirically test the model, and with policy makers due to the increasing influence of neoliberal political ideology which favours a less intrusive role for the State in regulation and enforcement [93, 94]. Gray and Sibley [95], however, are critical of responsive regulation because it adopts a regulator focus which overlooks the perspectives of individual actors inside the company whose practices depend on whether they perceive the regulator as a threat, ally or an obstacle. The responsive regulatory enforcement model resonates to varying degrees with "decentred regulation" [96–99] which emphasises the interactive nature of regulation between state and non-state actors; "new governance" [100], in which securing compliance is deliberative, participatory, and dynamic, where parties are empowered to experiment with how best to achieve compliance; and with "meta-regulation" in which the State requires and oversees that the regulated have internal checks and systems to ensure regulatory goals and objectives are met [101].

According to the responsive model, regulators first attempt to educate and persuade people to obey the law and warn them of the consequences for non-compliance. If wrongdoers failed to obey the law or remediate their wrongdoing, then enforcers responded by using a sanctioning approach which was tiered in terms of severity. As

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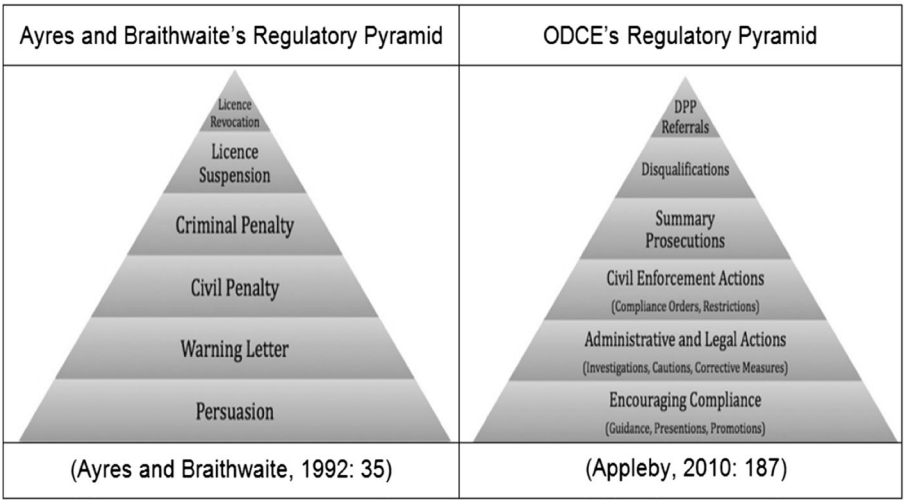

Fig. 1 The adoption of the regulatory pyramid in Ireland

noted by Scott [71], the goal "is to maintain as much enforcement activity as possible at the base of the pyramid. This approach is said to be effective not only with businesses which are orientated to legal compliance, but also with the 'amoral calculators' for whom compliance becomes the least costly path when they know there is a credible threat of escalation to more stringent sanctions." The crucial point, of course, is that enforcers must be willing to invoke these sanctions when necessary and "fire the big gun". As Hawkins [102], noted "… it is the device that makes all other law enforcement possible by granting credibility to more private and informal practices and thereby, in the great majority of cases, foreclosing the possibility of costly prosecution and trial." The idea was ultimately to make corporate actors realise that compliance, was in their interests because they avoided the regulator's 'stick'. As noted by Ayres and Braithwaite [92], the goal was to make corporate actors internalise governance norms because "[e]ffective regulation is about finesse in manipulating the salience of sanctions and the attribution of responsibility so that regulatory goals are maximally internalized, and so that deterrence and incapacitation works when internalization fails." Individuals become "active in their own government" ([33]: 469). In this highly sophisticated framework, governance is "a question not of imposing laws on men, but of disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics – to arrange things in such a way that, through a certain number of means, such and such ends may be achieved." ([27]: 96). White-collar crime was being governed in new ways combining both dimensions of thought and action in a form of "governmentality". Lipschutz and Rowe [103], however, are sceptical of these developments, noting that regulatory gaps left by government, which were traditionally the prerogative of sovereign States, are being filled by arrangements, codes and market-based frameworks, devised by nongovernmental organisations and international bodies to influence behaviour, so that there is "governance without government" and "governmentality without politics".

This new approach had a significant impact on the practice of corporate enforcement in Ireland. The ODCE, for example, was statutorily charged by section 12(1) of the CLEA

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2001 to encourage compliance with the Companies Acts and had an admirable history of doing so through media engagement, public presentations and information booklets ([8]: 154). Other non-punitive strategies, like directions to comply with the law and warning letters, have also been usefully employed. For example, the ODCE has declined to prosecute illegal directors' loans when they voluntarily rectified their wrongdoing, securing the repayment of €117 million in loans in 2012 and 2013 ([104]: 43; [105]: 39). In some cases, educative and persuasive strategies have not been sufficient and so regulatory responses have escalated up the enforcement pyramid. By design, however, most corporate and financial wrongdoing is addressed in the civil jurisdiction of the law rather than the criminal courts, as is demonstrated when contrasting the number of persons on the register of restricted persons and register of disqualified persons as against the number of persons summarily prosecuted each year under the Company Acts. By the end of 2002, there were just 54 people on the register of restricted persons ([106]: 31). However, this number rose to 961 by the end of 2016 ([107]: 39). Just 10 company directors were named on the register of disqualified persons in 2002 but by the end of 2016 this number rose to 3664 ([107]: 39). The ODCE, by contrast, prosecuted eight cases resulting in 20 convictions for offences prosecuted on a summary basis in 2002; but this declined to 7 convictions in four cases in 2015 ([108]: 17; 2016: 40–41). Prosecutions on indictments were even more rare; and imprisonment was exceptional. The first prison sentence for breaching the Acts since the ODCE was founded was imposed in 2011 ([109]: 4, 34). Gathering these threads together, Ireland has implemented a sophisticated tiered model of corporate enforcement, taking compliance and sanctioning approaches, using both civil and criminal enforcement mechanisms, where criminal law is now often the sanction of last resort.

More recently, however, the enforcement context appears to be changing again. In 2008, extensive wrongdoing in the financial services sector was revealed, precipitated by light-touch regulation [110, 111]. Ireland experienced a severe economic crisis in which the national economy declined and the rate of unemployment soared from 4.9% in 2007 to 18.1% by 2012 ([112]: 31). These events were the tipping point that crystallised sentiments which had been growing for some time. White-collar crime became politicised. The Minister for Justice in 2009, Dermot Ahern, emphasised that the law would "bring to justice those who may have played hard and fast with the financial security of this country [and] that, whether you have a balaclava, a sawn-off shotgun or a white collar and designer suit, the same rules apply" (Irish Times 25 February 2009: 1). Another Minister, Noel Dempsey, opined that the bankers were guilty of "economic treason" (Irish Times 24 February 2009: 1). Not to be outdone, then opposition spokesman, now Taoiseach (Prime Minister), Leo Varadkar stated that they did more damage than the IRA to the State and should be treated like subversives (Irish Times 29 October 2010: 10). While perhaps viewed as rhetoric, Miller and Rose ([56]: 277) note that political discourse is "a kind of intellectual machinery or apparatus for rendering reality thinkable in such a way that it is amenable to political deliberations … to codify and contest the nature and limits of political power." It articulated a politically expedient rationality which was used to justify the fortification of laws to enhance state powers and limit procedural rights in the fight against white-collar crime.

The Criminal Justice Act 2011 was enacted to enhance the investigative powers of regulators and to reduce delays in the investigation and prosecution of white-collar crimes. It empowered Gardaí to break up and extend detention periods, (s.7), to draw

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adverse inferences from refusing to explain suspicious circumstances involving the accused (s.9), to require people with relevant information to answer questions (s.15), and make it easier to determine if information is legally privileged (s.16). Moreover, the Act made it a criminal offence, punishable by up to five years imprisonment, for people to fail to report information to the Gardaí pertaining to corporate or financial crime (s.19). The Central Bank (Supervision and Enforcement) Act 2013 further increased the investigative and sanctioning powers of the Central Bank by specifying new information gathering powers, specifying rules to challenge legally privileged information, protecting whistle-blowers, and doubling penalties for administrative sanctions so that companies may be fined €10 million and individuals may be fined €1 million. Pan sectoral whistleblowing legislation was introduced by the Protected Disclosures Act 2014. Far from exhibiting inertia in the field of company law reform, the State engaged in a massive modernisation and consolidation project, producing the largest ever statute in the history of the State: the Company Law Act 2014. More recently, the Government announced a package of "Measures to Enhance Ireland's Corporate, Economic and Regulatory Framework" [113] which included, among others, proposals to consolidate corruption legislation, to streamline white-collar trials, and implement a European Directive to enhance transparency and investor protection. Shortly thereafter, the Law Reform Commission published its report "Regulatory Enforcement and Corporate Offences" [114], calling for a new agency with enhanced powers to address white collar criminality, and for the introduction of new measures like Deferred Prosecution Agreements, among others. These reports clearly signal that efforts to tackle white–collar crime remain on the criminal justice agenda.

Moreover, however, corporate enforcers have also indicated a greater willingness to escalate to more serious sanctioning approaches in practice. The Central Bank of Ireland, in its policy document *Our New Approach* ([115]: 2), also committed to taking a more aggressive intrusive approach. It has indicated, however, that it regards administrative sanctions, rather than criminal prosecutions, as the appropriate mechanism to do so [116]. The ODCE, in its annual report published in 2014, stated a preference for a gradual shift away from summary prosecutions in the District Court in favour of prosecutions on indictment (before a jury with more severe potential penalties). Over the past decade, the DPP has prosecuted some of Ireland's senior bankers for wrongdoing which came to light after the financial crisis (People (DPP) v Drumm (Dublin Circuit Criminal Court, 10 July 2018); DPP v Drumm (Dublin Circuit Criminal Court, 20 June 2018); *DPP v Bowe & Anor* [2017] IECA 250; *The People (DPP) v O'Mahoney, Daly and Maguire*, Circuit Criminal Court (Judge McCartan), 29 July 2015; *The People (DPP) v Whelan and McAteer* Circuit Criminal Court (Judge Nolan), 17 April 2014). The results of these cases are mixed; some resulted in convictions and some in acquittals. One particular prosecution, however, called into question the competence and legitimacy of the official State response to white-collar criminality. In *DPP v FitzPatrick* (Circuit Criminal Court (Judge Aylmer) 23 July 2017), the Court strongly criticised the ODCE for failing to conduct an impartial investigation, coaching witnesses, and destroying evidence which may have been exculpatory for the accused. The solicitor who had taken the lead in the case did not have experience of conducting criminal trials and had been operating under significant stress when he shredded evidence. On the one hand, the case demonstrates that continued legacy issues remain, particularly with regard to the lack of expertise and under-resourcing of

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regulators, issues acknowledged by the ODCE itself [117]. On the other hand, the prosecutions themselves were still a significant symbolic statement of the more intrusive contemporary approach to corporate enforcement in practice. The State persevered over a decade-long investigation, despite limited resources and considerable difficulties securing evidence, to prosecute serious breaches of the Companies Acts against some of Ireland's most senior bankers. In some cases at least, the State had proven its case beyond a reasonable doubt and secured convictions against some of the most senior figures in Irish banking, finally 'pulling the trigger on the big gun'. Moreover, in a subtle reformulation of the principle of proportionality, the judiciary have suggested that offenders without previous convictions would not get significant credit for mitigating factors where they were common among those who committed similar crimes (*DPP v Duffy & Anor* [2009] IEHC 208). This was the case even where they were rehabilitated and unlikely to offend again (*DPP v. Paul Begley* [2013] IECCA 32). Some have suggested that this formulation is less likely to privilege white-collar wrongdoers who are now more likely to receive custodial sentences for serious wrongdoing [118].

Drawing some of these developments together, the State boosted the investigative powers of the police, sought to avoid and limit due process rights in new ways, and increase punishments. To an extent, these developments were merely an extension of the existing trajectory. However, the mentality underpinning these developments was different. Unlike previously, when initiatives were introduced for mostly instrumental reasons, to address problems with proving guilt in white-collar crime cases, these initiatives reflected the recognition that corporate and white-collar crime threatened the economic security of the State. There was a further shift away from individual protection only addressing "personal references and towards system relations" ([119]: 432). Moreover, these developments also had ostentatiously political purposes. The "heating up" of political debates meant that politicians had to follow through on their "tough on crime" approach with something more tangible than rhetoric. Cracking down on due process rights and limiting conventional criminal procedure was the convenient way of blaming regulatory failure on something outside of politics. Therefore, these developments, in addition to responding to issues which had been long neglected, also reflected the political desire to "tool up" executive power and "act out" for public approval in an attempt to "govern through crime" [13].

Conclusion

Governmentality reveals that our contemporary regulatory space is invented and constructed to meet particular objectives [120]. The processes and strategies of government excavated in this article reveal the causes, indicators and outcomes of significant social and economic transformations in the Irish State. It analysed the technologies of power through which shifting political mentalities were realised. In doing so, it did not merely seek to describe how the State exercised governmental tools, but also sought to articulate and demonstrate the relationship between political power, economic forces and social contexts, and the extent to which tactics made these relationships work. A new way of governing corporate wrongdoing has emerged to address Ireland's changed political, economic and cultural context. Traditional methods

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of laying blame, forged in the agrarian Irish State, were no longer capable of dealing with the contemporary challenges of an advanced industrial economy which was more willing to recognise the risks posed by increased corporate activity. Corporate wrongdoing is being governed in new ways combining both dimensions of thought and action in a form of "governmentality". Applying this theoretical framework to this article, it was first shown that though the State initially governed under the cover of protectionism, to resist British influence as an assertion of sovereignty, it subsequently employed "the art of government" to escape economic stagnation, embracing competition and light-touch regulation to promote itself as an attractive place for foreign investment. This account does not downplay the role of the State but acknowledges the numerous sites of governance that now exist within and outside it [121]. Government is distinguished from acts for the self-preservation of the early Irish State and concentrated on boosting the security and welfare of the population, which "involves sets of practices and calculated strategies that are both plural and immanent in the State" ([33]: 466). Secondly, it was demonstrated that while centralised policing and prosecutorial bodies traditionally monopolised most of the responsibility for addressing corporate wrongdoing, contemporary regulatory governance is increasingly exercised through fragmented, embedded actors in a "responsive" enforcement model, using a diverse arsenal of tactics and sanctions. Governance became fragmented both analytically and politically, "understood as dispersed among a multitude of agencies and exercised in diverse ways through many apparatuses, institutions and architectures" [19]. The third aspect of this framework was applied to demonstrate that this graduated model of enforcement, in which criminal law has become the sanction of last resort, is designed to persuade corporate actors that compliance is in their own interests, so that they internalise compliance norms, not just because obeying the law is the right thing to do, but because it is in their interests. So understood, "power doesn't emanate from one source, nor does it work to one end nor take one form … to wield and be subjected to power, to subject ourselves and others to power" [19].

These transitions and developments had a significant impact on contemporary structures, practices and mentalities relating to the policing and punishment of corporate wrongdoing. Corporate wrongdoing had traditionally been criminalised using conventional criminal justice methods and the ordinary police and prosecutors were often charged with the responsibility of enforcing the law. Since the 1990s, however, the conventional crime monopoly became fragmented because a variety of specialist interdisciplinary agencies, with enhanced powers, now enforce the law. The near exclusive dominance of conventional crime methods also faded because enforcement strategies have diversified. There is an increased tendency to rely on regulatory criminalisation, involving strict liability and reverse onus provisions, and a parallel tendency to "civilise" law, using civil and administrative sanctions. These measures achieve the goal of avoiding the more onerous issue of proving guilt in criminal cases. Moreover, corporate wrongdoing is specifically addressed by a pyramidal enforcement architecture where criminal sanctions are now often a last resort, and not just a non-response. Far from being the subject of inertia and apathy, politicians have pledged to "get tough" on white-collar crime and introduced new laws to tool up executive power and act out for public approval in an attempt to "govern through crime". The expressive approach now competes with instrumental policies. Nevertheless, the State seems to have transitioned from one paradoxical model of corporate enforcement to another. The traditional system of corporate enforcement invoked the State's most

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powerful weapon of censure, the criminal law, but was remarkably lenient in practice because the law was rarely enforced. The contemporary model is more concerned with accountability and less with blame, is explicitly conciliatory but incorporates remarkably punitive, instrumental elements. Thus explained, the Irish experience provides a context sensitive analysis of regulatory intervention that extends governmentality studies to white-collar criminality, using it as lens to analyse how it understood problems and exercised power to advance the goals of prosperity and security, illustrating a move away from individual references to a greater concern with systemic risk, for instrumental and expressive reasons.

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