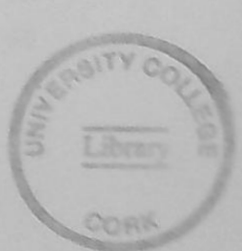
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THE LIVING VICTIMS OF HOMICIDE

Accommodating the Needs and Concerns of the Co-Victims of Homicide within the Irish Criminal Justice System

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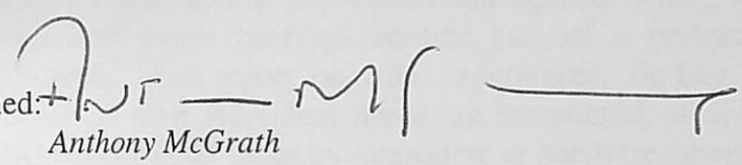
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Declaration

I hereby declare that this thesis is my own work and that it has not been submitted for another degree, either at University College Cork or elsewhere.

Signed: 

Anthony McGrath

Date: 7/10/2009

Abstract

The effects of homicide fan out from the loss of life at the centre of the criminal event to an array of individuals that include parents, siblings, spouses, offspring, significant others, extended family, and friends. Aside from dealing with the traumatic intrusion of homicide into their lives, these co-victims find themselves immersed in the unfamiliar world of criminal justice, confronted at every turn with a paucity of information and assistance, propelled through a series of transactions tightly harnessed to institutional procedures and agenda, where trials, sentencing, appeals, inquests, and parole hearings become part of a protracted journey strewn with impediments. Most report negative experiences, finding criminal justice a forum within which their individual needs are immaterial, their handling characterised at best by neglect and at times by insensitive or harsh treatment.

This thesis illustrates how the overall impact of homicide on its co-victims is of such magnitude that they must properly be regarded as victims in their own right, and questions how the Irish criminal justice system can best accommodate their needs and concerns by assessing the reforms championed by *Advocates for Victims of Homicide* (AdVic), an organisation helmed by those bereft by homicide who, having experienced that system firsthand and found it to be lacking, are best positioned to identify and campaign for the interests of this particular set of victims. The reforms sought and examined include the lack of general and case-specific information; the use of victim impact statements; potential interaction procedures with the public prosecutor; the sentencing standards for murder and manslaughter and the long-term administration of those sentences; and the overall treatment of homicide co-victims by criminal justice professionals. This thesis also proffers a number of practical recommendations to help alleviate the negative impact the legal system has upon homicide co-victims.

Acknowledgements

A doctorate is a substantial undertaking that requires the cooperation, assistance and support of many people. While mindful of attempting to thank each individually for fear of omission, there are those without whom I would not have finished this body of work when or in the manner that I have who deserve specific mention. It is said often of postgraduate research, not least because it is true, that your supervisor remains your most valuable resource throughout. I was fortunate enough to have not one but two of the best, Professor Caroline Fennell and Dr Shane Kilcommins. I am grateful to both for their direction and encouragement, which facilitated this experience and made it as rewarding as it was for me.

I also want to express my gratitude to Thomas Grall (BSc) for his invaluable assistance in compiling and verifying the results of the postal survey and for designing the tables and figures presented herein; Dr Maire Leane, Department of Applied Social Studies at University College Cork, for her advice on empirical research; Justice Joseph Finnegan, then President of the High Court, Justice Matthew Deery, President of the Circuit Court, and the Director of Public Prosecutions, James Hamilton, for their support in generating a high response rate to the survey, and to those who gave of their time to respond; Chief Prosecution Solicitor Claire Loftus, Office of the Director of Public Prosecutions; Professor Ian O'Donnell, Director of the Institute of Criminology, University College Dublin; Dr Enda Dooley, Director of Healthcare, Irish Prisons Service; the staff of the Boole Library, University College Cork, particularly Phil in Inter-Library Loans, and also the staff at the Berkeley Library, Trinity College Dublin; and to Maura Hynes, Principal Officer, Department of Justice, Equality and Law Reform.

In addition, a collective "cheers" to my friends, who offered the belief needed to get this done and for letting me talk of it more than they may have wanted to hear; and to the wonders of a Jack Daniels-induced conversation eleven years ago in *Alfies* on *Rue de Blarnè*, and all of its legal consequences…

And finally, to Annie Mulvaney, Joan Deane and Aoife Dillon of Advocates for Victims of Homicide – that your work is to ease the ordeal for those in the future who will regrettably experience the criminal justice system that so disappointed, distressed and disillusioned you epitomises not just your wonderful strength of character but is a brave tribute to the memory of those so cruelly taken from you. I wish you well on your continued journey.

August 2009

In memory of my mother,
Marie,
who would have read every word;

with gratitude to my father,
Liam;

and to Debbie,
who (almost always) refuses to play the big sister card on her baby brother.....

When loving hearts are separated, it is not the one who is exhaled to heaven, but the survivor, who tastes the sting of death.

Duchesse de Praslin

Introduction

On 8 March 2004, the profound, harrowing and dignified words of a grieving mother became the focus of a nation. Mary Murphy, whose 18-year-old son Brian died following a vicious assault outside Dublin nightspot Club Anabel at the Burlington Hotel in August 2000, delivered a powerful victim impact statement before the Dublin Circuit Criminal Court, printed and broadcast in its entirety by the media, granting the public an unprecedented view of a family reeling from the killing of one of its own, a family who felt that they too were victims "brutalised by this trial process."[1] Her words became the singular talking point of the day and days that followed, delivered at what she had wrongly believed to be the culmination of a case that had captured the attention of a wide section of the public like few others heretofore. Ensuing events that unravelled over three more years, which ultimately held no one to account for her son's death[2], served only to reinforce her deeply negative opinion of criminal justice in Ireland:

[1] Murphy M 'Victim Impact Statement of Mary Murphy' (9 March 2004) *The Irish Times* 7

[2] Of the four young men prosecuted for the death of Brian Murphy only Dermot Laide (22) was convicted of manslaughter in March 2004. That conviction was overturned by the Court of Criminal Appeal and in April 2006 the Director of Public Prosecutions entered a *nolle prosequi*, effectively putting to an end any question of a retrial. One of the factors reportedly bearing on this decision was a report compiled after the initial trial by State pathologist Dr Marie Cassidy, in which she reached conclusions to the cause of death which differed substantially from those of her predecessor, Dr John Harbison, who had conducted the post-mortem examination. She found that the injuries sustained by the victim were "relatively minor" and death could have resulted from alcohol-induced breathing difficulties (the toxicology report found that Murphy's blood alcohol level was 132mg, equal to three pints of beer). This conflicted with Dr Harbison's original finding that the death was caused by cerebral oedema (swelling of the brain) and the inhalation of blood due to multiple facial injuries consistent with an assault of "considerable violence." In March 2007, the Dublin City Coroner referred the case back to the DPP after Dr Cassidy, stating that she had previously not been given key evidence including photographs of the brain, revised her opinion to match that of Dr. Harbison. Despite this about turn the Director stated that he did not intend taking further prosecutions. In September 2007, seven years after the fatal incident, the inquest heard Superintendent Coburn agree that "considerable force had been applied to the kicks…to put it bluntly, [Brian] was kicked to death", while a witness described the assault as "akin to the behaviour of animals." The jury returned a unanimous verdict of death by unlawful killing.

> The [trial] was not facilitating justice or truth … I hope and pray that the injustice perpetuated on Brian will make people of goodwill, particularly working within the legal system, think again and re-evaluate what they are doing. [My son] suffered huge brutality, as have many other victims of homicide. When they die, their voice dies with them … On behalf of Brian and all the other victims of violent death, whose voices cannot be heard, I appeal to political and legal authorities to redress the imbalance in our legal system and to look at ways to bring truth back into the equation.[3]

Five days later, with the words of her impact statement still echoing, I read a feature, which fronted the *Irish Independent Weekend Review*, titled 'Our children were victims of killers, we're victims of the law.'[4] The article told of a group comprised primarily, though not exclusively, of parents bereaved by unlawful killing and the callous treatment they encountered at the hands of the legal system. This motivated them to establish what was to become Advocates for Victims of Homicide, a lobby set to challenge the handling of homicide co-victims by the criminal justice system. In this context, co-victims are the partners, parents, children, and relatives of the direct homicide victim.[5]

Shortly after, I met with Annie Mulvaney, one of the instigators of this budding organisation. She spoke of the *sui generis* experiences of homicide co-victims, how the aftermath of the killing becomes a time of immense disturbance and confusion. Apart from having to deal with the sudden traumatic intrusion of a homicide into their lives, co-victims learn that the killing itself becomes an ongoing event. They find themselves immersed in the unfamiliar world of police investigations, of confusing legal processes and court procedures, confronted with a paucity of information and assistance, with trials, sentencing, appeals, inquests, and parole hearings becoming part of a protracted and continuous journey strewn with impediments. The majority report negative experiences of the criminal justice system, a forum within which they quickly learn that their individual needs are immaterial, their handling characterised "at best by neglect and at times by insensitive and harsh treatment."[6]

It struck me as somewhat surprising that hitherto families of homicide victims had displayed such remarkable forbearance with the Irish legal system. These days it

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[3] Healy A 'Family says system 'does not facilitate justice'' (19 September 2007) *The Irish Times* 4

[4] McCarthy J 'Our children were victims of killers, we're victims of the law' (13 March 2004) *Irish Independent Weekend Review* 1. At the time, I was mulling over some potential (and, it must be said, some not so potential) research ideas for a PhD, and the theme of this article stirred my interest.

[5] A more detailed definition of *homicide co-victim* is provided at p94

[6] Dignan J *Understanding Victims and Restorative Justice* (London: Open University Press, 2005) 63

seems *de rigueur* to state that victims are outcast from criminal justice but this is never more so true when said of homicide co-victims. They are accorded no status *per se* as a legal entity, evidenced by the absence of any right of audience. Families sit in the public gallery, often hearing the lives of victims being misrepresented or described negatively by the defence, or realise that the life of their loved one is irrelevant to or depersonalised by the process, without any means of redress.[7] Nor, even though they are *de facto* victims, do they form part of any set of crime statistics kept or monitored by any government agency:

> Most public interest in homicide and murder has focused on the offender ... it seems to be because the victim is dead and the offender is alive. The co-victims are subjected not simply to a conspiracy of silence but a state of invisibility.[8]

The sudden, violent and horrific characteristics of the killing debilitate families, leaving them shocked and confused. The ensuing collection of perceived or actual insensitivities, indignities and intrusions imposed by the police, the prosecution, the defence, and the media all constitute a wrongdoing additional to that of the original crime. The criminal justice system is a significant milieu in shaping the post-homicide experience and existence of these families. We assume that when such an event occurs there will be a range of services provided, but experiences vary and most are dreadful, with co-victims left abandoned to cope as best they can, struck with the realisation, stricken even, that the justice system is not there to support them. Having journeyed through it, homicide co-victims tend to view the legal process as weighted heavily in favour of the accused. Advocates for Victims of Homicide are now calling for a greater responsiveness to the needs and concerns of this particularly damaged and traumatised subset of victims. Personally, I could not even begin to comprehend that in the midst of attempting to cope with the deliberate killing of a family member that one would then be pushed aside and failed at every turn by a system I would have presumed to be there to help and deliver justice:

> Indeed, the more we learn about the 'is' of the criminal process the more we are instructed about the 'ought', and the greater the gulf between them appears to become.[9]

I became committed that the basis for my research lay in folding homicide co-victims

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[7] Brown L 'The Aftermath of Murder and Manslaughter: The Families' Viewpoint' (1993) 12(1) *Bereavement Care* 6

[8] Spungen D *Homicide: The Hidden Victims* (London: Sage Publications, 1998) *xi*

[9] Packer H *The Limits of the Criminal Sanction* (California: Stanford University Press, 1968)

into the larger victim debate. What quickly became obvious was the notable dearth of study specific to this particular population of victims in Ireland; therefore a primary purpose of this thesis is to bring into sharp relief the objectionable position homicide co-victims find themselves in within criminal justice and to provide them with a better appreciation of what it is they are trying to improve, so that where there is a bigger picture to be seen, they might be able to step back and see it. This thesis explores some fairly uncharted terrain insofar as it is the first study to address the reforms sought by Irish homicide co-victims. As a result, the contribution this thesis hopes to make to criminal justice debate is as much about exploring the *why* behind many of the reforms sought than offering solutions in every instance. Hence this work is often and necessarily painted in broad strokes, and is not, nor was intended, as an exhaustive appraisal of any one single issue. It may well pose more questions than it answers and contain much more about the *need* to do than the *how* to do, but one of the purposes of research entails generating wider debate on the themes contained within. This thesis also proffers some practical recommendations, many of which, if implemented, will have broader ramifications benefiting not just homicide co-victims but all crime victims. I hope my research will be the spur to stimulate new ideas on how to create a more imaginative and effective criminal justice methodology that ensures that victims and co-victims alike are treated not just with dignity and compassion, but with accountability, shared knowledge, skill, and care.

In short, this thesis has two main research objectives. First, it sets out to demonstrate that the harm experienced by the bereaved is of such magnitude that they must properly be regarded as actual victims of crime in their own right. Reflective research into the experiences and needs of the bereaved and the extension of 'victimhood' to include the depth of loss endured as a consequence of the death by homicide of a loved one is timely and necessary. Secondly, having established a case for ascribing the bereaved the status of 'co-victims', this thesis then assesses the needs and concerns these co-victims have within the Irish criminal justice system by analysing the reforms championed by Advocates for Victims of Homicide. We must be mindful that groups such as this hold a mirror up to our criminal justice process. The co-victim's fight for change and inclusion in the overall framework of criminal justice is a refusal to be blanked by that system, a stand against the reduction of individual lives to the status of a statistic. This thesis will make clear the need to

appreciate that response, not as blind, emotive reaction but as a demand, and a wholly and highly legitimate one at that, for a role, recognition and redress.

Throughout the course of my research, I regularly encountered two very broad but controversial themes. The first, the rights of the defendant versus the rights of the crime victim, though important in overall victim discourse, is not central to this thesis, for Advocates for Victims of Homicide do not seek any participatory rights within the criminal trial, which, if they did, would only then raise concern as to how such rights might encroach upon the protections granted to the defendant. In any event, this thesis is not about a trade-off between either set of rights, instead it takes the reform measures sought by Advocates for Victims of Homicide and views them from a victim perspective with objective commentary. Nor is this thesis a critique of the rights afforded to accused persons or offenders. It does not attempt to juxtapose these rights with the reforms sought by homicide co-victims nor, more importantly, does it set out in any way to diminish the rights of the defendant. Indeed, this thesis remains mindful throughout of the constitutional due process and fairness protections guaranteed to those standing trial which must duly constrict and restrict any debate for participatory rights for victims.[10]

The second theme commonly encountered was the comparativeness of the victim's position within common law adversarial justice, as practised in Ireland and the United Kingdom, and the civil inquisitorial legal systems of mainland Europe. Again, as Advocates for Victims of Homicide are not seeking participatory measures in the Irish criminal trial similar to those enjoyed by victims within continental legal proceedings, this thesis is not an in-depth appraisal of one system over the other. It does, however, on occasion, distinguish or draw comparisons between the common law adversarial and the civil inquisitorial legal systems, but does so merely to draw attention to how victims and co-victims are more engaged with the latter.

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[10] In Ireland, *Bunreacht na hÉireann*, the Irish Constitution, has had a profound influence on the development of criminal procedure, particularly in relation to the trial itself, mainly because of "the expansive judicial interpretation of certain key constitutional provisions, notably the right to trial in due course of law conferred by Art[icle] 38.1 ["No person shall be tried on any criminal charge save in the due course of law"] and the right to personal liberty ["No citizen shall be deprived of his personal liberty save in accordance with law"] conferred by Art[icle] 40.4.1° - O'Malley T *Sentencing Law and Practice* (Dublin: Thomson Round Hall, 2006) 13-14. Leading cases in this area include *People (AG) v O'Brien* [1965] IR 142; *People (AG) v O'Callaghan* [1966] IR 510; and *State (Healy) v Donoghue* [1976] IR 325. The law does not, of course, guarantee a perfect trial, merely a fair one. The right to fair procedures is implicitly guaranteed by Article 40.3.1°, where "the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen", and Article 40.3.2°, where "the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person [and] good name…of every citizen."

Terminology

At this point, I would like to lay a few short housekeeping matters concerning some terminology employed herein. Whereas there is an overwhelming predisposition in related academic material to genderise offenders as male with the use of the pronoun he and victims as female or she, this practice is not adopted here. It is my preference to refer to both as *he*, simply because homicide is mainly perpetrated by males upon other males. Likewise, generic roles, like members of the judiciary or An Garda Síochána *et al.*, are all referenced as he. This is not to be misconstrued with any sexist motivation; it is purely for consistency. The use of the term *criminal justice system* throughout refers to the investigative, enforcement, prosecution, punitive, and service aspects of criminal law, procedure and related institutions. Of more import is the use of the word *homicide*. Homicide is a broad term relating to a variety of killings, culpable or otherwise. However, it is an obvious and far less gangly nomenclature than, say, *the co-victims of murder and culpable manslaughter* or *the co-victims of criminal homicide*. For reasons of fluidity I have chosen to limit the term homicide, unless otherwise stipulated, to mean these categories of killing.

Presentation

This thesis is structured into five chapters, though as several topics and themes appear, disappear and reappear with the flow of matters throughout, some overlap is both inevitable and necessary. It is important to contextualise this thesis and the opening chapter, 'The Crime Victim', fleshes out our understanding of the position of the victim within criminal justice. As astonishing in hindsight as his absence was, the victim has made an equally remarkable return as the criminal justice zeitgeist, a revival of interest that has spawned a wide array of research literature, which this chapter draws heavily from. It begins with a historical overview of how the victim was once centre-stage, fulfilling a role now tantamount to that of public prosecutor, before he was sidelined as criminal justice became a social contract, an exercise in State function. It then presents an outline of the criminological sub-subject of victimology, oft credited with initiating scholarly and professional interest in the victim and of relevance here not just because it is the field of study that this research falls within, but also because it once boasted a theory of victim-precipitated homicide, the offence central to this thesis. The focus next shifts to a consideration of the various factors that led to the birth of the crime victims' movement in the United

States and the subsequent rise of Victim Support in England, after which there is an account of developments within Ireland that have proven beneficial to victims. It would be wrong, however, to presume that the victim's comeback within criminal justice discourse has been entirely welcomed and it is not without its detractors, who hold forth that the victims movement has been politically hijacked to support more punitive measures in the face of long-term governmental inability to tackle the sources of crime, and that the terminology of *balance*, so frequently employed in victim-speak, is misguided and assumption-laden. This chapter concludes with a brief look at how the media abuse homicide co-victims and society's fear of crime so as to sell its wares.

The second chapter, 'The Co-Victims of Homicide', shifts attention away from the generic crime victim to focus more specifically on the homicide co-victim. Whilst it is hardly necessary to demonstrate the severity of the effect and the need for support felt by the relatives of homicide victims, this chapter charts the turbulent and traumatic repercussions that such a killing wreaks upon the individual and the familial unit. It would be difficult, if not futile, to debate or assign any role or right to homicide co-victims without first some appreciation of their experience via the psychological consequences of that crime and it is this phenomenology that is considered here:

> It is the task of the social scientist ... of any educator ... to continually translate personal troubles into public issues, and public issues into the terms of their human meaning for a variety of individuals.[11]

This chapter also tells of the formation of Advocates for Victims of Homicide and catalogues this pressure group's agenda for reform.

The third chapter, 'Homicide in Ireland: the Law, Statistics and Trends of Murder and Manslaughter', concerns itself with the crime that has afflicted those central to this thesis. It first sets out the legal differences between murder and manslaughter. Many co-victims are appalled when the killer of their loved one is convicted of manslaughter for what they themselves hold to have been murder, and are particularly anguished when the manslaughter is one resulting from the presence of provocation, the notorious doctrine of which is discussed at depth here. This leads into an appraisal of the debate on restructuring the charges of murder and manslaughter into a singular charge of criminal homicide, or into a range of homicide by degrees, or whether to retain the differentiation but remove the mandatory life-sentence for murder. The

[11] Wright Mills C *The Sociological Imagination* (Oxford: Oxford University Press, 1959)

chapter concludes with an overview of the statistics and trends of homicide, drawing attention to the increased occurrence of these killings in Ireland over recent times.

The fourth chapter, 'Post-Conviction: the Punishment and Parole of Homicide Offenders', concerns itself with the sentencing standards for murder and manslaughter in Ireland, and the long-term administration of those sentences. Co-victims and members of the public alike frequently express disquiet at the brevity of sentencing passed down and the early release from prison that is afforded to many homicide offenders. This chapter evaluates proposals to seek longer terms of imprisonment to be served for murderers and more appropriately consistent sentencing for those convicted of manslaughter, before then considering the process of parole and what role co-victims might be given within it.

The concluding chapter, 'Assessing the Needs and Concerns of Homicide Co-Victims within the Irish Criminal Justice System', evaluates many of the other reforms sought by Advocates for Victims of Homicide. In particular, three areas have been singled out for detailed examination; namely, the lack of accurate and timely information made available to crime victims; the granting of the right to make impact statements for homicide co-victims; and ways in which the Director of Public Prosecutions can attempt to reduce what co-victims hold to be the impersonal nature his Office. This is followed by some briefer observations on areas such as compensation; courtroom accommodation; delays in trials; the frequency with which bail is granted; the penalisation of the defence for attacking the character of the deceased at trial; and the treatment of co-victims by professionals within the justice system generally.

Finally, as is the norm, this thesis draws to a close with some concluding comments, followed by some practical recommendations.

Methodology

A large element of this thesis is the correlation and examination of previously published materials relating to homicide co-victims. Though a considerable quantity of this literature originates from the United States, where research regarding homicide co-victims is well advanced, it greatly assists in our understanding of the plight of the Irish homicide co-victim.

I interviewed Joan Deane, Aoife Dillon and Annie Mulvaney, committee members of Advocates for Victims of Homicide, on 15 June 2006. This was a structured

interview with which I conducted from a list of prepared questions, though invariably the conversation expanded out into different areas of mutual interest.[12] As is best practice, this interview was recorded in full and later transcribed.[13] In addition, I attended three national open meetings of the organisation, though purely as an observer.[14] After an initial introduction to the floor, I sat at the back of the room and took note of the discussions that ensued. I was conscious that those homicide co-victims who spoke at these meetings were, in many instances, recounting the most personal and painful of events, and I am grateful that they let me hear their stories, so as to provide me with some understanding as to their motivations for change. Nonetheless, this study is not about the personal narratives of homicide co-victims - however compelling they may be and however deserving they are to be heard, this is not the appropriate forum.

It is an unfortunate reality that empirical research in Irish criminal justice is considered an "absentee discipline."[15] In an attempt to help fill this void, I conducted a postal survey to gauge what level of support exists amongst the Irish legal profession for reforms advanced by Advocates for Victims of Homicide. While other means of surveying were considered, the postal method was favoured as telephone-based or face-to-face interviews were, due to the work demands of the profession in question, deemed unsuitable.

In May 2006, 249 questionnaires issued to the then sixty-six members of the High and Circuit Court, the eighty-three legal staff of the Office of the Director of Public Prosecutions, the top fifty recipients from the Criminal Legal Aid Scheme 2005 who were barristers, and the top fifty recipients who were solicitors.[16] It was preferred to target this small but specific group whose members had an interest and/or experience in the area of homicide law. In surveys of specific, more homogeneous groups (*i.e.*, Irish legal professionals within the area of homicide law) the postal method appears to

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[12] Quotes in this thesis that are not otherwise accredited are taken from the transcript of this recorded interview, conducted 15 June 2006. As AdVic operates as a collective, quotes are not assigned to individuals and may, for the purposes of fluidity and with the permission of the three interviewees, be an amalgamation of responses made by one interviewee immediately preceding comments made by another, but always in reply to the same question.

[13] Anderson G & Arsenault N *Fundamentals of Educational Research* (Philadelphia: Routledge, 1998) 187

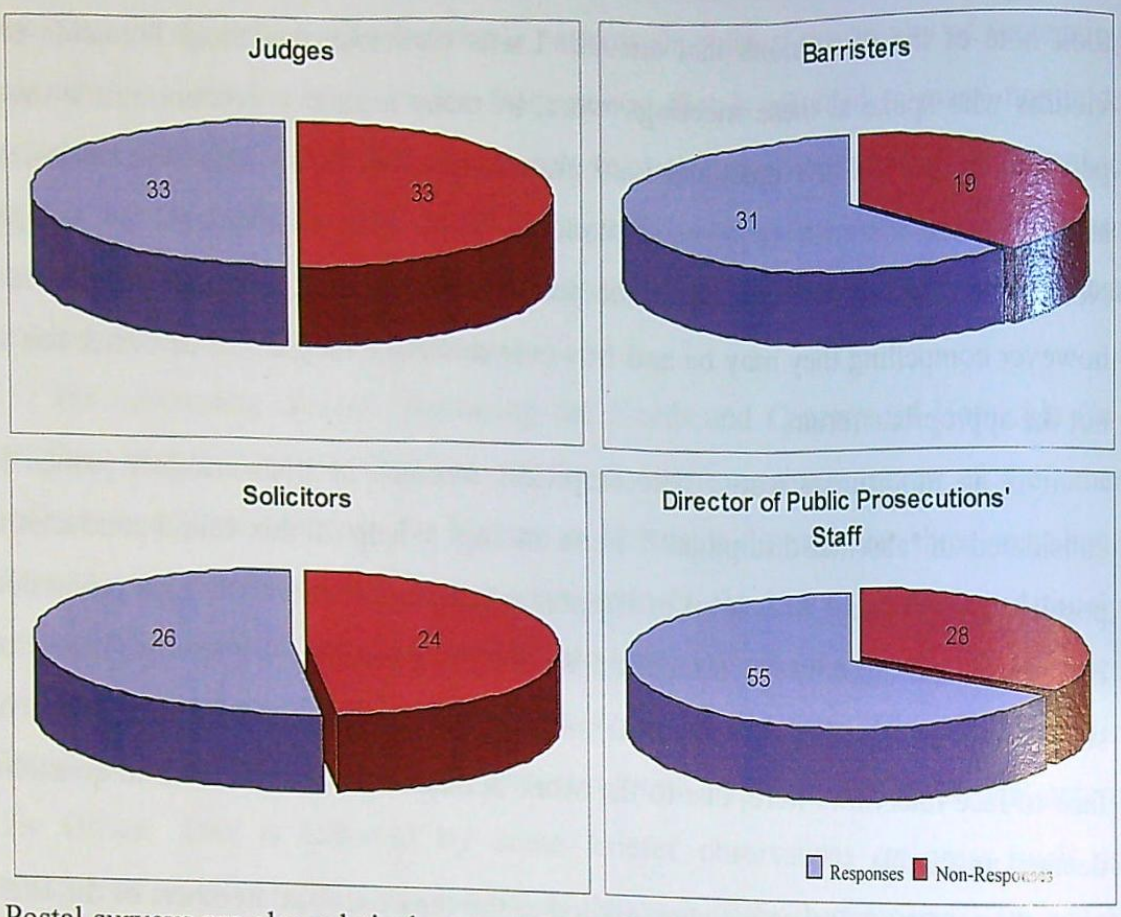
[14] Buswells Hotel, Dublin (4 April 2005); Metropole Hotel, Cork (17 September 2005); and Pery's Hotel, Limerick (11 October 2008)

[15] Rolston B & Tomlinson M 'Spectators at the 'Carnival of Reaction'? Analysing Political Crime in Ireland', in Kelly M, O'Dowd L & Wickham J (eds) *Power, Conflict and Equality* (Dublin: Turoe Press, 1982) 25

[16] It was presupposed that a large number of these recipients from the Criminal Legal Aid Scheme would have participated in homicide trials.

be about as good as other surveying techniques, especially when the topic under investigation is of particular relevance to the group.[17] In total, 145 of the 249 questionnaires were returned, representing a response rate of 58.2%. The responses are presented in graph form throughout this thesis at the appropriate junctures.[18]

Table 1: Breakdown of Responses to the Postal Survey by Group



Postal surveys are also relatively easy to organise; fairly inexpensive; less sensitive to potential biases introduced by the interviewer; best suited to eliciting confidential information and views; and permits recipients to complete it after consideration and without undue time constraints.[19] It was decided to make the survey anonymous, since respondents who wanted to express dissonant views may have been discouraged from answering if their names were readily associable to the reply. An obvious drawback to this anonymity was that it ruled out any follow-up qualitative research in the form of focus group discussions or cognitive interviews, though, in any case, this would have proven difficult, considering the aforesaid constraints of the professionals involved.

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[17] deVaus D *Surveys in Social Research* (London: Routledge, 2002) 127

[18] Percentages in these graphs are displayed as full numbers and therefore, in some incidences, will not sum to 100%. A tabulated chart of all responses, the questionnaire itself, and all accompanying material that issued with it, are appended to this thesis.

[19] See generally Babbie E *Survey Research Methods* (California: Wadsworth, 1973); deVaus D *Surveys in Social Research* (London: Routledge, 2002), and Salant P & Dillman D *How to Conduct Your Own Survey* (New York: John Wiley & Sons, 1994) 35

Each questionnaire was accompanied by a cover letter outlining the name and nature of the research being undertaken, why the particular sample group was chosen, and in what way the results would be presented. A second letter from Professor Caroline Fennell, Dean of the Faculty and Head of the Department of Law at University College Cork and one of my supervisors, was also attached. In addition, a letter from the Director of Public Prosecutions, James Hamilton, accompanied each questionnaire issued to his legal staff, highlighting that as the survey was anonymous personnel should reply with their personal views rather than with those held by his Office. Similarly, letters encouraging responses from the then President of the High Court, Justice Joseph Finnegan, and the President of the Circuit Court, Justice Matthew Deery, were sent to the benches of their respective courts. A stamp-addressed envelope was enclosed to facilitate replies.

The postal questionnaire comprised of two doubled-sided A4 sheets with sixteen dichotomous questions offering simple *yes* or *no* answers; two multiple-choice, one offering six, the other a range of seven choices; and two Likert scale questions, where respondents were asked to signal on a scale their satisfaction or agreement with the particular statement. The question and answer options were presented clearly to the respondent. The advantage of asking questions that can only be answered within a closed range, namely the ticking of a box, is that it is quick to code and extremely accurate.[20] It also minimises the completion time of the questionnaire for the recipient, thereby helping to maximise the response rate. Great care was taken to ensure that the wording of the questions precluded alternative interpretations.[21] There was a section at the end for additional comments, which almost one-third of respondents availed of, either in reference to questions asked or to offer additional points, and many of these have been subsumed into the overall debates presented herein.

Each returned questionnaire was numbered and all possible answers to every question coded. Using Microsoft Excel, each questionnaire number was positioned along the left-hand side of the worksheet, with individual question numbers inserted across the top. Then the code for each answer to all questions was inputted into two different worksheets, once by the author and once by Thomas Grall (BSc).[22] A

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[20] Fowler J & Floyd J *Improving Survey Questions: Design and Evaluation* (California: Sage Publishing, 1995) 2

[21] Browne M & Keeley S *Asking the Right Questions: A Guide to Critical Thinking* (New Jersey: Prentice Hall, 1998) 115. To this end, I am grateful to Dr Maura Leane, Department of Applied Social Sciences at University College Cork, who proofed my questionnaire.

[22] 'It is best when conducting surveys that a statistician is called upon to provide not just input on the procedures that will be used to the quality of the data collected but also to ensure that the questionnaire is

validation spreadsheet detected the differences between the first and second entries and these were corrected by reference to the original completed questionnaires, thereby validating the data entered. I was mindful from the outset that survey research carries with it an obligation to follow certain ethical norms and best practice standards, and every effort was made to ensure that a high standard of ethical behaviour was observed throughout.

In October 2008, as my research drew to an end, I made a presentation to AdVIC members on the merits or otherwise of victim impact statements, outlining proposals for reform as recommended later in this thesis. This thirty minute presentation was followed by a lively questions and answers session. In addition, AdVIC, the Office of the Director of Public Prosecutions and the head of An Garda Síochána's Family Liaison Scheme have all requested copies of my completed research.

As a final note, events in criminal justice are volatile and subject to change; matters that now seem auspicious can always founder and little beginnings can prosper. An occurrence in the future may always delay, wreck, transform or accelerate what is in train or indeed leave in its wake a new position or order, therefore this thesis should be taken as dealing with the state of affairs only as they so existed up to the end of March 2008.[23]

conducive to easy data processing ascertain and manipulation for analysis' – Levy P & Lemeshow S *Sampling of Populations: Methods and Applications* (New York, John Wiley & Sons, 1999)

[23] That said, the concluding section will note what developments have occurred from April until the end of November 2008, when this thesis was submitted.

CHAPTER 1

The Crime Victim

It is useful, in order to contextualise this thesis, and before its focus narrows almost exclusively to the offence of homicide and its co-victims, to first consider the changing and developing role of the generic victim in criminal justice practice and academic research, his emergence as social activist and voluntary victim support provider, and his portrayal and exploitation within political and media discourse.

This chapter begins with an overview of the major shift in the trajectory of the crime victim, outlining why the State, in its pursuit of fairness and institutionalised justice, displaced the victim from his historical and central standing as formal prosecutor of the offence to what is now the position of mere reporter of the criminal act and, where required, witness for the prosecution.

It then presents a synopsis of the academic discipline of victimology, a subfield of criminology oft credited with initiating professional interest in the crime victim. Even though victimology was originally conceived as the scientific study of victimisation, over recent decades and in response to the negativity its victim-precipitation theory of the criminal act engendered, which controversially portioned some blame for the crime to the victim, this discipline has shied away from its once strict methodical approach and morphed into what can now be defined as a welfare-centred subject, partially populated and driven by the very victims it once purported to study.

Next, there is a brief history and analysis of the factors that led to the rise of the rights-centred crime victims' movement within the United States, one that is widely regarded as siring the phenomenon of victim activism. This begets a short discussion on the differences between service and procedural rights and how some continental European countries are beginning to invoke the latter so as to involve the victim more in the workings of the criminal trial.

There then follows a brief account of the emergence and success of the support-orientated victims' movement in England and Wales. This leads into an examination of the position of the victim within Irish criminal justice, mapping out what developments have, in recent times, proven beneficial to him.

Notwithstanding that the crime victim is now a prominent feature in criminal justice debate, it would be wrong to presume that this revival of interest has been unequivocally positive. This prompts an evaluation of what some detractors hold to be the political hijacking of the victims' movement in order to support increasingly punitive measures in the face of long-term governmental inability to tackle the sources of crime, with such anti-defendant reform heralded as pro-victim when it does little, if anything, to assist his plight. There includes a critique on how the populist debate of *balance* between the rights of the victim and those of the defendant is a misconceived and idealistic pursuit, one ultimately unattainable.

This chapter then concludes with a brief look at how the media capitalise on society's fear of crime, and in particular how they utilise victims of serious offences, including homicide co-victims, as lucrative commodities to sell their wares.

A Brief History of the Crime Victim

The concept of *victim* dates back to ancient cultures and civilisations, its original meaning rooted in the idea of a sacrifice or scapegoat, the execution or casting out of a person to satisfy a deity or hierarchy. Today the word *victim* is commonly used to reference anyone caught in an asymmetric relationship or situation, *asymmetric* meaning anything unbalanced, exploitative, parasitical, oppressive, destructive, or having inherent suffering. This heterogeneous concept encompasses any person who experiences undeserved suffering, injury, loss or hardship due to any cause, resulting in the indiscriminate use of the word: cancer victim, holocaust victim, tsunami victim, victim of injustice, crime victim *et al.*[24] Hence, one commonality has come to apply to virtually all usages of the term *victim*, that is that the individual has suffered some injury and harm by forces beyond his control and not of his personal responsibility.[25]

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[24] Some feel that being defined as a *victim* carries negative connotations of pain, weakness or subjugation and prefer instead to subjectively define themselves with terminology such as *survivor*. The usage of this term can, however, publicly move victims prematurely through the process of healing before they have actually negotiated it.

[25] There is increasing concern regarding the social impact of victim attribution in what is said to be a growing and unattractive culture in which more people abjure responsibility for their own actions or refuse to accept that events may be beyond human control - see generally Sykes C *A Nation of Victims: The Decay of the American Character* (New York: St Martins Press, 1992)

The legal definition of *victim* typically encompasses a person who has suffered direct, threatened, physical, emotional, or pecuniary harm as a repercussion of the commission of a crime.[26]

Over the past four decades, the rhetoric of Western criminal justice has been increasingly permeated with concern for the rights and welfare of the victim. Government agencies now fund a multiplicity of voluntary organisations that are providing victim-related services on a significant scale, research projects and academic books apropos victims have become something of a growth industry, and once barely referenced, the needs and rights of the crime victim has become a recurrent topic in university classes in criminology and law.[27] There now exists an uncharacteristic consensus amongst academics, practitioners and policy makers alike that criminal justice has, for some time, not only neglected victims but is in many respects guilty of having treated them badly:

> For too long victims of crime have not been given the proper support and protection they deserve. This must change. [We] must ensure that their needs are placed at the very heart of the criminal justice system.[28]

Such is the widespread extent of this consensus that the concept of the harshly treated and poorly neglected victim has become "accepted dogma, almost a truism."[29] One would be mistaken though to presume that this relatively recent and burgeoning concern is placing, for the first time, the victim in the spotlight – it can more correctly be seen as the rejuvenation of the victim's prominent past from a relative hiatus, a reintroduction of this forgotten actor into criminal justice debate.

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[26] The use the term *victim* at any stage prior to a criminal conviction is sometimes criticised, for since defendants must be presumed innocent victims can thus only be legally presumed victims - Maisch H & Schuler-Springorum H 'Procedural Victimology and Its Contribution to Victimological Knowledge', in Drapkin I & Viano E (eds.) *Victimology, Crimes, Victims and Justice* (Lexington: Lexington Books, 1974) 13. It is true that in some cases we do not even know that the victim is an actual victim; all we know for sure is that he is an accuser. This rationale calls for the use of the term *victim* to be limited to post-conviction references, like victim impact statements or within parole processes. A more American approach to this predicament is that victims' rights neither trump nor are trumped by a defendant's presumption of innocence as each set of rights are independent and irrespective of each other. With reference to this thesis, the family of a homicide victim will always be able to point to a dead body, and therefore are co-victims from the outset, though they may not, it is true, be the co-victim of the defendant. However, interestingly, the presiding judge of the Central Criminal Court, Carney J, has observed that in Ireland, in almost every case that comes before him, it is accepted that the accused unlawfully killed the deceased, with the sole area of contention being whether the offender is guilty of murder or manslaughter - Carney P 'Decriminalising Murder?' (2003) 8(6) *Bar Review* 254-255

[27] Maguire M 'The Needs and Rights of Victims of Crime' (1991) 14 *Crime and Justice* 363, 364

[28] Straw J *[then Home Secretary in Britain]* 'Partners Against Crime' (1999) 71 *Victims Support Magazine* 8

[29] Sebba L *Third Parties: Victims and the Criminal Justice System* (Columbus: Ohio State University Press, 1996) 25

Ascribing rights to victims or locating them within legal proceedings, or a co-victim in the context of the homicide trial, gives rise to questions of significant complexity set against a backdrop of the larger context of the function of the victim within criminal process in general:

> The questions raised are of considerable antiquity and in a sense pre-figure the modern criminal justice system. The answers are informed by a pendular analysis of a criminal justice system which has arced from its beginnings as victim inspired, funded and administered, to a point where victims feel, it is said, completely closed out.[30]

The role of the victim was not always so minimal as it is now. In the past, obtaining justice was the exclusive dominion of the victim or of his clan.[31] In early penal systems victims were the central players, empowered by the absence of any public prosecutorial body to find and personally impose punishment for specific wrongdoings. This primitive form of victim retaliation served as an early albeit unorganised structure of social control.[32] The criminal act was rationalised as nothing more than a private matter to be settled between the two parties involved. Victims obtained redress from offenders in a direct manner, extracting personal reparation, originally by eye-for-an-eye vengeance, unconstrained by outside interferences, then later through negotiated or arbitrated emendation settlements.

Thus there previously existed an effective form of restorative justice; offenders making amends so as to restore order and peace as quickly as possible and avoid vengeful blood feuds.[33] A killer was generally given a year to pay the clan of the victim the value of his victim's life, a worth generally determined by a complex set of class-based rules, before the family could commence a blood feud. As not all lives were considered to be of equal worth, the blood feud might require the expropriation of many assets or the death of several persons to atone for the loss of life for a single individual. Nor was it unusual for a person who broke the law to be attacked by the entire community in which he lived. As the lawbreaker was considered to have gone to war with the local population its response was to go to war with him – to banish,

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[30] Gillane S 'Balancing the Scales in a Homicide Trial: A Reply' [2007] 1 *Judicial Studies Institute Journal* 30

[31] Sebba L 'The Victims Role in the Penal Process: A Theoretical Orientation' (1982) 30 *American Journal of Comparative Law* 217, 225

[32] Elias R *The Politics of Victimization: Victims, Victimology & Human Rights* (New York: Oxford University Press, 1986) 10

[33] Strang H *Repair or Revenge: Victims and Restorative Justice* (Oxford: Clarendon Press, 2002) 193

pursue or kill him, ravage his land or burn his house.[34] Hence, even in pre-modern western society, there existed both a public as well as a private reaction to crime.

Law at this time was primarily local rather than centralised, for the most part unwritten rather than enacted. As early legal systems began to materialise and right into the nineteenth century, the onus for prosecuting an offender rested squarely on the shoulders and energies of the individual victim whose responsibility it was to gather and correlate the evidence, assemble the witnesses, prepare and present the case before the court, and bear all of the associated costs. The victim, or in the case of homicide the next-of-kin or local coroner, assumed the role of what present day is identified as that of public prosecutor. This positioning of the victim is now widely regarded as antiquated:

> Privatised criminal investigation and prosecution is not seriously defended in contemporary juristic literature. There is no positive theory of private prosecution and no body of thought explaining or justifying it. No one tried to make the case that it was a desirable practice to have an avenger in charge of gathering prosecution evidence ... Private prosecution was a default system, accepted because devising an effective alternative would have required the political community to confront a nest of divisive issues.[35]

The tradition of private prosecution necessarily conferred upon victims a quasi-judicial function. Each could elect not to invoke the law, opting instead to engage in some form of personal settlement or private retribution:

> It is a very modern idea to think that every discovered offence should be followed automatically by prosecution; for centuries, the English system had worked on the principle that indictment before a court was the last resort to be tried; there were all sorts of alternative informal means which the [victim] might try to use short of formal prosecution.[36]

A corollary of this cumbersome responsibility of private prosecution was the widespread preference of informal means for dealing with offenders, including direct and immediate physical punishment, especially in a small community where a trial

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[34] Pollock F & Maitland F *The History of English Law Before the Time of Edward I* (Cambridge: University Press, 1898) 449

[35] Langbein J *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) 12

[36] Philips D 'Good Men to Associate and Bad Men to Conspire: Associations for the Prosecutions of Felons in England, 1760-1850', in Hay D & Snyder F (eds.) *Policing and Prosecution in Britain* (Oxford: Clarendon Press, 1980) 117, 158

might well have proven disruptive of social relations.[37] Whilst it was no golden era for victims, arrangements whereby the victim and the prosecutor were more or less synonymous ensured that victims at least exercised control over their own cases.[38]

A fundamental flaw with this paradigm of prosecution was not just the burden it placed upon victims but the imbalance of power it created. An influential and wealthy victim could obtain some semblance of justice more readily and accessibly than a poor victim, so too could a powerful and wealthy offender intimidate and hamper an impecunious victim in order to avoid a court hearing.[39] This system was frequently called into question for its arbitrary, discretionary and often benevolent form of localised justice. Victims who did choose to prosecute were being increasingly considered vengeful, capricious and open to intimidation or blackmail, resulting in the shameful perversion of the criminal trial for private ends.[40]

The initial intrusion of the State into criminal justice was merely to standardise private vengeance, not displace it. The adversarial trial between victim and offender, or trial by conflict as a substitution for unregulated combat, exemplified this regulation. Yet, by subtle transformation, the State exercised growing control over criminal processes by institutionalising justice, telling the victim that the injury was to both him and the State, then later alienating him and assuming the role of surrogate victim so that what was once the sole domain of the victim became for a brief period the joint province of victim and State before being converted into the exclusive realm of the latter. Hence the State is not merely the arbiter in a trial between victims and offenders, it, or some emanation of it, presents itself as the victim. Whilst the concept of private prosecution continues through the redress of wrongs under the aegis of civil law, the development of criminal law gradually permitted the "stealing of the conflict" from the victim.[41]

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[37] Beattie J *Crimes and Courts in England, 1660-1800* (Princeton: Princeton University Press, 1986) 39

[38] Sanders A 'Victim Participation in an Exclusionary Criminal Justice System', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 197, 199-200

[39] Some note that the wealth of the defendant remains an important factor in numerous respects - private counsel versus appointed free-legal aid; the resultant quality of representation; the financial ability to secure pre-trial release: 'No one can deny that a wealthy defendant realises benefits that his poor counterpart does not; although this, however unsettling and undesirable, has long been considered a necessary evil' - Hall D 'Victims Voices in Criminal Court: The Need for Restraint' (1991) 28 *American Criminal Law Review* 233, 259 *fn*138

[40] Rock P 'Victims, Prosecutors and the State in Nineteenth Century England and Wales' (2004) 4(4) *Criminal Justice* 331, 338

[41] Christie N 'Conflicts as Property' (1977) 17 (1) *British Journal of Criminology* 1, 3-4. This seminal paper asserts that victims are so over-represented by the State that they are pushed to the very margins of criminal proceedings, their victimisation paling alongside the interests of the State, which wants only to ensure that justice is accomplished and is uninterested in, for example, restitution. It essentially berates the evolution of

The perspectives about the nature of crime held by the victim and the State are greatly at odds. The victim sees the offence as a personal matter requiring justice *and* the whatever possible repair of harm suffered whilst the State views it as a violation requiring a consistent, predictable and equitable response. By drawing criminal justice into the arena of State power the redress of the particular wrong became secondary with retribution assuming the primary purpose. With crime regarded as a public wrong, fines payable to State coffers replaced compensation, thus severing links between restitution and punishment. Hereafter, the criminal act, once simply perceived as a private affair between victim and offender, became the business of strangers, viewed as a disruption of the effective working of social order, an offence against society as a whole under the auspices of the State, who now prosecutes on behalf of an abstraction (*i.e.*, 'the People'), with the concerns and interests of the actual victim at variance with the official agenda and therefore resultantly ignored, treated with unbridled indifference:

> The consequences of crime upon the victim [is] never really addressed ... Crime was conceived as a problem between an individual offender and the State with the latter trying to rehabilitate the former. The victim [is] absent from view rather than standing as an independent figure with claims that demand to be heard.[42]

Criminal justice, in definite contrast to civil justice, was not created in order to provide benefits to wronged citizens but instead to personify public authority, its matrix residing in the crime of *lese-majesty*.[43] The justification for this stemmed from a developing recognition that crime was of itself a revolt against society as a whole, for "the wrong done to an individual extends beyond his own family; it is a wrong done to the community of which he is a member and thus the wrongdoer may be regarded as a public enemy."[44] All crime is now perceived as a public injury. Some are serious wrongs of a moral nature that diminish and demean society (*e.g.*, murder or rape), others interfere with its smooth running (*e.g.*, dangerous driving or public order offences). Fundamentalists of criminal law tell us that one of the greatest achievements of modern criminal jurisprudence is that it regards crime as an offence against social

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western criminal justice that repositioned crime from a harm committed against the individual to one committed against the State.

[42] Kilcommins S, O'Donnell I, O'Sullivan E & Vaughan B *Crime, Punishment and the Search for Order in Ireland* (Dublin: Institute of Public Administration, 2004) 10

[43] See generally Sbriccoli M *Crimen Laesae Majestatis* (Milan: Giuffre, 1974)

[44] Wright M *Justice for Victims and Offenders: A Restorative Response to Crime* (Milton Keyes: Open University Press, 1991) 5

order:

> The invocation of the criminal justice process is society's way of telling the victim that it cares about his suffering and, to an extent, takes responsibility for it. It is a communal response to an individual act.[45]

The modern State, as victim by proxy, maintains that it adopted this paternalistic stance in order to fulfil its inherent duty to protect basic underlying societal interests that cannot and should not be taken care of by individual citizens. Its gradual monopolisation of investigatory and prosecutorial functions jettisoned any direct involvement for the victim, depersonalising the process by his omission, abandoning him to the periphery of proceedings from whence he was excluded from all dealings, his only meaningful role that of reporter of the offence and, if prosecution ensued, as witness:

> Historically the necessary abstraction and institutionalisation has led to a diminution of the role of the victim in the criminal justice process, a reduction of the real-life person stricken with injury, loss and fear to that of the bearer of specific function in an abstract, institutionalised and depersonalised procedure.[46]

It is a paradoxical peculiarity that this newfound prosecutorial system was christened a *criminal* justice system as opposed to a *victim* justice system, stressing that the model is more concerned with the punishing of an offender in a fair and just manner than with any real concern for the victim.[47]

By accepting responsibility for criminal prosecution the State inadvertently created a new imbalance of power, turning the alleged offender, pitted as he was against the seemingly unlimited resources and might of the State, into the vulnerable

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[45] O'Malley T 'Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions' (1993) *Irish Criminal Law Journal* 40, 57

[46] Meier B-D 'Restorative Justice: A New Paradigm of Criminal Law?' (1998) 6(2) *European Journal of Crime, Criminal Law and Criminal Justice* 125, 127

[47] Christie presented a simple if rather idealistic pitch for the possibility of victim-centred criminal justice. The first stage of his trial establishes whether the law was broken and, if so, by whom. Having determined the defendant's guilt, it then evolves into a victim-orientated phase that considers what can be done for the victim by, in turn, the offender, the community and the State. The final leg focuses on the offender's circumstances and punishment - see generally Christie N 'Conflicts as Property' (1977) 17 (1) *British Journal of Criminology* 1. What is interesting about this model is that it questions what the community and State can do to appease the damage done. This may appear novel, but if the State steals the conflict from the victim it seems only reasonable that it should offer help to those whom it steals it from. Critically, "Christie is not offering a thoroughly considered alternative to the established criminal trial, rather he is attempting to invert [its] skewed focus on the defendant's needs and rights, and those of the State, by placing consideration of the victim as a central focus" - Goodey J *Victims and Victimology: Research, Policy and Practice* (Essex: Pearson Education, 2005) 188

party.[48] To redress this inequity, a whole corpus of law evolved to enable the defendant to put his case clearly and to protect him from unfair prosecution and punishment. In doing so, the State acknowledged that the role of the defendant had, in the past, been compromised in numerous ways. There existed few limitations concerning the evidence that could be adduced against the defendant at trial; he was denied access to depositions, to copies of indictment, to the names of prosecution witnesses in advance and, for the most part, was not entitled to have arguments made for him by counsel in criminal proceedings. Nor was there any explicit presumption of innocence - the onus rested on the defendant to engage in the art of self-exculpation, if he were innocent he would have to demonstrate it through an active defence where his version of events could be heard and his demeanour observed.[49] The State, to help rectify these disparities in power, shifted the burden of proof wholly to the prosecution:

> The rule that a man is presumed to be innocent till he is proved to be guilty is [now] carried out in all of its consequences. The plea of not guilty puts everything in issue, and the [State] has to prove everything that [it] alleges from the very beginning. If it be asked why an accused person is presumed to be innocent, I think the true answer is not that the presumption is probably true but that society ... is so much stronger than the individual and is capable of inflicting so very much more harm on the individual than the individual can inflict upon society, that it can afford to be generous.[50]

Another outcome of State involvement was the increased professionalism of the criminal trial itself, which transferred from an amateur, hasty and relatively unstructured affair to the rigidly organised procedurally dictated business it now is:

> The law and its courts were ... imbued with ... individuals rationally pursing their own interests under the impersonal arbitration and discipline of the unvarying rules of law. Passionate contest was to be placed in the professional hands of lawyers, for whom passion was an instrument of calculation and confined by the rules of law, presenting no danger to society. Out of this contest ... justice would emerge.[51]

The ensuing influx of legal professionals helped to form strong due process values and a panoply of evidential rules, all of which can be argued to have accumulatively

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[48] This was a concern that once had dominance in the criminological hypothesis, one in which the *offender* figured as the victim of a biased criminal justice system, or in stronger Marxist critiques, as the victim of the contradictions of capitalism.

[49] Cairns D *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Oxford: Clarendon Press, 1998) 49

[50] Fitzjames Stephen J *A History of the Criminal Law of England* (London: Routledge, 1996) 354

[51] Wiener M *Reconstructing the Criminal – Culture, Law, and Policy in England 1830-1914* (New York: Cambridge University Press, 1990) 66

and collectively strengthened the hand of the defence. These included the inadmissibility of hearsay evidence; the greater scrutiny over the obtaining of confessions; the more rigorous examination of prosecution witnesses; and the exclusion of 'bad character' evidence for fear of raising a presumption of guilt:

> Given the profound implications for the liberty, reputation and livelihood of an accused charged with a serious offence, society has rightly ordained that [he] enjoy a series of special protections designed to ensure fairness and to guard against a possible miscarriage of justice.[52]

These developments gave credence to the fact that the ultimate objective of criminal procedure lies in convicting the guilty and acquitting the innocent, and that insofar as twin parts of this double object conflict the second has to be preferred.[53] Indeed, the underlying and undoubtedly noble philosophy of present day criminal jurisprudence is encapsulated by the principle that it is "better to run the risk of sparing the guilty than to condemn the innocent."[54] Victims of crime, and indeed society as a whole, are only served when the right person – and not just any person – is held accountable for an offence, for unjust convictions punish the innocent and result in the guilty left at large to re-offend.

Criminal justice is the system of legislation, practices and organisations, used and honed by the State, that are directed to maintain social control, deter and manage crime, and sanction those who violate the law. A criminal process constructed of public institutions, like the police, prosecutors, the judiciary, and representatives of the community as jurors, is one removed from the direct exposure and influence of the potential vindictiveness and emotion of a prosecuting victim. This distance brought to the fore more neutral procedures and punishments and promotes a public perception of fair procedure. Some have concluded that fairness to the defendant required the barring of the victim, but even if criminal justice did not consciously exclude victims,

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[52] Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice, Equality & Law Reform, 2007) 9

[53] Spencer J 'Improving the Position of the Victim in English Criminal Procedure' [1997] 31 *Israel Law Review* 286, 299

[54] This maxim is accredited to Voltaire from his novel *Zadig, or the Book of Fate* (1747). A few years later, in 1765, Blackstone noted approvingly that "the law holds that it is better that ten guilty persons escape, than that one innocent suffers" – Blackstone W *Commentaries on the Laws of England: Book 4* (London: Sweet, Maxwell, Stevens & Norton, 1844) 358. John Stuart Mill endorsed the principle in an address to Parliament in 1868 - Reiman J & van den Haag E 'On the Common Saying That It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: *Pro* and *Con*' (1990) 7(2) *Social Philosophy and Policy* 226. More recently, an ideal criminal justice system has been described as one in which it is thought a greater evil for society to interfere unjustifiably with an individual by depriving him of some good than for it to fail to punish those that have unjustifiably interfered - Morris H 'Persons and Punishment' (1968) 52(4) *The Monist* 475, 479

exclusion became an eventual by-product of its increasing focus on the rights of the defendant.[55]

As a cornerstone of democracy, criminal justice is now very much hegemonic State business and not social function. Justice may well be grounded in a demand by the entire social body but the legal tradition, in actuality, regards criminal justice as one of those public functions whose legitimacy resides more in the fact that it underpins the exercise of power, intrinsically tied to the concept of control, than to the services that the State renders to its people. Consequently, whilst pro-victim advocates may well view the displacement of the victim as an unfair aberration, the historian and fundamentalist certainly sees it as the very precondition for the existence of the criminal justice system.[56] This formal exclusion of the victim reflects the reality that his private interests are subordinate to those of the public, and that by its structuring, the criminal justice system tells victims that they are undervalued and, to a large degree, disregarded.

Whatever the legal understanding is of the criminal trial, it is reasonable to hold that it is the victim who is most harmed by the crime. That said, when victims feel that nobody cares about their suffering it is, in part, because institutionally and, in an inherited sense, accumulatively, nobody does:

> Victims feel that their needs have a low priority in the business of police, the court, and the correctional system … their role, they say, seems much like that of an expectant father in the hospital at delivery; necessary … in the past, but at the moment rather superfluous and mildly bothersome.[57]

Still, victims have not lost their importance in the matter of bringing offenders to justice. Their cooperation remains essential in the reporting of offences and providing evidence in court. The charge that is brought against an accused remains essentially a complaint made by a victim that is then regulated through the process. In fact, viewed from this perspective, the victim plays a leading role in the criminal justice system, holding the key with which to set the legal system in motion.

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[55] Beloof D, Cassell P & Twist S *Victims in Criminal Procedure* (North Carolina: Carolina Academic Press, 2006) 15

[56] Zauberman R 'Victims as Consumers of the Criminal Justice System?', in Crawford A & Goodey J (eds.) *Integrating A Victim Perspective Within Criminal Justice* (Aldershot: Ashgate, 2000) 37, 40–41

[57] Geis G 'Victims of Crimes of Violence and the Criminal Justice System', in Galaway B & Hudson J (eds.) *Perspectives on Crime Victims* (St Louis: Mosby, 1981) 64

Victimology – The Academic Study of Crime Victims

Victimology, a somewhat ungainly neologism, is an area of research that falls within the territory of *criminology*[58], heralded as generating at first academic then political and social interest in the crime victim.[59] From its origin to present day, victimology has been a rather amorphous field, a catchall subject encompassing any general interdisciplinary perspective on victims that draws on the research of sociologists, psychologists and the legal fraternity. It was initially anticipated that victimology would grow from being merely a branch of criminology into a discipline that would be its inverse, and though this did not materialise it remains today a research affluent sub-speciality within its parent field. It can now broadly be defined as the study of the extent, nature, causes, and consequences of victimisation, the reactions thereto by society, in particular the police, the criminal justice system, voluntary workers, professional helpers, and the connections between victims and other societal groups and institutions such as the media, businesses and social movements.[60] In short, it concerns itself with the previously forgotten half of the criminal dyad - as its name suggests, the victim.

In its emergent form, victimology centred itself entirely on the characteristics of the victim, believing not just that each had an unconscious aptitude for being victimised but postulating that in a large percentage of criminal cases the victim shared a variable proportion of the responsibility for his *own* victimisation.[61] It treated victims as active participants, duly classifying them according to the nature of their involvement in the criminal act. In doing so, proto-victimologists concerned themselves with the empirical development of systematic typologies and theories, although these classifications were highly moralistic and speculative at best, based mainly on abstract almost ontological thought. For example, Mendelsohn created a typology of six victims, with only the first - the innocent - as being in the wrong place at the wrong time; the other five all somehow contributing to their own injury.[62] von Hentig presented a more elaborate typology using psychological, social and biological

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[58] Criminology, a rather broad field of the behavioural sciences, is a delinquent focused study concerned with law making and breaking that correlates and analyses empirical data in order to explain violations of criminal law and the consequential societal reactions.

[59] Sutherland E *Principles of Criminology* (Chicago: Chicago University Press, 1924) was the first criminology textbook to include a chapter on victims.

[60] van Dijk J 'Introducing Victimology' (1997) 1(1) *The Victimologist* 1, 3. See also Karman A *Crime Victims: An Introduction to Victimology* (California: Wadsworth, 2003)

[61] Mendelsohn B 'Victimology' (1956) 3 *Etudes Internationals de Psycho-Sociologie Criminelle* 25-26

[62] Medelsohn B 'The Origins of the Doctrine of Victimology' (1963) 3 *Excerpta Criminologica* 239

factors that distinguished between born and society-made victims, comprising of thirteen categories: the young; the female; the old; the mentally defective; immigrants; minorities; the dull normals; the depressed; the acquisitive; the wanton; the lonesome and heartbroken; the tormentor; and the blocked, exempted and fighting victims.[63]

Such beginnings were essentially aetiological. Traditionally, in an attempt to define causation or association, criminological explanations for criminal behaviour centred solely on the socio-cultural characteristics, the biological abnormalities and the psychological peculiarities of the offender. Alternatively, in its formative years, victimology focused on *the victim's* characteristics, *his* relationship and interaction with the offender, and *his* role and contribution to the genesis of the crime committed. This mode of study was professed by its pioneers to transform aetiological criminology from the static, one-sided study of the qualities and attributes of the offender into a dynamic, situational approach that viewed criminal behaviour as the outcome of the processes of interaction:

> Since criminal behaviour is dynamic, it can only be explained through a dynamic approach, where the delinquent, the act and the victim are inseparable elements of a total situation which conditions the dialectic of the antisocial conduct.[64]

Victimologists claimed to offer the possibility of integrating predisposing factors with triggering or actualising factors, individual variables with situational variables, and encompassing and analysing the motive, initiative and action of the perpetrator with the attitude, response and reaction of the victim.

Victim-Precipitated Crime – The Victimology Pitfall

The concept of *victim-precipitation*, a theory based on some form of reciprocal criminality, became the crude lynchpin of nascent victimology. Its core principle attacked the way in which the criminal law conventionally makes clear-cut distinctions between offenders and victims, deeming that in a considerable number of cases across a variety of crimes a look into the origin of the situation reveals a victim who consents tacitly, co-operates, facilitates, conspires, or provokes his offender:

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[63] von Hentig H *The Criminal and His Victim: Studies in the Sociobiology of Crime* (New Haven: Yale University Press, 1948) 404-438

[64] Fattah E 'The Use of the Victim as an Agent of Self Legitimization: Towards a Dynamic Explanation of Criminal Behaviour' (1976) 1 *Victimology: An International Journal* 29

> Experience tells us that … relationships between perpetrator and victim are much more intricate than the rough distinctions of criminal law. Here are two human beings … what the law does is to watch the one who acts and the one who is acted upon … by this external criterion, subject and object, a perpetrator and a victim are distinguished. In sociological and psychological quality the situation may be completely different. It may happen that the two distinct categories merge. There are cases in which they are reversed and in the long chain of causative forces the victim assumes the role of determinant … Among common situations we do not find the evildoer-evil-sufferer group … there is a definite mutuality of some sort.[65]

Victim-precipitation countered the standard criminal-victim bifurcation wherein one individual violates another, citing that such a formulation failed rather miserably to capture the murky morality of many offender-victim interactions.[66] The typecasting of offender and victim in black and white terms was being re-dyed grey versus grey by victimologists in an attempt to falsify the longstanding stereotype of the innocent and unsuspecting victim.

Homicide is particularly amenable to a victim-precipitation examination, perhaps providing the most useful theoretical basis for analysis of the victim-offender relationship.[67] The concept of victim-precipitated homicide can be found in much of the research conducted throughout the early years of victimology, where homicide itself was increasingly viewed as the culmination of an intense and antagonistic interchange between the victim and his killer, a "situated transaction"[68] to which they both contributed as mutual participants. At first appraisal, its classic formulation reads sound:

> The term victim-precipitated is applied to those criminal homicides in which the victim is a direct, positive precipitator … The role of the victim is characterized by his having been the first in the homicide drama to use physical force directed against his subsequent slayer. The victim-precipitated cases are those in which the victim was the first to show and use a deadly weapon, to strike a blow in altercation – in short, the first to commence the interplay of resort to physical violence … in some

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[65] von Hentig H *The Criminal and his Victim: Studies in the Sociobiology of Crime* (New Haven: Yale University Press, 1948) 383-384

[66] Young R 'Integrating a Multi-Victim Perspective into Criminal Justice through Restorative Justice Conferences', in Crawford A & Goodey J (eds.) *Integrating A Victim Perspective within Criminal Justice* (Aldershot: Ashgate, 2000) 233

[67] Wolfgang M 'Victim-Precipitated Criminal Homicide' (1957) 48(1) *Journal of Criminal Law, Criminology and Police Science* 1

[68] Luckenbill D 'Criminal Homicide as a Situated Transaction' (1977) 25(2) *Social Problems* 177

> cases two potential offenders come together in a homicide situation and it is probably often only chance which results in one becoming a victim and the other an offender.[69]

For example, Wolfgang found that one-quarter of the 588 cases of criminal homicide in Philadelphia between 1948 and 1952 had been precipitated or caused by the victim.[70] von Hentig pitched the figure alarmingly higher, claiming that "about 85% of murder and manslaughter cases [entail]...[a] motive of killing [that] indicates the operation of a partnership. The murderous act is a more or less adequate response to stimuli and irritating agents."[71]

Ensuing studies appeared less concerned with acknowledging the act of homicide as a crime *malum in se* and more in favour of redefining it as some social event centred on actors whose relationship played a dynamic role in the way the homicide unfolded.[72] They found it difficult to discern groups of homicides in which there were no circumstances of victim participation.[73] Inherent to this contention was the acknowledgement that it was the victim who may have been the initial aggressor, who struck the opening blow or who behaved abusively, menacingly or provocatively, and that who finally became the killer and who the killed could hinge merely on which person had been more successful in reaching for a weapon or pulling a trigger:

> The intensity of interaction between the murderer and his victim may vary from complete non-participation on the part of the victim to almost perfect cooperation in the process of getting killed...it is amazing to note the large number of would-be murderers who become the victim.[74]

This idea was hardly novel, for the law of homicide has long recognised self-defence as a complete defence to murder and excessive self-defence or provocation by the victim as a reason for mitigating the offence from one of murder to manslaughter. Moreover, as statistics continuously reveal, in the majority of homicides, that the victim had some previous knowledge of his perpetrator, it logically follows that the

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[69] Wolfgang M 'Victim-Precipitated Criminal Homicide' (1957) 48(1) *Journal of Criminal Law, Criminology and Police Science* 1, 2

[70] Wolfgang M *Patterns in Criminal Homicide* (Philadelphia: University of Pennsylvania Press, 1958)

[71] von Hentig H *The Criminal and His Victim: Studies in the Sociobiology of Crime* (New Haven: Yale University Press, 1948) 384, 397

[72] Silverman R & Mukherjee S 'Intimate Homicide: An Analysis of Violent Social Relationships' (1987) 5 *Behavioral Sciences and the Law* 37; Polk K *When Men Kill: Scenarios of Masculine Violence* (Cambridge: Cambridge University Press, 1994) 3; and Morris T & Blom-Cooper L 'The Victim's Contribution', in Wolfgang M (ed.) *Studies in Homicide* (New York: Harper & Row, 1967) 70

[73] Avison N 'Victims of Homicide', in Drapkin I & Viano E (eds.) *Victimology: A New Focus* (Massachusetts: Lexington Books, 1973) 60

[74] Porterfield A & Talbert R *Mid-Century Crime in Our Culture* (Fort Worth: Leo Potishman Foundation, 1954) 47-48

very dynamics of the already existing relationship the victim bears to the offender plays some role in explaining the latter's flagrant behaviour.

It is submitted that the reasons for considering victim-precipitated homicide as a treacherous hypothesis are threefold. First, if claiming that homicide must be analysed as a facet of social relations in which killers and killed both play active roles, laced as it is with talk of the victim's contribution to his own death, from there it is a mere precarious step to conclude that homicide itself is a casually and morally ambiguous act. Secondly, this theory is only applicable by its own admission to a portion of homicides, thus tending to ignore those in which the victim does not initiate the violence, or, indeed, did an act so flaccid or unconnected in nature and comparison to the consequences it evoked that to say the victim had precipitation in his own demise is akin to blaming the act of buying a house as being responsible for it being burgled.

Thirdly, what cannot be heard, and what amounts to a methodological flaw in any analysis of victim-precipitated homicide, are the voices of the actual victims, whose definition of events leading to the homicide have literally been silenced. What remains are characteristically motivated accounts by the killer, construed and constructed for the purpose of a defence that intends to diminish his culpability whilst inflating that of the victims so as to blur the precise moral identities and roles of the participants in the fatal exchange:

> At the root of all victim-blaming are the perpetrator's own attempts to present the victim as the cause of his violence or abuse ... perpetrators will claim that their victims are almost directly responsible for their fates.[75]

It was, in the end, an attempt to assimilate the premise of victim-precipitation into the crime of rape that led to its general repudiation:

> The victim actually – or so it was interpreted by the offender – agreed to sexual relations but retracted ... or did not resist strongly enough when the suggestion was made by the offender. The term also applies to cases in which the victim enters vulnerable situations charged sexually.[76]

This obviously and deservedly drew severe and vigorous criticism, not least from the evolving feminist movement, whose hostility towards the theory identified its

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[75] Lamb S *The Trouble With Blaming: Victims, Perpetrators and Responsibility* (Cambridge: Harvard University Press, 1996) 78-80. Similarly, "the jury should have been conscious of the fact that, as in all cases of homicide, the deceased was not able to give his version of events which might have been markedly different from the accused" – *Osland v R* (1998) 73 ALJR 173, 227 as per Callinan J

[76] Amir M *Patterns of Forcible Rape* (Chicago: University of Chicago Press, 1971) 262

potential to be a weapon of ideological oppression. The notion that females trigger their victimisation, and by doing so somehow deserve to be victimised, is part of the patriarchal mindset which is at the very root of such crimes, one which continues to prohibit many women from reporting rape and domestic violence.

These collectively unpropitious writings on victim-precipitation, imbued as they were with some variable mutuality of responsibility, were quickly dubbed "the art of victim blaming":

> In the social sciences, victim blaming is becoming an increasingly popular rationalization for criminal and deviant behaviour ... over the past few years, victim blaming has become institutionalized within the academic world under the guise of victimology.[77]

Victims themselves considered victim-precipitation as the unpalatable and divisive point in the victimologist's oeuvre for it suggested, for instance, that assault victims had but themselves to blame if they chose to walk down alleyways after dark. Some felt the broader rationale behind this new-founded complicity of the victim was to find fresh scapegoats for explaining away criminality.[78]

Proponents of victim-precipitation submit that such criticism was prompted by a failure to grasp the subtle difference between the behaviouristic concept of victim-precipitation in studies of crime for explanatory purposes and the legalistic concept of victim provocation used by the courts for the sake of determining the criminal responsibility of the defendant for mitigation purposes, particularly in manslaughter, and for choosing optimal and suitable penal sanctions. Their belief was that victim-precipitation was a neutral, non-legal concept that could help explain the occurrence of criminal acts and that studying the role of the victim might result in a better prevention of crime. The intent, therefore, was less to exculpate the offender or to ascribe blame to the victim than to devise an explanatory model on which preventive programmes might be built to reduce the extent and severity of victimisation. This, however worthy an objective, remains the unfulfilled promise of victimology.[79]

To what ultimate gain this primitive form of victimology could have bestowed is unclear. If it had achieved a cohesive school of thought on victim-precipitation it is

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[77] Clark L & Lewis D *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977)

[78] Antilla I 'Victimology: A New Territory in Criminology' (1974) 5 *Scandinavian Studies in Criminology* 3, 7-8

[79] Rock P 'On Becoming A Victim', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 1, 3

submitted that the outcome, at best, would be of mere post-criminal act explanatory value. Even armed with such knowledge there could be no realistic possibility of altering the personal attributes of the victim that presupposed him to the crime; therefore, despite the claims of those who sired it, victim-precipitation held no apparent pre-emptive value. This old-style victimology was in actuality a poor effort to create a pseudo-science out of unqualified and unquantifiable human nature, often amounting to not much more than the abstracted and erroneous suppositions of empiricists in search for a language and academic legitimacy:

> Any new field … initially struggles to develop its terminology, define its boundaries, justify its existence, gain respectability and eventually claim its place among the already established disciplines … victimology is no exception.[80]

While victim-precipitation may be dismissed as distasteful, there does exist widely a social construct of what may be classified as a deserving victim. Those whose character, past conduct or actions can be considered as undesirable or as somehow contributing to their victimisation, like drug traders and users, prostitutes, heavy drinkers, former criminals, illegal immigrants *etc.*, are unlikely to be responded to sympathetically by the criminal justice system or the public.[81] We further assume an automatic innocence and non-complicity where there is the victimisation of young children, the elderly or the disabled. These social constructs create a hierarchy of victimhood, an iconography of an ideal victim who is weak, respectful, virtuous, and morally blameless, victimised by the ideal offender who is strong, possesses agency, is morally depraved and morally culpable.[82]

The Shift of Focus within Victimology

The negative reaction that greeted victim-precipitation led to a general reconsidering of the domain assumptions of victimology. Second-generation victimologists, in fear of becoming nothing more than some criminological footnote, shifted their attention away from these controversial studies and instead looked to victim *participation* in events resulting *from* the criminal act and the obligation on the offender to make good by compensating his victim. For example, Nagel argued strongly for this 'interactionist' victimology, particularly championing the relationship between the

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[80] Viano E (ed.) *Victims and Society* (Washington DC: Visage Press, 1976) 3

[81] Goodey J *Victims and Victimology: Research, Policy and Practice* (Essex: Pearson Education, 2005) 124

[82] Christie N 'The Ideal Victim', in Fattah E (ed.) *From Crime Policy to Victim Policy: Re-orientating the Justice System* (London: Macmillan, 1986) 17

offender and the victim *after* the commission of the crime.[83] It was his opinion that criminal justice should aim to satisfy the need of the offender for atonement, the need of the victim for retribution, and their joint need for reconciliation. This concept is now seen as an integral part of the subject:

> The counting, measuring, weighing, determining and comparing [of] victims ... and the collecting of victimological determinants, factors, associations and correlations will never achieve any great importance ... the removal of the conflict situation between criminal and victim should be the goal of criminal policy.[84]

Thus victimology was invested with a desire for affirmative welfare and rights-driven action for the crime victim in alleviating and overcoming the injurious effects of his victimisation. Indeed, this now forms the central theme of victimological writings. As a result, present-day victimology is an adumbration of its genesis; few advocate the initial approaches and near-theories adopted by its pioneers and little or no schools of thought have survived from its embryonic stage.[85]

It was somewhat unavoidable that having adopted a more pro-victim stance to its remit that victimology would become populated with those it purported to study:

> [Victims] entered ... obliquely and in disguise, taking their places without coordination, having no planned or clear relation to one another, jumbled together solely because they shared a common name. It was inevitable that what was thus formed bore the mark of its origins.[86]

The crime victims' movement is now seen as a significant concomitant component of victimology, it not only greatly influencing and altering the nature of its research but also, arguably, saved the discipline from extinction.

Having moved away from its purely academic origins into the practical world of advocacy, victimology has become more the practice of social work than science.

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[83] See generally Nagel W 'The Notion of Victimology and Criminology' (1963) 3 *Excerpta Criminologica* 245. Similar views were also advanced in Schafer S *The Victim and His Criminal: A Study In Functional Responsibility* (New York: Random House, 1968)

[84] Nagel W 'The Notion of Victimology and Criminology' (1963) 3 *Excerpta Criminologica* 245-247

[85] There remains, however, a small number who continue to build on the original investigations of Mendelsohn, von Hentig, and Wolfgang, studying how victims may contribute to their own personal vulnerability and victimisation by focusing on issues such as victim-proneness, shared responsibility, and victim-facilitation, precipitation and provocation. For example, Knudten relatively recently outlined a victim-offender contributory continuum on a nine-point scale ranging from "offender-full initiation" to "victim-full initiation", stating "all victims are not fully innocent, just as all alleged offenders are not totally guilty" – Knudten R 'A Dynamic Theory of Victimisation', in David S & Kirchhoff G (eds.) *International Faces of Victimology* (Monchengladbach: World Society of Victimology Publishing, 1992) 52, 61

[86] Rock P (ed.) *Victimology* (Vermont: Dartmouth Publishing, 1994) *xvi*

Victim activists now dominate the discipline, their zeal for promulgating victim-orientated policy politicises the subject, and removes from it any ability it once may have had to be impartial:

> Despite its noble objective, humanist victimology is for the most part unscientific, dominated by ideology, action not research orientated and plagued by the bandwagon phenomenon.[87]

Where academic victimology had been branded scientific and rational in its efforts to understand the origins and experiences of victimisation, the new victim advocacy remit has been labelled emotive and anti-offender in its quest to espouse the interests of victims.[88] Where one employed theory and critical analysis, the other utilises deeply personal and traumatic accounts of victimisation to position itself as the platform for victim-centred justice.[89] This has led to repeated pleas for the disentanglement of the scientific from the humanistic, the academic from the activist:

> Victimology is … a non-academic programme under which a hodgepodge of ideas, interests, ideologies and research methods have been rather arbitrarily grouped … characterised by a clash between two equally desirable orientations to human suffering - the humanistic and the scientific … [However], the humanists' work tends to be deprecated because it is considered propagandistic rather than scientific, and the scientists' work tends to be deprecated because it is not sufficiently orientated to social action. Each set of victimologists would probably be better off if it divorced the other and formed alliances outside the shadows of the victimology umbrella.[90]

There is concern that internal contradictions undermine the effectiveness of victimology, which instead of making a contribution "has lost all direction"[91], with "too may voices to allow any coherence in its reported understanding of the world."[92] Whilst the academic victimologist and the victim-activist both describe themselves as working towards the promotion of victims' interests, these two camps approach

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[87] Fattah E 'Victims and Victimology: The Facts and the Rhetoric' (1989) 1 *International Review of Victimology* 43, 61

[88] Goodey J *Victims and Victimology: Research, Policy and Practice* (Essex: Pearson Education, 2005) 95

[89] See generally Fattah E 'Victims and Victimology: The Facts and the Rhetoric' (1989) 1 *International Review of Victimology* 43-66; Fattah E *Understanding Criminal Victimization: An Introduction to Theoretical Victimology* (Scarborough: Prentice-Hall, 1991); Fattah E 'The Need for a Critical Victimology', in Fattah E (ed.) *Towards A Critical Victimology* (London: Macmillan, 1992) 3

[90] Cressey D 'Research Implications of Conflicting Conceptions of Victimology', in Fattah E (ed.) *Towards A Critical Victimology* (New York: St Martins Press, 1992) 57

[91] Elias R 'Paradigms and Paradoxes of Victimology', in Israel M, O'Connell M & Sarre R (eds.) *International Victimology: Selected Papers from the 8th International Symposium* (Canberra: Australian Institute of Criminology, 1996) 9, 27

[92] Miers D 'Positivist Victimology: A Critique' (1989) 1 *International Review of Victimology* 3, 17

victim-centred justice from differing standpoints, leading us to ponder if "victimology is a science or a service?...a discipline or a movement?"[93]

Despite its rather dubious past, victimology must be lauded for drawing justified attention to the plight of the victim, forcing as it did criminologists to recognise crimes as painful and transitive processes, and quite clearly succeeding in shifting the emphasis in criminological pursuits towards the victim. In addition, factions of the discipline may well serve as a necessary watchdog to future advances sought or achieved by the victims' movement. There is little doubt too that research into the effects of crime on victims has been of considerable importance in legitimising the claims of support groups about the need for their services, and they have used these findings as a strong lever in demands for funding.[94] As a compendium of all things victim-related, the field of victimology created, perhaps unwittingly, a platform from which all modern victim-orientated debate now stems.[95]

The Rise of the Crime Victims' Movement

The meteoric rise of the crime victims' movement can rightly claim considerable success in putting the interests of victims on the western criminal justice policy agenda, for becoming an integral part of the redefined mission of all criminal justice agencies, and for inciting new legislation.[96] It has also ensured that the perspective of the victim now draws continuous attention from the media and academic world, and has taken residence in the public consciousness and any policy debate that now evolves around the issue of crime. So too, the movement's service and support initiatives, once funded with grudging parsimony, now obtain greater financial support:

> Governments around the world have enacted reforms to provide services, rights and compensation to victims, and, while the nature and substance of these reforms and

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[93] Friday P 'The Faces of Victimology: Report of the General Rapporteurs, Part 1', in David S & Kirchhoff G (eds.) *International Faces of Victimology* (Monchengladbach: World Society of Victimology Publishing, 1992) 8

[94] See generally Rock P 'Governments, Victims and Policies in Two Countries' (1988) 28 *British Journal of Criminology* 44

[95] For example, the World Society of Victimology, founded in 1979, is a non-profit non-governmental organisation that currently enjoys consultative status with the Economic and Social Council of the United Nations and the Council of Europe, its global membership pooled from those with mutual concerns for victims working in related fields. Its aim is to promote research on victims as well as advancing international cooperation in dealing with the problems of victims, hosting a triennial international symposium and issuing a quarterly publication that serves as a continuing forum for victim-related debate amongst concerned academics and professionals.

[96] 'Few movements in the history of [the United States] have achieved such success in igniting the kind of legislative response that victims' rights activists have fostered over the past two decades' – Office of Victims of Crime *New Directions from the Field: Victims' Rights and Services for the 21st Century* (U.S. Department of Justice, Office for Victims of Crime, 1998) *ix*

> initiatives have varied from country to country, there has been a clear trend in criminal justice and social policy towards improving the position of those hurt by crime ... [and] to improve the treatment of victims and witnesses by the criminal justice system.[97]

Yet early manifestations of this movement were fragmented and diverse, putting forth no obvious or stable coordination of policies, projects or schemes.[98] As a tenuous system whose loosely coupled parts evolved independently, the ascription of a *crime victims' movement* was, from the outset, a somewhat misleading, albeit convenient, tag.

The miscellany of individuals, groups and organisations that played a part in improving the crime victims lot over the past four decades has comprised of some very strange bedfellows, themselves motivated by a wide range of interests, aims and ideologies, some deliberately avoiding collaboration or contact with official agencies and each other. Radical feminists, right-wing law-and-order advocates, legislators, legal professionals, psychologists, psychiatrists, community welfare workers, lobbying victim groups, criminal justice agents and academics from a variety of disciplines have all contributed to the debate and action. Despite a common professed concern for the victim that has often obscured their deep-seated differences, and resultantly hidden their motivations, the field is an extremely wide and incongruent one and discord is by no means absent.[99] What remains most astounding is that rather than being weakened by the disparate sources from whence it originated, this variegated crime victims' movement has instead gained considerable strength from the diversity of its beginnings.[100] More recently, an increased institutionalisation and professionalism of victim support services, coupled with the emergence of certain orthodoxies, has reduced these differences and in some way helped to formalise them.

It is pertinent to question why such a high level of interest and activity in what was the previously ignored area of the crime victim should have emerged and taken

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[97] Edwards I 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967

[98] This can be somewhat attributed to the absence of a single grand designer at the centre, save for the Canadian initiative, which was almost wholly sponsored and developed by one Government Department that conceived itself to have a reforming and coordinating role in the management of the criminal justice system and victims. Elsewhere, processes have occurred without much direction or harmonisation. In a sense, the Canadian initiative was an artefact of the organising intelligence of a Government Department whilst the British [and Irish] history has been the shapeless artefact of many minds – Rock P 'Government, Victims and Policies in Two Countries' (1988) 28(1) *British Journal of Criminology* 44, 54

[99] Maguire M 'The Needs and Rights of Victims of Crime' (1991) 14 *Crime and Justice* 363, 366-367

[100] Friedman L 'The Crime Victim Movement at its First Decade' (1985) 45 *Public Administration Review* 790, 794

root when it did:

> Their condition for centuries aroused little comment or interest ... suddenly, they were 'discovered', and afterwards it was unclear how their obvious neglect could have so long gone without attention and remedy.[101]

The victims' movement in the United States was an outgrowth of the rising social consciousness of the 1960s that unleashed the energies of an idealistic generation throughout that decade and the next.[102] It, like other great social movements of the last century, has as its genetic mainstay a shared sense of injustice that could be overcome by lobbying, litigation and political campaigning:

> Social activism by and for crime victims follows some of the traditional lines ... of reform movements that call for popular rights, equal treatments, and a spirit of humanitarianism.[103]

In this regard, the victims' movement has progressed like all social movements over the last half-century: civil rights, pro-abortion, gender equality, pro-divorce and the gay and lesbian movement, to name but a few. People, as individual citizens, imbued with a growing concern and concept of their rights, developed greater confidence in their roles as active members of society, empowered by an ethos of "this should not be happening to me." Indeed, the language of rights now dominates political debate[104]:

> 'Rights' is a powerful rhetorical device, particularly in American history and culture. The term suggests both freedom from something and freedom to do something: it suggests a certain vision of independence and autonomy ... the word almost automatically raises suspicions of oppression or deprivation and has been called into service by disparate groups seeking power, entitlements, equality, or liberty, often with great success. Hence, the terms 'civil rights', 'women's rights', 'gay rights', [and] 'the right to life' ... pervade the current political lexicon. Similar force attaches to the concept of 'victim's rights'. The term has come to mean some undefined, yet irreducible right of crime victims that 'trumps' the rights of criminal defendants.[105]

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[101] Geis G 'Crime Victims – Practices and Prospects', in Lurigio A, Skogan W & Davis R (eds.) *Victims of Crime: Problems, Policies and Programs* (Newbury Park: Sage, 1990) 255

[102] Young M 'A History of the Victims Movement in the United States', in Ochberg F (ed.) *Post-traumatic Therapy and Victims of Violence* (New York: Harper & Row, 1988) 319

[103] Weed F *Certainty of Justice: Reform in the Crime Victim Movement* (New York: Hawthorne 1995) 11

[104] Dworkin R *Taking Rights Seriously* (London: Ducksworth, 1994) 184

[105] Henderson L 'The Wrongs of Victim's Rights' (1985) 37(4) *Stanford Law Review* 937, 952

Consider, for a moment, the judicial process from the victims perspective. They are introduced to a system grounded on the legal fiction that they are not the injured party, have no standing in court, no right to counsel, no control over the prosecution of the case, and no voice in its disposition.[106] As members of an excluded group, crime victims mobilised to seek recognition and influence, materialising under the guise of a national social movement.[107] The rise of this movement represented an inevitable and overdue attempt at the correction of a trend that saw criminal justice processes less concerned with the victim and more preoccupied with the rights of the defendant.

Victims, frustrated that they were viewed as primarily serving the system rather than the other way round, began too to cast themselves as consumers of criminal justice, thereby entitled to make what they felt were reasonable demands of the process:

> The growing settlement of western borders and the development of the welfare state had weakened the conventional view of the transcendental state. It could now more correctly be viewed as a conglomeration of public services, based on the public interest. Whereas citizens were once simply passive beneficiaries of the state, the subsequent trend towards a view of the citizen as consumer tended, despite its ambiguities, to turn them into evaluators of public provision of services. Criminal justice may well remain solidly attached to the regalian side of state function, but it is not completely spared by the transformation of relations between public services and consumers of them.[108]

The refashioning of victims as rational choice customers has been swept along by a mindset shift that swept through public services and institutions, changes that claim to speak on behalf of consumers, users and taxpayers, representing a challenge to the "cosy cultures of professional self-regulation."[109]

The victims' movement could never have taken hold as a social body if the impact various crimes had upon its victims were not studied and shown to be detrimental. Qualitative research highlighted the acute stress and adverse physical, practical or financial effects suffered by the victims of burglary[110], domestic violence[111], sexual

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[106] Kelly D 'Victims' Perceptions of Criminal Justice' [1984] 11(15) *Pepperdine Law Review* 15, 17

[107] William B *Working With Victims of Crime: Policies, Politics and Practice* (London: Jessica Kingsley Publishers, 1999) 129

[108] Zauberman R 'Victims as Consumers of the Criminal Justice System?', in Crawford A & Goodey J (eds.) *Integrating A Victim Perspective Within Criminal Justice* (Aldershot: Ashgate, 2000) 37, 48

[109] Power M *The Audit Society* (Oxford: Oxford University, 1997) 44

[110] Maguire M *Burglary in a Dwelling* (London: Heinemann, 1982); Mawby R *Burglary* (Devon: Willan, 2001)

assault and stalking[112], violence[113], rape[114], and child victims[115], ethnic minorities[116], and the elderly.[117] Crime causes enormous pain and suffering to victims, including death, physical injury, psychological trauma, degradation, humiliation, fear, enforced vulnerability, and financial loss. Moreover, victims of any kind have always been the primary targets of altruistic sentiments. It is only natural that any attempt to alleviate the plight of the crime victim will be readily accepted and greeted as a manifestation of our humanitarian desire for sympathy and empathy.[118] The standard citizen is challenged and concerned by the angst of the victim since at any moment the vagaries of crime may fall upon him. We are all, in a sense, tertiary victims of crime, or at least victims in waiting. As a consequence, the question "what about the victim?" strikes a particularly sympathetic chord in the public and political arena:

> The victim is now, in a certain sense, a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical. Whoever speaks on behalf of victims speaks on behalf of us all.[119]

The speed with which, when it finally emerged, this counteroffensive by victims began to prosper was very much a sign of its time, reflecting the presence of several factors in the late 1960s/early 1970s that created an unusually propitious period for winning public sympathy and support.

It was the confluence of, *inter alia,* five separate concerns in the United States that gave rise to this victims' movement: the gestation of the academic field of victimology; rising crime rates coupled with the realisation of significant levels of unreported crime; the influence exerted by the women's movement in emphasising

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[111] Hoyle C & Sanders A 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment?' (2000) 40(1) *British Journal of Criminology* 14-36

[112] Kelly L *Surviving Sexual Violence* (Cambridge: Polity Press, 1988)

[113] Shapland J, Willmore J & Duff P (eds.) *Victims and the Criminal Justice System* (Aldershot: Gower, 1985); Stanko E & Hobdell K 'Assault on Men: Masculinity and Male Victimization' (1993) 33(3) *British Journal of Criminology* 400-415

[114] Scheppele K & Bart P 'Through Women's Eyes: Defining Danger in the Wake of Sexual Assault' (1983) 39(2) *Journal of Social Issues* 63-81; Allen S 'Male Victims of Rape: Responses to a Perceived Threat to Masculinity', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 23-48

[115] Hartless J, Ditton J, Nair G & Phillips S 'More Sinned Against than Sinning: A Study of Young Teenagers' Experience of Crime' (1995) 35(1) *British Journal of Criminology* 114-133

[116] Salisbury H & Upson A *Ethnicity, Victimisation and Worry about Crime: Findings from the 2001/02 and 2002/03 British Crime Surveys* (London: Home Office, 2004)

[117] Brogden M & Nijhar P *Crime, Abuse and the Elderly* (Devon: Willan, 2000); Donaldson R *Experiences of Burgled Older People: Home Office Findings 198* (London: Home Office, 2003)

[118] Fattah E 'The Need for A Critical Victimology', in Fattah E (ed.) *Towards A Critical Victimology* (New York: St Martins Press, 1992) 3, 5

[119] Garland D *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) 9, 11

the hidden offences of rape and domestic violence; a swelling consciousness of what amounted to the *re-victimisation* of the victim by the actual criminal justice system itself; and the widespread growth of victim activism. As victimology has been discussed in detail previously, it is the remaining four factors that are now addressed.

First, in 1967, the President's Commission on Law Enforcement and Administration of Justice conducted an innovative national victimisation survey to ascertain the nature and extent of unreported crime, known to criminologists as the *dark figure*, the gap between what might be the real level and the officially recorded level of crime.[120] This survey helped to buttress what the public already knew – that crime was at unacceptably high levels and its victims neglected. Though under-reporting is by definition hard to enumerate, figures generated by these surveys conducted under the authority of a government agency that shed some light on this dark figure of crime provided the ammunition of concrete data to endorse rhetorical claims about the true seriousness and depth of unlawfulness on the street. Therefore one of the first ways in which victims were rediscovered was as indices in alternative measures to calculate criminal activity, indeed "it is no accident that the explosion of interest in victims and victimization surveys developed simultaneously...each provided some stimulus for the other and each the potential for providing benefits to the other"[121]:

> Victims, once on the margins of criminological research, are now a central focus of academic research. Crime surveys, both national and local, and qualitative studies of the impact of crime, of victims needs and services have furnished a wealth of information which has permanently altered the criminological agenda ... As a result the victims has moved from being the 'forgotten actor' to key player in the criminal justice process.[122]

These surveys also revealed reasons for the non-reporting of swathes of crime: victims themselves determined that the crime was not serious enough to warrant reporting or felt no benefit in doing so as they were not insured; they dealt with the incident personally; they believed that nothing could or would be done about the

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[120] President's Commission on Law Enforcement and Administration of Justice *Task Force Report: The Police* (Washington DC: Government Printing Office, 1967)

[121] Hindelang M 'Victimization Surveying, Theory and Research', in Schneider H (ed.) *The Victim in International Perspective* (Berlin: de Gruyter, 1982) 151

[122] Zedner L 'Victims', in Maguire M, Morgan R & Reiner R (eds.) *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2002) 419

incident; or they did not want to involve the authorities out of fear of reprisal.[123]

Table 2: Percentage of Crimes Reported to An Gardaí Síochána

	1998	*2003*	*2006*
Burglaries	77.1	69.4	70.1
Theft of Vehicle	94.8	90.6	92.2
Theft from Vehicle	58.7	60.1	58.1
Vandalism	39.7	39.0	42.9
Theft of Bicycle	58.1	49.4	40.3
Violent Theft	61.1	59.1	61.5
Non-violent Theft	47.1	53.9	52.1
Assault	57.0	51.3	52.6

Crime and Victimisation Quarterly National Household Survey 2006 (Cork: Central Stastics Office, 2007) 3

There was a growing cognisance that many victims and witnesses were increasingly disaffected with or distrustful of the criminal justice system and thereby reluctant to participate.[124] One study found that many victims dropped criminal charges because encountering the justice process became too intimidating an ordeal or felt that the system did not sincerely care about them or the crimes committed, whilst another found that a third of respondents claimed that having endured that system once they would never become involved with it again.[125] In 1976, the Institute for Law and Social Research in the United States, having conducted a national study of prosecutorial decision-making, concluded that the reason why charges were not preferred or secured in cases of violent crime was primarily due to uncooperative witnesses.[126] A key assumption underlying the political identification of the crime victims' movement was that this failure of victims to cooperate had reached epidemic proportions:

> There was a growing feeling of impotence – a feeling that the authorities cannot relieve the problem and that there is little or nothing the rest of us can do. This decline of faith in our institutions of public order has had a corrosive effect. Victims report fewer crimes to the authorities because they do no expect them to be responsive ... even when they report crimes, a remarkably large proportion of victims later refuse to testify, which leads prosecutors to dismiss or reduce charges. Conversely, victims often find police unwilling to investigate and prosecutors

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[123] Central Statistics Office *Crime and Victimisation Quarterly National Household Survey 2006* (Cork: Central Statistics Office, 2007) 9

[124] Biderman A, Johnson L, McIntyre J & Weir A *Report on a Pilot Study in the District of Columbia on Victimization and Attitudes Toward Law Enforcement* (Washington DC: Government Printing Office, 1967)

[125] Elias R *Victims of the System* (New Brunswick: Transaction Books, 1983) 109, 132

[126] Institute for Law and Social Research *Expanding the Perspective of Crime Data: Performance Implications for Policymakers* (Washington DC: Institute for Law and Social Research, 1977). Subsequent research into witness cooperation concluded that many prosecutors labelled as 'uncooperative' witnesses who only lacked information about what was expected of them and when they were to present themselves – Cannavale F *Witness Cooperation* (New York: Lexington Books, 1976)

> unwilling to charge. In short, each – 'authorities' and victims – find the other uncooperative, resulting in a reciprocal cycle of decline. Confidence in justice is eroded, enforcement efforts are impeded, and conviction rates, when measured against crimes actually committed, tumble downward ... A collective memory has developed...that makes the victim feel uninvolved in the crime against him and that makes him regard the criminal law as unresponsive to his concerns.[127]

Law enforcement agencies remain dependant upon victims without whose cooperation in the reporting of crime, in the provision of evidence, in the identification of offenders, and in presenting themselves in court as witnesses most offences would go unpunished. As the overwhelming majority of crimes are discovered not by the police but by the public, the success of the justice system appears largely to be determined by the reporting behaviours of victims and witnesses, not action initiated by policing authorities.[128] This intrinsic reliance that criminal justice has on the victim proved to be a powerful bargaining tool for those seeking to further the recognition of victims needs and rights.[129]

It is somewhat surprising then, despite the importance of the victim's cooperation in the investigation and trial that little attention had hitherto been given to victim satisfaction in her dealings with the justice system. Contemporary research shows that insensitive questioning by the police, poor information, delay, or unexplained decisions taken by the public prosecution still compromise victims' willingness to cooperate and entail further suffering, leading some to withdraw from the criminal process, thereby limiting its ability to pursue cases effectively.[130] In the curious ways of history, having eliminated the victim from the process, the organs of criminal justice were now faced with implementing ways to augment victim cooperation in order to ensure that the system could detect, apprehend and prosecute offenders.

The second influence came from the contemporaneous women's movement, which helped highlight the true volume of crimes like rape and domestic violence, many of which were taking place in settings outside the scope of the criminal law (*i.e.*, within marriages or family homes), with the poor response of the criminal justice system held to be a potent illustration of women's lack of status, power and influence.

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[127] Goldstein A 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 *Mississippi Law Journal* 515, 518-520

[128] Royal Commission on Criminal Procedure *Report* (London: Her Majesty's Stationery Office, 1981)

[129] Zedner L 'Victims', in Maguire M, Morgan R & Reiner R (eds.) *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 1997) 598

[130] Cretney A & Davis G 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) 36(2) *Howard Journal of Criminal Law* 146-157

There existed a pervasive myth that women who were raped outside of the home were by their behaviour or by the clothes they wore 'asking for it', whilst marital rape was not illegal in many federal jurisdictions in the United States at this time; indeed it only became a criminal offence here in Ireland with the *Criminal Law (Rape) Amendment Act 1990*.[131] Domestic violence was treated as a private matter, that if a man beat his wife either she had provoked him or he was pathologically ill. These assumptions naturally fostered within women self-blame and inhibited them from reporting such crimes, a problem that still exists present day:

> The victims of rape, for fear of being disbelieved or for fear of facing their perpetrator, and for slightly different reasons, the victims of domestic violence, quite frequently do not wish to report crime or go through what they, quite rightly, see as something of an ordeal.[132]

As the vanguard of the victims' movement[133], feminists disseminated a radical critique of the male oppression that was seen to underlie the prevalence of these offences and campaigned against the inadequate responses of the community and the uninformed attitudes towards and often ignominious treatment of rape victims displayed by the police and the courts. The women's movement establishing rape crisis centres and shelters for battered women, specialised innovations that offered an escape from their victimisation and help with the practical consequences of rebuilding damaged lives, and was also instrumental in drawing attention to other forms of private victimisation that had remained largely hidden from official view, most notably child abuse.

Thirdly, as a by-product of the underreporting of crime and the victim's distrust of and dissatisfaction with the agents of criminal justice, socio-legal researchers produced findings from which evidence could be adduced of *secondary victimisation*, a term designated to express the view that the initial victimisation experienced from the acts of the offender was compounded by a further wave of victimisation caused by

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[131] Previous to the enactment of this legislation the law on martial rape was imbued with sexist ideology: 'A husband could not be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract' – Temkin J 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 407

[132] Marshall S 'Victims of Crime: Their Station and Its Duties' (2004) 7(2) *Critical Review of International Social and Political Philosophy* 104, 115

[133] The term *vanguard* is used because although other social movements enabled and empowered it the women's movement can be seen as a true precursor to the crime victims' movement. That said, the civil rights movement, that questioned the way in which white-dominated authorities treated minority victims of Ku Klux Klan terrorism, segregationist mobs and brutal police force, and the conservative law-and-order brigade, which attacked the landmark decisions of the Warren US Supreme Court (1953-1969) that extended new rights for the increased judicial protection of criminal suspects, defendants and prisoners, were both highly influential in the development, direction and diverse thinking of the fledging victims' movement.

the inconvenience and stress of the criminal justice system and the bureaucratic and impersonal character of its institutions that led to a sacrifice, or at least the placing on a low priority, of the interests of the victim. In effect, the concept of secondary victimisation illustrates how crime victims are victims in *and* of the justice system:

> It has demonstrated beyond much doubt that the majority of victims of all kinds of crime experience problems of some kind, however major or minor, and however short-lived or long lasting these may be. It has shown that even minor crime can have a severe emotional impact on victims. It has revealed a widespread need for information, about the progress of police investigations, about crime prevention and about compensation. It has demonstrated a need for special service agencies, from which victims of all types of crime can obtain information, practical help and emotional support. It has also uncovered an inexcusable phenomenon ... of 'secondary victimisation', the creation of extra distress for victims through insensitive behaviour by policemen, court officials or other agents of the criminal justice system.[134]

Victims feel that intimate aspects of their lives are subordinated to the workings of impersonal bureaucracy.[135] It has been previously documented that following the initial reporting of a crime, subsequent contact initiated by the police with the victim was almost always for the purpose of satisfying police requirements, like clarifying statements, and not out of any concern for the victim.[136] In this way, victims felt that criminal justice agencies used them instrumentally for system purposes. The maltreatment victims experienced from the various agents added insult to their injury and were clearly associable with their diminished cooperation.[137]

Any sampling of the vast empirical evidence on the impact of crime on victims provided them with ample proof to support the case for a major reappraisal of the justice system's responses to their victimisation:

> The victims' experiences [of criminal justice] ... are rarely considered, but will affect

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[134] Maguire M 'Victim's Needs and Victim Services: Indications from Research' (1985) 10 *Victimology* 539, 554. Similarly, "the traumatic effects of a violent crime are multiplied by neglect, lack of immediate resources, and the failure of such support systems as the courts, the police [and] the legal profession" - Reiff R *The Invisible Victim* (New York: Basic Books, 1979) 75; and "the victim suffers not only from the crime...but also from a series of events that serve to scar deeply and sometimes damage irreparably the human being for whose protection the public clamours" - Milliken R 'The Sex Offender's Victim' (1950) 14 *Federal Probation* 22-26

[135] Ziegenhagen E *Victims, Crime and Social Control* (New York: Praeger, 1978) 75

[136] Newburn T & Merry S *Keeping in Touch* (London: Her Majesty's Stationery Office, 1990) 116

[137] McCabe E 'The Quality of Justice: Victims in the Criminal Justice System', in Sheperd J & Sheperd G *Victimization of the Weak: Contemporary Social Reactions* (Illinois: Thomas, 1982) 133

> their attitudes to that system. If victims come to regard their treatment as too stressful, demeaning, unfair, distorting of reality, too remote, or too little concerned with their own rights, feelings and interests or if decisions are made which are felt to be unsatisfactory, it is possible that this 'secondary victimisation' may lead to disenchantment, disinterest and future non-cooperation, not only by the victim, but also by his friends or relatives.[138]

It is unreasonable and self-defeating to expect that victims will automatically keep subjecting themselves to personal loss, inconvenience and ill-treatment in the name of justice. This realisation triggered successive governments to introduce policy changes and support services in order to retain the victim's favour:

> Although some schemes were initially motivated by the desire of criminal justice personnel to ensure the cooperation of victims and witnesses in the prosecution of cases rather than by a desire to help victims ... victims have benefited, and gradually the welfare of victims has taken on value in and of itself.[139]

Finally, an oft-neglected cause for the emergence of this victims' movement was the irrefutable jolt of energy it received from crime victims themselves, for it was not summoned up out of nowhere by the magical powers of ideology nor by the ineluctable force of political rhetoric.[140] For decades, support for victims has, in the absence of sufficient resources, persevered and prevailed on the dedication of volunteers. The movement's continued strength comes not just from the social forces upon which it began, but from the relentless commitment, enthusiasm, competency, and leadership of extraordinary individuals who became the assiduously indefatigable champions of victims' needs and concerns, many of whom have personally survived tragedy, transforming their own victimisation into a positive and proactive source, devoting a lifetime of energies to improving victims causes:

> The enormous contribution of grass roots advocates across [America] should not be ignored. Too often they remain the outsiders or at best on the fringes of credibility. They deserve acceptance as the experts many of them have become. Their patience,

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[138] Shapland J, Willmore J & Duff P (eds.) *Victims in the Criminal Justice System* (Aldershot: Gower, 1985) 1

[139] Kahn A (ed.) *Victims of Crime and Violence: Final Report of the American Psychological Association Task Force on the Victims of Crime and Violence* (Washington DC: American Psychological Association, 1984) 8

[140] By the early 1980s the number of voluntary organisations in North America to support and fight on behalf of victims of specific types of crimes was increasing exponentially. Victim advocate organisations, in particular *Mothers Against Drunk Driving* (MADD), achieved national visibility through aggressive law-and-order campaigning, demanding rights for specific types of victims, including compensation, a say in prosecution and parole decisions, and heavier sentences for offenders.

passion, and perseverance have enabled them to endure, to overcome, and to achieve extraordinary advances for all victims.[141]

To its credit, the victims' movement has always been quick to recognise and draw attention to patterns of predation that society and criminal justice has overlooked or not yet seen. It is well to remember that in the middle of the last century the term *child abuse* had yet to be coined and *child sexual abuse* was even slower to be distinguished as a massive subset of child victimisation. So too *stalking* was a descriptor, but not for what is now identified as a terrifying and growing criminal offence, whilst *identity theft* was an unknown term, thought of as a freak inconvenience.

More recently, the interpretation of victims rights as a form of human rights, worthy of legal inception and protection both domestically and internationally, has affirmed their status.[142] For example, the provisions of the *Rome Statute* permit victims at the International Criminal Court to choose their own legal representatives through whom they have a right to present their views and make submissions when their interests are likely to be affected. Rights for crime victims have now been enunciated by several international organisations, where a series of conventions, guidelines and declarations have helped establish a consensus on a set of base level principles to improve the treatment of victims and to reduce instances of secondary victimisation. The three most recognisable of these are:

- United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* 1985 [UN Doc ARES/40/34], which states that victims are "to be treated with compassion and respect for their dignity ... to be provided with access to the mechanisms of justice and to prompt redress ... to be informed of their rights ... to be informed of their role and scope, timing and progress of the proceedings and of the disposition of their cases ... to be provided with proper assistance throughout the legal process ... to have their privacy protected and insure their safety ... to be considered for receipt of restitution...[and] to be informed about receiving compensation." The *World Society of Victimology* is in the process of lobbying to convert this Declaration into a Convention, thus giving the instrument more muscle to implement its principles.

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[141] *Office of Victims of Crime* New Directives from the Field: Victims' Rights and Services for the 21st Century *(Washington DC: U.S. Department of Justice, 1998) 150*

[142] Doak J 'Victims' Rights and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals' (2003) 23 *Legal Studies* 1

- Council of Europe *Recommendation (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure*, which contains sixteen guidelines for the way in which the police, prosecution services and the courts of the Member States should deal with crime victims.[143]
- European Union *Framework Decision on the Standing of Victims in Criminal Proceedings* (2001/220/JHA), which aims to harmonise the rights of victims in Member States of the European Union by providing certain minimum standards. It is a binding decision that obliges signatories to ensure that victims play a real and appropriate role in the criminal legal system, that the dignity of the individual is treated with due respect during the process, that they shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings (Article 2), ensure that victims are heard during these proceedings (Article 3), and have a right to receive information pertaining to their case (Article 4). However, it is evident from this Framework Decision that whilst concern for the victim has become a powerful motif in contemporary western societal responses to crime, it still remains in Europe, for the main, a service-driven concern.[144]

Victim Support Europe (formerly the European Forum for Victim Services) is a European wide non-governmental organisation based in the Netherlands that enjoys consultative status with the Council of Europe and the United Nations on behalf of victims of crime. Since its inception in 1990, it promotes, throughout Europe, the development of effective services and fair and equal compensation for crime victims, regardless of the nationality of the victim concerned, and the rights of victims as regards their involvement in the criminal justice system and with other agencies.

Without doubt, the crime victims' movement has made the terms *victims rights* and *victim services* part of the common lexicon, for "in the past three decades the status of the crime victim has gradually altered from being a non-entity or hidden casualty to a stakeholder whose interests and opinion matter."[145] It is surely the case that support is now reaching more victims than it would have without the force of the movement and the institutions of criminal justice are engaging with the victim to a

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[143] The Council of Europe in an intergovernmental organisation established in the wake of World War II in 1949 and has no organic links with the European Union. It strives to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles that are their common heritage. The promotion of these fundamental values is a shared and collective responsibility of its forty-seven Member States. At the heart of the Council of Europe lies the European Convention on Human Rights and the European Court of Human Rights, through which the Convention is enforced.

[144] Bottoms A 'Neglected Features of the Contemporary Penal System', in Garland D & Young P (eds.) *The Power to Punish* (London: Heinemann, 1983) 172

[145] Crilly M, Fennell C, Kilcommins S & Leahy S 'Making the voice of victims matter' (10 December 2007) *Irish Examiner* 15

greater and more effective extent than before. As a consequence of its achievements to date, and mindful that there is much more to be done, there are no signs of a waning of momentum within or interest for the victims' movement.

Procedural and Service Rights – A Tale of Two Victims' Movements

Even though the victims' movement is a hybrid of different requirements, it is generally accepted that it has two broad thrusts: *service* and *procedural* rights.[146] The former, service rights, assesses what material and psychological effects the crime has had upon the victim and the most efficacious ways of satisfying his resultant needs. These needs include access to information; the provision of welfare services; his being treated with respect and understanding by law enforcement authorities throughout the investigation and by legal professionals before and during court events; assistance in court procedural matters; and compensation when beset by violent crime; all of which, if provided properly, serve to largely eradicate secondary victimisation. The latter, procedural rights, concentrates on the role of the victim within criminal justice itself, with the aim of ameliorating the process for him by affording him opportunities of influencing certain decisions, through consultation or active participation, in matters relating to the disposition of the case pre, during and post-trial, and in particular the extent to which he should have a say in prosecution, bail, sentencing, and parole decisions.[147]

Procedural rights are clearly the more contentious of the two, for it is readily apparent that providing victims with any true participatory role creates a change in their position within the system and would challenge our entire perspective of the public nature of criminal justice. Advocates of procedural participation advance that it helps restore a sense of control to the victim by allowing for personal autonomy. Its

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[146] Ashworth A 'Victim's Rights, Defendants' Rights and Criminal Procedure', in Crawford A & Goodey J (eds.) *Integrating A Victim Perspective Within Criminal Justice* (Aldershot: Ashgate, 2000) 185. van Dijk, a leading European expert on victimology, has identified four main strands within the crime victims' movements: *the care ideology*, best exemplified by State compensation schemes and State-funded support services; *the rehabilitation ideology*, generally referring to efforts made to provide for the welfare of victims in much the same way as the probation service attempts to rehabilitate offenders; *the abolitionist ideology*, existing largely in the realm of theory and is essentially a deconstruction of criminal justice opposed to the appropriation of crime as a conflict between the State and the accused; and *the retributive ideology*, mainly concerned with the participatory demands of victims - van Dijk J 'Ideological Trends Within the Victims Movement: An International Perspective', in Maguire M & Pointing J (eds.) *Victims of Crime: A New Deal* (Milton Keyes: Open University Press, 1988) 115-126

[147] Though this distinction between procedural and service rights is analytically instructive, it is, admittedly, over-simplified and breaks down in respect of those service rights that have procedural implications; for example, the screening of vulnerable victims in court may have an adverse impact on the defendant's right to a fair trial – Hoyle C & Zedner L 'Victims, Victimization and Criminal Justice', in M Maguire, R Morgan & R Reiner (eds) *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2007) 461, 474 [though see *fn*185 here for a different take on the same theme]

adversaries argue that making the victim responsible for outcomes is yet another semblance of secondary victimisation that also gives rise to significant issues of principle concerning the due process protections afforded to the defendant.[148] These two broad strands of procedural and service rights have evolved over the past four decades as two distinct victims' movements: a rights-driven victim participatory United States model and a service and support-centred European-Australasian one.

In the United States, the federal Government and virtually all States have entrenched in some form of legislation procedural rights for crime victims ranging from information about the status of their offenders cases and an entitlement to restitution, to the right to be present and heard and to participate in the judicial process by sitting at the prosecutor's table throughout the trial.[149] In 1996, the President of the United States (as he was then), Bill Clinton, stated:

> When someone is a victim, he or she should be at the centre of the criminal justice process, not on the outside looking in. Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be.[150]

Rights are less readily bestowed or as easily won in Europe, yet there is some evidence to suggest that, of late, factions of European victim groups are becoming increasingly influenced by the rights-driven initiatives of their American counterparts.

There are now a growing number of European countries permitting some form of procedural victim participation, though one should be mindful that these developments have been made possible by the structures of their inquisitorial legal processes, which differ quite fundamentally from those of the adversarial common

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[148] Fenwick H 'Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60(3) *Modern Law Review* 317, 318; Hudson B 'Balancing the Rights of Victims and Offenders', in Cape E (ed.) *Reconcilable Rights? Analysing the Tension between Victims and Defendants* (London: Legal Action Group, 2004) 125-136

[149] Hall D 'Victim Voices in Criminal Courts: The Need for Restraint (1991) 28 *American Criminal Law Review* 233, 234–235. For example, see Beloof D 'The Third Model of Criminal Process: The Victim Participation Model' (1999) *Utah Law Review* 289, appendix A 328-329, which lists American state constitutions that give participant rights to victims. The National Victims Center in Rosslyn, Virginia, maintains a Legislative Database Project that analyses state and federal statutes dealing with victims. It estimates that there are now more than 32,000 victim-related state statutes in operation, with thirty-two state victims' rights constitutional amendments.

[150] Remarks made by then President of the United States of America, Bill Clinton, at the announcement of the *Victims' Rights Constitutional Amendment* (25 June 1996)

law system practised in Ireland.[151] While there is no such thing as a prototype inquisitorial process, most European criminal justice systems are classed as non-adversarial, placing little emphasis on party control. Many now make some kind of formal provision for victims to join the criminal action instituted by the State as "subsidiary prosecutors."[152] For example, in the *partie civile* procedure exercised in France and Italy, questions concerning the punitive aspects of the criminal process are not divorced from the reparative elements of the civil process; the same set of facts thus give rise to an adhesion practice that seeks to uphold the rights and interests of the State and the victim whilst maintaining those of the defendant. Though mainly geared to restitution demands, this approach allows victims legal representation whose status is equal to that of the public prosecutor.[153]

Other European countries empower or engage victims in even more meaningful ways. For example, in Germany, those who have suffered a serious crime have the right to become a *nebenkläger* (an auxiliary prosecutor), a formal and active participant in the prosecution of the case entitled to be heard in court on the charges preferred; to question witnesses and cross-examine the defendant; to give a full oral account of the impact the crime has had; and to express penal demands as well as utilise the right to simultaneous civil proceedings for damages.[154] In Portugal, Sweden and Turkey, victims of serious crime can also take part as assistants to the prosecutor, thus participating in the proceedings without bearing any responsibility for the charge. Here, victims have the right to question witnesses, introduce evidence and make observations. In Spain, the victim of a serious offence is entitled, at his own expense, to engage a private prosecutor, who works parallel to the public prosecution, ensuring that his private interests are addressed, and, upon conviction, can make submissions as to what the appropriate sentence should be. In Scandinavian countries, victims can be represented by lawyers, who can attend all witness interrogations and consult the

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[151] Ireland, like Canada, India, Australia, Malta and Cyprus, inherited her common law legal system from Britain. Adversarial legal systems are generally adopted in common law countries. The principle difference between our adversarial system and the inquisitorial system, which derives from Roman law, or the Napoleonic code, is that in the latter it is a judge who is tasked with investigating a case. Under the inquisitorial system, the goal of the prosecution is not to obtain a conviction but to discover the truth. Only the judge questions witnesses and there is no cross examination as we know it. Procedure and rules of evidence are also different; for example, there is no rule against hearsay and no exclusionary rules of evidence.

[152] Doak J 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294, 308; Joutsen M 'Victim Participation in Proceedings and Sentencing in Europe' (1994) 3 *International Review of Victimology* 57

[153] Saponaro G 'The Victim of Crime in the New Italian Code of Criminal Procedure', in Viano E (ed.) *Victims Rights and Legal Reforms – International Perspectives* (Onati: Onati Publishing Series, 1991)

[154] Pizzi W & Perron W 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problems' (1996) 32 *Stanford Journal of International Law* 37. Similar procedures operate in Poland.

entire case file. What research there is suggests that victim satisfaction is relatively high in inquisitorial systems as a result of this direct participation.[155] Interestingly, none of these countries have notably punitive penal policies, and the strengthening of victim involvement over recent years has, for the most part, been unproblematic, arousing no serious opposition.[156]

Elsewhere, in Hungary, Latvia and many other former USSR countries, victims, although afforded no participatory role within the criminal process, are now entitled to view major parts of the police and prosecution files, and while this does not allow them to shape decisions, victim understanding is increased through participation, dialogue and sight of the material on the basis of which decisions are made, and the availability of such material to them helps ensure that correct decisions are made.[157]

Yet processes that provide victims a participatory role in the framework of inquisitorial criminal justice systems raise fundamental challenges within our existing adversarial context. How would a traditionally dichotomous process facilitate the meaningful participation of a third party? What type of cases would warrant the introduction of the victim and would legal aid be provided? Would the victim become unduly exposed within the hostile environment of adversarial justice? Would trials become lengthier and costlier? On more principled grounds, is it proper that victims be able to shape cases against defendants who formally cannot be presumed to be their attackers and is, until a verdict is reached, legally innocent?

Accommodating undisciplined non-professionals in a game hitherto played by established players would be a complex development, one thwarted by a lack of consensus as to the proper place for the victim, if there be a place at all, within the adversarial trial. Purists fear that reform which enables victim inclusion in adversarial justice will run counter to the State's view of crime as a public violation and may even reintroduce the view that the victim is entitled to his pound of flesh, harping back to the idea of individual retribution, with victims becoming "squatters and anarchists" running wild with "ad-hoc populism...replac[ing] the impersonal rigour of codified and judicially made law."[158] Equally, several legal commentators have

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[155] Erez E & Bienkowska E 'Victim Participation in Proceedings and Satisfaction with Justice in Continental Systems: The Case of Poland' (1993) 21 *Journal of Criminal Justice* 47

[156] Maguire M & Shapland J 'The Victims Movement in Europe', in Lurigio A, Skogan W & Davis R *Crime Victims: Problems, Programs and Policies* (California: Sage, 1990)

[157] Sanders A 'Victim Participation in an Exclusionary Criminal Justice System', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 197, 222

[158] Weisstub D 'Victims of Crime in the Criminal Justice System', in Fattah E (ed.) *From Crime Policy to Victim Policy* (London: Macmillan, 1986) 205

refuted such reservations with evidence that few victims actually exercise their rights, while those who do are far less vindictive than expected.[159]

It is uncertain if the victim would benefit much or at all from the trial regressing, in part, to a positioning of him as a rival of the defendant, for this would place him in a precariously vulnerable position. If victims are to be bestowed actual participatory rights in adversarial criminal justice then these rights will unavoidably introduce a range of responsibilities. Giving victims a role in the criminal trial beyond that of witness will come at a price since it may require them to be subjected to greater scrutiny in the trial than they might find tolerable, particularly in the wake of a violent or invasive crime committed upon them.[160] Victim Support has argued that the responsibility for shouldering decision-making in criminal justice should remain with the State, that there is danger in moving towards arrangements that place a burden on the victim as it might result in a greater number failing to report crime for fear of enforced involvement.[161]

The reality is that the culture and structures of adversarial justice is one not well placed to incorporate victim-centred procedural developments, having as it does quite different priorities from those held by victims and, for that matter, the inquisitorial justice system. Nonetheless, the fundamental principles of our criminal justice, like the adversarial nature of its trial, the requirement that the burden of proof rests with the prosecution, and the obligation that guilt must be proven beyond a reasonable doubt, are sound. Adversarial justice has withstood the test of both practice and time and there is no real enthusiasm for abandoning it in favour of the inquisitorial system so favoured by the majority of Europe.

Before assessing the position of the victim within the Irish criminal justice system, our attention turns first to the emergence of the services-centred victims' movement in England and Wales, for it undoubtedly influenced developments in Ireland, highlighting the success of Victim Support as it thrived from local group to national organisation.

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[159] Davis R, Kunreuther F & Connick E 'Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment' (1984) 75 *Journal of Criminal Law and Criminology* 491

[160] Marshall S 'Victims of Crime: Their Station and Its Duties' (2004) 7(2) *Critical Review of International Social and Political Philosophy* 104; Reeves H & Mulley K 'The New Status of Victims in the UK: Opportunities and Threats', in Crawford A & Goodey J (eds) *Integrating a Victim Perspective within Criminal Justice* (Aldershot: Ashgate Dartmouth, 2000) 125-145

[161] Victim Support *Rights for Victims of Crime* (London: Victim Support, 1995) 8, 15

The Victims' Movement in England and Wales

The development of the victims' movement in England and Wales has been virtually hand-in-hand with that of support services. Adopting a more generalist outreach and welfare approach, it tends to advocate the extension of greater sensitivity and sympathy for the victim in the criminal justice system rather than pursuing any precise, enforceable rights. Even though the provision of welfare services undoubtedly constitutes the least controversial area of victim discourse, support services do involve the expenditure of large sums of public money that if spent inappropriately represent a significant waste of resources.[162]

The first British victim support service was established in Bristol in 1974. The rapid proliferation of similar schemes nationwide led to the creation of the National Association of Victim Support Schemes in 1979, later renamed Victim Support. Despite some resistance from independent-minded local schemes, the organisation steadily encouraged and achieved the centralisation and to a large extent the professionalism of what was formerly very much a localised movement, introducing a standardised model of organisation and service that led to parallel national schemes in, for example, Scotland, Northern Ireland, France, and the Netherlands.[163] What is most exemplary is that the main endeavours of Victim Support, despite its transformation into a national entity, remain very much the practical provision of services to individuals on a local basis.[164] There are now over one thousand paid staff and some eighteen thousand volunteers working within its three hundred and seventy local branches.[165]

One of the key factors to the palpable and palatable success of Victim Support through its formative years was the relatively enthusiastic institutional support it received. The police were swift to adopt an active role by attending regular meetings and providing names and addresses of victims of a variety of offences for referral. In 2006, Victim Support received 1,386,915 referrals, up 8% on the previous year, with nearly half (538,058) accounting for the crimes of homicide, sexual offences, grievous

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[162] Maguire M 'The Needs and Rights of Victims of Crime' (1991) 14 *Crime and Justice* 363, 417

[163] The *Vereiniging Landelijke Organisatie Slachtofferhulp* in Holland borrowed a great deal from the British model of *Victim Support*, as has the network of more than 150 schemes set up in France - Maguire M 'The Needs and Rights of Victims of Crime' (1991) 14 *Crime and Justice* 363, 384

[164] Maguire M & Kynch J *Public Perceptions and Victims' Experiences of Victim Support: Finding from the 1998 British Crime Survey* (London: Home Office, 2000) 13

[165] Rock P *Constructing Victims' Rights: the Home Office, New Labour, and Victims* (Oxford: Oxford University Press, 2004) 121

bodily harm, actual bodily harm, common assault, or robbery from the person.[166]

Victim Support was quick to identify that the success of providing support services would ultimately rest on State subvention.[167] After much patient and difficult diplomacy in the corridors of power, it secured the trust of the key players in criminal justice, namely the judiciary, the magistracy and the Crown Prosecution Service. More importantly for its survival, Victim Support acquired the ear and trust of Ministers and those policy officials and politicians working in the Home Office that funded it. In order to obtain and maintain such vital relations, Victim Support positively eschews an overt political agenda and does not represent any critical challenge to the workings of the criminal justice system *per se*[168]:

> Unlike many of the victim initiatives in the United States … [England's] Victim Support scheme … had no political aims or 'hidden agendas'. They took little interest in the offender, the court process, or the sentences passed. Their primary objective was very simple: to act as a 'good neighbour', or perhaps a 'good Samaritan', to people who have suffered at the hands of a thief or an assailant.[169]

Due to an emerging governmental ideology that coincided with its own, Victim Support proved to be quite appealing to the political establishment, thereby successful in attracting public funding when spending was tight:

> Victim Support secured Home Office funding in the 1980s when Government ideology and financial uncertainty were leading other areas of public service to a curtailment of service delivery and a reduced level of state involvement. This cannot be explained solely by reference to the organizations acceptable political hue, though this certainly was influential. The underlying philosophy of Victim Support was also important. [It] represented a community-based, voluntary movement at a time when the Government was sounding the 'trumpet voluntary' … This response to the victim of crime was built on an intent to reintegrate the victim into the community, not to create dependency. The then Prime Minister, Margaret Thatcher, had as one of her personal goals the elimination of the dependency culture … Additionally Victim Support represented a voluntary response which emphasized individuals helping other individuals from within their own community…Victim Support benefited from the

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[166] Victim Support *Annual Report and Accounts 2006* (London: Victim Support, 2006) 5

[167] Mawby R & Walklate S *Critical Victimology* (London: Sage, 1994) 80-81

[168] It has notably refused to make public statements about sentencing policies, even withdrawing its membership from the *World Society of Victimology* in 1985 when they proposed a United Nations charter recommending a greater role for the victim in the sentencing process.

[169] Maguire M & Corbett C *The Effects of Crime and the Work of Victims Support Schemes* (Aldershot: Gower, 1987) 2

meshing together of ideas which were emanating from central Government.[170]

Victim Support has been prodigiously successful, described as the fastest growing voluntary movement in England and Wales.[171] It is highly influential and has largely succeeded in setting the victim agenda by defining the types of victimisation that receive priority attention. It has become not just the authoritative mouthpiece of the victim and an appreciable service delivery organisation but also a new albeit minor power in criminal justice, taken by the mass media, politicians and officials to be established, informed and reasonably non-partisan.

Despite its status as a non-governmental organisation, Victim Support has increasingly come to constitute an appendage to the formal criminal justice system, simultaneously casting other victims groups and initiatives into the margins whilst securing itself a place at the centre of Government policy. This was evidenced in the *Victims Charter: A Statement of Service Standards for Victims of Crime* (1996), where Victim Support themselves were the subject of service delivery standards as if they were any other public organisation incorporated in the task of delivering criminal justice.[172] This represented an increased blurring between the State and civil society, reflecting a services and value for money demand from the Government in return for the £30million funding it awards to Victim Support per annum.[173] However, having ensured an early stronghold in the provision of services to victims, Victim Support has of late become wary as more diverse and specialist organisations and initiatives begin jostling each other for a place on the increasingly crowded and disjointed field of victim activity.[174]

Victim Support is a permanent representative on the Victims Advisory Panel, established in 2003 and placed on a statutory footing by the *Domestic Violence, Crime*

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[170] Rock P *After Homicide: Practical and Political Responses to Bereavement* (Oxford: Clarendon Press, 1998) 168

[171] Rock P 'Government, Victims and Policies in Two Countries' (1988) 28(1) *British Journal of Criminology* 44, 61

[172] Crawford A & Enterkin J *Victim Contact Work and the Probation Service: A Study of Service Delivery and Impact* (Leeds: Centre for Criminal Justice Studies Press, 1999) 8

[173] In 1979, the first year of its existence, Victim Support received just £5,000 government funding.

[174] Many other victim organisations have emerged since the birth of Victim Support, including *Support After Murder and Manslaughter* (SAMM), *Justice for Victims, Women' Aid,* the *National Society of Cruelty to Children* (NSPCC) and centres such as the *London Rape Crisis Centre.* For example, in 1995, *Victims' Voice* was founded by representatives of existing self-help co-victim organisations who came together at a conference and discovered that, despite their differing backgrounds - having lost a loved one to murder, manslaughter, road death, or disaster - they had much in common. By pooling human resources and knowledge, gained through the experience of a sudden violent death within the family, it was decided that more could be achieved with a unified voice towards improving victim services and understanding of needs specific to these families.

and Victims Act 2004. This Panel, chaired by the Minister of State with responsibility for victims' issues, groups together Ministers, officials, representatives of victims' organisations, and lay members who have themselves been victims of crime, to discuss, from the victim's perspective, the legal system, the prevention of crime and the wider social, cultural and emotional needs of the victim. Recent legislation in England has begun to enshrine the rights of crime victims. The aforesaid Act increased the protection, support and rights of victims and witnesses, introducing a *Code of Practice* enumerating these rights and creating the role of Commissioner for Victims and Witnesses, whose function is to "promote the interests of victims and witnesses" and "take such steps as he considers appropriate with a view to encouraging good practice in the treatment of victims and witnesses."

The Crime Victim in Irish Criminal Justice

Having explored the factors that led to the rise of the crime victims' movement, the difference between the procedural and service rights driven movements and the development of Victim Support in England and Wales, it is time to take the issue home and examine the position of the crime victim here within Irish criminal justice. Ireland is a country with a common law system, a body of principles and doctrine that has emerged implicitly from the history of decision-making by courts rather than explicitly from the politically motivated decisions of legislators.[175]

The Irish criminal justice system is a typical adversarial process, whereby the two parties, the State and the defendant, determine the scope of the proceedings with a resultant propensity towards trial avoidance.[176] An accused who pleads guilty, and

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[175] Waldron J *The Law* (London: Routledge, 1992) 15

[176] Trial avoidance is encouraged by the fact that an admission of guilt made at an early stage in the investigation is typically rewarded with a sentence discount for it saves the criminal justice system both time and money, may indicate remorse on the part of the offender and, in certain cases, particularly involving sexual offences, obviates any further trauma and distress for the victim in having to give evidence before the court – *People (DPP) v G* [1994] IR 587. While this is a pragmatic decision to encourage offenders to plead guilty, it may be difficult for the victim to come to terms with what amounts in his eyes to a lenient sentence. A trial judge who imposed a life-sentence on two rapists in separate cases, *People (DPP) v Tiernan* [1988] IR 250 and *People (DPP) v G* [1994] op. cit., saw both sentences overturned by the Supreme Court on the grounds that a sentence discount should have been given as the defendants had both pleaded guilty, for a guilty plea "makes possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination" [*People (DPP) v Tiernan* op. cit.]. In a subsequent case before the same trial judge in 1995, a man who pleaded guilty to ten rapes and seventeen other sexual offences against children aged between four and fourteen was sentenced to fifteen years imprisonment because the judge believed that the two earlier decisions of the Supreme Court precluded the imposition of the maximum life-sentence by reason of the defendant's plea of guilt. Following concerns vented by politicians and victim support groups, the then Minister for Justice, Nora Owen, stated that a judge should be free to impose a sentence arising from the evidence heard. s.29 of the *Criminal Justice Act 1999* subsequently provided that, save for when the sentence is fixed by law, a court, in determining what sentence to pass on a person who has pleaded guilty to

whose plea is accepted by the judge, is sentenced and convicted without a full trial taking place, although at arraignment he must be informed of his right to trial by jury and afforded the opportunity to withdraw his plea of guilt. A consequence of this disposition towards trial avoidance is that relatively few victims are required to testify in court, limiting the active participation of the victim to the mere reporting of the offence.[177] Those who are called to testify do so as a witness for the prosecution and not with any specific victim-designated role.[178] Nor do victims of crime, save in certain sexual offence cases where there is a strictly limited provision[179], have any individual right to legal representation in Irish criminal proceedings.

Though the State has a virtual monopoly on indictments, private criminal prosecution by a member of the public remains a common law institution.[180] A right of private prosecution may appear to demonstrate solicitude towards the victim but it is seldom exercised and rarely successful, not least because there is no legal aid available for pursuing such an action and with no assistance from An Garda Síochána the investigation, preparation and presentation of the case is extremely burdensome and costly. The person fulfilling the role of private prosecutor, referred to as a *common informer*, is described as "a member of the public capable of giving information in respect of the commission of an offence" and therefore need not be the victim.[181] Whilst common informers can prosecute summary offences they may only *initiate* the prosecution of indictable offences - once an indictable offence is actually returned for trial by the judge of the District Court the case must be handed over to

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an offence, and if it considers it appropriate to do so, shall take into account the stage in the proceedings at which the person indicated an intention to plead guilty, and the circumstances in which this indication was given (so that it was not a mere situational accommodation), but this shall not preclude a court from passing the maximum sentence prescribed by law for the offence if, notwithstanding the plea of guilt, it is satisfied that there are exceptional circumstances relating to the offence which warrant the its imposition.

[177] In 2004, 89% of those prosecuted pleaded guilty – Office of the Director of Public Prosecutions *Annual Report 2005* (Dublin: Office of the Director of Public Prosecutions, 2006) 31. Therefore only a maximum of one in ten victims could have been called to give evidence.

[178] Even as a witness, the victim is denied the opportunity to relay his own narrative to the court using his own words, which seems something of an irony given that logic dictates that such an account should have a key role to play in arriving at the truth – see generally Steffen S 'Truth as Second Fiddle: Re-Evaluating the Place of Truth in the Adversarial Ensemble' (1988) 4 *Utah Law Review* 799. See also Stone M *Cross-Examination in Criminal Trials* (London: Butterworths, 1995) 120-126; Cavadino M & Dignan J 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective' (1996) 4(3) *International Review of Victimology* 153, 155

[179] s.4 of the *Criminal Law (Rape) Act 1981*, as amended by s.34 of the *Sex Offenders Act 2001*, allows the complainant of a sexual offence legal representation for the period of the trial where the judge has granted leave for the defence to cross-examine the complainant on prior sexual history with other persons.

[180] *People (AG) v Killeen* (1958) ILTR 182; *People (AG) v Boggan* [1968] IR 67

[181] *State (Cronin) v Circuit Judge of the Western Circuit* [1937] IR 34, 49

the Director of Public Prosecutions (the DPP).[182] The Director then treats the case as he would any other and may therefore decide to drop the prosecution, despite this decision being against the explicit wish of the common informer. The courts have shown an unwillingness to interfere with this decision.[183] Even though the Irish private prosecution system is said to function as a constitutional safeguard against any arbitrary prosecution policies of the DPP, in truth it amounts to little more that "constitutional tokenism" for the normal citizen.[184] It is more of a theoretical possibility than a practical reality and thus does not operate as an effective control or balance over prosecutorial discretion.[185]

There have been, over recent years, legislative measures that have assisted the victim. Some, in deference to his emotional welfare, have involved the modification of certain legal rules to give greater weight to his needs and fears when giving evidence; others have proven to be of indirect benefit[186]:

- The *Criminal Law (Rape) Act 1981* provides public anonymity for the complainant of a sexual offence. No matters likely to lead members of the public to identify the victim as the complainant can be published or broadcast. The proceedings shall be held in private with only the verdict and sentence pronounced in public. The name of the offender cannot be published if by doing so it shall identify the victim or unless the victim makes an application to the court for his name to be released. The Act also provides that the failure or omission by the victim to offer resistance to the sexual act does not of itself constitute consent to that act.
- The *Criminal Evidence Act 1992* permits, in certain circumstances and at the behest of the DPP, that witnesses may give evidence in physical or sexual abuse cases by

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[182] The *Criminal Procedure Act 1967* provides that before the indictable offence can proceed to the Circuit, Criminal or Central Criminal Court, it is first subjected to a preliminary examination by a judge of the District Court who decides whether there are sufficient grounds to return the case for trial.

[183] In *H v DPP* [1994] 2 IR 589/[1994] 2 ILRM 285, the Supreme Court refused to order the DPP to proceed with a prosecution for sexual offences that the applicant alleged her husband had committed against their children and which the Director had already decided not to prosecute.

[184] Osborne P 'Private Prosecutions: A Comparative Perspective' (1993) *Irish Criminal Law Journal* 119, 139

[185] Miller F *Prosecution: The Decision to Charge a Suspect with a Crime* (Boston: Little Brown, 1969) 329

[186] In Ireland, what legislation that can be considered pro-vulnerable victim can certainly be argued to be somewhat anti-defendant, but this ignores the true reason why this legislation was introduced. The initiatives ensconced in such legislation - like the use of live television links between the courtroom and an adjoining witness room - are to assist victims in giving their best evidence at trial and need to be interpreted for what they bring to the trial process and, in particular, the presentation of evidence. It is unhelpful to view such initiatives as primarily a threat to the rights of defendants and the traditions of the courtroom. Indeed it is easy to mount a plausible argument that when a victim is permitted to present evidence without being in front of his offender the giving of such evidence is less likely to be stressful and emotive for the victim and shall therefore be less likely to influence a jury on a humanitarian level and that once the defence maintains the right to cross-examine the result may actually prove to be beneficial to the defendant.

live television link with the court. The impetus for this legislation was the growing concern over the particularly bruising experiences of children as witnesses in cases of child abuse. Barristers are liberated from the wearing of the court attire of wigs and gowns when this evidence is to be heard. The Act also removes the need for children to give testimony on oath and consequently the need for the corroboration of the child's unsworn evidence. It also compels, in certain circumstances involving violence or a sexual offence against a child, one spouse to give evidence for the prosecution that may incriminate the other, ending an old common law rule that prohibited them from doing so.

- The *Criminal Justice Act 1993* introduced victim impact statements in the cases of violent or sexual assaults; sanctions the court, where it deems appropriate, to award compensation to a victim in respect of any personal injury or loss; and permits the DPP to appeal what he perceives are unduly lenient sentences.
- The *Civil Legal Aid Act 1995* provides that victims of rape are entitled to free means-tested legal advice, as distinct to representation, from the reporting stage of the offence.[187]
- The *Bail Act 1997* allows a court to refuse bail to a person charged with a serious offence if it is likely that that person may commit another serious offence whilst on bail, and necessitates the court to impose *consecutive* as opposed to concurrent sentences when such an offence is committed where bail was granted.
- The *Criminal Justice Act 1999* created the new offence of intimidating a witness or jury member, with a penalty up to ten years imprisonment, and provides for witnesses who are in fear or subject to intimidation to give evidence by live television link.
- The *Sex Offenders Act 2001* provides for legal representation to be made available to the complainant in rape and other serious sexual assault cases on the application for leave by the defence to adduce evidence of the complainant's prior sexual history. The defence team must apply to the judge for the right to such a cross-examination. Legal representation in these limited circumstances is provided by the Legal Aid Board, who shall consult with the victim in advance of the hearing of such an application.

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[187] 'Most victims are unaware of this provision...[An Garda Síochána] have confirmed that in practice they would not advise a victim of this right' – Bacik I, Maunsell C & Gogan S *The Legal Process and Victims of Rape: A Comparative Analysis of the Laws and Legal Procedures Relating to Rape, and their Impact upon Victims of Rape, in the Fifteen Member States of the European Union* (Dublin: Rape Crisis Centre, 1998) 248

The Department of Equality, Justice and Law Reform published its rather grandly titled *Charter of Victims' Rights in the Criminal Justice System* in 1999, which set out the standards to be met by each key agency in the criminal justice process. It represented a "commitment to giving victims of crime a central place in the criminal justice system" and amalgamated, for the first time, "all the elements of [that system] from the victim's perspective."[188] As this Charter is considered in greater detail later, it is suffice here to note that it confers no rights or privileges but merely lists the ways in which the various organisations within the criminal justice system ought to be sensitive to the position of the victim, setting standards of service promising the ideals of efficiency, courtesy and fairness.[189]

The timely *Victim's Rights Bill 2008*, if enacted, will represent a watershed by providing victims for the first time with a set of comprehensive statutory rights under Irish law.[190] s.2 of the Bill proposes to ensconce in statute, for the first time, a definition of who constitutes a *victim*:

> 'Victim' means every complainant in relation to a crime or offence, and every person who, through or by means of a crime or offence committed by another person, suffers physical or psychological injury or emotional harm, or economic loss, including loss of, or damage to, property, and if a crime or offence committed by a person results in another person's death or in another person being in a state of continuing unconsciousness or suffering serious intellectual disability, every member of the immediate family of the other person.

The purpose of the Bill is to prescribe provisions applicable to the treatment and rights of victims of criminal offences and their immediate family, including persons whose relationship to the victim at the time of the offence was a close *de facto* non-martial partner, whether of the same gender or not. The Bill provides for a more comprehensive use of victim impact statements in the sentencing of offenders and for them to be permitted for a wider range of offences than is currently set down; proposes statutory footing to the obligations placed on An Garda Síochána by the Victims' Charter; gives statutory effect to the Commission for Support of Victims of Crime (see over), requiring it to draft a new and more extensive Victims Charter; and contains some radical reforms, such as placing an obligation on the Director of Public

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[188] Department of Justice, Equality & Law Reform *Victims Charter and Guide to the Criminal Justice System* (Dublin: Department of Justice, Equality & Law Reform, 1999) 2

[189] See pgs 230-233

[190] Initiated 22 January 2008 and sponsored by opposition Fine Gael TDs Alan Shatter and Charles Flanagan. This Bill is essentially an updated version of that party's *Victims Rights Bill 2002* which lapsed at First Stage because of the dissolution of the Dáil for a general election that year and the subsequent loss of seat for its then sole sponsor, Shatter, who since regained his seat in 2007

Prosecutions to inform victims before accepting a lesser plea and give reasons for doing so, and to consult with victims before agreeing to the granting of bail; and providing them with formal input into parole reviews.[191] The Bill, if passed, will give much needed recognition and clarity to the role of victims and co-victims in the criminal justice system, addressing some of their needs and concerns, and entitling them to have any violation of their rights investigated and reported upon, and introducing greater transparency and accountability into the workings of criminal justice agencies.[192]

The crime victims' movement in Ireland originated with the opening of the *Dublin Rape Crisis Centre* in 1979. The *Irish Association for Victim Support*, a voluntary registered charity with a small number of branches and virtually zero funding, was established six years later in 1985, firmly founded on a community-based approach that was committed to the best interests of victims of crime by actively supporting them, identifying their needs and advocating their rights. The group grew in both size and stature, aided and abetted by annually increasing Government funding. At the height of its existence, Victim Support comprised of some five hundred volunteers working through a network of over forty local chapters that accepted both self-referrals and An Garda Síochána referrals. By 2003, it claimed to be assisting over 7,000 victims of crime annually, just under half of which were victims of burglary.[193] It also initiated many specialist services throughout its lifespan, like those for tourists who became victims of crime whilst holidaying in Ireland or for the families of homicide victims, which were based primarily on identified need and clearly modelled on examples of best practice from its United Kingdom counterpart.

Victim Support developed, in a relatively short space of time, into a large national organisation with an established relationship with An Garda Síochána and the Department of Justice, Equality and Law Reform. Such relations garnered political influence and Victim Support was considered largely instrumental in achieving legislation that implemented victim impact statements in 1993. It latterly became rife with internal difficulties that gave rise to grave concerns of governance, accountability of public funds, and the depletion of its activity and service levels. The

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[191] The Bill reflects the standards prescribed by the aforementioned European Union *Framework Decision on the Standing of Victims in Criminal Proceedings* (2001/220 JHA) (Luxembourg: Office for Official Publications of the European Communities, L 82/1, 22.3.2001)

[192] However, one can't help (cynically) thinking that with legislation of this nature the point at which it becomes politically possible to enact is precisely the point when it becomes almost unnecessary.

[193] McGovern L 'Trial Venue and Process: The Victim and the Accused' [2003] 3(1) *Judicial Studies Institute Journal* 103

recommendations of a consultant appointed by the Department of Justice to investigate these difficulties resulted in the withdrawal of funding from the organisation, leading rapidly to its dissolution in March 2005.[194] This closure was particularly disheartening in light of the work Victim Support had achieved and the relationships it had fostered.

Simultaneously, the Minister for Justice, Equality and Law Reform established the Commission for the Support of Victims of Crime, whose three-year tenure had a two-tiered remit to disburse funds of approximately €1million per annum to ensure that individual groups emerging from the break-up of Victim Support could ensure a continuity of services on the ground and undertake a comprehensive review of current and future needs of victims so as to devise an appropriate national support framework of services.[195] Its Framework Report, *Recommendations for Future Structures and Services for Victims of Crime,* is due to be presented to the Minister during summer 2008.

Since March 2005, the Commission has awarded a total of €2.52million in funding to victim support groups. AdVic and Support After Homicide (see over), the two organisations that deal with homicide co-victims, the victims central to this thesis, have been awarded €49,000 and €80,000 respectively. The Minister has described the Commission as part of a governmental evolution of thinking in relation to the needs and interests of crime victims that must be seen in the context of a partnership between State agencies and the community and voluntary sector.[196] The Commission is also to have regard to international advances in relation to provisions of services for victims of crime, in particular the aforesaid European Council *Framework Decision on the Standing of Victims in Criminal Proceedings*. It will not, however, suggest proposals for new legislation to its parent department.

Following the disbandment of Victim Support, many excellent specialist services have continued to operate independently:

- *Court Support Services* (formerly *Court Witness Services*): This group of volunteers are trained to offer impartial and friendly support to victims of crime, their families and friends, and to other prosecution witnesses who have been called to give evidence before a court. Prior to the trial they can arrange court orientation, where a

[194] Commission for the Support of Victims of Crime *Annual Report 2005* (Dublin: Department of Justice, Equality & Law Reform, 2006) 2

[195] The lifespan of the Commission was due to expire in March 2008 but has since been extended.

[196] Remarks made by the then Minister for Justice, Equality & Law Reform, Michael McDowell, at the launch of the National Crime Victims Helpline (14 November 2005)

trained volunteer shows witnesses round the courtroom in order to familiarise them with the physical layout and the processes of the court and escort them to a room set aside for victims to relax and await the case being called. The Minister for Justice acknowledges that whilst "the Courts [for those who spend most of their working lives there] are places of familiarity, energy, challenge, stimulation, and naturally are places where we are comfortable and at home we can easily forget that for many of the other participants...the courts can be places of stress and trauma, anger, disappointment, and sorrow. I am thinking here of those people who come to court as witnesses to a crime, often as the victim themselves, or as families and friends of a victim of crime. Many...are not familiar with the working of the courts and the judicial process, and their own role in it, which I know often adds to their bewilderment and distress. It is important that everything possible is done to alleviate these stresses."[197] The assigned volunteer will typically stay with the victim and/or witness throughout the trail. Since 2005, the Commission for the Support of Victims of Crime has awarded this much-valued service €112,000 and intends to further aid its expansion nationwide throughout 2008.

- *National Crime Victims Helpline - 1850 211 407* (formerly *Crime Victims' Helpline*): Relaunched in November 2005, this free telephone helpline, manned by volunteers residual from Victim Support, acts as a point of contact for the various organisations that provide services for crime victims. Since 2005, the Helpline has received €251,500 funding from the Commission.

- *Support After Homicide* (formerly *Families of Murder Victims*): Victim Support originally developed this service in response to the increasing rate of homicide in Ireland to support co-victims and provide assistance on all the urgent practical matters that follow a sudden, violent death. Specially trained volunteers provide frontline services like information on the complexities of the criminal justice system, assistance in dealing with the media, accompanying co-victims to An Garda Síochána stations and the Coroner's Court, and liaison with statutory bodies. Many volunteers have more than ten years experience in providing one-to-one and family support. The service is available upon request and is usually provided for as long as two to three years after the homicide. It is the experience of this group that the grief work is delayed until the trial has concluded, thus a volunteer frequently works closely with a family for a prolonged period of time. It is general policy that volunteers have *not* been bereaved by homicide so as to ensure that they come free from personal burdens or experiences.

[197] Remarks made by the then Minister for Justice, Equality and Law Reform, Michael McDowell, at the launch of the Court Support Services (8 May 2006)

In principle, if for no other reason than the comparability of the two legal systems, the situation regarding crime victims in Ireland is somewhat analogous to that of England. The victim has no active participatory rights, save for the seldom employed and rarely successful capacity of private prosecutor. More recently, and referencing the *State (Healy) v Donoghue*[198], where it was noted that "it is justice which is to be administered in the Courts and this concept of justice must import not only fairness and fair procedures, but also regard to the dignity of the individual"[199], the Supreme Court, in *A v Governor of Arbour Hill Prison*[200], elaborated "that the 'individual' referred to...includes the applicant [a person accused and found guilty of unlawful carnal knowledge] or a person in his position but is not limited to such a person. The phrase certainly includes others who have become involved in the facts which give rise to this case and *in particular the victim.*"[201] While this may be regarded as a special if not wholly exceptional case, there are signs here that rights are not the monopoly of the defendant and that the State has a primary duty to protect and vindicate the rights of citizens in general and victims in particular.

In Ireland, the treatment of the victim by various agents of the criminal justice system has improved considerably over the last decade, but despite an apparent groundswell of support there remains much more to be done. Though criminal justice institutions have begun to work collaboratively in matters affecting policy towards victims, it is still very much the victim who has to attempt a coordination of the system's components rather than the system that pulls together to provide a coordinated and successful response and service for him. Politically, there is bipartisan support for the rights of victims but this has not culminated in rapid or radical action. Current debate on victims in Irish political and criminal discourse may portend a better future but its grammar is, at present, propitiatory. The actual provision of rights for victims is rhetoric rather than reality, with the gap between writ large.

In recent years, the victims lobbying movement in Ireland has gathered considerable momentum, thanks largely to the sophistication and tenacity of its advocates, but this may well be just so it can hit its head slightly harder off the brick wall. Victims continue to rely heavily upon voluntary groups for support, which does little to dismiss notions that they are the objects of charity. These voluntary

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[198] [1976] IR 325

[199] *ibid.*, at 348, *per* O'Higgins CJ

[200] [2006] IESC 57

[201] *ibid.*, *per* Hardiman J {*emphasis added*}

organisations are understandably less concerned with arguments about establishing standards of entitlement to services than with discovering where they can be of most practical help with their limited resources in straitened circumstances.[202] Victim groups are critical of the lack of certainty surrounding funding. At present, each group applies to the Commission for the Support of Victims of Crime annually, with the level of funding typically varying year on year. Most groups have expressed a want for a rollover three-year scheme of funding that would, logistically, enable forward planning.

Ireland has no concerted victim strategy and existing procedures have been composed entirely randomly with no thought to a grand design or, for that matter, with any dialogue of fusion with victims themselves. The field of victim support is now heavily populated by non-governmental organisations providing a wide range of general and specialist services. It is always open to debate whether support services should be provided officially rather than by voluntary groups relying on government funding, but regardless, victims themselves invariably benefit cathartically from their involvement in helping others. However, many victim support groups operate in isolation, resulting in the unnecessary and costly duplication of activities. There needs to be a centralised coordination of groups which would allow for a more focused and effective use of public funding and volunteers' time.

Support to crime victims should be given a higher precedence. After all, one of the primary tasks of a State is to guarantee the safety of its citizens. When it fails to do this, it must be a political priority to ensure that everything reasonably possible is done to help those subjected to crime by providing assistance before, during and after any trial, and indeed outside of the trial process itself. Nevertheless, Ireland continues to conform to the prevailing tendency in adversarial systems that victims are an extraneous factor to the functioning of criminal justice. If the victim is no longer the forgotten actor, he is still very much the poor relation, existing on the strength of benevolence and not on his own rights. Any victim 'rights' in Ireland are emblematic, theoretical and titular rather than real and enforceable; making it a country that talks about doing more than is actually being done.

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[202] Maguire M 'Victims' Needs and Victim Services: Indications from Research' (1985) 10 *Victimology: An International Journal* 539, 540

The Use and Abuse of Victims' Rights

Debate concerning the victim in criminal policy is a fashion, peculiar in the sense that virtually identical contents repeatedly appear dressed in new clothes. Viewed from a distance, the victim has become an opalescent concept of criminal justice insofar as the models and conceptions of the victim depend, to a significant degree, on the perspective of the viewer. Thus victims appear in many guises. There is the victim who is first normatively neutralised and then rediscovered; the victim who becomes the subject of scientific study and the starting point of criminological criticism of the meaning and function of criminal justice; the victim whose behaviour constitutes an element of the offence; the vengeful victim[203]; the victim activist who courts political interest; and finally, the media portrayal of the victim that attracts public empathy.[204]

With so many variations in and purposes for the embodiment of the victim it would be naïve to suggest that all have embraced this victims' movement. Victim reforms, innately polemical, have always courted some level of controversy and are resisted most in countries with adversarial criminal justice systems, where it is frequently considered heretical to suggest that greater inclusion of the victim might be warranted.[205] The legal profession may be said to typically oppose reform measures that are imposed from the outside, challenging, as they do, established legal traditions about the role of the victim in criminal justice and threatening routine court procedures.[206] Academics are quick to highlight the atavistic ideology and inherent legal contradictions underpinning such reform. To put the victim at the heart of the criminal system, some decry, is to reinterpret centuries of practice where the role between State and offender has been central to the resolution of crime and the administration of justice. Yet the victims' movement cannot be simply dismissed as some regressive development threatening to unleash ungovernable forces, instead it

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[203] One of the original fears concerning the revival of the crime victim is one now easily disparaged. As the victims' movement emerged, the political and legal arenas were haunted by the possible spectre of the victim-vigilante. Decades on, it seems to have been the establishment's own fearfulness that conjured up such an apparition for vengeful victims have never made their voice or presence forcibly felt in the politics of criminal justice. What this initial fear of an angry or vengeful victim did cause was a swift action by policing authorities to harness and restrict the potential victim-vigilante into professionally organised schemes of activity, such as neighbourhood watch programs, although such schemes have largely dwindled out in Ireland.

[204] Albrecht P 'The Functionalization of the Victim in the Criminal Justice System' [1999] 3(1) *Buffalo Criminal Law Review* 91

[205] O'Hara E 'Victim Participation in the Criminal Process' (2005) 13 *Journal of Law and Policy* 229

[206] Erez E & Rogers L 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals' (1999) 39(2) *British Journal of Criminology* 216

should serve to remind us that any system of criminal justice must be accountable.[207]

One of the truly remarkable achievements of crime victims is how swiftly it managed to organise itself into an interest group engaging both the public and the political majority. Its success in gaining mainstream acceptance was due mainly to a genuine widespread concern for the personal troubles of the crime victim. We are aware of the randomness of crime, that at any unfortunate moment any one of us may find ourselves a victim, an 'it-could-be-you' metonym. Hence we wish to ensure that there is support to help alleviate the effects of crime when it occurs. Relief for the victim is feasible and attracts strong social, political and personal appeal.[208]

The crime victim successfully anchored himself as a prolific component on the legal and political terrain in what was a relatively short period of time. Some, like victims of rape or homicide co-victims, are unusually driven and so harrowed that policy makers, practitioners and politicians have found it impracticable to deny them an audience.[209] As victims themselves see their claims as having some "existentially validating authority" no politician can afford to appear anti-victim.[210] Political campaigning for crime victims has assumed a moral position that appears to its advocates to be unassailable.[211] As a result, victims' concerns are often accepted without being assessed on actual merit, and in the wake of pro-victim populism it can be difficult to separate genuine problems from trendy or spurious claims. It is argued that invoking the victim into the political agenda smacks of an ideology tainted by false consciousness, laced with the distortions of moral panic and retribution revivals.[212] As a result, it would appear all too easy for both sides within the victim debate to brush remonstrations away as meaningless, on the one hand, yet on the other make simple *a priori* assumptions in support of their claims. More recently, academics are critically analysing not just how the crime victims' movement was so readily accepted but *why* it came to receive such prevalent political approval:

> The reaction to what has been described as [the victims' movement] has been overwhelmingly (and rather surprisingly) non-controversial ... and has not

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[207] Goldstein A 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 *Mississippi Law Journal* 515, 560

[208] Geis G 'Crime Victims – Practices and Prospects', in Lurigio A, Skogan W & Davis R (eds.) *Victims of Crime: Problems, Policies and Programs* (Newbury Park: Sage, 1990) 251, 260

[209] Rock P *After Homicide: Practical and Political Responses to Bereavement* (Oxford: Clarendon Press, 1998) *xiv*

[210] Rock P 'Murders, Victims and Survivors' (1998) 38(2) *British Journal of Criminology* 185

[211] Miers D 'The Responsibilities and the Rights of Victims of Crime' (1992) 55(4) *Modern Law Review* 482, 496

[212] Hall S *Drifting Into A Law and Order Society* (London: Cobden Trust, 1980)

> generated any serious criticism, or any meaningful confrontation ... the quasi response to the rhetorical cry of 'justice for victims' has been favourable. For a legislative issue to generate so little debate, so little opposition in the highly confrontational, highly partisan world of politics, is extremely unusual. The exceptional speed with which [victims] were rediscovered and their cause adopted by politicians, let alone the political climate that prevailed at the time of their rediscovery, are bound to raise questions about the real interests and motives.[213]

Though it originated as an ad-hoc challenge to the treatment of victims at the hands of the justice system, the victims' movement has since evolved into an institutionalised interest group whose goals often overlap with, and whose victimisation is at times managed by, proponents of the crime control model of criminal justice. This is witnessed by the semi-politicisation of many victim support groups and their proclivity for becoming willing allies to the law-and-order contingent. That victims became a focus of political concern, and indeed part of the political backdrop, has been related to the increasingly profound sense of disillusionment across the public spectrum with the ability of successive governments to 'do anything' about crime, reflective in the pervasive consensus that the criminal law and the threat of sanction standing behind it is not taken seriously, thereby futile as a deterrent.

The victims' movement is, or with more certainty *was* a social movement. That said, the accomplishments of any social movement very often depends upon its ability to capitalise on opportunities created, or, more worryingly, be taken advantage of by shifting political and social structures. To this end, for the last four decades or so, the victims' movement has subtly achieved enormous levels of success and stability on the back of as much political as public concern over escalating crime figures.

Public unease pertaining to crime in Ireland peaked precipitously in the middle of the last decade, due primarily to two defining incidents in June 1996 that shook the nation in a textbook case of what sociologists would term a "moral panic."[214] The first was the fatal shooting of Detective Garda Jerry McCabe during an attempted robbery of a post office van in Adare, Co Limerick, the second the killing of *Sunday Independent* crime investigative journalist Veronica Guerin as she sat in her car in

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[213] Fattah E 'The Need for a Critical Victimology', in Fattah E (ed.) *Towards A Critical Victimology* (New York: St Martins Press, 1992) 3-4

[214] Cohen S *Folk Devils and Moral Panic* (London: MacGibbon & Kee, 1972) 9

Dublin traffic.[215] The extent to which unlawfulness began to resonate with the public was captured by one national poll which found that despite only 8% of the electorate having considered law-and-order a main issue of concern in the 1992 election, this had increased five-fold to 41% come the 1997 election.[216] Since then the electorates' disquiet regarding crime appears to have taken residence in its hierarchy of concerns. The current public pessimism is such that four out of five people rate crime as a serious or very serous problem, notwithstanding that by international comparisons Ireland has a relatively low crime rate. In 2004, there were 2,500 serious crimes per 100,000 head of population as opposed to some 11,300 in England and Wales.[217] With public angst regarding crime at such a discernible level it was inevitable that victims would become as much the subject of political as criminological attention.

Table 3: Public Perception of Crime in Ireland

	Very Serious Problem	*Serious Problem*	*Fairly Serious Problem*	*Not a Serious Problem*	*Not a Problem*
2006	45.9	34.9	16.2	2.7	0.3
2003	46.5	33.9	17.0	2.3	0.3
1998	38.3	38.2	20.8	2.5	0.3

Crime and Victimisation Quarterly National Household Survey 2006 (Cork: Central Statistics Office, 2007) 22

Victims may well form a section of the electorate but potential victims, particularly in an era of sustained or increasing crime rates, form a significantly larger part. It is these possible victims that are the audience governments seek to satisfy with victim-orientated initiatives. Reforms and schemes promoted as ostensibly benefiting crime victims - like the Victims Charter, State compensation, and the introduction of impact statements - often well-intentioned and launched to great fanfare, have done little to alleviate the overall suffering of victims but guarantee relatively easy public relations benefits. Instead they play only a minute and oft-ineffective role at the shallow end of the justice system, more notable for the reforming enthusiasm they attract than for any influence upon victim satisfaction with the criminal process generally, for "at closer scrutiny most of these measures prove to be unfulfilled promises at best and political palliatives or judicial placebos at worst."[218]

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[215] A similar moral panic occurred in Britain in February 1993 following the abduction and subsequent murder of two-year old James (Jamie) Bulger by two ten-year old boys, Jon Venables and Robert Thompson, who became the youngest convicted murderers in Britain for almost three centuries.

[216] MRBI polls conducted for *The Irish Times*, 17-18 November 1992 & 26-27 March 1997 respectively.

[217] Corrigan C 'Crime 'out of control' once again' (September 2006) *Magill* 14, 15

[218] Fattah E (ed.) *Towards A Critical Victimology* (London: Macmillan, 1992) *xii*

These initiatives may serve to raise the overall profile of victims within criminal justice and thereby from time to time indirectly pressure various organisations to address their needs, but this scatter-gun approach highlights a lack of coordination between statutory agencies and produces new tensions within the criminal justice firmament.[219] Yet, paradoxically, victim-orientated schemes that are hollow and unfulfilling still prove a vote winner since even if dissatisfaction with the particular scheme in question results in users expressing criticisms of it, the larger group of potential victims still view it as a somewhat healthy and worthwhile initiative.

There is no doubt that politicians know which way the wind is blowing, nevertheless it is words not deeds and promises not policies for assisting victims that are the norm. Media fascination with crime also means that some politicians see it as a useful means of advancing their own careers by grabbing headlines. In the clamour for votes that heralds any election season the victim inarguably receives greater prominence than he does throughout the broad political calendar. For example, the 2007 Election Manifestos for all political parties made promises directly beneficial to the victims of crime[220]:

- *Fianna Fáil* proposed the establishment of both a Victim's Council to formulate victim policy and a statutory Victim Support Agency;[221]
- The *Progressive Democrats* made a commitment to double the funding currently available for victim support work;[222]
- *Fine Gael* and *Labour* both promised the implementation of a new Victims' Rights Charter that would ensure information for victims at all stages throughout the criminal justice process;[223]
- The *Green Party* guaranteed that victims would be afforded the same access to legal representation and court access as the accused;[224]
- *Sinn Féin* planned the establishment of a system of consistent victim liaison to ensure that victims, especially those of violent crimes, be kept fully informed throughout the investigation and prosecution process.[225]

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[219] Crawford A & Enterkin J *Victim Contact Work and the Probation Service: A Study of Service Delivery and Impact* (Leeds: Centre for Criminal Justice Studies Press, 1999) 3

[220] During the 2007 election campaign Fine Gael, clearly playing to the gallery, made the ludicrous billboard promise of 'No Bail for Criminals', seemingly ignorant to the fact that bail is mostly granted to people who have not yet been tried for a crime and are therefore legally innocent, not criminals.

[221] Fianna Fáil *Now, The Next Steps: Manifesto 2007* (Dublin: Fianna Fáil, 2007) 102

[222] Progressive Democrats *From Good to Great: Continuing Ireland's Radical Transformation* (Dublin: Progressive Democrats, 2007) 30

[223] Fine Gael National Press Office *Its Time To Put Victims Ahead of Criminals* (12 May 2007)

[224] Green Party *Its Time: Manifesto 2007* (Dublin: Green Party, 2007) 18

The combination over recent decades of the irrefutable rise in crime and the steadily audible voice of the victims' movement has led Government to focus on the language of victims' rights if not actual substantive rights and to respond with progressively more repressive legislative measures, downgrading expert advice in favour of sound-bite 'solutions' and short-term quick fixes, becoming preoccupied with imprisonment and adopting timely and seemingly pro-victim stances to pacify and assuage the victim.[226]

In Ireland, this was best evidenced by the controversy surrounding the *Criminal Justice Act 2007*, which broadened the categories of offences for which suspects may be detained for seven days, laid down mandatory ten-year sentences for certain drug-related crimes, introduced changes that in essence eroded the right to silence, imposed stricter bail provisions, launched measures on electronic tagging and established a DNA database, all as part of the fight against criminality. Some provisions of the Act, branded by the Minister for Justice, Equality and Law Reform as part of an overall need to "rebalance" the criminal justice system, a political term currently in vogue, were generally regarded as a knee-jerk reaction to appease heightened public fears following a flurry of gangland killings towards the end of 2006 and early 2007. The speedy implementation of the Act frustrated many civil libertarians and legal professionals whose calls for considered debate on its draconian measures fell on deaf political ears.

Such punitive interventions are symptomatic of the reactive nature of Irish criminal justice policy[227], and its recent tendency to look for inspiration toward the more penal disposition of the United States than to the more enlightening and culturally relevant European criminal justice systems.[228] Accordingly, political discourse regarding criminal policy is slanted so as to invoke a collective anger from the public, like when the Minister for Justice, as a precursor to the *Criminal Justice Act 2007*, posited gangland crime as posing as significant a threat to Irish society as

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[225] Sinn Féin *Others Promise, We Deliver: Manifesto 2007* (Dublin: Sinn Féin, 2007)

[226] A leading Irish academic authority on the presumption of innocence has gone so far as to say that some parliamentary contributions on the subject of crime and balancing victims rights with those of the defendant are indistinguishable in both content and style from articles in the tabloid press – Hamilton C *The Presumption of Innocence and Irish Criminal Law: Whittling the Golden Thread Legal* (Dublin: Irish Academic Press, 2007)

[227] 'Rhetoric and reaction, rather than reason and principle are the primary forces shaping [Irish] criminal justice policy' – O'Donnell I & O'Sullivan E *Crime Control in Ireland* (Cork: Cork University Press, 2001) back cover synopsis.

[228] O'Mahony P 'We over-rely on jail deterrent' (23 March 2006) *The Irish Times* 18

paramilitary activities did throughout the times of the Northern Ireland Troubles.[229] Ironically, this political perversion of talking-up fears of crime will eventually be interpreted as a chronic governmental failure to address the substantive issue.[230]

The *Criminal Justice Act 2007* exemplifies how policy-makers are quick to camouflage despotic legislation as victim-centred reform, even when those policies proposed and adopted in their name seldom directly serve victims' interests.[231] In this way, victims are used and abused as mere pawns in the fight against crime, adopted as a means to a political end. This exploitation functions to bolster the perceived legitimacy of government in the face of apparently intractable lawbreaking. The risk of unrestrained State authority, of arbitrary power, and the violation of human rights seem no longer to figure so prominently in public concern since the resurgence of the crime victim.[232] Empathy for the victim is skilfully transformed into rage against the offender and this transference of righteous anger is politically orchestrated to justify harsher sentences, consolidating law-and-order as a potent societal objective[233]:

> Law-and-order ideology promotes conservative strategies for fighting crime and victimisation. It relies largely on the negative view of human nature that assumes that people (and especially some people more than others) are inclined toward evil. Crime occurs when people either chose not to restrain their evil tendencies, or when law-and-order institutions act too weakly to deter them, or both. Thus, crime results from individual choices, not social conditions. Preventing crime depends on whether enough force has been generated to deter it: force in the form of tough criminal laws, strong police forces, frequent arrests and convictions, wars on crime and drugs, a

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[229] Lally C 'Dublin murder rate is fastest growing' (20 March 2007) *The Irish Times* 4

[230] James A & Raine J *The New Politics of Criminal Justice* (Essex: Longman, 1998) 81

[231] In March 2008, at the Association of Garda Sergeants and Inspectors (AGSI) annual delegate conference, senior gardaí demanded US-style live coverage of high-profile murder, manslaughter and kidnapping trials. Association President Paschal Feeney said, "It is high time that the general public become more fully aware of the carry-on in our courts…They should see first hand the pressure that witnesses and even victims of crime are placed under. They should see the histrionics, the antics and the showmanship…The extent of witness intimidation would become clear to viewers. Public knowledge of what goes on in our courts would hopefully lead to beneficial reform" – Lally C 'Televising of trials urged to show up intimidation' (19 March 2008) *The Irish Times* 9. It is difficult to see how daily broadcasts of a trial will benefit the victim or co-victim, indeed the heightened publicity may even add to their distress, and, to date, the victims' movement has not made a similar demand. However, and this is the more likely rationale behind this unexpected call, it is possible that the treatment and intimidation of investigating gardaí by the defence, a concern of the AGSI, might be diluted, representing yet another example where self-interested vocational demands are dressed as victims rights.

[232] Consider how capital punishment, once in abeyance in the United States, rejected as unconstitutional on the grounds of its cruel and unusual character, was re-enacted by many State legislatures getting tough on crime - the antiquated electric chair, the obsolete gallows, the outdated firing squad and the tarnished gas chambers were all replaced with the more socially palatable lethal injection, now used in all 36 States that have capital punishment except Nebraska, which requires electrocution.

[233] Jones S *Understanding Violent Crime* (Buckingham: Open University Press, 2000)

> proliferation of prisons, and severe penalties – including capital punishment. This ideology has dominated nations like the United States for the last century.[234]

There is little doubt that as crime rates soared the public became increasingly despondent about the likelihood of rehabilitating offenders. Criminality is deemed by many as a personal choice, a chosen career of wrongdoing, some manifestation of inborn wickedness. Thus efforts to deter or rehabilitate are tagged as a waste of public money, the only solution instead being punishment and incarceration.[235] By blaming crime on the immutable personal characteristics and choices of individuals, law-and-order theorists overlook that the origins of crime stem from poverty, alienation, lack of education and general discrimination, or at least dismisses these social causes as insoluble. They argue that the liberal notion of rehabilitation as the goal of the justice system has failed, for society always generates new criminals to replace the offenders it puts away. Victimisation is not in decline, and the justice system's tolerance, understanding and compassion shown towards its criminals serve only to perpetuate if not encourage the crimes done against society.

Furthermore, emphasis on the victim as an individual affected by a violent offence shifts the State's burden from wielding a just, socially-engineered solution to combat the social causes of crime to simply responding to singular criminal acts, from a pre-emptive tactic on a grand scale to a reactive approach to singular incidents:

> [An] emergent pattern of adjustment is the tendency of State agencies to give more priority to dealing with the consequences of crime rather than its causes…there has emerged a new emphasis on tackling the harmful effects of criminal conduct by supporting victims, mitigating crime costs, addressing public fear and reducing insecurity rather than intervening in ways that address crime itself. This is, to some extent, a predictable result of the worsening of crime as a social problem. As its effects become more widespread, so too do the demands for relief from those most affected. But it also represents a strategic shift on the part of criminal justice agencies, whose former claim to be addressing the problem at its roots now appears increasingly empty.[236]

With the State proving ineffective against the intangible *causes* of crime it focuses its

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[234] Elias R 'Paradigms and Paradoxes of Victimology', in Israel M, O'Connell M & Sarre R (eds.) *International Victimology: Selected Papers from the 8th International Symposium* (Canberra: Australian Institute of Criminology, 1996) 9, 10

[235] Henderson L 'The Wrongs of Victims Rights' (1985) 37(4) *Stanford Law Review* 937, 947

[236] Garland D *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) 121

attention on the more manageable *consequences* of crime, in particular pandering to retributive sentiments by consigning the offender to harsher punitive measures:

> A show of punitive force against individuals is used to repress any acknowledgement of the State's inability to control crime to acceptable levels. A willingness to deliver harsh punishments to convicted offenders magically compensates a failure to deliver security to the public at large.[237]

Even if punitive segregation fails in crime-reduction terms the State can still claim that something is being done for the victim by arguing that it is giving victims what they want, or at least what political projections of them are said to want.[238] What remains noteworthy in this deception is that whilst the State individualises the criminal act by simultaneously eliciting support for the victim and exciting hostility for the offender, it successfully manages to maintain the status quo in which the crime committed remains akin to an attack on the community as a whole, punishable solely by the State.

Absurdly, by focusing almost exclusively on responses to victimisation the victims' movement is guilty of ignoring the most fundamental right - the right *not* to be a victim.[239] A victims' movement worth its weight should surely be diverting some of its attention into concentrating on ways in which future victimisation can be best prevented, an ounce of prevention being worth a pound of cure. Effective crime prevention, as opposed to retaliation, should be the number one goal for all concerned, for "it is all very well to counsel and compensate a victim who has been hit on the head, but the chances are that he would rather not have been hit on the head in the first place."[240] Admittedly, the diverse reasons for and relative rarity of homicide, the offence central to this research, makes it a phenomenon difficult to predict or presage. Moreover, whilst it is possible to identify certain risk factors in relation to particular forms of homicide, such as alcohol consumption, it is often the case that these factors are widespread and legal, making the task of protecting high-risk populations or locations with any clarity extremely difficult.[241]

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[237] Garland D 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36(4) *British Journal of Criminology* 445, 460

[238] Sanders A 'Victim Participation in an Exclusionary Criminal Justice System', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 197, 208

[239] Beckett K & Sasson T *The Politics of Injustice: Crime and Punishment in America* (California: Sage Publications, 2004) 148

[240] Carrington F 'Victims Rights Litigation? A Wave of the Future' (1977) 11 *University of Richmond Law Review* 447, 468

[241] Brookman F *Understanding Homicide* (London: Sage, 2005) 278

Subsidising voluntary victim support work also enables governments to appear sympathetic to the plight of the crime victim without assuming any direct responsibility for their welfare. At the same time, the reliance that victim support and advocacy groups have on public funding demonstrates their unwillingness to pose a substantive challenge to government.[242] In this way, cynics claim that the State fund victim support groups as a control mechanism so as to prevent them from mounting a critical attack in what would be an act of biting at the very hand that feeds them.

The reorientation of criminal justice towards the victim connotes a cultural shift in penal thinking that augments the prevailing paradigm of retributive punishment in what has been termed "victims in the service of severity."[243] Those seeking greater accountability for offenders by understanding them a little less and condemning them a little more were quick to mistranslate and coerce the victims' movement into a vehicle of support for the punitive and exclusionary policies that have come to characterise present criminal discourse. The language of condemnation and punishment has re-entered criminal dialect, yet what is meant to be the expression of public sentiment is frequently distorted into politically driven proposals that take priority over more professional and research motivated initiatives:

> If victims were once the forgotten, hidden casualties of criminal behaviour, they have now returned with a vengeance, brought back into full public view by politicians and media executives who routinely exploit the victim's experience for their own purposes ... the new political imperative is that victims must be protected, their voices must be heard, their memory honoured, their anger expressed, their fears addressed. [In the United States] the naming of criminal and penal measures for crime victims (Megan's law, Jenna's law, Stephanie's law) purports to honour them in this way, though there is undoubtedly an element of exploitation here too, as the individual's name is used to fend off objections to measures that are often nothing more than retaliatory legislation passed for public display and political advantage.[244]

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[242] Shah P (ed.) *Defending Justice: An Activist Resource Kit* (Sommerville: Political Research Associates, 2005) 206

[243] Ashworth A 'Victims Rights, Defendants Rights and Criminal Procedure', in Crawford A & Goodey J *Integrating A Victim Perspective Within Criminal Justice* (Aldershot: Ashgate, 2000) 185, 186

[244] Garland D *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) 9, 143. Similarly, the trend in the United States to name criminal laws and penal measures after individual victims uses the plight of the victim to legitimate more extensive controls and new punitive measures – Wood J 'In Whose Name? Crime Victim Policy and the Punishing Power of Protection' (2005) 17(3) *National Women Studies Association Journal* 1-17

It is suggested that the whole edifice of the crime victims' movement has largely been built according to others notions of what victims want or should want.[245] To treat victims in this paternalistic manner, where they are spoken about or spoken for, is to perpetuate past approaches to the victim as the invisible person of criminal justice. However, contrary to the cliché, victims are not so much forgotten by our criminal justice system as they are used by it[246], for "the sanctified persona of the suffering victim has become a valued commodity in the circuits of political and media exchange."[247] The symbolic figure of the victim has become a somewhat celebrated and favoured constituency, routinely viewed functionally in political debate in a manner that is quite often detached from the claims of the organised victims' movement or the aggregated opinions of surveyed victims.

If crime victims are being given a voice, is it their own voice that is being heard or some carefully stage-managed one that fits the political message of which it now forms a part? Are victims being duped into believing that their cause is of political concern on merit, blind to the reality that politicians treat their agenda as some buffet of ideas, digesting what meets their own objectives in the war against crime whilst disregarding those that are distasteful, challenging or more difficult in their composition? Still, if reforms that are more anti-defendant than pro-victim in nature benefit victims indirectly, should victims care?

For all the talk of the political hijacking of the victims' movement, one should not forget that crime victims in the United States, and in particular homicide co-victims, push loud and hard against the system and have proven quite adept at courting political support and highly effective in passing legislation consistent with the law-and-order agenda. For example, in 1994, the State of California adopted Law AB971, colloquially known as "three strikes and you're out", under which a second serious felony attracts double the existing prison sentence and a third three times the usual sentence or twenty-five years to life, whichever is the greater[248]:

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[245] Shapland J, Willmore J & Duff D (eds.) *Victims in the Criminal Justice System* (London: Gower, 1985) 2

[246] Aynes R 'Constitutional Considerations: Government Responsibility and the Right Not to be a Victim' (1984) 11 *Pepperdine Law Review* 63, 68

[247] Garland D *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) 143

[248] In *Rummel v Estelle* [445 U.S. 263 (1980)], the U.S. Supreme Court upheld a life-sentence for the fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged cheque in the amount of $28.36, and obtaining $120.75 by false pretences; and in *Lockyer v Andrade* [538 U.S. 63 (2003)] upheld a sentence of fifty years to life for stealing videotapes on two separate occasions after three prior offences, stating that neither sentence conflicted with the ban on "cruel or unusual punishment" in the Eight Amendment to the United States Constitution.

> What was most unusual about [this] law was that it was drafted by the father of a murder victim, whose daughter was killed by a paroled offender. Mike Reynolds founded a pressure group whose political bandwagon became irresistible in the climate of fear and anger surrounding the kidnap and murder of a 12 year old girl, Polly Klass, in October 1993. Few members of the legislature were willing to risk voting against populist criminology in these circumstances, even though the Department of Corrections estimated that the law would require twenty additional prisons by the turn of the century ... on top of the twelve already scheduled.[249]

Similarly, in 1995, Suzanna Hopp, having witnessed the killing of her parents, was instrumental in getting legislation implemented in Texas permitting a person to carry a concealed weapon, a law which quickly became part of a broad movement in the United States.[250] As the right for a homicide victim to carry a concealed weapon benefits him about as much as the right for him to attend the execution of his slayer, a construal of his 'rights' are constantly being invoked by co-victims to claim rights that are more beneficial to them than to him.[251]

Restorative Justice – "In Whose Service?"

Even the seemingly benign practicality of restorative justice, presented as a victim-centred mechanism applicable to relatively minor crimes, can be tarnished with cynicism by way of its political motivation. Restorative justice, a process whereby all parties with a stake in a specific offence coalesce to resolve collectively how to deal with the aftermath of the crime, is an old idea resurrected in new threads, reflecting how disputes were settled and arbitrated in the past[252]:

> The objective of the idea of restorative justice ... is to bring the personal and individual levels of the offence, the experience of the harm and the consequences of the offence for the lives of the victim and others, back to light and reintegrate these aspects into the process of criminal justice. The aim ... is not ... the abolishment of

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[249] Jordan B & Arnold J 'Democracy and Criminal Justice' (1995) 44 *Critical Social Policy* 170, 172-173

[250] On 16 October 1991, Suzanna Hopp and her parents were having lunch at a diner in Killeen, Texas. She had left her handgun in her car so as to comply with Texas State law, which at that time forbid the carrying of a concealed weapon. When George Hennard drove his truck into Luby's diner and opened fire on the patrons, Ms Hopp instinctively reached into her purse for her weapon, but it was in her vehicle. The gunman killed twenty-three people, including her parents, and wounded some twenty others. As a survivor of the massacre, Ms Hopp testified across the country in support of concealed-handguns legislation, stating that had there been a second chance to prevent the slaughter she would have violated the Texan law and carried her handgun inside her purse into the restaurant, an action she believes had the potential to save many lives.

[251] Dubber M *Victims in the War on Crime: The Use and Abuse of Victims Rights* (New York: New York University Press, 2002) 187

[252] Marshall T 'Seeking the Whole Justice', in Hayman S (ed.) *Repairing the Damage: Restorative Justice in Action* (London: Centre for Crime and Justice Studies, 1997) 10, 15

> criminal justice, but an amendment to and perhaps the completion of the criminal justice system by drawing the attention to elements which have for a long time been rather neglected.[253]

Restorative justice emphasises the human impact of crime by facilitating the views of the victim, allowing him active participation in the course and outcome of his case, offering him material restoration through compensation settlements and emotional restoration in the form of an apology, all as the result of face-to-face mediation with his offender, who himself is held personally accountable for his behaviour and provided with the opportunity to take responsibility for his actions by making amends, thereby enhancing the quality of justice experienced overall for both victims and offenders.[254] It is essentially a conciliation premise that promotes a less formal process liberated from the strictures of the courtroom:

> It incorporates the principles that justice should be discursive, that it should be responsive to the circumstances of the particular case rather than subsuming individual acts and actors under general classes, and that it should allow a plurality of voices within the discourse.[255]

Restorative justice is fast becoming an acceptable alternative to traditional criminal justice proceedings. It is one of the aims of the European Council *Framework Decision of the European Union on the Standing of Victims in Criminal Proceedings*; article 10 providing that each Member State shall seek to promote mediation in criminal cases for offences that it considers appropriate for this sort of measure.

There is much criticism of the political willingness to introduce restorative justice, with some noting that the true impetus behind these schemes is anything but victim-orientated:

> Whilst it is true that individual victims may have felt some benefit, the motivation for the generation of such schemes has largely come from the general problem with the rising prison population. There has been no demonstrable desire to promote these schemes in terms of benefits to victims. The benefits for offenders seem clearer [especially where his participation results in no sentence to be served] - but the

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[253] Meier B-D 'Restorative Justice: A New Paradigm of Criminal Law?' (1998) 6(2) *European Journal of Crime, Criminal Law and Criminal Justice* 125, 127

[254] Umbreit M, Coates R & Kalanj B *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (Monsey: Criminal Justice Press, 1994) 5

[255] Hudson B *Justice in the Risk Society: Challenging and Re-affirming 'Justice' in Late Modernity* (London: Sage, 2003) 210

benefits to the State seem clearer still.[256]

In this regard, restorative justice can be viewed as yet another superficially victim-centred programme that has evolved without or with very little direct critical input from the victims it purports to assist, indicative of a contemporary political concern for the position of the crime victim that only finds expression when his interests coincides with theirs.

In Ireland, where restorative justice is very much in its infancy, an all-party committee recently backed a scheme that involves adult first-time offenders avoiding a custodial sentence if they apologise and make efforts to atone for their crime by working to compensate their victims.[257] The reasons cited for this initiative were that it may be more effective than jail in steering first-time offenders away from committing further crimes, that the pressure exerted on the court calendar would be eased by the more efficient use of its time, and that the cost of providing free legal aid, which is sourced from public coffers, would be significantly reduced - there was no mention of any benefit to the victim.

In spite of this, restorative justice can result in win-win outcomes at the lower scale of crime but it is not a panacea and has no place at the severe end of the criminal spectrum, of which murder, manslaughter, rape and sexual or violent assault all leap to mind, not just because it would require humility and a willingness to forgive that should not be expected from those victims or co-victims in the wake of such an offence, but that it would also be inconceivable for such a hardcore offence to be resolved as what would essentially be a private matter away from the watchful eyes of the media and the public:

> There are good reasons to assume that somewhere there is a border beyond which the general public is not willing to accept restorative justice as the only form of reaction to the offence but calls for retribution and punishment.[258]

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[256] Walklate S *Victimology: The Victim and the Criminal Justice Process* (London: Unwin Hyman, 1989) 129

[257] Pilot schemes have already taken place in Tallaght and Nenagh, where the rate of re-offending has reduced to a much lower rate than the national average - O'Keeffe A 'Just Say Sorry and Escape Jail Sentence' (4 January 2007) *Evening Herald* 4. Another format of restorative justice is already in operation in Ireland whereby a family conference is organised and run by the Probation Service at the direction of the courts in cases involving young offenders. This is a meeting between the victim(s), the young offender, the young offender's family and relevant others to discuss the offence and its effects. The meeting explores ways in which the offender can take responsibility for his behaviour and where possible, make amends. This is reached by group discussion, drafted into an action plan and submitted to the courts for approval.

[258] Meier B-D 'Restorative Justice: A New Paradigm of Criminal Law?' (1998) 6(2) *European Journal of Crime, Criminal Law and Criminal Justice* 125, 131

Be that as it may, restorative justice does show that providing new kinds of justice to victims is not always tantamount to a crusade against offenders and can be beneficial to victims of minor crimes.

The 'Balance' Debate – In Pursuit of the Unattainable

Discussion on the appropriate place for victims in criminal justice decision-making has a tendency to be couched in the language of *balance*, whereby the rights of the victim are posited as being antithetical to the rights of the offender. The concept of balance stems from the much-repeated claim that for too long offenders have been at the centre of attention in criminal justice, accumulating a series of rights, privileges and protections. Admittedly, it is difficult to dispel the perception that the defendant is laden with rights: he has legal representation which the victim does not, he enjoys the protection of specific constitutional and statutory provisions which the victim does not, he is frequently the focus of attention and concern even if, at times, it is negative in orientation, while the victim is excluded, treated when needed in a most cursory and bureaucratic fashion. Victims, for example, canvass that the right to counsel is the logical complement to the defendant's right to counsel. Calls for victims' rights are typically constructed from and intellectually corralled by comparisons with the extensive protections and entitlements afforded to defendants and offenders - free legal aid, the right to appeal, the huge sums of money spent trying to rehabilitate when so little appears to go to victims in terms of compensation or counselling *et al.* The metaphor of balance has immense rhetorical appeal, it is hard to deny the reasoning that "defendants have a series of rights, why shouldn't victims?"[259] As a combative device it has been harnessed to great effect, "importing a kind of realism and pragmatism that might otherwise be blighted by an unworldly absolutism."[260]

The parlance of balance may appear, at first blush, practical and fair but upon reflection it is deceptive and reductive, for it both forms and deforms the pursuit of victims' rights. Balance is a lazy mantra; a word pregnant with the assumption that what is to be rebalanced is irregular, dubious or inherently flawed:

> One does not set out to rebalance something already regarded as properly balanced. One sets out to rebalance something which is malfunctioning, which is out of kilter, which is not working appropriately. Accordingly the persistent use of the term

[259] Cassell P 'Balancing the Scales of Justice: The Case and the Effects of Utah's Victims' Rights Amendment' (1994) 4 *Utah Law Review* 1373

[260] Ashworth A *The Criminal Process: An Evaluative Study* (Oxford: Oxford University Press, 1998)

> "rebalancing" involves an assumption, which is rarely thought necessary to stand over by rational argument, that the criminal justice system is already gravely out of balance.[261]

It is near impossible to find equipoise in criminal justice, for to justify balance both the victim and the offender need to have the same stake and degree of interest in the process that they simply do not have. For example, legal representation for the defendant is crucial to ensure that he receives a fair trial and is not subject to the unrestrained power and resources of the State but legal representation for the victim cannot be justified on similar grounds for he is not in such a position of inequality *vis-à-vis* the State.[262] The harm for the victim has occurred before the trial insofar that he can usually point definitively at some loss or damage to property, or bear evidence of physical injury. He does not need at trial an assortment of legal protections to lay claim to his victimisation in the way that the defendant does to lay claim to his innocence, nor has the victim as much to lose - or some may say any *more* to lose - by the ensuing verdict. The defendant, on the other hand, has ample to lose if found guilty. If he is correctly found guilty he has no one to blame for those losses but himself but if he is found incorrectly guilty it is a travesty of justice; not only is an innocent person convicted but a guilty one remains at large. Therefore the State, because it threatens to revoke his freedom, created the numerous protections now available to the defendant, who is until the end of the process and under the presumption of innocence an accused person not yet nor may ever result in being a convicted offender:

> If the criminal justice system were ... to focus on the rights of victims to the virtual exclusion of other considerations, there would be a real danger that this would lead perhaps to the almost inevitable assumption that the accused was presumptively guilty of the offence and that the purpose of the criminal law was to punish the offender at the behest of the victim. While the legal system has to improve its engagement with victims, we must be careful that this does not take us down the path of implicit assumptions about guilt or which takes from the established constitutional liberties designed to ensure that the criminal trial is not only fair, but is seen to be fair.[263]

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[261] Hardiman A 'Weasel Words and Doubtful Meanings: A Study in the Language of Law "Reform"' [2007] 2 *Judicial Studies Institute Journal* 1, 4-5

[262] Edwards I 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 972

[263] Hogan G *Reflections on the Balance in the Criminal Law Review Group Report*, paper presented at the 2nd Annual Criminal Law Conference, 'Rebalancing Criminal Justice in Ireland: A Question of Rights', University College Cork, 29 June 2007

The fact that the onus rests on the prosecution, who must prove its case beyond reasonable doubt, illustrates that the concept of balance in criminal justice is not something that can be pursued in an absolutist way. Furthermore, the language of balance is mere fudge unless proposals are made on a reasonably clear and principled weighting of the interests that come into play.[264] Yet amidst all of its dialogue on balance, the victims' movement fails to present any real blueprint for reaching its desired equilibrium:

> Of course, we would want the criminal process to be well balanced, but the difficulty is that many of those who employ this terminology fail to stipulate exactly what is being balanced, what factors and interests are to be included or excluded, what weight is being assigned to particular values and interests [and] where this occurs ... it amounts to either self-delusion or intellectual dishonesty.[265]

The problem is that there are conflicting imperatives and no consensus on what should be done; it would seem easier to acquiesce on the existence of God. It is often not so much a debate as an aural riot; voices raised against one another like dealers on a trading floor, with the rights of victims and defendants brandished about like a game of ideological football. All involved claim to be driven by high principle but no one side ever appears to truly modify the view of the other.

Balance is a euphemism used to promote what amounts to anti-defendant legislation, like the aforesaid *Criminal Justice Act 2007*. Indeed much of what the Balance in the Criminal Law Review Group, a committee established by the Minister for Justice, Equality and Law Reform in November 2006 to "advise on the 'rebalancing of the criminal law'"[266], recommends has no direct benefits for the victim, instead serving as giving authority more power for dealing with the offender.[267] In this way, balance is a concept wilfully misemployed:

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[264] Ashworth A 'Victims Rights, Defendants Rights and Criminal Procedure', in Crawford A & Goodey J *Integrating A Victim Perspective Within Criminal Justice* (Aldershot: Ashgate, 2000) 185, 196

[265] Ashworth A *The Criminal Process: An Evaluative Study* (Oxford: Oxford University Press, 1998) 30

[266] Hardiman A 'Weasel Words and Doubtful Meanings: A Study in the Language of Law "Reform"' [2007] 2 *Judicial Studies Institute Journal* 1, 5. Here the Hon. Mr. Justice Adrian Hardiman was critical of the "remarkable" omission to include a single practising criminal lawyer on this committee: 'It is not necessary that such a committee be composed entirely of criminal lawyers, but it is necessary that there should be some input into a committee on the "rebalancing" of the criminal law from those who know how the law works in practise, and from both sides. Would any Minister dare set up a committee on defamation law without media representation? Or...on agriculture with no farming representative? Or on cancer care with no oncologist?'

[267] Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice, Equality and Law Reform, 2007)

> The term 'balance' should be banned, because it is one of the most misleading words in the debate. It has been used by several proponents .... as a rhetorical device. Too often it has been claimed that a certain change should be introduced 'to redress the balance', without proper supporting argument. On other occasions the talk of balance suppresses the conflicting considerations that need to be resolved. The first step should be to ascertain what the aim of a given part of the criminal process is, and then to ascertain what rights ought to be accorded to the suspects, defendants and victims. If there are conflicts, and there often are, then the justifications for the rights and their relative strength must be examined with care. To short circuit this process with bland assertions of 'balance' leads to sloppy reasoning.[268]

There are those who now suggest that the quest for balance is no longer vindicated, that the position and protection of the defendant has already been modified and diminished too much:

> When one considers the list of recent developments in the criminal law it should appear utterly contrarian to suggest that the 'pendulum' consistently swings in favour of the accused. It seems that a combination of political sabre rattling and lazy journalese allows that contention to stand relatively unchallenged and effortlessly repeated. When one considers, for example, the Public Order legislation; the amended Offences against the State Acts; the drug trafficking detention provisions; the Bail Act; the sex offenders register; the new drugs offenders register; mandatory sentencing in relation to particular drug offences; the Criminal Assets and Proceeds of Crime legislation; video link facilities for people of particular vulnerability; non-judicial warrants and so on it is startling that the claim can be made at all.[269]

The rights of the accused are no longer seen, as they were as recently as three decades ago, as assiduously fostered civil or human rights, but instead are increasingly viewed as a horde of technicalities unappreciated by a large portion of the public who misinterpret them as serving only to protect offenders, willingly oblivious to the value of the presumption of innocence, our gold standard of procedural fairness, believing that these rights should, in honour of its victims, be extirpated from criminal justice.[270]

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[268] Ashworth A 'Crime, Community and Creeping Consequentialism' [1998] *Criminal Law Review* 220, 229

[269] Gillane S 'Balancing the Scales in a Homicide Trial: A Reply' [2007] 1 *Judicial Studies Institute Journal* 30, 32

[270] Hardiman A 'Weasel Words and Doubtful Meanings: A Study in the Language of Law "Reform"' [2007] 2 *Judicial Studies Institute Journal* 1, 4. Similarly, "[R]espect for due process values seem like archaic sentiments that have little purchase upon the contemporary predicaments troubling the public" – Vaughan B & Kilcommins S *Terrorism, Rights and the Rule of Law* (Cullompton: Willan, 2008) 5

To talk of balance, if such a concept were possible, invariably means a diminishing of the necessary protection afforded to the defendant, for in the increasing emphasis on the admittedly seductive concept of finding a balance between competing rights there is some risk of eroding defendant's rights by stealth, by a cumulative imposition of restrictive provisions. Hence the concept of victim-centred justice is considered axiomatic to reprisal against the offender, a zero-sum game where the interests of victim and offender are assumed to be diametrically contradictory. Criminal justice is the setting for conflicting aims and interests, but some of these shall always warrant greater protection than others.

Yet if reforms ensure that criminal justice policy maximises the totality of freedom for all participants, then an extension of rights to the victim need not always be conterminous with a diminution in the protections afforded the defendant:

> Giving effect to the opinion of a victim about, say, the severity of punishment does not increase the freedom of the victim as much as it reduces that of the offender; thus such options should not be sought … Informing victims of prosecution decisions and the reasons for them, on the other hand, does reduce secondary victimisation and thus increases the freedom of victims without reducing the freedom of suspects. Therefore, this type of victim-right should be provided.[271]

The march of the victim does not in itself constitute a threat to the traditional perspectives of criminal justice. The threat posed comes from the political willingness to harness and manipulate support for the victim so as to replace considered discourse with vengeful anti-defendantism.[272] The biggest challenge for the victims' movement and its promoters is to convince the criminal justice establishment that victim-orientated initiatives and reforms need not erode the rights of the defendant.[273] The task and implications of introducing the victim into the delicate balance between State and offender remains a key issue for criminal justice. It is a complex mission, fraught with many of the conflicting themes discussed here. However, just because something is difficult to do does not preclude it from being done or from attempting to do it. Genuine concern for the victim should be a persuasive element of modern political and legal discourse on its own merits. Victims need to be part of the criminal justice agenda because of who they are in their own right:

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[271] Sanders A 'Victim Participation in an Exclusionary Criminal Justice System', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 197, 210

[272] Coen R 'The Rise of the Victim - A Path to Punitiveness?' (2006) 16(3) *Irish Criminal Law Journal* 10, 14

[273] Goodey J *Victims and Victimology: Research, Policy and Practice* (Essex: Pearson Education, 2005) 180

> The time has come to free victims' rights from their use as a tool for the achievement, maintenance, and expansion of State power ... the time has come to turn the pursuit of victims' rights from a weapon in the war on crime into a cause worth pursuing for its own rights.[274]

Finding ways of capturing and engaging the voice of victims in appropriate ways within criminal justice policy and process is now a prerequisite to rebuilding public confidence in the governmental ability to tackle crime. Listening, as some do, to the noise of that voice rather than to what it is that voice is saying is an offensive and ultimately futile strategy.

"Read All About It" – The Media Portrayal of Crime in Ireland

Politicians are not the only cluster guilty of commandeering the victim, the media incessantly play on the public fascination with crime to sell newspapers and guarantee ratings. Though this research is not an analysis of the role the media plays in society, it is worth highlighting some salient truths on its reporting of serious crime, and in particular how it headlines homicide so acutely, before briefly considering the negative affect this attention has on its co-victims.

The media are a powerful and overwhelming force, influencing societal knowledge and public consciousness more than any other contributor, playing an integral role in the forming and transforming of widespread attitudes towards crime, criminals, and ergo the criminal justice system.[275] It is erroneous to think of the news media as a single entity, for to do so largely ignores the distinctiveness of its particular components, say press or television, or the ways in which such media are internally differentiated depending upon the competitive and marketing strategies between, say, 'popular' tabloid and 'quality' broadsheet press, that result in significant deviations in their representations of crime and justice, both thematically and in individual cases. The media is not homogeneous; neither are its responses or, ostensibly, any realisation of its inferred responsibilities.

Crime has always had prominence in the content of mass media.[276] It is more frequent than any other category of news for each medium at every market level, so

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[274] Dubber M *Victims in the War on Crime: The Use and Abuse of Victims Rights* (New York: New York University Press, 2002) 7

[275] "Whoever controls the media – the images – controls the culture" – Allen Ginsberg, American poet.

[276] Reiner R 'Media Made Criminality: The Representations of Crime in the Mass Media', in Maguire M, Morgan R & Reiner R (eds.) *Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2002) 302, 305

much so that our daily lives are bombarded with a steady diet of violence.[277] The institutionalisation of crime reporters as a specialist breed of journalists is a self-reinforcing cause of habitual crime news and their often hyperbolical depiction of the crime phenomena generates and generalises a public alarm that is unrelated to the true dimensions of the problem. The problem with media commentary on crime is that in a business where headlines are limited to a few words and television and radio accounts rarely exceed ninety seconds most sections of the media do not facilitate measured reports, their treatment of the topic usually oversimplified and often just plain wrong.

The media portrayal of crime has always been skewed towards the more extreme end of the offence continuum. There exists a tabloid school of scaremongering that trivialises as it sensationalises. Specific crimes are selected for coverage not because they are representative but because they are "attention grabbing, eyebrow raising, indignation arousing, titillating, tension generating, and interest holding."[278] Headlines are near apocalyptic, full of vicious assaults, brutality, rape, and murder, as if a type of collective barbarism has been unleashed civically, ratcheting up public fear, inadvertently helping to cultivate support for repressive solutions.[279]

The prominence given to certain categories of crime, notably those involving sex or violence creates a somewhat distorted picture of their occurrence that is typically reflected in the beliefs of news consumers.[280] In Ireland, much as it is elsewhere, the public estimation of unlawfulness is independent of both personal experience and official statistics, instead predominately influenced by distorted media accounts that lead cumulatively to an overly pessimistic and fearful misperception of the seriousness and frequency of the problem. As a result, public anxiety over crime has a peculiar rather than a correlative relationship with actual crime rates:

> This pattern is so strong that the following claim can be made: typical crimes in the Irish press appear rarely in the official crime statistics and typical crimes in the official figures appear rarely in the Irish press account of crime.[281]

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[277] Cumberbatch G, Woods S & Maguire A *Crime In The News: Television, Radio and Newspapers* (Birmingham: Aston University, 1995)

[278] Anderson D & Sharrock W 'Biasing the News: Technical Issues in Media Studies' (1979) 13(3) *Sociology* 367, 370

[279] Kerrigan G & Shaw H 'Crime Hysteria' (18 April 1985) *Magill* 19; Sligo Champion 'Editorial' (24 July 1992) *Sligo Champion*

[280] Williams P & Dickinson J 'Fear of Crime: Read All About It? The Relationship Between Newspaper Crime Reporting and Fear of Crime' (1993) 33(1) *British Journal of Criminology* 33

[281] O'Connell M 'Is Irish Public Opinion Towards Crime Distorted by Media Bias?' (1999) 14 *European Journal of Communication* 191, 197. Members of the Irish public estimated an increase of 40% in violent assault from 1988 to 1993 when the true increase was just 11.8%. Similarly, the public surmised an increase

In its bid to obtain an audience the media presents victimisation out of focus. For example, child neglect is a far more prevalent ill treatment than child abuse but receives far less attention. Likewise, work-related fatalities in Ireland outnumber homicides but are rarely, if ever, deemed headline material.[282] O'Connell and Whelan found that while murder, attempted murder and conspiracy to murder made up just 0.004% of all recorded crime in Ireland in 1993, they comprised 15.3% of all printed crime news. Having devised a quantitative measure of sensationalism, the study calculated that murder-related offences accounted for a proportion of crime stories in the press 3,075 times greater than they appeared in official figures. A crude reading of this analysis is that murder has a 102,500 times greater chance of appearing in a newspaper than a minor driving offence, even though the later occurs approximately 18,500 times more.[283]

There are three reasons why the public deduce that homicide is occurring more frequently than it actually does. First, as a murder stays in the headlines for days or even weeks after the fatal event, is the prominent play and longevity of such news items. Second is the dearth of explanatory articles that place homicidal incidences into the context of population figures and comparative international rates. Thirdly, and more obliquely, is that illegal killings become news twice, first during the initial crime and investigation and again when the trial commences, usually quite some time after. As coverage of trials sit side-by-side with reports of fresh instances of homicide there is potential for the rate of its occurrence to be doubled in the public perception.

Media production is now one of the largest, avaricious and most lucrative sectors in the global economy.[284] Its function is no longer to inform and educate but to sell

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in murder of 30.3% when it had risen by only 15%. Yet the public estimated a rise in the occurrence of cannabis dealing as 30.3% when official statistics showed it to be up by 267.2%. This distorted perception was directly related to the prevalence of news reporting for each of these crimes - O'Connell M & Whelan A 'The Public Perception of Crime Prevalence, Newspaper Readership and Mean World Attitudes' (1996) 1 *Legal and Criminological Psychology* 179

[282] Between 2000 and 2004, the homicide rate in Ireland was 13.8 per mil/pop whilst workplace deaths were 34.6 per mil/employees. 'Occupational safety and employee protection fall squarely within the criminal law and many deaths result from ignorance, lax enforcement, deliberate flouting of the regulations and exposure of employees to known (or suspected) hazards. Members of the public can also fall victim to dangerous work practices. Like other violent deaths, these are criminal actions with lethal consequences...It is a sobering fact that Irish citizens are more likely to be lethally harmed at work, sometimes because their employer has broken the law, than they are to be killed by a violent attacker' - O'Donnell I 'Crime and its Consequences', in Fahey T, Russell H & Whelan C (eds.) *Best of Times? The Social Impact of the Celtic Tiger* (Dublin: Institute of Public Administration, 2007) 245, 254

[283] O'Connell M & Whelan A 'The Public Perception of Crime Prevalence, Newspaper Readership and Mean World Attitudes' (1996) 1 *Legal and Criminological Psychology* 179, 185. This was essentially a content analysis, which is a "research technique for the objective, systematic, and quantitative description of manifest content of communications" – Berelson B *Content Analysis in Communication Research* (New York: Free Press, 1852) 74

[284] McCullagh C *Media Power: A Sociological Introduction* (London: Palgrave, 2002) 1

newspapers and attain ratings. In this commercial enterprise where everything can be appropriated for entertainment, no matter how base or morally repellent, crime, and specifically murder, is grist to the mill, long providing editors with good copy that sells with a reliability few other items can match:

> The proportion of newspaper pages devoted to the coverage of violent and sexual crime has grown inexorably over the last two decades, but it is rarely acknowledged that this has as much to do with changing journalistic values and decisions about the marketability of the newspaper product as about the growth in violent crime.[285]

In the business of news the seemingly insatiable appetite for journalistic accounts of homicides exemplifies a societal preoccupation with illegal killings. Homicide, with its cruel and often arbitrary occurrence, is an ignominy that repels society, yet we are drawn to it as a never-ending source of voyeuristic entertainment. It is a great hook; its drawn-out investigation and subsequent trial grips and guarantees a returning audience. From the best-selling works of Agatha Christie to top-rating television franchises like 'Crime Scene Investigates', the deliberate killing of one human being by another, or more accurately the chase and reveal of those killings, have long fascinated the public.[286] So while homicide is greatly over-represented in crime reported, the media can justly argue that it is merely responding to what their viewers, listeners and readers want; that in this way it is the news consumer who ultimately determines what it is that the media focuses its attention on.

However, the media must accept some responsibility for both mystifying homicide and dramatising its importance and frequency in our society, not least by its reporting of the most atypical or egregious cases:

> Not unnaturally, the general public base their views on the information which they receive from the media. The media focus attention upon the high profile murders; they are, generally speaking, not concerned with the more humdrum, less newsworthy killings, many of which would not be regarded by the ordinary law person as true murder at all.[287]

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[285] O'Mahony P *Criminal Chaos: Seven Crises in Irish Criminal Justice* (Dublin: Round Hall Sweet & Maxwell, 1996) 168

[286] 'Real-life murder is arbitrary, sordid, pathetic and ugly. Fictional murder is not...[They are] ridiculously complex. The killer's *modus operandi* and motive must be deconstructed through detection, whereas actual personal killings are mostly unplanned and transparent (the spouse, with the gun, in the bedroom). The complexity, which is necessary if one is to have a plot, acts unconsciously to reassure us that murder is limited to those who are clever enough to scheme and cover up' – Klein D 'Reading the New Feminist Mystery: The Female Detective, Crime and Violence' (1992) 4(1) *Women and Criminal Justice* 37, 40

[287] Committee on the Penalty for Homicide *Report* (London: Prison Reform Trust, 1993) 6

The individual circumstances of a homicide play a crucial role in the manner in which it is reported. Motiveless or sexual homicides, or those involving young children, are more likely to be reported extensively. The indignation that society expresses toward a specific homicide is so highly symbiotic to its public presentation that the media forms part of the means by which some illegal killings become infamous, the names of some killers burnt on our minds and their crimes forming part of our national experience, whilst other more mundane incidences go unnoticed or quickly forgotten in the wider world. This constructs homicide differently to its reality, fostering social and political responses based on distorted contributions.[288]

Nowadays factions of the media are busily abandoning any responsibility they may have had as a source of disinterested and accurate information, instead opting for melodrama to capture and hold its target audience.[289] This is necessary, the media argue, in a society with everyday criminality. Most crimes differ only in details, like the location and identities of both victim and perpetrator. As the story the public read or heard yesterday is substantially similar to the one being headlined today, it becomes an exercise in journalistic technique to flesh out in greater detail the individualistic elements of the crime so that it appears new. As a consequence, there is an increasing trend for the victim and his family to become the pivotal focus of the homicide story, paralleling the increased centrality of victims in criminology itself. In recent times, intense media debate on several highly prolific homicide cases have regrettably influenced public opinion and even spread some confusion over who is the actual victim and who the offender.

There is a blurring of the lines in media coverage of criminal cases. Where once the media simply reported process and outcome, nowadays it is clear that in many recent cases the investigating officers utilised journalists to put pressure on suspects, creating an impression in the public mind that guilt was already established.[290] Certain sections of the media embellish or malign homicide investigations, reporting

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[288] Peelo M, Francis B, Soothill K, Pearson J & Ackerley E 'Newspaper Reporting and the Public Construction of Homicide' (2004) 44 *British Journal of Criminology* 256, 262-267, 272

[289] Schlesinger P, Howard T & Murdock G 'The Media Politics of Crime and Criminal Justice' (1991) 42(3) *British Journal of Sociology* 96, 97

[290] For example, on 22 October 2004, just three weeks after the murder of Rachel O'Reilly (31), who was found bludgeoned to death in her home in Naul, north County Dublin, the husband of the victim, Joe O'Reilly, and her mother, Rose Callaly, appeared on The Late, Late Show. It was widely rumoured, and never denied, that the investigating police provided a list of questions to the presenter, Pat Kenny, so that they could observe and gauge his responses and demeanour. Callaly did not look at O'Reilly throughout the course of the interview and was obviously traumatised. In contrast, O'Reilly was calm and composed, fueling speculation that he had murdered his wife and staged the botched burglary. He was later arrested and, two years later, in a high profile trial, convicted of murder.

innuendo, rumour and speculation, printing hearsay or leaked confidential details concerning live cases from "unnamed sources" as if it were common gossip, presented front-page as some national soap:

> Credible journalists ... have published information that clearly comes from police sources. These details, which should be confidential to the investigation, are being discussed in the homes, factories, offices and supermarkets of the nation ... [and] trivialises the murder of [the victim], turning it into a real-life game of 'Cluedo.'[291]

This trial by media, whereby "real-life cases [are] treated in public like episodes of *Columbo*, with the 'hunch' of the investigators supplying the narrative drive"[292] and suspects are "convicted by inference, innuendo or public prejudice"[293], raises co-victims expectations, who expect that a certain person will be prosecuted and/or convicted, and where such verdicts are not reached, the media react almost contemptuously towards the criminal justice system.

In addition, while the media have helped draw attention to the plight of the victim, they have primarily done so to support their 'crime out of control' stance. Indeed, some swollen ranks of the media are also guilty of administering its own 'justice', one that purports to fill the vacuum created by the traditional unwillingness of the justice system to hear the point of view of the victim. Yet the media only allows entry to the right type of victim, exploiting his story for the titillation of its audience or to galvanise the public. Moreover, when the rule of law produces unpopular results in high-profile cases, especially with unlawful killings in general and failed murder trials in particular, the media whip up the public mood to a feverish level.[294] In this way, victims are fated to be always blinking in the spotlight of media attention and the attendant opprobrium.

Media Interaction with Homicide Co-Victims

As each homicide is served-up for public consumption it is forgotten or ignored that there remains a grieving population who are consumed by rage and saddled with pain.

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[291] Kerrigan G 'McDowell preens while we play Cluedo' (28 November 2004) *Sunday Independent*

[292] Waters J 'DPP move feeds into trial by media' (24 October 2008) *The Irish Times* 16

[293] *ibid.*

[294] Sections of the media target the suspected perpetrator, despite the risk that public opinion – and therefore the jury pool – could be permanently tainted, putting in question the likelihood of a fair trial: 'We should be concerned that publicity surrounding controversial trials may sometimes have a greater role in determining their outcomes than anything laid down in law. There is little doubt that the magnification of the circumstantial, the hunch, or unadorned popular prejudice is in some cases creating consequences which the facts do not support...In some instances the background radiation of rumour, innuendo and a superficial impression can create conditions in which certain elements of the media refuse to accept the outcome of a trial' – Waters J 'Nevin case ought to be reviewed' (28 January 2008) *The Irish Times* 14

Media coverage can compromise the pursuit of truth, and when heightened, lurid or biased coverage collapses homicide trials co-victims can be left months waiting for a new date, deferring further any ability for closure and healing. Some quarters of the media do exercise consideration and objectivity but they often appear to be the minority.

Just as they experience a secondary assault from the criminal justice system, victims must steel themselves for a tertiary assault at the hands of the media. Co-victims, despite many requesting privacy, are thrust into public view, besieged by the sudden intrusion of an obtuse media who seek the most vivid and emotional responses to the crime. Their grief takes on a complicated and cruel dimension as it is transformed into public property and spectacle. This degree of intrusion constitutes a major homicide differential from other causes of death:

> You're in such a state of shock, you're not thinking in terms of newspapers ... You're not prepared for this ... I thought I'd come home by myself and cry my eyes out, but there already were [journalists and reporters] waiting when I got home. [It was] a freak show. We were not ready. We were numb. We didn't know what was going on.[295]

News reports can produce notoriety for the victim, particularly coverage that links him with deviant behaviour, detracting from a public willingness to empathise with surviving family members.[296] Those who are killed sometimes attract a sort of distasteful celebrity status, their name becoming household.

Publishing photographs or broadcasting crime scene footage containing body bags and spilt blood or ascribing nicknames to victims and offenders for the sake of headlines demean co-victims. In addition, attending funerals or memorial services, referenced as "the explicit pornography of grief", are journalistic ploys employed to serve up gruesome and unnecessary reminders of the violence associated with the killing.[297] Proffering synoptic accounts of the homicide that are erroneous, incomplete or misleading is particularly distressful and offensive to co-victims:

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[295] Grotta G *Crime Victims and the News Media* (Fort Worth: Texas Christian University, 1986) 10. 92% of co-victims feel it unseemly for a television news reporter and camera crew to approach a grieving individual immediately following a homicide - Fritz K *Television News Coverage of Tragic Death and the Grieving: Does It Affect the Bereavement Process of the Survivor?* (Western Illinois: Western Illinois University Department of Communications Art and Sciences, 1992) 91

[296] Riches G & Dawson P 'Spoiled Memories: Problems of Grief Resolution in Families Bereaved through Murder' (1998) 3(2) *Mortality* 143, 145

[297] Greenfield J 'TV: The Medium Determines Impact of Crime Stories', in Thomason T & Babili A (eds.) *Crime Victims and the News Media* (Fort Worth: Texas Christian University Department of Journalism, 1986) 19, 22

> I can remember reading [a national newspaper] on the Monday after [my son] was killed and there was just a small piece on it, but they described the beating in horrible detail and I got dreadfully upset. You wonder how necessary is it to describe and over-exaggerate? I was horrified. They described it as a beating that went on for twenty-five to thirty minutes, and the thought of that cracked me up completely. When I checked with the girls who were with [my son] it was like thirty seconds, they made a mistake … I didn't read anything for weeks and weeks because it would have been all lies.

Anniversary-related features that revisit or recollect old cases, or stories about the offender's time in prison, like religious conversion, demonstrates once again to co-victims that they are unable to control the story of the homicide. For example, one Irish family was "horrified" and "very hurt" when they heard the parents of their son's killer being interviewed on RTE Radio 1 on the fifth anniversary of that homicide:

> The interview was extremely traumatic for our family … we just heard it on the radio by chance. It really brought everything back … it doesn't help to keep going back to the way he died. We don't want to be reminded of how he was killed.[298]

At times, many families do become media-savvy, but their compliance in giving press conferences or initiating appeals for information, especially in relation to missing children or child homicides, is a crucial factor that makes them a focal part of the story.[299] Admittedly some deliberately utilise the media long after the story would, in news terms, be considered closed in order to convey their own version of events and make public any perceived injustices.

The National Union of Journalists' *Code of Conduct* states that as part of his duty to maintain the highest professional and ethical standards possible, a journalist shall do nothing that entails intrusion into the private life, grief or distress of an individual, subject to the justification of the overriding consideration of public interest. Apply this proviso to the coverage of any homicide, in particular 'red-top' tabloid reporting, and one questions the effectiveness of such a rider within the profession. The right of the public to know versus the privacy rights of the individual is a hoary argument, one of journalism's thorniest ethical dilemmas:

> Both crime victims and journalists have begun to ask whether crime reporting is

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[298] Finneran A 'Family fury as RTE still to say sorry' (12 March 2005) *Weekend Herald* 8

[299] Jewkes Y 'Media Representations of Criminal Justice', in Muncie J & Wilson D (eds.) *Student Handbook of Criminal Justice and Criminology* (London: Cavendish Publishing, 2004) 67, 70

> victimizing the victims again. The issue is not what newspapers and the electronic media have a right to do legally. It's what [it] ought to do ethically. The records of crime and its prosecution are public records. The public has a right to know. But where does that right to know end, and where do the privacy rights of private citizens begin?[300]

The media should ask why and in what manner they present a specific homicide to the public and attempt to balance its desire to provide compelling reports with reasonable sensitivity. Some effort must be made to bring the personal perspective into the equation, to give weight to matters of privacy, to balance the tension between earning a profit and behaving with decency, between the media as a commercial enterprise and a human institution.

Conclusion

The victim was once the pivotal player within early and developing criminal justice regimes, empowered with the sole responsibility to investigate, prosecute and punish his offender. Later, in its bid to regulate and institutionalise criminal justice, the State displaced the victim from proceedings, demoting him to mere reporter of the offence, and, when required, expecting him to testify. The State, no longer regarding crime as a private matter between the victim and his offender, adopted the role of public prosecutor. This stance created an imbalance of power between the prosecuting State and the accused, one which the State attempted to offset by establishing a whole canon of law aimed at creating an equality of arms that better enabled the defendant to put forth his case and protect him from unfair prosecution and punishment. That these developments were necessary to ensure fairness in the adversarial trial has done nothing to quell the lingering sentiment that defendants are treated more favourably by the justice system than the victims of crime. Nor, of course, did the reality that the State, having successfully commandeered criminal justice, viewed victims as essentially *personae non grátae*, mere afterthoughts whose demands infringed upon the neutrality and pursuit of fairness within the legal system. The State may well require the victim to report a crime so as to set in motion the process, but it made no meaningful attempt to consult with him or keep him informed.

From his state of near invisibility the crime victim has made a rather remarkable return to the forefront of criminal justice debate over recent decades, becoming a

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[300] Thomason T 'Compassion, Concern Mark Symposium', in Thomason T & Babili A (eds.) *Crime Victims and the News Media* (Fort Worth: Texas Christian University Department of Journalism, 1986) 2

significant player in the political arena and the major contributor in the provision of much needed support services to the similarly afflicted. His comeback was boosted by a widespread worry, both politically and publicly, over soaring crime rates and the official recognition that many victims, due to the insensitive and bureaucratic treatment they received from the criminal justice system and its agents, were becoming increasingly despondent with and disconnecting from that system, resulting in a rising level of unreported crime. In a sense, official interest with the victim at this time was sparked not from any true concern for his plight but from a self-serving awareness that a growing number of offenders were managing to escape detection, prosecution and punishment due to the unwillingness of the victim to engage with criminal justice authorities.

The general acceptance of the victims' movement was two-pronged. First, the public at large, in the knowledge that they may by happenstance and at any time become a victim, wanted to ensure that there was effective support and services available to help alleviate the effects of crime when it occurred. Secondly, so as to ensure that they would continue to report crimes and make themselves available as witnesses, governments wanted to reassure victims that the criminal justice system cared. Regrettably, this victims' movement has been used politically, and in certain circumstances has willingly let itself be so used as an advert for more punitive measures in dealing with offenders and for the gradual erosion of the rights of those accused of serious crimes.

The victims' movement developed initially in the United States as one of the many rights-driven social movements of that time and, consequently, the federal Government and virtually all States have ensconced in legislation procedural rights that actively involve victims within the criminal trial. Whilst the victims' movement in Europe has traditionally been more support and service focused, many continental countries are beginning to permit greater involvement within the trial for the victims of serious crimes.

This chapter has charted the rise of the victim within the arena of criminal justice over the past four decades. It is readily apparent that victims have legitimate needs arising from the harm caused to them and they are now widely considered as deserving of criminal justice support. What remains at issue, particularly in Ireland, is whether the type of rights that victims should be granted be procedural or service based in nature. Despite general agreement that victims be entitled to the basic rights

of information and assistance, these non-contentious services are not routinely delivered or statutorily guaranteed in Ireland, calling into question how committed we are about our promise to help and how we actually view victims and their needs. For example, the dependency many Irish victim support services, like Support After Homicide, the National Crime Victims Helpline and Court Support Services, have on official subsidies that must be annually applied for emphasises that victims remain beholden to the benevolence of government funding. In addition, despite attracting unabated levels of public, media and political attention, there has failed to be a corresponding rate of affirmative action, and victims have gained far less than perceived or promised.

In order to concentrate the mind on the particular subset of victims central to this thesis, the co-victims of homicide, the next chapter sets out to assert that these injured persons are *actual* victims of crime by cataloguing the effects homicide has upon them. This segues into an overview of AdVic, the lobby group formed by homicide co-victims, and sets out their stall for reform by inventorying the changes they seek within the Irish criminal justice system that will be assessed at greater depth later in this thesis.

CHAPTER 2

The Co-Victims of Homicide

The main purpose of this thesis is to focus on how the Irish criminal justice system can best accommodate the interests and concerns of the relatives of homicide victims. This chapter shall illustrate that the overall impact of the homicide on a loved one is of such magnitude that they must be recognised as victims in their own right. The effects of a homicide fan out from the loss of life at the centre of the criminal event to mothers, fathers, brothers, sisters, spouses, sons and daughters, and thence to the extended family and friends in a ripple effect. The descriptor *co-victim* responds to the need for a term to specify a category of victims that goes beyond the parameters of the standard definition of family to encompass a wider field of associated victims. In our contemporary society with same-sex partners and second families, *co-victim* is a term that pragmatically covers any person who due to their degree of closeness to the primary victim will experience a level of grief and loss that impedes upon their immediate daily existence.

It is hardly necessary to demonstrate the severity of the harm and the need for support endured by these co-victims. Still, it is useful to detail here their traumatic grief, so that from the intensity of their post-homicide experiences we can appreciate why family members and significant others are not, nor are seeking to be perceived as mere representatives of the homicide victim, or indeed as vicarious victims, but instead as *actual* victims of the crime. This chapter is an attempt at making somewhat understandable what is, for most of us, unthinkable and ineffable:

> You cannot appreciate the victim problem if you approach it solely with your intellect. The intellect rebels. The important proposals … will not be clear unless you

first confront the human reality of victimization.[301]

Homicide is not the only crime that can be held to have co-victims. There are those families who suddenly find themselves caring for a member left paralysed or brain damaged in the wake of a violent assault. These victims and co-victims can truly be said to be living a life-sentence. For the primary victim, his life may not have been terminated but the quality of that life is now radically altered, frustrated, and in comparison to the life he lived prior to the assault, lessened, leaving him with lifelong caring requirements. For the co-victims, they are left with caring responsibilities that prohibit them from ever achieving a semblance of closure regarding the crime in the way that some homicide co-victims may, over time, be able to manage. Increasingly, many families of motor accident survivors are unfortunately placed in a similar situation. Similarly, the partner of a rape victim can be classified as a co-victim, for the physical contact and emotional bond of their intimate relationship may be lastingly damaged by the sexual attack. However, this thesis focuses solely on homicide co-victims, if for no more expedient a reason than that these victims, through the launch in Ireland of Advocates for Victims of Homicide [hereafter AdVic], have mobilised themselves to fight for change and have presented an agenda for reform that warrants assessment. Much of what they seek will, if implemented, have beneficial ramifications for all victims and co-victims of crime.

What follows is a synopsis of the effects a homicide has on the person, on the family as a unit, and on an assortment of relationships, like partners, parents and children. Several of the symptoms outlined are not necessarily exclusive to homicide co-victims; there is, after all, a commonality to some of the responses experienced by all who struggle to accept the death of a significant other. Grieving the loss of a loved one is a universal process, one we shall, in all probability, encounter numerous times throughout the course of our lives. The normal repetitive circumstances of death are disease and old age; therefore it is the sudden, unexpected or untimely deaths that create more problems of initial acceptance, grief and long-term adjustment than anticipated 'natural' ones.[302] As a result, we undergo more severe reactions to the death of persons who die violently than to those who die non-violently.[303] The effects

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[301] President's Task Force on Victims *Final Report* (Washington DC: Government Printing Office, 1992) *vii*, 3

[302] Lehman D, Lang E & Sorenson S 'Long-term Effects of Sudden Bereavement: Marital and Parent-Child Relationships and Children's Reactions' (1989) 2 *Journal of Family Psychology* 344

[303] Sprang M, McNeil J & Wright R 'Psychological Changes after the Murder of a Significant Other' (1989) 70(3) *Social Casework: Journal of Contemporary Social Work* 159

of homicide, more than any other form of violent death, cannot be buried along with the victim; instead the extent of harm caused has the real potential to dismantle co-victims in a way that may never be repaired.

It is the unique situational and extenuating factors of a homicide that elicit significantly distinct and rigorous responses amongst its co-victims, varying in degrees of extremity, intensity and longevity:

> It is the form and context of dying rather than death itself that lends meaning and structure to the psychologic recapitulation and assimilation of death by the bereaved.[304]

The deliberate or reckless nature of the violence fatally inflicted upon the victim; the fact that the anguish of its co-victims and the crime, investigation and trial attract feverish public interest; and the protracted legal response to the homicide itself are all distinguishing features of this form of victimisation. After putting forth the torment co-victims find themselves swamped by post-homicide, this chapter then explains how some go on to develop post-traumatic stress disorder, which can linger for the months and years that follow. Having thus established through the description of the harm visited upon co-victims by the homicidal act that they are *de facto* victims of crime, there then follows a short history of AdVic, outlining how and why this pressure group came into being, including an enumeration of its demands for reform which, if implemented, will address many of their concerns and needs and shall help reduce the secondary victimisation imposed by the processes of criminal justice.

Notification of a Homicide

For many, unless they have actually witnessed the homicide, the nightmare commences with the death notification. No previous experience can prepare them for the onslaught of this news, with reactions typically more severe and extreme than learning of a death by any other means[305]:

> There is no preparation for this sudden onslaught … the death does not make sense; the mind cannot comprehend the meaning [and] demands more information than can be processed or stored.[306]

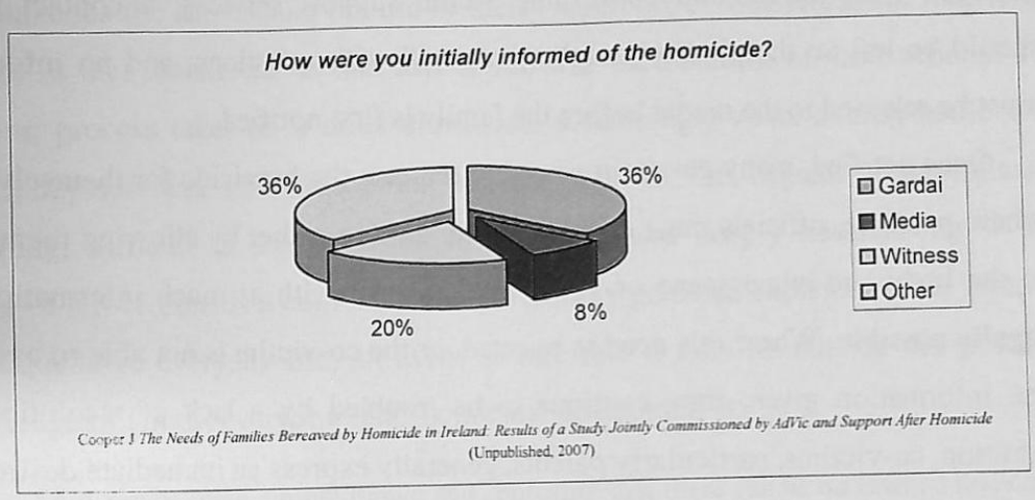
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[304] Rynearson E 'Psychological Aspects to Unnatural Death', in Zisook S (ed.) *Biopsychosocial Aspects of Bereavement* (Washington DC: American Psychiatric Press, 1987) 77, 78

[305] Burgess A 'Family Reaction to Homicide' (1975)45(3)*American Journal of Orthopsychiatry*391, 392

[306] Redmond L *Surviving: When Someone You Love Was Murdered* (Florida: Psychological Consultation & Educational Services, 1989) 31

Yet during this time co-victims are expected to assist the police enquiry, inform others of the tragedy, and be available to the media. The notification changes lives forever, plunging family members into a netherworld from which there is no obvious reprieve. The way in which this news is communicated leaves an indelible impression; whatever family members do or do not remember of the days after a homicide they can typically recall the details of the death notification. They may not recollect every word spoken but the essence of these words, and the manner in which they were delivered, will be etched in their memories forever.[307]



Cooper J *The Needs of Families Bereaved by Homicide in Ireland: Results of a Study Jointly Commissioned by AdVic and Support After Homicide* (Unpublished, 2007)

An Garda Síochána should endeavour to ensure that it is they who break the news of a homicide to the family. Admittedly this is not always possible, for neighbours or other witnesses may have the occasion to deliver the news first, but at any rate the police must be able to inform next of kin before the media run with the story. An empathic and informed death notification is an essential component to the co-victim's recovery process; if it is ill conceived or poorly delivered it predisposes him to emotional complications.[308] Hence the notification is not to be thought of as a single moment, for it becomes the catalyst for the trauma that follows, and recollections of it repeatedly resurface over the years that follow.[309] Complaints re death notification underscore an apparent lack of compassion, with queries left unanswered or dissembling, inchoate or wrong information provided. Without doubt, police officers regard death notification as a demanding, daunting and unwanted task, for they see lives literally dissolve before their eyes as they relay the news, and An Garda Síochána have welcomed input

[307] Harrison R 'The Impact of Stranger Murder' (1999) 6(1) *Therapist* 32

[308] Spungen D *Homicide: The Hidden Victims* (London: Sage, 1998) *xxiii*, 119, 133-134

[309] The intensity of the experience can also remain with the notifying police. At an AdVic Open Day in the Metropole Hotel, Cork (17 September 2005), one mother spoke of how the young officer who informed her of the murder of her son some fifteen years previously still calls each anniversary with a bottle of whiskey.

from AdVic and Support After Homicide in this matter for training its members.

The rules of notification can best be summarised as in time, in person, in simple language, and with honesty and compassion. More generally, death notification should always be made with two officers in attendance so as to ensure that a family member is not left alone for a period of time after; basic facts must be provided in clear, concise language; the immediate processes that follow, like the identification and release of the body, should be explained in full; the notifying officers ought to be sensitive to the loss experienced and never judge the victim; the family must be provided with information concerning victim support services; a contact number should be left so that family members can call with questions; and no information must be released to the media before the family is first notified.

Once notified, many co-victims need to recreate the homicide for themselves and, where possible, officials must enable them to do this, either by allowing them access to the body and crime scene or by furnishing them with as much information as is legally possible. Where this need is rejected, or the co-victim is not able to assimilate the information given, they continue to be troubled by a lack of resolution.[310] In addition, co-victims, particularly parents, generally express an immediate desire to see and spend time with the victim, although many are fearful, particularly when the body has been mutilated. Evidence suggests that the bereaved are haunted by horrific and exaggerated images of the victim's injuries and fear how he may have suffered. These concerns can by allayed by providing them with clear descriptions of the injuries, specifically the degree of any facial disfigurement.[311] This allows the co-victim to make an informed decision as to whether or not he wishes to view the body. In some cases, close proximity may be sufficient to meet their needs.[312]

The Effects of Homicide on Co-Victims

Each homicide typically affects a wide circle of individuals. In contrast to the direct victims, who are clearly calculable statistically, these associated victims are frequently undetected, unnoticed and unobserved, bystanders relegated to relative obscurity in the aftermath processes with poorly defined and consequently meagrely

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[310] Dannemiller H 'The Parent's Response to a Child's Murder' (2002) 45(1) *Omega* 1

[311] Brown L 'The Aftermath of Murder and Manslaughter: The Families' Viewpoint' (1993) 12(1) *Bereavement Care* 6; Parkes C 'Psychiatric Problems following Bereavement by Murder or Manslaughter' (1993) 162 *British Journal of Psychiatry* 49

[312] Riches G & Dawson P 'Spoiled Memories: Problems of Grief Resolution in Families Bereaved through Murder' (1998) 3(2) *Mortality* 143, 158

provided service and clinical needs.[313] They report that the professionals they encounter, like the police, hospital workers, funeral directors, clergy, psychologists, and psychiatrists, all make obvious by their comments and actions that they do not fully appreciate the impact and implications a death from homicide has upon them.

Most singularly, homicide unhinges and destabilises co-victims, leaving in its wake lives forever disturbed. Those who had special ties of kinship with the victim endure a complex *sui generis* range of reactions. They are tormented and enraged by the notion that someone made a wanton or wilful decision, no matter how instantaneous the act, to take the life of their loved one, or was violent or indifferent enough in their behaviour so that loss of life was the outcome of their actions. The grieving process takes on a cruel dimension, a seemingly never-ending battle with anger, hopelessness and frustration, ranked high in the degree of complicated mourning, difficult in the provision of aftercare, and deeply traumatising.[314] The killing of a loved one is a confusing and profoundly personal experience that swamps the etiquette of everyday life, an event so rare that it falls far outside the practical knowledge of almost everyone. This homicidal differential is:

> So overwhelming, unintelligible and confusing that there can be no learned responses to it, no recipe knowledge for managing it, no language with which to describe it, and normal structures of meaning collapse in consequence.[315]

Homicide leaves a devastating legacy; the depths of emotional reactions cannot be overstated, they are "a bewildering cacophony of intense sensations that suffuses fields of experience."[316] Co-victims are not psychologically prepared to appropriately deal with this violence entering their lives, hence their capacity to use adaptive coping mechanisms is quite simply overwhelmed.[317] They typically feel a group apart, a special minority quite unlike any other, in that the distinctiveness and force of their grief is quite unintelligible and incommunicable save to those who have suffered as

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[313] A study carried out in 1987/88 estimated that 5 million adult Americans had lost an immediate family member to criminal homicide – Amick-McMullan A, Kilpatrick D & Resnick, H 'Homicide as a Risk Factor for PTSD among Surviving Family Members' (1991) 15(4) *Behavior Modification* 545, 551-552

[314] Sprang M, McNeil J & Wright R 'Psychological Changes After the Murder of A Significant Other' (March 1989) *Social Casework: Journal of Contemporary Social Work* 159

[315] Rock P 'Murders, Victims and Survivors' (1998) 38(2) *British Journal of Criminology* 185, 194-195

[316] Rock P *After Homicide: Practical and Political Responses to Bereavement* (Oxford: Clarendon Press, 1998) 40

[317] King K 'It Hurts So Bad: Comparing Grieving Patterns of the Families of Murder Victims with those of Families of Death Row Inmates' (2004) 15(2) *Criminal Justice Policy Review* 193, 194

they have.[318]

Co-victims face an incapacitating array of experiences that assault the individual cognitively, emotionally, physiologically, and behaviourally.[319] These include an incessant yearning for the deceased; intense fear; lingering helplessness; a shattered sense of security; psychosomatic disturbances; overwhelming anxiety; aggressive impulses; a fixation on and a rage directed at the offender; an abhorrence that their loved one will forever be linked with the perpetrator, particularly when he is known to them; psychic numbness; oscillating almost schizophrenic behaviour; hyper-vigilance; immense sadness; a disintegration of beliefs; blame for both victim and self; isolation; emotional regression; the dramatic disruption of daily routines; a marked loss of interest in significant activities like employment; and a faltering of personal relationships.[320] These wide and varied responses fuse and fester, delaying and often preventing recovery:

> You feel right outside the normal course of events, you are outside the normal world … it affects *everything*. It makes *everything* trivial. If you've got to do anything, one can't be bothered.[321]

Holidays, birthdays and other formerly happy events associated with the deceased become painful and can lead to severe depression, from thence co-victims become at risk of developing conditions such as anxiety disorders and drug or alcohol abuse or dependence.[322] Many report that there is no recovery; instead they develop an ability to endure the waves of pain, anguish and trauma. Emotions, fuelled by anger, stay raw, with some remaining unable to discuss with equanimity a killing that has occurred years before. Homicide co-victims can be a very ill, dysfunctional population. Marriages may break-up and people can break down. The killing perforates and tyrannises their day-to-day existence; one survives merely because it is the course of human development to do so, never quite getting over it, just hoping to somehow get through it:

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[318] Rock P *After Homicide: Practical and Political Responses to Bereavement* (Oxford: Clarendon Press, 1998) 31; Walter T *The Revival of Death* (London: Routledge, 1994) 5

[319] Armour M 'Experiences of Co-victims of Homicide: Implications for Research and Practice' (2002) 3(2) *Trauma, Violence & Abuse* 109, 111

[320] Parappully J, Rosenbaum R, van den Daele L & Nzewi E 'Thriving After Trauma: The Experience of Parents of Murdered Children' (2002) 42(1) *Journal of Humanistic Psychology* 33, 42

[321] Rock P *After Homicide: Practical and Political Responses to Bereavement* (Oxford: Clarendon Press, 1998) 46

[322] Asaro M 'Working With Adult Homicide Survivors, Part 1: Impact and Sequelæ of Murder' (2001) 37(3) *Perspectives in Psychiatric Care* 95, 100

> Any one whose family member has been killed by a homicide will be changed ... it is a 'change' that is, to some extent, dialectic rather than homeostatic ... the internalized trauma ... will diminish with time but it will not go away. It will change from a horrific and private chronicle into a bearable narrative that can be shared and revised, but it will always be.[323]

Homicide presents a fourfold loss to the co-victim, inflicting massive injury upon the intra-psychic and interpersonal realities of surviving kin.[324] First, there is the finality of the death, the loss of anchorage to a significant interpersonal tie. Having lost someone on whom they depended for some level of emotional sustenance, co-victims must adapt to the personal and familial consequences of the victim's disappearance from their lives. We are each built symbolically around our significant others and assimilate them into ourselves; to lose another is to lose part of oneself.[325]

Secondly, there is the real or perceived loss of community existence. The fabric of a community allows people to camouflage what might otherwise be an overwhelming set of veracities, to edit reality in such a way that it seems manageable, its perils remaining at least partly masked.[326] Co-victims not only suffer a loss of communality insofar that they have been failed by the social institutions they assumed would protect them, but more immediately they experience a kind of distancing from those around them. The dominant factor in determining ones ability to cope with the aftermath of a homicide is the strength of their social network.[327] Yet friends and acquaintances may feel uncomfortable and avoid co-victims, unsure of what to say, evading the subject of the killing, or becoming so distressed by or exasperated with the intensity and repetitiveness of the co-victim's mourning that they themselves withdraw as their admonishments to "move on and put it behind you" go unheeded.[328] The upshot is that co-victims either attempt to hide in plain view by repressing their feelings or withdraw socially, both counterproductive tactics that hinder the grieving process. The contaminating power of association with homicide can also lead to co-

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[323] Rynearson E & McCreery J 'Bereavement After Homicide: A Synergism of Trauma and Loss' (1993) 150(2) *American Journal of Psychiatry* 258-261

[324] Masters R, Friedman L & Getzel G 'Helping Families of Homicide Victims: A Multidimensional Approach' (1988) 1(1) *Journal of Traumatic Stress* 109, 116-117

[325] Hass A *The Aftermath: Living With the Holocaust* (Cambridge: Cambridge University Press, 1995) 41-42

[326] Erikson K *Everything In Its Path: Destruction of Community in the Buffalo Creek Flood* (New York: Simon & Schuster, 1976) 240

[327] Sebba L *Third Parties: Victims and the Criminal Justice System* (Columbus: Ohio State University Press, 1996) 346

[328] Getzel G & Masters R 'Serving Families Who Survive Homicide Victims' (1984) *Social Casework: Journal of Contemporary Social Work* 138, 139

victims being ostracised from everyday life, detrimentally leaving them without much in the way of emotional shelter at a time when it is most needed:

> While death is an absolute, the social responses to it demonstrate considerable variation ... because it is not only the death itself, but the manner of dying which determines the social meaning of any death.[329]

Thirdly, co-victims question previously held ideologies or philosophies. Much of the psychological trauma of being a homicide co-victim is derived from the shattering of very basic assumptions held about the operation of the world.[330] We tend to cope with the uncertainty and fragility of life by believing in some way that our world is comprehensible and orderly, constructing social theories that permit us to feel that we have a substantial element of control over events, enabling us, in some way, to make sense of random tragedies.[331] The aggressive and, for the most part, deliberate nature of homicide shatters the co-victim's concept of the order, predictability, reason, and justice of our world, challenging them to become a theologian, a philosopher and a jurist, leading them to formulate a series of questions beyond the realm of human understanding for which there are no acceptable answers.[332] Some verbalise these shattered assumptions as an act of betrayal from some higher being, others are surprised to find dormant religious beliefs returning to the fore.[333]

Finally, there is the powerful injury inflicted to the intra-psychic perspective by the homicide. We each view ourselves, and by extension those around us, as uniquely insulated from disaster, invulnerable to life's vicissitudes in a way that denies our own mortality. Indeed, without such illusions it would be difficult to endure the brittle nature of the human condition. The intrusion of homicide falsifies the protective assumption that although violent crime happens, it happens to others. The expectations of protection, the habits of defence and the sense of safety all seem to fossilise from one breath to the next. This confrontation with mortality has the power to provide a massive shift in the way one lives.[334] These four losses collectively result

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[329] Michalowski R 'The Social Meaning of Violent Deaths' (1976) 7(1) *Omega: Journal of Death and Dying* 83

[330] Janoff-Bulman R 'The Aftermath of Victimization: Rebuilding Shattered Assumptions', in Figley C (ed.) *Trauma and Its Wake* (New York: Brunner, 1985) 17

[331] Antonovsky A *Health, Stress and Coping* (San Francisco: Josey Bass, 1979)

[332] Herman J *Trauma and Recovery* (New York: Basic Books, 1992) 178

[333] 'And almost everyone when age, disease, or sorrow strikes him, inclines to think there is a God, or something very like him' - Clough A 'There is no God, the Wicked Sayeth', in *Poems of Arthur Hugh Clough* (London: Macmillan, 1898)

[334] Yalom I *Existential Psychotherapy* (New York: Basic Books, 1980) 159

in a personal fragmentation of the individual, where the very idea of self can be thrown into disarray, leading to a more difficult and severe course of mourning than that associated with other more common forms of death.

It has been observed that criminal justice proceedings, rather than helping co-victims make sense of the homicide by allocating blame and exacting retribution, may actually magnify their outrage.[335] Ineffective before in the prevention of the killing, co-victims can now do little that is purposeful because others, namely the police and the courts, will assume control over almost all the events that follow to the extent that the victim is no longer practically or symbolically theirs.[336] This alienation will be reanimated at every stage of the natural history of the formal management of the homicide.[337] Co-victims endure "almost universal frustration" with the criminal justice system, coupled with a strong impression that the offender is given more support and consideration than bereaved families.[338]

Co-victims regularly park their healing in order to focus on the arduous task of seeing that justice is served, believing that it is the least and last thing they can do for their loved one. This commitment to obtaining justice is, to them, a strong public indicator of their love for the victim; in fact the "letting go" prescribed in grief work would be abhorrent to many until justice is done. Hence the final stage of grieving, acceptance, is often prolonged or prevented either by participation in the criminal justice process, which can take several years to unfold, or by the failure of law enforcement agencies to apprehend the offender, or, where he who is believed to be the offender is detected, a failure to prosecute him successfully. Co-victims frequently labour under the misunderstanding that if there is a trial then justice will automatically prevail, an expectation that the accused will be punished and that the homicide shall automatically attract a heavy sentence. For some, the court case is built up unrealistically as the panacea that shall restore normality to their world, bringing with it some modicum of closure. They are disappointed as it dawns upon them that the conviction obtained does not give what they had imagined. Many who hoped that their pain would ease once a just sentence was imposed are shocked when they feel no different, realising that no amount of punishment can relieve their sorrow, that there

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[335] Parkes C 'Psychiatric Problems following Bereavement By Murder or Manslaughter' (1993) 162 *British Journal of Psychiatry* 49

[336] Rock P 'Murders, Victims and Survivors' (1998) 38(2) *British Journal of Criminology* 185, 194

[337] Amick-McMullan A, Kilpatrick D, Veronen L & Smith S 'Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Role' (1989) 2(1) *Journal of Traumatic Stress* 21

[338] Mezey G, Evans C & Hobdell K 'Families of Homicide Victims: Psychiatric Responses and Help-Seeking' (2002) 75(1) *Psychology and Psychotherapy: Theory and Research* 65

can be no undoing of a homicide, no possibility of making good the damage that has been inflicted.[339]

Once a death is defined as a homicide, private grief is rendered irrelevant or instrumental, subordinated to legal procedures and the overall need of the State to demonstrate the exercise of justice. It is open to surveillance by the police for indications of guilt or complicity and made available to the media for use in furthering investigations. Homicide must be one of the few causes of death in modern society where the private and diverse reactions of the bereaved are the subject of such official scrutiny. Moreover, the variety of specific tasks that are requisite post homicide, such as interaction with the police, the coroner, the courts, and the media, consumes much energy, often draining the strength needed to focus on healing. It is not suggested here that the police or courts intentionally minimise the personal needs of co-victims, indeed there are many stories where the concern and sensitivity of officials has been found to be helpful, just, considerate, and highly praised, but the overall impression and practice is that the legal implications of a homicide overrides any personal significance which the victim held for his family.[340]

The greater preponderance of homicide co-victims report negative experiences of the criminal justice system, a forum within which they quickly discover that their individual needs are overridden by the public agenda. They find themselves propelled through a series of transactions that are tightly harnessed to institutional procedures and protocol, reducing them to mere bit or non-players who can but sit back on the outer fringes and endure lengthy trial delays, witness courtroom shenanigans and stomach what they perceive to be unjust verdicts or obscure sentencing.[341] The ensuing collection of perceived or actual insensitivities, indignities and intrusions imposed by the police, prosecutors, the defence, and the media all constitute a wrongdoing additional to that of the original crime. Co-victims are set adrift and left feeling acrimonious, disempowered, disillusioned, used, placated, barred, patronised, and discriminated against – their single, prominent and perennial refrain is one of a legal system that readily betrays both the deceased and them.

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[339] Rock P *After Homicide: Practical and Political Responses to Bereavement* (Oxford: Clarendon Press, 1998) 30

[340] Riches G & Dawson P 'Spoiled Memories: Problems of Grief Resolution in Families Bereaved through Murder' (1998) 3(2) *Mortality* 143, 146-153

[341] Armour M 'Journey of Family Members of Homicide Victims: A Qualitative Study of Their Post-Homicide Experience' (2002) 72(3) *American Journal of Orthopsychiatry* 372, 375-376

Familial units are inimitable, a lifespan social development full of evolving mutual and reciprocal influences and relationships, each with their own mores and dynamics. How a family manages can be highly influenced by pre-established rules and coping mechanisms; some will be open and frank about feelings and emotions, some will refuse to converse, making discussion of the deceased and the manner of his death taboo, others will become increasingly chaotic and disintegrate.[342] Families often present a communal "psychic numbness" after the fatal incidence that serves as a "protective shield", an emotional withdrawal in which all feelings are blocked.[343] This dulled listlessness operates as a defensive dissociation from the anger, pain and helplessness that threatens to engulf them.

Individual family members will have varying interpersonal bonds with the victim specific to them that influences the intensity of grief felt:

> Every person grieves differently at his or her own pace, for each person in the family lost the same person and at the same time, a different person.[344]

As each struggles to navigate his feelings, the need to support other family members can be challenging, if not entirely forgotten. Most are incapable, at least in the short-term, of providing each other with the emotional support needed because they all had differing degrees of closeness to the victim and will have had varying exposure to the homicide or homicide-related events, like death notification or body identification.[345] In addition, it is vital to appreciate that as family members grieve in dissimilar rhythms - one may be angry, another in shock, a third in the throes of depression - they are unable to help each other, not just because they each have their own grief to attend to, but because they may not yet have reached the stage that the other has and thus cannot comprehend or assist with it.

Post homicide, a family equilibrium undergoes permanent shifts that are difficult to accept and adapt to. The sudden absence of the role that the deceased played compels familial positions to undergo major restructuring, often forcing co-victims to assume new contextual relations within the family hierarchy. For example, a parent

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[342] Pynoos R & Nader K 'Children's Exposure to Violence and Traumatic Death' (1990) 20 *Psychiatric Annals* 334

[343] Lifton J *The Broken Connection* (New York: Simon & Schuster, 1979) 166

[344] LaTour K *For Those Who Live: Helping Children Cope with the Death of a Brother or Sister* (Omaha: Centering Corporation, 1983) 15

[345] Spungen D *Homicide: The Hidden Victims* (London: Sage, 1998) 64

might have to provide what previously both parents had supplied or the middle child may have to assume the mantle of now being the eldest. Similarly, co-victims might be forced to re-enter employment, education plans can be disrupted, and life plans permanently thwarted.[346]

Where it has been the crime scene, the family home can be in turmoil, and the return to it after lengthy forensic investigations can be extremely distressing. In some cases it is not cleaned thoroughly, with families having to live with harrowing reminders, like bloodstained carpets and furniture. Some feel the need to relocate in an attempt to escape the memory of the killing, the house becoming a prosaic memorial of all that now haunts them.

It is not unusual for the victim and the perpetrator to be members of the one clan.[347] The stresses of an intra-kin homicide totally decimate any semblance of family, at least as it existed prior to the event. Depending on the nature of the history between perpetrator and victim, individual family members take sides. Some, in light of previously known or newly discovered extenuating circumstances, attempt to if not forgive then understand the offender, but this can further divide the family when these views are not shared. There may also be custodial, fiscal and property matters that need to be addressed, resulting in co-victims assuming adversarial stances against one another. If and when these matters are determined, long-standing issues of distrust amongst surviving family members can remain apparent and in all probability will never be truly resolved, with some naturally harbouring long-term feelings of betrayal and resentment.

The police investigation may expose circumstantial details of the victim's private life that were previously unbeknownst to co-victims, like a substance dependency or his sexual practices and preferences. This adds greatly to the distress of co-victims, not just for what the details are in themselves but because the deceased had chosen to segregate family members from that part of his life, leaving them with an irrevocable sense that they did not really know the victim at all. Nor is it unusual, in cases where prior to the homicide the victim had engaged in what can be construed by others as high-risk conduct (*e.g.*, violent or disorderly behaviour, prostitution, drug-taking or dealing, or in what is colloquially referred to as "mixing with the wrong crowd"), for him to be blamed or even vilified for the way he died or for the way he lived, leaving

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[346] Lord J *No Times for Goodbyes: Coping with Sorrow, Anger and Injustice after Tragic Death* (California: Pathfinder, 1987)

[347] Duncan J 'Murder in the Family', in Kutash I (ed.) *Violence: Perspectives on Murder and Aggression* (San Francisco: Jossey-Bass, 1978) 172

co-victims to endure the aspersions cast by others upon the deceased.[348] This blaming not only publicly diminishes the life of the victim, subtly implying that the killing was somehow deserved, but regrettably evokes lasting feelings of shame within the family.

There are several distinct familial subsystems - parents, siblings, partners, significant others, and extended family – and their different reactions to a homicide are now individually considered.

The Effects of Homicide on Parents

The death of a child, in previous generations considered a common and even expected event in a family history, is now viewed as a violation of the natural order of life wherein parents should be survived by their offspring.[349] It is one of the least expected experiences in life, with no descriptor in the English language for a parent whose child has died.[350] The loss, from any cause, of a child has long been recognised as constituting a particularly difficult form of bereavement and one that embodies multiple losses for parents, both actually and symbolically, its occurrence frequently described as "life's greatest tragedy."[351] When compared to other forms of bereavement, parental mourning has been found to be particularly chronic, severe and complex, with major and unparalleled symptom fluctuations over time.[352]

The sudden, traumatic and arbitrary nature of a child's homicide complicates the grieving process and predisposes the parental co-victim to unabated pathologic mourning, comprising of powerful and prolonged depressive symptoms and psychosocial impairment, "it is as though [one is] not fully alive anymore."[353] Though reactions following the killing are similar to those observed after the death of a child by way of suicide, accident or illness, it is well documented that the duration of the post-homicide reaction falls far beyond the parameters of what is considered to be a normal response to death. Longitudinal studies show that it can take three to five years for the most intense grief symptoms to begin to subside and found significant

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[348] Spungen D *Homicide: The Hidden Victims* (London: Sage, 1998) *xi*

[349] Rinear E 'Psychosocial Aspects of Parental Response Patterns to the Death of a Child by Homicide' (1988) 1(3) *Journal of Traumatic Stress* 305, 315

[350] The word *orphan* describes a child who has lost a parent whilst the term *widow/widower* is attributable to those who have lost their spouse.

[351] Brown F 'The Impact of Death and Serious Illness on the Family Life Cycle', in Carter E & McGoldrick M (eds.) *The Changing Family Life Cycle: A Framework for Family Therapy* (Boston: Allen & Bacon, 1989) 457, 466

[352] Rando T (ed.) *Parental Loss of a Child* (Illinois: Research Press, 1986) *xi*

[353] Schiff H *The Bereaved Parent* (New York: Crown, 1977) 40

levels of depression in parents up to the seventh year following the killing.[354]

Demographically, parents who have had a child killed represent the largest group of homicide co-victims by relationship. This is hardly surprising, as statistics reveal that homicide shows a special predilection for male members of the adolescent and young adult population who would be of an age to have one or both parents surviving. The term *child* may hold connotations of youthfulness or dependency of age but it is a family label that is applicable to children of all ages.[355] The reactions discussed occur in parents even when the deceased child is an adult himself because they revolve around the loss of the actual relationship. Society, rather obliquely, seldom considers the death of an adult as a parental loss, but this ignores the reality that parenthood is a process that only ends with the death of the parent, not with the death of the child.[356] Accordingly, parents of a deceased adult child often find themselves demoted to an outer circle of mourners, with the partner and children of the victim the primary recipients of attention.

A fundamental parental role is to serve as the protector of ones offspring, so much so that when a child is killed parents inherently believe that their sense of competence as a parent is challenged, or worse, that they had failed in this primal task. They may berate themselves with unjustified and unreasonable guilt over uncontrollable circumstances, castigating themselves for working too much, for not having spent more time with their child, for not taking enough interest in the daily minutiae of his life, for not being stricter, for leaving him alone – the list of reasons to self-blame is endless and parents may become calcified in a state of perpetual penance. Most are preoccupied with fantasies of undoing, irrational thoughts of how they might have prevented the homicide, self-reproachful ideas similar to "if only."[357] Many will preserve a hypothetical lifeline of their child:

> There is maintained an empty historical track… [found] life-long in most bereaved

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[354] Murphy S, Clark Johnson L, Wu L & Lohan J 'Bereaved Parents: Outcomes 4-60 months after their Children's Deaths by Accident, Suicide, or Homicide: A Comparative Study Demonstrating Differences' (2003) 27 *Death Studies* 39, 57; Martinson I, Davis B & McClowry S 'Parental Depression following the Death of a Child' (1991) 15 *Death Studies* 259

[355] deVries B, Dalla Lana R & Falck V 'Parental Bereavement over the Life Course: A Theoretical Intersection and Empirical Review' (1994) 29(1) *Omega: Journal of Death and Dying* 47, 48

[356] Benedek T 'The Family as a Psychologic Field', in Anthony E & Benedek T (eds.) *Parenthood: Its Psychology and Psychopathology* (Boston: Little Brown, 1970); deVries B, Dalla Lana R & Falck V 'Parental Bereavement over the Life Course: A Theoretical Intersection and Empirical Review' (1994) 29(1) *Omega: Journal of Death and Dying* 47, 62

[357] Spungen D *Homicide: The Hidden Victims* (London: Sage Publications, 1998) 39

parents: 'he would be eighteen years old and graduating from school this year.'[358]

They will spend the remainder of their lives agonising over the "why", the inanity of the homicide, with more and more questions heaped upon each other until there seems little point in asking them anymore.

Parents can become so focused on their own pain that they fail to notice their surviving children are also in need of support, love and reassurance, thus straining or even permanently damaging parent-child relations.[359] It is not uncommon for parents to put the deceased child on a pedestal, attributing to him qualities that are idealistic and unreal, which create difficulties for other siblings.[360] It is an unfortunate truth that the killing of a child frequently becomes a metaphor for the demise of the family itself.

One of the greatest problems experienced in parental bereavement is that although parents are viewed as representing a dyad they are two distinct individuals whose disparities can be especially profound when it comes to gender-based differences in mourning. Each grieves in a different way, often leading one to assume that the loss is not the same for both, or worse, to wrongly apportion blame to the other for that loss.[361] Misunderstandings occur, with accusations regarding the depth of love for the dead child commonplace, putting wedges instead of bridges between the couple in its attempt to cope long-term. As each deals opposing with grief; one may show distress more visibly, the other may more readily sacrifice or park their needs in the service of the other. Often they are unable to help one another because they are not capable of help themselves, and each may wish to turn away from the memories that the other evokes. These dissimilar grief patterns have been found to cause conflict and estrangement between partners, severely testing relationships, and it is not uncommon for the parents of a deceased child to irreparably grow apart and separate or divorce.[362]

It is the bereaved mother who is typically the more verbal in articulating reactions, without any attempt to contain or suppress emotions she may cry, scream, keel, and

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[358] Klass D & Marwit S 'Toward a Model of Parental Grief' (1989) 19(1) *Omega: Journal of Death and Dying* 31, 41

[359] Rinear E 'Study Outlines Parental Grief Patterns' (1984) 4 *Survivors* 2, 3

[360] Murray-Parkes C *Bereavement* (New York: International Universities Press, 1972) 70

[361] Spungen D *Homicide: The Hidden Victims* (London: Sage, 1998) 31

[362] Klass D 'Marriage and Divorce among Bereaved Parents in a Self-Help Group' (1986) 17(3) *Omega: Journal of Death and Dying* 237; Parappully J, Rosenbaum R, van den Daele L & Nzewi E 'Thriving After Trauma: The Experience of Parents of Murdered Children' (2002) 42(1) *Journal of Humanistic Psychology* 33, 55; Rinear E 'Study Outlines Parental Grief Patterns' (1984) 4 *Survivors* 2, 3

Table 4: The Impact of Homicide as Voiced by Irish Co-Victims

"It's just so traumatic, really. It's something that you feel you'll never get over… You won't forget it; you just have to live with it"
Participant 1, Dublin Focus Group 1 (10/06/2006)

"I survived two suicide attempts…now [four years after the murder] I'm getting the strength to move on…I still have my bad days, don't get me wrong, but it's 50/50 now instead of an all time low… you'll never get closure. I think you'll be living with [this] for the rest of your life"
Participant 1, Dublin Focus Group 3 (14/06/2006)

"You can't function. You're in a trance. And people think you're taking everything in, but you're walking through the whole thing and you don't remember"
Participant 6, Dublin Focus Group 1 (10/06/2006)

"I went to every single court appearance…I was never told *not* to go, but at the same time I was never encouraged. The presence of the family, I feel, is so important, because you're needing to remind all these strangers in the room that this person is not just a number…it's our lives"
Participant 8, Limerick Focus Group 7 (11/07/2006)

"[The group therapist] said, 'you'll never have a normal life again, you'll have a new normal. You have to start your life from now, basically. It's not forget the past, but to carry on cause you'll never have the same life'"
Participant 1, Dublin Focus Group 3 (14/06/2006)

"The night my son died, a neighbour came over. She had lost her son through natural death five years before, and she sat down, and we were talking, and she said to me, 'this is going to make or break your relationship'. But I was lucky, it didn't break us up. But she was right; it does put an awful strain…You're arguing about stupid things…things that's happening in the legal system. You're blaming one another. You're looking for somebody to blame"
Participant 8, Limerick Focus Group 7 (11/07/2006)

"It doesn't stop after someone has been killed. There's a whole ripple effect, and the whole emotional side of things…it's not just the victim that's been killed. They destroy the family as well, they destroy everybody else"
Participant 2, Cork Focus Group 5 (1/07/2006)

"It's because it's a murder, I think, rather than a natural death…I don't know whether ye found this, but it was dealing with the different stages. One [family member] was angry, one was quiet. And they were all going through these different stages through the years. And everybody was caught up in the different emotions. It was just like a ripple, or rather a tornado, going around all the time. And one would be just finished with one [emotion], and next thing the other one would go into that stage"
Participant 3, Limerick Focus Group 7 (11/07/2006)

"It's kind of on-going. You never get over it. Like you think you're all right for a while but then you hear of someone else and it all comes back. It all starts again"
Participant 4, Dublin Focus Group 3 (14/06/2006)

"You hear all about *their* [the accused] character in the court. And there's just nothing [for the victim]. Oh my God, that used to really kill us in the court. It was all about *them*, and nothing about [my son]. My lovely, quiet son, you know. It was heartbreaking"
Participant 3, Dublin Focus Group 1 (10/06/2006)

"We're too lenient here with people who commit murder…I feel it's an insult to the victims, or the families of victim…I want to do something about changing the law in this country, to make people pay for the crime they have committed, not just a cursory couple of years in jail"
Participant 2, Cork Focus Group 5 (1/07/2006)

"There were photographs of [our sister], the way she was left inside the room, that was all barred…That's not right. The reality and the truth of what happened to [our sister], not all of it was told in court…I can't understand why the truth can't be shown"
Participant 1, Cork Focus Group 5 (1/07/2006)

"When [offenders] leave the court to start their sentence…they're in rehabilitation. The focus then becomes on them becoming better people. The victim is forgotten about. We're forgotten about"
Participant 8, Limerick Focus Group 7 (11/07/2006)

- extracted from Cooper J *The Needs of Families Bereaved by Homicide in Ireland: Results of a Study Jointly Commissioned by AdVic and Support After Homicide* (Unpublished, 2007)

wail. The bereaved father has a propensity to deal with the loss by retreating into a silence that although his partner may misinterpret as a lack of care is generally one made to refute the presence of intense emotions in an attempt to appear publicly strong, thus denying him the opportunity to be comforted by others. His sense of responsibility for the well being of his family results in the postponement of his own grief until others, in particular his wife, have recovered.[363] He perceives the numerous inquiries of "how is your wife holding up?" as a denial of, or at least a disinterest in, his own pain, further quashing any desire he may have to emote. He might also immerse himself in the many practical exigencies thrown up by the homicide or commonly use work as an escape and by extension the workplace as a haven from the painful reminders of the family home.

Grandparents constitute another set of co-victims, one oft and unfairly forgotten. In contemporary society, where both parents are commonly engaged in employment or where there is only the everyday presence of a single parent, an increasing number of grandparents are spending more time involved intimately with their grandchildren, so much so that they become bereaved parents of a second order.[364] In fact, grandparents suffer two losses: the loss of the grandchild and the loss of their own child, the parent, who is subsequently changed so radically by the killing.[365]

The Effect of Homicide on Children

Children are frequently forgotten throughout the aftermath of a homicide and are called upon to grow up quickly. Extended family and community support generally focuses on helping the bereaved parents, and it is not unusual for children, particularly younger ones, to be neglected or removed from the home for periods of the day and cared for by neighbours or friends.[366] It can be difficult to know what to tell young children but ideally they should be provided with factual, developmentally age-appropriate information regarding the homicide. This shall better prepare them for the inevitable singling-out they will feel from their peers in the schoolyard and in their daily socialisation.

Despite a common perception that children are resilient they do experience the same psychological reactions that adult co-victims report, but with differing mourning

[363] Schatz W 'Grief of Fathers', in Rando T (ed.) *Parental Loss of a Child* (Illinois: Research Press, 1986) 292

[364] Rando T *Treatment of Complicated Mourning* (Illinois: Research Press, 1993) 181

[365] National Organization for Victim Assistance (NOVA) 'Survivors of Homicide Victims' (1985) 2(3) *Network Information Bulletin* 1, 4

[366] Burman S & Allen-Meares P 'Neglected Victims of Murder' (1994) 39 *Social Work Monographs* 28-34

patterns.[367] The grief of children extends across all the developmental stages but it is sporadic and can be easily aborted, replaced by a variety of defensive operations, like game playing, that can postpone indefinitely their sense of loss. Current needs or events will interrupt their mourning, but this should not be mistaken as the death having had little impact or misread as a completion of the grieving process.

Siblings of a homicide victim suffer not just from the death of a brother or sister but also from the loss, temporary or long-term, of functional parents. Where parents are unable to find the emotional reserves in the pursuing months to care for their surviving offspring, these children may feel devalued, unworthy of living or suffer extreme loneliness. It is normal that they feel guilt if they do not concur with their parent's idealisation of the killed sibling, or resentment at being held to the imagined standards that the deceased did not possess. Some parents may become hyper-vigilant, but this impairs the healing process by significantly reducing the time children have to interact outside of the home.

When the homicide in question is one of a parent, the surviving children who have not yet reached adulthood have legitimate concerns about their future. Younger children become overly fearful for their own safety or of losing another parent or sibling in a similar manner, instilling in them extreme feelings of helplessness. Where there was familial discord, older or adult children can have intense feelings of remorse that all wrongs were not righted prior to the homicide. Where one parent has killed another, children struggle to comprehend, often feeling revulsion and betrayal over what essentially amounts to the loss of both parents. These children may feel forced, pending on the motivations behind the homicide, to choose between one parent and the other, or become the centre of a custody battle between opposing sets of grandparents.[368] Research has shown that children who go to live with the family of the victim tend to fare better than those who go to live with the perpetrator's family.[369] In addition, regardless of many erroneous assumptions, the death of a parent is still a critical life passage for an adult child, who is surprised at the intensity of emotions they feel.[370]

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[367] Freeman L, Shaffer D & Smith H 'Neglected Victims of Homicide: The Needs of Young Siblings of Murder Victims' (1996) 66(3) *American Journal of Orthopsychiatry* 337-34

[368] King K 'It Hurts So Bad: Comparing Grieving Patterns of the Families of Murder Victims with those of Families of Death Row Inmates' (2004) 15(2) *Criminal Justice Policy Review* 193, 196

[369] Black D, Harris-Hendricks J & Kaplan T 'Father Kills Mother: Post-traumatic Stress Disorder in the Children' (1992) 57 *Psychotherapy and Psychosomatics* 152, 157

[370] Spungen D *Homicide: The Hidden Victims* (London: Sage, 1998) 73

The Effect of Homicide on Partners

Many sociologists rate the death of a partner, save for the death of a child, as the most stressful change that one can experience in life, an event exacerbated when that death is sudden, traumatic and violent.[371] A marriage or long-term relationship is a partnership where each has clearly defined parts to play in assisting the life of the pair along. There is then an automatic isolating nature to widowhood:

> For most of us, our relationship with our mate is ... a central part of our self and our being in the world. As a result, one of the major roles your spouse had was as someone who affirmed your identity.[372]

The recently widowed must learn new tasks and skills that were previously those of the spouse or assume full child-rearing responsibilities or financial obligations that were formerly shared, the demand of which may obviate the processing of grief or veil it with anger. The co-victim may also blame their partner for certain behaviours as innocuous as being in the wrong place at the wrong time or working late on that fatal day which they feel contributed to the homicide. The age of the surviving partner is an important factor. The elderly may not recover or adapt as well as the young, they have lost a partner of many years and with their life so intertwined with the deceased, that loss is catastrophic. Younger partners may suffer from feelings that they have lost their future, or may never wish to embark on a new relationship for fear of tarnishing the memory of their dead partner, or for fermenting in others a perception that they did not love the victim as much as they did, or worse, for fear that a similar fate awaits any new liaison.

The Effect of Homicide on those outside the Immediate Family

Although the immediate family of a homicide victim may feel the greatest impact from the killing, there are others who also experience, to varying degrees, its effects. The term *significant other* can be applied to a number of different relationships, like fiancés, cohabiting partners, and gay or lesbian partners, many of whom can be relegated to the position of secondary mourners that belies the loss felt. Their pain, if considered at all, is often marginalised, ranked after that of the more immediate family, who may not invite these co-victims to participate in funerals or memorial

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[371] Schnert K *Stress/Unstress: How You Can Control Stress at Home and on the Job* (Minneapolis: Augsburg, 1981)

[372] Rando T *How To Go On Living When Someone You Love Dies* (Massachusetts: Lexington Books, 1988)

masses or attend court proceedings or group support sessions. Blood relatives often wrongly presume that these external relations were less meaningful than their own, ignorant to the fact that sometimes due to the distance lived from his family home or because of past estrangement the victim may have effectively strengthened non-familial relationships, such as friends or work colleagues, into a surrogate family.

Significant others can also include persons unknown to the family, particularly in the case of those engaged in extra-marital affairs or secret same-sex relationships at the time of the homicide. As their status is misunderstood, denied or unknown, the inevitable exclusionary practices that follow from the funeral onwards can be wrenching for this particular subset of co-victims. They suffer from what is referenced as "disenfranchised grief", for not only is the relationship not publicly recognised but the co-victim may not have access to others who are also mourning the loss, a person with whom they may find some solace or validation of their own pain.[373] In the socially forbidden relationship secrecy can obscure its ending publicly just as it obscured its existence, and with no satisfactory or understanding outlet for the expression of that loss it runs the danger of becoming perhaps the loneliest and potentially most destructive grief of all.[374]

The Psychological Impact of Homicide

Despite the hurt the word permeates in our minds, grief is a healthy reaction to loss. Bereavement studies illustrate that those who experience a loss move more or less sequentially through five stages which take variable periods of time depending on the personality of each individual, their connection with the deceased, and the manner in which the deceased died; stages generally classified as *i)* shock and denial; *ii)* anger; *iii)* the bargaining phase; *iv)* depression, loss and loneliness; and *v)* reorganisation, solutions and acceptance.[375] These normal emotional responses are important catalysts to healing.[376] The initial shock serves to protect the mourner from experiencing the reality of the event and is considered healthy once it does not last for more than a few

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[373] Doka K (ed.) *Disenfranchised Grief: Recognizing Hidden Sorrow* (Massachusetts: Lexington Books, 1988) *xv*

[374] Fowlkes M 'The Social Regulation of Grief' (1990) 5 *Sociological Forum* 635, 644-645

[375] Bowlby J *Attachment and Loss: Sadness and Depression* (London: Hogarth, 1980); Caplan G *Principals of Preventive Psychiatry* (New York: Basic Books, 1964); Doyle P *Grief Counselling and Sudden Death* (Springfield: Thomas, 1980) 2-25; Kubler-Ross E *On Death and Dying* (New York: Macmillan, 1969) 14-39; Westberg G *Good Grief* (Philadelphia: Fortress Press, 1962) 15-63; and Lindemann E 'Symptomatology and Management of Acute Grief' (1944) 101 *American Journal of Psychiatry* 141

[376] Becvar D *In the Presence of Grief: Helping Family Members Resolve Death, Dying and Bereavement Issues* (New York: Guilford Press, 2001) 71

days. The denial acts as a buffer against the sudden, unexpected news and allows the bereaved to maintain a degree of saneness. Anger emerges when denial can no longer be maintained and stems from the frustration felt over the loss of control and the inability to alter the situation. Bargaining takes place when the brain tries to rationalise the loss so as to maintain order within the illusion of control or makes futile expressions of bartering, absurdly making promises if things are returned to as they were before. Depression occurs when the individual realises the hopelessness and irreversibility of the loss. Finally, acceptance and adaptation are achieved when the bereaved is able to return to some form of normalcy, but this "should not be mistaken for happy. It is almost void of feelings."[377]

In the past, even though mourning entails grave departures from the normal attitude of life, it was never regarded as a pathological condition or referred for medical treatment, instead there was a reliance that it would be overcome after a certain lapse of time, and that any interference with it was useless or even harmful.[378] This is no longer the case. Researchers have now concluded that homicide does not lead to the sequential mourning of the classic grief pattern, rather it seems to precipitate in the co-victim a series of crises, each of which cause new episodes of grief and require new processes of working through and adaptation.[379] As a consequence, homicidal loss falls within the syndrome of complicated mourning because the mode of death prevents its co-victims from moving through the processes or stages that are critical for resolving grief.[380] Clinical descriptions of family reactions to homicide have alerted mental health professionals to the traumatic impact the event has on those surviving the direct victim, enabling a consensus that the entire spectrum of symptoms are more consistent with a diagnosis of Post-Traumatic Stress Disorder [hereafter PTSD] than with normal grief alone.[381]

PTSD is a psychiatric disorder that can occur following the experience or witnessing of life-threatening events such as military combat, natural disasters,

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[377] Kubler-Ross E *On Death and Dying* (New York: Macmillan, 1969) 113

[378] Freud S 'Mourning and Melancholia', in Strachey J (ed. & trans.) *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (London: Hogarth, 1953) 243-244

[379] Masters R, Friedman L & Getzel G 'Helping Families of Homicide Victims: A Multidimensional Approach' (1988) 1(1) *Journal of Traumatic Stress* 109, 115

[380] Rando T *Treatment of Complicated Mourning* (Illinois: Research Press, 1993)

[381] In North America, one clinical study found that more than one in five (23.3%) of all immediate family homicide co-victims would develop PTSD as a full disorder at some point after the homicide - Amick-McMullen A, Kilpatrick D & Resnick H 'Homicide as a Risk Factor for PTSD among Surviving Family Members' (1991) 15(4) *Behavioural Modification* 545, 546 & 553. Also see Falsetti S & Resnick S 'Helping the Victims of Violent Crime', in Freedy J & Hobfoll S (eds.) *Traumatic Stress: From Theory to Practice* (New York: Plenum Press, 1995) 263-285

terrorist incidents, serious accidents, or violent personal assaults such as rape. Whilst most survivors of a trauma, given a little time, return to normal living, some have stress reactions that do not go away of their own accord or may even become worse over time. These individuals develop PTSD, often reliving their experience through nightmares and flashbacks, with symptoms severe enough to significantly impair daily life, leaving them feeling detached and estranged from the world around them.

The American Psychiatric Association added PTSD to its *Diagnostic and Statistical Manual of Mental Disorders* classification scheme in 1980. The disorder is controversially unique among psychiatric diagnoses due to the stipulation that the aetiological agent emanates from *outside* the individual (a traumatic event) rather than some inherent individual weakness (a traumatic neurosis). A traumatic event is conceptualised as a catastrophic stressor that is beyond the range of usual human experience, clearly dissimilar from the stressors that constitute the normal vicissitudes of life, one that is likely to overwhelm their adaptive capacities.

Clinical experience with PTSD has shown that there are individual differences regarding ones capacity to cope with catastrophic stress, some people exposed to traumatic events do not contract the disorder while others develop it full-blown. These observations prompted the recognition that trauma, like pain, is not an external phenomenon that can be completely objectified. The traumatic experience is filtered through a person's cognitive and emotional processes before it can be appraised as an extreme threat. As there are personality differences in this appraisal process individual people appear to have varying trauma thresholds; some are more protected from and some more vulnerable to developing symptoms after exposure to extremely stressful situations. Though there is currently a renewed interest in subjective aspects of traumatic exposure, it must be emphasised that events such as rape, torture, genocide, and severe war zone stress are experienced as traumatic events by virtually everyone.

Diagnostic Criteria for Post-traumatic Stress Disorder [382]

A. The person has been exposed to a traumatic event in which both of the following were present:

1. The person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or

[382] Adapted from the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (Washington DC: American Psychiatric Association, 2000) 467-468

a threat to the physical integrity of self or others.

2. The person's response involved intense fear, helplessness or horror. In children, this may be expressed instead by disorganised or agitated behaviour.

B. The traumatic event is persistently re-experienced in one, or more, of the following ways:

1. Recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions. In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
2. Recurrent distressing dreams of the event. In children, there may be frightening dreams without a recognisable content.
3. Acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and disassociate flashback episodes, including those that occur on awakening or when intoxicated). In young children, trauma-specific re-enactment may occur.
4. Intense psychological distress at exposure to internal or external cues that symbolise or resemble an aspect of the traumatic event.
5. Physiological reactivity on exposure to internal or external cues that symbolise or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

1. Efforts to avoid thoughts, feelings or conversations associated with the trauma.
2. Efforts to avoid activities, places or people that arouse recollections of the trauma.
3. Inability to recall an important aspect of the trauma.
4. Markedly diminished interest or participation in significant activities.
5. Feelings of detachment or estrangement from others.
6. Restricted range of affect (such as an inability to have loving feelings).

7. Sense of a foreshortened future (such as not expecting to have a career, marriage, children, or a normal life span).

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

1. Difficulty falling or staying asleep.
2. Irritability or outbursts of anger.
3. Difficulty concentrating.
4. Hyper-vigilance.
5. Exaggerated startle responses.

While symptoms included in this hyper-arousal criterion, such as insomnia and irritability, most closely resemble those seen in panic and generalised anxiety disorders, hyper-vigilance and startle are more characteristic of PTSD. The hyper-vigilance in PTSD may sometimes become so intense as to appear like frank paranoia. The startle response has a unique neurobological substrate and may actually be the most pathognomonic PTSD symptom.

E. Duration of the disturbance (symptoms in criteria B, C and D) is more than one month.

This minimum duration for diagnosis was initially set at a mandatory six months but was reduced to one month in 1987. The classification 'Acute PTSD' is used to specify symptoms of duration less than three months, 'Chronic PTSD' for duration of three months or longer, and 'With Delayed Onset' to indicate that at least six months had passed between the traumatic event and the onset of the symptoms.

F. The disturbance causes clinically significant distress or impairment in social, occupational or other important areas of functioning.

Researchers have found that the occurrence of PTSD in homicide co-victims materialises due to the atypical nature of the involved stressor; its potential for causing significant symptoms of distress in almost anyone; its departure from both ordinary human experience and simple bereavement; and its occurrence as a result of human design.[383] There are few environmental stressors recognised as more powerful than the killing of a family member, it throws the co-victim so far out of their normal range of equilibrium that it is difficult to restore a sense of balance.

Witnessing the killing is *not* a prerequisite for the development of PTSD; it is the

[383] Rinear E 'Psychosocial Aspects of Parental Response Patterns to the Death of a Child by Homicide' (1988) 1(3) *Journal of Traumatic Stress* 305, 308

sudden, violent and intrusive nature of the loss into the life of the co-victim that predisposes him to the disorder.[384] Factors that can predict a high level of PTSD symptomatology include whether the co-victim was living with the victim at the time of the homicide, or if they shared a high degree of closeness, or saw each other regularly before the fatal incident.[385] Recovery is prolonged and complicated by the sheer magnitude of the loss inflicted. One of the severest forms of psychological trauma identified is that suffered by those whose child has been killed.[386] Worryingly, no specific intervention is known to be effective for these parents.[387]

The homicide takes on something of an unrelenting all-consuming quality that can never be completely worked through or forever placed firmly in the past. Little else competes for attention in the months and years that follow:

> Homicide survivors may present symptomatic behaviours characteristic of post-traumatic stress disorder up to five years following the murder of a loved one … this becomes a normal range of functioning for this distinct population.[388]

It is also advanced that PTSD cannot be applied to all co-victims because for some there is no real *post* to their symptoms, the loss and fear will always remain ongoing and real, residual lifelong.[389] This longevity of pain shifts it from pathology to purpose, "a suffering that validates the very significance of [the victim's] life."[390] It is this sense of purpose that has led some to become advocates in the drive for better services and legal rights for similarly afflicted families.

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[384] Asaro M 'Working With Adult Homicide Survivors, Part 1: Impact and Sequelæ of Murder' (2001) 37(3) *Perspectives in Psychiatric Care* 95

[385] Thompson M, Norris F & Ruback R 'Comparative Distress Levels of Inner-City Family Members of Homicide Victims' (1998) 11 *Journal of Trauma Stress* 223

[386] Parappully J, Rosenbaum R, van den Daele L & Nzewi E 'Thriving After Trauma: The Experience of Parents of Murdered Children' (2002) 42(1) *Journal of Humanistic Psychology* 33, 36; Burgess A 'Family Reaction to Homicide' (1975) 45(3) *American Journal of Orthopsychiatry* 391; Knapp R *Beyond Endurance: When a Child Dies'* (New York: Schocken Books, 1986); and Sanders C 'A Comparison of Adult Bereavement in the Death of a Spouse, Child and Parent' (1980) 10 *Omega: Journal of Death and Dying* 303

[387] Murphy S, Braun T, Tillery L, Cian K, Johnson L & Beaton R 'PTSD among Bereaved Parents following the Violent Death of their 12-28year-old Children: A Longitudinal Prospective Analysis' (1999) 12 *Journal of Traumatic Stress* 273

[388] Redmond L *Surviving: When Someone You Love Was Murdered* (Florida: Psychological Consultation and Education Services, 1989) 52

[389] Feldman Hertz M, Prothrow-Stith D & Chery C 'Homicide Survivors: Research and Practice Implications' (2005) 29(55) *American Journal of Preventive Medicine* 288, 289

[390] Stroebe M & Gergen K 'Broken Hearts or Broken Bonds?', in Klass D, Silverman P & Nickman S (eds.) *Continuing Bonds: New Understandings of Grief* (Philadelphia: Taylor & Francis, 1996) 40

Sharing Pain: The Benefit of Support Groups

Many people bereaved by homicide have established peer support groups that are aimed at helping others move towards some level of healing. Countless co-victims speak of their need for contact with others who have been through a similar experience, most of those who have had this kind of contact valued it and those who had not said they would have liked or would still like it.[391] These groups are indispensable sources of support. Members reach out in expressions of shared rage and mutual caring, contacting each other between organised meetings for conversation and to share information, pamphlets and books that they feel might benefit each other. Support groups may be the first modality available to co-victims to provide them with a safe place in which to share their experiences, feelings, frustrations, and successes. These groups are not therapy groups *per se* but they are therapeutic. It is probable that membership, instilled as it is with a sense of empathy and solidarity, provides its own healing. Some may find that they initially feel worse after attending, but this is because they are actively dealing with the emotional issues surrounding the homicide. Learning that others have endured similar and survived provides a measure of hope. In this way, co-victims find guidance and insight from the coping experiences of others. People may be individually powerless in preventing their own victimisation but collectively powerful in coping with it.[392]

Participation may also provide a sense of connection, helpful for those attempting to reconstruct their worldview after the homicide. Shared grief provides a strong bond at a time where many feel alone or misunderstood by their own extended family and social network. Support groups can become a surrogate or temporary replacement society wherein the co-victim can be with people who are undergoing comparable emotions and who give him the freedom to vent and validate his experience with others, allowing him to revise it in ways that make it more tolerable and impose upon it some order, helping to restore a sense of order into his life.[393] Through contact with others unabated grief finds an outlet; the group experience allowing ritualistic

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[391] Victim Support *In the Aftermath: The Support Needs of People Bereaved By Homicide* (London: Victim Support, 2006) 48

[392] Janoff-Bulman R 'The Aftermath of Victimization: Rebuilding Shattered Assumptions', in Figley C (ed.) *Trauma and Its Wake: The Study and Treatment of Post-Traumatic Stress Disorder* (New York: Brunner & Mazel, 1985) 15, 31. "Although the world is full of suffering, it is full also of the overcoming of it" – Helen Keller (1880-1968), American author, activist and lecturer.

[393] Murphy S, Braun T, Tillery L, Cain K, Johnson L & Beaton R 'PTSD among Bereaved Parents following the Violent Deaths of their 12-18year-old Children: A Longitudinal Prospective Analysis' (1999) 12 *Journal of Traumatic Stress* 273, 274

testimony to the dead victim with singular acceptance.[394] Storytelling may be a helpful coping strategy for co-victims but it is also a compelling education for those who listen, for nothing can tell of the anguish and agony of the aftermath of homicide like the words of those who live through it. To have conversed with them is to have witnessed the determination, strength and resilience of the human spirit.[395]

Those co-victims who feel especially aggrieved or outraged at how the criminal justice system managed the homicide investigation and prosecution, and how it treated them throughout, become more proactive and vocal, campaigning political and legal institutions for better treatment and prescribed rights, their philosophy an effort "to salvage something positive"[396] from the traumatic experience. Here, in Ireland, the lobbying group of co-victims is AdVic, and it is their formation and agenda for reform that our attention is now turned to.

Advocates for Victims of Homicide: The Irish Campaigning Co-victims of Homicide

Launched in April 2005, AdVic is a national, charitable, partly government-funded but independent organisation run by and on behalf of families bereaved by murder, manslaughter or fatal assault.[397] It is not affiliated with any religious or political organisation and holds no ideology beyond the right of the victim and co-victims of homicide to be treated with dignity and respect.[398] Helmed by family members who themselves have been bereft by homicide, families it describes as "the most voiceless of groups" within criminal justice, and having experienced firsthand that system and found it to be lacking in fairness, AdVic considers itself best positioned to identify the

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[394] Getzel G & Masters R 'Serving Families Who Survive Homicide Victims' (1984) *Social Casework: Journal of Contemporary Social Work* 138, 144

[395] 'The world breaks everyone, and afterward, many are strong at the broken places' – Hemmingway E *A Farewell to Arms* (New York: Scribner, 1929)

[396] Bettelheim B *Surviving and Other Essays* (Vintage: New York, 1979) 34

[397] Single-issue victim groups support and promote the welfare of certain specific genres of victims. They tend to be formed and run by those who have either directly experienced the single-issue crime, like victims of rape or domestic violence, or by those whose loved ones has been the victim, as with murder or manslaughter. Even the most cursory glance at these groups provide an essence of the nature of crimes that they represent - victims of domestic violence, sexual abuse, child cruelty, rape, racial discrimination, homophobia, and families of homicide victims are all represented by various adaptations of single-issue groups across the United States and Western Europe. Within Ireland there are numerous well-established groups catering for the differing needs of specific victims, such as *One In Four* (domestic and child abuse), *Rape Crisis Network Ireland* and *Support After Homicide*. While the latter offers emotional and practical support to co-victims throughout the aftermath of homicide, *Advocates for Victims of Homicide*, the newest victim group to emerge, campaigns for legal rights and reforms for the victims and co-victims of homicide.

[398] Advocates for Victims of Homicide (AdVic) *A Helpful Directory of Information for People Bereaved by Homicide* (Dublin: AdVic, 2006) 4

needs and concerns of co-victims following the devastating loss of a loved one in this violent manner:

> We know we have limitations, we don't have legal experience [but] we thought...it more important that we had gone through the homicide experience ... we are uniquely positioned to ... lobby for change on the basis of "here is a group of normal everyday people who have been through the system and can see these huge flaws in it."

AdVic hopes to alleviate at least some of the difficulties homicide co-victims experience by successfully promoting comprehensive and coordinated inter-agency support services. It aims to increase awareness, provide and disseminate information, contribute to policy development in relation to the handling of these families, develop and facilitate education and training programmes for agencies involved, provide a collective voice on all relevant issues, and campaign to redress perceived and real disparities within the criminal justice process, advocating changes that they believe will bring about a much needed improvement in the treatment of such co-victims:

> Of course, the ideal is that [co-victims] should not have to fight or remedy any failings, perceived or real, of the justice system; they should be able to rely on a fair justice process and simply be left to grieve in peace.

Establishing AdVic was originally more a matter of contingency than of deliberate choice, of co-victims having chance encounters during the course of their separate journeys through the criminal justice process, "it was very much a joint coming together." These early transitory meetings gave way to the realisation that many felt that the deceased victim and they, as co-victims, were neglected or ill treated by the justice system:

> I would have always thought that the State would protect the victim in some way ... but you don't feel that anyone in that courtroom is there for the victim ... and they're not.

Homicide is an experience prolonged and protracted by outside influences, not least by the unfamiliar and often difficult episodic stages of criminal justice process. It became increasingly clear to these grouping families that it was impossible to cope with the grief associated with homicide effectively without also dealing with the related impact that the legal system has upon them. Many described their experience

as one of being on the outside, excluded, peripheral to official processes, often not kept informed yet expected to understand and participate when called upon.

Two studies have focused on how the Irish criminal justice system impacts upon the grief of families of homicide victims.[399] In 2000, research commissioned by Victim Support demonstrated that these co-victims had a high level of practical and support needs from statutory bodies and concluded that many contacts with organisations, like An Garda Síochána, the Courts, the Coroner's Court, and the Health and Social Services, exacerbated rather than reduced co-victims' distress. It recommended that statutory services could offer increased practical, psychological and financial support, whilst statutory agencies could alleviate feelings of alienation by offering proactive information on the investigative and legal processes and by opening or improving channels of communication with the family of the deceased.[400] In 2006, Support After Homicide and AdVic commissioned a follow-up study which concluded that despite much lobbying and awareness generating over the intervening six years most of the voiced needs previously expressed by homicide co-victims had yet to be addressed.[401]

In this latter study, Cooper asked homicide co-victims to complete three psychological inventories to objectively evaluate their anger, grief and coping mechanisms since the killing. The results of the psychological inventories demonstrated that although the participants reported high levels of anger, they were not by nature angry people. The level of emotional anger was far higher than that found in the normal population. Anger was found to be generally suppressed instead of expressed. Grief and anger are expressed at clinically high levels as families try to come to terms with the loss of a loved one through violence, whilst simultaneously progressing through the investigative and prosecution process. Families continue to perceive a large imbalance between how the rights of the accused are protected and their own concerns and needs addressed. Families bereaved through homicide appear not only to be victims of violence but subsequent victims of a system that traditionally has not recognised their grief, trauma and vicarious victim status.

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[399] Cooper J *In the Aftermath of Homicide: Practical and Support Needs of Bereaved Families* (Unpublished, 2000) and *The Needs of Families Bereaved by Homicide in Ireland* (Unpublished, 2007)

[400] see generally Cooper J *In the Aftermath of Homicide: Practical and Support Needs of Bereaved Families* (Unpublished, 2000)

[401] see generally Cooper J *The Needs of Families Bereaved by Homicide in Ireland* (Unpublished, 2007) and/or Cooper J *The Emotional Effects and Subsequent Needs of Families Bereaved By Homicide in Ireland: Summary Report* (Dublin: Commission for the Support of Victims of Crime, 2008)

Founding members of AdVic spent more than a year prior to its public launch researching and debating its objectives, hosting numerous open days about the country for homicide co-victims to attend.[402] These open days remain important to forming and informing the mandate of the group; facilitating "the throwing of as many ideas as possible into the melting pot", allowing many diverse voices to be heard and for the democratic development of policies. These forums are full of frank discussions and spontaneous narratives where co-victims relate and emphasise their personal stories, highlighting various injustices and the need for change, continuously demonstrating how important it is for co-victims to meet and debate:

> We put our experiences together … we had to start somewhere so we started from the experience of the people in the group … although we'd shared problems, everyone had maybe one problem that other people didn't so we tried to incorporate all of those into our policy document so as to be as inclusive as possible … so that any family who finds themselves in this situation where they have to get through the legal system and the homicide, they would be able to look through the policy document and pick out a few things that they can relate to.

Whilst ensuing chapters shall expand upon the substantive issues that AdVic have staked as its agenda for reform, for the present and in order to provide a flavour of the various concerns of the group, it is sufficient to list here its main objectives:

- A homicide trial, save in exceptional circumstances and for compelling reasons, must commence no more than one year after the Book of Evidence has been served.
- The Director of Public Prosecutions should assign an individual in his Office whose role it is to liaise with the family of a homicide victim.
- The co-victims of manslaughter *and* murder victims ought to be allowed, by statute, to give a victim impact statement before the court.

  Offenders convicted of manslaughter or a non-fatal violent assault, save in the most exceptional circumstances and for compelling reasons, must not be granted bail where the case is adjourned after conviction for sentencing.
- The current practice of release on licence of life-sentence prisoners ought to be reassessed with a view to introducing a minimum term of imprisonment to be served of twenty-five years for those so convicted, and in keeping sync with this proposal

[402] An Garda Síochána would not, understandably and for reasons of confidentiality, provide AdVic with names and addresses of other homicide co-victims. Instead, they kindly agreed to post out details of these early meetings directly to these families on behalf of AdVic.

that the current practice of inviting life-sentence prisoners to partake in parole hearings seven years into their sentence be delayed to a later juncture in that sentence.

- In each instance of review of a person convicted of murder or manslaughter the Parole Board must seek a written submission from the family of the victim, unless that family has previously expressed a wish to the contrary.
- The Irish Prison Service should automatically inform the family of a homicide victim in advance the date on which the perpetrator of the homicide is to be released, unless that family has recorded a wish to the contrary.
- There should be a comprehensive review of the charges of murder and manslaughter.
- A set of non-statutory sentencing guidelines should be introduced to ensure consistency in the severity of sentencing for manslaughter convictions.
- The power to make awards in respect of pain and suffering when dealing with compensation for families of victims of homicide under the Scheme of Compensation for Personal Injuries Criminally Inflicted should be fully reinstated without the current limitation.
- The Department of Foreign Affairs should appoint an appropriately trained person whose function it is to liaise with the family of a homicide victim where the victim is an Irish citizen and the homicide occurs in a foreign country.

Since its instigation, AdVic have been invited to numerous meetings with key players within the criminal justice system, including the Minister for Justice, Equality and Law Reform, representatives of the Director of Public Prosecutions, the President of the High Court, An Garda Síochána Training Section, the Director General of the Courts Service, and the State Pathologist. AdVic have utilised these meetings both to express their concern relating to a range of issues relevant to homicide co-victims and to position the organisation on the criminal justice landscape. They were greeted, by and large, with positive responses and constructive interest:

> They received us very well, they listened to what we had to say … certain things we obviously didn't see eye-to-eye on but some things we agreed upon.

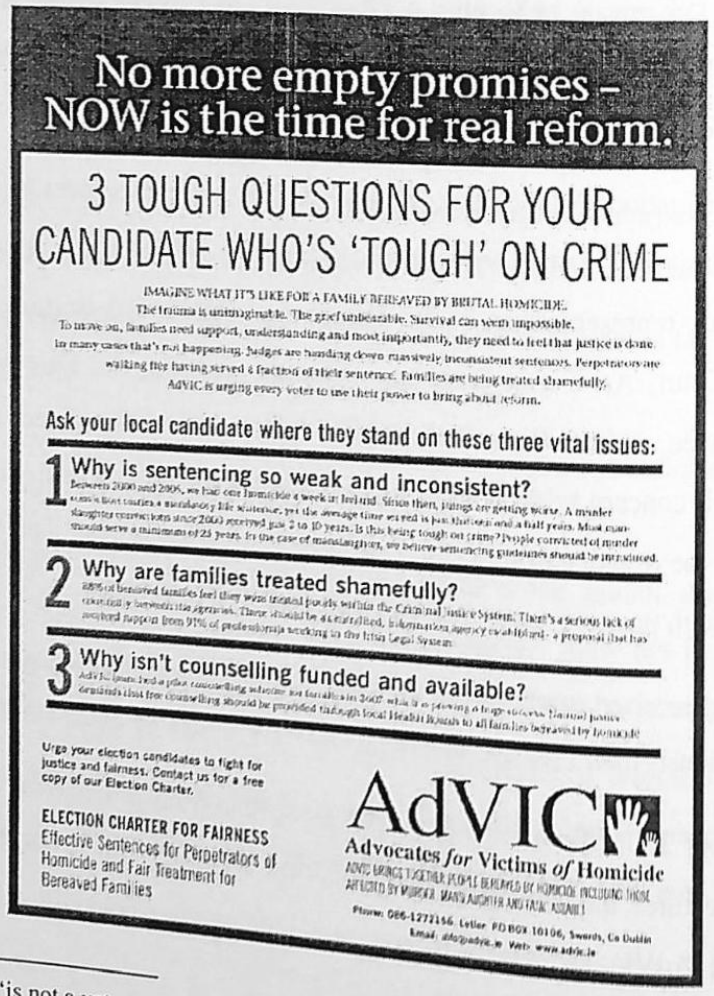
In November 2006, Joan Deane, who was so incensed at her own experiences at the trials of the three men charged in connection with her son Russell's killing that she co-founded AdVic, became the first non-legal professional to address the Annual

National Judicial Studies Institute Conference, a symposium held in Dublin Castle for members of the judiciary.

In a move emphasising the political lobbying nature of the group, AdVic, during the run-up to the 2007 General Election, placed an advertisement in the nation's leading broadsheet, *The Irish Times*, urging voters to question their local candidates on the doorstep as to why sentencing for homicide offenders is so weak and inconsistent, why there are poor liaison services for the families of homicide victims, and why there is no counselling provided for these co-victims. To coincide with this, AdVic distributed leaflets to TDs and senators outside the Dáil calling for them to prove that their crime policies were not just empty promises aimed at securing votes. Aoife Dillon, committee member of AdVic told the assembled media outside the Dáil at a press call:

> In this election campaign, candidates from all parties are using crime to attract votes. Is this a genuine commitment to change? If this is an empty promise, for families bereaved of homicide, this would be another crime.[403]

AdVic Advertisement from The Irish Times (27 April 2007)



[403] Collins D 'Crime 'is not a vote catcher'' (27 April 2007) *Irish Examiner*

Although AdVic does not directly provide emotional support or counselling services, it is all too well aware from their own experiences of the immense need for emotional support and counselling services:

> [Some] may only need [counselling] for a very short time. It may not be for the rest of your life, it might just be counselling to keep you functioning until the trial is over. Others may need it for a long time into the future.

AdVic recognised that if counsellors became acquainted with the events and processes that occur in the aftermath of homicide they would then be better equipped to deal with the profound needs of the co-victim. To this end, it established workshops with the purpose of developing a national panel of accredited professional counsellors that are trained in trauma counselling specifically related to homicide, a panel from which it partially subsidises a number of visits for co-victims who require them. The group conducted eight weekend workshops over as many months throughout 2006 that were attended by ten counsellors from about the country.[404] These workshops included detailed presentations from Chief Superintendent John O'Mahony on the role of An Garda Síochána in the aftermath of homicide; State Pathologist Professor Marie Cassidy on the work of her office and the effects of homicide on co-victims as she understands it; Chief Prosecution Solicitor Claire Loftus from the Office of the Director of Public Prosecutions on how and why the system of public prosecution works as it does; Professor Kate Gillespie of the Omagh Trauma Centre on the trauma caused to co-victims of death by violence; Reid Professor of Criminal Law, Criminology and Penology at Trinity College Dublin, Ivana Bacik, on the law of homicide and criminal liability in general; Jean Casey, a counsellor who facilitates workshops for the volunteers of Support After Homicide, who focused on the complex post-homicide grieving process; and Maura Leahy of Barnardos on helping children to understand death by homicide.

AdVic also host biennial ecumenical memorial services for murder victims, the last of which was held in St Anne's Church, Dawson Street, Dublin in September 2007, and attended by over two hundred people, including the then Minister for Justice, Equality and Law Reform, Brian Lenihan. At a previous service in May 2005 at the Honan Chapel, University College Cork, Pat Dillon, whose daughter, Gráinne, was working as a trainee manager at Jury's Inn, Limerick in January 2002 when she

[404] Subsided counselling is available in Dublin, Meath, Westmeath, Kildare and Laois, with plans to run a set of workshops throughout 2009 in Kilkenny for counsellors from the south and west of Ireland.

was shot dead by Paolo Nascimento, a former Portuguese soldier working there as a night porter, told the assembled media that such services demonstrate the need for a group like AdVic, that she has spoken to a number of families at the ceremony whose cases had yet to come before the courts: "they all came because they felt lost and alone and looked to those of us who had been through the system to give them the kind of advice they needed to cope."[405]

The group has always attracted steady media attention, and are now routinely asked to provide comments on criminal justice news that revolves around homicide. It has also been central to several features in national newspapers and representatives of the committee have appeared on a variety of television programmes such as *Morning AM*, *The Big Bite* and *Prime Time*. More significantly, in April 2005, AdVic, to mark its launch, formed a panel on Ireland's premier and the world's longest running television talk show, *The Late Late Show*, with a gathering of homicide co-victims fleshing out the audience.

Previously, during their own personal journeys, many in the organisation have had negative experiences, "most of us in the immediate aftermath of the homicide actually felt the media was very intrusive. Everybody [in AdVic] had a problem with the media at some stage." Even now, on an official level, not all approaches from the media have been agreeable:

> [The media] want a human-interest story, and you want to put across the fact that you're trying to move on from that and organising this group to help other families. You're not really there to discuss your personal case, but some make it very clear that unless you do you will not get air time … it would be better from a personal point of view if you didn't have to go over your own case all the time. Sure, you are here because of what happened to you, but it is [your] private life … When we launched initially it was just interview after interview after interview and all they wanted to do was talk about your personal case with a closing line saying that you set up [AdVic] and that is not what its about … but you've got to use the media … it is give-and-take. If you don't use them you are going to get nowhere.

AdVic have been refused airtime when they were unwilling to conform to the sometimes sensational criteria set by particular members of the media:

> We have been invited on to say and do certain things which, because we wouldn't do or say, the invitation was quickly withdrawn … Sky News, for example, made

[405] Ring E "'Heartless' legal system haunts victim's mother' (2 May 2005) *Irish Examiner*

> numerous phone calls...but they wanted to do awful things like they wanted to take [one of the committee, a bereaved mother] to the site where [her son] died to interview her. You just say no ... you have to retain a bit of dignity and privacy.

For the founding members of AdVic, any changes to the processes of the criminal justice system and any rights for victims and co-victims that are introduced come too late to assuage their own negative experiences. Their drive is one sourced not just from a want to honour the loss of their loved one by achieving something positive in their memory, but also by a greater humanitarian desire not to have other similarly afflicted families in the future experience the same inadequacies and exclusion that they themselves directly felt at the hands of the Irish criminal justice system.

Conclusion

The wider impact of crime on secondary or indirect victims is becoming increasingly recognised, with homicide co-victims the most telling exemplar. This chapter has shown that the sudden, violent and horrific characteristics of a homicide debilitates co-victims, leaving them shocked and confused, exposed to complicated mourning that at its most severe leads to post-traumatic stress disorder. The overall impact of the homicide is of such magnitude that they must be properly recognised as victims in their own right. Every single study of the life trajectories of these co-victims tell that they are lives forever breached and damaged, their suffering encysts, forming a wound that can never heal, a lifelong scar. In addition, whilst the impact of homicide is readily apparent, the protracted nature of criminal justice, the co-victim's neglect or ill-treatment at the hands of many of the agents of that system, and the media focus on the investigation, trial and the exposure of their private grief all constitute additional difficulties that further exacerbate their victimisation. The extent of harm inflicted upon homicide co-victims is to such a severe degree that it was inevitable that an organisation like AdVic would emerge to join the ranks of victim groups in Ireland. Before assessing their needs and concerns, as identified by the reforms sought by that group, we first assess the law relating to the crime that has affected those co-victims, the law of homicide.

CHAPTER 3

Homicide in Ireland

The Law, Statistics and Trends of Murder and Manslaughter

It would be wrong to debate how the justice system can best accommodate the needs and concerns of homicide co-victims without first examining, by way of the law and its frequency in Ireland, the actual crime of homicide itself. This chapter states the law relating to criminal homicide by illustrating what constitutes an individual charge of murder and manslaughter, drawing particular attention to what many co-victims perceive to be the notorious and, at times, distorted areas of provocation and self-defence. It then considers the ongoing debate of whether to restructure the law of homicide by amalgamating murder and manslaughter into a single catchall charge of criminal or unlawful homicide, or instead retain the two distinct offences but remove the mandatory life-sentence for murder. Finally, the statistics and trends of homicide are utilised to highlight the increasing prevalence of this fatal act within our society, which, in turn, signifies the growing number of co-victims central to this thesis.

Homicide is the generic term whereby one person terminates the life of another.[406] It may be an excusable killing, for example, one committed in self-defence where no more force than was necessary was used, or by misadventure, the unfortunate mischance arising out of a lawful act such as the playing of a game. Homicide may also be deemed lawful where a member of An Garda Síochána, after all other means have failed and as a last resort, kills a person in the prevention of an atrocious crime. Lawful killings also include those committed during military operations or, in

[406] 'There are four kinds of homicide: felonious, excusable, justifiable and praiseworthy, but it makes no great difference to the person slain [or his family] whether he fell by one kind or another – the classification is for the advantage of lawyers' – Bierce A *The Devil's Dictionary* (California: Book Tree, 2000) 57

jurisdictions that permit such a penalty, the execution of a person upon sentence of law. Homicides that are neither justifiable nor excusable are termed criminal or unlawful homicides.

Criminal homicide is not a single entity in law; it is split into the charges of murder and manslaughter, with the latter further divided into voluntary and involuntary manslaughter. These subdivisions have been shaped by strong moral and instrumental imperatives and are continually debated and redefined with regard to the pivotal issue of culpability. It is fair to state that the degree of seriousness applied to each offence, both in the stigma attached to its committal and, subsequently, in terms of the imposition of an appropriate penalty, is essentially a reflection of the perpetrator's state of mind with regard to the killing; thus it is thought just to label and treat different types of homicide differently.

The Law of Criminal Homicide

Causation: The Actus Reus of Homicide

There are three common elements to each type of unlawful homicide: that there is an actual death, that it be the death of another human and, as homicide is a result offence, the death was caused by the acts of the defendant, which is known as *causation*. In most cases this will be obvious, although difficulties can arise where there can be said to be more than one cause of death. Homicide will be attributed to the defendant where the prosecution have shown that but for the conduct of the defendant the victim would not have died as and when he did and that the original injuries inflicted arising from such conduct were still an operative and substantial cause of that death.[407]

Any intervening act that was reasonably foreseeable will not break a chain of causation. For example, a defendant will be found to have caused the death of the victim if he knocks the victim unconscious and leaves him lying on a beach below the high tidemark, as it is reasonably foreseeable that when the tide comes in the victim will drown. However, the defendant would not be found liable for homicide if the victim was left unconscious above the high tidemark but was killed by a car careering out of control off a nearby road, as this event could not have been reasonably

[407] In *R v Jordan* (1956) 40 Cr App R 152, the Court of Criminal Appeal quashed a murder conviction when it heard new evidence that, at the time of death, the original stab wound had almost healed and that the victim died as a result of the hospital administrating a drug to which he was known to be allergic to. It was held that the stab wound was no longer an operative cause of death. It should be noted that this case was fact specific and that the law still requires extraordinary circumstances for medical treatment to break the chain of causation.

foreseen. Therefore, where another event intervenes it must be overwhelming so as to render the defendant's original act or omission merely a part of the history in which the death occurs, thereby relieving him of any criminal liability.[408]

Where the intervening cause is some existing weakness of the victim, like an unusually thin skull which renders fatal a blow that would not typically be regarded as life-threatening, the defendant's act, and not the victim's imperfect skull, remains the cause of death. Similarly, where a pre-existing condition of the victim, known or unknown to the defendant - such as age, intoxication, haemophilia, or a weak heart - hastens or causes death, the influence of that condition does not operate to sever causation, notwithstanding that a healthy individual might have been expected to recover from the injuries actually inflicted. In short, the defendant does not have the right to expect the constitution of his victim to mitigate the consequences of his actions.[409]

At common law there existed a rule that if more than a year and a day elapsed between the defendant's conduct and the death of the victim, then such conduct was conclusively presumed *not* to have caused death, thereby protecting a person who had injured another from remaining, *ad infinitum*, at risk of prosecution for murder. So as to reflect that modern advances in medical knowledge and treatment can keep people alive for indeterminate amounts of time (*e.g.*, life-support machines can sustain a semblance of life for long periods), this rule was abolished prospectively by s.38 of the *Criminal Justice Act 1999*.[410]

Causation is essentially the factual objective element in homicide that must be divorced from blame, for the defendant may well bring about the death of the victim without intention, recklessness or criminal negligence and in doing so commits no crime. To be convicted of murder or voluntary manslaughter it must be proven, beyond reasonable doubt, that in addition to causing the death of the victim the defendant acted with a coincidental mental fault appropriate to the offence, classically described as the duel presence of the *mens rea*, a guilty mind, at the committal of the *actus reus*, the guilty act. In practice, the matter in question in homicide trials tends not to be whether the defendant actually caused the death of the victim but if in

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[408] In *People (AG) v McGrath* (1960) 99 ILTR 59, the Court of Criminal Appeal rejected that the removal of the victim to hospital by car amounted to a *novus actus interveniens*, a new intervening act causing death.

[409] In *R v Blaue* [1975] 3 All ER 446, the victim, whose stab wounds were not considered life-threatening, died as a result of her refusal, on religious grounds, to accept a blood transfusion. The Court of Appeal rejected the argument that such refusal broke the chain of causation, stating that those who use violence on other people must take their victims as they find them.

[410] Carey G 'The Year and a Day Rule in Homicide' (2001) 11(1) *Irish Criminal Law Journal* 5

killing he intended to take life or cause serious injury:

> In nearly every case, it is accepted and not in issue that the accused unlawfully killed the deceased ... the area of contest in contested trials is therefore between murder and manslaughter.[411]

If the prosecution fails to prove causation, the defendant will escape liability for the death on the basis that the injury he inflicted was not in law the cause of death. He may, however, be liable for the original act, like a charge of assault under the *Non-Fatal Offences Against the Person Act 1997.*

The Charge of Murder

To ground a murder conviction, the State must prove, beyond reasonable doubt, that the defendant intended to cause death or serious injury to some person (as there exists a presumption of innocence, no burden of proof is cast upon the accused).[412] This mental element or *mens rea* of intent is fundamental to the definition of murder, its presence distinguishing the crime, making it exceptionally reprehensible and justifying the imposition of a special punishment. However, intention must not be confused with motive or premeditation.

The *mens rea* for murder was traditionally defined at common law as *malice aforethought*, but this resonant term is deceptive and completely misleading as to the range of conduct that can constitute the offence. The defendant's motives do not have to be malicious, and are in fact irrelevant; for the mercy killing of a terminally ill loved one prompted by compassion satisfies the *mens rea* requirement for murder just the same as shooting someone because you hate them. Nor, despite the word *aforethought*, is premeditation a prerequisite, for once the required intent is present a murder can be committed on the spur of the moment.[413] The term *malice aforethought* has been commented upon as "an anachronistic phrase never used except to mislead or to be explained away"[414], a choice of words that now haunts the law of murder, its mistaken identification with the concept of premeditation resulting in its difficulty to prove.

The common law offence of murder is now regulated by the *Criminal Justice Act 1964*, which provides:

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[411] Carney P 'Decriminalising Murder?' (2003) 8(6) *Bar Review* 254

[412] Charleton P *Offences Against the Person* (Dublin: Round Hall Press, 1992) 6

[413] Elliot C & Quinn F *Criminal Law* (Essex: Pearsons, 2004) 46

[414] Keane R 'Homicide: The Mental Element' [2001] 2(1) *Judicial Studies Institute Journal* 66, 68

4(1) Where a person kills another unlawfully, the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.

An intention to cause serious injury that results in death, even though the defendant did not intend to kill, is sufficient to ground a murder conviction. The human body is inherently fragile, and as no one can accurately predict whether a serious injury will result in death - it may depend on the physique or health of the victim, on the rapidity of the emergency services response, or even on the distance from a hospital - the law holds there to be no moral difference between a person who deliberately causes serious injury to another and someone who sets out to kill. It is so inferred that if a person chooses to cause serious injury to another he has shown a sufficiently wanton disregard for life as to warrant the label *murderer* if death results.[415]

The Act fails to prescribe what constitutes a *serious injury*. Certainly any such definition would be necessarily elaborate, if not impossible, in attempting to cater for every eventuality, especially given the subjective causation principle of having to take ones victim as one finds them, for what amounts to a serious injury for one may not be for another. In any case, if the victim ultimately dies from the injuries inflicted by the defendant, that death is strong *prima facie* evidence that such injuries were serious. An intention to cause anything less than serious injury will, at best for the State, result in a conviction for manslaughter.

s.4(2) of the Act, though stating that the defendant shall be presumed to have intended the natural and probable consequences of his conduct, provides that the onus rests not on the defendant to rebut this presumption but on the prosecution to prove, to a standard beyond reasonable doubt, that any evidence adduced by his defence has not rebutted this presumption.[416] This makes the test for intention subjective. Intent necessarily involves a conscious choice to bring about a particular state of affairs - one can only mean something to happen when one realises that ones conduct, or the consequences of ones conduct, involves its occurrence. In essence, there are two forms of intent. *Direct intent* arises where the defendant intended to bring about a certain result. An *oblique intent* applies where the defendant acted intentionally but

[415] Ashworth A *Principles of Criminal Law* (Oxford: University Press, 2003) 263
[416] *People (DPP) v McBride* (1997) ILRM 233

brought about a result that he did not specifically desire. This oblique intent is sufficient for murder if the defendant foresaw death or serious injury as a virtually certain result of his actions. An occurrence foreseen as a probability is not necessarily intended though a consequence foreseen as a certainty is.

The difference here is subtle. In exploding a bomb on an aeroplane in order to collect insurance on the wreck, the bomber may well desire that the passengers survive but knows that only the most extraordinary circumstances shall save them, yet still he detonates. In this case, oblique intent can be compellingly inferred because the consequence, the death of the passengers, save for some wholly improbable supervening event, can be foreseen as a certainty, no matter how unwanted by the bomber. In a separate scenario, the pub bomber who places a warning using an accepted procedure relies on a foreseeable possibility that the warning will be heeded and the pub vacated, thus preventing the deaths that he does not desire. The pub bomber can, however, also foresee a possibility that the warning may not be heeded, but merely risks that occurrence, which is recklessness, not intention. He can be charged with manslaughter but he does not satisfy the intent element required for murder.[417]

In cases of oblique intent the jury should be directed to approach their verdict in two stages. First, they should determine whether the defendant would have foreseen death or serious injury as a natural and probable consequence of his unlawful and voluntary act. This test is subjective and takes into account the mentality, state of intoxication, age and the other personal circumstances and idiosyncrasies which shape the defendant's approach to the decision.[418] If the jury decide that death or serious injury was the natural and probable consequence of the defendant's actions, they must then consider whether the defendant has adduced any evidence capable of rebutting this presumption.[419]

In each murder trial it is the function of the jury to assess the evidence, assisted by the presumption that the defendant intended the natural and probable consequences of his conduct, in order to determine whether there was intent to cause

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[417] Charleton P *Offences Against the Person* (Dublin: Round Hall Press, 1992) 46-47

[418] Charleton P, McDermott P & Bolger M *Criminal Law* (Dublin: Butterworth, 1999) para. 7.94

[419] In *People (DPP) v Hull* (Unreported, Court of Criminal Appeal, 8 July 1996), the applicant, despite pleading guilty to manslaughter, was convicted of murder for killing another by shooting at a closed door behind which the victim had been standing. The applicant raised the issue that the firing of the gun through the door was accidental, which, if so, was capable of rebutting the presumption, under s.4(2), that he had intended the natural and probable consequences of his conduct. Thus, the jury had to determine whether the prosecution had convinced them that the firing of the gun was not accidental but instead deliberate in order to conclude if the presumption applied.

death or serious injury. In determining whether the defendant was virtually certain that his act would cause death or serious injury the jury should draw inferences, as in all criminal cases, from the evidence presented and from the surrounding circumstances. If, after such an analysis, they are left in a state of reasonable doubt as to the evidence, which may include the evidence submitted by the defendant that he did not intend to kill or cause serious injury, they must acquit.

It is regrettable that the Act failed to define the term *intended*, for it is undesirable that the criteria of as serious a crime as murder, carrying as it does such severe consequences upon conviction, should remain so unclear. Leaving a key term so diffused gives rise to inconsistent interpretations by trial judges in directing juries that potentially undermines the principle of equal treatment for each defendant. It is not sufficient to hold that *intent* is an ordinary word with common usage, though it might generally be taken as meaning "purpose or desire."[420] In the absence of clarity, and as the upshot of the failure to provide them with clear standards, juries have a free hand to expand or contract the concept of intent to meet their perceived sense of justice in a particular case. They might incorrectly impose their own interpretations, such as motive or premeditation, to the term, or confuse it with defences mobilised around the vexed question of a sound mind rather than some ontologically absolute distinction between objectives of behaviour.

The Law Reform Commission has repeatedly called on the legislature to define the term *intended* and that in addition to its ordinary meaning of a conscious objective or purpose it should also embrace the foresight of a virtual certainty.[421] The Commission holds that the law, in treating those who realise that their conduct poses a risk of causing death but press on regardless as guilty only of the lesser charge of manslaughter, is far too generous and proposes that the scope of murder be expanded to include persons who commit a killing recklessly under circumstances manifesting an extreme indifference to the value of human life. They recommend that a person is taken as acting recklessly with respect to a killing when he disregards a substantial and unjustifiable risk that death will occur when that risk is of such a nature and degree that, in considering the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe

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[420] Bacik I 'Review - Law Reform Commission Consultation Paper on Homicide: The Mental Element in Murder' [2000] 22 *Dublin University Law Journal* 264, 266

[421] Law Reform Commission *Consultation Paper - Homicide: The Mental Element in Murder* (Dublin: Law Reform Commission, 2001) 76-78; Law Reform Commission *Report – Homicide: Murder and Involuntary Manslaughter* (Dublin, Law Reform Commission, 2008) 73

if in his situation.[422] Hence forth, a defendant would no longer be able to raise a defence by simply stating "I did not intend to kill or cause serious injury", recklessness to that possibility could alone ground a murder conviction.

The common law doctrine of transferred malice - where if X intends to kill or seriously injure Y, shoots at Y but misses and subsequently kills Z, then X will be found guilty of the murder of Z by the transferral of his intent to kill or seriously injure Y - was enshrined in s.4(1) by the phrase "whether the person actually killed or not."

The Charge of Statutory Murder

s.3 of the *Criminal Justice Act 1990* is applicable to the murder of, or an attempt to murder, a member of An Garda Síochána or the Irish Prisons Service acting in the course of his duty; a foreign diplomat or government member for political motive and committed within the State; or a murder, or attempt to murder, committed in furtherance of certain subversive objectives, primarily concerning treason, under the *Offences Against the State Act 1939*. The *mens rea* for statutory murder requires the prosecution to prove that the defendant knew his victim was one of the professions prescribed or displayed reckless advertence to that possibility and, where the victim is a member of An Garda Síochána, the defendant also knew him to be acting in the course of his duty.[423] The penalty for statutory murder is that at least forty years be served in prison, while an attempt to commit attracts a minimum sentence of twenty. Where the evidence is found to be insufficient for a statutory murder conviction, the alternative verdicts of ordinary murder or manslaughter may be returned as appropriate.

At first glance, s.3 seemingly allows for the rather anomalous situation whereby the crime is defined by the occupation of the victim rather than the motivation of the perpetrator but in actuality it is that career which motivates the killer. The impetus behind this particular piece of legislation was that the lives of certain people whose duties entail representing and protecting the interests of the State, and in doing so are placed in an exposed and dangerous position, can be provided with an extra level of protection in the form of a more severe penalty for killing or attempting to kill them.

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[422] Law Reform Commission *Report – Homicide: Murder and Involuntary Manslaughter* (Dublin: Law Reform Commission, 2008) 73

[423] This was the majority decision of the Supreme Court in *People (DPP) v Noel & Marie Murray* (1977) IR 360, later given statutory recognition by s.3(2)(a)

The Charge of Manslaughter

The offence of manslaughter arose from the preoccupation of structuring criminal law within the analytical framework of *actus reus* and *mens rea*, of voluntary conduct, personal responsibility and extenuating factors.[424] Behind its emergence lay the judicially perceived need to circumvent the automatic and severe consequence of a conviction for murder, at that time the death penalty, for killings that though worthy of punishment the offender, due to the presence of certain extenuating circumstances, was less culpable than a murderer. In essence, the effect of a successful plea is to reduce that which would otherwise be murder to manslaughter.

There has been an unfortunate tendency across the common law world to define murder but to leave manslaughter as some undefined, residual category encapsulating all other unlawful killings. Resultantly, manslaughter is a diverse concept, often referred to as the most elastic of offences, encompassing a wide variety of homicide that does not amount to murder but is nevertheless neither lawful nor accidental.[425] Since the law relating to murder and manslaughter originated from the one common law of homicide, it is always open for the jury to return a guilty verdict for manslaughter where the defendant is initially charged with murder. So as to cater for the broad range of killings that fall under the offence sentencing is discretionary; it may, at one end of the scale, be a minimal or non-custodial sentence, yet at the other extremity can result in the imposition of the maximum life-sentence.[426]

Involuntary Manslaughter

Involuntary manslaughter is something of a misnomer and should not be confused with the concept of automatism.[427] It simply refers to a killing that does not amount to murder or voluntary manslaughter due to the lack of malice aforethought, though a mental element akin to unlawfulness, somewhere between intent and a high degree of negligence, is necessary.

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[424] McAuley F & McCutcheon J *Criminal Liability: A Grammar* (Dublin: Round Hall Sweet & Maxwell, 2000)

[425] 'Some killing resulting in manslaughter convictions may have been little more than accidental, while others may be close to murder' - O'Malley T *Sentencing Law and Practice* (Dublin: Thomson Round Hall, 2006) 248-249

[426] *People (DPP) v Conroy* [1989] ILRM 139, 142

[427] Automatism is the reflexive and unconscious conduct caused by some external factor that exempts a person from criminal liability for acts carried out since his conduct is altogether involuntary. The defence covers acts committed whilst sleepwalking or in a state of concussion or hypnotic trance; or as a result of a spasm or reflex action; or while recoiling from the attack of, say, a dog or a swarm of bees; or acts carried out by a diabetic suffering a hypoglycaemic episode. Automatism does *not* operate as a defence if it is self-induced (*e.g.* by alcohol or drug consumption)

Involuntary manslaughter can arise in two ways. First, from an act of gross negligence involving a high risk that substantial personal injury will result from the negligent act or omission of the offender. This arises in a variety of contexts ranging from particularly dangerous driving to medical or workplace negligence.[428]

The second way is by the committal of an unlawful and dangerous act, typically an assault, that includes an intent to cause physical harm that falls less than an intent to cause serious injury:

> The defendant punched the deceased in the mouth during the course of a fight, which caused the latter to stumble backwards and hit his head off the pavement. As is typical in this kind of situation, the blow to the head by falling was the cause of death. The defendant did not intend to cause death; the punch administered had merely caused a tear in the membrane of the deceased's lip. The principle is that where the defendant strikes a trivial blow, with the intention of producing mere momentary pain, but death unexpectedly results from it, then if the blow is unlawful the person who strikes it will be guilty of manslaughter.[429]

However, the Law Reform Commission is of the opinion that the law punishes very harshly people who commit minor acts of deliberate violence that unforeseeably cause death:

> Arguably, it is inappropriate to label an accused who was 'unlucky' – in the sense that a single punch led to the death of a man – with the same crime as someone who repeatedly kicked his victim in the head or stabbed him in the chest.[430]

It is true that in most single punch scenarios there would have been no prosecution for assault had a fatality not occurred. In these cases, prosecution for manslaughter following a minor assault can be said to hinge on an accident, the chance outcome of death. The Commission does, however, appreciate that the occurrence of death is a very serious consequence of unlawful conduct and should be marked accordingly. It

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[428] Most fatal road traffic cases which arise from negligent or aggressive driving now lead to charges of dangerous driving causing death, an offence introduced by the *Road Traffic Act 1961* following a string of cases where juries had acquitted drivers who had been charged with manslaughter. However, in extreme cases of very high culpability charges for manslaughter may still be brought. For example, in *R v Spree & Keymark Services Ltd* (Crown Court, 8 December 2004), the director of a trucking company was convicted of manslaughter and sentenced to seven years imprisonment after one of his employee truck-drivers fell asleep at the wheel halfway through an eighteen-hour shift and drove through a motorway crash barrier, killing himself and two motorists. It emerged that the manager had organised a bonus scheme for employees who drove shifts longer than those prescribed by law.

[429] *People (AG) v Quinn* [1965] IR 366

[430] Law Reform Commission *Report – Homicide: Murder and Involuntary Manslaughter* (Dublin: Law Reform Commission, 2008) 6

is likely to be traumatic for the family of a victim who has died as a result of a deliberate assault, albeit minor in nature, if the perpetrator of that assault was only charged with, convicted of and sentenced for assault rather than manslaughter. While it does not believe that the occurrence of death necessarily increases the culpability of the offender, the Commission recognises that, as consequences matter, a fatality undoubtedly gives a much more serious dimension to the offence. It therefore recommends the enactment of a distinctly new offence, 'assault causing death', which clearly marks the occurrence of a death in its label:

> 'Assault causing death' occurs where an accused commits an assault which causes death and a reasonable person would *not* have foreseen that death or serious injury was likely to result in the circumstances.[431]

This new offence would, in terms of gravity, be ranked beneath involuntary manslaughter on the homicide ladder. The Commission recommends that the offence should only be prosecuted on indictment and attract a higher sentencing maximum than assault *simpliciter*.

Voluntary Manslaughter

Voluntary manslaughter caters for situations where the offender had both the necessary *mens rea* and *actus rea* for murder but certain extenuating and excusing circumstances mitigate the offence to one of manslaughter. This can present itself in one of three ways. First, where the offender kills in self-defence using more force than was reasonably necessary but not more than he genuinely believed to be so.[432] Here the law concedes that in making a real mistake the offender lacked the moral culpability normally associated with murder and resultantly his liability is reduced to manslaughter. Secondly, under s.6 of the *Criminal Law (Insanity) Act 2006*, an offender who successfully pleads or is found to have diminished responsibility in answer to a charge of murder or infanticide will be convicted of voluntary manslaughter. Thirdly, an offender will be convicted of voluntary manslaughter where, despite the prosecution having establishing the presence of all the elements of murder, the jury is satisfied that the offender was acting under provocation. Co-victims voice strong concern over the range of killings that fall away from the charge of murder into the territory of manslaughter, with its discretionary and comparatively

[431] *ibid.*, at 104-106 {*emphasis added*}
[432] *People (AG) v Dwyer* [1972] IR 416

lenient sentencing. They are particularly wary that the mitigating defence of provocation is always in danger of being employed self-servingly by offenders who "claim that their victims are almost directly responsible for their fates."[433]

The Provocation Predicament

Provocation is a difficult and contentious aspect of the law of homicide, perhaps best understood amongst its historical context before the complexities of conflicting dicta, precedence, practice, and academic comment blurred its boundaries and scope.[434] One of the fundamental prerequisites of the criminal law has always been that individuals are expected to control their behaviour; indeed this is the principle upon which the viability of any society depends. The importance that the criminal law attaches to the maintaining of self-control reflects the innate connection between the elementary principles of criminal liability and the moral infrastructure of our society; its recognition of provocation a policy-motivated concession to "human frailty."[435]

The presence of provocation serves to operate as a partial defence to murder.[436] As it does not function as a complete defence exonerating the offender, an acquittal will never be justified. This mitigation acknowledges that some act or series of acts done or said, or a combination of both, emanating from a person who does not necessarily have to be the victim, can provoke the offender to lose control and commit a fatal act. This loss of self-control is deemed to be temporary insofar as the offender would be able to avail of the defence of insanity if the loss were in any way permanent. There is also cognition that the loss of control is not entirely complete, that there remained a possibility that the offender could, but did not, reason himself out of his emotion.

Academics have long debated whether provocation amounts to a partial defence because the killer relies upon it to claim that he has done the right thing, a justification, or that what he has done is wrong but that the provocation amounts to an

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[433] Lamb S *The Trouble with Blaming: Victims, Perpetrators and Responsibility* (Cambridge: Harvard University Press, 1996). Similarly, "the jury should [be] conscious of the fact that, as in all cases of homicide, the deceased was not able to give his version of events which might have been markedly different from the accused" – *Osland v R* (1998) 73 ALJR 173, 227 as per Callinan J

[434] Though the foundations of the modern doctrine of provocation was laid in English law during the 17th century, and one hunt for the first reported incident of it before the courts led to 1576 (see generally Kaye J 'The Early History of Murder and Manslaughter' (1967) 83 *Law Quarterly Review* 569), provocation was in no way at that time a new concept, for Aristotle wrote that "acts proceeding from anger are rightly judged not to be done of malice aforethought, for it is not the man who acts in anger but he who enraged him that starts the mischief" – Aristotle *Nicomachean Ethics* (South Dakota: NuVision Publications, 2007) 85

[435] McAuley F 'Anticipating The Past: The Defence of Provocation in Irish Law' (1987) 50 *Modern Law Review* 133

[436] In most common law jurisdictions provocation can only be invoked to a charge of murder but may be considered a mitigating circumstance when sentencing for most other criminal offences.

extenuating circumstance, an excuse. The doctrine of provocation emerged in an era analogous with the development of early quixotic concepts of honour, where it was expected that an insult or attack upon the esteem of a man be avenged with resort to lethal weapon.[437] Therefore it initially developed on a justificatory basis, for the cause of the killing "rested not in the hatred or design of the slayer but rather in the actions of the deceased who aroused the slayer's passions."[438] This explains the early requirements that the provocative conduct had to be unlawful, thus making the response of killing less socially undesirable, and that it had to emanate from the deceased, so that the offender had some right to exercise force against someone who was responsible in depriving him of his self-control.[439] Hence the degree of wrong done was diluted by the blameworthiness of the victim to whom it was done. However, the provocation defence does not sit well with the balancing of harms concept underlying justification, for it is difficult to appreciate how the taking of a life can ever be less harmful or equal to the non-deadly conduct of the provoker.

Since the middle of the last century, the emphasis has shifted from specific events capable of having the requisite result, namely the provocative act of the victim, to the result itself, the loss of self-control of the offender. This swing from cause to effect led to the acknowledgement that words as well as actions could provoke, that they did not have to emanate from the victim and, to one degree or another, the admission of subjective factors as being relevant for the consideration of the judge or jury when determining if and understanding how the killer was so provoked. These changes transformed the basis for the partial defence from justification to excuse, the central notion now a recognition that the guilt of the offender is not as bad as that of a murderer since the killing stemmed from a loss of self-control to which no ordinary law-abiding person may be subject. As with other excuses, he is rendered less culpable through the exercise of societal compassion.[440]

While it was previously believed that the presence of adequate provocation negated any intention to kill, it is now widely accepted that the existence of intent is

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[437] 'When men had a glowing ambition to excel in all manner of feats and exercises they naturally conceived that manslaughter in an honest way...was the most chivalrous and gentlemanly of all their achievements' – Baldrick R *The Dual* (London: Chapman & Hill, 1965)

[438] Ashworth A 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292, 293

[439] Aldridge P 'The Coherence of Defences' [1983] *Criminal Law Review* 665, 669-670

[440] For a more complete read on this justification-excuse debate see *et seq*, Ashworth A 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292; McAuley F 'Anticipating the Past: The Defence of Provocation in Irish Law' (1987) 50 *Modern Law Review* 133; Dressler J 'Provocation: Partial Justification or Partial Excuse?' (1988) 51 *Modern Law Review* 467; and Horder J *Provocation and Responsibility* (Oxford: Clarendon Press, 1992)

totally consistent with the partial defence:

> The provocation relied on usually is one, if not the sole cause of the formation of the intention to kill or cause serious injury to another … to speak of provocation negating or depriving a man of the intention to kill … is to confuse cause and result.[441]

In this sense, provocation begets the intent to kill; the sudden loss of self-control experienced by the offender is to such an extent that he is unable to prevent himself from *intentionally* killing or causing serious injury to the victim.[442] Provocation does not, therefore, in any way negate intent but actually presupposes it. Indeed, the very presence of intent is why provocation can only ever operate as a partial defence to murder and that an acquittal, irrespective of the severity of the provoking act, shall never be justified. If it were that intent was to be, in some way, annulled or exonerated by the presence of a provocative act, the partial defence would be emasculated or even otiose:

> For since [provocation] is applicable to murder and simply reduces the crime to manslaughter, it would be worthless if it could be pleaded successfully where the *mens rea* present was less than that required for murder, because in that event the accused could only be convicted of the lesser offence anyway.[443]

The traditional test for provocation, to evaluate the defendant and his actions against those of the objective 'reasonable man', is, at base level, a simple one, yet despite its long heritage there remains much ambiguity regarding the parameters of this standard across the common law world. The concept of the reasonable man slipped into criminal law from the law of negligence and was probably intended in its new surroundings to operate more as an anthropomorphic metaphor than the seminal and precise legal standard it since became. Notions such as the reasonable man abound in law and, given the diversity of human nature, are always fraught with difficulty, inviting subjectivism. It is unfortunate that he was set as the benchmark by which the conduct of the defendant was to be tested, for it required a jury to make the surely unwarranted assumption that this "paragon of virtue, the reasonable man, gives way to provocation"[444] and kills:

> The introduction of the reasonable man into the law of provocation is odd … The

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[441] *People (DPP) v MacEoin* [1978] IR 27, 30

[442] *R v Thornton* [1992] 1 All ER 306

[443] McAleese M 'The Reasonable Man Provoked?' (1978) *Dublin University Law Journal* 53

[444] Williams G 'Provocation and the Reasonable Man' [1954] *Criminal Law Review* 240, 241

> reasonable man is careful, moral, prudent, calculating, law-abiding … How absurd, then, to imagine that he is capable of losing all control of himself and committing a crime punishable with imprisonment for life![445]

Tests for provocation are far more contrived and artificial than other legal principles involving hypothetical people, for they require juries to construct two different persons, one having the traits of the defendant, the other absent such traits.[446] The reasonable man standard for provocation, along with the growing circuitous measures for which characteristics of the defendant may be attributed to it, is, to say the least, convoluted, inordinately complex and perhaps even incoherent in direction to juries. Such is the entropy with which, in particular, the English courts has got itself into over its protracted attempt to define the reasonable man within its criminal jurisprudence, that its quest has developed into something of a search for a legal scarlet pimpernel or a hunt for the chimera.

Recognising the storm of academic and professional criticism that attached itself to the law of provocation across the waters, and free as they were from any immutable statutory provisions on the matter, the Irish courts sought an alternative formulation to this partial defence. In the landmark judgment of *People (DPP) v MacEoin*[447], the Court of Criminal Appeal found that the objective reasonable man test as it appeared in English law was "profoundly illogical"[448], for it required a defendant to be judged to a standard that would not necessarily bear any relationship to his own temperament and knowledge nor sit well with the heterogeneous nature of a modern society. In framing a new subjective standard, Kenny J relied heavily on the dissenting judgment in the Australian High Court case *Moffa v The Queen*[449]:

> The [objective] test cannot withstand critical examination. It is not clear whether the reasonable man, if he was subjected to the same provocation, would (or might) have lost control, or would have lost control to the extent of killing in the manner he did. Is he a complete stranger subjected to the provocative conduct or a person in the same circumstances? To be in the same circumstances, he should be taken to be in the same relationship with the deceased and must have experienced the relationship … he should have lived the life of the accused, or it would be impractical to speak of

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[445] Williams G *Textbook of Criminal Law* (London: Stevens & Son, 1983) 489

[446] Neal L & Bagaric M 'Provocation: The On-Going Subservience of Principle to Tradition' (2003) 67(3) *Journal of Criminal Law* 237

[447] [1978] IR 27

[448] *ibid.*, at 32, *per* Kenny J

[449] (1977) 13 ALR 225

> what a reasonable or ordinary man would do in the circumstances ... Once the full circumstances are taken into account, the objective test disappears because it adds nothing to the subjective test ... The objective test should not be modified by establishing different standards for different groups in society. This would result in unequal treatment. The objective test should be discarded. It has no place in a rational criminal jurisprudence ... It degrades our standards of civilisation to construct a model of a reasonable or ordinary man and then to impute to him the characteristic that, under provocation ... he would kill the person responsible for the provocation.[450]

What the Court of Criminal Appeal left in the wake of *People (DPP) v MacEoin* was a valiant subjective test, purged of any reference or trappings of the reasonable man, a test without precedent in the common law world at that time:

> When the defence of provocation is raised ... the trial judge at the close of the evidence should rule on whether there is any evidence of provocation which, having regard to the temperament, character and circumstances of the accused, might have caused him to lose control of himself at the time of the wrongful act and whether the provocation bears a reasonable relation to the amount of force used by the accused. [451]

It is the segment of this formulation, "whether the provocation bears a reasonable relation to the amount of force used", that gives rise to insuperable difficulties since it apparently incorporates some element of objectivity into judging the *reaction* of the defendant to the provocation, an approach "no less illogical than the full-blooded objective test it sought to replace"[452]:

> The circle cannot be squared. Either the test is purely a subjective one, in which case these can be no place for the proportionality requirement, or the proportionate requirement exists, in which case the test cannot be purely subjective.[453]

If a person loses self-control in a given situation how can what they did when they lost self-control be anyway amenable to a test of proportionality?[454] This anomaly was addressed in *People (DPP) v Mullane*[455], where the Court of Criminal Appeal denied that any test of proportionality between the provoking act and the force used existed,

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[450] *ibid.*, at 242, *per* Murphy J

[451] *People (DPP) v MacEoin* [1978] 27 at 34-35, *per* Kenny J. Reaffirmed by Barrington J in *People (DPP) v Kelly* [2000] 2 ILRM 426: 'The question [the jury] have to decide is not whether a normal or reasonable man would have been so provoked by the matters complained of as totally to lose his self control but whether this particular accused with his peculiar history and personality was so provoked.'

[452] Stannard J 'Making Sense of *MacEoin*' (1998) 8(1) *Irish Criminal Law Journal* 20, 24

[453] *ibid.*

[454] Neligan N 'The Provocation Conundrum' (2002) 12(2) *Irish Criminal Law Journal* 2, 3

[455] (Unreported, Court of Criminal Appeal, 11 March 1997)

but rather that the reference to "reasonable relation" was designed as a vehicle for testing the credibility of the defendant's testimony, vis-à-vis the type and quantum of evidence offered to support a plea of provocation, and that the jury should always determine whether the reaction of the defendant to the provocation, given his state of mind, was reasonable *for him*:

> The impugned sentence in *MacEoin* really comes down to credibility of testimony rather than to any suggestion that the conduct of the accused is to be once more judged by an objective standard … The trial judge is required to make it clear to the jury at all times that they must decide matters by reference to the state of mind of the accused. That is not to say … that simply because an accused asserts that he was provoked and lost control, that the jury must necessarily accept that … they must make up their minds as to what credibility they afford to the version put forward by the accused, or any witness he may call on his behalf.

Later, in *People (DPP) v Kelly*[456], it was challenged that as the test was now wholly subjective once the defendant showed that *he* believed that something capable of provocation took place the defence would invariably succeed.[457] The court held that the partial defence of provocation does not operate in such a manner as to allow any person who kills another in a fit of temper to establish that he was in a fit of temper and no more and then defy the prosecution to exclude the reasonable possibility of there being provocation:

> If the reaction of the accused in totally losing his self-control in response to the provocation appears [to the jury] to have been strange, odd or disproportionate that is a matter which they are entitled to take into consideration in deciding whether the evidence on which the plea of provocation rests is credible.[458]

There remains at all stages a tactical burden on the defendant to produce credible evidence, however weak or limited, suggesting the presence of all the elements of provocation as that phrase is understood at law. Still, the subjective nature of our newfangled test does mean that it is virtually impossible for the prosecution to rebut evidence of provocation once the plea has been raised.[459] The subjective standard set

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[456] [2000] 2 IR 1

[457] 'One could say that the more outrageous the allegations the more likely the defence of provocation is to succeed' - Carney P 'The Role of the Victim in the Irish Criminal Process' [2007] 1 *Justice Studies Institute Journal* 7, 14

[458] *People (DPP) v Kelly*[2000] 2 IR 1 at 11, *per* Barrington J

[459] In *People (DPP) v Davis* [2001] 1 IR 146 at 159-160, Hardiman J found that in order for the subjective direction in *MacEoin* to avoid irrational justice policy considerations needed to be put in place that

in Irish law is built entirely around what occurs in the mind of the defendant, who can manipulate any objective proof. That said, the insanity defence has much the same kind of problem and it results in an outright determination of no criminal liability.

It is evident from the amount of appeals on which convictions are deemed unsafe that since it diverged so markedly from other common law countries the Irish judiciary has yet to get to grips with presenting its subjective standard to the jury.[460] The Court of Criminal Appeal has acknowledged the need for a re-examination of the Irish approach to provocation, adding ruefully, "it is with some trepidation that the court ventures into [that] territory."[461] The Law Reform Commission has since recommended a rapprochement between our current subjective standard and the original basis of the plea.[462] Ironically, a relatively recent House of Lords decision suggests that the law of provocation in England is moving closer to the subjective approach presently exercised in Ireland.[463]

Not surprisingly, the provocation conundrum has long been bedevilled by philosophical and analytical ambiguities. It is nigh impossible to read even a selection of the extensive modern literature on the matter without reaching the conclusion that the doctrine has serious logical and moral flaws:

> It is particularly difficult to approach provocation without running into all sorts of other questions about the structure of homicide, including the equivocal role that motive, emotion, and personal circumstances have in theories of culpability and punishment.[464]

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supersede the provocation defence, where its application would promote moral or social outrage: 'An illustration is the case of a defendant who holds white supremacist beliefs and who genuinely believes that it is the greatest insult for a black person to speak to a white person unless spoken to first. On being spoken to by a black person he becomes enraged and kills while in the throes of his bigoted passion. Tested subjectively he has been provoked but there is no reason why the laws compassion should be extended to him, given that his beliefs are morally repugnant. The strictly subjectivist terms in which Irish law has expressed the defence lend themselves to allowing the plea to the racist, yet it is safe to assume that the courts did not have cases of this type in mind when they set about reforming the law…There is a minimal degree of self-control which each member of society is entitled to expect from his or her fellow members: without such a threshold, social life would become impossible.'

[460] Nelligan N 'The Provocation Conundrum' (2002) 12(2) *Irish Criminal Law Journal* 2, 3

[461] 'Experience has shown that, at least since the law in Ireland diverged so markedly from that in other common law countries…there has been a good deal of difficulty in dealing with cases where provocation…is an issue' - *People (DPP) v Davis* [2001] 1 IR 146 at 154, *per* Hardiman J

[462] Law Reform Commission *Consultation Paper - Homicide: The Plea of Provocation* (Dublin: Law Reform Commission, 2003) 1

[463] *R v Smith (Morgan James)* [2001] 1 AC 146. 'It could only be misleading for the judge to refer to the reasonable man at all and the words of [s.3 of the *Homicide Act 1957*] would be better concealed from the jury – which shows how far the decision [in *R v Smith (Morgan James)*] departs from authorities on which it is supposed to be based' – Metcalfe N 'Case Comment: *R v Smith (Morgan Jones)* (2000) *Criminal Law Review* 1004, 1009

[464] Wells C 'Provocation: The Case for Abolition', in Ashworth A & Mitchell B (eds) *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 85, 86

The law of provocation is essentially a compromise, neither conceding the propriety of the fatal act nor exacting the full penalty for it.[465] At face value the availability of the partial defence seems reasonable, a fine balance between a concession to human frailty and the concept of retributive justice. Yet as the society that our law aims to protect becomes ever more pluralist, and resultantly more complex, aided and abetted by an ever-increasing knowledge in scientific, medical and psychological fields, the boundaries and scope of the provocation doctrine has blurred and frayed about the edges:

> The history of the provocation defence was constructed on the paradigm of 'crimes of passion', a history of passion that is increasingly private and personal. Once an honour code, then heated blood, now a state of mind, the idea of passion has moved steadily inward. That move has fundamentally altered the shape of the defence. When honour ruled, courts imposed categories of wrongs defined by social relationships. When passion became a natural force within the 'blood', all the important doctrinal limitations focused on when the blood could cool. When passion became mental distress, our questions delved into the minds of ordinary people to provide the answers ... it took the 'reasonable person' model a step further by asking juries not only to look into persons minds but also to identify their personal characteristics ... what has moved from norm to body to mind [is] now a question of subjective identity.[466]

The concept of provocation, historically construed around male ideas of sexual jealously, anger, honour, and revenge, built, as it was, upon archaic notions from patriarchal origins, is constantly attempting to adapt and mutate, chameleon-like, to address the modern societal problems it now finds itself confronted with. It is constantly under attack from law-and-order advocates who lambaste a doctrine that permits an intentional killer to sidestep a murder conviction.[467] There have been calls

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[465] Williams G 'Provocation: The Reasonable Man' (1954) *Criminal Law Review* 240, 242

[466] Nouse V 'Passions Progress: Modern Law Reform and the Provocation Defence' (1997) 106 *Yale Law Journal* 1331, 1396

[467] One of the most controversial questions to arise within the law of homicide in recent years is how it should deal with a battered woman who kills her abusive partner. *Battered women syndrome* (BWS) is a physiological condition attributed to those women who despite being submitted to a cycle of domestic violence are incapable of ending the relationship, their inability to leave often attributed to a state of chronic fear or 'learned helplessness'. This exceptionally complex issue, which has pertained itself to the defence of provocation for obvious reasons, has now been considered by the courts of all major common law jurisdictions. It is suffice to say that in many (perhaps most) jurisdictions, provocation represents the only (or, at least, best) partial defence to murder available to battered women who kill their abusers when such a killing is in response to lesser levels of violence or to no violence at the particular time of the killing (if it was in response to significant violence she may, of course, plead self-defence). Attempts to address the issue under the defence of diminished responsibility assigned a demeaning assertion of mental dysfunction to the woman that could be avoided by pleading provocation, which asserts that her emotional response is one that

across all common law jurisdictions for the eradication of the partial defence of provocation[468] based on the manner in which it lends legitimacy to hate crimes that are sexist, homophobic or racist; condones superficial explanations of violence; allocates a proportion of blame to the victim[469], and facilitates his defamation by acting as an open invitation for the defendant to fashion appalling stories that might vindicate his behaviour; and that its abolition might send out a useful message of general deterrence to people that they should manage their anger before emotions boil over into violence or they will be treated with the same contempt as those who kill calmly.[470] Yet such critics can hardly claim that the law treats a conviction for manslaughter as a minor or trivial offence or that it condones violence, for those convicted do not avoid telling societal condemnation, nor are they exonerated, as they can and do receive significant punishment for their actions.

The availability of any criminal defence or mitigating factor will inevitably result in occasional verdicts that are objectionable to fair-minded persons, but occasional bad results hardly justify its erasure. To abolish the partial defence of provocation raises some serious issues, it would clearly be wrong in the face of shockingly extenuating circumstances for juries to be forced to convict a person of murder.[471]

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a person, in her violent situation, might reasonably experience. There is debate as to whether this is entirely fair: some suggest that such cases should fall under the ambit of self-defence, so as to allow battered women ownership of their acts and permit, where suitable, an acquittal; others argue that a new defence of 'self-preservation' be established. There is too the argument that battered women who kill in non-confrontational circumstances should be permitted to plead a full excuse, based on principles similar to duress. It is submitted here that a real danger to this is that by application it may also be open to rape victims who, at a later date, take the law into their own hands and kill their attacker, or to children who suffered long-term sexual abuse and who later kill their perpetrator.

[468] For example, in Australia, see the Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General *Chapter 7: Administration of Justice Offences - Report* (1998); in Canada, see the House of Commons Report of the Subcommittee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General *First Principles: Recodifying the General Part of the Criminal Code of Canada* (Ottawa: Queen's Printer, 1993); and in New Zealand, see the New Zealand Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (New Zealand: Crimes Consultative Committee, 1991)

[469] After all, the victim's behaviour need not be unlawful or even deliberately insulting so long as it can be characterised as provocative from the subjective viewpoint of the defendant.

[470] Dressler J 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' [2002] 86 *Minnesota Law Review* 959, 966; Wells C 'Provocation: The Case for Abolition', in Ashworth A & Mitchell B (eds) *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 85, 101-102; Miller E '(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code' (2001) 50 *Emory Law Journal* 665, 667; Howe A 'More Folk Provoke their Own Demise: Homophobic Violence and Sexed Excuses - Rejoining the Provocation Law Debate Courtesy of the Homosexual Advance Defence' (1997) 19 *Sydney Law Review* 336, 337; Horder J *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) 192-194; Goode M 'The Abolition of Provocation', in Yeo S *Partial Excuses to Murder* (Sydney: Federation Press, 1991) 37; and Mahoney M 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1, 65-66

[471] Appeals for eradicating the partial defence are typically conjoined with the caveat that the mandatory life-sentence for murder be revoked and that provocation be instead considered as a mitigating factor when sentencing - Morgan J 'Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told About Them' (1997) 21 *Melbourne University Law Review* 237

Cases that currently fall under the ambit of provocation may be forced to fit into a variety of, debatably, more clearly defined and less controversial defences such as self-defence, excessive self-defence, duress, diminished responsibility, and insanity, scattering its problems to the four corners of homicidal law.

The law of homicide itself is a rickety structure set upon shaky foundations:

> Some of its rules have remained … even though it has long been acknowledged that they are in dire need of reform. Other rules are of uncertain content, often because they have been constantly changed to the point that they can no longer be stated with any certainty or clarity.[472]

Like a house of cards, removing one feature from the law of homicide, like provocation, would cause the whole edifice to totter.

Whilst some of the perplexity and uncertainty surrounding the concept of provocation is inherent to the situations it accommodates, the law relating to it as it now stands presents difficulties of application and consistency. By its very nature this partial defence cannot be presented in simple black and white terms, for it deals with the grey area of human reactions. The fact that provocation is made available to excuse outbursts of violence in response to non-violent as well as violent acts is considered by many to be its fundamental shortcoming. Provocation, it is argued, is a mixed message full of internal contradictions, a deeply unsound dispensation of the fatal acts of the defendant and an exaggeration of any wrongdoing of the victim that condones anger over restraint. The harsh truth is that a previous unwillingness to assign the doctrine to the annals of common law history has resulted in attaching to it unsavoury branches that now seem to merit its very existence.[473]

Provocation remains a partial defence oft-annihilated for its cases of extremities, always destined to be criticised, all contradictions and ragged ends, but then so to is the human imperfection and impaired capacity for self-control it purports to concede:

> It is wrong … to stigmatise, condemn and punish a person to the extent that we do a murderer simply because that individual only lives up to the standard of the ordinary law-abiding but imperfect person in similar circumstances. We may want people to be better than they are, but the criminal law is not meant to make people virtuous or

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[472] Law Commission *Murder, Manslaughter and Infanticide* (London: Stationery Office, 2006) 3

[473] See generally Neal L & Bagaric M 'Provocation: The On-Going Subservience of Principle to Tradition' (2003) 67(3) *Journal of Criminal Law* 237

> punish them for being less than that.[474]

To remove the defence of provocation from the current framework of homicide law would be an unnecessary injustice to those who deserve to avail of it. Whatever the problems the common law of provocation presents us with, murder convictions for people with a compelling defence is not the answer. Most people have a breaking point, and we ought to insist that the law continues to acknowledge that reality:

> [The law] has at once a sacred regard for human life and also respect for mans failing, and will not require more from an imperfect creature than he can perform.[475]

No common law jurisdiction has abolished the doctrine to date. Regardless of whatever future reform or modification that may occur to the law of homicide there is little doubt that provocation shall continue to be recognised, for the law would be less just without some variation of it. The partial defence of provocation, as a nod to human fallibility and foibles, shall continue to confront our anxieties but it will never quite be able to resolve them; that is, in a sense, its frailty for attempting to recognise and accommodate our own.

The Common Law of Self-Defence

The common law of self-defence is bifurcated into what is known as full self-defence and excessive self-defence.[476] Where full self-defence operates it does so as a complete defence, duly acquitting the defendant. A person is entitled to use force to defend himself or another against an attack, or in defence of his property or in preventing the commission of a grave crime, and, having due regard to all the circumstances, if such force was necessary and reasonable, notwithstanding that there was a deliberate killing, no crime will have been committed. Excessive self-defence operates where a person subjected to an attack endeavours to prevent the consummation of that attack by using force, but in doing so exercises more force than was necessary *but no more than he honestly believed to be necessary*, and as a result kills his attacker, he shall be guilty of manslaughter and not murder.[477] Where the defendant knowingly used more force than he honesty thought necessary in the

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[474] Dressler J 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' [2002] 86 *Minnesota Law Review* 959, 1002

[475] *R v Kirkham* (1837) 173 ER 244, *per* Coleridge J

[476] The common law of self-defence is only applicable to incidences of self-defence that result in homicide. The *Non-Fatal Offences Against the Person Act 1997* has codified the law relating to self-defence where, given the title of the Act, the self-defence exercised is *not* lethal.

[477] *People (AG) v Dwyer* [1972] IR 416

circumstances, he will have no defence and shall be convicted of murder. The common law was neatly encapsulated in *People (AG) v Doyle*[478]:

> A person is entitled to protect himself from unlawful attack. If in doing so, he uses no more force than is reasonably necessary, he is acting lawfully and commits no crime even though he kills his assailant. If he uses more force than may objectively be considered necessary, his act is unlawful and, if he kills, the killing is unlawful. His intention, however, falls to be tested subjectively and it would appear logical to conclude that, if his intention in doing the unlawful act was primarily to defend himself, he should not be held to have the necessary intention to kill or cause serious injury. The result of this view would be that the killing, though unlawful, would be manslaughter only.[479]

In essence, Irish law adopts the reductive approach to self-defence. What this means is that if the defendant thought the force was reasonable, *and* the jury thought objectively that the force used was reasonable, the defendant will be acquitted. If the defendant honestly thought the force used was reasonable but the jury thinks it was objectively *un*reasonable, the defendant is then convicted of manslaughter. If, however, the jury does not believe that the defendant honestly thought the force used was reasonable, the defendant will be convicted of murder.

The person subjected to the attack is not obliged to measure his response with exactitude, as he cannot be expected to remain entirely rational since "detached reflection cannot be demanded in the presence of an uplifted knife."[480] However, the degree of force he uses is limited by the necessity of the occasion and must be objectively considered reasonable insofar as the force used is what a reasonable person would consider necessary when faced with the same circumstances.[481] Resultantly, an immediate resort to violence, or a failure to take alternative courses of action, like retreat, where such an alternative was reasonably open to the defendant, may be used as evidence to indicate that the force used by the defendant was not reasonably necessary or that he acted from an improper motive.[482] Where the defendant mistakenly but genuinely believed that a threat to him or another existed, he

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[478] [1972] IR 416
[479] *ibid.*, at 429, *per* Butler J
[480] *Brown v U.S.* 256 U.S. 335 (1921), *per* Holmes J
[481] *People (AG) v Dwyer* [1972] IR 416 at 420, *per* Walsh J
[482] Charleton P *Offences Against the Person* (Dublin: Round Hall Press, 1992) 155

is entitled to be judged according to him mistaken view of the circumstances.[483]

Self-defence is an affirmative defence. The defendant must raise it with *prima facie* evidence, which the State, if it is to secure a conviction, must disprove beyond reasonable doubt.[484] Once self-defence is raised, and notwithstanding that the judge has a duty to review the evidence when instructing the jury, it becomes a matter for the jury alone to determine whether the defendant acted reasonably.[485] The defence is only available to those who take action in good faith and not to those who, under the guise of the situation in question, act from motives of revenge or ill-will. Nor can a person avail of self-defence if he created the situation where violence was employed or used an illegally held weapon in his defence.[486] These caveats are to prevent an individual from attempting to mask what was a murderous act as one of self-defence.

The infamous self-defence case in Ireland was that of Padraig Nally, a 61year-old Mayo farmer charged in November 2005 with the murder of father-of-eleven, John 'Frog' Ward. The victim and his son, both members of the travelling community, had come unsolicited to the defendant's farm. Upon finding Ward attempting to push open the back door of his home, Nally fetched his loaded shotgun and shot the deceased in the hip and hand. In the violent struggle that ensued, Ward, who at trial was found to be a man of violent disposition with experience in fighting, was hit twenty times about the head and upper body with a stick, suffering a fractured arm in his efforts at defending himself before managing to flee. Nally, believing that Ward's son, who had now driven away, had gone for reinforcements in terms of personnel or weaponry, returned to his barn, reloaded the shotgun and followed the deceased, fatally shooting him in the back as he attempted to flee the property. He then hid the body across the road in a field, fearful of the consequences of reinforcements arriving to find it.

The Court found that Nally had developed major anxieties that his house would be burgled and that he himself would be harmed and killed by intruders, fears engendered by a recent spate of thefts and burglaries that had occurred in the area. The trial judge, Carney J, directed the jury that he would accept either a verdict of

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[483] *R v Williams (Gladstone)* [1987] 3 All ER 411 - The defendant witnessed a man dragging a youth, who was calling for help, along the street. The man falsely stated to the defendant that he was a police officer when, in actuality, he was a citizen who had captured the youth stealing a lady's handbag. When the man could not show any identification the defendant, believing that he meant the youth harm, struggled with him, causing him injury. Initially convicted of assault causing bodily harm, the Court of Appeal held that as the defendant honestly believed that the victim was assaulting the youth and had acted in defence of that youth, he was entitled to be judged according to his mistaken view of the circumstances.

[484] *People (AG) v Quinn* [1965] IR 366

[485] *People (DPP) v Clarke* [1994] 3 IR 289

[486] *People (AG) v O'Brien* (1969) 1 Frenwen 343

murder or manslaughter, but removed the option of a full self-defence verdict from them on the basis that the force used by the defendant was so excessive as to destroy the notion that it could have been reasonable. The jury subsequently found Nally guilty of manslaughter. The trial judge, Carney J, in sentencing the defendant to six years, said that initially Nally had been protecting the inviolability of his home but having gained the upper hand in the altercation this changed.

The Court of Criminal Appeal quashed this conviction on the grounds that the trial judge had erred in law by only allowing the jury to consider a "truncated" defence of self-defence, thus denying them the option to consider a full defence argument of self-defence and thereby possibly acquit Nally of all charges, even if such an acquittal were to fly in the face of the evidence presented before them.[487] On retrial two months later, a newly composed jury acquitted Nally of manslaughter and he walked free. That Padraig Nally killed John Ward was never in dispute, but the case forced the legal and moral perceptions of self-defence and of what constitutes reasonable force into the spotlight.

The Nally case was enormously divisive in Ireland, with many supporting the defendant and his actions to defend his perceived risk to his person and property, holding him as a victim of both criminal travellers and of the justice system. He became a reluctant *cause célèbre* for homeowners to use force to defend their property. Others maintained that his actions were far in excess of what could be deemed self-defence and that evidence showed that his responses and actions, such as shooting Ward when he was manifestly in retreat, were proactive rather than reactive. Furthermore, the travelling community made the claim that the lives of travellers were regarded as expendable, that had Nally himself been a traveller and Ward a member of the settled community a different verdict would have been returned. Adding to the controversy, Ward had numerous previous convictions, including aggravated assault on a member of An Garda Síochána, and at the time of his killing had several outstanding bench warrants for his arrest.

Co-victims are conscious that there is the potential for some fatal actions to be spuriously dealt with under the rubric of self-defence or excessive self-defence, insofar as the defendant may utilise the availability of this defence as a shield behind which to hide the motivations for his conduct or as a filter through which to reclassify what amounted, in actuality, to a murderous act. They also point out that even though

[487] *People (DPP) v Nally* [2006] IECCA 128

the victim was in the process of, say, a burglarious act, to legitimise killing as a response to such conduct is extreme and wrong, opening the door to some form of prophylactic killing as part of the legal regime of self-defence, with great potential for the perversion of self-defence through deliberate misuse and wrongful application. The Law Reform Commission is of the belief that, whatever the circumstances, the protection of self-defence should not be permissible to use lethal defensive force in defence of personal property.[488]

Reforming the Structure of Homicide

It is not my intent to present here some grand design to remedy any failings within the law of homicide; indeed, such an attempt would be foolhardy and require deliberations somewhat beyond the confines and remit of this thesis. However, it is worthwhile to make some thematic observations on the overall structure of the law of homicide.

The murder/manslaughter distinction, initially founded so as to diminish the area of cases to which the death penalty was applicable, is almost certainly half a millennium old. As no further general categories of homicide have evolved over the intervening period, this distinction has had to bear the strain of accommodating changing and deepening understandings of the nature and degree of criminal culpability and the emergence of new partial defences, such as diminished responsibility, whilst simultaneously trying to be based on sound and just principles.[489]

It has been long and frequently argued that the general law of homicide urgently needs to be rationalised and refined through legislation for the purposes of judicious application in present day, yet there seems to be a political unwillingness to undertake the task, almost as if the law in this matter is sacrosanct:

> Have we some dead hand of the past, now cloaked with the majesty of the ages and garbed in the sanctity of centuries of use, controlling our present day law when there is no reasonable basis for what is being done? Are we dealing with the law at a point where it is almost religious in nature ... something too fundamental to permit of discussion?[490]

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[488] Law Reform Commission *Legitimate Defence - Consultation Paper* (Dublin: Law Reform Commission, 2006) 35

[489] Law Commission *Murder, Manslaughter and Infanticide* (London: Stationery Office, 2006) 9. Even diminished responsibility, a relatively young creature of the law's imagination, is a ramshackle intellectual attempt to embrace modern clinical psychology and psychiatry, an area it has great trouble in comprehending and accommodating.

[490] Weber J 'Some Provoking Aspects of Voluntary Manslaughter Law' (1981) 10 *Anglo-American Law Review* 159

The fine lines and technical distinctions between the charges of murder and manslaughter are part of an increasingly outdated jurisprudential legacy. Periodic well-intentioned judicial developments tinker with the law of homicide, serving only to further muddy existing murky waters, with recent cases generating new precedence in an attempt to solve ambiguities that preceding judgments have left in their wake. This is notably problematic in the previously discussed domain of provocation. It is reasoned that the constant difficulty involved in maintaining cogent watertight boundaries between murder and manslaughter can be solved by simply removing the division and creating a new singular offence that reflects the degree of moral culpability in the gravity of its sentencing.

When reform is debated there are generally two options advanced, each having as its basis a recognition that our current binary distinction does not work. The first is to consolidate the individual offences of murder and manslaughter into a single charge of unlawful homicide. It follows that the mandatory life-sentence would disappear with the offence of murder itself, thereby allowing judicial discretion case-by-case as to the severity of sentencing which would range, pending on the motivations and circumstances of each unlawful homicide, from non-custodial measures up to a maximum life-sentence. The second option retains the separate offences but removes the life-sentence as the automatic punishment for murder, thus leaving the sentence, pending on the motivations and circumstances of each murder, to judicial discretion.[491]

These proposals pose two questions. Should the criminal law continue to recognise murder as a separate offence? If so, should a conviction for murder continue to warrant a life-sentence? These two enquiries are essentially intertwined:

> The jurisprudential skein, in which crime and penalty are jointly present [as with murder], is tangled; the more vigorously one thread is pulled, the more obstinate becomes the other in its resistance to being unwound prior to it being neatly re-

[491] There is a third but less frequently debated option to introduce different degrees of murder, like the US-style *first degree* and *second degree* formulations. It is commonly suggested that with a three-tier schema *first degree murder* should encompass those killings where the moral depravity is of such gravity, *e.g.*, involving extreme cruelty and/or multiple, young or elderly victims, or law enforcement personnel, that they demand condign punishment such as the incarceration of the perpetrator for life, often without parole; that *second degree murder* should include killings that due to the presence of provocation would currently be treated as manslaughter; and that the third degree of *manslaughter* would encompass all incidents of involuntary manslaughter. However one can readily anticipate similar problems as those that exist with the current law insofar that there would still be much formidable, forensic and perhaps irreconcilable debate concerning, for example, the borderline between first and second degree murder, and indeed second degree murder and manslaughter.

ordered.[492]

The central purpose of the proposed reform is to open out the terrain of homicide to reflect the different circumstances in which people kill and allow the uniqueness of each incident to be accommodated in sentencing discretion. Certainly the existence of mandatory life for murder has meant that the question over who should be labelled a *murderer* has become analogous with who should receive the life-sentence. Nevertheless, this does not reflect reality and actually distorts the boundaries of the arguments at hand, for a person who kills intentionally albeit in response to provocation is guilty of manslaughter and may receive a life-sentence yet is still not labelled a murderer, whilst the mercy killing of a terminally ill loved one constitutes murder[493], thereby visited by its affiliated life-sentence, even though society rarely, if ever, regards this offender as a murderer in the literal sense.[494]

The crime of murder is a distinct and grave offence on our statute books, applicable to those killings which society rightly regard as violating the sanctity of life. All jurisdictions, both ancient and modern, consider it a most serious and atrocious crime and impose a severe penalty for its commission. It is oft regarded as a unique form of offending insofar as the deliberate killing of another represents a wrong against some "higher authority."[495] It is typically referenced in the moral language of jurisprudence as the most heinous act in the criminal calendar. Indeed this term *heinous* is seemingly reserved in legal parlance to specifically describe murder.

Nonetheless, its practicality can be presented somewhat differently, with criminologists telling us that much murder is actually fairly prosaic.[496] It is well

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[492] Blom-Cooper L & Morris T *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Oxford: Hart Publishing, 2004) 171

[493] A *mercy killing* is the act of procuring the death of a person who has an incurable or intractably painful disease by a family member or friend for reasons of mercy or compassion. In nearly all such cases the killer is suffering from depression, anxiety, despair, and from feelings of futility and helplessness and, due to his special relationship with the victim, is emotionally affected, and when he kills, does so in response to great strain. There is an argument to be made that, where there is evidence to support it, the persistent and emotional pleading of the victim to their loved one to be put out of their pain could be assessed as cumulative provocation, so that the 'mercy killer' would then be charged with manslaughter – Williams G 'Provocation and Killing with Compassion' (2001) 65 *Journal of Criminal Law* 149. Indeed, the House of Lords has observed that the law now recognises that emotions which may cause loss of self-control are no longer confined to anger but can include fear and despair - *R v Smith* [2001] 1 AC 146

[494] Actually, one of the more remarkable features of modern criminal law is its resistance to notions of excuse based on individual characteristics or circumstances: 'Liability for theft is not compromised by poverty…liability for murder is not compromised by good motive' - Wilson W *Criminal Law: Doctrine and Theory* (London: Longman, 1998) 375

[495] See generally Fletcher G *Rethinking Criminal Law* (Boston: Little Brown, 1978)

[496] Rock P 'Murders, Victims and Survivors' (1998) 38(2) *British Journal of Criminology* 185, 189

recognised that far from being homogenous, murderous acts, and the motives for them, are considerably diverse. The charge of murder bundles together an assortment of offences vastly differing in degrees of culpability, ranging from brutal, cynical and repeated offences to the almost venial if objectively immoral mercy killing:

> It is of course true that some murders plumb the depths of unimaginable human, or more properly sub-human, depravity and involve a degree of sadistic or callous violence which is almost impossible to describe … Murders of this character are, however, a very small fraction of the murders committed year by year, most of which occur in a domestic or emotional context, the product of sudden anger, often fuelled by drink, or obsession rather than planning or the hope of gain. The deliberate taking of another human life must always be a serious thing and attract a criminal penalty but there are many murders which cannot fairly be regarded as uniquely heinous and which, if they arouse public revulsion, must also arouse the sympathy of any reasonably imaginative observer.[497]

Just how indelible is the heinousness of murder in the public perception? Even if a majority view murder as a whole as unacceptable there must be considerable variation in the degree to which individual incidences of it are regarded as truly heinous:

> Is it seriously to be believed that the general public would greet the death of one drug dealer at the hand of another, albeit by being gunned down, with the same degree of anguish and outrage which would accompany the death of a child at the hands of a paedophile?[498]

Similarly, though there exists a certain degree of public support for euthanasia in specific cases, these so-called mercy killings presently fall within the ambit of the law of murder.

There is an appreciation that the gradations of culpability in the crime of murder are almost as infinite as the variations in the human psyche itself, which begets the proposition that not all murderers deserve similar contempt:

> Some would say that the time has come to recognise that unlawful killings may range all the way across the spectrum from the cold blooded act of terrorism which kills

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[497] Quoting from the Newsam Memorial Lecture delivered by Lord Bingham of Cornhill, the then Lord Chief Justice of England, titled *The Mandatory Life Sentence for Murder*, at the Police Staff College, Bramshill Hook, Hampshire on 13 March 1998 (see bibliography for worldwide web link to transcript)

[498] Blom-Cooper L & Morris T *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Oxford: Hart Publishing, 2004) 169. This exemplifies how the public perceive the wickedness of a crime by focusing, in part, on the character of the victim, whereas the legal classification is determined by focusing on the *mens rea* of the offender.

> tens or even hundreds of men, women and children to the impetuous assault which results in a tragedy never intended by the assailant. Why should not the law provide for one crime of homicide and allow the courts then to impose the appropriate sentence taking into account all the circumstances which led to death?[499]

It is frequently suggested that a baseline offence of unlawful homicide would be preferable due to the moral diversity of killings designated as murder on the basis that the spectrum of intentional killings is too wide or, some might argue, too narrow, and that certain intentional instances, like mercy killings, ought not be branded as murder at all or treated with the same severity as, say, a contract killing. However, it is crucial that we avoid being the intellect that can make intentional killings seem natural, trite or even just. Equally, we ought to be reluctant to group together murders with other less culpable killings in some wider offence of unlawful homicide just because the acts and the reasons for them that currently fall within its hold are so varied.

The principal judge of the Central Criminal Court, Carney J, is one of the leading proponents of merging murder and manslaughter into a single crime of unlawful homicide, maintaining that in almost every case that comes before him it is accepted that the accused unlawfully killed the deceased, with the sole area of contention being whether the offender is guilty of murder or manslaughter:

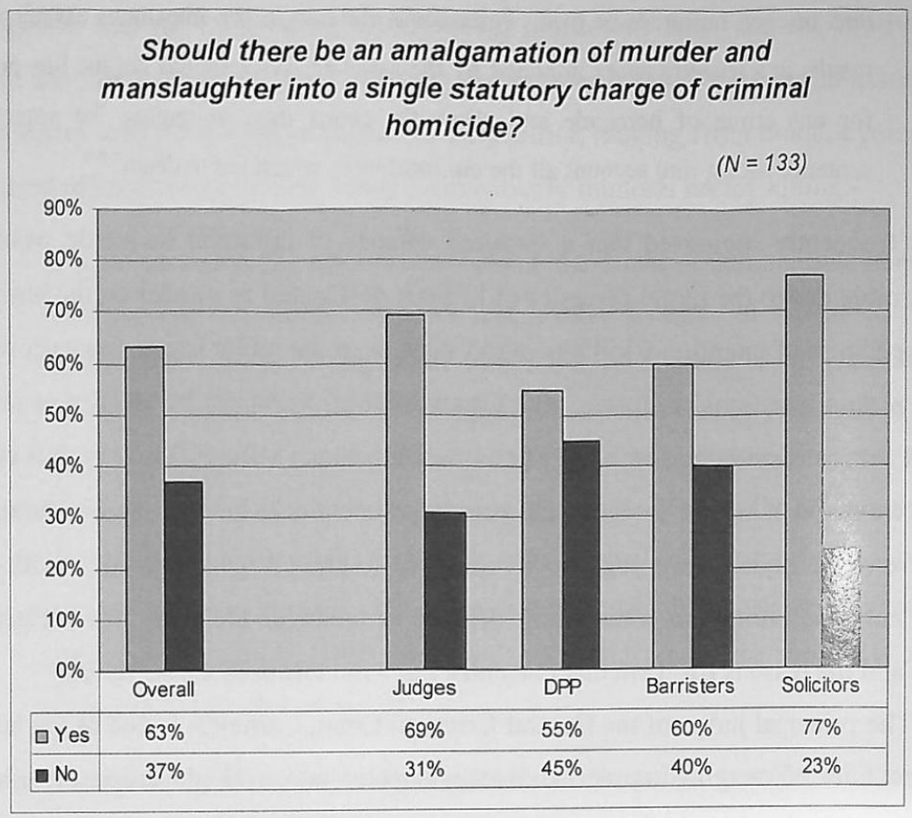
> There seems to me to be a greater attendance of family at murder trials now than ever before. There may, in the row of seats behind junior counsel, be a row of seven pairs of piercing eyes looking into mine because they have nowhere else to look. Whether the trial be days, weeks or months, they remain *in situ* right through the pathology and right through the evidence attacking their love one, to set up a provocation defence to which there is no right to reply. In nearly half of these cases, the jury will return a verdict of manslaughter, even though the textbook says it should be murder. I have never known the family members concerned to accept this situation. They feel that the case has been lost if the verdict is manslaughter rather than murder and that they have not, as they put it, 'got justice'. The murder manslaughter distinction seems to me in this respect to impose a gratuitous suffering on the relatives of victims.[500]

The postal survey conducted as part of this thesis found that nearly two-thirds (63%) of Irish legal professionals supported an amalgamation of murder and manslaughter into a single statutory charge. Despite this response, it is contended that the notion of collapsing the distinction between murder and manslaughter is severely flawed.

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[499] Keane R 'Homicide: The Mental Element' [2001] 2(1) *Judicial Studies Institute Journal* 66, 78

[500] Carney P 'Decriminalising Murder?' (2003) 8(6) *Bar Review* 254-255



First, without having to decide on the central issue of intent, the function of the jury would be reduced to satisfying themselves as to the identity of the killer and the seldom-contentious issue of causation. Once causation has been proven, the issue of intent, the moral distinctions between certain forms of killings, and even those partial defences which currently function as a means for mitigating the crime of murder to that of manslaughter - provocation, diminished responsibility and excessive self-defence - would cease to have any forensic purpose, becoming matters for the judiciary in imposing sentence rather than for the jury in determining the nature of the offence at hand:

> The crucial questions of culpability would be decided solely by the judge ... the jury would have no role in this; the judge would derive no assistance from their verdict.[501]

In *People (DPP) v Davis*[502], the Supreme Court held that the constitutional right to trial by jury has, as a fundamental and absolutely essential characteristic, the right of the jury to deliver a verdict. To remove from the jury the role of deciding whether a killing was one of murder or manslaughter may then be doubtful in constitutional terms. The sentencing judge, instead of the jury as finders of facts, would henceforth

[501] Ashworth A *Principles of Criminal Law* (Oxford: University Press, 2003) 261, 291
[502] *People (DPP) v Davis* [1993] 2 IR 1

determine the degree of culpability, resulting in an emasculation of the defendant's right to trial by jury.

In addition, as the criminal law is about the collective condemnation of wrongdoers, it follows that a fairly selected jury is the embodiment of our conscience and can better reflect community norms and values than a lone member of the judiciary, bringing to bear not just a diversity of personal experiences, but whose prejudices and biases can be balanced by virtue of their number:

> What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.[503]

A jury trial guarantees that the administration of the criminal law is infused with the values, the intuitions and the everyday working morality of the ordinary citizens who constitute the people that the State prosecute in the name of:

> The jury is more noble in theory than in reality ... yet for once, the idea is more important than the practice ... [W]hen a jury is present ... there is an element of doubt about the outcome that is quite beyond the control of the state. This turns the presumption of innocence from a mere slogan into a real possibility. Some on the jury may actually be prepared to believe that the police got the wrong man.[504]

In addition, if, as generally anticipated, that a plea of guilt is to be the norm for a charge of unlawful homicide, based on the reasoning that defendants plead 'not guilty' to murder convictions in the hope of being convicted for the less culpable and therefore typically less punishable charge of manslaughter[505], trials will become something of a rarity, the process leapfrogging from arraignment to lengthy and more complex sentencing hearings in which, having already pleaded guilty, one imagines the offender would be on the back foot disputing the aggravating matter of intent or any relevant mitigating factors, like provocation. Hence, any reform that significantly limits the role of the jury should be rigidly opposed.

Secondly, if we were to eradicate the offence of murder many would be likely to think, and it would be difficult to dissuade them, that the law no longer regards the intentional taking of life as being especially austere so as to warrant its own separate

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[503] Hart H 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401, 404

[504] Hitchens P *A Brief History of Crime: The Decline of Order, Justice and Liberty in England* (London: Atlantic Books, 2003) 232

[505] Bacik I 'Review: Law Reform Commission Consultation Paper on Homicide: The Mental Element in Murder' [2000] 22 *Dublin University Law Journal* 264

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charge. In a time where interpersonal violence is on the up, deleting the distinction of murder would be perceived as a further retreat from the principle that human life is sacred. As a distinct offence, murder has an important symbolic and declaratory effect that serves to convey the seriousness of the particular killing and indicate to society the nature and quality of the crime.[506] We brand those convicted of it with the ignominious term *murderer*, a label replete with a chilling connation all of its own, for they made a choice, and a particularly reprehensible one at that:

> Conviction labels are as important as justice in the distribution of punishment. These labels instantiate and reflect a pre-juridical method of categorising anti-social deeds, which method reflects, more or less precisely, the reality of our moral culture. At its simplest, that culture has sought to identify a particular class of killings which separates itself from the pack of unlawful killings by the unique quality of the deed from which it issues. At a basic level it judges that killing by [manslaughter] is the breach of a different moral obligation than murderous killings – the implication being that murder is a form of deliberated wrongdoing.[507]

Murder is widely, if not unanimously, understood as being a more serious offence than manslaughter. People who are convicted of manslaughter are considered by members of society to be less culpable and therefore less blameworthy than those convicted of murder.[508] Not only is it highly probable that the public would be hostile to any move to abolish this distinction, but to combine the two offences together would be to confound in common minds the gradations of iniquity. Rather then incorporating murder into a catchall category of criminal homicide we should look towards reforming the definition of murder so that those illegal killings widely considered to be less abhorrent would instead fall short of the offence and be duly dealt with under manslaughter, with its discretionary sentencing.

Is Mandatory Life the Fitting Penalty for All Murder?

The Law Reform Commission recommends retaining the murder/manslaughter division but is of the opinion that most of the difficulties associated with this

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[506] Law Reform Commission *Consultation Paper – Homicide: The Mental Element in Murder* (Dublin: Law Reform Commission, 2001) para. 11

[507] Wilson W 'Murder and the Structure of Homicide', in Ashworth A & Mitchell B (eds) *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 24

[508] Mitchell B 'Public Perceptions of Homicide and Criminal Justice' [1998] 38 *British Journal of Criminology* 453

distinction could be addressed by the removal of the mandatory life-sentence.[509] The fact that murder carries with it mandatory life has had immense practical significance in the development of its *mens rea* rules:

> If the penalty distinction between murder and manslaughter were not so great, the arcane debate over the exact meaning of intention ... would probably never have evolved. Far fewer cases would turn on this issue, since inevitably more defendants would plead to murder if it did not carry a mandatory penalty ... There are many types of murder, and to impose the same indeterminate sanction upon every person convicted of murder, irrespective of mitigating factors, amounts to a real injustice for many individuals.[510]

The elimination of mandatory life for murder is raised in the context of providing a compromise or answer, other than abolishing the murder/manslaughter distinction, to the problem of heterogeneity in the crime of murder, so that account can be taken of moral variability at the sentencing stage.[511] As outlined earlier, murder encompasses such a multitude of diverse sins that many hold mandatory life as inappropriate. Some murders display a level of appalling depravity or sadistic violence, but most occur in an emotional context, often the product of provocation, or are fuelled by drink or obsession rather than greed or careful planning.[512] Where there is variation in blameworthiness and culpability it is seemingly unjust that there is parity of punishment:

> It is logically and jurisprudentially wrong to require judges to sentence all categories of murder in the same way, regardless of the particular circumstances of the case before them.[513]

It is customary sentencing practice that the penalty should be tailored to meet the needs of each specific case yet mandatory life, far from being individualised, is generalised to the ultimate degree, a one-size-fits-all item of penal footwear that

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[509] Law Reform Commission *Report – Homicide: Murder and Involuntary Manslaughter* (Dublin: Law Reform Commission, 2008) 8, 24; Law Reform Commission *Report - Sentencing* (Dublin: Law Reform Commission, 1996) 68

[510] Bacik I 'Review: Law Reform Commission Consultation Paper on Homicide: The Mental Element in Murder' [2000] 22 *Dublin University Law Journal* 264

[511] Even if the life-sentence were removed as the mandatory consequence of a murder conviction, life would remain the maximum discretionary penalty and, presumably, some would be so convicted. However, in France, where there are approximately one thousand murders per annum, on average just twenty-five (2.5%) life-sentences are administered each year.

[512] Law Reform Commission *Report – Homicide: Murder and Involuntary Manslaughter* (Dublin: Law Reform Commission, 2008) 18

[513] Blom-Cooper L & Morris T *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Oxford: Hart Publishing, 2004) 166

ultimately hobbles the charge of murder, resulting in less admissions of guilt, thereby generating more trials, even where the case for conviction is overwhelming and, in relation to the victims central to this thesis, submits them to the media circus that a murder trial now becomes. There have been repeated calls from lofty quarters to abrogate the mandatory life-sentence. In Ireland, the then Chief Justice, the Hon. Mr Justice Ronan Keane, proposed that mandatory life be replaced by a system whereby the judiciary decides the sentence for each convicted of murder[514], while the former President of the High Court, Finnegan J, now sitting in the Supreme Court, went further by commenting that some murderers do not even merit a custodial sentence.[515]

The mandatory life-sentence is generally promoted for its deterrent, retributive and denunciating elements. First, the deterrent factor of mandatory life is highly questionable, for the vast majority of murders are the result of sudden anger, drunken fury, obsession, desperation, and miscalculation, rather than careful premeditation. It is typical of the many rows that occur late at night, where one or both parties are intoxicated with alcohol or drugs and become angry over some relatively trivial event, that such offenders are highly dysfunctional and have generally, or at that time, little stake in what the rest of us refer to as society. Deterrence is based on a rational assessment and fear, qualities notably absent in such fracas.

Secondly, a biblical overtone of "an eye for an eye, a tooth for a tooth" attaches itself to mandatory life, as if its imposition somehow balances the murderous equation. The retributive argument that life is the only suitable punishment for murder would only be unassailable if all murders were of equal gravity and heinousness, which they are not, and if all murderers received the same punishment in practice, which they do not. The life-sentence pronounced by the court gives no real clue to the offender, the co-victim, the media or the public at large, what, in practical terms, the sentence means – that is, years to be served in prison:

> It is difficult to understand what retributive purpose is served by pronouncing a formulaic sentence [like mandatory life] in open court if that sentence bears no relationship to the punishment which the murderer will actually undergo in the vast majority of cases.[516]

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[514] Keane R 'Homicide: The Mental Element' [2001] 2(1) *Judicial Studies Institute Journal* 66, 78

[515] As referenced in an address by the then Minister for Justice, Equality & Law Reform, Michael McDowell, titled *Sentencing in Ireland*, at the Edward O'Donnell McDevitt Symposium on Criminal Law, held at the Honourable Society of King's Inn, Dublin (20 February 2004)

[516] Law Reform Commission *Report – Homicide: Murder and Involuntary Manslaughter* (Dublin: Law Reform Commission, 2008) 20

This is decided later, behind closed doors, by the Minister for Justice, Equality and Law Reform as part of the parole process.

Thirdly, as the harshest penalty the Irish justice system can enact, the life-sentence carries with it societal denunciation. However, whether it is regarded as a sufficient condemnation depends on the public's perception of what life imprisonment means. If it is widely believed that mandatory life results in an average of, say, eight, ten or twelve years incarceration, the deterrent effect of it will be somewhat blunted, even if that belief is untrue. In the same way, how can mandatory life underpin public abhorrence of murder when everyone knows that life does not mean life but on average somewhere in the region of thirteen years?

The public would, perhaps, have greater confidence in criminal justice if the sentences pronounced on convicted murderers were intelligible, transparent and certain, but mandatory life is none of these things for it does not mean what it says. However, and of great import, at present the offender remains, after release on parole, at liability to his life-sentence, subject, theoretically at least, to recall for the remainder of his life. If mandatory life was removed for murder convictions, those who receive a lesser sentence would have no further liability to the State once they have served that lesser sentence.

Recently, following a challenge to the constitutionality of the mandatory life-sentence by two convicted murderers in *Whelan & Lynch v Minster for Justice, Equality and Law Reform and the Attorney General*[517], the High Court found that the life-sentence breaches neither the Irish Constitution nor the European Convention on Human Rights. In dismissing the challenge, the court, having regard to the nature of the offence of murder and the defences and trial procedures available to those accused of it, held that the mandatory life-sentence does not flout the constitutional doctrine of proportionality as the deprivation of liberty can be justified in every single murder case and was designed to reflect the constitutional significance attached to the right to life, a right placed at the apex of the hierarchy of constitutional rights:

> There can be nothing offensive in the Oireachtas promoting the respect for life by concluding that any murder, even at the lowest end of the scale, is so abhorrent and offensive to society that it merits a mandatory life-sentence and the question of proportionality can never arise so as to weight the right of the offender to liberty above the right of the legislature to forfeit liberty as a penalty for the lowest order of

[517] *Whelan & Lynch v Minster for Justice, Equality & Law Reform & Attorney General* [2007] IEHC 374

murderous activity. Proportionality as between sentences of the same nature does not in the opinion of this court apply to those convicted of murder.[518]

The sentencing of offenders, particularly serious offenders, is an anxious task that demands considerable insight and judgment. It is a skill that judges acquire and continuously hone over a professional lifetime. To decide the right sentence for a murderer is not a task any different in kind from determining the appropriate sentence for a drug baron, a serial rapist, a child abuser, or an armed robber. If, however, as AdVic asserts, the judiciary have problems in finding uniformity in manslaughter sentencing, what makes one believe that they would be any more competent at sentencing for murder if so optioned? In the absence of clear, principled sentencing guidelines, affording the judiciary unfettered sentencing discretion with regard to murder would only increase uncertainty, inconsistency and public disquiet.

Having previously reasoned that murder and manslaughter should not be amalgamated into one single charge of criminal or unlawful homicide, it is then somewhat illogical to regard murder as a special category of act if it is not to require particular punishment from the rest of the law of homicide. At a conceptual level, it is largely for this reason, that murder is *sui generis* and is not merely the pinnacle of a sliding scale of culpable homicides, that the mandatory sentence is justified, the unique character of the offence generating its distinctive punishment. If mandatory life were to be removed, the only other purpose then for retaining the offence of murder would be as a label of disgrace, yet, in a catch-22 scenario, for the term *murderer* to operate as a stigma it would necessitate specific treatment in the form of a severe and distinctive punishment, namely mandatory life.

With due regard to the deliberate nature of murder, it is contended that the mandatory life-sentence is both appropriate and desirable. In addition, to abandon it betrays those who voted to abolish capital punishment on the understanding that the alternative life-sentence would serve instrumentally as an emollient of the death penalty, and it was probably taken at that time to mean, if not the remainder of a lifetime served in prison, then certainly a significant period of time incarcerated. The intentional taking of life must remain in the eyes of both the law and society as an offence for which there can be no more serious punishment:

> [The harm caused] is absolutely irremediable … this finality makes it proper to regard death as the most serious harm that may be inflicted on another, and to regard a

[518] *ibid.*, *per* Irvine J

> person who chooses to inflict that harm without justification or excuse as the most culpable of offenders ... If causing death is to be regarded as the most serious harm that can be inflicted, it would seem to follow that the most blameworthy form of homicide should result in the highest sentences imposed by the courts.[519]

The definite and onerous mandatory life rightly denounces murder as emphatically as possible and must act, at least in some instances, as having a significant deterrent value. It is not just a punishment or a deterrent but an assertion by the people that murder shall always attract the most serve penalty available. One must recognise "the great emotional appeal"[520] of the automatic life-sentence for the public, even if that penalty is somewhat illusory, content as they are that the punishment fits the crime, and one suspects that they will take some convincing to abandon it.[521]

There is no immediate prospect of watering-down the penalty for murder. Political reticence and obduracy to reconsider the mandatory life-sentence by introducing a sliding moral scale to murder sentencing almost certainly arises from a fear of public and thereby electoral disquiet. The Minister for Justice, Equality and Law Reform, Brian Lenihan, has stated that he would require a lot of persuading on its removal, for "a life sentence for a life gives a very important message...It marks the fact that a life has been lost."[522] Murder, the intentional destruction of human life, must continue to be regarded as the worst offence that can be committed and it is appropriate that its sentence represents not just the severity of the offence but be a statement of the horror society feels at its commission.

Codification of Irish Criminal Law

It is pertinent to make one further observation concerning any possible future reformation in the law of homicide. Regrettably the structure of Irish criminal law is not always built upon clear fundamental concepts. Nowhere is this more evident than in the law relating to homicide, where offences, and the elements and defences thereof, are evasive and laced with sophism, not explicitly defined in statute. Though the following passage is taken from the Court of Appeal in England, it is as relevant to this jurisdiction:

> One would expect a developed system to embody a law of murder clear enough to

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[519] Ashworth A *Principles of Criminal Law* (Oxford: University Press, 2003) 256-259

[520] Law Reform Commission *Report – Sentencing* (Dublin: Law Reform Commission, 1996) para. 5.9

[521] McDermott P 'A Brave Study on Complexity of Murder' (29 January 2008) *Irish Examiner* 17

[522] Coulter C 'Lenihan baulks at life-sentence removal' (30 January 2008) *The Irish Times* 7

> yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual base. This is not so … the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning.[523]

The present state of the law of homicide has been reached in a piecemeal fashion, the result of gradual evolution rather than through any widespread systematic thought. The importance of clarify should never be underestimated or underdeveloped:

> While the distinction between murder and manslaughter is the outcome of casuistic determinations based in changing moral and social judgments, it is the duty of the elected legislature to ensure that these judgments are cogent and just.[524]

With the establishment of the Criminal Law Codification Advisory Committee by the *Criminal Justice Act 2006*, moves are now afoot to codify all substantive Irish criminal law.[525] This code will include what might best be described as the traditional core of the criminal law: *viz.*, homicide offences, non-fatal offences against the person, sexual offences, offences against property, public order offences, and offences against the administration of justice.

Although the process of codification does not necessarily purport to alter or even clarify the various statutes and common law rules that form its contents, it is hoped that this procedure in Ireland may take heed of the recommendations of the Law Reform Commission and attempt some alteration and clarification in homicide law by introducing a statutory definition of *intent* in murder and a concise precise test for provocation with regard to manslaughter into its end product:

> The Report [of the Expert Group on Codification of the Criminal Law] recognises the role of the Law Reform Commission in the partnership of criminal law reform, and identifies the critical area of the law on homicide currently being considered by [the]

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[523] *Attorney-Generals Reference No 3 of 1994* [1998] 1 Cr App R 91, 93

[524] Wilson W 'Murder and the Structure of Homicide', in Ashworth A & Mitchell B (eds) *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 21

[525] It is expected that this entire process of codification will take up to ten years. Codification in the form of the recension of the sources of law in a single instrument has been a notable feature of the European legal landscape since at least Roman times. Although quintessentially a legislative enactment, the character of the code as a body of general and permanent rules confers upon it a symbolic significance greater than that enjoyed by ordinary legislation – Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Dublin: Stationery Office, 2004) 12. Consequentially, "a code should not attempt to provide rules that are immediately applicable to every conceivable concrete case, but rather an organised system of general rules which will be easy to discover so that from these rules, through an easy process, judges and citizens may deduce the manner in which this or that practical difficult may be resolved" – David R *Les Grands Systèmes de Droit Contemporains* (Paris: Dalloz, 1982) 70. The codifier must always be sensitive to the interpretive role of the judiciary, aware that too much specificity could foreclose this and that the criminal law is destined to proceed as a partnership between the legislature and the judiciary.

Commission as being one of the key building blocks of the code.[526]

Homicidal offences and defences need to take their place within a readily comprehensible legal structure, set out with clarity, in a way that will promote judicial certainty and in a manner that non-legal professionals can understand.

Statistics and Trends of Homicide in Ireland

Homicide, albeit an infrequent event statistically insignificant compared to all other offences and causes of death, is rightly regarded as a serious crime. Notwithstanding a cyclical spate of drug-related organised crime[527] and gangland killings[528] over the past decade and a governmental inability to counter them, homicide can hardly be considered a widespread social problem in Ireland or for most developed countries. Human interaction inevitably leads to violent encounters, and thus a base rate of homicide is to be expected of any society:

> [Murder is now] an extremely rare event, statistically insignificant compared to all other causes of death. [An English] population ... has fewer than 600 murders each year; fewer than 600 personal catastrophes out of 48 million relatively peaceful lives, a malfunction rate that designers of any mechanical or electronic systems might envy.[529]

Nevertheless, irrespective of how that idea is expressed, it is impossible to escape the fact that the killing of one human by another, in whatever circumstances, is a dreadful happening. Accident is bad enough, but when the killing constitutes a criminal event

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[526] Remarks made by the then Minister for Justice, Equality & Law Reform, Michael McDowell, at the launch of the Expert Group on the Codification of the Criminal Law (30 November 2004)

[527] *Organised crime* has four characteristics: violence, corruption, continuity, and variety in the types of criminality engaged in – Maltz M 'On Defining 'Organised Crime': The Development of a Definition and a Typology' (1976) 22 *Crime and Delinquency* 338; and involves a group of people working together on a long-term basis to commit crime with the central aim of making a profit, using violence or the threat of violence – Levi M 'The Organization of Serious Crimes', in Maguire M, Morgan R & Reiner R (eds) *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2002) 880. These two contentions are present in s.70 of the *Criminal Justice Act 2006*, which defines a *criminal organisation* as "a structured group comprising three or more persons acting in concert which is established over a period of time and has as its main purpose the commission of serious offences in order to obtain material benefit." The general use of the term *organised crime* in Ireland applies both to structures and to crimes, to the actors and the acts – see Campbell E 'Introduction' *Organised Crime and the Culture of Control in Ireland* (Unpublished PhD, submitted to University College Cork, 2007)

[528] Whilst it has no legal basis, the phrase *gangland killing* has seeped into political and public discourse. References to it in media and political spheres denote the assassination of persons suspected of involvement in organised crimes, like drug-trafficking, by other such persons. Notwithstanding the lack of a legal definition, *gangland killing* is a term whose meaning is taken as a given, and is frequently cited in the Dáil - for example, see *Dáil Debates*, Col.1677, *per* Minister for Justice, Equality and Law Reform, Michael McDowell.

[529] Leyton E *Men of Blood: Murder in Modern England* (London: Constable, 1995) 9

it moves to the foreground of individual and public consciousness.[530] No matter how infrequent, it would be sociologically irresponsible and myopic not to treat homicide as having a devastating effect on society at large.

Table 5: Homicide Victims by Decade in the Republic of Ireland

	Murder	Manslaughter	Infanticide	Total	Average rate (per million)
1991-2000	334	105	0	439	12.0
1981-1990	219	74	1	294	8.4
1971-1980	195	58	6	259	8.1
1961-1970	72	45	14	131	4.5
1951-1960	55	28	20	103	3.5

(excluding the 33 murders committed on the 17 May 1974 caused by terrorist car bombings in Dublin and Monaghan)

The pattern of homicide in Ireland replicates that found in so many other western countries, one of a long-term decline, due to the development of internal and external controls on the expression of violence, proceeded by something of a stasis before the current incremental rise.[531]

Following a recent upsurge in gangland killings and domestic fatal stabbings, the 2007 homicide rate in Ireland soared 25% to record levels, with seventy-eight murders and six manslaughters.[532] Official comparative figures show that most European countries typically record ten to fifteen homicides per million of population each year: Northern Ireland has the highest rate (28.6), followed by Finland (27.7) and Scotland (22.5) - the Republic of Ireland ranks seventh worst (15).[533]

While the limitations of crime statistics have been well-versed elsewhere, it is a reasonable assumption that homicide, due to the serious nature of the offence, is the most reliably recorded crime with few, if any, going unreported. Even so, there is not always a perfect correlation between initial reports and final records, thus incidents initially dealt with as a homicide may, subsequent to police investigations or the

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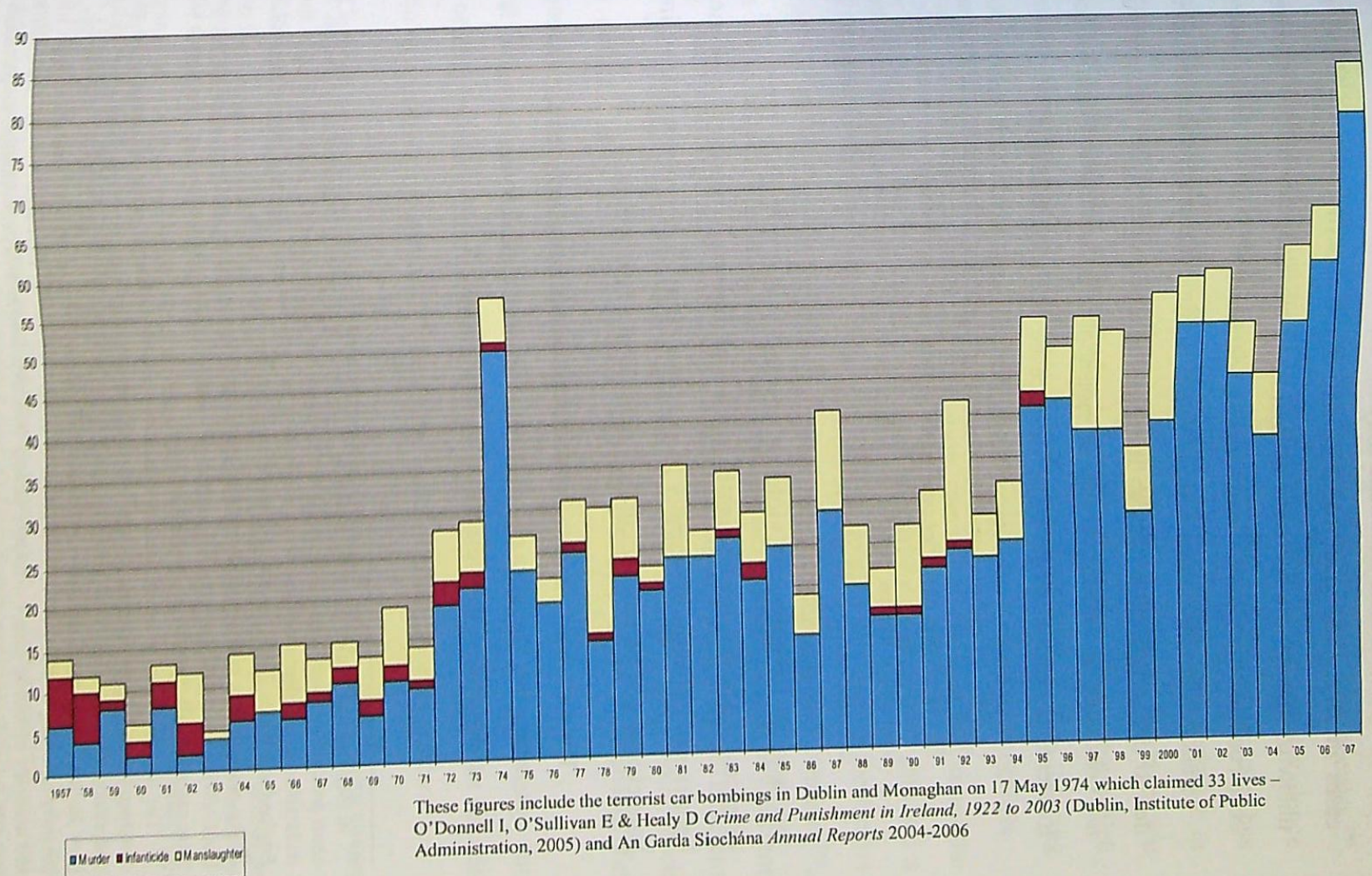
[530] Blom-Cooper L & Morris T *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Oxford: Hart Publishing, 2004) 1–2

[531] There were 2,692 recorded homicides in the island of Ireland, *excluding* Dublin, between 1841 and 1850, compared with just 260 between 1941 and 1950 (216 in the Republic, *including* Dublin, 44 in the North). Even allowing for the substantial decline in population from 8.2m in 1841 to 4.3m in 1941, this was a remarkable fall - O'Donnell I 'Unlawful Killing Past and Present' (2002) *Irish Jurist* 56, 62

[532] Central Statistics Office *Headline Crime Statistics Quarter 4/2007* (Cork: Central Statistics Office, 2008). Murder attempts and threats also rose significantly from 103 the previous year to 166

[533] O'Donnell I 'Crime and its Consequences', in Fahey T, Russell H & Whelan C (eds) *Best of Times? The Social Impact of the Celtic Tiger* (Dublin: Institute of Public Administration, 2007) 245, 252. In contrast, despite the staggering decline in homicide in the United States in recent times, from 23,440 in 1990 to 16,200 in 2002, its rate of killing per mil/pop (55.9) remains twice that of the most deadly EU country but far less than South Africa, where, between 2000 and 2002, lives were ended through crime at a rate of 488.4 killings per mil/pop. In 2007, South Africa recorded 30,960 murders, a rise to 652.7 per mil/pop while the United States remained relatively constant with 16,692 murders, equating to 55.4 per mil/pop.

Table 6: Number of Recorded Homicides in the Republic of Ireland 1957 - 2007



These figures include the terrorist car bombings in Dublin and Monaghan on 17 May 1974 which claimed 33 lives – O'Donnell I, O'Sullivan E & Healy D *Crime and Punishment in Ireland, 1922 to 2003* (Dublin, Institute of Public Administration, 2005) and An Garda Siochána *Annual Reports* 2004-2006

completion of court proceedings, be categorised differently.[534] Similarly, cases of missing persons may later be reclassified, causing a slight revision of homicide figures for certain past years.[535] In addition, the figures presented in the Annual Reports of An Gardaí Síochána may not reflect the final classification of homicide cases in any given year, for it is one of the idiosyncrasies of these reports that unlawful killings are recorded as murder or manslaughter before proceedings have been concluded or, in most cases, even commenced.[536]

Ireland has witnessed a general falloff in crime rates over the past decade, largely due to the significant reduction in crimes against property, but this overall decrease has concealed an actual *increase* in violent offences committed against the person.[537] Incidents of serious interpersonal violence are escalating unabated:

> [AdVic is] disappointed the number of homicides is increasing so dramatically. The fact is people have become more violent, that's something we need to deal with as a society. It seems people no longer have problem-solving skills and they resort to extreme violence to resolve anything.[538]

Increases in interpersonal violence inexorably lead to higher homicide rates. The offences of murder, manslaughter and assault frequently represent essentially similar behaviours differing principally in outcome rather than process. Many instances of homicide would be more accurately considered a fatal assault:

> The difference between homicide and assault may simply be the intervention of a bystander, the accuracy of a gun, the weight of a frying pan, the speed of an ambulance, or the availability of a trauma centre.[539]

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[534] In England and Wales in 1997, a total of 735 deaths were initially recorded as homicide. By the time court proceedings were concluded in 2000 this figure had dropped to 612, as in some cases the death was reclassified as accidental or there was a conviction for a lesser offence - Home Office *Criminal Statistics for England and Wales 2000* (London: Home Office Stationery Office, 2001) 79

[535] For example, it is widely speculated that a number of unresolved disappearances of young women in the Dublin/Wicklow region between 1993 and 1997 were the result of the activities of a serial killer, though these cases are still regarded as 'missing persons'

[536] 'The interpretation of crime statistics in every country is fraught with difficulty. The problems are compounded in Ireland because of the over-reliance on police data, the compilation of which is poorly understood. Despite lengthy deliberations, an Expert Group, set up by the Minister for Justice, Equality & Law Reform, remained confused as to how the statistics were assembled and should be interpreted, a minority reporting that despite its best efforts it could "come to no conclusions about the quality, reliability and accuracy of Garda data"' – Expert Group on Crime Statistics *Report* (Dublin: Department of Justice, Equality & Law Reform, 2004) para. 2

[537] O'Donnell I 'Crime and its Consequences', in Fahey T, Russell H & Whelan C (eds.) *Best of Times? The Social Impact of the Celtic Tiger* (Dublin: Institute of Public Administration, 2007) 245, 246

[538] O'Keeffe C 'Calls for action over rising crime' (29 January 2008) *The Irish Examiner* 1

[539] Gottfredson M & Hirschi T *A General Theory of Crime* (Stanford: University Press, 1990) 34

When contemplating the factors responsible for the upward trend in homicide it is important to consider a trio of tentative explanations: the surge in alcohol consumption, recent population trends and the rise in internal organised crime conflict.

First, alcohol consumption in Ireland has tripled over the past four decades.[540] Studies have long attested that increases in both public disorder and lethal violence are intertwined with rising levels in alcohol ingestion.[541] The growth in beer sales has been identified as the single most important factor in explaining the escalation in violent crime.[542] Irish research has indicated that in approximately half the homicide cases the victim, perpetrator or both had a level of intoxication above that which would render driving illegal.[543] Alcohol lowers our inhibitions, often causing individuals to vent more freely pent-up frustrations, tensions and emotional conflicts.

Secondly, Ireland has an increasing population, one that has surged four times the European average over the last decade, aided and abetted by a rising birth rate and a period of unprecedented net inward migration.[544] If emigration was one of the factors responsible for the decline in homicide rates over much of the last two centuries[545], then it is reasonable to apportion this recent trend of net immigration to any current increase. Immigration brings in its wake a multi-cultural society, where different methods of personal dispute resolution and the readiness and frequency with which different cultures may resort to violence will be reflected in rising statistics for interpersonal violence that can result in homicide.

Thirdly, gangland killings, primarily related to illegal drug trading, an entrepreneurial industry that rose on the tide of the Celtic Tiger over the past decade "has risen to epidemic proportions"[546], becoming a major law-and-order concern:

> Contract killings and assassinations arising from internal feuds and turf wars among

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[540] In 1960 the average consumption per head of population in Ireland was 4.8 litres of *pure* alcohol per annum. This peaked at 14.4 litres in 2001, before falling slightly to 13.5 litres in 2003 – Strategic Task Force on Alcohol *Second Report* (Dublin: Department of Health and Children, 2004) 7-8

[541] Wolfgang M 'Victim-Precipitated Criminal Homicide' (1957) 48(1) *Journal of Criminal Law, Criminology and Police Science* 1, 9

[542] Field S *Trends in Crime and their Interpretation* (London: Her Majesty's Stationery Office, 1990)

[543] Dooley E *Homicide in Ireland 1992-1996* (Dublin: Stationery Office, 2001) 19

[544] The preliminary census figures for 2002 show an average annual net *inward* migration of 25,500 from 1996 to 2002, compared with an average annual net *outward* migration of 26,800 between 1986 and 1991 – Central Statistics Office *Census 2002: Preliminary Report* (Dublin: Stationery Office, 2002). The Central Statistics Office of Ireland quote a 46.8% increase in the official population figures in the forty year period from 1966 (2,884,002) to 2006 (4,234,900)

[545] O'Donnell I 'Lethal Violence in Ireland 1841-2003' (2005) 45 *British Journal of Criminology* 671

[546] Parole Board *Annual Report 2006* (Dublin: Parole Board, 2007) 4

> criminals, particularly drug-dealing cartels, are another new trend ... it is an extremely unwelcome development in Irish crime that ready resort is now made to lethal violence by ordinary criminals intent on exacting revenge, or intimidating others, or establishing and maintaining dominance in organised crime. The presence in Irish society of a number of criminals who are prepared to kill in cold blood for pay or under instructions marks a definite deterioration and an utterly reprehensible cheapening of the value of life.[547]

Though the public can appear apathetic toward gangland killings, of the view that those who live by the sword must die by the sword and that such acts are even perhaps helpful insofar as they entail criminals killing one another, subliminally these murders heighten our fear about the type of society we now live in. It is only when innocent victims get caught in the crossfire - like Donna Cleary[548], Anthony Campbell[549] or Shane Geoghegan[550] - that people become truly outraged, remonstrating about the modern scourge of organised crime and killings.

Table 7: Homicide Rate per Million of Population in EU Capital Cities

	1990 - 1992	*2000 - 2002*	*% change*
Dublin, Ireland	14.7	21.2	44.5
Vienna, Austria	22.1	28.4	28.6
London, England	24.7	26.7	8.2
Edinburgh, Scotland	21.2	16.4	-22.8
Rome, Italy	18.2	13.6	-25.3
Berlin, Germany	29.5	21.7	-26.4
Copenhagen, Denmark	25.3	16.0	-36.8
Stockholm, Sweden	37.7	22.0	-41.6
Paris, France	36.3	18.1	-50.1
Belfast, Northern Ireland	149.9	62.4	-58.4

O'Donnell I 'Crime and its Consequences', in Fahy T, Russell H & Whelan C *Best of Times? The Social Impact of the Celtic Tiger* (Dublin: Institute of Public Administration, 2007) 245, 253

Organised crime is mainly an urban phenomenon, epitomised by the fact that, geographically, the greatest number of gangland killings occur within the Dublin region, by far the most densely populated area in the country. It is this rising homicide rate in our capital city that distinguishes Ireland from her European contemporaries. Though the rate of lethal violence in Dublin is not out-of-step with that displayed in

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[547] O'Mahony P *Criminal Chaos: Seven Crises in Irish Criminal Justice* (Dublin: Round Hall Sweet & Maxwell, 1996) 177

[548] Mother-of-one Donna Cleary (22) died after shots were fired indiscriminately into a house where she was attending a 40th birthday party in Coolock, Dublin on 5 March 2006

[549] Apprentice plumber Anthony Campbell (20) was shot dead alongside crime boss Martin Hyland as he was fixing a radiator in the home of the latter's sister in Finglas, Dublin on 12 December 2006

[550] Limerick fitter and rugby team captain Shane Geoghegan (28) was shot dead on 9 November 2008, having been apparently mistaken for a man associated with one of the feuding gangs in the city.

other European capitals, it has increased dramatically at a time when the international trend is downward.[551]

The population of homicide has always been deeply male-gendered, reflecting, in part, different patterns of sociability.[552] Homicide remains an offence overwhelmingly perpetrated by males on other men - in nine out of ten incidences the offender is male while in nearly three-quarter of all cases so too is his victim.[553] In addition, the most exposed age group to homicide, as either perpetrator or victim, is that of younger men, for they are "too emotionally uncontrolled and physically powerful."[554]

The mean age of the homicidal perpetrator in Ireland is 29.6 yrs, with 81.3% of homicides committed by people in the 17-40 year-old age group.[555] Young people, as revellers, and specifically young males, are often tightly pressed or enmeshed together in very particular locations, like pubs, nightclubs, concerts, or outside on streets late at night. When coupled with the excessive ingestion of alcohol, these groupings foster tension-fuelled and potentially violent situations. Accordingly, it is also germane to consider the near doubling over the past four decades of the overall population that comprise of males in the 15-34 year-old age group who are most likely to cause and are at maximum risk from many of the aggressive behaviours that can result in homicide and thereby logical to conclude that as the overall number of potential perpetrators and victims increase one can statistically anticipate a comparative rise in its occurrence.[556]

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[551] O'Donnell I 'Crime and its Consequences', in Fahey T, Russell H & Whelan C (eds) *Best of Times? The Social Impact of the Celtic Tiger* (Dublin: Institute of Public Administration, 2007) 245, 252; Lally C 'Dublin murder rate is fastest growing' (20 March 2007) *The Irish Times* 4

[552] Maher L *Sexed Work* (Oxford: Clarendon Press, 1997) 33; Hagan J & McCarthy B 'Streetlife and Delinquency' (1992) 43(4) *British Journal of Sociology* 533; and Hagan J, Simpson J & Gillis A 'The Sexual Stratification of Social Control' (1979) 30(1) *British Journal of Sociology* 25

[553] Dooley E *Homicide in Ireland 1992-1996* (Dublin, Stationery Office, 2001) 1. Feminist critiques regularly highlight the maleness of crime, especially violent crime, with some suggesting that male-perpetrated homicide is best understood as the situational accomplishment of masculinity - Brookman F *Understanding Homicide* (London: Sage, 2005) 308. While it is blatant that men are statistically more prone to criminally violent behaviour than women, there should be some concern as to how masculinity as a gender is used to *explain* violent behaviour: 'Masculinity is often a gloss on complex social process. The concept is sometimes attributed a casual power – for example, that masculinity is said to cause a social problem, such as violence – when masculinity [itself] is rather the result of other social processes' – Hearn J *The Violence of Men* (London: Sage, 1998) 213

[554] Leyton E *Men of Blood: Murder in Modern England* (London: Constable, 1995) 209

[555] Taken in conjunction with the standard deviation (*i.e.*, the measure of spread around the mean value), it is apparent that the ages of perpetrators are closely clustered around this mean value - Dooley E *Homicide in Ireland 1992-1996* (Dublin, Stationery Office, 2001) 11

[556] The Central Statistics Office quotes the 2006 population estimates for 15-34 yr old males as 691,200, representing an 83.4% increases over the last four decades (1966 – 376,900)

Table 8: Homicide Victims in 2005 by Age and Gender

	Murder		Manslaughter	
Age	male	female	male	female
0-10	0	0	0	0
11-20	4	0	0	0
21-30	24	3	0	0
31-40	9	1	0	0
41-50	3	4	2	0
51-60	3	0	1	0
61-70	1	1	1	0
71+	1	0	0	0
TOTAL	45	9	4	0

Central Statistics Office *Statistical Yearbook of Ireland 2006* (Dublin: Stationery Office, 2006) 132

As homicide remains a relatively rare event in Ireland, one would suspect it is too random for analysis to provide any meaningful or defining information, yet studies have shown remarkable constants in its demography. The Department of Justice, Equality and Law Reform commissioned two separate studies, spanning between them twenty-four years from 1972 to 1996, which represent the most comprehensive dataset on homicide in Ireland.[557] Irish people, as it is elsewhere, discernibly kill and are killed by those with whom they have an intimate social connection, reiterating that homicide is seldom the feared random event between strangers. The affinity between victim and offender populations should not come as any surprise for they are typically aligned demographically, share similar characteristics, and will have had an intimate or long-standing and often acrimonious relationship.[558]

Table 9: Relationship between Victim and Perpetrator

	1972 - 1991	1992 - 1996
Married *(including de facto)*	51 (8.4%)	24 (11.7%)
Blood Relation	101 (16.6%)	34 (16.6%)
Friend *(person known >24 hrs)*	180 (29.5%)	78 (38.0%)
Acquaintance *(person known <24 hrs)*	86 (14.1%)	11 (5.4%)
Stranger	170 (27.9%)	48 (23.4%)
Unknown	22 (3.6%)	10 (4.9%)

Dooley E *Homicide in Ireland 1972-1991* (Dublin: Stationery Office, 1995) 15; *Homicide in Ireland 1992-1996* (Dublin: Stationery Office, 2001) 16

The motive in half of all homicides was shown to be anger or rage.

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[557] Dooley E *Homicide in Ireland 1972-1991* (Dublin: Stationery Office, 1995); Dooley E *Homicide in Ireland 1992-1996* (Dublin: Stationery Office, 2001). Given the substantial rise in homicide figures since 1997 it is unfortunate that a third analytical study has yet to be undertaken.

[558] Rock P 'Murders, Victims and Survivors' (1998) 38(2) *British Journal of Criminology* 185, 189; Fattah E *Criminology Past, Present, and Future – A Critical Review* (London: Macmillan, 1997) 247. Similarly, "when you bolt your doors at night to keep yourself safe from strangers you are locking yourself up with all those people most likely to do you harm" - Young J 'Murder Most English' (14 January 1987) 856 *Time Out* 5

Table 10: Motives for Homicide

	1972 - 1991	*1992 - 1996*
Anger/ Rage/Quarrel	248 (40.7%)	103 (50.2%)
Robbery	75 (12.3%)	14 (6.8%)
Jealousy	13 (2.1%)	7 (3.4%)
Revenge	30 (4.9%)	18 (8.8%)
Psychosis	31 (5.1%)	7 (3.4%)
Other Mental Disorder	27 (4.4%)	8 (3.9%)
Sexual	37 (6.1%)	9 (4.4%)
Self-Defence	44 (7.2%)	4 (2.0%)
Sadistic	17 (2.8%)	2 (1.0%)
Accident	19 (3.1%)	8 (3.9%)
Suicide Pact	0 (0.0%)	0 (0.0%)
Terrorism/Sectarianism	37 (6.1%)	3 (1.5%)
Gangland/Organised Crime	2 (0.3%)	15 (7.3%)
Other *	8 (1.3%)	1 (0.5%)
Unknown	22 (3.6%)	6 (2.9%)
Total	*610 (100%)*	*205 (100%)*

* other motives include recklessness, break up of a relationship, chronic child abuse, financial (insurance) gain, impusive (fear), concealment of birth, panic after childbirth and stress after childbirth - Dooley E *Homicide in Ireland 1972-1991* (Dublin: Stationery Office, 1995) 16; *Homicide in Ireland 1992-1996* (Dublin: Stationery Office, 2001) 16

The majority of homicidal incidents occur between 10pm and 4am, the outcome of the commonness of alcohol consumption during this timeframe.

Table 11: Time of Occurrence of Homicide Incidents

	1972 - 1991	*1992 - 1996*
04.00am - 12.00noon	57 (9.3%)	22 (10.7%)
12.00noon - 8.00pm	136 (22.3%)	39 (19.0%)
8.00pm - 4.00am	397 (65.1%)	132 (64.4%)
Unknown	20 (3.3%)	12 (5.9%)

Dooley E *Homicide in Ireland 1972-1991* (Dublin: Stationery Office, 1995) 15; *Homicide in Ireland 1992-1996* (Dublin: Stationery Office, 2001) 16

The location of a homicide is, more often than not, the victim's home or in a public place.

Table 12: Location of Homicide Incidents

	1972 - 1991	*1992 - 1996*
Victim's Home	220 (36.1%)	74 (36.3%)
Perpetrator's Home	37 (6.1%)	10 (4.9%)
Other Indoor Location	67 (11.0%)	16 (7.8%)
Outdoor (Private)	57 (9.3%)	23 (11.3%)
Outdoor (Public)	225 (36.9%)	79 (38.7%)
Unknown	4 (0.7%)	3 (1.0%)

Dooley E *Homicide in Ireland 1972-1991* (Dublin: Stationery Office, 1995) 15; *Homicide in Ireland 1992-1996* (Dublin: Stationery Office, 2001) 16

Homicide is not one unitary act or event. It assumes a number of very diverse and individualistic forms, with the only common factor being the death of the victim. Despite this, these studies surmise that the 'typical' homicide in Ireland entails the

killing of a male in his thirties by a somewhat younger man, who is known to him, at night, when one or both are intoxicated, and in the context of an affray.

Homicides which occur within a domestic setting or an emotional context seldom go unsolved because they involve persons known to each other and typically take place in transparent circumstances, where suspects or witnesses are readily at hand, or that the heat of the moment nature of the killing leaves plenty of evidence. In comparison, the conviction rate for gangland killings is considerably lower, for they are well planned and meticulously carried out, often professionally, often with too many suspects to concentrate the investigation. Of the 127 such killings that have occurred in the eleven years, there have been just fourteen convictions.[559] This poor conviction rate (9%) ensures that organised criminals will continue to kill each other relatively unperturbed by fear of getting caught, despite the fact that the then Minister for Justice, Equality and Law Reform, Michael McDowell, likened a run of killings by gangs in 2004 to the "last sting of a dying wasp"[560], intimating that such slayings were coming to an end. However, there were a (at that time) record number of gun killings in Ireland in 2006, twenty-five in total, including five in just six days in December.[561]

Homicide is a crime difficult to predict and therefore hard to combat.[562] Thus it is vital that offenders are detected and successfully prosecuted, so that this may act as a deterrent to others. Somewhat surprisingly, the matter of detection rates seldom receives any oxygen in the context of debate concerning victims' rights, yet surely there could be nothing more central to their concerns.[563] Official figures show that in seven out of ten homicides the perpetrator is detected[564], but the use of the term *detection* includes those homicides where An Garda Síochána are satisfied as to the likely identity of the perpetrator even when no-one is prosecuted, as is often the case

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[559] Bracken A 'Gangland Killers Getting Away with Murder' (7 September 2008) *The Sunday Tribune*

[560] Anderson P 'Gangland killings on the wane, McDowell declares' (22 November 2004) *The Irish Times*

[561] Lally C & MacCormac R 'Murder toll in six days rises to five after Dublin shooting' (14 December 2006) *The Irish Times* 1

[562] 'It is difficult to pre-empt or prevent a homicide because many a killing is an action quite out of keeping with the normal character of the man or woman who commits it' – Wootton B 'Morality and Mistakes', in Blom-Cooper L (ed.) *The Hanging Question* (London, Duckworth, 1969) 18

[563] Gillane S 'Balancing the Scales in a Homicide Trial: A Reply' [2007] 1 *Judicial Studies Institute Journal* 30, 31. "Every unpunished murder takes away something from the security of every man's life" – Daniel Webster, American Senator (1782-1852)

[564] Taking the average number of murders listed as detected within the Annual Reports of An Garda Síochána from 2002-2007

with gangland killings. Despite this competency in detection, the actual conviction rate for some form of homicide is generally half of all instances.[565]

Conclusion

We live in a time of rising murder rates. What was, a few decades ago, a rare event that captured the nations front-pages for months on end has, in recent years, become more than a once-a-week occurrence, where killings are quickly replaced in the public consciousness by fresh instances, and some do not even make headlines. Given this increase, it is important that the structure of homicide retains the crime of murder as the apex of fatal offences and that it is not amalgamated into some catchall criminal homicide charge. Nor should the life-sentence be removed as the mandatory consequence of a murder conviction. To do either has the potential to dilute our reaction to the offence, both legally and sociably, and will represent to many a devaluation of life that is disrespectful to the victim and his family.

Though I believe that the framework of homicide must remain unaltered, the law concerning individual homicidal offences is sorely in need of legislative alteration and clarification. For example, as previously discussed, the definition of murder should be widened to encompass persons who commit a killing recklessly under circumstances manifesting an extreme indifference to the value of human life. The term *intent* in respect of murder should be defined in statute and in addition to its ordinary meaning of a conscious objective or purpose it should also embrace the foresight of a virtual certainty. There is also a clear need to prescribe the common law doctrine of provocation in statute. The Law Reform Commission, following on from a comprehensive assessment of the law in other jurisdictions and consultation with legal professionals here, have recommended these and other changes to be made to the law of homicide[566], yet successive governments have shied away from taking action. It is essential, particularly in an era of growing interpersonal violence, and given the significance of a loss of life, that homicide offences, and the definitions thereof, are unambiguous and properly group together, under suitable offences with fitting punishments, the various unlawful acts and intents that result in death. Let us not

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[565] Dooley E *Homicide in Ireland 1992-1996* (Dublin: Stationery Office, 2001) 19

[566] See, for example, Law Reform Commission *Consultation Paper - Homicide: The Mental Element in Murder* (Dublin: Law Reform Commission, 2001); Law Reform Commission *Consultation Paper - Homicide: The Plea of Provocation* (Dublin: Law Reform Commission, 2003); and Law Reform Commission *Report - Homicide: Murder and Involuntary Manslaughter* (Dublin: Law Reform Commission, 2008)

forget that in its worst forms homicide is the most heinous kind of offence but that, problematically, in some other embodiments it is understandable and even perhaps forgivable. We should treat the charge of homicide and the range of defences to it with the clarity and respect it so blatantly demands.

Though homicide remains a relatively infrequent event, the need for criminal justice to respond to its most atrocious offences in a principled, fair and rational manner should be unaffected by the volume of those offences.[567] Moreover, the increasing regularity with which homicide is taking place has clearly "cheapened" human life.[568] It is a lamentable act, one that causes untold trauma to co-victims. Homicide stuns, diminishes, terrifies, angers, pains, frustrates, and mystifies society; it embraces and challenges our strongest emotions, our sense of injustice and our concept of death. Each homicidal incident affects our sense of safety, fairness and justice, each is a scourge upon society. To deny its effect on the general public is to deny the human capacity for empathy.[569]

In a small country like Ireland, homicide is no longer an incident that happens to somebody else; increasingly we all know a family who has been affected by it. Sight is often lost of the fact that each killing is not only a loss of life but represents a family decimated, that each victim, irrespective of which strata of society they come from or why they came to be killed, is someone's parent or child, brother or sister, loved one or friend, and that the needs and concerns of homicide co-victims will be of relevance to at least another eighty families next year, and unfortunately, if current trends ensue, probably many more.

Having examined the crime of homicide, by way of the law and its frequency in Ireland, the focus of this thesis now turns to the sentencing standards for murder and manslaughter, and the long-term management of those so sentenced.

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[567] Ashworth A & Mitchell B (eds) *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) 3

[568] Parole Board *Annual Report 2004* (Dublin: Parole Board, 2005) 5; Parole Board *Annual Report 2006* (Dublin: Parole Board, 2007) 4

[569] Spungen D *Homicide: The Hidden Victims* (London: Sage, 1998) 10

CHAPTER 4

Post-Conviction

The Punishment and Parole of Homicide Offenders

It is hardly surprising, notwithstanding the Supreme Court ruling that "sentencing is neither an exercise in vengeance, nor the retaliation by victims on a defendant"[570], that one of the main concerns articulated by co-victims centres on the punishment of homicide offenders. It is both a persistent and understandable response to the killing of a loved one to demand that those who commit such a violation be fittingly punished.

This chapter examines these concerns by first observing the comparative brevity of time those convicted of murder spend incarcerated as part of the mandatory life-sentence imposed, questioning whether the judiciary should be permitted, in certain circumstances, to place guarantees on the duration of the sentence to be served in prison by attaching to it a no parole or a no parole before a specified time condition. The focus then shifts to the sentencing of those convicted of manslaughter. Many co-victims express confusion and dismay with what they perceive to be lenient and inconsistent sentencing, and some recommendations are proffered to achieve consistency in sentencing. This is followed by an overview of the parole system and an examination of how the co-victim might be able to partake in that process. However, before embarking on an appraisal of the sentencing standards for murder and manslaughter in Ireland, and the long-term administration of those sentences, it is first worth making some general comments on sentencing and criminal punishment.

[570] *People (DPP) v M* [1994] 3 IR 306 at 317, *per* Denham J

Sentencing in Ireland

Punishing offenders is the ultimate enactment of criminal justice. The existence of a system of penal sanctions forms part of the environment in which society creates and reinforces its sense of social values and demonstrates its rejection of criminality and contributes, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe community. The lynchpin of sentencing is the notion of measured communal blame, whereby the offender is punished because he has transgressed standards agreed upon by the community. The classic objectives of the criminal penal sanction are deterrence (both individual and general), retribution, incapacitation (so that, where necessary, offenders are sequestered from society), the denouncement of unlawful conduct, and rehabilitation. Although at different times different reasons have been in ascendancy, one single justification never entirely dominates the imposition of the prison sentence; hence any penalty imposed must reflect these overlapping purposes. For this reason there is and can be no convenient or precise sentencing formula.[571]

As there is a constitutional guarantee that the criminal trial in Ireland must be fair and conducted in the due course of law, and as sentencing is "a vital part of the unconcluded criminal trial"[572], it logically follows that sentencing must also incorporate these constitutional guarantees.[573] The traditional approach in Ireland, subject to few but important exceptions[574], is that sentencing be left to the discretion of the judiciary, who, having regard to statutory *minima* and *maxima*, impose a proportional penalty. The dominant principle to emerge from the Irish courts is that the sentence imposed must be proportionate to both the gravity of the offence *and* to the personal circumstances of the offender:

> The imposition of a particular sentence must strike a balance between the particular

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[571] Green G 'The Concept of Uniformity in Sentencing' (1996) 70 *Australian Law Journal* 112; Henderson L 'The Wrongs of Victim's Rights' (1985) 37(4) *Stanford Law Review* 937, 987

[572] *R v Olbrich* (1999) 199 CLR 270 at 282, *per* Kirby J (High Court of Australia)

[573] In *Nevin v Crowley* [1999] 1 ILRM 376 (HC), [2001] 1 IR 113 (SC), the offender, on being convicted in the District Court, was remanded for the preparation of a probation report on his suitability for community service. While leaving the court he made a remark to the Gardaí present, to which they took objection, and he was immediately brought back before the judge, who there and then sentenced him to six months imprisonment and disqualified him from driving for two years. In judicial review proceedings, he contended that his solicitor and counsel had been afforded no opportunity to cross-examine the prosecuting Garda or to make submissions as to sentence. Neither the High Court not the Supreme Court had any difficult in quashing the sentence imposed on the grounds that the sentencing judge, in reaching sentence, had not exercised procedural fairness.

[574] There are a small number of offences that have fixed prescriptive punishment. The most notable and relevant to this study are murder, for which there is a mandatory life-sentence, and statutory murder, where the court is obliged to impose imprisonment for a period of not less than forty years to be served.

> circumstances of the commission of the relevant offence and the relevant personal circumstances of the person sentenced.[575]

The first element of this principle, that the punishment fit the crime, requires that the penalty be scaled relative to the severity of the infraction (though this does not mean that the punishment has to be in any way equivalent to the crime committed). This is measured by reference to the harm caused or risked by the offender and his culpability. *Harm* in this context relates to the extent of injury caused or risked by that conduct - the more grave the harm, the more serious the offence and the resultant punishment it merits. *Culpability* refers to the concept of blameworthiness, which requires that the degree of criminal responsibility and quantum of punishment be linked to the personal awareness of the consequences of ones conduct.[576]

The second element, that the punishment must also take account of the personal circumstances of the offender, tailors and individualises the sentence for each offender, the essence of which was well expressed by the Court of Criminal Appeal in *People (DPP) v McCormack*[577]:

> Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but *the appropriate sentence for the crime because it has been committed by that accused.*[578]

In *People (DPP) v C (W)*[579], the Central Criminal Court located the proportionality principle in sentencing within a constitutional context: "the selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality"[580]:

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[575] *People (DPP) v C (W)* [1994] 1 ILRM 321 at 324, *per* Flood J

[576] von Hirsch A *Doing Justice: The Choice of Punishments* (New York: McGraw-Hill Ryerson, 1976) 79

[577] [2000] 4 IR 356

[578] *ibid.*, at 359, *per* Barron J {*emphasis added*}. Similarly, "[It is] the duty of the Courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – *not only in regard to the particular crime but in regard to the particular criminal*" – *People (AG) v O'Driscoll* (1972) 1 Frewen 351 at 359, *per* Walsh J {*emphasis added*}. Foucault has referenced the key to this notion of individualised punishment as a "biographical investigation", whereby the causes of the crime must be sought in the story of the offender's life – Foucault M *Discipline and Punishment: The Birth of the Prison* (New York: Vintage, 1979) 252

[579] [1994] 1 ILRM 321

[580] *ibid.*, at 324, *per* Flood J. O'Malley notes that the question of whether adherence to the proportionality standard within a sentencing context is actually a constitutional imperative as well as a rule of law has yet to be argued in detail before the superior courts, though on the basis of the decisions already made by the Supreme Court in *State (Healy) v Donoghue* [1976] IR 325 and *People (DPP) v M* [1994] 3 IR 306, he finds it difficult to foresee a rejection of the proposition that such a mandate exists. However, in the unlikely event

> As a concept, proportionality enjoys a high level of intuitive acceptability. It seems right that a reaction should be proportionate ... to the stimulating act ... The principle that punishment should be proportionate to the crime and the circumstances of the offender also has a sound moral basis. Criminal liability should not be imputed to a person unless he has committed a prohibited act or omission with the requisite level of culpability. Just as it would be wrong to hold a person guilty of a crime for which he was not morally responsible, so it would be wrong to punish him in a manner or to an extent that was out of proportion (in the sense of being excessive) to his actual culpability ... Proportionality fits well with classical behavioural theories and, in more recent times, rational choice theory. If crime is treated as the product of a freely willed act or omission, the application of proportionate punishments becomes readily defensible.[581]

Implicit in the requirement to give consideration to the personal circumstances of the offender is an obligation to give due credit for mitigating factors in each case in which the court has a discretionary sentencing power, irrespective of the nature or gravity of the offence.[582] There are those who opine that sentencing should be determined solely on the basis of the crime committed, that mitigating factors are subjective and therefore immaterial in assessing punishment. The manner in which an offender commits a crime might intuitively seem relevant to the determination of punishment, or indeed to his future dangerousness, but it is only of limited usefulness.[583] For example, the fact that a homicide is committed in a particularly vile way does not necessarily mean that its perpetrator is more likely to commit a second violent act than a more fastidious killer.[584]

However, no term is more popular in the lexicon of progressive reformers than *the individual*, adamant as they are that the criminal law must respond to each offender and not to uniform categories of offences, a sentiment embodied in the popular slogan "treat the criminal, not the crime", a rehash of the dominical proverb "love the sinner, hate the sin." This motto dually espouses for solving the social conditions that beget crime - *viz.*, a culture of unemployment; poverty; inadequate schooling; the increasing

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that proportionality was held to lack a constitutional foundation, it would still enjoy a strong and independent existence at common law - O'Malley T *Sentencing Law and Practice* (Dublin: Thomson Round Hall, 2006) 88

[581] O'Malley T *Sentencing Law and Practice* (Dublin: Thomson Round Hall, 2006) 80-81

[582] Some mitigating matters advanced by the defence may be relevant to *both* offence gravity and the personal circumstances of the offender.

[583] Henderson L 'The Wrongs of Victim's Rights' (1985) 37(4) *Stanford Law Review* 937, 989

[584] Slobogin C 'Dangerousness and Expertise' (1984) 133 *University of Pennsylvania Law Review* 97, 153-154

use of violence as discourse; the wide availability and consumption of drugs; and the changes in traditional institutions of social control such as the family and established religion - whilst supporting the use of mitigating factors in determining sentence.[585] Resultantly, "a whole set of assessing, diagnostic, prognostic, and normative judgments concerning the criminal have become lodged in the framework of the penal sanction."[586]

This process of sentencing - of fitting the punishment to the crime with an understanding for the individual offender - essentially fosters a symbiotic relationship between the blame game, where we are driven to ever more drastic penalties that we then hesitate to enforce in their entirety, and the abuse excuse, where we find ourselves drawn to open-ended psychological defences and blame-shifting strategies, yet censure the system for being soft on crime:

> Our society holds superficial, emotion-laden, and powerful – but utterly conflicting – intuitions about just what it wishes to accomplish in the administration of criminal justice ... instincts that not only change from time to time but more interestingly differ at a wholesale level of abstract policy from the retail level of individual cases.[587]

In the wake of high-profile trials that fail to deliver the verdict or penalty the masses want we castigate the legal system. We clamour for justice when what is really sought is retribution. We pay respect to due process and say offenders deserve to be rehabilitated when in truth we hold a Manichean view of *us* and *them*, wanting to cast criminals out from society by delivering upon them harsh or harsher sentences. Any show of compassion toward or effort to humanise the punishment of an offender is twisted into a disregard for the victim and his suffering, easily represented as some insult to him and his family.[588] Despite this dysfunctional fusion of retribution and empathy it remains that we must always condemn and seek to deter criminal acts when the perpetrator could have done otherwise, even if his motivations evoke our sympathy:

> The purpose of the trial is to stand by the victim ... a just legal system must stand by its victims ... by seeking to punish the guilty we do not abandon the innocent who

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[585] Rothman D *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* (New York: Harper Collins, 1980) 10; Law Reform Commission *Report - Sentencing* (Dublin: Law Reform Commission, 1996) 18

[586] Foucault M *Discipline and Punish: The Birth of the Prison* (London: Allen Lane, 1977) 18

[587] *Schulhofer S 'The Trouble with Trials; the Trouble with Us' [1995] 105* Yale Law Journal 825, 828

[588] Garland D *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) 143, 180

suffer.[589]

However, punishment should be viewed as a tragic and preferably modulated necessity rather than the righteous condemnation of a wholly nefarious offender to vindicate an utterly innocent victim, imposed not in anger but with regret, for "it demeans a system of justice if its process is one of vengeance or has such a perception. It evokes concepts of primitive jurisprudence."[590] Still, whilst the individual circumstances of the offender may shorten the duration of the penal sanction, and rehabilitation is now, debatably, the over-arching goal of criminal justice, the hallmark of imposing a custodial sentence should never be mistaken for anything other than retribution, the punishment of the offender for breaching the law:

> We pursue retribution in some cases, even if no crimes are reduced thereby, because we wish to display society's contempt for certain acts. For example, the spouse-killer deserves punishment, even if all such killings unambiguously were acts of momentary passion and hence undeterrable, and even if the spouse-killer could somehow be personally incapacitated by preventing him from acquiring another spouse. Nevertheless, a moral outrage must be articulated, and punishment for retributive purposes alone performs that role...If one were restricted to just a single objective for guiding the imposition of all sentences, then retribution is probably the most reasonable one to employ. It reflects the fact that one primary consideration in choosing a penalty is the seriousness of the offence.[591]

The Management of the Mandatory Life-Sentence for Murder

A conviction for murder, as provided for by s.2 of the *Criminal Justice Act 1964*, results in penal servitude for life. Previously, when the death penalty was practised, to destroy life was to forfeit the right to life. Since its eradication, its modern version is the forfeit of the right to life *in society*. Even in this context the term *life* is something of a misnomer, for while there is no guaranteed release date and although some may well serve out the remainder of their life in prison, it seldom translates to a sentence of incarceration determinable upon the lifespan of the offender.

A judicial recognition of this was evident in *People (DPP) v Whelan*.[592] Having admitted guilt, Peter Whelan was sentenced to life for the brutal murder of Nicola

[589] Fletcher G *With Justice for Some: Protecting Victims' Rights in Criminal Trials* (Massachusetts: Addison-Wesley, 1995) 256-258

[590] *P.T. v DPP* [2007] IESC 39, *per* Denham J

[591] Blumstein A 'The Search for the Elusive Common Principle' (1987) 82(1) *Northwestern University Law Review* 43

[592] (Unreported, Central Criminal Court, 20 December 2002)

Sweeney and given a further fifteen years for the attempted murder of her friend, Sinead O'Leary. Carney J, in a unique departure from sentencing norms, directed that due to the horrific circumstances of this outrage the latter sentence should run *consecutively* to the life-sentence. This was appealed on the grounds that as a life-sentence meant life placing a consecutive sentence upon it could not then extend it. The Court of Criminal Appeal, in acknowledged that a life-sentence does not always result in life imprisonment but does, however, amount to a life of liability to that sentence, thus making the consecutive sentence somewhat redundant, simply mirror-imaged the sentence so that the fifteen years for attempted murder was to be served by the offender *prior* to commencing his life-sentence for murder in 2017.

Homicide co-victims are quite right when they point out that societies liberalism has paved the way for a lighter response to the act of murder, noting that the true sentence has been reduced in just five decades from execution to an average of just fourteen years spent incarcerated.[593] Be that as it may, it is now widely accepted that offenders serving life-sentences who have spent a considerable number of years imprisoned and who are deemed suitable for release ought to be paroled at an appropriate time for reintegration into society, though each case is dealt with on its own merits and the actual length of detention can vary significantly.[594]

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[593] Michael Manning, the twenty-fourth and last person to be executed in the Republic of Ireland, was hanged on 20 April 1954 after being found guilty of the murder of Catherine Cooper. The last two death sentences were issued on 3 December 1985 to Michael McHugh and Noel Callan for the fatal shooting of Sergeant Patrick Morrissey, but these were commuted to a minimum of forty years imprisonment.

[594] Nevertheless, the imposition and implementation of the life-sentence varies across Europe. For example, in Austria and Germany, the minimum term of a life-sentence to be served before the prisoner can apply for parole is fifteen years. In Denmark, prisoners sentenced to life serve, on average, sixteen years. In Greece, a "life term" lasts twenty-five years, though the prisoner can apply for parole after sixteen. In France, life-sentenced prisoners are eligible for parole after eighteen years has been served (or twenty-two for recidivists), though they may be released early for serious health reasons. In Romania, parole is only possible after twenty years. The average period of a life-sentence served in Sweden is twenty-two years. In Russia, "conditional early relief" is only possible after twenty-five years. In Hungary, the court determines a period between twenty and forty years for life imprisonment, after which parole can be requested, though the offender can also be condemned to life imprisonment excluding the possibility of parole. In Poland, a life-sentenced offender must serve twenty-five years in order to be eligible for parole, though the court may choose to set a higher minimum term during sentencing (the highest set so far was fifty years in 2002). In Portugal, life imprisonment is limited to twenty-five years, though the vast majority never serve more than twenty. In Italy, an offender sentenced to life may, after twenty-six years served in prison, or twenty-one in cases of good behaviour, be paroled. However, ten years into that sentence, or eight in cases of good behaviour, he may be granted permission to work outside the prison during the day or spend up to forty-five days a year at home. In Belgium, the life-sentence is assimilated to thirty years, with eligibility for parole after ten (or twenty for recidivists). In the Netherlands, life imprisonment almost always means exactly that. The offender may apply for parole, but it can only be granted by Royal Decree and is almost never successful, with only two people, both being terminally ill, granted clemency since 1940. In Estonia, life strictly means imprisonment until death, and while it is theoretically possible that the President may grant clemency, this has yet to occur. In England and Wales, a life-sentence is of indeterminate length, though in can, in exceptionally grave cases, mean life. The *Criminal Justice Act 2003* set out guidelines for how long murderers should spend incarcerated before eligibility for parole. Essentially multiple murderers whose crimes involved sexual abuse, pre-planning, abduction, or terrorism should never be released, while other

The life-sentence is now widely regarded as incompatible with the human dignity of convicted persons[595], though it is important to note that this is in the context of imposing a life-long life-sentence, as opposed to a life-sentence with the possibility of parole. For example, the Federal German Constitutional Court found life imprisonment without the mere possibility of parole to be antithetical to human dignity:

> Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The State] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth.[596]

Humanitarian considerations suggest it would be inherently wrong to deprive a person of all hope of release[597], for this would militate against any meaningful rehabilitation. An indeterminate release date leaves open a tunnel of hope for the prospect of release within a reasonable time and may encourage the offender to reform or conform. The release does, however, have life-long conditions attached:

> The essence of a life sentence is the *liability* to be detained for life; however long or short a period a life sentence prisoner has actually served before he is released on licence, he remains subject to recall for the rest of his life.[598]

Therefore those so sentenced continue to serve that sentence, subject to conditions that may entail a prohibition on residing in certain locales, whilst on release. Should an offender breach the conditions set down as part of his release, or come to the notice of An Garda Síochána, he may, without warrant or court proceedings, be returned to prison to continue serving that life-sentence.

The postal survey conducted as part of this thesis asked Irish legal professionals what they would regard as a suitable *average* period of time of the mandatory life-sentence to be served imprisoned for those convicted of murder.

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multiple murderers should serve a minimum of thirty years. This minimum should also apply to single murders involving sexual or racial motives, firearms or the killing of a police officer, with most other murders subject to a fifteen year minimum.

[595] See generally deBeco G 'Life Sentences and Human Dignity' (2005) 9(3) *International Journal of Human Rights* 411

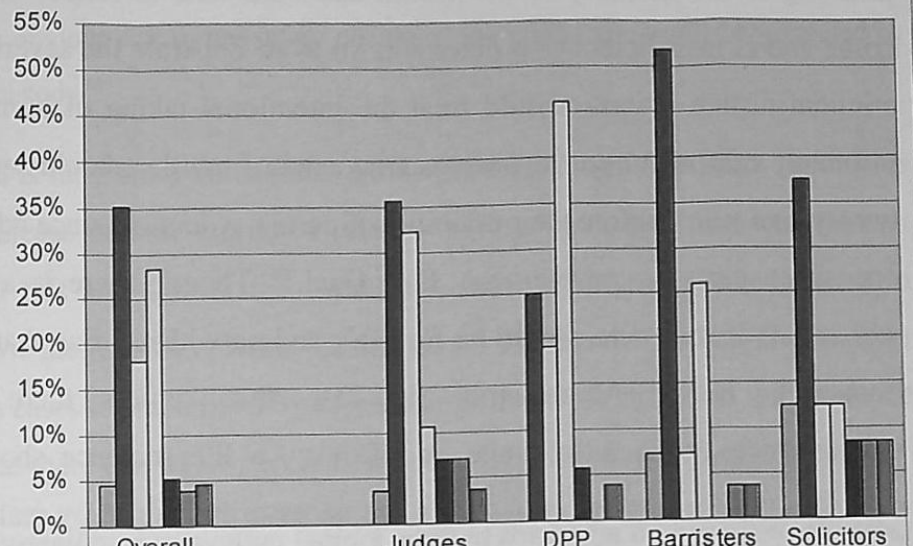
[596] *Re Life Imprisonment* (1977) 45 BVerfGE 187, at 228 – It was held here that although life was a competent sentence and every prisoner does not have to be released, each must have a realistic chance for eventual release, provided that he is rehabilitated and no longer considered dangerous.

[597] Many families state that they themselves are living a life-sentence from which there is no parole, and express anger that humanitarian concessions are granted to the offender when he himself, by killing, acted so inhumane.

[598] Criminal Law Revision Committee *Penalty for Murder* (London: Her Majesty's Stationery Office, 1973) para. 12

What would be, in your professional opinion, the desired average duration of a mandatory life sentence served?

(N = 131)



	Overall	Judges	DPP	Barristers	Solicitors
9-11 yrs	5%	4%	0%	7%	13%
12-14 yrs (Current*)	35%	36%	25%	52%	38%
15-17 yrs	18%	32%	19%	7%	13%
18-20 yrs	28%	11%	46%	26%	13%
21-23 yrs	5%	7%	6%	0%	8%
24-26 yrs	4%	7%	0%	4%	8%
Other	5%	4%	4%	4%	8%

The largest group of respondents (35%) were in favour of the status quo, whereby the offender convicted of murder serves, on average, thirteen years of his life-sentence incarcerated before parole. This is, nevertheless, somewhat misleading when compared to other statistics thrown up by the responses. For example, three-fifths (60%) of respondents endorsed a preference that the offender serves a period of his life-sentence *greater* than the current average. In addition, over a quarter (28%) wanted a minimum period of 18-20 years to be served before parole.[599]

AdVic have repeatedly expressed concern as to what duration actually constitutes

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* The Minister for Justice, Equality and Law Reform, Michael McDowell (as he was then), in his address *Sentencing in Ireland* at the Edward O'Donnell McDevitt Symposium on Criminal Law, held at the Honourable Society of King's Inn, Dublin (20 February 2004), stated that of the fifty-one life-sentenced prisoners who had been released over the past decade the average sentence served was just over 13½ years. This figure, a rollover average likely to increase incrementally, reflects only relatively recent trends, with approximately eight years the average served just two decades previous. It also relates to a control group consisting only of prisoners who have been released and does not take into account those still in custody who are serving periods ranging from weeks to almost forty years. For instance, in February 2007 there were 234 prisoners serving a life-sentence, sixty-four of which were in their fourteenth year or more of that sentence, including, since 1974, John Shaw and Geoffrey Evans, 1982, Malcolm Macarthur, and 1985, Michael McHugh and Noel Callan - Information provided be email from Betty McGrath, Irish Prisons Service (13 February 2007)

[599] Many of the 5% who responded 'Other' wrote varying comments reflecting the sentiment "life should mean life", with none indicated a preference for a period below the lowest option of 9-11yrs.

a life-sentence, believing that offenders who set out to murder should spend a considerable period of time in prison. They argue that the current average served is insulting to the memory of the victim and both fails to reflect the enormity of the crime and is insufficient as a deterrent. So as to illustrate the severity with which the criminal justice system should treat the intentional taking of human life, AdVic is resolutely campaigning that persons convicted of murder should serve a minimum of twenty-five years before the possibility of parole, a demand since adopted by the main opposition party to government, Fine Gael.[600] Though there is a strong sentiment within AdVic that "life should be for life", and notwithstanding that in 2006, the then Taoiseach, Bertie Ahern, told the Dáil that "unless there are extenuating circumstances, such as old age or infirmity, a life sentence should mean life"[601], decisions concerning reforms sought are necessarily hedged by realistic expectations, and having taken legal advice on the matter, AdVic subsequently chose to campaign for life to represent a mandatory minimum of twenty-five years imprisonment:

> Realistically, we had to look at what we could achieve ... there was no point in coming out screaming for immensely harsh retribution that [we're] not going to get, we've all known that from the beginning.

The Chairman of the Parole Board, Dr Gordon Holmes, has repeatedly commented on the importance of ensuring that those convicted of murder spend significant periods of time in prison:

> Whilst each case must be carefully considered on its own merits, nonetheless a message must go out to the public that persons who are convicted ... of murder will serve a very long sentence indeed ... the seriousness of the crime of murder must be reflected in the length of time served by those convicted.[602]

Former Minister for Justice, Equality and Law Reform, Michael McDowell, previously indicated that the trend towards longer periods of imprisonment being served shall continue:

> When an adult commits a murder, often in a cold blooded fashion, then he must be in no doubt of the consequences – he will serve a long prison sentence following conviction for such a heinous and despicable crime. In cases characterised by

[600] 'Fine Gael said that the 2007 crime figures underlined the need for convicted murderers to serve 25 years in prison and for those imprisoned for gangland crimes to lose remission' Lally C 'FG/Labour want tougher approach to drug-dealers' (29 January 2008) *The Irish Times*

[601] O'Regan M 'Taoiseach says life sentence 'should mean life'' (3 March 2006) *The Irish Times*

[602] Parole Board *Annual Report 2004* (Dublin: Parole Board, 2005) 3-5

> aggravating factors such as cruelty, the use of firearms ... gangland motivation, or significant premeditation ... longer sentences of at least 15-20 years should be served. Likewise, where the perpetrator, by his crime or by his personality or behaviour remains an obvious risk to the safety of others, the public good will be protected by extended custody.[603]

However, in what is far from a transparent parole process, future Ministers for Justice may decide to release certain murderers after a shorter period of incarceration. A safeguard against this and against the overall arbitrariness of the parole process in general, is to allow the judiciary, when passing down the mandatory life-sentence for murder in certain cases characterised by aggravating factors, to attach to that sentence a qualification that there can be *no parole* or *no parole before a specified time*.

In cases characterised by aggravating factors, should the judge be permitted to state, when passing down the mandatory life sentence in murder, that this sentence carries with it, as permitted in other jurisdictions, the classification -



Results of the postal questionnaire reveal that a mandatory life-sentence with the caveat of *no parole* is opposed by three-quarters of all respondents (75%). However, a similar number were in favour of a practice whereby the judiciary may pass a life-

[603] Quoting from his address at the launch of the 2005 Annual Report of the Parole Board (24 March 2006)

sentence with the stipulation *no parole before a specified time* (71%), recognising that certain murderers, due to the circumstances of the killing, should be treated more severely. It has been referenced elsewhere in this research that one school of thought holds mandatory life for murder as outdated and unjust, leading as it does to dissimilar cases treated similarly. For them, a system of *no parole before a specified time* is perhaps a compromise, operating as a judicial nod to the release of less liable offenders early whilst guaranteeing the longer detainment of those deemed more culpable. It is a strange anomaly not to permit the judiciary to distinguish between different categories of murders by imposing varying lengths of time of the life-sentence to be served imprisoned before parole is possible when, to all intents and purposes the Executive, through the Minister for Justice, Equality and Law Reform, does exactly that when he makes his final determinations on parole, and, even more worryingly, does so clandestinely, behind closed doors.

There are those who advance that the judiciary cannot predict or assess circumstances such as the rehabilitative efforts of and the threat to public safety posed by the offender at the time of sentencing, matters which are greatly significant when the issue of parole is being considered. Nevertheless, with or without a discretionary proviso of *no parole* or *no parole before a specified time*, the rationale behind the life-sentence for murder remains wholly punitive, thereby delivered with retrospective purpose, and has been held by the Irish courts to contain no element of preventive detention.[604] In cases of murder, the court merely concerns itself with past events and therefore should be afforded the opportunity to single out particular killings that are exacerbated by the use of cruelty, firearms or the exercise of significant premeditation for guaranteed minimum periods of detainment before possible parole. In accord with general humanitarian thought on the matter, it is recommended that the judiciary should *not* be able to pass down a mandatory life-sentence with the condition of *no parole*.

Sentencing for Manslaughter

Manslaughter can literally range from an act that is little more than accidental or negligent to something involving a murderous intent excused by provocation:

> Of all the crimes in the calendar, [it] faces the sentencing judge with the greatest problem, because manslaughter ranges in its gravity from the borders of murder right

[604] *Whelan & Lynch v Minster for Justice, Equality & Law Reform & Attorney General* [2007] IEHC 374

down to those of accidental death.[605]

To reflect the extent to which manslaughter can vary in context and gravity, the courts are invested with a wide-ranging discretion in sentencing a person so convicted. Though unusual, the imposition of a life-sentence for manslaughter can be justified in exceptional cases.[606] At the lower end of the gamut, in instances where little violence was intended, where the killing was in response to severe provocation, or where there existed other mitigating factors, manslaughter can attract a light custodial or even suspended sentence:

> In considering cases of manslaughter the court inevitably looks at a number of factors to determine the appropriate sentence. First, the court will examine the context in which the death was caused. If it is particularly reprehensible conduct ... the court is bound to impose a longer sentence than otherwise might be the case ... The next factor that inevitably has to be considered ... is whether violence of any kind was contemplated or intended by the defendant. There will be manslaughter cases ... where the defendant never contemplated or intended any violence at all. Where actual violence is clearly intended the sentence must inevitably reflect both the fact of that intention and the extent of the violence contemplated ... A further factor to consider is the behaviour of the defendant after inflicting the unintended serious injury.[607]

In a trilogy of Irish cases, the Court of Criminal Appeal found that the trial judge had erred in principle when determining the proper approach toward manslaughter sentencing. In *People (DPP) v Dillon*[608], the Court ruled that a bid by White J to stem the epidemic of fatal stabbings by introducing a deterrent sentence of a minimum of twenty years where a knife was used and a life taken was erroneous in principle by his placing of knife fatalities into a special category of manslaughter and by assigning, no matter what the circumstances, a minimum sentence, and therefore reduced the original sentence to one of eight years. Similarly, in *People (DPP) v Kelly*[609], the Court again replaced a fourteen-year sentence with one of eight. On this occasion, White J had structured the sentence for a fatal stabbing by stating that a sentence of

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[605] *R v Walker* (1992) 13 Cr App R (S) 474 at 476, *per* Lord Lane CJ

[606] In the Supreme Court case of *People (DPP) v Conroy (No. 2)* [1989] IR 160, Finlay CJ stated, albeit *obiter*, that there was no presumption that a particular instance of the crime of manslaughter could not, from a sentencing point of view, be as serious as, or more serious than, an instance of the crime of murder and further that there was no sentencing principle which would inhibit a court from imposing the maximum permissible sentence for manslaughter merely on the grounds that such a sentence had not been imposed in recent times.

[607] *Attorney-Generals Reference No's 19, 20 & 21 of 2001* [2002] 1 Cr App R (S) 33, 136

[608] (Unreported, Court of Criminal Appeal, 17 December 2003)

[609] [2005] 1 ILRM 19

not less than twenty years was appropriate, but after considering pertinent mitigating factors set it to fourteen. The Court, despite describing the sentence as conspicuous for its clarity and based on the laudable motive of deterring knifing fatalities, again declared it wrong in principle as it represented a departure without any supporting authority from the established principles of sentencing. In frequently reducing sentences, as it did again in *People (DPP) v Aherne*[610], the Court of Criminal Appeal appears to have set the standard tariff for manslaughter at eight years.

The employment of mitigating and aggravating factors are extremely influential in shaping the sentence for manslaughter.[611] Circumstances that reduce the harm caused or risked by an offender, or lessen his culpability, are considered mitigatory and include whether he pleaded guilty to the offence and assisted in its investigation; if he attempted to remedy the harmful consequences of his actions; whether he played only a minor role in the commission of the offence, or had made voluntary attempts to prevent its effects; if he committed the offence on impulse or was motivated by strong compassion or human sympathy; or whether there existed excusing circumstances which, although not amounting to a defence to criminal liability, tend to extenuate his culpability, such as ignorance of the law, mistake of fact, or circumstances of duress or necessity.

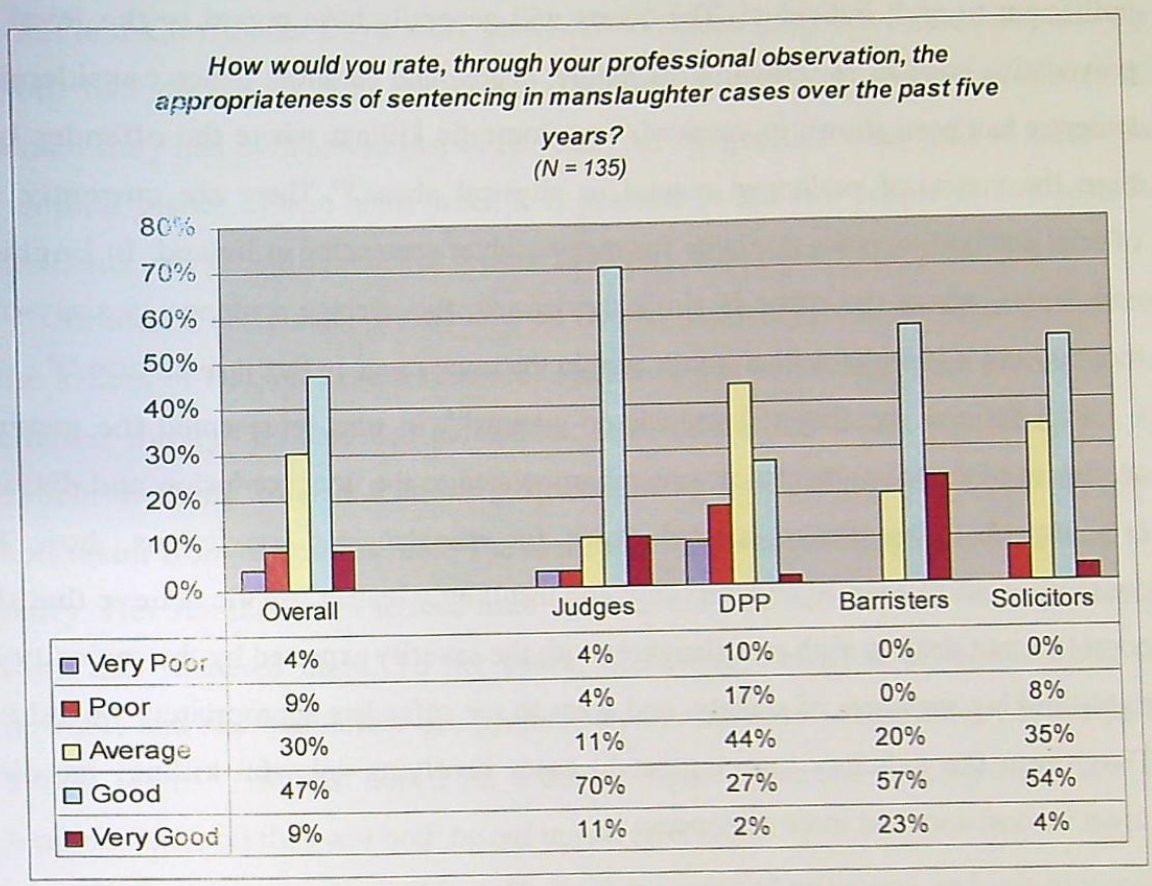
Conversely, circumstances that both increase the harm caused or risked by the offender, or add to his culpability, are deemed to be aggravating factors, and include

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[610] (Unreported, Court of Criminal Appeal, 5 July 2004)

[611] *DPP v Whiteside & Dieber* [2000] VSC 260 – This Supreme Court of Victoria manslaughter case must rank as one of the more unusual and controversial. Two men, John Whiteside and Kristian Peter Dieber, genuinely but mistakenly believed that a woman whom they met in a distressed state had just been raped because she told them so. The two went in search of the alleged rapist and accosted two men they saw running away. They eventually caught up with one of these men and assaulted him. Keith Hibbins died from the assault. In fact, the two men who were running away were a homosexual couple who thought the two offenders were vigilantes out to 'bash' homosexuals. To add further irony, the woman claiming to have been raped, Euvegina Tsionis, had well-attested psychiatric problems and had not in fact been assaulted at all, but dumped drunk and partially clad from her boyfriend's car. Cummins J, in finding that the offenders actions occurred because of an unplanned, spontaneous upsurge of emotion in a cruel, rare confluence of events, gave both a three year sentence, suspended save the time they had spent in remand, and in doing so noted that each had pleaded guilty; each had genuine remorse for the suffering they caused others; each were comparatively young; each had no prior convictions and had placed before the court a weighty and substantial body of evidence attesting to their excellent characters and concern for others; neither were persons of aggression or of violence; each initially acted out of genuine and decent concern for the female victim, as they believed her to be; each acted without premeditation, in a brief timeframe, and despite their wrongful actions remained at the scene and cooperated with police enquires; each were determined not be come before the criminal courts again; and finally, each had the potential and intention of contributing positively to society: 'It is proper, and not tautological, that in such a case, mercy should operate. There is some commendable learned writing on the subject. Shakespeare said it in three words, "mercy seasons justice".' With unusual alacrity, the Court of Criminal Appeal of the Supreme Court of Victoria, in *DPP v Whiteside & Dieber* (2000) 1 VR 331 (CCA), condemned the perverse rectitude of the trial judge and increased the sentence to six years, with a minimum of four to be served before eligibility for parole, noting that the vicious actions of the offenders smacked more of a desire to avenge and punish than of misguided chivalry.

whether he had premeditated the offence; had committed it as a member of a group organised for crime, had played a leading role or induced others to participate in its commission; or exploited the position of a weak or defenceless victim, or a position of confidence or trust; had threatened to use or actually used violence or excessive cruelty, or carried a weapon; or caused, threatened to cause, or risked the death or serious injury of another person; or committed the offence for pleasure or excitement.



	Overall	Judges	DPP	Barristers	Solicitors
Very Poor	4%	4%	10%	0%	0%
Poor	9%	4%	17%	0%	8%
Average	30%	11%	44%	20%	35%
Good	47%	70%	27%	57%	54%
Very Good	9%	11%	2%	23%	4%

Nearly half the respondents rated the appropriateness of sentencing in manslaughter cases over the past five years as good (47%). It comes as no real surprise that those most satisfied with the sentences handed down are those who deliver them. Nonetheless, the principle judge of the Central Criminal Court, Carney J, bound as he is by considerations of fealty and obedience, has commented, "I must have regard to and take guidance from the fact that in recent times the Court of Criminal Appeal has decimated many of the manslaughter sentences imposed."[612] However, it should also be noted that over two-fifths (43%) of respondents regarded the aptness of manslaughter sentencing to be average, poor or very poor, a worrying portion when one considers the importance criminal justice attaches to fashioning fair and just sentencing.

[612] *People (DPP) v O'Donoghue* (Unreported, Central Criminal Court, 24 January 2006)

Sentencing for manslaughter resulting from provocation poses specific problems for the judiciary. The very presence of provocation critically reduces the charge from one of murder so that the offender receives from the off a significant concession in the form of the reduced verdict. As the penalty for a manslaughter following provocation takes into account the subjective beliefs and reactions of the offender to the provoking act or words, it is impossible for the resultant sentence to be undifferentiated for or indifferent to each individual. The courts will generally have regard to the level of provocative conduct as shown by its nature, degree and duration; hence considerable leniency has been shown in cases of, say, domestic killings where the offender had been the victim of prolonged mental or physical abuse.[613] There are currently no official detailed statistics available for manslaughter sentencing in Ireland. In England and Wales, where the crime is similarly defined, the average sentence is sixty-one months, and it is probable that it falls within the same range in this jurisdiction.[614]

At a national meeting of homicide co-victims[615], in what represented the general sentiment of those in attendance, several articulated to the floor confusion and dismay at many of the sentences handed down for manslaughter convictions, how by comparison some seemed undeservedly and insultingly lenient. AdVic believe that the courts are not dealing with manslaughter with the severity expected by the majority of right-thinking members of society, and want to see offenders appropriately punished. They deem the judiciary too clement in cases involving unlawful killing, handing down inconsistent and inapt sentences:

> Families of homicide victims and the majority of the public at large, feel that the sentences being handed down for manslaughter are frequently too lenient, with the penalties imposed not reflecting the severity of the crime. A label of manslaughter does not erase the fact that a human life has been taken in violence, and society views this as the most serious crime of all. It would be expected that a judge in his sentencing would reflect this view. However, this is not happening in reality, and in effect, is further devaluing the victim, and human life. The maximum sentence for manslaughter is life imprisonment [yet] 75% of manslaughter convictions since 2000 have received a sentence of from two to less than ten years with the majority … being

[613] In *People (DPP) v Bell* (14 November 2000) *The Irish Times* 4, a woman who stabbed her abusive partner two nights after she had learnt that her sister had died of a drug and drink overdose, and where An Garda Síochána had placed before the court evidence that she had been hospitalised 51 times since she began her relationship with the victim, was given a four-year suspended sentence for his manslaughter at the Central Criminal Court under the condition that she continue to attend counselling and Alcoholics Anonymous meetings for the duration of that suspended sentence.

[614] Coulter C 'No Formula to Fit Every Case' (25 January 2007) *The Irish Times* 18

[615] AdVic Open Day at the Metropole Hotel, Cork (17 September 2005)

> closer to five years ... Lenient sentences frequently cause great unease in the public perception, and a much distorted message to society is given when judicial clemency takes place.[616]

Research conducted by AdVic cites dozens of cases in support of their view. For a most telling exemplar, in June 2000 two elderly brothers were attacked in their home, resulting in the subsequent death of 81-year-old Paddy Logan. For this manslaughter, John and Christopher Doyle were sentenced to fifteen and twelve years respectively. Both had previously been involved in the violent killing of another pensioner for which they had each served just three years. AdVic question what kind of values our criminal justice system holds when it is possible to kill two people in two separate incidents and yet still be due for release from prison before the age of forty-five?[617]

Similarly, co-founder of AdVic, Joan Deane, was horrified at the lenient sentences the killers of her son Russell received. Mark Johnson and Christopher Wood, having entered through an unlocked patio door, attacked her son as he was seated on the couch watching a movie with his girlfriend, using a golf club and pickaxe that they had taken from his garden shed. The assailants then went to a nightclub and later to a party. Her son died from serious head injuries, but also bore broken ribs, a collapsed lung and shattered limbs. To her shock, both were convicted of manslaughter not murder, and she was further disappointed by the sentence - Johnson got seven years, Wood eight: "I at least hoped for a double figure sentence. I thought [it] was too lenient. After all they will both be out in just five years."[618]

Whilst co-victims inevitably suffer a deep sense of grievance and injustice when those who have killed are given short sentences, the Court of Criminal Appeal has observed:

> In cases where there is a death and especially a death caused by an intentional as opposed to a negligent act, unhappiness with the sentence is often expressed in the reflection that even the longest sentence will end at some point, probably while the defendant is still quite young, whereas the suffering and deprivation of the deceased person's family will be permanent. This is very sadly true. But it ignores the fact that under our present sentencing regime, sentences must be proportionate not only to the

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[616] Deane J 'Balancing the Scales in a Homicide Trial' [2007] 1 *Judicial Studies Institute Journal* 18, 23-24

[617] *ibid.*, at 24

[618] Killilea G 'After the Trial I Got My Son Back, But I Was Wiped Out, Devastated' (19 November 2006) *Sunday Tribune* 14

crime but to the individual offender.[619]

It is possible that co-victims may feel that there can never really be enough punishment for the taking of a loved one's life, but this does not justify or give a *carte blanche* for slight or lenient punishment.

AdVic are further aggrieved because full custodial sentences are not being served, and believe that the sentences fashioned by the courts should be regarded by the system as determinate sentences whereby "seven years means seven years, not out in four." This is known as "truth in sentencing...[a] policy intent...to ensure that a substantial period of a prison sentence...is actually served."[620] In any event, prisoners serving a finite sentence have a legal entitlement to a 25% remission, *irrespective* of their behaviour and rehabilitative efforts.[621] AdVic see this as yet another example whereby "the system swings into action to facilitate the offender."[622]

While they placed an advertisement in *The Irish Times* during the run-up to the 2007 General Election requesting voters to ask their local candidates "why is sentencing so weak and inconsistent?"[623], AdVic does not canvass for any participatory or consultative role for the co-victim in formulating an offender's sentence, other than a want to deliver an impact statement that forms part of the sentencing deliberations.[624] This is in keeping with the decision in *McCourt v UK*[625], where the mother of a murdered woman alleged a breach of Article 8 of the *European Convention of Human Rights* on the grounds that she was denied the right to participate in the process of sentencing the convicted offender. The Commission struck out her claim as manifestly unfounded, holding that it would be inappropriate to recognise any role for co-victims in setting sentence since they lack the requisite impartiality.

"All Other Things Being Equal": Finding Consistency in Sentencing

Victims are constantly confused and angered by what they, and the general public, hold to be apparent inconsistencies in sentencing, questioning how two offenders

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[619] *People (DPP) v Kelly* (Unreported, Court of Criminal Appeal, 5 July 2004), *per* Hardiman J

[620] Banks C *Criminal Justice Ethics: Theory and Policy* (California: Sage, 2004) 182

[621] The *Prison Rules 2007* allow the Minister for Justice, Equality & Law Reform, where the prisoner has made exceptional efforts towards rehabilitation and the Minister is satisfied that, as a result, the prisoner is less likely to re-offend and will be better able to reintegrate into the community, the discretion to grant greater remission of sentence in excess of one quarter but not exceeding one third. This Rule does not apply to a prisoner sentenced to life or committed to prison for contempt of court. At the time of writing, no prisoner had been granted extra remission under this Rule.

[622] Deane J 'Balancing the Scales in a Homicide Trial' [2007] 1 *Judicial Studies Institute Journal* 18, 24

[623] Advert reproduced here at p126

[624] The matter of victim impact statements is considered at p242

[625] (1993) 15 EHRR CD 110

convicted of seemingly identical crimes can receive different sentences. This happens because the sentencing judge must always take into account the personal circumstances of each offender when formulating sentence, and as no two individuals are the same, nor too can their sentences:

> This [fuels a] distrust of judges, whose sentencing practice is perceived to be preoccupied to such an extent with mitigating factors that the '[just] deserts' element, merited in the light of offences committed, is significantly displaced in the sentences ultimately imposed.[626]

Nonetheless, when we speak of consistency in sentencing, we must do so within the context that consistency can only ever really denote similar or like when all other things are equal. Dissatisfaction with sentencing consistency is often mistranslated. It does not necessarily imply that sentencing need be exceedingly harsh. Hough found little supporting evidence for the populist assumption that the public are predisposed towards tougher sentencing in general, instead they are systematically misinformed about the level of sentencing imposed in practice and that upon correction their opinion shifts and closely conforms with actual sentencing patterns.[627] As it is judicial inconsistency rather than any lack of punitiveness that is the primary issue of concern, the facile assumption that the responsibilities of criminal justice to the victim and the public are best discharged through the imposition of heavily retributive sentences is one best avoided.[628] In this context, *consistency* really means *consistently appropriate* insofar as the sentencing duration is suitably punitive rather than overly lenient or indeed overly harsh and is imposed to all similar cases.

If the public think that the application of penal sanctions is something of a lottery it would be difficult to disabuse them. It is not surprising that they are dissatisfied, for they know little about the complex structure and trends of the sentencing process. Indeed much of the ubiquitous public perception of a lenient judiciary derives from the incomplete or misdirected news coverage of trials and sentencing hearings, promoting the notion that the judiciary has a penchant for imposing light sentences:

> The idea that the contemporary judiciary is somehow afflicted with a condition of mind that compels them to impose sentences of increasing leniency in serious cases, while absurd and unsubstantiated, appears to have become embedded in the psyche of

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[626] Law Reform Commission *Consultation Paper - Sentencing* (Dublin: Law Reform Commission, 1993) 40

[627] Hough M 'People Talking About Punishment' (1996) 35(3) *Howard Journal* 191

[628] Ashworth A & Hough M 'Sentencing and the Climate of Opinion' [1996] *Criminal Law Review* 776, 781

unbridled populism.[629]

Studies have shown that the public are so overly influenced by single-case information that when it forms an opinion as to the appropriateness of sentencing in general a person will give undue weight to a single incident.[630] This would not be so distorting if the sentences prominently reported actually characterise typical cases, but just as the crimes presented by the media are unreflective of those actually committed, so too reports on sentencing do not reflect the norm.[631] It is an unfortunate reality that the sentencing outcomes considered newsworthy are those predetermined by the media to be unduly clement, proffered as ongoing evidence of an incompetent or out-of-touch judiciary, of a "world gone mad" and a "travesty of justice" that enables the public to falsely generalise the entire process as one excessively lenient.[632]

There are three avenues that can be travelled in order to attain judicial consistency in general sentencing. The first is to install mandatory sentences, a measure described by the Court of Criminal Appeal as "a revolutionary alteration superimposed on the conventional principles of sentencing."[633] Mandatory penalties are designed to eliminate judicial discretion, under the assumption that judges are too lenient and, as a result, offenders are generally not deterred from crime.[634] This regulatory approach, as adopted across the United States, encroaches upon judicial function to the point where sentencing discretion is effectively transferred to the public prosecutor, whose choice of charge to bring before the court is, in part, determined on the basis of the fixed sentence that such a conviction would entail. To bring mandatory penalties to the forefront of penal policy would be to impinge, if not constitutionally then most definitely radically, upon the independence of the judiciary:

> In matters of sentencing the independence of the judiciary goes to the heart of the matter. Where the sentencing of offenders is concerned, especially those convicted of

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[629] Blom-Cooper L & Morris T *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Oxford: Hart Publishing, 2004) 172

[630] Hamill R, Wilson T & Nisbett R 'Insensitivity to Sample Bias: Generalizing from Atypical Cases' (1980) 39 *Journal of Personality and Social Psychology* 578; Tversky A & Kahneman D 'Availability: A Heuristic for Judging Frequency and Probability' (1973) 5 *Cognitive Psychology* 207

[631] Roberts J & Doob A 'News Media Influences on Public Views of Sentencing' (1990) 14(5) *Law and Human Behavior* 451, 452-454. Similarly, "The public…is forced to build its view of sentencing on a data-base which does not reflect reality" - Canadian Sentencing Commission *Sentencing in the Media: A Content Analysis of English-language Newspapers in Canada* (Ottawa: Department of Justice, 1988) 95-96

[632] Jewkes Y 'Media Representations of Criminal Justice', in Muncie J & Wilson D (eds) *Student Handbook of Criminal Justice and Criminology* (London: Cavendish Publishing, 2004) 67

[633] *People (DPP) v Dermody* (Unreported, Court of Criminal Appeal, 21 December 2006), *per* Hardiman J

[634] Shichor D & Sechrest D (eds) 'Introduction', in *Three Strikes and You're Out: Vengeance as Public Policy* (California: Sage, 1996)

> notorious crimes, the popular press has tended to resonate expressions of opinion that are noteworthy for a simplistic and unequivocal advocacy of retributive punishment than a reflective consideration of the more complicated interaction between justice for the individual and the public good ... If public confidence in the judiciary is to be maintained it can be argued that much will depend upon the maintenance of its independence; increasing resort to measures designed to constrain it, such as mandatory penalties of all kinds, can serve only to weaken that confidence by progressively reducing the role of the judiciary to that of automata, applying not wisdom and judgment in the context of justice but politically determined decisions through the medium of a managerial bureaucracy.[635]

The very real danger to introducing a system of mandatory sentencing is that it creates a situation whereby it falls upon elected representatives to set down the mandatory penalties for criminal offences. This is a situation best avoided, for politicians are exceptionally vulnerable to and frequently react hastily to transient swings in public mood. They often lurch in one direction before there follows a public outcry that such a move has gone too far, but by then it proves difficult to revert. In addition, there is a high price to be paid for implementing a regime of mandatory sentencing; that is, no sentence will ever be truly fair. More specifically, a mandatory sentence for manslaughter would be wholly unsuitable considering the broadness of the conduct and situations that constitute the offence and any such move is roundly denounced here.

The second approach is to establish a statutory scheme of sentencing of mandatory minimums and prescriptive sanctions specific to variations of each offence. This cannot truly take into account the principle of proportionality and would result in absurd and unforeseen outcomes that fail to reflect the circumstances of each offence and of each offender. Numerical guidelines enforced through legislation either take into account only some of the relevant considerations or would have to be so complicated and detailed as to make their application difficult if not impossible. Persuaded by the unanimity of the judiciary in raising objections, the Law Reform Commission is opposed to the introduction of a regulatory scheme of sentencing.[636]

The third and more viable option is for the introduction of a set of non-statutory guidelines that would, by its nature, be indicative, establishing hierarchies of gravity for certain offences and setting norms from which, having due regard to individual

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[635] Blom-Cooper L 'The Penalty for Murder: A Myth Exploded' [1996] *Criminal Law Review* 707, 716

[636] Law Reform Commission *Report - Sentencing* (Dublin: Law Reform Commission, 1996) 9

circumstances, a trial judge may depart. O'Malley labels this as a policy of "principled discretion", one which continues to vest in the judiciary structured discretion but demands that it be exercised against a backdrop of "authoritative, but not inflexible, principles and canons."[637] In addition, these guidelines could perform a valuable role in indicating not only what factors should be treated as aggravating or mitigating, but to what extent each of these factors can bring to bear on a sentence. They would also serve to elucidate for practitioners and the wider public the reasoning underlying sentencing generally.

In spite of a decade old recommendation from the Law Reform Commission for a proper non-statutory structure for sentencing guidance[638], Ireland remains the only country in Europe without a code to direct judges in their sentencing function.[639] In the absence of sentencing guidelines, Ireland has been accused of having "one of the most unstructured sentencing systems in the common world"[640], adopting a "disjointed 'instinctive synthesis' approach" with mixed results[641]:

> On the one hand, relatively unbridled judicial discretion can have a valuable influence in facilitating the imposition of individualised sentences … On the other hand, such latitude has contributed to a lack of coherence … The lack of formal constraints can result in disparities, inconsistencies, capriciousness and disproportionate sentencing in particular circumstances.[642]

The Director of Public Prosecutions has repeatedly called on the judiciary to devise clear guidelines that work towards greater uniformity in sentencing in order to avoid the implementation of more crude mandatory sentences.[643] The judiciary itself has drafted proposals for the establishment of a judicial council that would influence policy on sentencing, but legislation for this has been languishing in the offices of the

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[637] O'Malley T 'Principled Discretion: Towards the Development of a Sentencing Canon' (2002) 7(3) *Bar Review* 135, 136

[638] Law Reform Commission *Report - Sentencing* (Dublin: Law Reform Commission, 1996)

[639] Irish Independent 'Editorial: A Question of Homicide' (28 October 2006) *Irish Independent* 30. For example, in England the *Sentencing Guidelines Council*, an independent body responsible for promoting consistency and transparency in sentencing, published *Sentencing Manslaughter by Reason of Provocation* in 2005.

[640] O'Malley T *Sentencing Law and Practice* (Dublin: Round Hall, 2000) 8. See also O'Donnell I 'A Comment on Sentencing' (2000) 10(4) *Irish Criminal Law Journal* 2-3

[641] Kilcommins S, O'Donnell I, O'Sullivan E & Vaughan B *Crime, Punishment and the Search for Order in Ireland* (Dublin: Institute of Public Administration, 2004) 145

[642] *ibid.*, at 185

[643] Roche B 'DPP urges judges to agree on sentencing uniformity' (9 February 2007) *The Irish Times* 3; McDonald D 'Judges should have final say in sentencing' (21 May 2007) *Irish Independent* 8

Attorney General for some years now.[644] Fianna Fáil, as part of its 2007 election manifesto that saw it returned to government for a third successive term, promised:

> To establish a Judicial Sentencing Commission ... comprised only of serving judges from each of the State's courts and its powers will include the power to establish sentencing guidelines. These guidelines will improve the consistency of judicial sentencing without impairing the independence of trial judges in specific cases. Trial judges will be required to follow the Commission's guidelines or to explain why the guidelines are not being followed in any particular case.[645]

The introduction of non-statutory sentencing guidelines would also present a chance for the judiciary to breakaway from existing sentencing principles and precedents that can now be argued as somewhat outdated, established as they were in a bygone era where interpersonal violence and manslaughter was less prevalent and less mindlessly vicious, more often a deviation from normal behaviour that, when taken in the context of the relationship of the victim and defendant, frequently drew empathic punishment. These new guidelines can recognise that random and brutal violence is an increasing activity within society that must be severely punished.

When guidelines are eventually implemented to didactically promote consistency, it is important to note that they are unlikely to be effective unless they are routinely adhered to and departures from them explained in detail. Research tells us that victim and public satisfaction is significantly increased when the judiciary offer explanations outlining the how and why an individual sentence was selected and these guidelines shall facilitate such clarifications.[646]

A judiciary stripped of its discretion, either by the adoption of mandatory minimums or a statutory scheme of sentencing guidelines, will effectively have its hands tied, resulting in all parties involved feeling outrage at the inability of a judge to sentence as he sees fit. Is it better to trust the limitedness of fixed sentencing composed at a point in time past, reflective of the concerns of a group of mixed interests of that day or, as widely favoured, place our trust in a system where the judiciary themselves actively, and in the view of the public, strive for a level of consistency that can accommodate an acceptable latitude of discretion from within? We must place our trust in some entity to impose sentencing on our offenders, "if we

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[644] Irish Times 'Editorial: The Debate on Sentencing Policy' (15 March 2007) *The Irish Times* 19

[645] Fianna Fáil *Now, The Next Steps: Manifesto 2007* (Dublin: Fianna Fáil, 2007) 100

[646] Gardner J *Victims and Criminal Justice* (South Australia: Office of Crime Statistics, Attorney-Generals Department, 1990) 48

cannot trust the judges…[then] we can trust no one."[647]

Little is known about the reality of sentencing practice in Ireland, and this dearth of basic statistical data hinders most seriously the development of any real knowledge about sentencing standards that could assist judges in achieving consistency[648]:

> It is a feature of the criminal justice system that decisions are taken at one stage in ignorance of what is occurring elsewhere in the system.[649]

The Law Reform Commission recommends the establishment of a national agency for the systematic collection of quantitative and qualitative sentencing decisions from all trial courts that could marshal information and patterns resulting from different combinations of material case factors.[650] As raw quantitative data is generally reported in numerical form and is devoid of the nuances which are important in the administration of justice, quantitative information alone would produce a mechanistic, sterile informational system incapable of indicating anything but a monochromatic aggregate picture of sentencing practices suitable for gross statistical reporting but of no real value to individual trial judges who might want to know *why* a particular sentence was chosen as the sanction for a specific crime. Therefore a centrally located criminal justice database should assemble qualitative information to the greatest extent possible, with the judiciary and the court registrars and clerks given every necessary facility to provide this material. The availability of this data to the judiciary would enlighten them to the important elements in past sentencing practice, encourage uniformity and influence judicial sentencing discretion whilst leaving that discretion intact.

Since June 2006, as a necessary precursor to the computerised Irish Sentencing Information System (ISIS) database, the Courts Service have engaged postgraduate research students to gather and input sentencing information. A pilot version of this database was introduced into the Dublin Circuit Court in late 2007, with four judges participating, and extended to the Cork Circuit Court in April 2008. ISIS is very much in its infancy, and due to the scale of the task at hand it is likely to be at least three

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[647] Blom-Cooper L & Morris T *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Oxford: Hart Publishing, 2004) 2

[648] Law Reform Commission *Consultation Paper - Sentencing* (Dublin: Law Reform Commission, 1993) 33-34. Similarly, former Chief Justice Finlay previously commented on the absence before the court of "statistics or information…concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction" – *People (DPP) v Tiernan* [1989] ILRM 149, 152

[649] Bacik I 'The Practice of Sentencing in the Irish Courts', in O'Mahony P (ed.) *Criminal Justice in Ireland* (Dublin: Institute of Public Administration, 2002) 348

[650] Law Reform Commission *Report - Sentencing* (Dublin: Law Reform Commission, 1996) 32

years before the database proper is fully functioning and rolled out nationwide to the judiciary.[651]

In the interim, consistency in manslaughter sentencing can be more immediately improved by creating a tradition of sentencing guidance from the appellate courts.[652] While this is now beginning to emerge from the Court of Criminal Appeal, there is "still a considerable distance to go before we have claim to a coherent body of sentencing jurisprudence."[653] This can be further buttressed by the more effective dissemination of decisions of authoritative precedent on sentencing ranges and criteria for particular variations of the offence from the Court of Criminal Appeal, too many of which go unreported. These benchmark decisions should not be overlooked or undervalued for their ability to disperse sentencing information with the intent of promoting uniformity that accumulatively develops a coherent, effective and just body of sentencing jurisprudence.

Ireland has a highly discretionary sentencing system. The discretion afforded allows the judiciary to tailor the sentence imposed to the specific circumstances of the offender and the offence committed. However, discretion in the absence of comparative information leads to inconsistent sentencing decisions and a perceived arbitrariness and unfairness at the heart of criminal justice.[654] What the judiciary and indeed we should expect is that they are assisted in every way possible in a bid to develop a fair and consistent approach to the process:

> It is clear overall, that a new approach ... is required, based on an emphasis on the provision of information on sentencing, not least to the judiciary so that it no longer has to make sentencing decisions in a vacuum ... Only when more information is available, and accessible to a greater number of practitioners, policy-makers and judges, in particular, can a coherent sentencing policy be developed. Such a policy should aim to ensure that judicial discretion is exercised in a more structured way.[655]

The combination of a coherent non-statutory sentencing policy, the development and dissemination of appellate guidance and the availability of a database containing

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[651] Information provided by email from Freedom of Information Officer, Miriam O'Flanagan, Courts Service (13 August 2007), and by telephone (21 November 2008)

[652] For example, in *R v Brewster* [1998] 1 Cr App R 220/[1998] Cr App R (S.) 181, the court indicated the different levels of gravity in burglary offences, as well as the relevant aggravating and mitigating factors, which should be considered when reached sentence.

[653] O'Malley T *Sentencing Law and Practice* (Dublin: Thomson Round Hall, 2006) 24

[654] Law Reform Commission *Report - Prosecution Appeals and Pre-trial Hearings* (Dublin: Law Reform Commission, 2006) 34

[655] Bacik I 'The Practice of Sentencing in the Irish Courts', in O'Mahony P (ed.) *Criminal Justice in Ireland* (Dublin: Institute of Public Administration, 2002) 348, 369

information as to relevant sentencing practices nationwide should be sufficient in a relatively small jurisdiction to certify that judicial discretion is exercised in an informed and uniformed manner. In practising this discretion, it is vital that the judiciary should never lose sight, when it comes before them, of the seriousness of the loss of life at the hands of another, and how our social values implore an appropriate punishment to reflect this greatest of wrongdoing.

Parole for Homicide Offenders

Parole is the supervised release of a prisoner before the completion of his sentence. It differs from amnesty or commutation insofar as the release is conditional and parolees may be returned to prison if they violate any of the conditions attached to the release.

Established in April 2001, the Parole Board replaced the Sentence Review Group, which effectively performed the same duties. It is a non-statutory body operating on an administrative basis in a strictly advisory capacity. There are, at present, eleven members, including the Chairperson, Dr Gordon Holmes; the Director of the Probation Service; the Medical Director of the Central Mental Hospital; two senior officials from the Department of Justice, Equality and Law Reform; and six community representatives. The Board, by way of recommendation to the Minister for Justice, Equality and Law Reform, advises of the prisoners progress to date, the degree to which he has engaged with the various therapeutic services, and how best to proceed with the administration of his sentence. The decision to actually parole an offender serving a long-term sentence is made in accordance with statutory authority by the Minister, after his having due regard to the recommendations of the Parole Board. He can choose to accept the recommendations of the Board in their entirety, in part or reject them.[656]

The Parole Board reviews the case of a prisoner sentenced to eight years or more, but less than fourteen, at half-sentence stage. Those sentenced to fourteen years or more, including life, are reviewed after seven years in custody. Not all prisoners eligible for a parole review accept the invitation to partake in the process. Prisoners serving sentences for the murder or attempted murder of a member of An Garda Síochána or the Irish Prison Services acting in the course of their duty; or of a foreign diplomat or government member for political motive and committed within the State;

[656] In 2006, of the 73 recommendations made, the Minister accepted, in full, 64 (87.7%); refused 3 (4.1%); accepted in part 4 (5.5%); and a decision was still pending in 2 instances by the yearend (2.7%) – Parole Board *Annual Report 2006* (Dublin: Parole Board, 2007) 31

or a murder, or attempt to murder, committed in furtherance of certain subversive objectives, primarily concerning treason, under the *Offences Against the State Act 1939*, are not, as a general principle, eligible for parole.

When considering a prisoner's sentence, the Board obtains reports from the Prison Service, the Probation Service, and the Prison Review Committee and, where appropriate, from medical, psychological and psychiatric experts. The Board will also be advised about the family circumstances of the prisoner and, in the event of his receiving temporary release, where he could reside. The impact the release of the prisoner may have on the victim or victim's family is also given careful consideration:

> It must be a terrible shock to a family to realise that a person who murdered one of its members has been released back to society. Whilst the Board takes all circumstances into account when considering matters nonetheless its job is to hold the balance of fairness between the convicted person on one hand ... and the common good on the other.[657]

In each case of review, two members of the Parole Board interview the prisoner at considerable length in order to ascertain his reaction to the crime and whether he displays genuine remorse. In coming to its decision as to what it will recommend to the Minister, the Board will consider if it is reasonable to grant early or temporary release in light of the nature and circumstances of the offence committed; whether paroling the offender would constitute a threat to the community; if there are any compelling compassionate grounds which merit special consideration (such as the prisoner having developed a terminal illness); whether he has engaged constructively and effectively with prison-based therapeutic services to combat his criminal behaviour; and whether the risk of his re-offending has been appreciably minimised. The Board attempts to strike a balance between the rehabilitation of the prisoner on the one hand, and the abhorrence of the general public of the crime that was committed on the other, and the sufficient part of the prisoner's sentence which must be served in custody to allay this. Where the Board does not recommend a prisoner for parole, a second or subsequent review will generally take place on an annual basis where the prisoner is serving less than ten years, or every three years for those serving more than ten. The largest category of prisoners to come before the Board is those convicted of murder.

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[657] Parole Board *Annual Report 2006* (Dublin: Parole Board, 2007) 9

Table 13: Homicide Caseload for the Parole Board

	2001	2002	2003	2004	2005	2006
Murder	34	26	14	12	16	23
Manslaughter	6	3	2	4	11	9
TOTAL	*40*	*29*	*16*	*16*	*27*	*32*

Parole Board *Annual Report 2006* (Dublin Parole Board, 2007) 28

An entitlement to review should not be construed as an automatic right to parole. Whilst the Board initially reviews offenders sentenced to life imprisonment after seven years, the experience of recent times show that they are normally reviewed on a number of occasions before any substantial concessions are recommended:

> The timeframe for the first review of a life-sentenced prisoner … has led – wrongly – to an assumption that life sentence prisoners are then released.[658]

Life-sentence prisoners on parole are subject to life-long supervision from the Probation Service, a non-statutory body under the auspices of the Department of Justice, Equality and Law Reform. The Minister can revoke this condition, but such an erasure is exceptionally rare. The reintegration of offenders into the community is an important aspect of the work of the Probation Service. It seeks to increase public safety by the effective management and monitoring of ex-prisoners with and within communities.

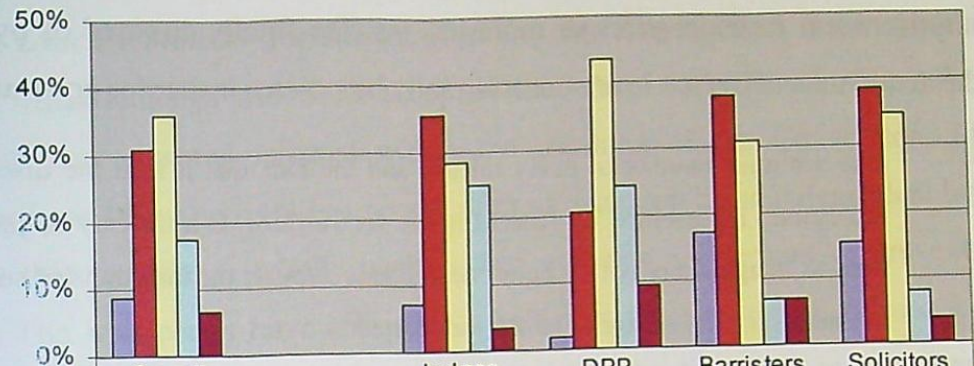
At any one time it is supervising approximately 5,500 cases, including offenders who are subject to orders from the court or supervision under the *Sex Offenders Act 2001* and life-sentence prisoners on temporary release. For example, on 1 February 2007, the Probation Service was managing the supervision of fifty-nine life-sentence prisoners on temporary release.[659] In some cases, where it would be particularly difficult for a prisoner to be reintegrated into the community, normally following a highly-prolific crime and trial, arrangements can be made with the service equivalent to the Probation Service in a foreign jurisdiction for supervision of the parolee in that country.

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[658] Comments made by the then Minister for Justice, Equality & Law Reform, Michael McDowell, at the launch of the 2005 Annual Report of the Parole Board (24 March 2006)

[659] Information provided by email from Assistant Director of Operations, Gerry McNally, Probation Service (8 February 2007)

A prisoner serving a mandatory life sentence is eligible to have his case reviewed by the Parole Board after 7 years have been served. What should be, in your professional opinion, the desired time-frame in which this review can be initiated?
(N = 136)



	Overall	Judges	DPP	Barristers	Solicitors
4-6 yrs	9%	7%	2%	17%	15%
7 yrs (current)	31%	36%	21%	38%	38%
8-10 yrs	36%	29%	43%	31%	35%
11-13 yrs	18%	25%	25%	7%	8%
Other	7%	4%	9%	7%	4%

The largest portion of respondents to the postal survey expressed an opinion that the initial review of a life-sentence prisoner by the Parole Board should be conducted eight to ten years into that sentence (36%). More tellingly, just over three-fifths (61%) wanted to see a period longer than the current practice of seven years being served before an initial review could take place. It is probable that this want stems from the nature of the offence. Murder convictions are difficult to obtain for the State and those who are found guilty should have to serve an appropriate period of time in prison before the possibility of parole.[660] In addition, as recent trends reveal that life-sentence prisoners are not being paroled at the initial review at seven years, or in the majority of cases at a second hearing at ten years into that sentence, why then permit a review before the Board at such an early juncture? It is probable that these hearings, however cursory, offer some guidance to the offender in terms of setting benchmarks for behaviour and rehabilitation necessary in preparing him for eventual release.

Not surprisingly, the State has been challenged that when the Minister for Justice, Equality and Law Reform makes a determination on the possible release on licence of

[660] In 2006, the Central Criminal Court disposed of 52 murder cases. Just 15 (28.8%) resulted in a murder conviction. Of the remainder, 18 (34.6%) resulted in a manslaughter conviction, 4 (7.7%) led to a conviction for a lesser charge, 2 (3.8%) were found not guilty by reason of insanity, 9 (17.3%) were acquitted and 4 resulted in other determinations including *nolle prosequi* – Courts Service *Annual Report 2006* (Dublin: Courts Service, 2007) 92

a life-sentence prisoner it is in breach of the *European Convention on Human Rights* because he is a member of the Executive making a decision that should be solely in the domain of the judiciary.[661] This method is at variance with the cardinal principle of the separation of powers, for once an offender who has been sentenced to imprisonment for eight years or more has his case finally disposed of by the courts, the actual time he serves in prison essentially becomes a matter for government:

> The arbitrary manner of early release and the fact that it is at the discretion of the Executive, represented by [the Minister for Justice], is a travesty of justice ... It is hard to imagine any policy better designed to subvert the intentions of sentencing and to undermine the authority of the judiciary.[662]

Under Article 6.1 of the Convention, a criminal defendant has the right "to a fair and public hearing...by an independent and impartial tribunal established by law." As the imposition of sentence forms part of that process, it follows that an independent and impartial tribunal must also determine the length of that sentence to be served. In essence, the Convention requires that what can in shorthand be called judicial functions may only be discharged by a judicial-like panel. It is contended that Irish law is incompatible with the Convention because the Parole Board is not a court-like body, insofar as that concept is understood in European human rights law.

It is easy to rectify this anomaly. Simply place the Parole Board on a statutory footing so that it becomes a suitably independent and impartial body in law, assigning to it the function of making *final* determinations on applications for release rather than merely advising the Minister for Justice. There are no compelling reasons preventing the Minister from making legitimate representations to the Board as an interested third party when and where he feels so obliged.

Alternatively, the State may effectively argue that as the judiciary is required to impose a life-sentence to a murder conviction - which in etymological terms means entire life - that the Minister's discretionary decision is an act of clemency serving

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[661] See generally Irish Human Rights Commission *Report into the Determination of Life Sentences* (Dublin: Irish Human Rights Commission, 2006). These challenges were prompted by legal proceedings initiated in 2004 by convicted murderer Malcolm Macarthur to have the courts direct the Government to order his release in line with the recommendation of the Parole Board. He claimed that his continued detention amounted to a breach of his rights under the European Convention. Mr Macarthur was jailed for life in 1982 for the murder of Bridie Gargan, a nurse, in the Phoenix Park, Dublin, and is now among the longest-serving prisoners in Ireland. His arrest in the home of the then Attorney General embroiled the administration of the day in a major political controversy that the Taoiseach, Charles Haughey (as he was then), referred to famously as "a bizarre happening, an unprecedented situation, a grotesque situation, an almost unbelievable mischance."

[662] O'Mahony P *Criminal Chaos: Seven Crises in Irish Criminal Justice* (Dublin: Round Hall Sweet & Maxwell, 1996) 92

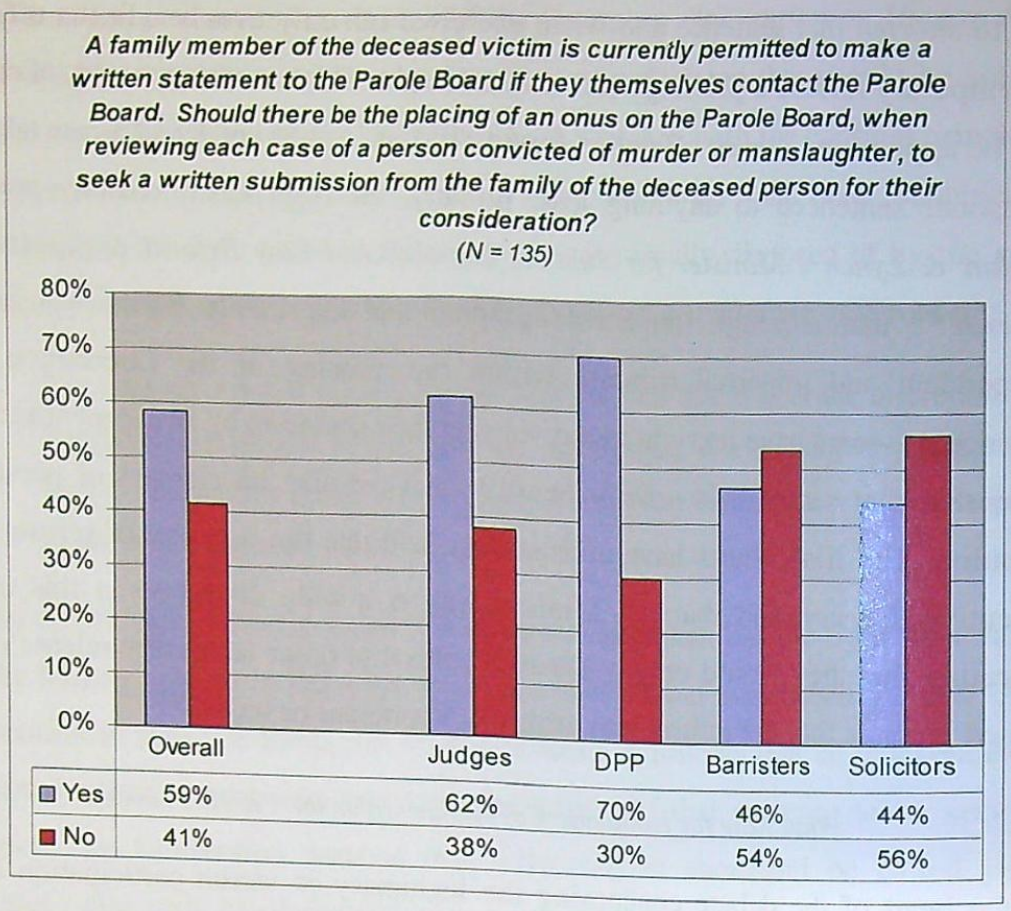
only to *shorten* that sentence and when exercised can only ever benefit the offender, his temporary release a privilege rather than a right. This reasoning would, of course, only be applicable to those offenders serving life and would not defeat a case taken by a prisoner sentenced to anything less. Equally, the High Court recently noted in *Whelan & Lynch v Minister for Justice, Equality and Law Reform & the Attorney General* [663] that although the State accepted that the Parole Board was not an independent and impartial tribunal within the meaning of the Convention, life-sentence prisoners have no right to a review of their detention by an independent body given that that sentence is wholly punitive and contains no element of preventive detention. The Irish courts have consistently held that the question of release is an Executive decision and that the Minister enjoys a wide discretion in this regard, indicating that they would only overturn a refusal to order temporary release on the limited grounds that the refusal was arbitrary, capricious or unjust.[664]

What Role for Homicide Co-Victims within the Parole Process?

At the heart of the debate concerning the legitimacy of victim participation in the parole process is whether victims can *ever* exercise some moral right of control over offenders. Some argue that the crime remains, fundamentally, one committed against the State; therefore the only entity entitled to assume control over the offender is the State itself. The counterview favours the rationale that it is only post-conviction, where the status of the defendant is changed to one of offender that the victim can legitimately exercise some right over *his* offender, and this right can be best achieved by some form of participation within the parole process.

[663] [2007] IEHC 374

[664] Irish Human Rights Commission *Report into the Determination of Life Sentences* (Dublin: Irish Human Rights Commission, 2006)



Just under three-fifths (59%) of respondents wanted to see an obligation placed on the Parole Board to seek a written submission from co-victims when reviewing the case of a prisoner. While current practice permits co-victims, *of their own volition*, to make a written submission, one might reason that without a request to do so many are unaware of this option. In comparison, the *Code of Practice for Victims of Crime* in England and Wales requires that the National Probation Service take all reasonable steps to establish whether a victim or co-victim wishes to make any representations.

When a victim asks the Irish Prisons Service to be kept informed of the management of their offender's imprisonment they are contacted regarding significant developments in the history of that sentence, which includes reasonable prior notice of any prison transfer; parole review; intended release; or, as soon as is practicable, the escape or indeed, if it occurs, the death of the prisoner. In August 2007, the Irish Prisons Service had ninety-three such requests from victims on their books, thirty-three of which were made by the families of an offender sentenced for murder. The remainder came from the families of manslaughter and death by dangerous driving victims, and victims of rape and serious sexual or violent assault.[665] Even though there

[665] These victims and co-victims are kept informed by the manner recorded in their initial request, be that in writing, by telephone or by contact from their local An Garda Síochána - Information provided by email from Victim Liaison Officer Andrew Brennan, Irish Prisons Service (14 August 2007)

will always be a number of co-victims who post trial seek to put that part of their life behind them and therefore do not wish to be contacted in the future, this figure seems rather low, arguably a result of co-victims not being routinely informed of their right to make such a request. As homicide co-victims may, of their own accord, make a written submission to the Parole Board, there would appear to be no reason, other than the additional administrative burden of contacting them, why they should not be formally invited to do so. Under the *European Convention of Human Rights*, any information material in affecting parole decisions should be made available to the offender. This necessary lack of confidentiality attached to the information he submits to the Parole Board can prove problematic for the victim:

> The lack of confidentiality leaves some victims particularly troubled ... [raising] serious concerns about personal safety and the potential future intimidation of victims.[666]

It is Parole Board policy to disclose all documents considered in its review to the prisoner concerned, although the general practice is that submissions made by a victim or co-victim, or any other third party[667], will only be disclosed with the consent of the author. This disclosure excludes information that identifies or may lead to the identification of the victim's address, as distinct from his name. If against disclosure, the victim may withdraw his submission from consideration by the Board. As the final decision is made by the Minister for Justice, Equality and Law Reform, the victim is free to make submissions directly to that Minister, thereby circumventing the parole process, thus effectively removing the submission from the documents before the Board that may be disclosed to the offender or used in proceedings he may subsequently initiate, such as a judicial review. Victims need to be made aware of the potential dangers posed by this freedom of information, but nonetheless it should be

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[666] Crawford A & Enterkin J *Victim Contact Work and the Probation Service: A Study of Service Delivery and Impact* (Leeds: Centre for Criminal Justice Studies Press, 1999) 87. The ad-hoc approach adopted in England to address these concerns is one wherein the information provided by the victim is incorporated into the final report of the parole officer. This compromise is not without its problems, for diluting victim input weakens their voice and invariably leads to in-built forces of moderation and normalisation exercised by the parole officer, who has no clear guidance as to how he should interpret the victim's submission into his own report. It also raises the potential that the original rationale, to take account of the interests of the victim in considering decisions on early and conditional releases, may be subverted in the name of protecting the victim.

[667] From time to time, inappropriate third party submissions into the parole process are exposed by the media, typically causing co-victims further distress at what they perceive to be the disturbing practice of politicians seeking favourable treatment for the offender. Most notably, in January 2007, the then Minister for Labour Affairs, Tony Killeen, met with the family of Robert Lynch, who had been killed in February 1991, to apologise for a letter sent from his constituency office seeking the release from prison of the man convicted of the murder.

viewed as a positive double-edged sword insofar as it may well deter exaggeration or untruths. It is best to adopt a forewarn approach, whereby the victim is informed of the offender's right to access this information and then to let the victim decide if he still wishes to proceed with a submission.

The disclosure of submissions to prisoners is particularly inequitable to victims given the dearth of specific offender-related information to which they themselves are faced with, denied as they are access to records concerning the attitudes, custodial treatment, rehabilitative programmes undertaken, and future socialisation intentions of the prisoner, information that if know and if favourable may salve any fears the victim feels and result in his non-contending or even supporting an early release.

When victims are preparing a written submission to the Parole Board, they should be mindful that it is interested in knowing about the physical, financial and emotional impact of the offence on the victim (like an impact statement), the ongoing impact, and any conditions the victim would like the Board to impose if the offender is granted release. The written submission is the opportunity for victims to state how they feel about an offenders proposed release into the community. For example, if a victim were fearful about coming into contact with the offender, they may request that a condition be imposed excluding the offender from residing in their neighbourhood. The submission must not include any additional evidence or fresh allegations concerning the offender. The Parole Board can not vary a sentence imposed by the court, nor can they refuse parole because there is a perception that the sentence imposed was lenient.

The Balance in the Criminal Law Review Group proposes that those victims or relatives who did not get the opportunity to make an impact statement be allowed to be heard by the Parole Board in the presence of his offender, whose agreement to this is set as a condition for his case to be eligible for review.[668] This suggestion raises the wider issue of the entitlement of any victim to confront his offender at the parole or remission stage. At present, whereas co-victims can make a written submission to the Board, they are not permitted to make representations in person. While many victims or co-victims will not wish to engage in what can be seen as a form of restorative justice, others may welcome the opportunity to look the offender in the eye and speak directly to him. Interestingly, the right to personally attend a parole hearing is not

[668] Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice, Equality & Law Reform, 2007) 239

amongst the calls made by AdVic, suggesting that, in general, homicide co-victims do not seek to confront the offender.

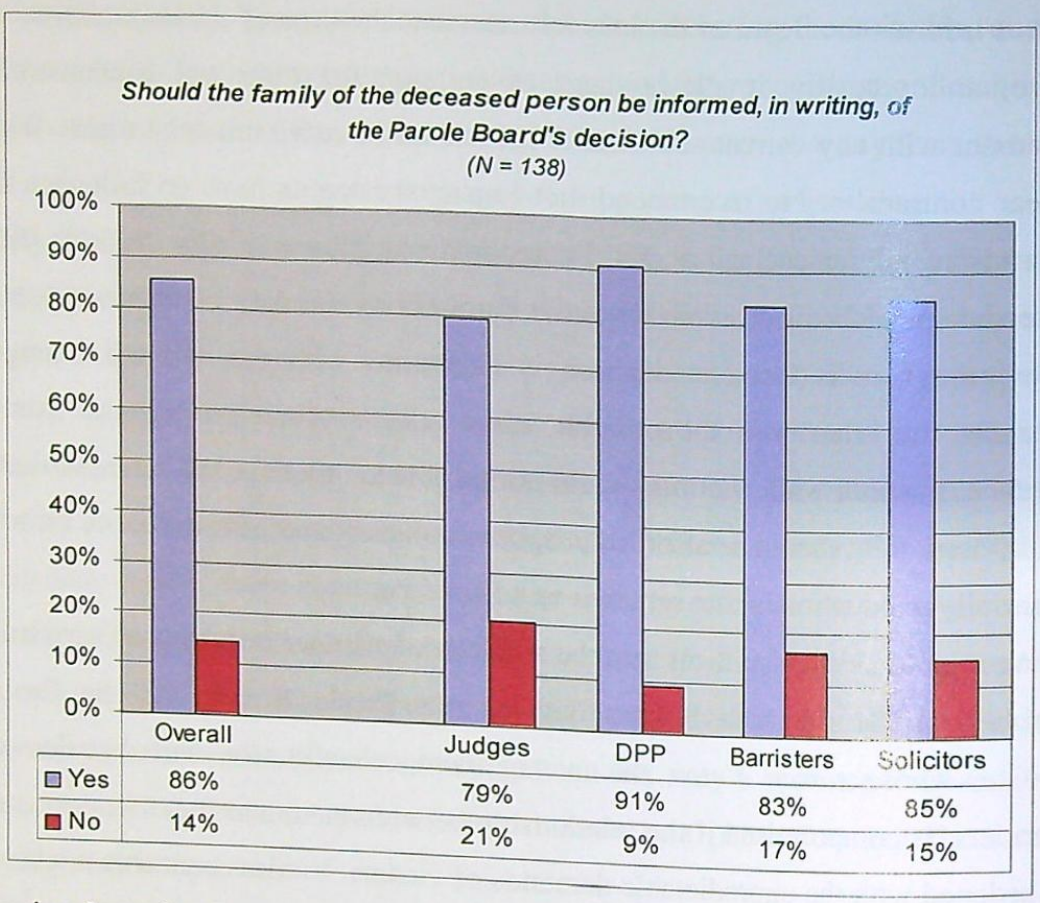
The Parole Board, upon request, can now have access to the Book of Evidence from the original trial. The Balance in the Criminal Law Review Group also recommends that any victim impact statement presented to the sentencing judge should be placed as an addendum to these papers.[669] The purpose of this is twofold: first, it informs the Board of the loss felt nearer to the time of the commission of the crime;' and secondly, it allows them to compare the tone and contents of that statement with any current submission the victim or co-victim may make. It might appear contradictory to recommend that impact statements have no influence in the determining of sentencing, as will be recommended later in this thesis[670], yet that these statements be made available to the Parole Board for their consideration, but the differential here is that one decision is concerned with the maximum length of sentence, the other with the possible early release, albeit on licence, from that sentence. In short, while victims should not be able to influence the actual sentence to be imposed, they should be afforded a right to comment and bear influence on what is essentially a reduction in that sentence at a later date.

Accommodation of victims into the territory of prisoner release processes must be troublesome for the Irish Prisons Service, the Parole Board, and the Probation Service, whose *raison d'etre*, the management, rehabilitation and resettlement of offenders, is compromised if the relationship between them and the offender-as-client is burdened with the unpredictable demands of victims. Victims concerns ought, some hold, to be interpreted as having a narrow agenda, used not to prohibit the release of the prisoner entirely but only to establish conditions on that release.

The *Code of Practice for Victims of Crime* in England and Wales states that representations made by victims or co-victims are irrelevant to whether the prisoner is released or not, but if having decided that release is appropriate in a given case the Probation Service must subsequently consider victim representations when defining what conditions are attached to that release. The victim is then informed of any restriction the offender will be subject to that specifically relates to contact with him or his family and the date on which that restriction order will cease to have effect. Victims must also be provided with an explanation for the non-inclusion of any condition they have requested to be attached to the release. It holds as a good

[669] *ibid.*, at 254
[670] The matter of victim impact statements is considered at p242

proposition to exclude the viewpoint of the homicide co-victim from the actual issue of release as opposed to the conditions that may be attached to that release, for to do otherwise may expose an offender to the relentless inability of a family to comprehend that he may at some stage be fit for release. Any genuine fears co-victims have regarding their future safety can be catered for and monitored in terms of the restrictions tied to the parole.

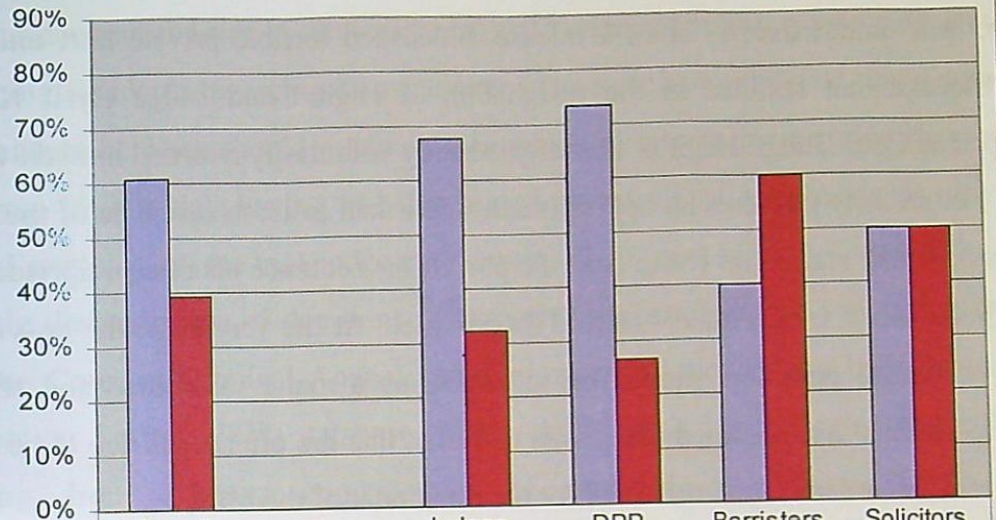


	Overall	Judges	DPP	Barristers	Solicitors
Yes	86%	79%	91%	83%	85%
No	14%	21%	9%	17%	15%

There is a large level of support for the families of homicide victims to be informed in writing of the outcome of the decision of the Parole Board in relation to the temporary or early release of an offender convicted of murder or manslaughter. The increase in support for this proposal in comparison to the previous, which asked whether the Board should be required to contact co-victims inviting a written submission, might stem from a belief that whilst the decisions of the Board should be conveyed to relevant co-victims, those decisions are for it alone to make and not to be swayed by representations from co-victims. However, this stance may be dispelled if, as recommended, victim input is only considered in relation to any restrictions to be placed on the parole that relate to their safety and security, and not regarding the principal issue of whether parole is to be granted or not. Victims and co-victims

should be informed, in writing, of the decision of the Board and of any restrictions attached to the parole of the prisoner that relate to their safety and security.

Should the Prison Services inform the family of a homicide victim in advance of the date on which the perpetrator of the homicide is to be released or repatriated (this currently only occurs if the family contact the Prison Services and request it)?
(N = 137)



	Overall	Judges	DPP	Barristers	Solicitors
Yes	61%	68%	74%	40%	50%
No	39%	32%	26%	60%	50%

Similarly, just over three-fifths of respondents (61%) support a system whereby the Irish Prisons Service contact co-victims directly, informing them of the imminent release, temporary or otherwise, of their offender. It is current practice that the Irish Prisons Service inform only those who have requested to be notified. A Victim Notification Scheme should be offered to all victims and, where there is a fatality, co-victims of an offender who is sentenced to a period of four years or more, or where the sentence is less but his offence resulted in the death of another:

> As the majority of murders occur within social or familiar networks, the issues arising from release in relation to the [co-victims] of the deceased can be very complex and can often engender strong feelings of anxiety, fear and anger ... it is therefore recommended that relevant procedures are built into the system to ensure that the victims family are asked whether they wish to be informed, at the appropriate time, of the offenders release date.[671]

Ireland is a relatively small country, and chance encounters with perpetrators who are released early and victims who are unaware of that release can be deeply distressing.

[671] House of Lords Select Committee on Murder and Life Imprisonment *Report* (London: Her Majesty's Stationery Office, 1989) 493

This is best illustrated by reference to what is known as the Philip Sheedy affair. Sheedy pleaded guilty to driving under the influence of alcohol and to dangerous driving causing the death of Anne Ryan. He was subsequently sentenced to four years in prison in October 1997, with permission to review sentence two years later. Following a bizarre set of circumstances, he was released from prison thirteen months later in November 1998. A chance sighting by the husband of the victim, John Ryan, who was uninformed of such a release, unleashed terrible private hurt and a legal earthquake that resulted in the resignation of High Court Judge Cyril Kelly and Supreme Court Judge Hugh O'Flaherty. Sheedy voluntarily returned himself to jail.

For security purposes an approximate rather than exact release date of the prisoner - who, at that stage, has completed the part of his sentence entailing imprisonment to the satisfaction of the State - should be provided. At the very least, the co-victims of life-sentenced prisoners should be informed, as a matter of course and through a procedure that has recorded their want to know, that the offender is due to be released but remains at liability to the State for the remainder of their lives.

Conclusion

Whatever the varying degree and combination of rationales at play for sentencing generally, it is a given that for the most serious offence of murder retribution is the dominant force behind the punishment bestowed. To reflect this, it is crucial that an offender convicted of murder serves a significant period of time in prison before parole; otherwise the imposition of mandatory life is a somewhat superfluous exercise, too lenient to be fittingly retributive, futile as a deterrent and an insult to the victim, his family and to society at large. The average period of a life-sentence for murder actually served in prison presently stands at approximately fourteen years, though admittedly this is a rollover figure that only takes into account those offenders released over the past decade and is one likely to increase year-on-year. In any event, findings presented here indicate that eighteen to twenty years would be deemed a more favourable duration, representing as it does the middle ground between present practice and the twenty-five years being sought by AdVic. As a result, a prisoner serving mandatory life for murder should only be first eligible to have his case reviewed by the Parole Board after a minimum period of nine years has been served. In addition, it is recommended that the judiciary be permitted to single-out what it considers to be particularly heinous murders by attaching to mandatory life an exclusion from the parole process before a specified time of that sentence has expired

(*e.g.* ten, twelve or fourteen years). This enables the judiciary to ensure that such offenders serve significant and, at the very least, specific periods of time imprisoned.

Co-victims are often hurt and confused by what they perceive to be the apparently lenient and inconsistent sentencing manslaughter convictions attract. In order to allay these concerns, and to honour a long-outstanding promise of the Government, it is imperative that a set of coherent non-statutory guidelines be introduced. These must take into account the rise in fatal interpersonal violence by duly reassessing previous sentencing standards regarding manslaughter so as to enhance the deterrent element of the punishment. They should establish hierarchies of gravity for certain offences and set norms from which, having had due regard to individual circumstances and with detailed explanation, the trial judge may depart. They must be complimented by both the wide dissemination of decisions of authoritative precedent on sentencing ranges from the Court of Criminal Appeal and the implementation of the Irish Sentencing Information System (ISIS) database, which shall marshal information and patterns resulting from different combinations of material case facts. These three developments would greatly assist the judiciary iteratively in achieving consistency not just in the punishment of manslaughter offenders, but for sentencing in general.

It is surprising that victims and co-victims alike do not have or demand a greater and more official involvement within the parole process. It would be difficult for the State to deny them some level of formal participation, for once the accused is found by a jury to be guilty he no longer enjoys the presumption of innocence and instead becomes the victim's offender. This stance is commonly evoked to support victim input into both sentencing and parole processes, but whereas sentencing must, for the most part, be an independent task of the judiciary, parole is the early release of an offender from serving that sentence, and therefore his victims should be permitted some say into what is essentially a concessionary process. In essence, whilst co-victims should not be allowed to influence the length of sentences imposed by the judiciary, they ought to be afforded a voice in the process that has, at a later date, the potential to reduce that sentence.

It is therefore recommended that the Parole Board invite co-victims, unless they have recorded a wish to the contrary, to make a written submission when it is reviewing the case of an offender convicted of murder or manslaughter and that they are advised, in writing, of the decision of the Board and of any terms or conditions attached to the parole of the prisoner that relate to their safety and security. They

should also be informed by the Irish Prisons Service of the approximate release date of the homicide offender. If co-victims are to be actively invited to partake in the parole process it will be important to ensure that the Parole Board, and the Irish Prisons Service in terms of providing release dates, adhere to sensitive intervention practices where future contact with victims is made and explain the limits of both influence and confidentiality conferred upon the information that they provide. In addition, so as to avoid inevitable future challenges to its work, the Board should be placed on a statutory footing so that it becomes an independent and impartial process that determines applications for release rather than merely advising the Minister.

As an aside, the interest co-victims have in the sentencing and release of homicide offenders is understandable and legitimate. The subject of sentencing is, however, one part of victim discourse often and all too easily disparaged as the searing verbalisation of the vengeful instincts of the harmed. Many portray victims' sentencing demands as unseemly and overtly retributive, using them as leverage in an attempt to dismiss, in their entirety, all other claims victims make. But what is wrong with those harmed by crime seeking retribution through the criminal justice system? That such a question needs to be posed in a thesis regarding homicide co-victims is an indicator of the complacent tone that has seeped into criminal punishment debate. It now seems, in some lofty quarters, almost distasteful to demand harsher punishment and lengthier sentences, that rehabilitation be the core focus of any sentence. Yet it is entirely natural for victims and co-victims of serious crimes to want and expect criminal justice to retaliate severely against offenders. Indeed, for the main, it would be irrational and perhaps even disrespectful of the life taken if co-victims were to promote or tolerate clemency for the killer. In spite of this, certain types of murder, like mercy killings, and particular incidences of manslaughter have indeed prompted pleas for leniency from co-victims, signifying that in some cases they can and do weigh up the circumstances of a homicide above and beyond any instinctive desire for vengeance. Whereas sentencing must always be independent, it is a contemptible ploy to mistranslate the subjectively reasonable desire co-victims may harbour for more severe punishment into a sweeping dismissal of all their claims, which are, in general, rational and argued within the framework of irrefutable and logical debate. It is this wide array of entreaties from homicide co-victims for inclusion and reform within the Irish criminal justice system that this thesis now considers.

CHAPTER 5

Assessing the Needs and Concerns of Homicide Co-Victims within the Irish Criminal Justice System

Having already demonstrated that the family of a homicide victim are, by virtue of the effect the killing has upon them, *de facto* victims of the fatal crime; and having examined the law of homicide, the sentencing standards for murder and manslaughter, and the long-term administration of those sentences within Ireland, this thesis now assesses the needs and concerns these homicide co-victims have with various aspects of criminal justice process and procedure, as identified from the reforms sought by AdVic. Three topics have been earmarked for substantial assessment; namely, access to information, victim impact statements, and the functionality of the system of public prosecution. These have been chosen due to the prominence they hold within any debate concerning victims' rights.

First, the need for information, in relation to the progress of the investigation and the prosecution specifically, and to the procedures and workings of the legal system generally, is the most common and constant need referenced by all crime victims. While it would appear by far the easiest and most immediate victim demand that the justice system could comply with - and there is little, if indeed any objection to providing victims with relevant and appropriate information - there exists no legislative right to information and no statutory body to oversee its dissemination.

Secondly, victim impact statements are a notorious bone of contention within criminal justice debate, giving rise to considerable difficulties, both conceptually and practically. The use of impact statements in this jurisdiction swings in and out of public and legal professional favour, primarily in response to various controversies

surrounding the content of certain statements delivered by homicide co-victims. Yet impact statements often represent the only opportunity the family of a homicide victim will be given by the court to partake in the trial. They request that impact statements be utilised in murder cases, so as to relay to the offender the hurt caused by his actions, and in manslaughter cases, where they can help inform sentencing. Those opposed to this innovation are quick to point out that sentencing must remain an independent and objective endeavour, insofar as it must be free from the variable demands of victims themselves. This chapter, having evaluated the arguments made by both camps, proffers a possible compromise solution.

The third issue singled out for detailed analysis is the system of public prosecution. In Ireland, the Director of Public Prosecutions represents the public interest in a criminal trial. It is the function of this Office to determine whether to prosecute and under what charges. Victims undoubtedly have a vested interest in this process, wanting, as they understandably do, to ensure that the offender is brought before the courts and punished for his crime. While acknowledging that this system of public prosecution must remain independent in its decision-making, homicide co-victims want to be informed of the reasons behind the decisions made, promoting ways wherein the system of public prosecution is made more transparent for victims.

Having dealt with these three sizeable topics, this chapter then addresses, more briefly, a variety of other needs and concerns expressed by co-victims; namely, the delay in bringing trials before the court; the accommodation of victims within the courtroom; the character attack of the deceased by the defence at trial; the application of bail laws; state compensation; the homicide of Irish citizens abroad; and the overall treatment of homicide co-victims by criminal justice professionals.

The Want to Know: Information Rights for Victims [672]

The criminal justice system is often indecipherable and indeed inhospitable to the uninitiated, a mire of procedures that remain, in many respects, embedded in another era. Part of the problem is that it is not a system in the true sense of the word, instead operating more as a federation of factions. Shapland has likened the integration of victims into criminal justice to a medieval baron system, whereby each baron or criminal justice fiefdom jealously guards its piece of processing, negotiating

[672] The author presented a paper entitled *The Informational Needs and Concerns of the Co-Victims of Homicide in Ireland*, essentially an overview of this section, at the International Postgraduate Conference on Criminal Justice and Human Rights at University College Cork, 3 May 2007

reluctantly with others and only when called to do so, the subject of negotiation frequently one merely of boundary disputes. In this context, victims – or 'peasants' (to extend the analogy) – find it difficult to penetrate the medieval castle walls, being largely left on the outside. Moreover, the difficulty for victims is that their needs span several fiefdoms that rarely or ineffectively communicate with each other. In such a context, effecting real change, even with regard to simple and uncontroversial needs such as information, becomes heavily problematic.[673]

As a civilian in a highly professionalised legal environment, the victim is generally unacquainted with judicial proceedings and usually lacking the necessary training to understand the specialised terminology or follow the many legal manoeuvres.[674] The primary frustration of victims has long and widely been identified as the paucity of information relating to criminal justice procedures provided or made available to them:

> It is easy to identify from the vast empirical research that the need for information is the most cited of the victim. Victims are normally not familiar with the criminal justice process ... unless criminal justice authorities provide them with information, victims do not know what to expect or what has happened in their case. Moreover, if the victim has to appear as a witness, there is a common desire for a general briefing on court procedures and quite often a need for specific legal advice.[675]

This need for information includes, for example, regular updates concerning police progress with the investigation; whether an individual has been arrested in connection with the crime; if he is on bail or in custody; the dates of court applications, hearings, trials and inquests delivered sufficiently far enough in advance so as to be of actual benefit to the victim who wishes to make arrangements to attend; how a family may regain access to tissue and other body samples held as evidence after the trial and appeal process; and how they might obtain a transcript of that trial.

As victims are generally novices unfamiliar with the processes of criminal justice, the provision of information should not be limited to their particular case but must

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[673] Shapland J 'Fiefs and Peasants: Accomplishing Change for Victims in the Criminal Justice System', in Maguire M & Pointing J (eds) *Victims of Crime: A New Deal?* (Milton Keynes: Open University Press, 1988) 187-194

[674] Roberts J & Erez E 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 *International Review of Victimology* 223, 232-233

[675] Maguire M 'Victims' Needs and Victim Services: Indications from Research' (1985) 10 *Victimology* 539, 545. Similarly, "numerous studies have shown that being kept informed is one of the most important needs of victims" - Edwards I 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 977. See also Victim Support *In The Aftermath: The Support Needs of People Bereaved By Homicide* (London: Victim Support, 2006) 59

also encompass information and advice regarding procedures in general.[676] Victims are thrust into a complex system of legal players who, for the most part, communicate in language seemingly tailored to obfuscate the non-professional, where they have much to learn and understand about elements of the process. They have an obvious interest in obtaining as much information as possible from the key players within that system, particularly from the investigating police and the prosecutor:

> If the criminal process is the taking over by the State of the vengeful instincts of the injured persons – buttressed by the recognition that the harm to the victim is also harm to the State – then it would seem, at first blush, that the victim at least has a right to be informed of and where appropriate involved in, the processes that have led to whatever is the state settlement of the harm that has been done to him.[677]

The lack of understanding that many victims have of the legal system, together with their literal exclusion from the process, exaggerates the distance between victims and offenders. Victim support literature frequently notes that offenders have a legal team who will discuss each step of the process with them as it arises, whilst victims do not. Those fortunate enough not to be victims of serious crime can but imagine the stress and uncertainty encountering the criminal justice process generates. Feelings of powerlessness and frustration are almost universal amongst victims, with many feeling isolated or invisible within the legal system, coming away from the entire experience with a firm belief that the offender receives better treatment and more consideration than the victim or his family. We owe it to victims to try and demystify their journey through that system so as to make it more tolerable, for "victims have the right to the best treatment the State can offer, [and] part of this should be a dispassionate explanation of how and why the legal system works as it does."[678]

Knowledge and power are intimately related[679]; hence victims seek information because at some deep-rooted level it is a restoration conduit for control. There is no contesting that victim information has always been erratic, "both scanty and rather

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[676] Criminal Justice Reform *Hearing the Relatives of Murder and Manslaughter Victims: The Governments Plans to Give the Bereaved Relatives of Murder and Manslaughter Victims a say in Criminal Proceedings (A Consultation Paper)* (London: Office of Criminal Justice Reform, 2005) 16

[677] Morris N *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974) 56

[678] O'Malley T 'Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions' (1993) *Irish Criminal Law Journal* 40, 60

[679] Indeed, "*scientia potentia est*", stated originally by English author and philsopher Sir Francis Bacon (1561-1626) in his work *Meditationes Sacrae* (1597) is, in modern times, typically paraphrased as "knowledge *is* power" {*emphasis added*}

patchy"[680], and any preening from the plethora of related literature will throw up adjectives such as unclear, erroneous, discrepant, haphazard, and incomplete. Access to information is crucial, even if it is just information that explains why certain details are not available at a particular time, for it allows the victim to cope and comprehend and feel in someway a party to the process.[681] Victims do not expect to be spoon-fed information, indeed most take a pro-active role in seeking out what it is they want to know. Though some information is available it is scattered, not always easy to access, can take considerable time and effort to gather and correlate, and, when found, much of it is couched in dense legal language that can prove daunting:

> The information is out there but it is not offered to you. The onus is very much on the family to go seek it, and a family who is experiencing homicide-related trauma is not in a position to even know what it is they need to know, never mind to go and get it.

A better comprehension of the criminal justice system certainly contributes to the victim's overall satisfaction with the process.[682] Research has confirmed that when victims receive explanations about proceedings they are satisfied with the outcome, irrespective of the nature of that outcome.[683]

Annie Mulvaney, co-founder of AdVic, believes that "the family [of a homicide victim] need to be kept informed...[for] when you are left in the dark, and not listened to or talked to, the frustration is incredible."[684] Many stress that they have no previous experience of the complex procedures that follow whilst the various criminal justice agencies they encounter are well versed, dealing as they now do with some homicide-related incident on an almost daily basis, unintentionally tending to be insensitive to the human suffering involved behind the crimes they process[685]:

> It is traumatic enough to endure the sudden and possibly violent death of a loved one [but] as well as coping with profound grief, the relatives of homicide victims endure a

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[680] Shapland J, Willmore J & Duff P (eds) *Victims in the Criminal Justice System* (Aldershot: Gower, 1985) 49

[681] Riches G & Dawson P 'Spoiled Memories: Problems of Grief Resolution in Families Bereaved through Murder' (1998) 3(2) *Mortality* 143, 157

[682] Hagan J 'Victims Before the Law: A Study of Victims' Involvement in the Criminal Justice Process' (1992) 73 *Journal of Criminal Law and Criminology* 73

[683] Erez E 'Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements', in Crawford A & Goodey J (eds.) *Integrating a Victim Perspective within Criminal Justice* (Aldershot: Ashgate, 2000) 177; Sanders A & Young R 'Discontinuances, the rights of victims and the remedy of freedom' (2001) *New Law Journal* 44, 47

[684] McInerney S "The family is removed from everything': Campaigners seek to put victims' families at centre of process' (29 January 2006) *Sunday Tribune* 8

[685] Davis R, Kunreuther F & Connick E 'Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment' (1984) 75 *Journal of Criminal Law and Criminology* 491, 504-505

police investigation into the death and have to try to make sense of an unfamiliar and often lengthy criminal justice process.[686]

Following an approach by AdVic, the Bar Council of Ireland, under their Voluntary Assistance Scheme, provide access to free legal advice for homicide co-victims, including, for example, advice relating to the issues of probate, custody *etc.* that may stem from the homicide. In order to access this service, the co-victim must first get in touch with AdVic, who are required to be the link through which all contact is made. It is important for the co-victim to provide as much detail as possible at the outset so that the Bar Council can match a barrister or solicitor to the query, who will then respond by letter or telephone.

The Role of An Garda Síochána in Keeping Victims Informed

The police are typically held to be the most secluded part of criminal justice, yet as his first point of contact with that system they play a vital role in shaping the victim's experience.[687] The *Garda Charter for Victims of Crime* stipulates that each member of the force will treat all victims in a courteous, helpful, respectful, and professional manner.[688] It defines a victim as any person or group of people whom, individually or collectively and directly or indirectly, suffer harm as a result of a crime or other traumatic incident that requires a Garda response.

In the past, An Garda Síochána forwarded the details of a victim to Victim Support, who then initiated direct contact, but this practice has ceased since the implementation of data protection legislation.[689] Now, all victims are referred to the National Crime Victims Helpline. In addition, since December 2006, PULSE, the Garda computer system, automatically generates letters to crime victims providing them with some basic details concerning their case, like the contact details of the investigating officer, and listing national and local victim support contacts. This initiative is rather an impersonal communiqué, one that is but a drop in the ocean in meeting the broader informational needs articulated by victims.

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[686] Criminal Justice Reform *Hearing the Relatives of Murder and Manslaughter Victims: The Governments Plans to Give the Bereaved Relatives of Murder and Manslaughter Victims a say in Criminal Proceedings (A Consultation Paper)* (London: Office of Criminal Justice Reform, 2005) 1

[687] Sholnick J *Justice Without Trial* (New York: Wiley, 1975) 14

[688] An Garda Síochána *Garda Charter for Victims of Crime* [http://www.garda.ie/pub/victims_charter.pdf]

[689] See the provisions of the *Data Protection Act 1988* and the *Data Protection (Amendment) Act 2003*

Table 14: Crime Victims' Satisfaction Rating with An Garda Síochána

Satisfaction with:	Satisfied/very satisfied (%)	Dissatisfied/very dissatisfied (%)
Speed initial call taken	80.8	11.2
Speed to scene	77.1	14.5
Thoroughness	71.2	16.7
Politeness	93.7	2.7
Understanding of problem	82.6	10.2
Answers to questions	82.6	10.9
Performance of first Garda(i)	74.1	13.7
Information on Case Progress	35.8	40.2
Information on Outcome	27.8	47.1

Totals not 100% due to the omission of those who were neither satisfied nor dissatisfied - O'Dwyer K 'National Survey of Victims of Crime' (March 1998) *Communique: An Garda Siochana Management Journal* 24, 26

Whereas levels of satisfaction with the initial services rendered by An Garda Síochána are high, these tend to decline steadily as the case progresses, and once the investigation is under way the quality and quantity of information given can vary considerably. Dissatisfaction arises from the failure of An Garda Síochána to keep victims informed, their perceived inefficiency and a general sense of disillusionment, a product of a growing feeling that the police do not care or are doing nothing.[690]

Given this, the *Victims Charter and Guide to the Criminal Justice System* (to be discussed in the next section) is somewhat commendable insofar as it enunciates to An Garda Síochána a variety of onerous information-related responsibilities, such as providing the victim with the contact details of the investigating Gardaí; informing him of relevant victim-related services; outlining the investigation process; telling when a suspect is charged and if he is in custody or on bail (a matter where, interestingly, the facts are far less frightening for the victim than the fear of the unknown), and the conditions attached to that bail; and if one is to be called as a witness, the date and location of court hearings and the possibility of being asked to complete a victim impact statement.[691]

While on paper the tasks the Charter enumerates for An Garda Síochána seem easily attainable, in practice they are less so. It can be difficult for the victim to make contact with the specific officer who is investigating his case in order to enquire about developments for the hours that that officer may be working depends on the unit he is a part of or how the flexible duty system used to cover peak hours pans out on any

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[690] Shapland J 'Victims, the Criminal Justice System and Compensation' (1984) 24(2) *British Journal of Criminology* 131, 134; Shapland J, Willmore J & Duff P (eds) *Victims and the Criminal Justice System* (Aldershot: Gower, 1985) 83-89

[691] An Garda Síochána *HQ Circular No.21/98 Re: Victim Support and Charter for Victims of Crime* (3 February 1998); An Garda Síochána *HQ Directive No.142/99 Re: Victims Charter and Guide to the Criminal Justice System* (4 November 1999); and An Garda Síochána *HQ Directive No.195/01 Re: Referral Procedures to Victim Support* (13 November 2001) all echo these commitments.

given day. Other officers are unlikely to know of or are understandably unwilling to relay information because of their unfamiliarity with the precise details concerning the case. A major study of crime victims across Europe noted that the Irish chances of success in the area of information provision would be greatly boosted if civilian office-based personnel within local Gardaí stations were to maintain contact with victims or, rather than leaving it to the availability and discretion of local Gardaí, that a uniformed system for informing victims be devised and implemented nationwide.[692]

The ratings presented in Table 14 should not be seen as a direct criticism of An Garda Síochána, for it is best remembered that victim support, however desirable and though they might strive to provide it, is not their primary function:

> The situation that you find yourself in is that you're continuously contacting [An Garda Síochána] to try and find out ... it is not their job, they do an immense job in fairness to them, but it's not their job. It should be someone in an administrative role [who is] able to get all that information.

Many victims and co-victims report being treated with kindness and sensitivity by An Garda Síochána, yet they also reveal that access to detailed information was typically down to the personal integrity or discretion of the senior investigating officer, who seemingly provided this "in good grace" rather than as a matter of course.

Due to the somewhat lengthy nature of the judicial process, the need of the victim for information relating to the criminal prosecution is likely to still exist a year or more after An Garda Síochána have detected the offender. Keeping victims informed over a period of time longer than the immediate investigation and detection is one of the most difficult things for An Garda Síochána to achieve, for they have fulfilled their chief duty to apprehend the offender and therefore logistically view the case as closed, becoming rightly more concerned with current undetected crimes. Despite this, the Director of Public Prosecutions utilises An Garda Síochána as their medium for communication with crime victims, expecting them to pass on important information accurately and timely. It would appear, at least on an anecdotal level suggested by my conversations with co-victims, that this information can be delayed weeks or months, or even not relayed at all. It has been observed that the drip-feeding of information or misinformation is an endemic problem where there exists a scheme wherein one agency (*i.e.*, An Garda Síochána) is required to inform victims of

[692] Brienen M & Hoegen E *Victims of Crime in 22 European Criminal Justice Systems* (Nijmegen: Wolf Legal Productions, 2000) 482

decisions that have been made by another (*i.e.*, the DPP).[693]

It is essential that An Garda Síochána ensure a structured approach in its dealings with co-victims. When a homicide is committed, a well-honed system is activated to investigate the crime. The local District Officer will take charge of the investigation, assisted by teams of local detectives and uniform Gardaí. Very often the assistance of specialist detectives from National Support Services will be sought. In all cases, forensic experts from Garda Headquarters will be employed. Every effort is made to determine the how, who and why of a violent death. Yet whilst all this was being done, it was very often the case that the families of victims were forgotten.[694]

Though some ad-hoc format was in practice for a time before[695], in December 2006 An Garda Síochána officially launched its Family Liaison Officer Scheme. A liaison officer is appointed to all families of victims who have been or are being subjected to emotional or psychological trauma relating to homicidal incidents, kidnappings, false imprisonment, hostage siege situations, suicide, and road traffic accidents. Liaison officers are specifically trained members of An Garda Síochána who, following best practices identified in other jurisdictions, are also an integral part of the homicide investigatory team, and whose functions are to:

- Provide care, support and information in a sensitive and compassionate manner to the family;
- Secure the confidence and trust of the family, thereby enhancing their contribution to the investigation;
- Gather evidence and information from them in a manner which contributes to the investigation and preserves its integrity;
- Assist with dealings they may have with the media throughout the investigation;
- Help guide them through the complicated criminal justice system by giving timely information and practical support concerning the investigation and associated procedures, and provide them with contact details regarding support agencies; and
- Open a communication channel for families to the senior investigating officer.

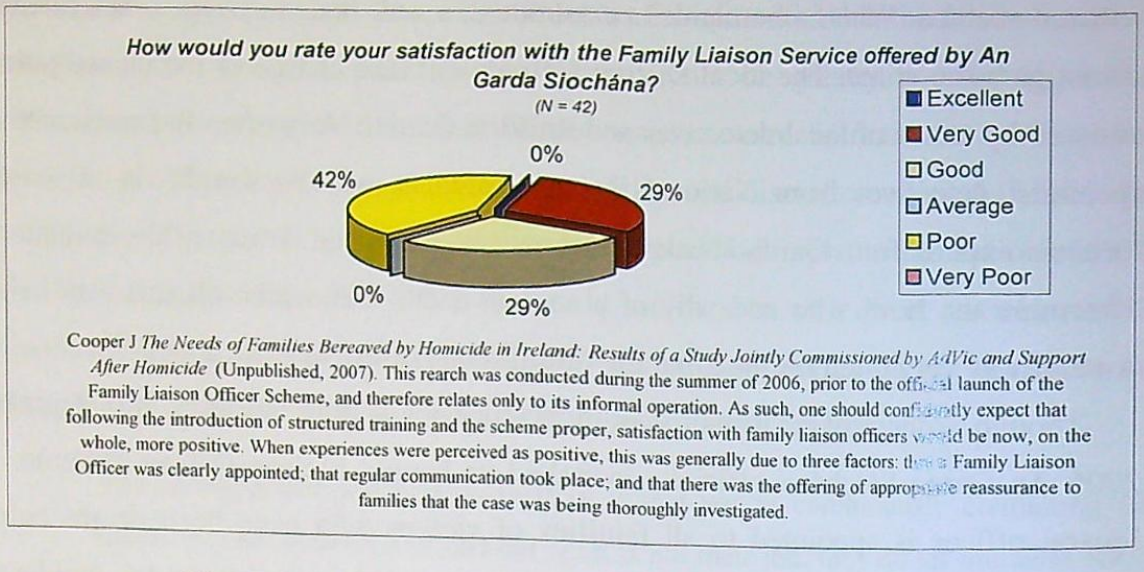
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[693] Sanders A 'Victim Participation in an Exclusionary Criminal Justice System', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 214

[694] O'Mahoney J *Developing a Best Practice Approach for Liaison between Gardaí and the Families of Murder Victims* (unpublished dissertation by Detective Superintendent John O'Mahoney, submitted for BA in Police Management, 2005)

[695] In 2006, Cooper found that 28% of the families she interviewed as part of her studies had what would now be referred to as a Family Liaison Officer appointed - Cooper J *The Needs of Families Bereaved by Homicide in Ireland: Results of a Study Jointly Commissioned by AdVic and Support After Homicide* (Unpublished, 2007)

At the time of writing, there were 136 family liaison officers nationwide with a further thirty-two to be trained by the end of 2008.[696]



Cooper J *The Needs of Families Bereaved by Homicide in Ireland: Results of a Study Jointly Commissioned by AdVic and Support After Homicide* (Unpublished, 2007). This rearch was conducted during the summer of 2006, prior to the official launch of the Family Liaison Officer Scheme, and therefore relates only to its informal operation. As such, one should confidently expect that following the introduction of structured training and the scheme proper, satisfaction with family liaison officers would be now, on the whole, more positive. When experiences were perceived as positive, this was generally due to three factors: that a Family Liaison Officer was clearly appointed; that regular communication took place; and that there was the offering of appropriate reassurance to families that the case was being thoroughly investigated.

The Victims Charter and Guide to the Criminal Justice System

The Department of Justice, Equality and Law Reform, in a bid to meet the informational needs of crime victims, published the *Victims Charter and Guide to the Criminal Justice System* in 1999. This Charter set out to inform victims of what they could expect in the way of services, representing a "commitment to giving victims a central place in the criminal justice system"[697] and amalgamating for the first time all the elements of that system from the victim's perspective. Despite appropriating a tone of rights the Charter does not confer any, indeed what is cast in this grandiose tone are, in actuality, mere aims that should be simply characterised and classified as good policy.

The Victims Charter represents little more than a broad statement of the obvious, promoting the extension of greater sensitivity and sympathy for the victim, merely promising victims the fine ideals of efficiency, civility and fairness. It seems peculiar that professionals within the justice system might not act towards crime victims in a manner that is anything but efficient, courteous and fair, and even more so that a Charter should be deemed appropriate to ensure such competent levels of service delivery. This lacklustre Charter, presented as progress, actually served to point out the lack of humanity in the system. If anything, the need for such a bland document

[696] Information provided by email from Family Liaison Officer Coordinator Superintendent Bernard (Joe) McKeown (24 March 2008)

[697] Department of Justice, Equality & Law Reform *Victims Charter and Guide to the Criminal Justice System* (Dublin: Department of Justice, Equality & Law Reform, 1999) 2

highlights the pre-existing arbitrary and inconsistent qualities of the criminal justice system towards the victim.

The Charter is a résumé of the standards of service to be met by An Garda Síochána; the Courts; the Prison Service; the Probation Service; the State Prosecution Service; the now defunct Victim Support; and the Coroner Service - encouraging rather than binding each of these key criminal justice agencies. It fails to establish the crime victim as a consumer *per se* with incumbent consumer rights or, for that matter, as a citizen with any substantive rights. It contains little if any new information and no real guidance as to what victims could or should do if the prescribed standards are not met, other than to submit a complaint to the actual body that failed to meet these standards. Without the force of law, it is reasonable to assume that the theory of the Charter on the one hand and its everyday implementation on the other diverge widely.

A consequence of its failure to set any legally enforceable rights is that the agencies of criminal justice, for reasons relating to time, manpower and budgetary constraints, are unlikely to voluntarily strive for high standards in meeting the levels of service that the Charter sets for them. Nevertheless, quasi or non-legal documents may have the effect of encouraging criminal justice bodies to respond as if the victim actually does possess legal rights.[698] Services to victims can, in principle, be satisfactorily provided without them being legally enforceable, and though whether they are *actually* satisfactory remains an empirical matter, the existence of a lobby group like AdVic would suggest that they are not.

The Charter did, however, help stimulate an examination of the manner in which victims were treated by agents within and around the justice system, calling upon each to scrutinise their incorporation of victims and encouraging of them certain base commitments in addressing victims needs, an assessment that many, if not all, would still fall short of. There is no doubt that there has been a cultural shift in practice and policy towards the provision of information to victims but agencies have been, if not slow to change, then slow in reaching standard requirements and expectations.

The Victims Charter thereby amounts to an act of political posturing, lacking enforceable remedies for non-compliance, leaving the situation perhaps as vague as it was before its conception and is wholly insufficient to the task. For the most part, it emphasises that victims have no rights at all, only courtesies and conveniences to be

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[698] Fenwick H 'Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60(3) *Modern Law Review* 317, 324

extended or withheld at the whim of criminal justice bodies. Promising victims rights that are not delivered involves a certain danger:

> Providing rights without remedies would result in the worst of consequences … ultimately, with the victims best interests in mind, it is better to confer no rights than 'rights' without remedies.[699]

Much might be learned from the *Code of Practice for Victims* in England and Wales, which guarantees the provision of very significant levels of information to victims and importantly identifies the responsibilities of organisations within the criminal justice system in this area. As a comparative barometer, it is helpful to note that since this Code of Practice entered into force in April 2006, a victim of crime in England and Wales now has the *legal* right to be informed of the progress of his case. Some of the key requirements of this Code include the right to information about the investigation within specified time scales; notification of any arrests and forthcoming court hearings; the assignment of a dedicated family liaison officer to bereaved relatives; and clear information from the Criminal Injuries Compensation Authority:

> This is the latest tool to ensure that the needs and concerns of victims of crime are central to the criminal justice system. Victims deserve 'rights' … under the Code, all criminal justice agencies have a legal duty to provide the crucial information and advice that is so important to giving victims the ability to get their lives back on track.[700]

Under this Code, there are a number of remedies for victims with legitimate complaints, including an apology, consolatory payments, and for changes to be made in processes and practices to prevent the matter complained of from reoccurring.

Here in Ireland, the Commission for the Support of Victims of Crime is currently examining the provision of services as currently set out in the Charter. In 2006, it wrote to all relevant agencies requesting an assessment of the Charter's provisions insofar as they relate to that organisation in particular and to the criminal justice system as a whole; an estimation of the effectiveness of the services being provided in

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[699] Kilpatrick D & Otto R 'Constitutionally Guaranteed Participation in Criminal Justice Proceedings for Victims: Potential Effects of Psychological Functioning' (1987) 34 *Wayne Law Review* 7, 27

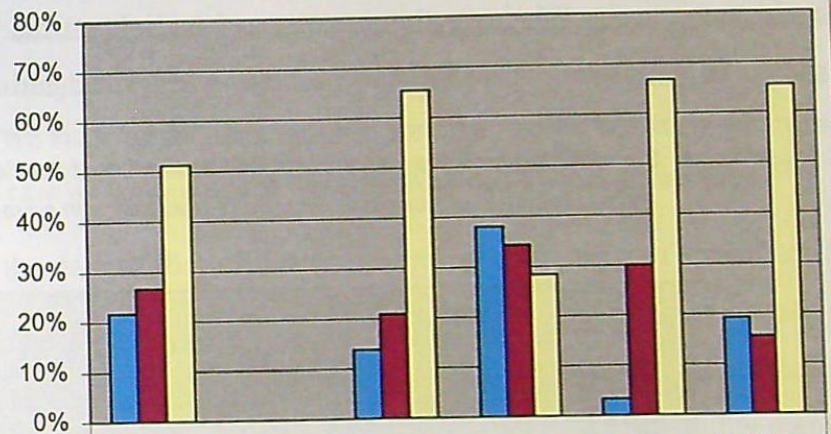
[700] Criminal Justice System *New Rights for Victims of Crime Come Into Force: Press Release* (CJS004/2006 - 31 March 2006). All police forces in England and Wales, including the British Transport Police and the Ministry of Defence Police, the Crown Prosecution Service, Her Majesty's Court Service, the Police and the Crown Prosecution Service Witness Care Units, the Parole Board, the Prison Service, the Local Probation Boards, Youth Offending Teams, the Criminal Compensation Authority, the Criminal Injuries Compensation Appeals Panel and the Criminal Cases Review Commission are all bound by this *Code of Practice for Victims*.

terms of the benefits for victims; and an outline of the proposals each organisation has for the future development of such services. The Commission has evaluated these responses and is preparing a draft framework for the delivery of services to victims of crime, due for submission to the Minister for Justice, Equality and Law Reform in mid-2008.[1]

Information Rights for Victims in Ireland

As astonishing as it may sound, a victim of crime in this jurisdiction has no legal right to information concerning the investigation or prosecution of his case. The postal survey conducted as part of this thesis put a trio of questions regarding information rights for crime victims to Irish legal professionals.

Should the commitments published in the Victims Charter and Guide to the Criminal Justice System (1999) be safeguarded in legislation?
(N = 138)



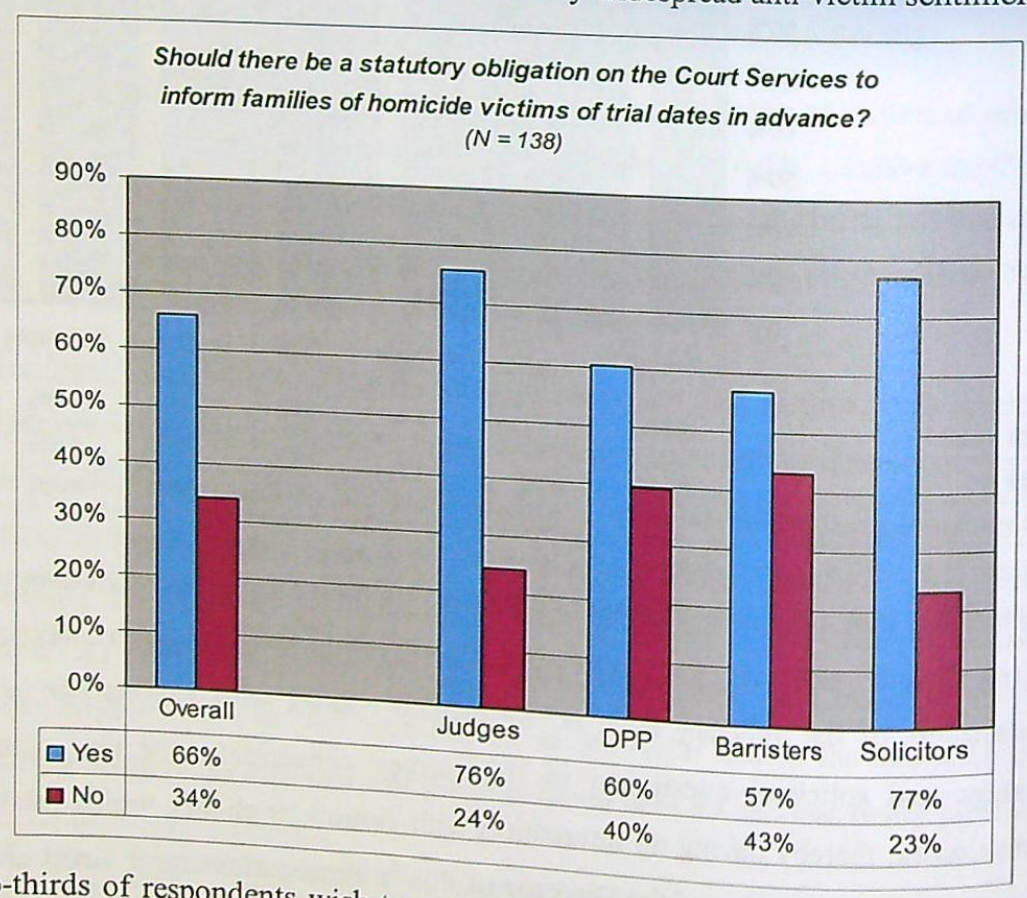
	Overall	Judges	DPP	Barristers	Solicitors
Yes	22%	14%	38%	3%	19%
No	27%	21%	34%	30%	15%
Unfamiliar with Charter	51%	66%	28%	67%	65%

It is startling that a majority of respondents are unfamiliar with the provisions of the Victims Charter. However, upon reflection, this figure is perhaps not so unexpected, for members of the judiciary have no immediate contact with victims *per se*; the barristers and solicitors questioned in this survey concentrate, for the main, on defence work, thereby having no interaction with victims as clients; whilst relatively few members of the Office of the Director of Public Prosecutions have direct contact with victims, and when they do, the victim will, in all probability, have already encountered the Charter through another source such as An Garda Síochána or a

[1] Commission for the Support of Victims of Crime *Annual Report 2007* (Dublin: Department of Justice, Equality & Law Reform, 2008) 11

victim support group. Still, this is not to say, especially in view of the unique nature of this type of document, that all professionals working within criminal justice should not have some level of familiarity with the Charter and its contents.

Taking those unfamiliar with its provisions out of the equation, the preponderance of respondents are opposed to legislating for the aims enumerated within the Charter. It is difficult to postulate why, particularly bearing in mind its relatively benign provisions. Perhaps this unwillingness stems from a recognition that due to the ever-evolving needs of crime victims there ought to be no specific and thereby limiting legislative rights, which are not as easily tweaked to the concerns of the time as a Charter may be, or that there exists some awareness that the burden it would place on the organisations of criminal justice may be greater than they can currently accommodate, thus giving rise to a fear that due to manpower constraints a diminishing of other more important services provided elsewhere by each of these agencies may occur. Whatever the reasons, and in light of the following responses, this unwillingness is unlikely to derive from any widespread anti-victim sentiment.



Two-thirds of respondents wish to see a statutory requirement placed on the Courts Service to inform familial co-victims of the dates of hearings relating to the homicide. One must question why a third are opposed to the implementation of what appears to be a reasonable proposal. Ensuring that the Courts Service notifies families of

homicide victims of trial dates means that there is a formal procedure wherein these co-victims are advised of such dates sufficiently in advance and without having to obtain the information from another source, like An Garda Síochána or the Office of the Director of Public Prosecutions, thus enabling those who wish to attend the court to make alternative employment or child-care arrangements.

For example, Aoife Dillon, whose sister Gráinne was murdered by fellow employee Paulo Nascimento in an attempt to cover-up his theft of €3,313 at Jury's Inn in Limerick in January 2002, was anxious to attend every court hearing, but was given as little as a few days notice:

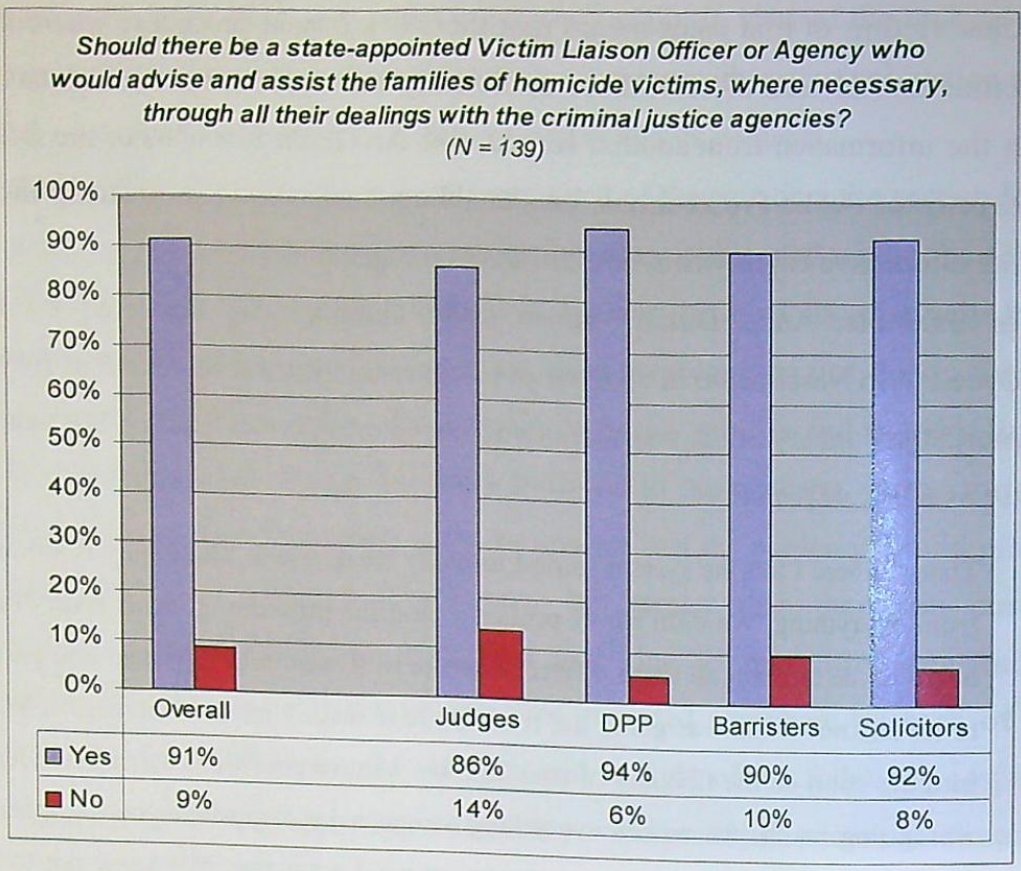
> That's where I felt the system started to really break down. The family is so removed from everything. We didn't ever properly meet the prosecution team. Everything we heard came through all these different channels. If we could have had one person … to let us know what was going on, it would have made such a difference … We went into the court on the first day of trial, and we were so confused, we had no idea what was going on. It just makes everything so much harder, when you're fighting for information. We knew to get there early, so we'd get a seat. We knew not to be too emotional, in case we would collapse the trial. And that's about all we knew.[702]

There is, possibly, the danger that officially informing co-victims of trial dates may subjectively persuade them to attend a trial that they had no previous intention of attending or give the incorrect impression that they are under some legal obligation to do so. However, the reality is that at any homicide trial a number of family members are always in attendance, due to a personal need to feel involved and the powerful cathartic effect of seeing justice done. They expect to learn the truth about all elements of the killing and seek what is fashionably called "closure" through the successful completion of prosecution where possible.[703] Perhaps respondents felt implementing this procedure would overburden an already stretched Courts Service, though this speculation seems improbable due to the relatively small number of trials in question. More likely, considering the response to the following question, many felt that the onus of providing this information would be better placed elsewhere.

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[702] McInerney S "The family is removed from everything': Campaigners seek to put victims' families at centre of process' (29 January 2006) *Sunday Tribune* 8

[703] Joan Deane, co-founder of AdVic, remarked of her experiences of the trial, "I feel that I have faced evil and coped. I discovered a strength I didn't even know I had…I feel now that the trial is over that we have [our son] back to ourselves, and we can remember [our son] the way he really was, with no doubts and no more confusion as to why it happened" - Killilea G 'After the trial I got my son back, but I was wiped out, devastated' (19 November 2006) *Sunday Tribune* 14



There is a sweepingly high level of support for an innovative State-appointed but autonomous Victim Information Authority (to coin it a name) that would assist the families of homicide victims through all their dealings with criminal justice agencies. This endorsement illustrates that legal professionals are aware of the dearth of information and assistance presently made available to co-victims and want to see a marked improvement. Numerous respondents took time to submit additional comments that referenced how cumbersome and unfair the burden the current system of communication with co-victims is on both the members of An Garda Síochána and the Office of the Director Of Public Prosecutions, whose chief functions and responsibilities lie elsewhere. Many also expressed that in whatever manner such a proposed scheme might be eventually realised that it is paramount for it to be independent from existing criminal justice bodies.

The criminal justice system is a mosaic of public agencies, each with their own agendas, bureaucracies and rituals, "a labyrinth of rules and regulations…a confusing muddle of organizations that do one thing, but not another…of bureaucracies that refer you to other bureaucracies."[704] At present, there is an absence of clarity with respect to working partnerships between these different bodies; each sense that

[704] Rock P *A View from the Shadows: The Ministry of the Solicitor General of Canada and the Making of the Justice for Victims of Crime Initiative* (Oxford: Oxford University Press, 1987)

something more should be done to assist the plight of the victim but none are clear as to what or who should be doing it. Victims are often treated indifferently or as some emotional annoyance, frequently transferred not just from one telephone extension to another but from one agency to the next in an exasperating "pass the parcel" practice.

Members of AdVic have observed through their collective experiences an almost continuous breakdown in communication between the various agencies of the criminal justice system, one that inevitably adds greatly to the frustration felt:

> [AdVic does not accept that] bureaucracy should hamper families in the midst of the most traumatic experience of their lives ... nor do [they] believe that the sense of helplessness commonly experienced following a homicide should be compounded by a lack of access to information.

The number of different bodies with which the co-victim will come into contact with is, of itself, part of the difficulty in obtaining information, for "there is no cohesion between the different [criminal justice] agencies. To expect a family who has no knowledge of the system to climb their way through it..." The sentence hangs there unfinished, the recollection of the arduousness of the information gathering task within a post-homicide context too difficult to verbalise. This lack of professional coherency is principally due to the absence of any statutory obligation to provide informational services to crime victims.

A central message here is that the different criminal justice agents, from the police and the prosecution to the courts and the parole board, and even victim support groups themselves, must consider victims as part of a criminal justice whole, and not just in terms of the narrow responsibilities of each particular agency:

> There is a need ... to adopt cross-cutting horizontal accountability towards victims to challenge the current focus on each agency's own branch of criminal justice and set of limited responsibilities.[705]

Yet an effective standardised and collaborative multi-agency approach takes more than political goodwill in the form of an aspirational Victims Charter. Instead of expecting co-victims to negotiate the system, unsure of where or even what information they require, the resolution is to create an official body that interacts with all others to gather case and system information on behalf of individual co-victims.

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[705] Goodey J *Victims and Victimology: Research, Policy and Practice* (Essex: Pearson Education, 2005) 172. See also Shapland J 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies', in Crawford A & Goodey J (eds) *Integrating a Victim Perspective within Criminal Justice* (Aldershot: Ashgate, 2000) 147-164

This thesis has shown that there is manifest professional support for the establishment of a statutory authority within the conceptual framework of a one-stop-shop whose *sole* role is in helping homicide co-victims broker the criminal justice process.[706] This Victim Information Authority should have operational independence from all other criminal justice bodies and government departments in the performance of its duties. Placing victim services within a host organisation that has some other function as its primary purpose, like crime prevention, prosecution, or probation services, poses the risk that if funding or manpower becomes scarce, victim assistance activities, as a secondary function of that organisation, are likely to be amongst the first areas to be cut or abridged.[707] Still, this is not to say that such an Authority cannot be funded in its entirety from the budget of the Department of Justice, Equality and Law Reform or manned by appropriately trained staff of the Civil Service.[708]

The functions of this proposed Victim Information Authority would include:

- Furnishing co-victims with continuous notification of relevant information from all key figures within the criminal justice system, including the Courts Service, the Parole Board, and the Irish Prisons Service;
- Providing an overview of formal legal procedures, outlining to co-victims why their views are not given effect within the criminal trial, thus reducing any unrealistic expectations they may have of their role or the role of the trial (though while this Authority may provide legal *information*, it should not provide legal *advice*);
- Explaining important legal terms and decisions in user-friendly language;
- Informing co-victims of the purpose of victim impact statements;
- Supplying useful telephone numbers and referral to support groups;
- Advising on remedies that are not integral to the legal process, such as the filing of applications for compensation;
- Offering practical guidance on handling the media; and
- Housing a library of recommended related books and articles so that the co-victim may research further.

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[706] Though there is an obvious case for expanding this service to embrace victims of violent and sexual assault, a sound argument can be made for catering for homicide co-victims from the off for it is better to test the viability of this service on a limited scale before considering future expansion (the relatively small occurrence of homicide results in a manageable number of co-victims)

[707] Friedman L 'The Crime Victim Movement at its First Decade' (1985) 45 *Public Administration Review* 790, 792

[708] Existing Civil Service staff with relevant legal or sociological qualifications or work experience can be sought for secondment to the Authority and/or given specific legal and victim-orientated training.

Once given written authority by the co-victim, as necessitated under data protection legislation, it should be the function of this Authority to interact with all other criminal justice agents in order to collect information pertaining to a particular homicide case, necessitating a spirit of integrated thinking and greater accountability from the staff of other criminal justice bodies to provide cohesive and consistent information, creating an overall culture of collaboration.

The need for information is a constant. Providing a concerned, competent and tangible service would reassure co-victims that the justice system is not as uncaring as they had feared.[709] The powerful therapeutic effect of this recommended Information Authority cannot be overstated, for victims who seek information gain much more than mere knowledge when their request for help is met, and it can make an enormous difference to their subsequent and long-term psychological welfare.

A welcome by-product of this Authority is that it would greatly reduce, if not eradicate in full, the number of co-victims contacting the various bodies within the criminal justice process. Constant calling, though understandable from the victim's perspective, is often viewed and treated as an annoyance by personnel within those agencies, particularly when there are no new developments to report, with many finding it distracting from their primary tasks. The reality is that from the perspective of a system that must handle a large number of cases with limited resources, "victims are a nuisance."[710] If this Authority were to be established, criminal justice bodies would find themselves dealing with just one or two staff from this Authority who are seeking information on behalf of co-victims, allowing over time the fostering of good and effective working relations and communication channels.

There would be an inevitable degree of arbitrariness in the need for and use of this Authority. It is difficult to make a firm statement regarding the number of people who would avail of this specialist service, though common sense would indicate that each homicidal incident would result in at least one co-victim, if they were given proper notification of its existence[711], seeking the assistance of the scheme. Access to the Authority may be limited, for reasons of practicality, to a certain number of co-victims. Three or four seems an appropriate number that would appear to cater

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[709] Masters R, Friedman L & Getzel G 'Helping Families of Homicide Victims: A Multidimensional Approach' (1988) 1(1) *Journal of Traumatic Stress* 109, 121-122

[710] McCabe E 'The Quality of Justice: Victims in the Criminal Justice System', in Sheperd J & Sheperd G *Victimization of the Weak: Contemporary Social Reactions* (Illinois: Thomas, 1982)

[711] An Garda Síochána could, as a matter of course, leave a pamphlet with the co-victim at or, as soon as is practicable, after the notification of the homicide that explains clearly the objectives and services of this Victim Liaison Authority.

sufficiently for a variety of relationships, like parents, spouses, partners and children, though there will be circumstances where it would be just, particularly where such a cap excludes just one or two family members, to allow more, but this could be determined on a case-by-case assessment. Whilst the nearest next-of-kin who wants to avail of the service could nominate the other co-victims, there would be grounds for a co-victim not nominated by the immediate next-of-kin to utilise the service. It is envisaged that this would be of necessity in incidences where there was an intra-familial homicide resulting in a division between co-victims, or in the event of the exclusion of someone who would normally have access to the service but for the next-of-kin's unwillingness, like a person removed from the immediate family by divorce or separation, a same-sex partner, or another relationship of significant duration unapproved of by the immediate next-of-kin.

Co-victims should be able to opt-in and out of the service as they wish; some may not want to be contacted after the trial is concluded, others may wish to be notified years later when the issue of parole or release for the offender arises. The onus rests on co-victims who wish to be kept informed long-term to register any changes to their contact details with the Authority. In addition, while it is likely that, at first, there shall only be one outlet for this Authority, in order to provide a truly national service it should subsidise the reasonable transportation costs for a fixed number of visits for those residing elsewhere throughout the country.

The Victim Information Authority should be established on a pilot basis. There is the danger as with any new agency, that it may become institutionalised as part of the overall criminal justice system, or become used by that system in pursuit of the system's objectives, and in the process lose sight of its own original goals.[712] Attitudinal data will need to be collected to gauge the success and future evolution of the Authority. This will need to be gathered from both the co-victim, who must assess how timely and accurate the information he received from the Authority was, and from the staff of the Authority itself, who must measure their own success in obtaining the required information from the various criminal justice bodies that they interact with. The eventual success of this Authority will depend heavily on political will and the (enforced) cooperation of all criminal justice agencies.

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[712] Davis R, Tichane M & Connick E *First Year Evaluation of the Victim Involvement Project* (New York: Victim Services Agency, 1980) 85

The case for providing a Victim Information Authority is strong[713], especially as it is largely neutral in due process:

> The provision of information to victims increases their freedom ... and causes no loss of freedom to suspects and defendants ... this is doubly so when one takes into account that keeping victims satisfied is vital to maintaining their support for the criminal process, which in turn is crucial for the success of many prosecutions.[714]

The establishment of an information-driven service is unobjectionable in principle, for it does not infringe upon the rights of the defendant, and its implementation is wholly consistent with the desires of the crime victims' movement.[715] To those who are opposed to any form of victim participation in the criminal justice system it can be reasoned that the mere act of receiving information, like the status of a case or the dates of hearings, lacks the essential characteristic of a participatory act, for the victim is a passive recipient.[716]

To recapitulate, there should be just one organisation whose role it is to access and supply information pertinent to homicide co-victims, who should not themselves have to chase down information through contacting numerous disparate sources. The systematic provision of information from one source alone has been shown to increase victim satisfaction with the criminal justice system.[717] As the death notification, body identification, post-mortem, police investigation, trial, appeal, parole reviews, and the release, early or otherwise, of the prisoner each have the capacity to be traumatic minefields for the co-victim, he should be advised and assisted from the start as to what will follow in the days, weeks, months, and years ahead.[718] Adopting a Victim Information Authority like the type recommended herein would greatly help guide

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[713] 'There is a sound case for systematic and routine communication of information to victims about the progress of their case' – Ashworth A 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 *Oxford Journal of Legal Studies* 86, 114. Beyond this, Ashworth sees the victim as having no active role in, say, the decision to prosecute, or the determination of the charge to be tried. The scheme proposed here would be purely informational in nature, and would not be providing co-victims with any decision-making role or influence or input into those making decisions within the process.

[714] Sanders A & Young R 'Discontinuances, the Rights of Victims and the Remedy of Freedom' (2001) 151 *New Law Journal* 44, 47

[715] It also fulfils the obligations on the State prescribed by the European Council *Framework Decision of the European Union on the Standing of Victims in Criminal Proceedings* with regard to the right to receive information, communication safeguards, and specific assistance in relation to this particular group of victims - (2001/220/JHA) (Luxembourg: Office for Official Publications of the European Communities, L82/1, 22.3.2001)

[716] Edwards I 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 977

[717] Hoyle C, Cape E, Morgan R & Sanders A *Evaluation of the 'One Stop Shop' and Victim Statement Pilot Projects* (Bristol: Department of Law, University of Bristol, 1998) 6

[718] McGovern L 'The Victim in the Criminal Justice Process', in O'Mahony P (ed.) *Criminal Justice in Ireland* (Dublin: Institute of Public Administration, 2002) 393, 397

them through the maze of unanticipated events that follows a homicide:

> Few will question the anxiety which many victims have to endure as they await the outcome of various decisions, and few will question the wisdom, humanity and, indeed, the justice of making every effort to keep victims informed of whatever progress is being made.[719]

In comparison to England and Wales, victim support in Ireland has been somewhat piecemeal, haphazard and voluntary-driven. Since the simultaneous collapse of Victim Support and the establishment of the Commission for the Support of Victims of Crime in May 2005, the model for victim support finds itself, once more, at an embryonic stage. Whilst oft-accused of a preoccupation with the rights of the defendant and the rehabilitation of the offender, both worthy and necessary pursuits of any democratic criminal justice system, the State now finds itself, perhaps somewhat circuitously and belatedly, at a time where it has a real chance to seize the initiative, to move away from the albeit well-intentioned funding of voluntary groups and to create a cohesive and effective statutory agency that can meet the informational needs and concerns of victims of crime.

As with any burgeoning project, the most important aspect is to lay the foundation on which it is built upon right. The victim-centred initiative proposed herein would be a welcome move ensuring that the problems faced by homicide co-victims in obtaining information at varying times from several different and often difficult sources are overcome. If criminal justice agents routinely feed case information into the Authority, if the information the Authority then provides is accurate, timely and explained in detail, and if co-victims feel respected and staff are skilled to their needs, then this service would undoubtedly improve the experience the co-victim has of criminal justice, helping to reduce if not eliminate secondary victimisation by increasing his satisfaction with that system.

Victim Impact Statements: Is Anyone Listening, and Why Do They Hear?[720]

AdVic campaign that the co-victims of manslaughter *and* murder be entitled, by statute, to present an impact statement before the sentencing of an offender and that

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[719] O'Malley T 'Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions' (1993) *Irish Criminal Law Journal* 40, 41

[720] A version of this section on victim impact statements is due to be published in one of Ireland's leading peer review legal periodicals – McGrath A 'Victim Impact Statements in Ireland: Is Anyone Listening, and Why Do They Hear?' 30 (2008) *Dublin University Law Journal* (forthcoming)

its contents be considered amongst all the factors that form part of sentencing deliberations. It is intended to broach this matter in four parts. To begin, there is a synopsis of the arguments for and against the practice of impact statements, many of which are interrelated. Next, there is an overview of the current legislation and practice regarding impact statements in Ireland. This leads into my claim that these statements do not actually weigh upon sentencing decisions. Finally, this discussion concludes with some observations and proposals for the future function of the impact statement that could reconcile both sides of this heated debate by acknowledging that the attempt to put victims nearer to the heart of the criminal justice system vis-à-vis impact statements is a misguided approach that changes much less than meets the eye but could still, if reformed properly, answer a strongly felt need.

The victim impact statement is a relatively new criminal justice initiative that confronts traditional ways of processing justice by offering the sentencing judge a personalised account of the harm inflicted upon the victim by the actions of his offender. Previously, the views of the victim were largely seen as irrelevant and even dangerously distracting in the overall pursuit of justice.[721] Impact statements were introduced to individualise the consequences of crime, to show how it affected the victim in all his particularity and human specificity.[722] In doing so it was generally anticipated that the victim's overall frustration with and alienation from the legal process would be palpably reduced by increasing his sense of involvement and fair treatment in court, culminating in a restoration of his dignity; for "a criminal justice system that provides no opportunity for victims to participate in proceedings would foster greater feelings of helplessness and lack of control than one that offers victims such right."[723] If a victim believes that he will be respected and heard, then that victim is more likely to be satisfied with the processes of criminal justice.[724]

The use of impact statements is now commonplace in many adversarial jurisdictions and though each have introduced it with its own nuances it is sufficient to allude to a crude generic definition for the initial purposes of this discussion. An impact statement is typically prepared by the victim and furnished to the court after the offender is found or has pleaded guilty and prior to his sentencing. It affords the

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[721] Strang H *Repair or Revenge: Victims and Restorative Justice* (Oxford: Clarendon Press, 2002) 1

[722] Garland D *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) 9, 179

[723] Kilpatrick D & Otto R 'Constitutionally Guaranteed Participation in Criminal Justice Proceedings for Victims: Potential Effects of Psychological Functioning' (1987) 34 *Wayne Law Review* 7, 19

[724] Booth T 'The Dead Victim, the Family Victim and Victim Impact Statements in New South Wales' (2000) 11(3) *Current Issues in Criminal Justice* 292, 306

victim the opportunity to inform the court, in writing and sometimes verbally, of the physical, psychological, emotional, and financial effects that the crime has had upon him, and should be taken into account, amongst all other relevant considerations, by the trial judge in the sentencing of the offender.

The Arguments For and Against Victim Impact Statements

The use of impact statements has been the subject of much academic commentary. Not surprisingly, it is fair to state that the practice is one not unilaterally embraced. Instead of moving toward some form of consensus, the issue continues to garner bitter clashes of opinion laced with emotional evocations and ideological denouncements. The tone of the arguments in favour tend to highlight the usefulness of impact statements, hemmed with some humanitarian almost moral by-product, whilst the flavour of those opposed concentrate on legal arguments concerning the comparability of sentencing and established due process procedures.

Proponents of impact statements assert that the purpose behind victim participation is not to pressure justice but to aid in its attainment.[725] It is frequently advanced that as a consequence of its preoccupation with the defendant, and, if found to be so, the offender, the criminal justice system fails to display enough concern for the plight of the victim, and that it is when the court has determined that the accused is, in fact, an offender that the victim is most emphatically entitled to be heard, for he rises above being an alleged victim, or a victim, to being *the offender's* victim.[726] Allowing him a voice reminds the judge, the jury and the wider public that behind the prosecuting State is a real person with an understandable interest in how the case is resolved.[727]

It is generally asserted, and for the purposes of this discussion it is accepted, that granting the victim the right to inform the court of the impact that the crime has had upon him goes some way to countering the asymmetric nature of the justice process. Furthermore, the imposition of a sentence often constitutes both a practical and ritual completion of an episodic and protracted painful period for victims and would appear to be a suitable juncture for the courts to assist in their recovery:

> It is significant for victims healing that the judge acknowledges at the time of sentencing that victims have been injured [and] solicit specific information from

[725] Herrington L *Presidents Task Force on Victims of Crime: Final Report* (Washington DC: Government Printing Office, 1982) 78

[726] Schulhofer S 'The Trouble with Trials; the Trouble with Us' [1995] 105 *Yale Law Journal* 825, 849

[727] Kelly D 'Victims' (1987) 34 *Wayne Law Review* 69

victims on the crime's impact on their lives.[728]

Victims have expressed a high degree of satisfaction when judges cite phrases from impact statements when sentencing, the practice represents to them an official acknowledgement of the harm sustained.[729] Indeed, an awareness of the anguish felt by the relatives of homicide victims is increasingly reflected in the ambit and quality of sentencing remarks, evidenced in the amplified use of emotive language by members of the judiciary, who describe the loss using terminology like "devastating", "tragic" and "intense", or the expression of that loss as "heartrending", "powerful" and "deeply moving".

Sentencing is never administered in entirely abstract and impersonal terms. It is frequently tempered by the circumstances of the offender and by a supply of almost unlimited mitigatory evidence on the part of the defence. Yet it is offensive for victims to hear a plethora of reasons as to why the offender should receive some concession from the courts:

> It is an affront to the civilized members of the human race to say that at sentencing … a parade of witnesses may praise the background, character, and good deeds of [the defendant], without limitation as to relevance, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.[730]

Fairness dictates that the person who has borne the brunt of the offender's crime should be allowed to speak. Permitting the victim or co-victim to submit an impact statement acts as some figurative counterbalance to the allowing of mitigating evidence. Not only do victims appear to derive some satisfaction from delivering impact statements, but offenders seem to accept it.[731] The contents of an impact statement might also promote a primary goal of criminal justice, namely the rehabilitation of the offender, who may, when confronted with the reality of the harm caused, become remorseful and undertake not to re-offend.[732]

It is further posited that the proportionality and accuracy of sentencing will

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[728] Office of Victims of Crime *New Directives from the Field: Victims' Rights and Services for the 21st Century* (Washington DC: US Department of Justice, 1998) 108

[729] Meredith C & Paquette C *Summary Report on Victim Impact Statement Focus Groups* (Ottawa: Policy Centre for Victim Issues, Department of Justice, 2001) 9; Erez E 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Victim Enhancement of Justice' (1999) *Criminal Law Review* 545, 553

[730] *Payne v Tennessee* (1991) 501 US (Supreme Court) 808, *per* Rehnquist CJ

[731] Sebba L *Third Parties: Victims and the Criminal Justice System* (Columbus: Ohio State University Press, 1996) 225

[732] Talbert P 'The Relevance of Victim Impact Statements to the Criminal Sentencing Decision' (1988) 36 *University of California Los Angeles Law Review* 199, 217

improve if victims convey the impact the crime has had, thus enabling the process to become more democratic and reflective of the community's response as a whole to wrongdoing.[733] It is contended that only when the full details relative to an individual case become known, which includes the impact of the crime, can consistent and appropriate sentences be reached, thereby truly achieving equality in sentencing practice. Hence it is reasoned that impact statements make an important contribution to proportionality and uniformity rather than to severity in sentencing.[734] However, absolute parity in, for example, manslaughter sentencing is a rather idealistic goal unobtainable in the absence of fixed mandatory sentencing.

Those who object to impact statements purport that the practice can only lead to harsher sentencing.[735] The principle of equality demands the treatment of similarly situated offenders alike.[736] As the sentencing of an offender is an objective process, the gravity of the offence must be determined from an impartial viewpoint.[737] It is argued that the court's insulation from unacceptable public pressures is undermined by the substitution of the victim's private subjective approach to the crime for the ostensibly objective one traditionally practised.[738] This, it is claimed, results in "unequal justice", whereby similar cases will be disposed of differently depending on the personality attributes of the victim.[739]

It is wrong, some decry, that the severity of an offender's sentence could depend on whether the victim is vindictive or forgiving, resilient or weak, and that in principle sentencing should be determined according to the normative effects of a given type of crime without any regard to the disposition of the particular victim.[740] Accentuation of victim harm over offender culpability invariably leads, it is reasoned, to the different treatment of two offenders whose crimes are precisely the same on the basis of their victims' responses, affronting traditional sentencing principles by

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[733] Rubel H 'Victim Participation in Sentencing Procedures' (1986) 28 *Criminal Law Quarterly* 226

[734] Erez E 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Victim Enhancement of Justice' (1999) *Criminal Law Review* 545, 548

[735] Fattah E 'Towards a Victim Policy aimed at Healing, not Suffering', in Davis R, Lurigio A & Skogan W (eds.) *Victims of Crime: Problems, Policies and Programs* (California: Sage, 1997) 268

[736] Henderson L ' The Wrongs of Victims Rights' (1985) 37 *Stanford Law Review* 937, 991; Talbert P 'The Relevance of Victim Impact Statements to the Criminal Sentencing Decision' (1988) 36 *University of California, Los Angeles Law Review* 199, 211

[737] von Hirsch A *Doing Justice: The Choice of Punishments* (New York: McGraw-Hill Ryerson, 1976) 79

[738] Victorian Sentencing Committee *Sentencing* (Melbourne: Attorney-Generals Department, 1988)

[739] Grabosky P 'Victims', in Zdenkowski G, Ronalds C & Richards M (eds.) *The Criminal Injustice System* (Sydney: Pluto Press, 1987) 147. It can also be advanced that "unequal justice" occurs where there is no fixed mandatory sentencing, or in the absence of a reasonable adherence to statutory sentencing guidelines, for different judges may pass down different sentences upon hearing the same set of facts.

[740] Ashworth A *Sentencing and Criminal Justice* (Cambridge: University Press, 2005) 356

injecting arbitrariness and inequality into a system that sets consistency as one of its core values:

> To set a sanction in response to the victim's [or co-victim's] urgings injects an arbitrary and unpredictable element into the sentencing scheme, the result of which may be the unduly harsh, or even unduly lenient, treatment of the offender. This would represent little more than the throw of a dice to the offender ... our justice system must strive to minimise and mute as many disparity-inducing factors as possible. It cannot be disputed that inviting victim input ... pushes us further away from the ideal of even-handed sentencing.[741]

Some question whether victims should be afforded any opportunity to influence decisions that are not appropriately theirs.[742] They fear that allowing impact statements shifts the primary goal of criminal justice nearer to meeting those of the private individual, thereby undermining the fundamental concept of crime as a violation against the State, ultimately paving the way for a reversion to the repressive and vengeful days where criminal prosecution amounted to little more than a branch of tort law.[743] Moreover, victim advocates themselves have raised objections that the making of an impact statement raises victims' expectations unrealistically whilst imposing additional burdens upon him by demanding he relive his experience and accept some responsibility toward the overall punishment of his offender.[744]

It has been deduced that on the face of it retribution is the only rationale that easily accommodates the use of victim impact, but this presupposes the existence of a harsh punitive tone in the impact statement itself, one that needs to be sated in order for the victim to be assuaged and gratified by the process.[745] While intuitively we may suspect that victims are obsessed with vengeance, published findings indicate that

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[741] Hall D 'Victims Voices in Criminal Court: The Need for Restraint' (1991) 28 *American Criminal Law Review* 233, 258

[742] Sanders A, Hoyle C, Morgan R & Cape E 'Victim Impact Statements: Don't Work, Can't Work' (2001) *Criminal Law Review* 447, 458

[743] Abrahamson S 'Redefining Roles: the Victims Rights Movement' (1985) *Utah Law Review* 517

[744] Reeves H & Mulley K 'The New Status of Victims in the UK: Opportunities and Threats', in Crawford A & Goodey J (eds) *Integrating a Victim Perspective within Criminal Justice* (Aldershot: Ashgate Dartmouth, 2000) 125, 138. This is the view expressed by Victim Support in England, who have long recommended that victims *only* provide details of the relevant harm suffered *to the prosecutors* for the preparation of the case – Victim Support *Rights for Crime Victims* (London: Victim Support, 1995). This resulted in the introduction of the Victim Personal Statement Scheme (VPS) in October 2001. The VPS is typically completed for victims by police officers, appended to the case papers and may be updated at any stage throughout proceedings. It can be disclosed to the offender and the information provided will be taken into account at each decision-making stage - Home Office *Victim Personal Statement Scheme: A Guide for Investigators* (2001). In September 2005 a pilot scheme was established to permit the relatives of dead victims to speak in court in person or via a legal representative or victim's advocate.

[745] O'Malley T 'Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions' (1993) 3 *Irish Criminal Law Journal* 40, 53

impact statements are not, for the most part, unduly retaliatory, rather "the opposite appears to apply: [victims] tend to understate, rather than overstate, the impact of offences."[746] The majority do not exploit impact statements as some retributive tool to exaggerate the consequences of the crime or make unjustified statements regarding the offender.[747] It seems that if victims nurture a sense of vengefulness it forms part of their private grief.[748] With reference to homicide co-victims in this jurisdiction, far from being vindictive we have instead repeatedly observed through the media the overtly dignified expression of their anguish; indeed, "it is astounding to witness the restraint displayed by so many angry and grief-stricken people in such circumstances."[749] Even so, compassion expressed by victims is no more relevant in determining sentence than any desire they may have for retribution. Regardless of whether the victim feels utterly merciful towards the criminal - and some do - the crime has still been committed and must be suitably punished.[750]

It is further observed that an impact statement will vary in quality according to the victim's level of literacy, particularly if he is preparing it without assistance, raising concern that the more articulate the victim the more the judiciary, as end-users of the statement, may be improperly influenced by its contents and distracted from the objectivity of the sentencing process.[751] This notion is severely flawed, blinkered, as it is, to the larger picture that whilst each victim's ability to communicate varies, the same can be said of all other participants in the criminal trial:

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[746] Hoyle C, Cape E, Morgan R & Sanders A *Evaluation of the 'One-Stop-Shop' and Victim Statement Pilot Projects* (Bristol: Department of Law, University of Bristol, 1998) 28. This has been referenced as "a generous understatement of victim harm" - Erez E & Rogers L 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals' (1999) 39(2) *British Journal of Criminology* 216. Similarly, "victim's recommendations did not sound punitive or vindictive" – Heinz A & Kerstetter W 'Victim Participation in Plea Bargaining: A Field Experiment', in Miller H, McDonald W & Cramer J (eds.) *Plea Bargaining in the United States* (Washington DC: Government Printing Office, 1978) 167, 172. See also Walker N & Hough M *Public Attitudes to Sentencing* (Aldershot: Gower, 1987) 10

[747] Cassell P 'Barbarians at the Gates?: A Response to the Critics of the Victims' Rights Amendment' (1999) *Utah Law Review* 479

[748] 'Most of us do recognize and accept, as a matter of common sense, the appropriateness of hatred and revenge in some circumstances as a human response, specifically when these responses are exhibited by victims of serious wrongdoing and are directed against those who have wronged them' – Murphy J 'Getting Even: The Role of the Victim' (1990) 7(2) *Social Philosophy and Policy* 209, 211. These reactions are normative in homicide co-victims and usually decrease over time. Acknowledging the naturalness of these responses is not accepting that personal hatred and revenge has any place in criminal justice.

[749] Power B 'Giving vent to grief is only human' (7 May 2006) *The Sunday Times* 16. At the conclusion of one recent murder trial, the mother of the victim made her way through the tide of people to the back of the public gallery to embrace the parents of her daughter's boyfriend, who had just admitted guilt to her murder, in a remarkable gesture of forgiveness and understanding - Roche B 'It's such a sad waste of life' (7 December 2006) *The Irish Times* 4

[750] *R v Nunn* [1996] 2 Cr App R (S) 136, 140

[751] Booth T 'The Dead Victim, the Family Victim and Victim Impact Statements in New South Wales' (2000) 11(3) *Current Issues in Criminal Justice* 292, 303

> No two prosecutors have exactly the same ability to present their arguments to the jury [and] no two witnesses have exactly the same ability to communicate the facts … [yet] there is no requirement that the evidence and the argument be reduced to the lowest common denominator.[752]

Apprehension has also been expressed that a poignant display of grief from a victim or co-victim in (where permitted) his oral presentation might be detrimental to the detachment of the court in assessing the seriousness of the offence, permeating the shroud of impartiality surrounding the judiciary.[753] We must not deny judges their humanity - some would need to have a heart of stone not to be moved by the intensity of such moments – but so too we should not deny them their years of experience, of witnessing the gamut of emotions in the courtroom and of their consistent refusal to defer to them. The judiciary are experienced in ignoring testimony that has no probative value and are not easily swayed by the affective demeanour of victims.[754] Raw emotions carry no weight in place of facts and criteria.[755] Indeed, amidst all the factors that the judge must consider he is highly unlikely to impose an unduly harsh sentence solely on the basis of the victim's perception of and reaction to events.[756]

In addition, if the giving of an emotionally charged impact statement were to act as an aggravating factor than the absence of a statement would presumably have some value in sentencing too, albeit mitigatory. This is clearly not the case, for it would be inequitable for the judicial response to a killing to depend on whether or not the co-victim chose to be involved by submitting an impact statement. Similarly, whether the victim was a sterling member of the community or someone of dubious character would also carry some weight, but we know this is rightly not so. In cases involving homicide, it is routinely accepted that punishment should be measured solely by the manner and circumstances of the death of the victim.[757] It is a tenet of law that each

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[752] *Booth v Maryland* (1987) 482 U.S. (Supreme Court) 496 at 518, *per* White J. Likewise, "the goal of sentencing evenness certainly cannot be achieved in pristine fashion for prosecutors, defence barristers, witnesses and others vary in their ability and persuasiveness such that juries and sentencing authorities will respond accordingly, resulting in differing decisions for similar defendants" - Hall D 'Victims Voice in Criminal Court: The Need for Restraint' (1991) 28 *American Criminal Law Review* 233, 258

[753] Hinton M 'Guarding Against Victim-Authored Impact Statements' (1996) 20 *Criminal Law Journal* 317, 320

[754] Roberts J & Erez E 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 *International Review of Victimology* 223, 237

[755] Vilmoare E & Neto V *Victim Appearances at Sentencing Hearings under the California Victims' Bill of Rights* (Washington DC: US Department of Justice, 1987)

[756] Grohovsky J 'Giving Voice to Victims: Why the Criminal Justice System in England and Wales should allow Victims to speak up for themselves' (2000) 64 *Journal of Criminal Law* 416

[757] Booth T 'Voices After the Killing: Hearing the Stories of Family Victims in New South Wales' (2001) 10(1) *Griffith Law Review* 25, 29

human life be treated as having an equal fundamental value; the life of one cannot be measured as a greater worth than another simply because it has been demonstrated through the eloquent representations of their loss that the victim comes from a close family with loving relatives. As Hunt CJ of the New South Wales Supreme Court observed:

> It is regarded by all thinking persons as offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another. It would therefore be wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in one case than it is in another.[758]

If impact statements delivered by co-victims were to be truly included in the sentencing equation the process might, inadvertently, reflect an unacceptable valuation of human life. Many descriptions of the deceased conveyed in impact statements tend to be such reverent tributes as to be in the nature of eulogies. One commentator rather cynically noted how "dream families are created; idyllic relationships, doting parents, bereaved wives, the heartbroken fiancé" are all evoked before the courts.[759] While the loss and deprivation felt by a co-victim stemming from a homicide may be more severe in one case than in another, it would be particularly grotesque to parade impact evidence in a manner that would foster the comparison of different victims and result in some form of sentence correlation with a constructed value - and a biased construction at that - of the victim.

The Use of Victim Impact Statements in Ireland

Victim impact statements were introduced in Ireland by the *Criminal Justice Act 1993*. s.5(1) of the Act provides that:

> In determining the sentence to be imposed on a person for an offence to which this section applies, a court should take into account, and may, where necessary, receive evidence or submissions concerning any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed.

The wording "on the person in respect of whom the offence was committed" clearly adopts a restrictive definition of *victim* excluding, on strict interpretation, the

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[758] *R v Previtera* (1997) 94 A Crim R 76 at 86

[759] Kennedy H *Just Law: The Changing Face of Justice and Why It Matters to Us All* (London: Chatto & Windus, 2004)

homicide co-victim.[760]

s.5(3) provides that:

> Where a court is determining the sentence to be imposed on a person for an offence to which this section applies, the court shall, upon application by the person in respect of whom the offence was committed, ask to the effect of the offence on such person being requested to do so.

The term "upon application" implies choice, indicating that impact statements are not mandatory. Analyses of similar statutory provisions in other jurisdictions have demonstrated that the right to submit a statement is utilised far less than may be expected.[761] For example, in the United States, less than 18% of victims or families attend sentencing hearings, with just 15% submitting written and only 9% (where permitted) presenting oral statements.[762] However, the courts have held that the decision of the victim to give or not to give an impact statement is not to be treated of itself as either an aggravating or mitigating factor.[763]

Impact statements are only legislatively applicable to a precise range of crimes, namely those where the person is a victim of a sexual offence or of an offence involving violence or the threat of violence.[764] A practice has emerged wherein the trial judge *may* also allow the surviving relatives of a victim of an unlawful homicide to submit impact evidence, though some judges refuse to hear it.[765] Nevertheless, the Court of Criminal Appeal recently expressed its approval of hearing such statements:

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[760] Coffey G 'The Victim of Crime and the Criminal Justice Process' (2006) 16(3) *Irish Criminal Law Journal* 15, 17; Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice, Equality & Law Reform, 2007) 236

[761] Mitchell D 'Victim Impact Statements: A Brief Examination of their Implementation in Victoria' (1996) 8 *Current Issues in Criminal Justice* 168; Hall D 'Victims Voices in Criminal Court: The Need for Restraint' (1991) 28 *American Criminal Law Review* 233, 241

[762] Finn-deLuca V 'Victim Participation at Sentencing' (1994) *Criminal Law Bulletin* 403

[763] *People (DPP) v C(M)* (Unreported, Court of Criminal Appeal, 16 June 1995)

[764] Interestingly, "the system of victim impact statements, as originally operated (if not envisaged) was by way of a psychiatric assessment of the victim. This had the dual benefit of reporting the trauma felt by the victim, and that could include trauma induced by the trial process itself, but seen through a professional 'filter'. These reports often provided a devastating insight into the effect of the offence on the victim, furnishing exactly what was visualised by legislation, absent in the past, which spelled out to the court just what had been visited upon the complainant by the offender in the course of the commission of the crime and what consequences they had suffered...But as the demand grew for the provision of such reports...the tendency to have a victim present a report through the lens of a...psychiatrist began to evaporate. This may well have been because demand outstripped supply, but for whatever reason a tendency began to emerge...for Gardaí or victims to prepare their own impact statements" - Robinson D 'Hearing the Voice of the Silent Victim' (2006) 100(2) *Law Society Gazette* 14

[765] In *People (DPP) v Noonan* (Unreported, Court of Criminal Appeal, 20 April 2003), after the offender pleaded guilty to dangerous driving causing death, the Circuit Court judge refused to read a victim impact report from the family of the deceased. The Director of Public Prosecutions appealed the twelve-month prison sentence on the grounds of undue leniency, arguing that if the trial judge had read the impact

> A practice has developed by which a sentencing judge has a discretion to permit a victim impact statement to be made in such circumstances. In the view of this court, that is as it should be for the reasons, firstly, that such a statement can be of assistance to the sentencing judge in determining the appropriate sentence to be imposed, and secondly, because it affords the family or friends of a deceased victim ... an opportunity to express the loss to them arising from the unlawful homicide.[766]

It may be argued that this *dictum*, albeit *obiter*, is highly persuasive in requiring the judiciary to allow impact statements when co-victims wish to submit one, but in the absence of legislation it clearly remains a discretionary right. It can obviously be distressing and disappointing for family members to be refused the opportunity to give an impact statement by certain judges. The Director of Public Prosecutions recently called for legislation governing the use of impact statements for homicide co-victims because "some judges take one view and others take a different view of the practice."[767]

It remains a problematic lacuna in Irish legislation that the 1993 Act fails to give any real guidance as to the weight to be attributed to the contents of an impact statement.[768] In the absence of clear statutory direction, the trial judge is "to have regard to", "take into account" and "to receive evidence or submissions" – phrases that seem calculated to leave him in a difficult position in terms of what consideration the impact statement should be afforded.[769] Practicality dictates that the judiciary are expected to treat impact statements with what can best be regarded as a "genuine but distanced respect."[770] This overall lack of clarity, both in what influence impact statements should have on the final sentence and whether or not homicide co-victims be permitted to make them, stems not just from opacity at a legislative level but also from the equivocal place of the victim within criminal justice at large.

Previously, there was uncertainty regarding the evidentiary status of impact

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statement a tougher sentence would have been imposed. The Court of Criminal Appeal found that it was within the trial judge's powers not to read or hear co-victims' impact evidence.

[766] *People (DPP) v O'Donoghue* [2006] IECCA 134, *per* Macken J

[767] Downes J 'DPP calls for impact statement law' (10 March 2008) *The Irish Times* 6

[768] In comparison, and in an effort to mute similar calls of confusion on the matter, the introduction of the Victim Personal Statement scheme in England was swiftly followed by a Practice Direction, limiting the role which impact statements were permitted to play - Lord Chief Justice *Practice Directive: Victim Personal Statements* (London: Court Services, 2001)

[769] Court of Criminal Appeal guidance on the matter was most unhelpful, merely directing the sentencing judge that "when evidence has been heard under the provisions of section 5 [of the *Criminal Justice Act 1993*], [he] has a duty to take this evidence into account in determining the sentence to be imposed", offering no assistance as to how or what import is to be attached to such evidence - see *People (DDP) v C(M)* (Unreported, Central Criminal Court, 16 June 1995)

[770] Guiry R 'Who is the Victim? The Use of Victim Impact Statements in Murder and Manslaughter Cases' (2006) 16(3) *Irish Criminal Law Journal* 2, 3

statements. The Court of Criminal Appeal has since held that in presenting an impact statement the victim inferentially exposes himself to cross-examination on its contents, which is subject to the same rules of admissibility and weight of contemplation as any other evidence.[771] Any refusal of a cross-examination would permit the emotional welfare of the victim to override the concern that adversarial truth-finding mechanisms are necessary to ensure a fair trial for the defendant.[772]

There are three reasons why a cross-examination on the contents of an impact statement is rather theoretical. First, the current practice of providing the defence in advance with a copy of the statement allows objections to be raised regarding the content and therefore the opportunity to neutralise it of its contentious elements prior to any oral delivery at the sentencing hearing. Secondly, if impact statements were to become an area of legal contention the victim may demand legal representation that would, in essence, introduce a murky tripartite element to proceedings that disputes the central assumption of criminal law as a public wrong. This would be a pyrrhic victory, one wholly adverse to the victim that would open him to all sorts of unwanted procedures of proof. If cross-examination were to take place, could the defence then request independent reports from psychiatrists, psychologists or counsellors that may verify or contradict the impact of the crime upon the victim in what would effectively amount to a mini-trial? Thirdly, the defence probably suspect that the actual impact statement has little bearing on the final sentence imposed. Therefore any attack on its contents is likely to be a wasted or even counter-productive exercise, running the risk of being perceived by the judge as adding insult to injury, a gamble the defence are unlikely to take because of the prospect of adverse repercussions on the ensuing sentence.[773] Still, the possibility of a cross-examination, however theoretical, helps dispel unease that offenders may be subjected to unfounded allegations made from what would be, in the absence of an option to cross-examine, the relative security of the victim's impact statement.[774]

The postal survey conducted as part this thesis put a trio of questions regarding the use of victim impact statements to Irish legal professionals.

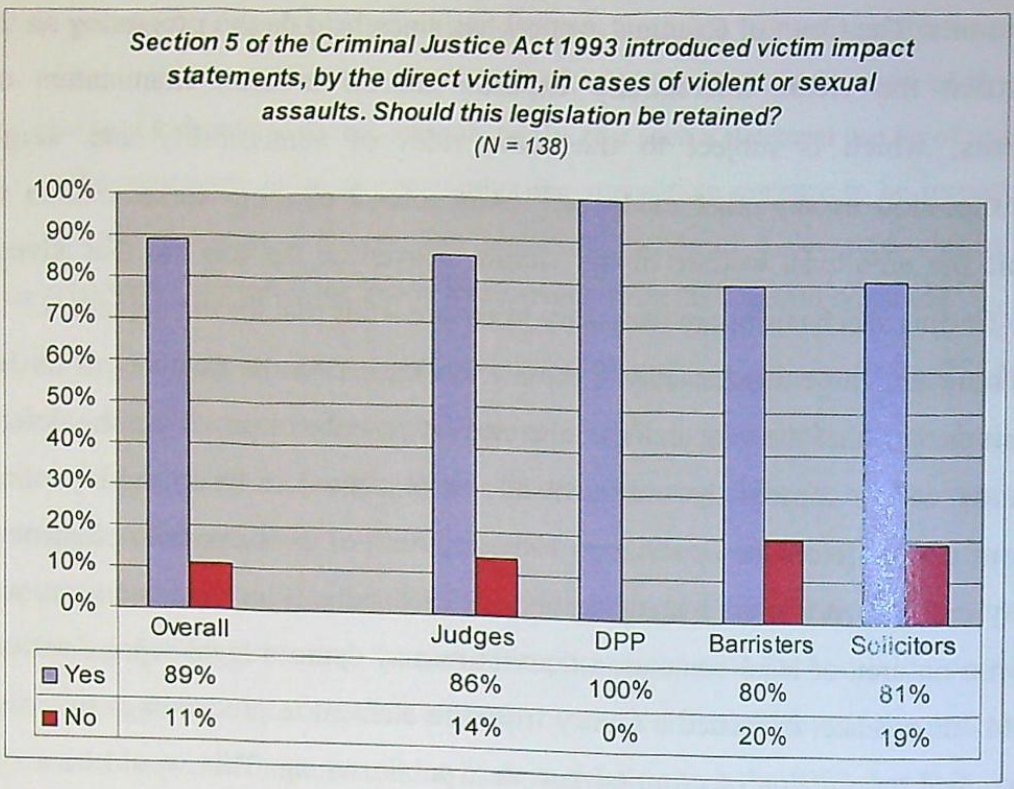
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[771] *People (DPP) v C(M)* (Unreported, Central Criminal Court, 16 June 1995)

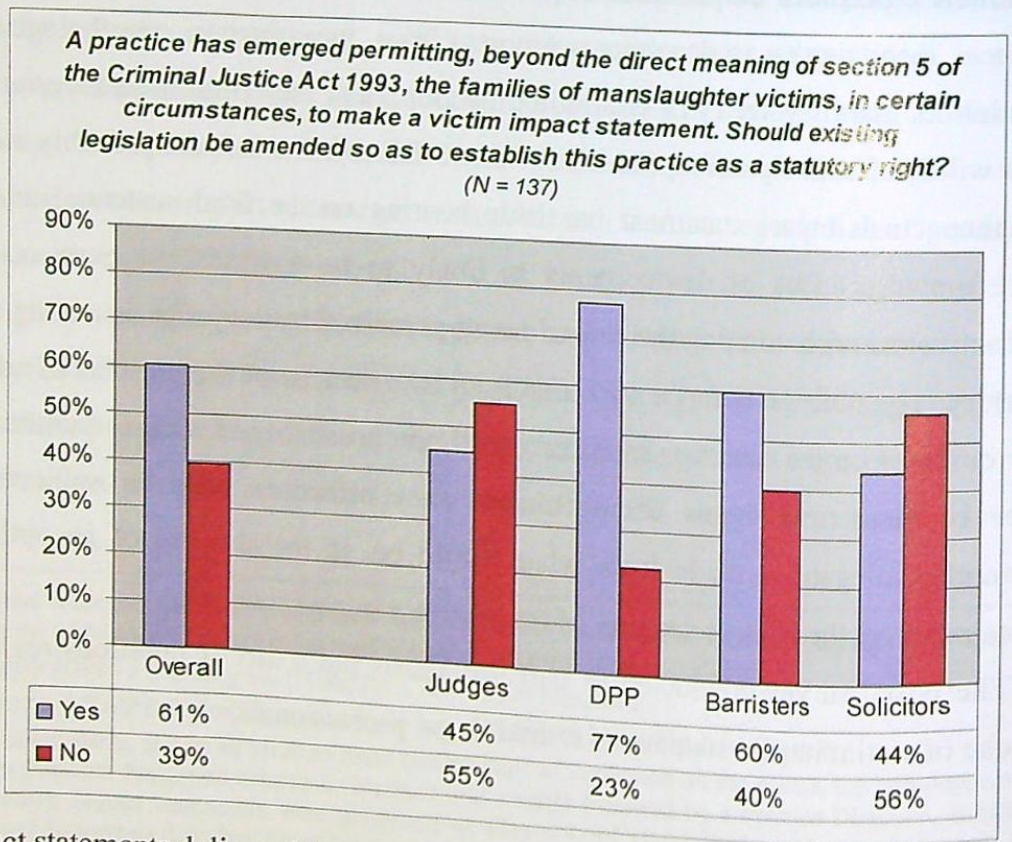
[772] Laster K & O'Malley P 'Sensitive New-Age Laws: The Reassertion of Emotionality in Law' (1996) 24 *International Journal of the Sociology of Law* 21, 26

[773] Erez E & Rogers L 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals' (1999) 39(2) *British Journal of Criminology* 216

[774] Ashworth A 'Victim Impact Statements and Sentencing' (1993) *Criminal Law Review* 498, 507



There is strong support for the retention of victim impact statements as currently provided for in legislation.



Impact statements delivered by homicide co-victims attract enormous media attention. In March 2004, Mary Murphy, the mother of Brian Murphy, who was killed outside Club Annabel at the Burlington Hotel, Dublin, spoke of what she had expected from the trial and her criticisms of the justice system. Her statement was one of undoubted

power, printed and broadcast in its entirety in the national media, granting the public an unprecedented view of the grief of a family inflicted by homicide:

> In front of us were seated the prosecution barristers, and solicitor. Beside them were the defence barristers and their solicitors. The media and the accused were also present. All of these people had a voice. Brian and our family, I felt, had no voice. That was why I felt surrounded and under attack … As a result of this trial, there is a gaping wound and I am not sure where we go from here. What effect has the trial had on me? I'm back to when Brian died. That we should be forced to revisit it after 3½ years is inhuman. The shock, the anger, the sadness are back and along with these is fear which must be present as a result of hearing the details of what happened to Brian. I wonder will I ever feel safe again, because the way the justice system works makes me think we live in a very unsafe society. I wanted questions answered by coming to this trial every day. I feel brutalised by this trial process. The quest for the truth becomes a battle between two sides caught in a game, each side trying to win points … Brian becomes the object in the red shirt ... Truth is lost here. Brian is lost here. I am lost here.[775]

Homicide co-victims, particularly parents, have articulated a compelling need to provide impact statements.[776] The accused, AdVic argue, is represented by counsel, who is devoted to the defendant's interests, while in contrast the State prosecutor usually more readily and closely identifies with other law enforcement personnel than with the victim. By introducing impact statements at the sentencing stage the victim, or the memory of him, is not pushed as much to one side.[777]

An organisational difficulty in granting surviving relatives a statutory right to make impact statements is finding the best way to accommodate disputing co-victims or those who may, as a result of the homicide, be at odds with one another:

> One can readily anticipate huge problems in relation to the question of the entitlement to give victim impact evidence in respect of situations … where the crime itself is *intra* family, an all too common feature of indictable crimes. One can also readily contemplate arguments which already arise in other contexts in relation, for example, to the status of same sex partners, 'second families' and so on.[778]

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[775] Murphy M 'Victim Impact Statement of Mary Murphy' (9 March 2004) *The Irish Times* 7

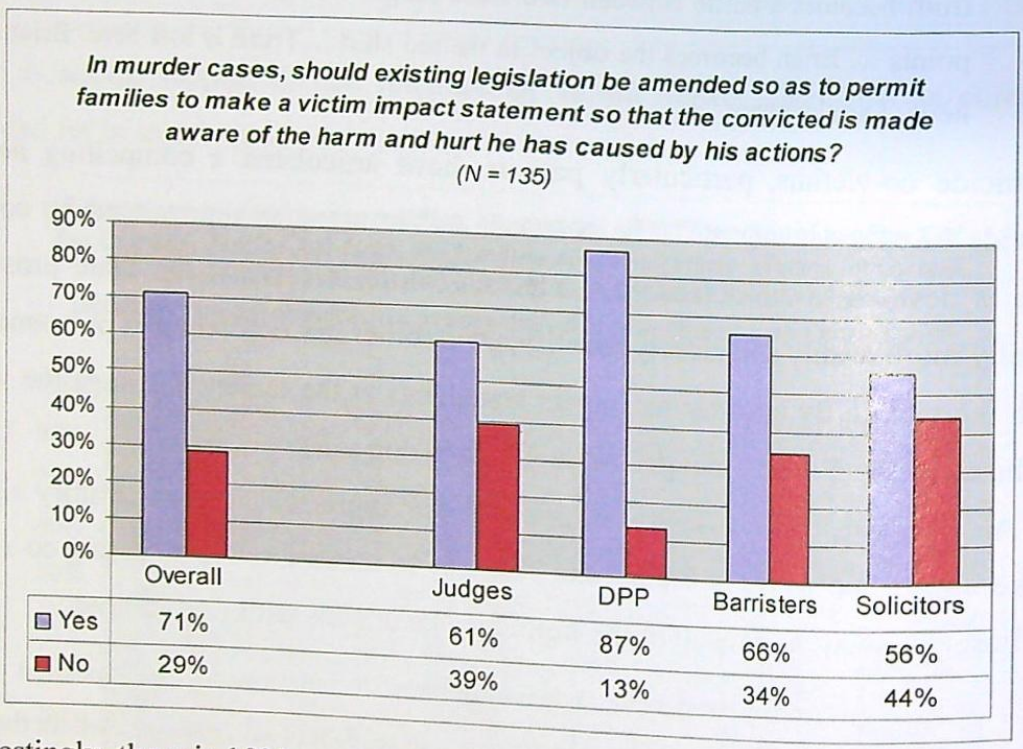
[776] Erez E 'Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements', in Crawford A & Goodey J (eds.) *Integrating a Victim Perspective within Criminal Justice* (Aldershot: Ashgate, 2000) 165, 176

[777] Carey G 'Victims, Victimology and Victim Impact Statements' (2000) 10(3) *Irish Criminal Law Journal* 8, 10

[778] Gillane S 'Balancing the Scales in a Homicide Trial: A Reply' [2007] 1 *Judicial Studies Institutute Journal* 30, 36

In England, where a family is unable to agree as to which of them should deliver an impact statement, it would appear that the senior investigating officer responsible for the case must nominate a spokesperson, but "within the very fabric of [this] solution there is the obvious potential for further alienation as families may have imposed upon them from without an official spokesperson to speak on their behalf."[779] The alternatives, whereby there is a proliferation of impact statements delivered or some external body amalgamates all of these statements into one, are unappealing.

It is difficult to legislate in this area. If more than one immediate relative wishes to make a statement, or where a co-victim, say an unmarried or same-sex partner of the deceased, who but for the disapproval of the victim's immediate family would be considered as a fitting person to submit an impact statement, the sentencing judge should, on a case-by-case assessment, exercise some practicality and, where appropriate, permit a second individual to make a statement.



Interestingly, there is 10% more support for homicide co-victims to deliver an impact statement following a murder conviction than when a manslaughter conviction has been returned. It may seem futile to allow a co-victim make an impact statement following a murder conviction, since the associative life-sentence is mandatory and cannot then by influenced by the contents of that statement, but this presumes that impact statements have affect when the sentence to be imposed, as in manslaughter cases, is at the discretion of the judiciary. Indeed, implicit in the present practice of

[779] *ibid.*

allowing some co-victims make impact statements following murder convictions must be the acknowledgement that that statement has absolutely no effect on sentencing, a claim expanded upon over the coming pages. Perhaps the increase in support is also partly because the question included the purpose "so that the convicted is made aware of the harm and hurt he has caused", a function considered shortly. By permitting impact statements on those occasions where the offender is convicted of, or pleads guilty to, murder, the deceased victim is evoked in what would otherwise be a most summary sentencing hearing.

The findings presented here endorse evidence from other jurisdictions that suggest that impact statements do not raise practical problems for, or serious challenges from, legal professionals.[780] Despite criminal justice practitioners' general acceptance of them, research shows that they are divided as to whether impact statements should or actually do influence sentencing decisions, not least because some feel the information relayed is potentially irrelevant, exaggerated or unverifiable.[781] The support witnessed amongst the Irish legal profession in this thesis for the retention of impact statements and its extension on a statutory basis to the families of manslaughter *and* murder victims is, however, particularly noteworthy as this survey was conducted four months *after* a highly volatile use of an impact statement finally realised its potential for abuse.

In January 2006, at the sentencing of Wayne O'Donoghue for the manslaughter of his 11-year-old neighbour Robert Holohan, the deceased's mother, Majella, strayed from her pre-presented statement to go beyond the established facts and introduce evidence that she was made aware of but that had not been heard by the jury. The controversial statement held, at its core, her belief of the failure of the trial to address unanswered questions about the possible motives for the killing and her overall dissatisfaction with the prosecution's handling of the case, implicitly accusing Holohan of sexually abusing her son. Her wilful outburst highlighted what she perceived as a betrayal by the justice system, whose abstract legal principles got in the way of what she saw as the common-sense exposure of all evidence in the court for the ultimate determination of the jury.[782]

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[780] Erez E 'Victim Participation In Sentencing: And the Debate Goes On...' (1994) 3 *International Review of Victimology* 17, 28

[781] Hoyle C, Morgan R & Sanders A *The Victim's Charter: An Evaluation of Pilot Projects* (London: Home Office, 1999) 3

[782] It was regrettable that her impact statement was harnessed, by fault or design, by many factions of the media to vilify Holohan as a paedophile, changing the complexion of the case in the public eye, and creating

The trial judge, in sentencing the offender to four years imprisonment, stated that victims should never use impact statements to entice or engage the court in retaliatory sentencing.[783] The Court of Criminal Appeal, in reviewing that sentence, stated:

> While great sympathy must undoubtedly exist for the person making the victim impact statement, every effort must also be made to ensure that the statement is not used to undermine the proper role of the prosecution in a trial, nor to seek to place in the public domain unfounded or unproven allegations against a convicted person who is awaiting sentence ... The person who proposes making the statement should be warned by the sentencing judge that if in the course of making the statement in court they should depart in any material way from the content[s] ... as submitted they may be liable to be found ... in contempt of court. If it be the case that such departure ... involves unfounded or scurrilous allegations against [the offender], that fact may be considered by the sentencing judge to be a matter to be taken into account in mitigation of the sentence to be imposed.[784]

Carney J, the presiding judge of the Central Criminal Court, later spoke publicly about Ms Holohan's departure from her impact statement:

> [The] sentencing objective was totally frustrated by an unscripted addendum to the victim impact statement and the enthusiastic adoption of it by the tabloid press. The tabloids stirred up such hatred for the [offender] that he has no future in this country when his time is served ... Nobody would have wished to add to the grief of the victims but they were given an iconic status by the media, in particular by the tabloids, which would have made it all but impossible for the victim to be held to account. The victim was acting under the influence of obsessive grief. The tabloid press do not have this excuse.[785]

Ms Holohan subsequently issued a statement in response to this criticism:

> I understand that as a legally trained person, [Judge Carney] can and should distinguish between facts he has to take into account and those which he cannot. I do not believe it is fair to put a victim in the same position. The features that I alluded to, semen and the like ... were matters that any responsible mother would allude to. Was I to go into court and give a statement which made no reference to these matters

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a public chorus of venomous unanimity to convict a young man for a crime that he had no opportunity of defending in open court.

[783] *People (DPP) v O'Donoghue* (Unreported, Central Criminal Court, 24 January 2006), *per* Carney J

[784] *People (DPP) v O'Donoghue* [2006] IECCA 134, *per* Macken J

[785] Carney P 'Accused has no future in country when his time is served' (11 October 2007) *The Irish Times* 16

> although they were of considerable concern to me? I think I would not have done justice to my much loved son Robert if I had done so.[786]

It is instances like this that have the potential to sully the use of impact statements.

In short, the current practice of the Irish courts regarding a homicide co-victim delivering an impact statement is that some judges elect to hear these statements, others, as is their prerogative, refuse. Those who permit impact statements are provided with no statutory guidance as to how to reflect the contents of these statements in the sentence to be passed down. Thus, it is impossible to know, with any degree of certainty, what influence, if any, impact statements actually have on sentencing outcomes. Are some judges allowing impact statements merely to appease co-victims, not paying any heed to the contents? And if not, are those co-victims who are denied the opportunity to present an impact statement then being deprived of some potential influence on the sentence to be passed down? The matter becomes even more ambiguous when one considers that some families are permitted to make an impact statement following a murder conviction, even though it can be of no relevance as to sentence as this is mandatory.

The real and unresolved difficulty relating to the effect that a victim impact statement is meant to have on sentencing is *how*? Victim impact statements, as will be recommended over the coming pages, must be stripped of the disingenuous supposition that its contents influence sentencing and instead should be recognised as a medium for the public expression of the loss experienced by homicide co-victims.

Do Victim Impact Statements Actually Influence Sentencing?

It is a cornerstone of criminal justice that each offender has a fundamental right to be protected against procedures that are inherently arbitrary and capricious. Sentencing systems that truly consider victim impact will inevitably bear these features and are innately wrong in principle.[787] It is my contention that victim impact statements have no actual influence on sentencing outcomes.

The sentencing of an offender is founded on long established concepts of culpability, intent and damage done.[788] The legislature has, in prescribing criminal

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[786] 'Judge Criticises Victim Impact Evidence' (11 October 2007) *The Irish Times* 1

[787] Murphy J 'Getting Even: The Role of the Victim' (1990) 7(2) *Social Philosophy and Policy* 209, 220

[788] The damage done is not always gauged by the actual harm caused to the victim, for the offender is only culpable for harm that was a reasonably foreseeable consequence of his unlawful actions. Ashworth notes that "criminal liability *and* punishment should be determined primarily according to the wickedness or danger of the defendant's conduct...on what he was trying to do or thought he was doing, *not upon what actually happened in the particular case*" - Ashworth A 'Punishment and Compensation: Victims,

offences, already gauged and subsumed the likely loss or injury sustained by the victim into the definition of each offence or its associative range of penalties. In addition, the judiciary has established, over decades, sentencing practices that already account for, in the abstract and prior to the introduction of victim impact statements, the level of harm inflicted.[789] For example, if a person is raped, it is assumed by all concerned that this will have long-term traumatic and personal repercussions for the victim. Likewise, if a person is robbed at gunpoint, it is a given that the person was shaken and traumatised.[790]

There is a double bind at play here. When victims, through their impact statements, tells judges what they expect to hear they tell them nothing new, but when unexpected things are mentioned they have to be "taken with a pinch of salt" in the absence of supporting evidence.[791] In short, the judge will already have considered any harm emanating from the impact statement which he can rightly take account of, insofar as that harm would have been expected, because he would have always have done so previous to the introduction of impact statements. If this were not so, there would be plenty of evidence available to show that sentencing for the offences to

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Offenders and the State' (1986) 6 *Oxford Journal of Legal Studies* 86, 97 {*emphasis added*}. For example, if an individual stole an unmarked car which, unbeknownst to him, held in the boot an organ on ice for delivery to a hospital for immediate transplant, and because of his crime the patient died, he could not be held responsible for the death of that person, as it was never his intent, nor was it a reasonably foreseeable consequence of his theft, that that person would die. Here, the offender's culpability and intent is for larceny, even though the damage done by his actions indirectly caused a death. In addition, as he would not be charged with the homicide, the family of the deceased would not be able to give impact evidence; therefore the harm caused to them by the death would no way feature in what would be a sentence based purely on larceny. Resultantly, victim harm is often greater than the offender can legally be held culpable for, thus impact evidence of such harm has no probative value, since it relates to harm caused indirectly or unintentionally by the offender that he cannot, in law, be punished for. It is perhaps for this very reason that impact statements, under s.5 of the *Criminal Justice Act 1993*, are limited to a precise range of crimes; namely those where the person is a victim of a sexual offence, or of an offence involving violence, or the threat of violence; for here the harm risked should be readily anticipatable by the offender. If the central determinant of offender liability were to focus on the actual quantum of harm caused rather than the harm unlawfully intended or risked, the focus would shift from culpability for criminal intent to personal responsibility for outcomes, requiring a major rethink of criminal law and its traditional punitive responses to its transgressors – see Strang H *Repair or Revenge: Victims and Restorative Justice* (Oxford: Clarendon Press, 2002) 201; and Finn-deLuca V 'Victim Participation in Sentencing', in Stolzenberg L & D'Alessio S (eds.) *Criminal Courts for the 21st Century* (New Jersey: Prentice Hall, 1999) 372. As a result, offenders who commit identical offences but where the effects on the victims differ would *not* receive similar sentences, while conversely offenders whose differing crimes resulted in like harm, despite the variance of their intent and actions, would. Imagine the end result of this approach on, for example, involuntary manslaughter, where the offender did not intend the death of the victim though that was the ultimate harm caused by his actions – his sentence would be analogous with the offender who actually intended the death of his victim because the end result, the loss of life, was identical. Indeed, there would then be no need for the separate charges of murder and manslaughter.

[789] Davis R & Smith B 'The Effects of Victim Impact Statements on Sentencing Decisions: A Test in an Urban Setting' (1994) 11 *Justice Quarterly* 453, 467-468

[790] Henley M, Davis R & Smith B 'The Reactions of Prosecutors and Judges to Victim Impact Statements' (1994) 3 *International Review of Victimology* 83, 88

[791] Sanders A, Hoyle C, Morgan R & Cape E 'Victim Impact Statements: Don't Work, Can't Work' [2001] *Criminal Law Review* 447

which victim impact statements are now permitted, like sexual assault, have become more severe since the introduction of such statements, but no such assertion or proof has materialised or, indeed, is presumed.

Whereas sentencing is and must remain an independent and objective exercise[792], it also needs to be one that is consistent and apparent. The lynchpin of criminal justice is the notion of measured communal blame. Lawbreakers are punished to varying degrees to correspond to differences in moral blameworthiness and because they have transgressed standards agreed upon by the community. It is this notion of collective judgment that explains why a criminal receives a particular sentence. Therefore sentencing, as a purposive social endeavour, must always be guided by rational inquiry and not ever dictated by the raw impulses of victims, for to do so would be as absurdly analogous to doctors basing treatment decisions on what the patient thinks is appropriate or engineers constructing bridges, not in accordance with the rules of physics, but on the basis of what drivers reckon might work. The individual victim is but part of broader society and, resultantly, should not be invited or entitled to influence or make explicit recommendations as to an offender's sentence, for to do so not only introduces an element of unpredictability into the process of sentencing, but also runs the very real and aforesaid danger of giving the impression that one life is of a greater worth than another by marking its taking with a heftier sentence.

Not surprisingly, in view of the reasons just mentioned and as previously referenced, research has found no discernible evidence that impact statements put offenders in jeopardy of more severe sentences:

> Research suggests that the victim impact statement has not ... compromised defendants' rights ... it appears [too] that participation in sentencing has not had a great influence on sentences.[793]

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[792] Sentencing in Ireland is not an objective exercise in the true sense of the word, for the sentencing judge is obliged to take account of the personal circumstances of the offender: 'The sentence to be imposed is not the appropriate sentence for the crime, but *the appropriate sentence for the crime because it has been committed by that accused*' - *People (DPP) v McCormack* [2000] 4 IR 356 at 359, *per* Barron J {*emphasis added*}. These circumstances are typically presented (subjectively) to the sentencing judge by the defence vis-à-vis mitigating factors. Where this discussion re impact statements references sentencing as an objective endeavour, it does so within the context of it being uninfluenced by the emotions or demands of crime victims.

[793] Erez E 'Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements', in Crawford A & Goodey J (eds.) *Integrating a Victim Perspective within Criminal Justice* (Aldershot: Ashgate, 2000) 165, 173-174. See also Erez E 'Victim Participation in Sentencing: And the Debate Goes On...' (1994) 3 *International Review of Victimology* 17, 28; Davis R, Henley M & Smith B *Victim Impact Statements: Their Effects on Court Outcomes and Victim Satisfaction* (New York: Victim Services Agency, 1990) 6; and Erez E & Tontodonato P 'The Effect of Victim Participation in Sentencing on Sentencing Outcome' (1990) 28 *Criminology* 451

These studies are routinely heralded as some justification for the very existence of impact statements, as though its lack of effect is proof positive of its worth rather than evidence of its failure. It remains unclear whether the fact that impact statements seldom if ever influence sentencing is a product of resistance by criminal justice practitioners to victims' input, or because they are "misconceived in principle and unsatisfactory in practice."[794] Participatory rights, like victim impact statements, cannot be grafted onto the existing adversarial criminal process without generally remaining simply cosmetic, which they are, nor can they be made potent without creating profound changes to sentencing, which they do not.[795]

The introduction of impact statements in Ireland was very much a cursory knee-jerk reaction to public pressure, an exercise in window-dressing that ticked all the boxes for swift action: cheap, visible, politically astute, and relatively benign. Impact statements may well provide victims with a voice where previously they were silenced, but if no one is really listening to what is said, the right it infers becomes a wrong, a facetious charade begetting secondary victimisation, for if "impact statements do not influence sentences then asking victims' opinions and not acting on them increases victims' feelings of frustration and impotence."[796] It is wrong then to tell co-victims that they may make an impact statement and pretend that it has some bearing on sentencing outcomes. Fudging this issue only makes it more virulent, fuelling a somewhat redundant debate. This is not a call to abandon the impact statement, indeed "victim participation *of some kind* is here to stay."[797] We must instead remove the fiction that impact statements have the potential to influence sentencing, and in doing so eliminate a string of clearly dubious and erroneous assumptions that leave us free to reassess and recalibrate the use of these statements.

A New Purpose and Place for Victim Impact Statements

It should be presented clearly to victims, both by informed professionals and through legislation, that impact statements do *not* form part of the deliberations of sentencing judges. This may appear to do a disservice to victims, but if it is explained why - that the system of sentencing strives for uniformity in order to be just and that the

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[794] Sanders A, Hoyle C, Morgan R & Cape E 'Victim Impact Statements: Don't Work, Can't Work' (2001) *Criminal Law Review* 447

[795] Villmoare E & Neto V *Victim Appearances at Sentencing under California's Victims' Bill of Rights* (Washington DC: National Institute of Justice, 1987) 5

[796] Mawby R & Walklate S *Critical Victimology* (London: Sage, 1994)

[797] Sanders A, Hoyle C, Morgan R & Cape E 'Victim Impact Statements: Don't Work, Can't Work' (2001) *Criminal Law Review* 447, 448

information impact statements provide have long been accommodated within established sentencing practices - a true service is done. Victims should not be misled. Research has confirmed that victims who are given explanations as to the *why* of criminal proceedings are more likely to be satisfied with the outcome than victims who receive none, regardless of the nature of that outcome.[798] There is no reason to doubt that proper elucidation can be effective in preventing the misunderstood purpose, the heightened expectation and the subsequent disappointment experienced by the victim regarding the use and purpose of impact statements.[799]

Instead, impact statements should be promoted as a cathartic platform from which victims and co-victims may highlight the harm and loss suffered:

> There is one ... intangible benefit to impact statements: allowing the victim to be heard in court personally maintains a lifeline to the reality of the experience of victims - something which may otherwise be lost in the everyday court routine.[800]

Many hold that the purpose of the law is not to offer victims solace, nor is the court an appropriate place for homicide co-victims to grieve or vent emotions as part of either some healing process or vendetta. Yet why should they not have the right to emote at the close of a protracted ordeal through which they have sat as non-participants and silent observers, often hearing the defence cast aspersions on the character and record of their dead child, partner or parent in its bid to mount a defence to the homicide charge? The delivering of an impact statement may represent to them formal closure, a milestone in the healing process, an attempt to reclaim their loved one from a process that stole him the moment his life was illegally ended:

> The making of victim impact statements is a rather benign way of providing victims with a right of input and of satisfying their psychological need to be part of the process, without any documented adverse effects on the adversarial system.[801]

Tendering a statement has a cathartic and remedial effect on the victim, facilitating a public acknowledgement of their grief and loss. If, as in the words of former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and

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[798] Erez E 'Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements', in Crawford A & Goodey J (eds.) *Integrating a Victim Perspective within Criminal Justice* (Aldershot: Ashgate, 2000) 177

[799] Wright M 'The Court as Last Resort: Victim-Sensitive, Community-Based Responses to Crime' (2002) 42(3) *British Journal of Criminology* 654, 662

[800] Joutsen M 'Victim Participation in Proceedings and Sentencing in Europe' (1994) 3 *International Review of Victimology* 57, 63

[801] Erez E 'Victim Participation in Sentencing: And the Debate Goes On...' (1994) 3 *International Review of Victimology* 17, 28

Rwanda, Judge Richard Gladstone, "one of the important, if not the most important aspect of justice, is healing victims"[802], then the criminal process is only beginning to do its job, and should seek out ways that foster the healing of victims without intruding on the necessary rights of the defendant to a fair trial:

> One thinks of justice in the context of deterrents, of retribution. But too infrequently is justice looked at as a form of healing, a form of therapy for victims who cannot really begin their healing process until there has been some public acknowledgement of what has befallen them.[803]

Traditionally the law has viewed emotion as antithetical to reason, order, justice, and coherence. There are those who believe that the courts should be confined to the administration of justice and not to some wider social purpose. Literature in the growing field of therapeutic jurisprudence reveal the harm the victim experiences by feeling external to the process and provides support to the proposition that having a voice may improve his long-term welfare.[804] There will be those who object that these concerns are the province of sociologists and psychologists and not of the courts, but this view rather conveniently ignores that judges face a myriad of social issues, like substance abuse, poverty, mental illness, and family dysfunction daily.[805] The reality is that social problems are never quite divorced or divorceable from legal problems – it is, after all, axiomatic that crime stems from social roots.

The criminal justice system plays out a homicide trial in a series of steps that are controlled, prescribed and guaranteed under the law, concerned only with the apprehension, arrest, prosecution, and punishment of the offender. Viewed from this perspective, the extent of victimhood - the loss of life - is not fully conveyed by the process. The criminal trial process displays an almost obsessive, and victims would say excessive, preoccupation with the defendant, a state of affairs justifiable by reference to the presumption of innocence. However, when the defendant pleads, or is found, guilty, thereby altering his status to offender, the process remains centred on him. Permitting an impact statement at this stage increases the visibility of the victim, individualising and personifying him, and for a few short moments at the tail end of

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[802] Remarks made by Justice Richard J. Goldstone of the South African Constitutional Court and former Chief Prosecutor with the International Criminal Tribunals for the former Yugoslavia and Rwanda, at his speech given at the United State Holocaust Museum (27 January 1997)

[803] *ibid.*

[804] Wiebe R 'The Mental Health Implications of Crime Victims' Rights', in Wexler D & Winick B (eds.) *Law in a Therapeutic Key* (Durham: Academic Press, 1996) 645

[805] Fulton Hora P & Schma W 'Therapeutic Jurisprudence' (1998) 82(1) *Judicature* 9, 10-12

the process turns the focus of attention to the person who has suffered the most from the crime. Family members often feel that the victim is airbrushed out of the homicide trial, that their loved one is lost in or depersonalised by the process, his social standing transformed from a person into some body of evidence, that though a life has been taken "this fact is dismissed and reduced to a statistic."[806]

The right to give an impact statement is of particular worth to homicide co-victims; to them their words represent, on a symbolic level, the victim himself. AdVic suggests that in order to personalise the deceased a character profile of the victim, composed by his family, be submitted into the Book of Evidence. Similar procedures are in operation elsewhere. For example, in Sweden, co-victims can make PowerPoint presentations before the court portraying the life of the deceased. For reasons broadly similar to the rationale applied in relation to the use of impact statements, this practice is not endorsed here. A properly reconstituted and relocated impact statement, as recommended over the following pages, can be relied upon to adequately celebrate the life of the victim.

The positive impact of informing the court of the effects of the crime on the victim should never be underestimated; it can facilitate personal recovery whilst contributing to the humanising of the criminal justice system. The victim *qua* witness is needed in criminal justice as an information-provider, but that role is inextricably determined by its need for *particular* information:

> Limiting the role to that of witness leads potentially to the secondary victimization documented so extensively ... victim impact statements may alleviate these effects, it is possible to accede to the victim's wish to be an expresser, and, in doing so, the victim may provide more information than the system needs or wants.[807]

The impact statement could also contribute to the satisfaction of another purpose of criminal justice: the rehabilitation of the offender.[808] Rehabilitation is essentially concerned with implementing practices that aim to change the values of the offender

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[806] Russell J *Home Office Funding of Victim Support Schemes – Money Well Spent?* (London: Home Office, 1990) Appendix 4

[807] Edwards I 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44(6) *British Journal of Criminology* 967, 978

[808] Roberts J & Erez E 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 *International Review of Victimology* 223, 226; Booth T 'Voices After the Killing: Hearing the Stories of Family Victims in New South Wales' (2001) 10(1) *Griffith Law Review* 25, 40; New South Wales Law Reform Commission *Sentencing – Discussion Paper 33* (Sydney: New South Wales Law Reform Commission, 1996) 11.35; Talbert P 'The Relevance of Victim Impact Statements to the Criminal Sentencing Decision' (1988) 36 *University of California Los Angeles Law Review* 199, 217; and Henderson L 'The Wrongs of Victims Rights' (1985) 37 *Stanford Law Review* 937, 990

so that he will not commit further offences.[809] It is thought that the more sensitised the offender is to the harm he has inflicted the less he will be able to use delusory justification techniques.[810] Impact evidence disclosed in court confronts the offender with the extent of harm suffered and constructs a personalised image of the victim as a damaged human being:

> It can be considered an important part of the rehabilitation of the convicted person in facing the reality of what he has done. Being made to sit and listen to the victim impact statement of a family may well begin to give him some sense of the consequences of [his] actions. Rehabilitation is one of the points of a custodial sentence, and this process can best begin in the courtroom.[811]

Consequently, the offender may be so shocked as to be remorseful and empathetic; he might be prompted to claim ultimate responsibility for the offence and seek to desist from the commission of future criminal offences.[812]

Even though impact statements do not influence the sentence, it is essential that victims and co-victims have a voice:

> [They] should still be heard and respected by the court, the offender and the community so, at the very least, we can all be reminded of our humanity ... to this end, it is crucial that the court must comment publicly upon victim impact statements submitted by family victims in each and every case and acknowledge the suffering of those victims and their grief as a result of the death of the deceased.[813]

Accordingly, reading impact statements after the sentencing stage eliminates the risk of arbitrary sentencing, but victims would still be a part of the criminal proceedings by having voiced their loss to the offender, the court and the public. In this way, victim impact statements become part of the offender's sentence and not a factor in determining it.[814] In addition, explicitly removing the impact statement from the realm of sentencing has the added benefit of alleviating any pressure on judges to impose tougher sentences based on the contents of these statements as their sentence is

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[809] Ten C *Crime, Guilt and Punishment* (Oxford: Clarendon Press, 1987) 8

[810] Hudson J & Galaway B *Victims, Offenders and Alternative Sanctions* (Massachusetts: Lexington Books, 1980)

[811] Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice, Equality & Law Reform, 2007) 237

[812] Booth T 'The Dead Victim, The Family Victim and Victim Impact Statements in New South Wales' (2000) 11(3) *Current Issues in Criminal Justice* 292, 297

[813] Booth T 'Voices After the Killing: Hearing the Stories of Family Victims in New South Wales' (2001) 10(1) *Griffith Law Review* 25, 40

[814] Mulholland C 'Sentencing Criminals: The Constitutionality of Victim Impact Statements' (1995) 60 *Missouri Law Review* 731

already handed down before the impact statement is delivered.

Aristotle noted that the law is "reason free from all passion"[815], but this does not preclude compassion. Preventing the co-victim from speaking exacerbates his suffering and sense of alienation from criminal justice as a whole. After all, co-victims have sat in court and observed the killing of their loved one argued in a relatively staid, sterile and legalistic manner. Their voice is an expression of humanity. The legal system ought to be robust and assured enough to accommodate it.

Reconstructing the Victim Impact Statement

It is recommended that legislation be introduced making permissible the oral presentation of an impact statement by the direct victim in cases where the offender is guilty of an actual or threatened violent or sexual assault or by a co-victim where the offender is guilty of manslaughter or murder.[816] This does not preclude the victim from nominating an individual to make the statement on his behalf once the victim has so contributed to its contents that it can be taken as a reasonable reflection of the impact felt.[817] It is important that the victim, co-victim, or his chosen representative, presents the impact statement and *not* a member of the prosecution. As the victim remains dissociated from the prosecution throughout the proceedings, it would be wrong for him to have to sit passively in the public gallery while a legal professional reads, summarises, interprets, and sanitises his words. Furthermore, as the relationship between the prosecution and the offender is adversarial in nature, the offender may be less likely to listen to a statement read by the prosecution or be stirred by its sentiments. While it should be mandatory for the prosecution or some other designated authority to inform the victim of his right to make an impact statement his expression shall remain at all times voluntary.

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[815] Barker E *The Politics of Aristotle* (Oxford: Clarendon Press, 1946) 146

[816] Extending the right of delivering impact statements to all victims of crime is not an option considered here, as it falls outside the remit of this thesis. That said, some will argue that allowing impact statements for relatively minor crimes will slow down the process overall, and that in many cases the harm caused will hardly warrant a statement. Others are quick to point out that the burglary of an elderly person's house can have a long-term if not life-long impact on their life, far greater than the impact experienced by younger people faced with a similar crime, and that allowing impact statements in these circumstances is important.

[817] Some people many wish for another to present the impact statement before the court, either from fear of the defendant or from public speaking. However, it is vital that the impact statement represents the individual's words and loss. Carney J referred to the receiving in court of an impact statement that had essentially been prepared by the Dublin Rape Crisis Centre for lobbying purposes as a "serious abuse of process" – Coulter C 'Judge criticises 'abuse' of rape victims report' (7 April 2003) *The Irish Times* 5. There have been other impact statements that have lobbied for change, but these did not encounter the wrath of the bench as they were made on a *personal* basis. One father utilised his impact statement to appeal to the Government to provide extra funding to establish specialist units with therapists to help bereaved families and friends cope with the trauma of having a loved one murdered – Keaney P 'Victim Impact Statement of Peter Keaney' (7 December 2006) *The Irish Times* 4

The impact statement should be defined in legislation, directly referencing its sole communicative function. It must be clearly articulated to victims by informed personnel, and supplemented by literature, that impact statements do not form any part of the deliberations of the judiciary as to the severity of sentence. So there remains no confusion as to the purpose of the impact statement its presentation should be relocated to immediately after the sentencing of the offender, prior to his removal from the court. In this way, the emotional aspect can be clearly separated from the sentencing process.

The victim shall, through the prosecution, disclose the impact statement to all parties as soon as is practicable before the sentencing hearing, enabling the defence and trial judge to review its contents prior to its oral delivery. As the statement will have no effect on sentencing, objections from the defence to part or parts of its contents and any requests for censorship should be carefully scrutinised before being judicially upheld. The victim should sign a declaration that the information contained in the statement is true and be made aware that he is prosecutable for providing information before the court known to him to be false, or intended to mislead or damage unfairly the position of the offender or the reputation of the court in the reasonable view of the court or the public at large.

To prevent abuse of the right to give an impact statement *viva voce*, the victim or co-victim should not appreciably stray from his pre-submitted text so as to ire or damage irreparably the position of the offender. If such a departure occurs and places in the public domain unfounded or scurrilous allegations against the offender the victim will be held in contempt of court.

The victim must not offer any opinion as to how the court should have punished the offender, or use his statement to question evidence presented to the court, or bring before the court evidence that did not form part of the original prosecution case or defence confutation, nor is the flavour of his statement to be such as to bring into disrepute or be contemptuous of the substantive workings of the court.

While there will be an obligation on the court to allow the victim emote via his impact statement this should not preclude the court, on its own initiative, to give directions or impose conditions on the statement that may, in the opinion of the court, be necessary to protect the safety, security, emotional welfare, or privacy of the victim or co-victim, or indeed the immediate or long-term security of the offender. This will allow the court, in circumstances where it considers it necessary or appropriate, to

direct that all or part of the statement not be disclosed, disseminated or published, protecting an offender from unfounded allegations which are extraneous to the offence for which he was convicted.

To some, and in particular AdVic, it may seem that the ramifications of the proposals put forth here to redefine the purpose and relocate the impact statement saves it at too high a price - namely by making redundant any instrumental or probative value it may have had in determining sentence, reducing it to a mere symbolic aspect of victim participation. In reality, these proposals are a recognition of the current illusory value of the impact statement and a conferring upon it a truth that mounts a challenge to the criminal justice system to appreciate the victim impact statement on a different level that satisfies the utilitarian, humanistic, moral, and cathartic views of its proponents whilst eliminating, in their entirety, the procedural and judicial fears of its opponents.

All the while it must not be forgotten that the original intent behind impact statements, as enunciated at the outset, was for it to be communicative, an objective that has become derailed and corralled by a persistent focusing on the misconstrued and unrealistic 'impact on sentencing' function, from where most of the lingering opposition to impact statements seemingly animate. The reconstituted and relocated victim impact statement recommended here is an honest exclusion from the sentencing process rather than the dishonest inclusion it presently represents, reiterating its communicative function. Free from the trappings of its current pretence the impact statement proposed herein benefits the victim; the person originally purported to gain the most from its introduction, by allowing for the acknowledgement and expression of his loss whilst treating him with respect.

The Role of the Director of Public Prosecutions [818]

Before assessing the proposals put forth by AdVic as to how the Director of Public Prosecutions can better accommodate the concerns and needs of co-victims, it is proper to first outline the functions and responsibilities of that Office. The prosecution system in Ireland is constitutionally grounded in Article 30.3 of *Bunreacht na hÉireann*, which provides that all indictable crimes and offences prosecuted in any court shall be pursued in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that

[818] For fluidity, the Director of Public Prosecutions will be referred to throughout, and where appropriate, as 'the DPP', 'the Director', 'the Office of the DPP' or 'he'.

purpose. The Director has been responsible for the prosecution of all indictable criminal offences since the enactment of the *Prosecutions of Offences Act 1974*, and is said to represent the public interest in criminal law.[819] He has no investigative functions save for certain duties arising under the *Garda Síochána (Complaints) Act 1986* concerning inquiries into alleged offences by members of An Garda Síochána.

Though the Office of the DPP comes under the general remit of the Department of Justice, Equality and Law Reform, that Minister, the Government or the Attorney General are neither answerable for nor entitled to answers about the actual prosecutorial policies applied or individual decisions taken by the Director:

> [His] role under the Irish Constitution is a very difficult one, a very lonely one ... [but] you can't have a democratic prosecution. You have to trust a Constitutional officer to bring the prosecution, and that person must have independence.[820]

It is accepted practice, domestically and internationally, that prosecution authorities like the DPP are not susceptible to judicial review and public law remedies in the usual manner.[821] His role is protected by legislation, adhered to by the courts and endowed with a broad and virtually uninfringeable discretion in the performance of his duties. Indeed, this veritable independence of the Director is considered its *raison*

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[819] The cited reason for creating the Office of the DPP was that as Ireland's accession to the EC had greatly increased the demands on the Attorney General's office, it was advisable that his prosecutorial functions be hived off in order to permit the more effective discharge of his primary function as "the advisor of the Government in matters of law and legal opinion", as per Article 30 of the Constitution. Although it did not form any part of the official explanation, the establishment of the DPP was highly motivated by the need to secure the appearance of independence in prosecutions. Given that the AG is effectively a political appointee, there was always the danger that such independence may be compromised by political influence in prosecutions that have domestic political implications. The consent of the AG is still required for prosecutions by the DPP for a very limited category of offences, including the *Official Secrets Act 1963*, the *Geneva Conventions Act 1962* and the *Genocide Act 1973*, which reflect the diplomatic and international importance that attaches to such offences – Casey J *The Irish Law Officers: Roles and Responsibilities of the Attorney General and the Director of Public Prosecutions* (Dublin: Round Hall Press, 1996)

[820] McConnell D 'McDowell in favour of DPP Reform' (26 November 2006) *Sunday Independent* 2

[821] The High Court has a supervisory role in ensuring public bodies act in accordance with the law. In performing this judicial review function it is generally not concerned with the merits of the decisions at question but with the fairness of the procedures used to reach such a decision. However, a further but very narrow basis for judicial review that does go to the merits of a decision made is rationality, thus the decision of a public body may be struck out on the grounds that it was irrational – Bradley C *Judicial Review* (Dublin: Round Hall, 2000). In *Evitson v DPP* [2002] 3 IR 260, the DPP reviewed an initial decision not to prosecute for a road traffic offence where the suspect had lost control of her car and collided with another, resulting in the death of the other driver. This initial decision not to prosecute had been conveyed to the suspect and the family of the deceased. After an internal review, prompted by representations made by the father of the deceased, the decision not to prosecute was changed and the suspect was notified that she would now be prosecuted. The Supreme Court, "viewing the matter objectively, and leaving aside every element of sympathy for the applicant", upheld the decision of the High Court quashing the decision to prosecute, finding that although the DPP was entitled to review an earlier decision not to prosecute and arrive at a different conclusion, in circumstances where a suspect was informed of a decision not to prosecute, it would be unfair to prosecute where no new evidence had emerged. As an aside, in England and Wales, where an inquest jury returns a verdict of unlawful death, the courts have required the Crown Prosecution to reconsider a decision not to prosecute in light of such a verdict and, where they still choose not to prosecute, will review whether those reasons are sufficient.

d'être, a revered characteristic of the office considered paramount to the carrying out of its functions:

> In a very real sense the independence of the Director of Public Prosecutions is of far greater importance to the public than it is to him ... the jurisdictions in which it is not fully applied tend to be those in which problems regarding miscarriages of justice and breaches of human rights most often arise.[822]

Nor is his independence compromised by the fact that he is appointed or can be removed by government as the procedures set in place severely limit the scope for any improper or political interference.[823]

There are obvious reasons for centralising criminal prosecutions in an independent body like the DPP. He will possess a surer sense of which laws might be applicable to offensive conduct and, where they conflict, which of them might be best applied. His impartiality guarantees fairness and his assignment ensures prosecution in cases where justice might require it even though individual victims do not. Yet it can be difficult for the Director to be truly neutral, to weight impartially the facts, the law and the equities bearing on the many decisions he must make. As he sees the larger picture, no individual decision is made in a vacuum but is instead comparative; therefore rape may be reduced to an indecent assault, street mugging to larceny, multiple burglary offenders may be charged with just one, and many offences may not be prosecuted at all because of their overall triviality, each a decision that can mar the prosecution process in the eyes of victims.

It will generally be in the public interest to prosecute a crime where there is sufficient evidence to justify doing so, not just so that the wrongdoer is convicted and punished but also that the process can fulfil its role as a public deterrent. There are, however, a variety of other factors to be considered in determining whether the public interest necessitates a prosecution, including the seriousness of the alleged offence; whether the likely length and expense of the trial would be disproportionate having regard to the seriousness of the alleged offence and the strength of evidence; the presence of any aggravating or mitigating factors; the length of time elapsed since the

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[822] Barnes E 'Reflections on Twenty-Five Years as Ireland's First Director of Public Prosecutions', in O'Mahony P (ed.) *Criminal Justice in Ireland* (Dublin: Institute of Public Administration, 2002) 89, 92

[823] Before removing the Director, the government must convene a committee comprising of the Chief Justice, a High Court judge and the Attorney General to inquire into his health or, either generally or in a specific case, his conduct. This committee has all the powers, rights and privileges of the High Court. The government can only remove the Director after consideration of the report submitted by the committee - Walsh D *Criminal Procedure* (Dublin: Round Hall Sweet & Maxwell, 2002) 585

alleged offence; the age and mental or physical health of the accused; the consequences of a conviction being disproportionately harsh or oppressive in the particular circumstances; whether the offender already made amends or shows genuine remorse and, if he is already serving a sentence in relation to another matter, whether it is likely that the courts would impose an additional penalty:

> [The court] rejects the submission that [the Director] has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence before him ... [The court is] satisfied that there are many other factors which may be appropriate and proper for him to take into consideration.[824]

The Director must introduce only enough evidence to secure a conviction, at all times mindful that unreliable evidence can totally undermine a trial and possibly lead, under the strict rules of evidence, to a total acquittal:

> It is not the rule that all offences for which there are sufficient evidence must be prosecuted. Indeed the Director is not obliged to call evidence he does not consider to be credible, reliable and trustworthy.[825]

That the burden of proof necessary is one beyond reasonable doubt, which is higher than mere probability, must be borne in mind at all times when considering whether to prosecute.

Over time, the Office of the DPP has identified the principles necessary for the discharge of its duties and has gradually welded them into a prosecutorial policy.[826] He and his staff have a duty to act at all times honestly, fairly and objectively, and to remain unaffected by individual or sectional concerns and from media or political influence, having due regard only and at all times to the public interest.

The parties involved in a crime - the victim, the accused and, to a lesser degree, society as a whole - each have an obvious vested interest in the decision whether to prosecute, for which offence, and in the outcome of that prosecution. The Director must consider this triangulation of interests and, despite their inherent tensions, the underlying goal must always be that the guilty are convicted and the innocent acquitted. The prosecutor knows that the consequences of convicting the innocent are

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[824] *State (McCormack) v Curran* [1987] ILRM 225, *per* Finlay CJ

[825] *State (DPP) v District Justice McMenamin* (Unreported, High Court, 23 March 1996), *per* Barron J

[826] Office of the Director of Public Prosecutions *Guidelines for Prosecutors* (Dublin: Office of the Director of Public Prosecutions, 2006)

more tragic than seeing the guilty acquitted. He owes a special duty not just to the victim but also to the accused. If he harbours any doubts, he should not prosecute. His reliance must be on the strength of his own case rather than the weakness of the defence. As he undertakes to present persuasively rather than forcefully prosecute the case, he and his staff should sidestep courtroom shenanigans and theatrics. He must not argue any proposition of fact that is not an accurate or fair interpretation of the evidence nor knowingly advance any legal proposition that does not correctly represent the law. It is an adage of common law systems that the duty of prosecuting counsel is not to obtain a conviction at all costs but to act instead as administrators for justice.

Table 15: Breakdown of Main Reasons for a Decision Not to Prosecute[827]

Reason for No Prosecution	*2004*		*2005*		*2006*	
Insufficient Evidence	2948	79%	2871	75%	2904	73%
Juvenile Diversion Programme	162	4%	196	5%	224	6%
Public Interest	155	4%	199	5%	176	4%
Sympathetic Grounds	50	1%	74	2%	50	1%
Time Limit Expired	162	4%	193	5%	270	7%
Undue Delay	57	2%	93	2%	119	3%
Other*	188	5%	206	5%	236	6%
Total	*3722*		*3832*		*3979*	

*the death or disappearance of the suspect or the complainant, or the refusal of a complainant to give evidence are some of the examples included under 'other' - *Annual Report 2006* (Dublin: Office of the Director of Public Prosecutions, 2007) 34

As the decision whether or not to prosecute is one with far-reaching consequences for the individuals involved, it is essential that it be a meticulous one, based on tactical judgments about the prospects of securing a conviction. In practice, it is usually the decision *not* to prosecute that is likely to prove most controversial, as the decision to prosecute is always open to the ultimate review – the trial process itself. However, even when a defendant is acquitted, the anxiety and trauma caused by being charged with a criminal offence, let alone the consequences resulting from albeit a failed prosecution, can include loss of reputation and employment, disruption of personal relations and crippling financial expense. On the other hand, when a decision not to prosecute is reached, the victim, having made what is often a difficult and occasionally traumatic decision to report the crime - rape being an obvious example - may feel rejected and disbelieved.

A prosecution should only be initiated and continued where there is a *prima facie* case against the accused. The Director should not lay a charge where there is no

[827] Roughly one-third of all files received by the DPP result in a decision not to prosecute – Office of the Director of Public Prosecutions *Discussion Paper on Prosecution Policy on the Giving of Reasons for Decisions* (Dublin: Office of Public Prosecutions, 2008) 35. It should be noted that all rape complaints must be referred to the DPP, even where there is evidently insufficient evidence to pursue a conviction, as must all files relating to a fatal single-car road traffic accident, notwithstanding that the death of the driver means that no-one could be prosecuted.

reasonable prospect of securing a conviction. In assessing the evidence, he should have due regard to any defences which are plainly open to or have been indicated by the accused. In addition, the evidence must be such that a jury, properly instructed on the relevant law, could conclude beyond a reasonable doubt that the accused is guilty of the offence charged.[828]

When having determined that a prosecution is warranted, the Director must decide as to which charge or charges are apposite. This choice is generally within his exclusive domain, though he should only prefer charges that are justified by the facts. In many cases, the evidence will disclose a number of possible offences, and although he should ideally select a single charge that adequately reflects the nature and extent of the criminal conduct, the number of charges should be kept as few as possible. While in the ordinary course of events the charge laid will be the most serious disclosed by the evidence there is no legal obligation to lay the most serious charge.[829] This is most controversial in a homicide case when the Director finds that the more appropriate charge to proceed with is one of manslaughter instead of murder. It can appear to co-victims to amount to a quasi-judicial decision: "sometimes, the decisions made by [the prosecutor] are equivalent in nature to the final decisions rendered by a judge or jury."[830]

AdVic propose three changes to the way the Office of the DPP conducts its business: that the Director assign an individual in his Office to liase with the families of homicide victims; that he be able to provide co-victims with explanations for non-prosecution, or reasons why specific evidence was not brought before the court at trial; and that, post-conviction and so as to assist the judge in his deliberations, the Director be allowed to make a submission as to what sentence he considers

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[828] It has always struck me that a necessary reality of maintaining a meticulous prosecutorial process that only seeks a conviction when it is so satisfied of its case is that it tells a learned jury that the person before them is in fact guilty and that any other verdict is one primarily derived from a technicality.

[829] The DPP must not prefer a more serious charge than the evidence warrants to secure a guilty plea to a less serious offence. Ireland does not engage in the practice of plea-bargaining, an agreement between the prosecution and the defence by which the accused agrees to plead guilty to a lesser charge. Similarly, a guilty plea to a less serious offence is generally not accepted in the absence of some material change of circumstance, such as the death of an important witness. Where there is such a material change which renders the Book of Evidence no longer an accurate reflection of the evidence to be led by the prosecution, the defence would be informed, and if at that stage a plea to a less serious offence was offered it would be considered, set against the guiding principles of the public interest and the interests of justice, but at no time would prosecution counsel invite the offer of such a plea - Barnes E 'Reflections on Twenty-Five Years as Ireland's First Director of Public Prosecutions', in O'Mahony P (ed.) *Criminal Justice in Ireland* (Dublin: Institute of Public Administration, 2002) 89, 100. During a murder trial, if, for example, a question emerges of a witness not swearing up or of the defence of provocation turning out to be much stronger than expected, the DPP may accept a plea to the lesser charge of manslaughter from the defence. It is procedure to inform families of this turn of events.

[830] Danto B, Bruhns J & Kutscher A *The Human Side of Homicide* (New York: Columbia University Press) 236

appropriate. These three proposals are now considered in turn.

Prosecution Liaison with Homicide Co-Victims

As a crime is regarded as an offence against the whole of society, of which the victim is but a part of, the DPP, in very formal terms, commences and pursues prosecutions in the name of the People of Ireland and does *not* act on behalf of individual victims. Still, the victim should not merely be viewed as an instrument to procure convictions, he should be considered as an injured party with moral if not legalistic rights that should be structurally taken into account at all stages of the criminal investigation and trial. Whereas public policy necessitates prosecutorial decision-making to be always exercised by a non-partisan adjudicator, it does not necessarily follow that any input from the victim should be incapable of being considered as one of the many factors in this process nor have the potential to act as an indispensable aid to truth-finding. There was in the past an indifference to the position of victims, deriving in part from a longstanding code of conduct that prevents prosecuting barristers from speaking to witnesses about evidence. Unfortunately, this translated into a practice of not speaking to victims at all, which naturally gave rise to concerns of alienation.[831]

Victims seek better legal representation of their interests. Statistical analysis reveal that victims judge prosecutors in part as a client views private counsel - the better the perceived representation, the more favourable the evaluation.[832] This assessment was not just based on the ultimate disposition of the case, rather the more frequently victims heard from the prosecution and were consulted or informed about the case the more satisfied they were, immaterial of the final verdict. Research further suggests that public prosecutors are perceived as being less vigorous or energetic in the manner in which the case is presented, but even those who do strive to secure a conviction are clearly limited by evidential and cross-examination rules in their ability to conduct the case with the same degree of zeal as that of the defence.[833]

The *Victims Charter and Guide to the Criminal Justice System* outlines the Director's commitment to ensuring that victims are treated with the utmost consideration and respect, that when making a decision relating to a prosecution he shall have regard to any view expressed by the victim and will examine a request from him for a review of that decision and, where appropriate, conduct an

[831] Gillane S 'Balancing the Scales in a Homicide Trial: A Reply' [2007] 1 *Judicial Studies Institute Journal* 30, 33

[832] Kelly D 'Victims' Perceptions of Criminal Justice' [1984] 11(15) *Pepperdine Law Review* 15, 19

[833] Doak J 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) *Journal of Law and Society* 294, 306

independent *internal* review. When prosecuting, particularly offences of a violent or sexual nature, the Office of the DPP works with An Garda Síochána to ensure that victims are kept fully informed of developments. Improving liaison with injured parties is a priority for the Director. Once a prosecution has commenced and there is a file on the matter, a member of his Office is able to deal with enquires regarding progress in that case.[834]

At the request of a victim, the Office of the DPP will facilitate a pre-trial meeting to discuss the case, the purpose of which is to explain the trial process and answer any questions. There are, however, clear limits as to how far any victim-prosecutor rapport can be stretched. While the victim is entitled to have his views heard and considered at this meeting, he is not entitled to give instructions to the prosecution concerning the conduct of the trial. In addition, the Director's representative will not discuss evidence with any injured party, family member or witness.

Yet the evidence available to the Director might disclose important details regarding the victim's life or death previously unknown to the family for which they may be quite unprepared to hear for the first time in open court. Where this information is evidence to be presented by the defence, co-victims may be the only people able to help the prosecution set the record straight:

> The trial itself is an adversarial process involving the prosecution and the defence. Unless the relatives are witnesses they play no role in the trial and do not speak in court. They are expected to be passive observers of a process that involves the re-telling of the events that led to the death; often many months or years after it occurred. This is difficult enough for anyone to cope with, but they may also hear inappropriate damaging reference to the victim's conduct and reputation made by the defence. They may be the only people able to help the prosecution put the record straight.[835]

For example, one woman who killed her husband by striking him on the head an inordinate number of times with a lump hammer while he slept successfully established the defence of provocation by contending that the relationship had been abusive. After the verdict was reached, the family of the deceased released diaries that strongly contradicted the facts that had been alleged and strongly suggested that it was

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[834] Loftus C (Chief Prosecution Solicitor) 'Victims Are Supported', in *Letters to the Editor* (5 May 2005) *Irish Independent* 33

[835] Criminal Justice Reform *Hearing the Relatives of Murder and Manslaughter Victims: The Governments Plans to Give the Bereaved Relatives of Murder and Manslaughter Victims a say in Criminal Proceedings (A Consultation Paper)* (London: Office of Criminal Justice Reform, 2005) 13

the deceased who had actually been the party in the marriage who was the victim of abuse. Tellingly, there had been no mechanism for this information to come to the attention of prosecuting counsel let alone to the attention of the jury throughout the course of the trial.[836] The Director, in conjunction with An Garda Síochána, must always be alive to the real possibility that co-victims can be of assistance in providing rebuttal evidence to defence claims.

The Director favours communicating frankly with victims. For instance, there will be occasions whether in advance of, during, or after a trial where, through his legal team and usually in fairly general terms, the DPP may advise co-victims and victims alike of weaknesses in the prosecution case or difficulties arising from the evidence. Where this is done, it would be at all times underpinned by the rule that the Director operates a very strict policy against discussing specific evidence with witnesses, victims or co-victims.[837] Any complaints by a victim concerning the manner in which the staff or representatives of the Office of the DPP have treated him should be addressed directly to the Director.

In 2006, the Director established a committee to review all of its procedures in respect of communications with victims. As a result of this ongoing work a number of changes have been made primarily aimed at ensuring that victims receive information in a timely manner regarding developments in their case and also that they are made aware of their entitlement to a pre-trial meeting with the prosecution legal team. The Director continues to work closely with An Garda Síochána, who have recently appointed a senior Garda to coordinate contact with victims, and adhere to a policy of communicating with victims where possible via the members of An Garda Síochána who have developed a relationship with that victim. In cases involving homicide this will be the assigned Family Liaison Officer.[838]

To the victim the prosecutor is a bureaucrat who holds decisive power over his use of the criminal law, but for the prosecutor the victim is just one amongst many competing interests, part of a larger picture and public. It would appear that direct contact seems necessary for co-victims to feel a party to the process. The pre-trial meeting arranged upon request for co-victims is a one-off, typically held a fortnight or

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[836] Carney P 'The Role of the Victim in the Irish Criminal Process' [2007] 1 *Justice Studies Institute Journal* 7, 14 {The case in question is not referenced by name}

[837] Information provided by email from Chief Prosecution Solicitor Claire Loftus, Office of the Director of Public Prosecutions (31 October 2007)

[838] Office of the Director of Public Prosecutions *Annual Report 2006* (Dublin: Office of the Director of Public Prosecutions, 2007) 24-25

so before the trial is due to commence. It is difficult to expect the Office of the DPP to open up channels of frequent communication with co-victims, as it would prove complicated if the co-victim were also a witness and, due to the limited amount of information that the Director can confer, an ineffective use of its resources.

Providing Explanations for Prosecution Decisions

AdVic believes that the DPP should provide co-victims with explanations for non-prosecutions; for why specific evidence was not brought before the court at trial; or for reasons why charges less than what the victim believes to be just are pursued, like where a manslaughter charge is preferred over murder. While co-victims may not always agree with these decisions, the provision of an explanation at least offers a better chance that they are left with some confidence in the system of prosecution. Research has shown that informing victims of the reasons behind prosecution decisions, particularly when they relate to non-prosecution, reduces secondary victimisation and may also assist them in realising that the non-prosecuted is in fact innocent.[839]

In a society that has moved towards greater transparency and accountability, the Office of the DPP remains one of the last bastions to resist opening its doors to public scrutiny, its decision-making remaining covert, conducted within an impregnable bulwark of secrecy. Legitimate and disquieting questions arise as to why the Director decides not to prosecute or why 'evidence' that later creeps out into the public domain did not form part of his original case:

> It is, after all, the twelve men and women of the jury who sit in judgment, not the paid official, so they [the jury] should be given all evidence. [AdVic] don't want the whispers following judgment and sentencing which leave us all with nervous nagging doubts. We want the light to shine into all the corners of the case, not just the selective centre.[840]

The policy not to provide reasons for decisions to bring or maintain a prosecution, other than to An Garda Síochána, has often led to public controversy.[841] This typically occurs when cases collapse (the Judge Brian Curtin child pornography case; the collapse of the Dermot Laide retrial for the manslaughter of Brian Murphy in the

[839] Sanders A 'Victim Participation in an Exclusionary Criminal Justice System', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 197, 210

[840] O'Kelly E 'Victims left in a legal limbo while officials grind through the motions' (10 September 2006) *Sunday Independent* 28

[841] An Garda Síochána are provided, in confidence, with the reasons for non-prosecution in order to assist them in preparing similar cases in the future.

'Club Annabel' case); when certain evidence was not used to form part of the prosecution case (as when the fact that sperm was found on the hands of Robert Holohan did not form part of the case against Wayne O'Donoughe); when prosecutions were abandoned because of possible miscarriages of justice (the Nora Wall case; the Dean Lyons case); or where it was decided not to pursue proceedings (most infamously when the Director prosecuted Malcolm McArthur for the murder of nurse Bride Gargan, ignoring a petition of over 10,000 signatures to also prosecute for the murder of farmer Donal Dunne, instead entering a *nolle prosequi* for that offence). This latter example led to a public furore and one of the few occasions when the then Director, Eamonn Barnes, spoke publicly, defending the policy of saying nothing:

> There is a coercive reason for it. If reasons are given in one or more cases, they must be given in all. Otherwise wrong conclusions will inevitably be drawn in relation to those cases where the reasons are refused, resulting in unjust implications regarding the guilt of the suspect.[842]

The Supreme Court has since upheld this view in *H v DPP*[843]:

> The stance taken by the Director ... is that he should not, in general, give reasons in any individual case as to why he has not brought a prosecution because if he does so in one case he must be expected to do so in all cases. [The court] would uphold this position as being a correct one.[844]

There exists other compelling grounds why the Director has no duty to disclose reasons for non-prosecution. First, to provide reasons, either general or specific, may cast doubt on the innocence of a person who is merely suspected of committing a crime and is, of course, entitled to his good name and the presumption of innocence until such time as he is actually convicted of a criminal offence. The reasons for non-prosecution often have little or no relevance to the issue of guilt or innocence and may be, and often are, the non-availability of a particular proof, perhaps purely technical but nevertheless essential to establish the case. For example, if the Director were to say that a certain case did not proceed because a witness died or was too ill to testify, the public might infer that but for that reason there would have been a case mounted

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[842] McGee H 'Working behind closed doors' (26 January 2006) *Irish Examiner* 17

[843] [1994] 2 IR 589

[844] *ibid.*, at 603, *per* O'Flaherty J. In any event, in *State (O'Callaghan) v Ó hUadhaigh* [1977] IR 42, Finlay P stated *obiter*, "it can be argued plausibly that...the DPP has the same right as any other litigant before the Courts of not proceeding with a case." As there is no general duty on a litigant to justify to a court the initiation or withdrawal of proceedings, this comment would seem to suggest the view that the Director of Public Prosecutions is similarly not so obliged.

against a particular suspect, and whom, they may conclude, would have been found guilty if that witness were producible at trial.[845] Hence, from the public perspective, the giving of such reasons for non-prosecution may be tantamount to a conviction of "unprovable guilt", without the individual ever having the benefit of the protections afforded by the careful analytical examination in open court of the case against him.

Secondly, there are occasions when revealing reasons for non-prosecution could well erode the standing or reputation of an identifiable witness. For example, to say that a witness was not thought to be reliable would have the potential for implanting serious psychological consequences as well as attacking his right to a good name, particularly if the implication can be imputed that he was not merely incorrect but was telling a deliberate untruth or was untrustworthy. Accordingly, and in the absence of a statutorily provided privilege, this could expose the Director to costly actions in defamation.[846] Likewise, the giving of reasons for a decision not to prosecute may cause further distress to a victim of crime, particularly if that victim perceives the reason given as casting aspersions on the credibility of his account of events.

Thirdly, there is the possibility that future developments in a case, like the emergence of new evidence, may be prejudiced by the publication of sensitive material. Fourthly, providing explanations for non-prosecution would, in certain cases, imply that the failure to reach the "correct" conclusion to prosecute was due to bureaucracy or overly exacting procedures, many of which protect the due process rights of the accused. Fifthly, and more opaquely, the reason may expose the limitations of the Office of the DPP at a given time; the Director may simply lack the

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[845] Office of the Director of Public Prosecutions *Discussion Paper on Prosecution Policy on the Giving of Reasons for Decisions* (Dublin: Office of Public Prosecutions, 2008) 12

[846] It is possible that statements of reasons for non-prosecution may be privileged at common law, in certain circumstances providing immunity from liability in defamation. In the absence of any legal obstacle, an argument could be made that the DPP has a compelling interest in communicating the reasons for not prosecuting to victims of crime and perhaps, more generally, to the public or media. There are two types of privilege that might be applicable in this context: absolute and qualified. In short, *absolute privilege* protects statements in situations in which the law considers that absolute freedom of communication is so essential that no action in defamation should be allowed, regardless of the truth of the statement or the motive or malice of the speaker. It applies, for example, to statements by the President; to those made during parliamentary proceedings and in official Oireachtas publications; to statements made in the course of judicial proceedings; and to communications between a solicitor and a client. The essential difference between absolute and qualified privilege is that malice defeats qualified privilege. Two criteria apply at common law to determine the existence of *qualified privilege*: whether there exists a social, legal or moral duty or interest to make the statement over which privilege is claimed; and whether there was a duty or interest on the part of the person to whom the statement is made to receive it: 'It is impossible to enumerate fully the occasion recognised by law as attracting qualified privilege. Nor would it be desirable to do so, as such a list might give the wrong impression that the list is closed. This is not the case and new occasions will undoubtedly arise in the future to which the law will be willing to attach privilege' – McMahon B & Binchy W *Law of Torts* (Dublin: Butterworth, 2000). Even if statements of reasons for non-prosecution given adversely affect the reputation of others, there is a substantial likelihood that any action could be met with the defence of justification (*i.e.*, that the statements are true).

resources to prosecute every offence that is brought to his attention. This rationale acknowledges that at some level law enforcement must be partly selective and that if there existed a duty to give reasons for non-prosecution it would force the Director to expose his perception of what class of offences are causing the greatest harm to society and therefore more likely to be prosecuted, a move akin to inviting professional criminals to counter-strategise accordingly to the unavoidable resource constraints of the public prosecutor.[847]

There are, on the other hand, reasons for establishing a process whereby the Director can furnish victims and the wider public with the reasoning behind his decisions. First, where the identity of a suspect has entered the public arena and a decision is made not to prosecute there would be a valid argument in favour of the Director releasing a statement explaining why this decision was taken. For example, DNA evidence might show conclusively that a suspect is not guilty of the offence. Secondly, this reform has the potential to both increase public confidence in a key organisation within the criminal justice system and to improve clarity and enhance understanding of prosecutorial decision-making. Thirdly, it has the possibility of convincing victims and co-victims that the non-prosecuted is in fact innocent. Fourthly, it will remove that individual from the fray and refocus or reinitiate police investigations that were halted when the file was sent to the Director, encouraging them to seek either more compelling evidence or, where the reason given has cleared the suspect completely, the actual offender. Finally, it would increase the accountability and transparency within the Office.

Former Director, Eamonn Barnes, whilst still in office, expressed the invidious situation he often found himself in regarding the giving of reasons:

> If some method can be devised whereby the Director could, without doing injustice, inform the public of the reasons for his decisions, he will very willingly put it into operation. From time to time his Office is subject to criticism arising from its inability to respond to enquiries from interested parties such as the victim of a crime or the family of such a victim. Unfortunately, the Director is unaware of any method in which reasons can be given without, in many cases, doing injustice.[848]

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[847] Foley B 'Judicial Review of the Director of Public Prosecutions – The *Eviston* Case' (2003) 15 *Irish Law Times* 239

[848] Director of Public Prosecutions *Press Statement* (22 July 1983), reproduced in Office of the Director of Public Prosecutions *Annual Report 1998* (Dublin: Office of the Director of Public Prosecutions, 1999) Appendix 7. Likewise, "there are times when [the Director is] pawing the ground to give reasons, especially when people are making political capital out of it. If [he] could get around the issues of injustice and defamation [he] would be delighted to give reasons" - Sheridan K 'Victims receive rightful Place in justice

More recently, the current (and second) Director, James Hamilton, noted:

> The policy of not giving reasons has sometimes been the subject of controversy or criticism ... especially when high-profile investigations have failed to result in a prosecution. Making the victim of crime central to the criminal justice system without compromising the principle that the office represents the People as a whole remains a major challenge for the office ... the increased strength of groups representing victims and public concern about the plight of victims, together with public concern about issues relating to crime ... have led to a situation where the work of the office is increasingly carried out in the glare of intense public and media scrutiny.[849]

The current practice of not providing reasons for decisions was not a rule invented or formulated by the Director or his Office, it has long pre-dated both. However, as it is not governed by any statutory provision, there exists no authority that would prevent the modification of this policy. AdVic is campaigning for change:

> So many families of homicide victims are left in limbo when they do not know the reasons why a prosecution does not take place following the tragic death of their loved ones. Such families are incapable of getting on with their lives, they are stuck in time, always questioning themselves around what happened...and ten, fifteen, twenty years later are still traumatised and feel a sense of injustice that they will never know why the person(s) they think is responsible for the death of their loved one will never be brought to justice.

In recent years, a number of common law jurisdictions have moved cautiously towards providing reasons for non-prosecution where it is possible to do so without impinging on the rights of others. For example, in England and Wales there is an overall policy in favour of giving reasons to victims for a decision not to prosecute.[850]

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system: New measures promise greater consideration for the victims of crime' (18 September 1999) *The Irish Times* 8

[849] Office of the Director of Public Prosecutions *Strategy Statement 2007-2009* (Dublin: Office of the Director of Public Prosecutions, 2007) 2

[850] In October 2002, the Crown Prosecution Service (CPS) in England and Wales introduced a new policy called the Direct Communications with Victims initiative (DCV). This initiative implemented three key changes in working practices: *i)* the CPS are now responsible for communicating any decision to drop or substantially alter a change directly to the victim rather than via the police; *ii)* any explanations of CPS decisions must provide as much detail as possible as to the reasons for the decisions while bearing in mind the sensitive and important issues which may restrict to some extent the amount of information that can be given; and *iii)* a meeting will be offered in cases involving a death, child abuse, sexual offences, racially or religiously aggravated offences, or in cases with a homophobic, transphobic or sexual orientation element, and in cases in which the offence was aggravated by hostility based on disability. In other cases, the decision-making lawyer will have the discretion to offer a meeting to a victim if it is considered appropriate in the given circumstances. The CPS has adopted three different approaches to the provision of reasons for decisions: *i)* a *standard model*, whereby the prosecutor who made the decision is responsible for all written and face-to-face contact with the victims and other interested parties in relation to the giving of reasons; *ii)* a

This is also the present approach in Norway. Though there is no official policy in Sweden it is commonplace that general reasons for non-prosecution are providing to victims, but these reasons tend to be more exhaustive in high profile or complex cases. In the Netherlands reasons are provided to victims and, where the name of a suspect has become public, also to the media. In South Africa victims and their families are provided with the general principle underlying the decision not to prosecute. All federal jurisdictions of Australia operate an overall policy in favour of providing reasons for non-prosecution, but there are some variations insofar that South Australia does so only after each case is assessed to establish whether it is acceptable to provide reasons and New South Wales does not where to do so would cause serious undue harm to a victim, a witness or an accused or would significantly prejudice the administration of justice. In Federal Canada the giving of reasons is within the discretion of the prosecutor and will depend on the facts of each individual case; in British Columbia the victim or media is informed only when they were aware that there was a suspect; while in Nova Scotia it is policy to provide victims with reasons before any public revelation of the decision not to prosecute.

The Office of the DPP recently embarked on research into the value and legal ramifications of providing reasons for decisions not to prosecute, publishing a discussion paper on the matter in January 2008 to stimulate debate and consult widely on the matter, underlying its commitment to work with interested parties towards a shared understanding of the difficulties in this area as well as seeking collaborative approaches to the solutions required. The Director, addressing the matter on RTE, remarked:

> The question is how far we can go. My own instinct is to be very cautious and to start with the more serious type of offence and see if we can do that … What I would like to be able to do would be able to say, in whatever class of cases we decided upon, that we could give a reason without casting a doubt on an identifiable suspect such as would cause them to be condemned by the public; or without disclosing the existence of a Garda informant; or of Garda investigation methods.[851]

At the time of writing, the Director is seeking written submissions from parties

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victim information bureau model, whereby a dedicated unit is primarily responsible for liaising and communicating with victims/interested parties, although any communication issued by this unit to the victim are checked and signed by the prosecutor who is responsible for the decision not to prosecute; and *iii)* a *hybrid model*, whereby both the prosecutor responsible for the prosecutorial decision and a dedicated liaison officer are involved in contact with victims/interested parties. The use of one of these three models is determined by each individual CPS area, of which there are forty-two.

[851] McGee H 'DPP say sentencing policy for drug cases is flawed' (29 January 2008) *The Irish Times* 7

addressing the following questions:

- Should the current policy of nondisclosure be changed?
- If so, should reasons be given only to those with a direct or legitimate interest, the victims of crime or their relations, or should reasons also be given to the public at large? Is it realistic to give reasons to the victim or his family without expecting that they would leak into the public domain?
- If reasons are given, should they be general or detailed? Should they be given routinely or only upon request?
- Should they be given in all cases, or only in certain pre-defined categories of serious cases, such as murder, manslaughter, sexual offences and cases involving serious violence?
- How can reasons be given without encroaching on the constitutional right to ones good name and the presumption of innocence? How should cases where a reason cannot be given without injustice to another party be dealt with?
- Should the communication of reasons attract legal privilege?
- By whom and by what means should reasons be communicated?[852]

Following on from this consultation process the Director is hopeful to announce his decision regarding the policy on giving reasons in summer 2008. He is faced with the unenviable task of attempting to find some appropriate procedure that protects the rights it needs to whilst satisfying the demands of victims and the public to know the reasons that motivate his decisions. If he fails, the status quo remains whereby the Director, despite his at all times operating in the interests of the public, will be no more answerable to those interests, or the private interests of individual victims, than he presently is.

If the Director is to proceed with some scheme for providing reasons for his decisions he should do so without resorting to bland generality like, for example, that the evidence did not permit a prosecution, insofar as this can be done without compromising other legally protected interests, such as the interests of suspects, victims or witnesses. Naturally, there will always be cases where the Director will be unable to provide a very detailed or satisfactory statement of reasons without compromising these competing interests. In such instances, victims and other interested parties should accept on faith the decision of the Director (which is the

[852] Office of the Director of Public Prosecutions *Discussion Paper on Prosecution Policy on the Giving of Reasons for Decisions* (Dublin: Office of Public Prosecutions, 2008) 3-4

enforced situation victims find themselves placed in at present). This will, however, ultimately and only prove acceptable if his Office develops a track record of providing detailed reasons when and where possible.

Prosecution Submissions as to the Appropriate Sentence

AdVic, disturbed by what they regard as widespread leniency and inconsistency in manslaughter sentencing, believe that if the Director were permitted to make submissions at the sentencing stage then the seriousness of the loss of life and the impact felt by the co-victims and society as a whole would more likely be reflected in the sentence handed down. The right of the Director to make submissions at sentencing is not, at present, regulated by statute. However, in *People (DPP) v Botha*[853], the Court of Criminal Appeal held that the prosecution was under a duty to assist the court with "relevant information" regarding sentencing precedents.

The *Guidelines for Prosecutors*, issued by the Director, set out the duties a prosecutor has in relation to sentence, namely requiring that the court is presented with all the evidence relevant to the circumstances in which the offence was committed that is likely to assist the court in determining the appropriate sentence, including the background, history and previous convictions of the offender; that the court is made aware of the range of sentencing options available and is referred to any relevant authority or legislation; and that the court has before it "appropriate submissions" concerning victim impact. With regards to advocacy in the strict sense, these guidelines provide that the prosecutor must not seek to persuade the court to impose a sentence of a particular magnitude.[854] That said, the prosecution has a key role in adducing the evidence that sets the parameters of the sentencing process – he has ample power to place aggravating factors before the court *by way of evidence* and to challenge any proposition put by the defence in a speech of mitigation *where supporting evidence has not been laid*. What is currently lacking is the right for him to make a direct statement as to what he believes the sentence should be.

The Director can no longer hold the view that the function of the prosecution ends with the deployment of evidence and that the act of sentencing is solely for the judiciary. A hue and cry in response to two absurdly lenient sentences, one involving rape, the other incest, led to the introduction of s.2(1) of the *Criminal Justice Act 1993*:

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[853] [2004] 2 IR 375

[854] Office of the Director of Public Prosecutions *Guidelines for Prosecutors* (Dublin: Office of the Director of Public Prosecution, 2006)

> If it appears to the Director of Public Prosecutions that a sentence imposed by a [sentencing] court on conviction of a person on indictment was unduly lenient, he may apply to the Court of Criminal Appeal to review the sentence.

That court has since held that to justify intervention the sentence passed at first instance must be both manifestly and unduly lenient and connote a clear and substantial divergence by the trial judge from the norm that would, save perhaps in exceptional circumstances, have been caused by an obvious error in principle.[855] Victims can petition the Director to apply to the Court of Criminal Appeal for a review of what they consider to be lenient sentences, though their knowledge of structures and trends in sentencing is likely to be somewhat awry with current practices. The Director may well conclude that the sentence, however lenient, is not *unduly* so. He has since sought a review 259 times and was successful in having the original sentence quashed and in its place a more appropriate one imposed in 129 of those applications (49.8%).[856] The DPP, James Hamilton, recently stated:

> To put it into context, there are about 3000 indictable cases heard every year. We appeal some 35 of them on grounds of undue leniency ... a little over 1%. The vast majority of cases heard, the sentence is well within the norms one would expect.[857]

Interestingly, in all reviews undertaken the court has paid specific regard to the impact of the offence on the victim when deciding whether to interfere with the original sentence.

It is somewhat anomalous that the Director may make what are in effect proposals as to the imposition of sentence at an appeal stage but not at the original sentencing stage. He is uniquely able to tender submissions aimed at bringing a greater level of consistency to sentencing as he is a participant is all criminal cases. That the prosecution are unable to make a submission as to an appropriate sentence is particularly unfair when viewed from the victim's perspective. For at present, the prosecution must appeal on the grounds on an unduly lenient sentence, with this amounting to yet another rung in the process and yet another day in court that victims must wait for and endure, delaying the closure they seek even further.

However, granting the Director permission to recommend a specific sentence or

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[855] *People (DPP) v McCormack* (Unreported, Court of Criminal Appeal, 18 April 2000); *People (DPP) v Byrne* [1995] 1 ILRM 279

[856] Office of the Director of Public Prosecutions *Annual Report 2006* (Dublin: Office of the Director of Public Prosecutions, 2007) 37-38

[857] McGee H 'DPP says sentencing policy for drug cases is flawed' (29 January 2008) *The Irish Times* 7

sentencing range would have significant resource implications, though presumably the Office currently keeps all sentences imposed following conviction on indictment under observation, otherwise it would be difficult to see how the Director can rationally select the sentences it now refers to the Court of Criminal Appeal for review. In short, the Office of the DPP must already have some observational method of gauging sentences for similar offences against each other so as to identity those which it considers unduly lenient.

Yet there are concerns that the process of advocating a sentence permits an over-zealous prosecutor to denounce the convicted by calling for exemplary sentences, or may lead to tactical submissions (*e.g.*, urging eight years in the hope of obtaining six) or, over time, might give rise to almost irresistible pressure to seek a review, under the provisions of the 1993 Act, of a decision that fell below or outside the range of the sentence sought.[858]

The current situation is that post-conviction and pre-sentencing the prosecutor cannot, of his own volition, draw specific attention to aggravating factors, nor has he an automatic right to reply to any plea in mitigation unless there is no factual basis for such a plea. AdVic finds that this creates an imbalance between the prosecution and the defence. To rectify this imbalance it is recommended that the prosecution be allowed to volunteer information regarding sentencing precedents and where the defence chooses to make a plea of mitigation, notwithstanding the prosecutions right to challenge the factual basis of that plea, the prosecution should be permitted to remind the court or draw its attention to any aggravating factors and, in the context of the wider availability of data on previous sentences, provide the sentencing judge with any precedent that offers a comparison between the facts of the particular case before the court and those of an earlier case or cases in terms of aggravating circumstances.[859] This ensures that the prosecutor cannot seek a sentence beyond the range that previous similar fact cases with like aggravating factors received, thereby protecting the offender from excessive sentencing submissions whilst allowing the judiciary to give a sentence less likely to be considered unduly lenient and thereby susceptible to action by the prosecution under the provisions of the 1993 Act. Besides, just as the courts recognise the independence and overall public interest at play in the function of

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[858] Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice, Equality & Law Reform, 2007) 221-226

[859] The context for any change in this area is the availability of greater information regarding sentencing, both in the introduction of non-statutory sentencing guidelines and the implementation of the Irish Sentencing Information System (ISIS), as recommended in the preceding chapter.

the Director they must also exercise trust that his Office shall not engage in tactical or unnecessarily ardent submissions.

Right of Prosecution to Appeal

As an adjunct, a question that arose in many of my conversations with homicide co-victims was why the Director could not appeal outright a verdict reached at trial, noting that such appellate rights are vested in the defendant. It is oft overlooked that criminal appeals by the defence are themselves something of a novelty, only established by the *Courts of Justice (Evidence) Act 1924*. Granting the defendant appellate rights guarantees that he is afforded every opportunity to prove his innocence. In this spirit, s.2 of the *Criminal Procedure Act 1993* allows for the reopening of a case *by a convicted person* alleging a miscarriage of justice where there is fresh or newly-discovered evidence or where it can reasonably be ascertained that a defect in the previous proceedings potentially or actually affected the outcome of the original case.

No 'full' prosecution appeals are permissible against what the Director considers an unreasonable jury verdict found against the weight of evidence, as it would be fundamentally incompatible with the sanctity of the jury trial under the Constitution. It has been correctly observed that:

> There is no evidence of widespread discontent with jury verdicts. Indeed the very fact that occasional surprising verdicts of acquittal are given seem to make them acceptable as being the decision of a group of citizens formed at random from the population.[860]

In addition, the offender may not be prosecuted for substantially the same crime for which he already stood trial.[861] Yet, in circumstances where a case has been dismissed in error, or the jury were directed wrongly as to the applicable law, or that new facts emerge after they reached a verdict, it would seem reasonable that the prosecution has some right to appeal or re-prosecute.

At present, there are currently two levels of appeals: the first a private one, exercisable by the convicted for doing justice in his individual case by correcting a wrong decision; the second the public one that engenders overall confidence in the

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[860] Working Group on the Jurisdiction of the Courts *Criminal Jurisdiction of the Courts* (Dublin: Stationery Office, 2003) 175

[861] *People (DPP)* v *O'Shea* [1982] IR 384

administration of justice in correcting, clarifying and developing the law.[862] When a person tried on indictment is acquitted, the Director may, under s.21 of the *Criminal Justice Act 2006*, refer a question of law arising from the trial to the Court of Criminal Appeal *without prejudice* to that verdict, so that if successful the point of law will have been clarified in favour of the prosecution but the court does not reverse the acquittal. s.22 allows access to the Supreme Court where it is the Court of Criminal Appeal that has made the potentially erroneous decision. These provisions enable higher courts to decide on important questions of law on which a ruling considered to be erroneous in law has been rendered by the trial judge and which due to the absence of a full right of appeal by the Director would remain binding on all lower courts with the only possible remedy the introduction of legislation.

It is doubtful if there is any significant public interest in preserving an acquittal that was reached in error or at the fault of a technicality and only fair to introduce, in these circumstances, a process of appeal to be utilised by the prosecution. Letting the potentially guilty benefit over what is, in essence, administrative errors, where the letter of the law is given more weight than its spirit, is a miscarriage of justice. Indeed, a trial that founders on an error of law made by a trial judge cannot reasonably be described as a trial carried out in the due course of the law.[863] Furthermore, there is the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes either in error or where later new material points strongly or conclusively to guilt. Such incidences clearly undermine public confidence in criminal justice. That erosion of confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself.

Thus, it is recommended that a *with prejudice* right of appeal be introduced where there has been a fundamental defect in the previous proceedings, such as where an acquittal was directed by a trial judge in error; where a verdict was set aside by the Court of Criminal Appeal without directing a re-trial; or where the trial judge made what can clearly be shown to be an erroneous ruling, say on the admissibility of evidence, that had the effect of weakening the prosecution case. There should be safeguards imposed upon this shift in our jurisprudence, namely that the Director can determine, pending on the significance the point of law he seeks clarification on

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[862] Woolf H *Access to Justice* (London: Her Majesty's Stationery Office, 1996) 153

[863] Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice, Equality & Law Reform, 2007) 196

actually played in the trial, whether to invoke a 'with prejudice' or a 'without prejudice' appeal, and so as to remove the possibility of a criminal trial hanging indefinitely over the accused, the invoking of a 'with prejudice' appeal in relation to a contended error can only be initiated within a fixed timescale, say three or six months:

> The DPP keeps an open mind [on the issue of 'with prejudice appeals'] ... his personal view is that he would be on the whole in favour of the introduction of 'with prejudice' appeals where there has been a serious error of law by the judge. He is thinking of cases such as where there has been an acquittal following a serious error by the trial judge in the charge of the jury or a wrongful decision to exclude evidence and the appeal court is of the opinion that the error of law could have affected the outcome of the trial. Any such appeals would have to be subject to safeguards, detailing the strength of evidence required and other procedural matters ... The Director is not in favour of appeals where there has been no serious error of law by the judge and the jury has acquitted, with two possible exceptions - where scientific evidence not available at the time of trial shows conclusively that an accused is guilty [and] where an acquitted person subsequently claims to have committed the offence.[864]

Article 4.2 of Protocol 7 to the *European Convention on Human Rights* allows for the prosecution to reopen a case where there is evidence of new or newly discovered facts.[865] It would be desirable for Ireland to introduce legislation that permits re-prosecution where new or newly discovered facts are highly probative, providing compelling evidence of guilt.

In conclusion, the victim is an element of criminal justice proceedings whose interests must be guarded and promoted carefully by the Director of Public Prosecutions. He is not to be treated merely as a piece of evidence utilised to procure conviction but instead as a person hurt by a wrong that the State undertakes, on his behalf, to find and punish the offender. The recognition of the victim as an injured person who deserves to be treated with respect and accountability needs to percolate into and reverberate about the criminal justice system at every level, and the Director and his staff, as the societal representation of the victim, must always lead by example. The public nature of our criminal prosecution system recognises the damage

[864] Information provided by email from Chief Prosecution Solicitor Claire Loftus, Office of the Director of Public Prosecutions (23 February 2007)

[865] In England, the *Criminal Justice Act 2003* empowers the Court of Appeal to quash acquittals and order retrials where new and compelling evidence to serious offences not available at the first trial is discovered and where it is in the interests of justice to do so. These provisions, which have retrospective effect, arise from the development of identification technology and cold-case review techniques that enable more sophisticated forensic examination of bodily sample evidence that might not have been available at the time it was gathered. It also applies when a person previously acquitted later confesses.

crime does to us all and helps ensure a fair system without the cumbersome need for the victim or co-victim to act. We should remain fully committed to the public basis of our prosecution system while also expecting it to identify and adapt to what is best for the carrying out of its duties with due regard to the accused, the victim and the public at large.

Having dealt with the substantial topics of sentencing, parole, information, impact statements and the role of public prosecution, some briefer observations on other concerns expressed by co-victims are gathered here.

Delays in Bringing Trials before the Court

In response to the amount of time it takes for a homicide trial to commence once the investigation has been concluded, AdVic propose that once the Book of Evidence has been served, a homicide case, save in exceptional circumstances and for compelling reasons, should take no more than a year to come to trial[866]:

> Victim Support supported a family whose son was murdered. It took five years for his trial to reach the Four Courts due to three previous delays (no courtroom or no judge available). By the time the trial got underway, a shared refrain by all testifying witnesses – both State and defence witnesses alike – was that five years is a long time and memories had faded.[867]

National Crime Council research found that in the period from 2002 to 2004, cases of murder and rape (the two offences it studied) took two to three times longer to process here in Ireland than in England and Wales, with a typical murder case taking almost twenty-one months (ninety weeks) from the time of arrest to the start of the trial.[868] It takes, on average, ten weeks for An Garda Síochána to complete their investigation and forward the file to the Director of Public Prosecutions, whose decision takes a further seventeen weeks before he returns the case for trial. The biggest delay, on average sixty-three weeks, occurs in the waiting for a court date, with almost a third then failing to start as scheduled.

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[866] When a person is charged with an indictable offence the prosecution must serve the defence with a set of legal documents known as the *Book of Evidence* before the trial. It contains a statement of the charges made against the accused, a copy of any sworn information in writing, a list of the witnesses the prosecution intend to call, a statement of the evidence that each witness is going to give, and a list of exhibits to be introduced at trial. This advance documentation allows the defendant to know the charges and evidence set against him and to appropriately prepare his defence.

[867] Joint Committee on Justice, Equality, Defence & Women's Rights *Report on a Review of the Criminal Justice System* (Dublin: House of Oireachtas, 2004)

[868] National Crime Council *An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002 to 2004* (Dublin: Stationery Office, 2006)

The Council recommended that murder and rape cases, save in exceptional circumstances, should be returned for trial within a year. It did note, however, that since its research was conducted the waiting times had been cut from an average of eighteen months in 2002 to an average of seven to eight months in 2006. The Courts Service advise that this decrease was achieved by assigning extra judges who sit longer hours, changes in court procedures including the commencement of out-of-Dublin trials where appropriate, and by the on-going provision of refurbished courthouses.[869] The then Minister for Justice, Equality and Law Reform, Michael McDowell, further stated a commitment:

> To reducing that figure to a period of not more than three to four months ... From the point of view of the families and the point of view of rape victims the delays of the kind that are typical in Ireland are simply unacceptable. Subject to the requirement of due process and proper investigation, speedy trial is fairest to the victims, the victims' families [and] the accused.[870]

Administrative delay needs to be reduced. Interaction between An Garda Síochána and the Office of the DPP is vital for identifying steps that can be taken to expedite the decision-making of that Office. Where homicide files remain with the Director for longer than it takes An Garda Síochána to painstakingly gather evidence, there is clearly something askew. These delays display an indifference to the personal anguish of victims, co-victims and to those who may be innocently accused. While the system of public prosecution must take its course, it need not plod placidly along. Accountability in terms of the promptness with which the decisions of the Director are made does not conflict with his duty to make considered independent decisions – nonetheless, whereas *quick* decisions are certainly desirable for all parties involved *correct* decisions are more so.

The Supreme Court has identified delay in prosecution as a ground militating in favour of granting bail in serious cases. In addition, where cases are adjourned, collapsed or directed for retrial, victim groups have long expressed frustration that the case goes "to the bottom of the pile", often taking up to two years to come about for trial again, causing additional distress and further delaying closure for victims. In recent times, this problem has been greatly eased by the near elimination of backlog in the Central Criminal Court, and Carney J, the presiding judge of that court, has also

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[869] Cullen P 'Study highlights long delays in criminal cases' (5 September 2006) *The Irish Times* 4

[870] Address by then Minister for Justice, Equality & Law Reform, Michael McDowell, at the launch of the National Crime Report (4 September 2006)

given an undertaking to AdVic that homicide cases falling into this category will be re-listed without delay.[871]

Courtroom Accommodation

Shortly after its formation, in June 2005, AdVic met with the presiding judge of the Central Criminal Court and senior staff of the Courts Service to outline concerns that on occasion the family members of a homicide victim, due to the amount of media and public in attendance, were unable to obtain seats in the courtroom or that the only seating available was in close proximity to the seating reserved for the family members of the defendant, or had to stand. Quite disturbingly, it had previously been articulated to some co-victims that the reason they had no reserved seating was because they, unlike the family of the defendant, who have reserved seating, had "no living interest" in the proceedings.

At this meeting, it was agreed that a particular row of seating will now be designated for the victim's family members by the simple expedient of court staff placing laminated 'Reserved' notices. It is not necessary for family members to request seating in advance. Any co-victim who might be uncertain as to the exact location of this seating should approach the court registrar or staff, who will direct them to the appropriate place.[872]

Many courtrooms are in very old buildings, which are not custom-made and therefore unable to cater for the large crowds which homicide trials attract. One of the most difficult problems frequently encountered in court is contact between the family of a homicide victim and the accused and his family.[873] For example, Joan Deane, co-founder of AdVic, had to endure the indignity of having one of the men charged with killing her son not only hold open the courtroom door for her, but then had to walk under his arm to enter. Communal entrances, waiting rooms and toilet facilities all provide ample opportunity for unwanted tension-filled encounters between victims and the defendants or the defendants' families. Efforts should be made to ensure that the defendant is brought into court physically separate (*i.e.*, through a separate entrance) or temporally separate (*i.e.*, after the family and court are seated) to the family of the victim. Court security should also be increased in order to ensure that victims and families are not being taunted or intimidated in court.

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[871] Carney P 'The Role of the Victim in the Irish Criminal Process' [2007] 1 *Judicial Studies Institute Journal* 7, 12

[872] Information provided by letter from Chief Executive Officer PJ Fitzpatrick, Courts Service (13 March 2007)

[873] White M 'The New Criminal Court Complex' [2007] 1 *Judicial Studies Institute Journal* 1, 3

A new purpose-built €120 million Dublin Criminal Court Complex (DCCC) is due for completion in late 2009 at the junction of Parkgate Street and Infirmary Road, adjacent to the main entrance of the Phoenix Park. This development, consisting of twenty-two courtrooms, will draw all criminal trials from the Dublin District, Circuit and Central Criminal Courts from the Four Courts and associated buildings together to one purpose built facility, addressing the shortcomings that exist at present, like insufficient courtrooms and ancillary facilities for different court users. It shall include victim support facilities and, more importantly, secure circulation routes for the public, jurors, witnesses, judges, and staff to ensure the segregation of all the important disparate users through different access points. The generous size of each courtroom will enable the good segregation of users within the courtroom itself.

This study accepts that the accommodation concerns of co-victims will be resolved with the opening of the DCCC. That said, in recent times an increasing number of homicide trials have been hived out to regional locations about the country. Many of these facilities are such that close proximity encounters between co-victims and the defendant or his family remain inevitable. It is vital that this issue is addressed when plans for any future refurbishments of these courthouses are being drawn.

Though court trials are public events, it is also recommended that once a session begins, unnecessary traffic entering and leaving the courtroom is prevented, or kept to a minimum.

The Character Attack of the Deceased by the Defendant at Trial

Risking over-simplification, the exclusionary rule contained within s.1(f) of the *Criminal Justice (Evidence) Act 1924*, in very general terms, precludes the defendant from being cross-examined as to his bad character during the trial unless he drops what is commonly referenced as his shield of protection by giving evidence of good character or makes imputations against prosecution witnesses, including victims. The rationale behind limiting the circumstances within which the prosecution can present evidence of bad character, like previous convictions, is to preserve the presumption of innocence for the defendant:

> The introduction of bad character evidence where there were no grounds for doing so can only be seen as a significant erosion of the presumption of innocence and that in the case of a jury trial, the risk of a prejudice would be glaringly obvious.[874]

[874] *People (DPP) v Murphy* [2005] 2 IR 125 at 150, *per* Kearns J

A particular issue arises in homicide cases where the victim is obviously not available to give evidence as a witness for the prosecution. What then where the accused makes imputations on the character of the deceased? Had the deceased survived the attack he would be available to give evidence as a witness to the assault so that the defendant could not make imputations on his character without being subject to cross-examination as to his own bad character. AdVic question why, when he attacks the character of the victim, the defendant does not risk cross-examination as to his own bad character simply because the victim is deceased. They feel that nobody within the trial process is there to protect the character and good name of the victim and find it distressing when defendants make untrue statements about the victim in order to mitigate their own homicidal actions:

> In setting up the defence of provocation the accused person has … *carte blanche* to attack the character of the deceased person and can do so without giving evidence and on the basis of totally hearsay and uncorroborated, unsubstantiated contentions. The family of the loved one may have to listen to the most outrageous and untrue allegations being made without any mechanism to test the allegations being made. There is, in effect, free rein to blacken the character of the deceased with no check upon it and no sanction if the allegations are wholly false.[875]

What frequently happens in a homicide trial is that as there is a dead body the defendant cannot claim that the killing did not happen, and as there is a weight of evidence against him, hence the trial, he cannot always claim that it was not him who killed the victim. Therefore the defendant, in the knowledge that homicide defences are one-sided narratives, creates or exaggerates the bad or violent tendencies of the victim so as to mount a defence. That is the reality of our adversarial process. The deceased victim can be distorted and portrayed differently, so he becomes someone the co-victim does not recognise.

In truth, it is most likely that the ability of the defendant to cast aspersion upon the killed victim *without* dropping his shield of protection from cross-examination as to his own bad character was an unintentional loophole within the 1924 Act rather than a deliberate exclusion.[876] Hence the Balance in the Criminal Law Review Group consider that in cases where the injured party has died or become incapacitated, and

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[875] Carney P 'The Role of the Victim in the Irish Criminal Process' [2007] 1 *Justice Studies Institute Journal* 7, 14

[876] A similar anomaly existed in England and Wales, which was only relatively recently resolved by the implementation of s.105 of the *Criminal Justice Act 2003*

accordingly cannot give evidence as a result of an assault or other criminal act, and the defence attacks the character of that party, the defendant shall be then liable to cross-examination as to his character. This entails amending s.1(f)(*ii*) of the *Criminal Justice (Evidence) Act 1924* by adding a further category (*i.e.*, deceased or incapacitated victims) of injured party in which such cross-examination is permissible. It also calls for the defence to provide ten days notice of an intention to make an imputation against a deceased or incapacitated victim so as to allow the prosecution time to check what is being asserted and prepare a rebuttal.[877]

The Granting of Bail by the Courts

Bail is the setting at liberty of an accused person that is granted by way of a recognisance that he will appear when called for trial. The accused is bailed into the custody of a surety who guarantees the attendance of the accused at trial or be liable to the State for the sums secured. Prior to 1996, the law concerning bail was largely contained in successive Supreme Court decisions where, broadly speaking, it could only be refused where an accused was likely to fail to appear for trial or likely to interfere with the conduct of the trial by, say, intimidating prosecution witnesses.[878]

A shift in national thinking regarding the bail regime culminated in a referendum that amended the Constitution with the insertion of Article 40.4.7°:

> Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.

This was given effect by the *Bail Act 1997*, which defines *a serious offence* as any crime for which a person of full capacity not previously convicted can be sentenced to a period of no less than five years imprisonment, and requires the court:

- to receive evidence or submissions from concerned parties like An Garda Síochána;
- take into account the nature and degree of seriousness of the offence charged, and its likely sentence;
- the nature and degree of seriousness of the offence likely to be committed if released on bail, and its probable sentence;

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[877] Balance in the Criminal Law Review Group *Final Report* (Dublin: Department of Justice, Equality & Law Reform, 2007) 145

[878] *People (AG) v O'Callaghan* [1968] 102 ILTR 45; *Ryan v DPP* [1989] IR 399; *People (DPP) v Doherty* (Unreported, Supreme Court, 26 February 1993); *People (DPP) v Brophy* (Unreported, Supreme Court, 2 April 1993)

- the strength of evidence in support of the charge;
- any other convictions of the accused and, in particular, any previous conviction for an offence he committed whilst on bail; and
- whether he is addicted to a controlled drug within the meaning of the *Misuse of Drugs Act 1997*.

Where it was refused on the grounds that he is likely to commit a serious offence, the Act allows for the bail application to be renewed four months on and this may then be granted if the interests of justice so require. While the *Criminal Justice Act 1984* requires *consecutive* sentences to be imposed for crimes committed on bail, the 1997 Act requires that an offence so committed be seen as an aggravating factor and that a greater sentence than would be normal should be imposed for the offence in question.

An obvious difficulty with the 1997 Act is that it requires the judiciary to indulge in a certain amount of crystal ball gazing to determine the likelihood of an applicant committing a serious offence were he to be released on bail, though previously the judge was required to peer soothsayer-like into the future to determine the probability of an applicant turning up for his trial.[879] Opponents of the Act have asserted that it is a poorly disguised form of preventive detention offending the very fundamental concept of personal liberty enshrined in the Constitution, an "obvious example of the public and political zeal for hard-line legal reform."[880] Furthermore, it has been contended that refusing bail cultivates an appearance of guilt, running counter to the presumption of innocence in that the accused is being seen to be punished, even though he has yet to be tried, convicted and sentenced, and this prejudice is further compounded by the fact that his imprisonment before the trial makes it difficult for him to assist in the preparation of his own defence.[881] Article 5 of the *European Convention of Human Rights* allows for pre-trial detainment if there is "reasonable suspicion" of the accused having committed the offence and if the detention is for a "reasonable period" only.[882]

Ireland is not singularly harsh in the implementation of its bail provisions. AdVic argue that bail laws are liberally applied and demand more rigorous application. They question who is better but the Gardaí to present evidence before the court of reasons

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[879] O'Higgins M 'Bail – A Privilege or a Right?' (1998) 3(7) *Bar Review* 318, 319

[880] O'Mahony P (ed.) *Criminal Justice in Ireland* (Dublin: Institute of Public Administration, 2002) 329

[881] Walsh D *Criminal Procedure* (Dublin: Round Hall Sweet & Maxwell, 2002) 514

[882] Moreover, there is no right to detention conditions being different from those under which convicted persons are held - *Skoogström v Sweden* (1982) No 8582/79 (ECHR)

why a person is at risk of committing another serious offence if granted bail, particularly where the individual is known to them. An Garda Síochána have frequently expressed dissatisfaction that too often bail, in the words of the then Minister for Justice, Equality and Law Reform, Michael McDowell, is granted "in the teeth of Garda opposition."[883] AdVic believe that recommendations made by An Garda Síochána to refuse bail to certain individuals should be given careful consideration by and carry significant weight with the judiciary:

> [An Garda Síochána] wouldn't make a request lightly and the judiciary should take it on board. [An Garda Síochána] are the ones on the front line and know exactly the character of the people they're dealing with in a lot of cases. But too often, when they make recommendations they're overruled in court.[884]

The reality is, of course, that persons seeking bail are persons resisting imprisonment, perhaps for years, pending the resolution of the question of whether they are offenders or not.

AdVic also observes how difficult it is for homicide co-victims where bail is granted and the accused lives near or is known to them. In one particularly galling example, a witness during the murder trial of Vincent Flynn, who severed the aorta of Steven Morris (17) with a hunting knife whilst on the doorstep of his home because he was consumed with jealousy after his girlfriend idly mentioned that she considered Morris good-looking, referenced as part of his evidence that Flynn had been on a lecture tour of Limerick schools to talk about his life whilst on bail awaiting trial. The parents of the victim, Tony and June Morris, were horrified and had an unquenchable and somewhat understandable need to know what their son's murderer had said about Steven during his talks, but nobody would tell them:

> The two of us were in and out of offices and writing letters to TDs, the Department of Education, the clergy and the bishop trying to get answers but we were stone-walled. It made us feel very angry; brushed aside … It caused a lot of grief and anger.[885]

In 2006, the Minister for Justice, Equality and Law Reform, Michael McDowell (as he was then), clashed with the judiciary, publicly questioning what he saw as their lenient attitude to granting bail, in spite of the legal changes which followed the result

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[883] Healy A 'McDowell concerned at interpretation of bail laws' (14 April 2006) *The Irish Times*

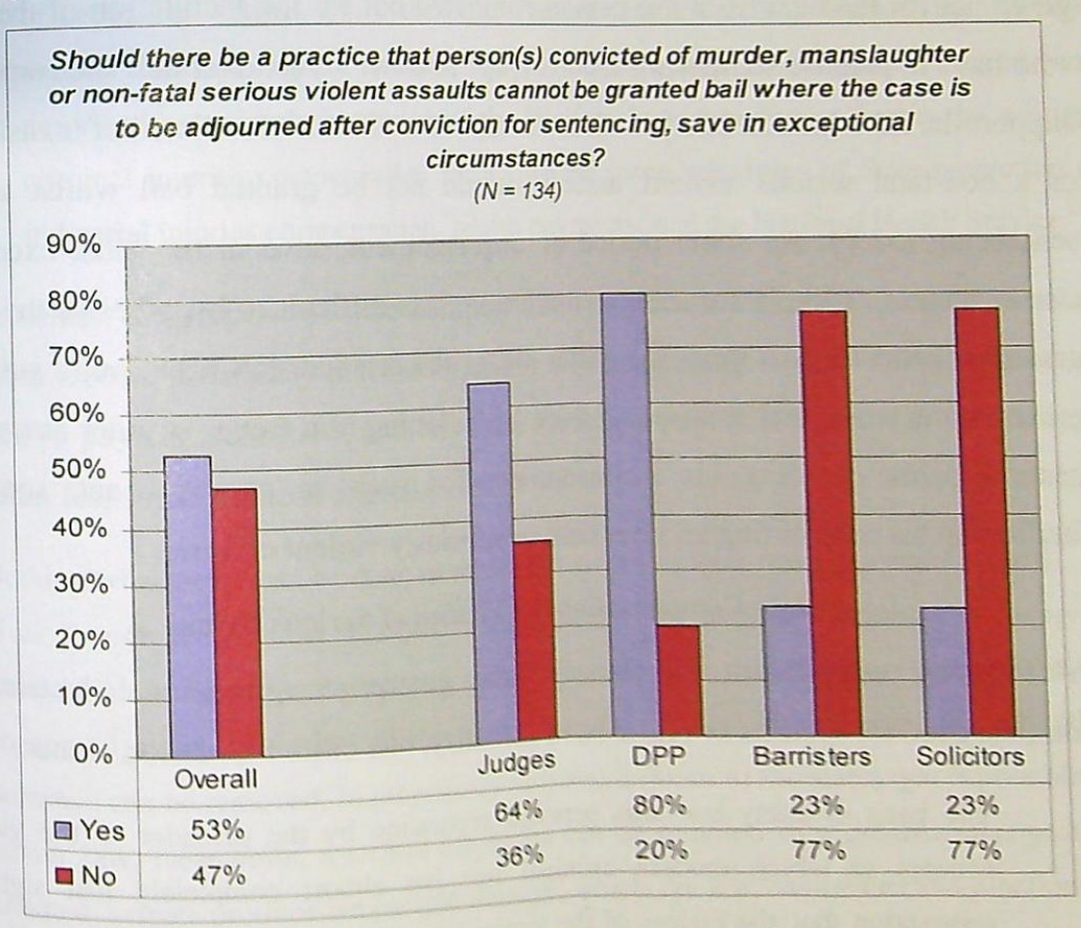
[884] Kane C '43 killings in 4 years were by people out on bail' (28 October 2008) *Irish Examiner*

[885] McCarthy J 'Our children were victims of killers, we're victims of the law' (13 March 2004) *Irish Independent Weekender Review* 1

of the 1996 referendum aimed at tightening up bail legislation:

> The law is there. The Gardaí testify in these cases and oppose bail, and yet, constantly, we find that those who are charged with serious offences and where the Gardaí oppose their bail, find themselves with people being admitted to bail. This is a situation that I strongly contend is wrong.[886]

In their defence, judges state that it would be wholly unjust to place suspects in custody for indefinite periods of time, possibly up to two years, while waiting for a case to be listed for hearing, pointing out that the very concept of bail initially developed because detainment pending trial is a great hardship that can cost the accused, who may actually be innocent, his income and reputation, and that the prospect of an acquittal may be reduced as he is unable to adequately prepare his defence. The judiciary also note that where bail is granted it has been done in the majority of cases with the agreement of the Director of Public Prosecutions.[887]



AdVic recommends that bail should not be afforded to offenders where there is a history of violent conduct and cite a lengthy list of incidents where the lax application of bail legislation cost the lives of people that the system purports to protect. Twenty

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[886] O'Regan M 'McDowell criticises bail law application' (15 December 2006) *The Irish Times* 8

[887] Carney P 'The Role of the Victim in the Irish Criminal Process' [2007] 1 *Justice Studies Institute Journal* 7, 17

of the homicides committed in 2005 were done so by persons on bail (34%).[888] For example, Michael Doyle, found guilty of the manslaughter of Mark O'Keeffe in May 1997, was on bail awaiting trial for the violent assault of a taxi driver at the time he committed the killing. Brian Willoughby was found guilty of the murder of Brian Mulvaney in 2000, a crime he committed whilst on bail awaiting a sentencing hearing in relation to three separate unprovoked and random violent attacks that he had pleaded guilty to. Jonathan Touhy, found guilty of the murder of Robert Rogers in 2002, was on bail awaiting sentence at the time of the killing, having pleaded guilty to robbing a taxi-driver at knifepoint.[889] Each of these, and dozens like them, killed whilst on bail awaiting trial or sentence for other violent offences.

Victims are particularly angered by post-conviction pre-sentencing bail. AdVic believe that allowing bail to a person convicted of manslaughter or violent assault is unacceptable and should not occur. The excuse that bail in these circumstances is given not for the benefit of the person convicted but for the facilitation of the people who have to prepare sentencing reports rings hollow.[890] Just over half the respondents support the introduction of a practice whereby the offender convicted of manslaughter or a non-fatal serious violent assault should not be granted bail whilst awaiting sentencing (53%). As some period of imprisonment, save in the most exceptional circumstances, is likely for such a conviction, it is difficult to hypothesise the lack of greater support for this proposal. After all, as the offender has been found guilty of a grave crime, what justification can there be in letting him free to wander amongst the general public pending his imprisonment for such an atrocious act, sometimes facilitating his committing another fatal or seriously violent crime?

State Compensation for Victims of Serious Crime

While often considered a relatively new enterprise of criminal justice, state compensation for victims of crime is, in actuality, one of its foundation stones:

> The basis of early law was personal reparation by the offender to the victim, a concept of which modern criminal law has almost completely lost sight. The assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society, in its dealings with offenders, increasingly emphasises the reformative aspects of punishment. It may well be that

[888] An Garda Síochána *Annual Report 2005* (Dublin: An Garda Síochána, 2006) 43. In the same year, persons on bail committed a total of 5456 headline offences. These are not comforting figures.
[889] Deane J 'Balancing the Scales in a Homicide Trial' [2007] 1 *Judicial Studies Institute Journal* 18, 27
[890] Carney P 'The Role of the Victim in the Irish Criminal Process' [2007] 1 *Justice Studies Institute Journal* 7, 16

> our penal system would not only provide a more effective deterrent to crime, but would also find a greater moral value, if the concept of personal reparation to the victim were added to the concepts of deterrence by punishment and of reformation by training. It is also possible to hold that the redemptive value of punishment to the individual offender would be greater if it were made to include a realisation of the injury he had done to his victim as well as to the order of society, and the need to make personal reparation for that injury.[891]

While the State cannot be considered as an insurer *per se*, some argue that it should be held somewhat responsible to victims in failing to fulfil its duties of protection and prosecution, both in the form of equitable relief in requiring investigation and prosecution and through damages for injury[892]:

> In [one] formulation ... compensation would represent a collective insurance provided by society. All taxpayers would be regarded as subscribers. All taxpayers were at risk of becoming victims. Since the State forbade citizens arming themselves, it should assume responsibility for its failure to provide protection ... The ideas it offered were described as a simple extension of the Welfare State which was then in the making, criminal injuries compensation refracting the same principles of State protection as industrial injuries compensation, health payments, and the National Health Service.[893]

Nevertheless, the purpose of state compensation is that the victim is not dependent on the often remote possibility that the offender will be identified, prosecuted, convicted, ordered to pay compensation, and have the means to pay.[894] It is not, nor should it be mistaken for, some panacea exercise:

> Nothing whatsoever can be done to return the victim to their pre-victimization state ... it is as though the victims of crime expect the law to provide *restitution in integrum* [restoration to the original position], a state that is only possible in those areas of the law concerned with inanimate objects. In tortuous disputes of nuisance, the offending nuisance can be removed. In proprietary disputes, a return to the status quo is possible. In labour law, meanwhile, a sacked employee can be returned to a pre-dismissal post. In contrast, crimes produce irreparable damage, which the law has neither the function nor

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[891] Home Office *Penal Practice in a Changing Society* (London: Her Majesty's Stationery Office, 1959) 17

[892] Aynes R 'Constitutional Considerations: Government Responsibility and the Right Not to be a Victim' (1984) 11 *Pepperdine Law Review* 63, 115-116

[893] Rock P *Helping Victims of Crime: The Home Office and the Rise of Victim Support in England and Wales* (Oxford: Oxford University Press, 1990) 66, 74

[894] Hoyle C & Zedner L 'Victims, Victimization and Criminal Justice', in Maguire M, Morgan R & Reiner R (eds) *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2007) 461, 480

the power to fix.[895]

Compensation payments are symbolic gestures made to reflect society's sense of responsibility for and sympathy with the blameless victims of violence but explicitly not in recognition of any liability.[896] Hence there is no attempt at parity between state compensation payments and civil awards:

> [The State] no longer tries to compensate victims in the same way as civil law damages, but simply provides a lump sum in recognition of the injury suffered.[897]

Ex gratia criminal compensatory schemes, although generally welcomed upon their initiation, have subsequently been subjected to considerable criticism as symbolic products of opportunistic politics in a bid to placate the reactionary and obstructive victim, first instituted to defuse their wrath so to ease the abolition of capital and corporal punishment, and afterwards maintained as a short-term buyoff so that the process of implementing needed reforms to ameliorate the criminal justice process for the offender could be introduced and take effect in the long-term.[898]

English penal reformer and social anthropologist, Margaret Fry, propounded present day victim compensation throughout the 1950s. It was first implemented in New Zealand in 1963. A year later the Criminal Injuries Compensation Scheme was established in England to cater for the victims of violent crime, operating on a case-by-case assessment. However, since 1995, in an attempt to curb the spiralling cost of payments, the British Government revised the practice under which claimants would henceforth be given flat-rate payments under a tariff scheme - a quicker method, it be true, but for many a much less generous one. The tariff scheme groups injuries of comparable severity into twenty-five bands, each receiving a standard fixed payment up to a maximum of £250,000. The minimum award was set at £1,000, thus making the scheme more administratively efficient as it effectively denies compensation to victims of minor assaults and robberies, thereby reducing the number of claims.[899]

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[895] Coen R 'The Rise of the Victim – A Path to Punitiveness?' (2006) 16(3) *Irish Criminal Law Journal* 10, 12

[896] Duff P 'The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner?' (1998) 18(1) *Oxford Journal of Legal Studies* 105, 107. See also Criminal Injuries Compensation Authority *Annual Report (Year ended 31 March 2005)* (London: Stationery Office, 2006); Miers D *State Compensation for Criminal Injuries* (Oxford: Oxford University Press, 1997)

[897] Home Office *Compensation for Victims of Violent Crime: Possible Changes to the Criminal Injuries Compensation Scheme* (London: Home Office, 1999) 46

[898] Rock P (ed.) *Victimology* (Vermont: Dartmouth Publishing, 1994) *xiv*; Rock P 'On Becoming A Victim', in Hoyle C & Young R (eds.) *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002) 1, 3-4

[899] Miers D 'Criminal Injuries Compensation: The New Regime' (2001) 4 *Journal of Personal Injuries* 371-395

In Ireland, s.6 of the *Criminal Justice Act 1993* allows the court to order an offender to pay compensation instead of or in addition to dealing with him in any other way. This offender-victim model of compensation is seldom of any real worth to the crime victim. If the courts do not take into account the means of the offender, or where the offender is sentenced as well as ordered to pay compensation, he may not have the immediate means to satisfy the order, not only leaving the victim with empty hands, having raised his expectations which can later not be met, leading to secondary victimisation, but alternatively may add to new victimisation if the offender resorts to re-offending in order to pay off this compensation order debt.

Where no compensation is available from the offender, either because there is no readily identifiable offender or any compensatory payment would be outside of his means, the victim can apply to the non-statutory scheme of Compensation for Personal Injuries Criminally Inflicted, which was introduced following the iniquitous Dublin and Monaghan bombings of 1974. The scheme is administered by the Criminal Injuries Compensation Tribunal and funded by the Department of Justice, Equality and Law Reform.[900] It pays compensation for expenses and losses suffered as a direct result of a physical injury sustained from a violent crime or while assisting or attempting to assist in preventing a crime or saving a human life.

The onus of proving entitlement to compensation rests with the applicant, who is required to submit all necessary and relevant supporting documentation with the completed detailed application form. The applicant must be the injured victim, or individuals who have taken on the responsibility for looking after the injured victim and as a result are out of pocket, or if the victim is deceased, his immediate family. The crime must have been reported to An Garda Síochána as soon as was reasonably practicable and the victim must have fully cooperated with the investigation. While there is no time limit in making an application where the victim has died as a result of the injury inflicted, in all other cases a three-month time limit is employed unless the applicant submits what is considered as a reasonable explanation for the delay. As each claim is generally determined on the basis of the completed application form there is normally no requirement to actually appear before the Tribunal. Compensation payments generally fall into three categories:

- *Personal Injuries with Short-Term Effects*, where the actual loss of earnings, medical

[900] The Tribunal consists of a Chairman and six Members who must be either practising barristers or solicitors, each of whose term of office is for three years.

and dental expenses, reasonable travelling expenses (such as to the hospital, dentist, physiotherapist *etc.*), medication and eyeglasses are covered;

- *Personal Injuries with Long-Term Effects*, where the estimated loss of earning potential and the estimated future medical expenses, including the estimated future expenses as a result of the disability, may be paid; and
- *Death of Victim due to Criminal Injury*, where the family will be paid for their own loss of earnings, expenses that may have been incurred by the victim prior to his death, future loss of support or maintenance for anyone who was dependent on the victim, funeral and burial expenses, and compensation towards mental distress experienced by immediate family members. Compensation for mental distress is limited to a maximum one-off payment of €25,394.76. It is a matter for the Tribunal to determine how this sum shall be divided amongst the victim's family members who apply.

No compensation will currently be paid if the loss is less than €63.50; if the injuries were sustained as the result of a traffic accident (unless the Tribunal determines that there was a deliberate attempt to mow down the victim or impact his vehicle); for pain and suffering endured following the crime; or where the offender and victim were living together as part of the same household when the injury occurred, thereby expressly excluding victims of domestic violence and family members of an intra-family homicide. As a result, the extended family, like grandparents or uncles and aunts, who might be entrusted to raise children who, following an intra-family homicide, are effectively left parentless, are not entitled to seek financial aid toward the expenses of caring for these children through the State scheme of compensation.

When determining the final amount of the award the Tribunal will consider any salary or social welfare payments the victim received whilst on sick leave from employment and any compensation paid by or on behalf of the assailant. The Tribunal can reduce or award no compensation if it determines that the victim provoked the incident and may take into account the behaviour, character, way of life and criminal record (if any) of the victim, leading to the arbitrary disqualification of victims not perceived as wholly innocent, even if innocent on this particular occasion. Therefore the eligibility for compensation depends upon the perception of innocence, the moral blamelessness and the lack of responsibility of the victim:

> I spoke to a family whose son had been killed. He had previously been in trouble with the law. They were finding it difficult to get compensation because if you have been

> in trouble with the law you may not be eligible for it. Whether the victim committed a crime or not prior to his death, this is his family we are speaking about. They still have to bury the individual. Their loss is the same as if he had not been a criminal. They are still co-victims, and innocent co-victims at that … And what about a criminal that has committed crimes before? Is that criminal still not eligible for free legal aid? Where is the equality?

In practice it is unlikely that an award will be refused if all the requirements of the scheme are met. While a single member of the Tribunal carries out the determination of original applications and awards, there is a one-off right of appeal that is assessed by three of its members. The Tribunal may also be used by Irish citizens to claim compensation if they have been the victim of violence abroad. In such cases, the Tribunal makes an application for compensation to the equivalent authority in the country where the incident took place.

Nonetheless, it is abundantly clear that crime victims have needs extending far beyond those that can be satisfied monetarily. In England, a recent House of Commons Committee of Public Accounts Report revealed that fewer than 5% of victims of violent crime claim compensation.[901] This Report delivered a "withering verdict" of the Criminal Injuries Compensation Authority, noting that "a large portion of citizens injured by violent criminals are left in ignorance of the compensation scheme, leading to the absurd situation that only 5% apply for compensation", that those who do are "hampered by a complex application form", that even though the number of applications had fallen by 23% since 2000, the time taken to resolve the average application has risen from twelve to seventeen months, and that "if the scheme for compensating victims of violent crime is anything to go by, the Ministry of Justice's declared objective to place victims at the heart of the criminal justice system is a long way from fulfilment."[902] Elsewhere, it has been charged that less than 1% of all violent crime victims have applied for State compensation in jurisdictions where it is permissible, as reimbursement is widely considered inadequate for the losses sustained.[903]

Hence compensation for victims of violent crime is "an illusory remedy", more

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[901] House of Commons Committee of Public Accounts *Compensation Victims of Violent Crime* (London: The Stationery Office, 2008)

[902] Gibb F '95% of violence victims do not seek compensation' (20 November 2008) *The Times*

[903] Elias R 'Alienating the Victim: Compensation and Victim Attitude' (1984) 40 *Journal of Social Issues* 128

likely to offend than appease in its application.[904] It is rather absurd that the State undertakes to protect the public against crime but then, when a loss occurs, offers no *effective* remedy to the victim.[905] Despite this, and in the obvious absence of any alternative post-crime remedy for making good the losses suffered, "the most common response to the plight of victims [of serious violence] appears to be to compensate them – to give them money."[906] Even so, governments have generally been careful to ensure that eligibility for compensation is hedged with sufficient restrictions to keep expenditure from increasing exponentially.[907] In the two-year period from 2005, the Tribunal paid out €12.56million.

If the purpose of State compensation is, on behalf of society, the recognition of the experience that crime victims have suffered and to assist in their recovery towards living as normal a life as possible under the circumstances, it can be argued that there should be parity of awards for pain and suffering whether due to physical, emotional or psychological injuries. AdVic is seeking that the power to make appropriate awards to homicide co-victims in respect of pain and suffering, beyond the present maximum compensatory amount of €25,394.76 (formerly IR£20,000) that can be divided amongst all applying familial co-victims, be reinstated into the State compensatory scheme, particularly where the deceased has dependants and was the primary earner. At present, the Tribunal typically awaits the verdict of the trial and/or inquest before proceeding to payout compensation. Given that there is a deceased and that his killing is unlawful, and that co-victims incur immediate expenses, AdVic wants to see compensatory payments, even in part, issued within six months of a violent death.

The symbolic value of having a compensation scheme is probably strong enough to maintain it, but it is unlikely to ever extend to embrace the psychological injuries particularly pertinent to homicide co-victims due to issues of determination and expense. Compensation for pain and suffering caused by homicide remains a thorny issue, for it asks, somewhat circuitously, for a financial worth to be placed not just on the life of the victim, but also for a value to be somehow calculated on the level of

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[904] Rosen C & Harland A 'Restitution to Crime Victims as a Presumptive Requirement in Criminal Case Dispositions', in Roberts A (ed.) *Helping Crime Victims: Research, Policy and Practice* (California: Sage Publications, 1990) 233

[905] Schafer S *The Victim and His Criminal: A Study in Functional Responsibility* (New York: Random House, 1968) 27

[906] Shapland J 'Victims, the Criminal Justice System and Compensation' (1984) 24(2) *British Journal of Criminology* 131

[907] Maguire M 'The Needs and Rights of Victims of Crime' (1991) 14 *Crime and Justice* 363, 418

suffering endured by co-victims.[908]

On a related note, there is a need for greater State intervention to ensure that all victims of violence have access to bereavement counselling and professional psychological intervention.[909] As the State, through its system of public prosecution, assumes 'ownership' of the crime committed, it seems logical that they must also take some responsibility for assisting those harmed directly by the offence. Where the State attempts to meet quantifiable losses and expenses through its scheme of Compensation for Personal Injuries Criminally Inflicted it generally avoids the incalculable compensation for emotional losses. It is recommended, particularly in light of and as a counterbalance to the vast sums of money invested into the rehabilitation of offenders, and as part of a cross-departmental approach to assisting crime victims, that the Department of Health and Children establish a scheme that refunds the victims of serious sexual and violent crimes and homicide co-victims for counselling and therapy services undergone as a consequence of the psychological injuries inflicted upon them by the actions of the offender.

Meeting the Reasonable Expenses of Homicide Co-Victims attending Trial

It is a given that co-victims will want to attend the homicide trial. Unless they are appearing as a witness, they are not entitled to recoup expenses. In England and Wales, the Bereaved Relatives Fund covers travel and accommodation costs for up to three relatives of a homicide victim throughout the duration of the trial. These expenses are awarded retrospectively against receipts submitted by the relatives in support of their application, which is not means-tested. There is no ceiling on the

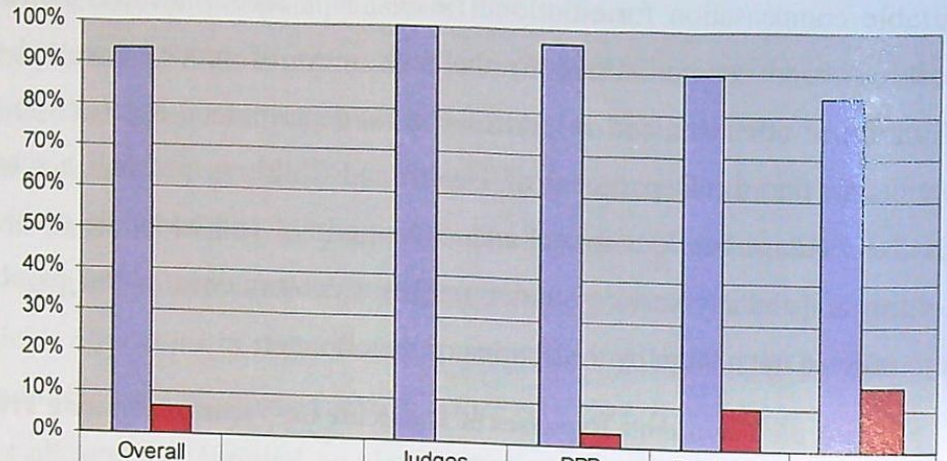
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[908] Homicide co-victims possess the rarely exercised right to damages against the offender in a civil action, where the burden of proof is lower than in a criminal trial. However, such cases are now slowly winding their way into the Irish courts. In 2004, the parents and son of Sophie Toscan Du Plantier, the French women murdered in West Cork in 1996, launched a civil case against journalist Ian Bailey, claiming he had wrongfully caused her death. Despite being arrested twice in connection with the murder, Bailey was never formally charged by the State. He had previously sought damages from five Irish and British newspaper groups, alleging that articles they published branded him as the murderer. However, his eight-year libel action ended when he withdrew all his claims with the central allegation made by the newspapers still standing: that he was a reasonable suspect in the Toscan du Plantier murder. The newspapers contributed €70,000 towards Mr Bailey's expenses and waived costs awarded to them in his failed Circuit Court action, but they did not have to pay him any damages. Although the High Court refused to strike out the action by Toscan Du Plantier's family, they later abandoned it. Similarly, the widow of John 'Frog' Ward is now seeking unlimited damages from Padraig Nally, who was acquitted of the murder and manslaughter of her husband on the grounds of self-defence {the facts of this case are relayed at p153} - McDonald D & McDonald B 'Nally Sued for 'Blood Money' over Shooting' (6 February 2007) *Irish Independent* 1. This is a tort-based claim seeking aggravated damages for mental distress and economic loss. This case, if it proceeds, will prove interesting, for it will determine whether distressed relatives unhappy with a perceived perverse jury verdict in a criminal trial will be able to utilise the lower standard of proof in a civil action to extract damages from those cleared of criminal charges?

[909] O'Malley T 'Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions' (1993) *Irish Criminal Law Journal* 40, 60

potential award; where the fund has awarded expenses to relatives coming to England from overseas costs have been high. The average payout is £260 but the maximum award has been near to £10,000, the lowest under £100. Victim Support administers the fund on behalf of the Office for Criminal Justice Reform.[910]

In England, there is a non-means tested Bereaved Relatives Funds, financed by the Office for Criminal Justice Reform, to retrospectively meet the costs of travelling and accommodation of up to three relatives attending the trial of a person charged with the murder or manslaughter of one of their family. Should there be a similar fund sourced from the Exchequer here in Ireland?
(N = 139)



	Overall	Judges	DPP	Barristers	Solicitors
Yes	94%	100%	96%	90%	85%
No	6%	0%	4%	10%	15%

The majority of respondents were in favour of establishing an identical scheme sourced from public monies here in Ireland (94%). Until relatively recently, murder cases were heard centrally in the Four Courts in Dublin. Since 2004, the Central Criminal Court sits outside the capital at various times throughout the year, mainly in Cork and Limerick, but also in Galway, Sligo, Castlebar and Ennis. It would be of great benefit to families who have to travel daily to locations where the homicide case is being heard, or who have to stay in hotels for the duration of the trial due to the distance from their home, and especially for those who are self-employed and/or who have to forfeit earnings so as to attend the trial, to have some system where expenses incurred are reimbursed. Attending the trial to witness the prosecution and conviction of an offender can be a therapeutic and cathartic experience for co-victims. Establishing a scheme whereby co-victims may claim expenses incurred by attending a trial would certainly display that the State supports their attending trial.

[910] Information provided by email from Mr Robert Lisowski, Victim Support (10 April 2006)

AdVic requests that the Department of Foreign Affairs appoint an appropriately trained person whose function it is to liase with the family of a homicide victim where the victim is an Irish citizen and the homicide occurs in a foreign country. Where there is the death, homicide or otherwise, of an Irish citizen overseas, the Department of Foreign Affairs request that a member of the local An Garda Síochána calls in person to the next-of-kin, informing them of the incident and advising them to initiate contact with the appropriate Consular Division. Staff in embassies and consulates can assist families in a number of ways: they can provide information regarding the legal and medical procedures that are being pursued in the relevant country; can liase with the local authorities on behalf of the family; and can obtain copies of post-mortem and police reports and arrange for their translation where necessary. Though they cannot intervene in the legal process, the Department can seek to ensure that the authorities are treating the case according to the law of the country concerned and while unable to provide legal advice they do provide families with the details of English-speaking lawyers in that jurisdiction. They can also identify a suitable undertaker firm and are regularly involved in organising the repatriation of remains, and in doing so works closely with undertakers in Ireland and abroad, and with airlines.[911] It is difficult to see what more the Department can possibly do when the homicide occurs within a different jurisdiction, respectful, as they must be, of the legal process in that country. However, co-victims should be able to recoup reasonable expenses incurred from attending, if there is one, the inquest and trial abroad from the afore-recommended scheme.

The Treatment of Homicide Co-Victims by Criminal Justice Professionals

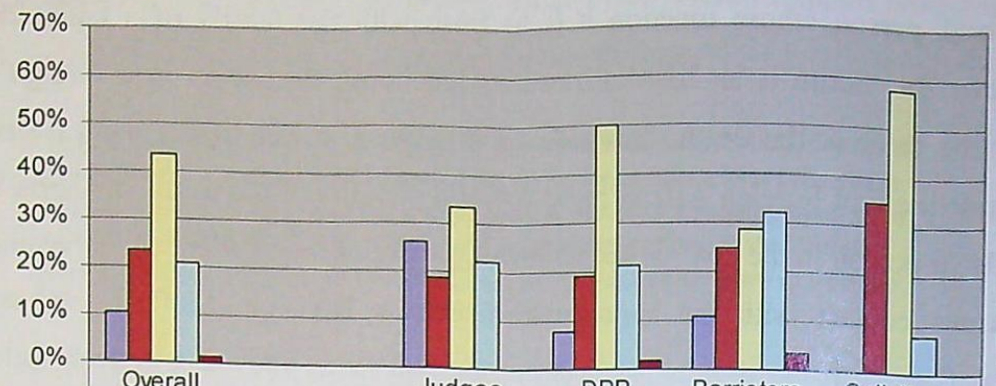
Victims measure satisfaction with criminal justice not by outcomes but primarily by the extent to which they are accorded dignity, fairness and respect from the professionals working throughout the system.[912]

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[911] Information provided by email from Garrett O'Brien, Department of Foreign Affairs (27 March 2007)

[912] 'The major criteria used to assess process fairness are those aspects of procedure least linked to outcomes: ethicality, honesty and the effort to be fair' - Tyler T 'What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law and Society Review* 103, 128. Similarly, "the evidence seems to suggest that any measure which takes care to pay attention to the needs of the crime victim will result in improved levels of satisfaction with the criminal justice system" - Walklate S 'Victim Impact Statements – Voices to be Heard in the Criminal Justice Process?", in Williams B (ed.) *Reparation and Victim-Focused Social* Work (London: Jessica Kingsley, 2002) 156. See also Sebba L *Third Parties: Victims and the Criminal Justice System* (Columbus: Ohio State University Press, 1996) 346; and Joutsen M 'Victim Participation in Proceedings and Sentencing in Europe' (1994) 3 *International Review of Victimology* 57, 65

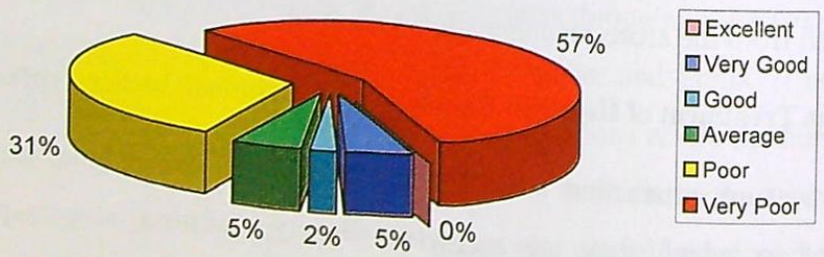
How would you grade the general treatment of families of homicide victims by the Irish criminal justice system?
(N = 133)



	Overall	Judges	DPP	Barristers	Solicitors
Very Poor	11%	26%	8%	11%	0%
Poor	23%	19%	19%	25%	35%
Average	44%	33%	50%	29%	58%
Good	21%	22%	21%	32%	8%
Very Good	2%	0%	2%	4%	0%

Most striking here is that over three-quarter of the respondents (78%) classify the treatment of the families of homicide victims within the criminal justice system as average or below average, with just over one-third (34%) assessing that treatment as poor or very poor - a startling and sobering appraisal of a system that sets itself high standards of excellence. Not surprisingly, co-victims have a more negative appraisal of their treatment by the criminal justice system than its professional participants.

As a co-victim of homicide, how would you rate your treatment by the Irish criminal justice sytem?



Cooper J *The Needs of Families Bereaved by Homicide in Ireland: Results of a Study Jointly Commissioned by AdVic and Support After Homicide* (Unpublished, 2007)

The ill treatment co-victims feel is, in part, an evaluation fostered by the traditional rules of adversarial justice. When processing an accused through the justice system, the State must keep within the framework of laws that protect individual rights. The aim of criminal justice is fairness, quintessentially the pursuit of an ideal. It fulfils symbolic functions that require it to respond to other imperatives than simply

punishing the guilty. In this way, criminal justice is increasingly understood not as a rational system but through the rationality of that system.[913] The criminal trial is a search not necessarily for the truth but for fairness and justice.[914] Its observance to due process and its preoccupation with the rights of the defendant means that it is not beyond acquitting a person merely because a piece of evidence that goes toward his guilt was gathered unjustly, and it is here victims feel that the niceties of due process, a set of necessary rules that filter and restrain the power of the State to imprison people, somehow circumvent common sense. Hence there exists an impression that when what the system considers as justice is done, true justice in its literal meaning can be betrayed, displaying to victims an actual injustice. It is at these times that providing victims with clear and frank explanations for criminal procedure can help lead to a reduction in their frustration and disappointment with the system.

Similarly, co-victims are horrified by complex rules of evidence that exclude certain information from a judge and jury, appalled that justice appears to rely largely on clearing evidential hurdles and sidestepping manipulative tactics deployed by skilled advocates at trial. In the adversarial tradition, it is the role of the prosecutor to discharge the burden of proof beyond a reasonable doubt and the job of a defence lawyer to raise enough doubt to kick the charges to touch. To many co-victims this appears as some game, where a clever defence wiles the truth. In some highly publicised and dramatic cases justice is so obviously denied as to bring the whole system into disrepute.

In addition, barristers often display a competitiveness that can be upsetting for co-victims. For example, the defence is often allowed to exploit the emotions of a victim's family shamelessly and dramatically in an attempt to collapse the trial. Co-founder of AdVic, Joan Deane, was shell-shocked by the tactics adopted by the

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[913] Feeley M & Simon J 'Actuarial Justice: The Emerging New Criminal Law', in Nelken D *The Futures of Criminology* (London: Sage, 1994) 173, 178

[914] For example, consider how a guilty plea in the common law adversarial system bypasses or halts the trial process in its tracks, with proceedings moving directly to the sentencing stage. This is often felt to deny victims their "day in court." By contrast, in continental inquisitorial legal systems, if it is found to be in the interests of justice, the trial process will continue; the court will examine the case file in an attempt to ascertain what actually happened and why, revealing details of the crime that otherwise may have been ignored. In this regard, principles of what constitutes *truth finding* and a *fair trial* differ greatly between the two systems of justice; with the adversarial trial process perhaps not the best structure for truth finding. An example of how a guilty plea impinges on co-victims was provided by Michael Dillon, father of 24-year-old Gráinne, who was shot three times at point-blank range with a single-barrel shotgun by fellow employee Paulo Nascimento to cover-up his theft of €3,313 at Jury's Inn in Limerick in January 2002. Mr Dillon was finally permitted to speak at the inquest two-and-a-half years after the killing: "Because of [his] guilty plea we never had our day in court – he changed his plea at the last minute and we were already in the courtroom when we discovered there would be no details given of the murder in court. I would like to thank the coroner today for allowing us to hear these details of our daughter's final moments' - Hanlon K 'Inquest hears woman killed by night porter' (21 September 2004) *The Irish Times* 2

defence during the trials of her son Russell's killers. During the first, when the prosecution produced without warning the pickaxe that had been used to attack her son, Ms Deane gasped perceptibly and left the courtroom, a reaction the defence saw as prejudicial, asking for the jury to be discharged. The judge, however, held her response as understandable and asked the prosecution to warn the family before producing such evidence again. On a separate occasion when silent tears rolled down her face the defence again requested the discharge of the jury but this too was rejected. At this stage Ms Deane felt that she was on trial herself, with the instructing solicitor for the defence watching her intently for any reaction that could be cast as prejudicial:

> I felt like they didn't want me in the courtroom, even though it was my right to be there. I was absolutely terrified that the case would collapse again but this time it would be my fault [it had collapsed sixteen months previously due to headlines in two newspapers]. I became a nervous wreck.[915]

During each of the three trials (two had been collapsed due to adverse media commentary) the defence requested that the Deane family be moved from their designated seating but this was refused. After the trial, Ms Deane wrote to the Law Society of Ireland to complain about the conduct of the instructing solicitor but their reply informed her that it is the job of the defence to defend their client to the best of their abilities "without fear or favour to any third party", and that the obligation to ensure a fair trial rests solely in the hands of the presiding judge.

Whereas continental inquisitorial systems can, somewhat ideally, be characterised as platforms for finding the truth through the careful collection and sifting of evidence contained in the case file, the adversarial process is best characterised as combative justice, designed to culminate in a confrontational showdown between prosecution and defence with the judiciary or jury determining the most convincing line of argument. As judges are drawn from a population of top barristers, this culture of aggressive justice can become normalised and self-perpetuating.[916] The highly competitive nature of proceedings is abrasive to victims and co-victims alike and renders trials fundamentally ill equipped to address private concerns, making it difficult to reconcile the values and aims of criminal justice with those of the victim.

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[915] Killilea G 'After the Trial I Got My Son Back, But I Was Wiped Out, Devastated' (19 November 2006) *Sunday Tribune* 14

[916] Goodey J *Victims and Victimology: Research, Policy and Practice* (Essex: Pearson Education, 2005) 157

The courtroom is the focal point of the entire criminal justice system; the judge who presides over the court becomes not only the final arbiter of each evidentiary and procedural issue, but also establishes the tone, pace, and the very nature of the proceedings. Particularly for the victim, the judge is the personification of justice, serving as the collective representation of impartiality and fairness.

The drive for victim inclusion is not only to be won in the courtroom.[917] Many of the changes required to improve the treatment of victims are not major or structural but are cultural and attitudinal. The justice system, if not an almost hermetically sealed world of legal elites and professionals, is an administration dominated by actors with technical monopoly.[918] Those working within it rarely view the criminal justice system from a customer service perspective, some even dismissing the victim as if he were some interloper. There is a perception, quite often justified, that professional participants are aloof or turgid, confusing coldness with proficiency, allergic to displays of compassion:

> Members of the bar … have vested interests in maintaining their monopolistic control over the criminal justice system, [and] have grown up without any exposure to crime victims or their problems. The 'legal culture' … is one that has not made room for crime victims.[919]

Any genuine and meaningful change in the legal culture will hardly be realised without a basic change in the perception of criminal justice practitioners toward the status of victims.[920] It is characteristic of any system to resist the introduction of alteration to its rules, practices and organisation, and criminal justice is no different. The very prospect of change intimidates even to the point of preventing debate on the matter; the transformation in the manner of thinking needed is hindered not as much by the lack of possibilities but rather by "the huge strength of traditions and taboos and of doctrines and dogma."[921] The rigid practices that have developed down the years do not make an effective response to the concerns and needs of victims an easy task. The treatment of victims is characterised by an inflexible mindset and an inability to see a new way of engaging with them.

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[917] Crilly M, Fennell C, Kilcommins S & Leahy S 'Making the Voice of Victims Matter' (10 December 2007) *Irish Examiner* 15

[918] Faget J *La Mediation: Essai de Politique Penale* (Ramonville Saint-Agne: Eres, 1997) 77

[919] Cassell P 'Barbarians at the Gates?: A Response to the Critics of the Victims' Rights Amendment' (1999) *Utah Law Review* 479, 535

[920] Kury H, Kaiser M & Teske R 'The Position of the Victim in Criminal Procedure' (1994) 3 *International Review of Victimology* 69, 70

[921] Vester F *Neuland des Denkens* (Stuttgart: Deutsche Verlagsanstalt, 1980) 456

All players on the criminal justice field must display greater victim empathy and acumen, and be ethically alive to the necessity for the constant examination of how they set about their business and how the procedures they operate by can be improved, always mindful of the human dimension to their work. Legal stricture will never be enough. Respect for victims cannot, in the end, be conjured through legislation alone, "the expression of humane values within criminal justice ultimately resides within [its] practitioners."[922] It is of paramount importance that families are treated, at all times, appropriately, professionally, with respect and consideration given to their needs.

Conclusion

This chapter, in setting out to illustrate and evaluate the main needs and concerns homicide co-victims have with the processes and procedures of Irish criminal justice, presented detailed analysis of three particular topics, singled out for the prominence they hold within any debate concerning victims' rights; namely, the need for information; the right to make a victim impact statement; and the impersonal functionality of the system of public prosecution.

First, it is well documented that the primary complaint of victims concerns the lack of information available, both in relation to criminal justice processes in general and, more specifically, to the investigation and prosecution of individual cases. Victims simply do not know how to negotiate the complicated layers of criminal justice, or what to expect from the procedures as and when they unfold. Having first highlighted the lack of accurate and timely information made available to crime victims, this chapter recommends the establishment of a non-aligned state-funded Victim Information Authority that will help homicide co-victims broker the justice system. Providing victims with information creates a nexus between them and the system of criminal justice, and goes some way to quelling their much-vocalised feelings of alienation and frustration. There is no reason to doubt that explanations regarding criminal justice procedures will also prove effective in preventing the heightened expectations and subsequent disappointments voiced by victims. Though we must be wary of the simplistic notion that the criminal justice system's responsibility to the victim can be discharged through the imposition of any one need, if one requirement had to be placed on a higher echelon, information would most

[922] Crawford A & Enterkin J *Victim Contact Work and the Probation Service: A Study of Service Delivery and Impact* (Leeds: Centre for Criminal Justice Studies Press, 1999) 89

certainly be it, for it remains by far the most common need cited in victim research literature

Secondly, the families of homicide victims cite the right to deliver an impact statement as an important mechanism for involving them within the criminal proceedings, representing for many the only opportunity they will be given by the court to partake in the trial. Having considered the arguments for and against the granting of this right, this chapter recommends a recalibrated and relocated version of impact statements, whereby they are delivered *after* the sentence has been handed down. While this eliminates the risk of arbitrary sentencing and ensures that victims are not misguided by the belief that the contents of their impact statement will have some direct bearing on the sentence to be passed, victims will still be given a part to play in the criminal proceedings by voicing their loss to the offender, the court and the public. In this way, victim impact statements take on a more plausible function, becoming part of the offender's sentence and not a factor in determining it.

Thirdly, while it is accepted practice, both domestically and internationally, to centralise criminal prosecutions in an independent body like the Office of the Director of Public Prosecutions, and protect such independence by making it unsusceptible to judicial review and public law remedies in the usual manner, AdVic is campaigning for ways in which the impersonal nature of public prosecution may be reduced. This chapter noted that save for a one-off pre-trial meeting with the family of a homicide victim, save any sudden, changing circumstances that necessitate a further meeting, it would be unreasonable for the Director of Public Prosecutions to open or maintain a frequent line of contact with co-victims, as it would prove complicated if the co-victim were also a witness and, due to the limited amount of information that the Director can confer, would be an ineffective use of his resources. However, it was recommended that the Director pursue some scheme, insofar as this can be done without compromising the legally protected interests of suspects, witnesses and victims, wherein he can provide homicide co-victims with explanations for non-prosecution; for why specific evidence was not brought before the court at trial; or for reasons why charges less than what the victim believed to be appropriate were pursed, like when a manslaughter charge is preferred over murder. In addition, it was further recommended, particularly in light of the fact that the DPP now has a right to appeal what he considers an unduly lenient sentence, that he be permitted to make submissions as to what would be held to be an appropriate sentence; and so as to

avoid acquittals on technicalities or error, that he be also granted a *with prejudice* right of appeal. This can be utilised in circumstances where there has been a fundamental defect in the previous proceedings, such as where an acquittal was directed by a trial judge in error; where a verdict was set aside by the Court of Criminal Appeal without directing a re-trial; or where the trial judge made what can clearly be shown to be an erroneous ruling, say on the admissibility of evidence, that had the effect of weakening the prosecution case.

Following these detailed analyses, there were some further observations made on the other needs and concerns of co-victims. Everything should continue be done to ensure that trials are brought before the courts without undue delay, and that those adjourned, collapsed or directed for retail should be re-listed without day. Courtrooms should also be refurbished to ensure decent segregation for the victim and/or his family from the accused and his family.

So as to quell the character attack of the deceased by the defendant at trial, something done to create some mitigating circumstances, which can obviously be quite distressing for the family, legislation should be amended so that the defendant drops his shield of protection from cross-examination as to his own bad character when he attacks the character of the deceased.

The courts, save for exceptional circumstances, should not release on bail pending sentence any individual convicted manslaughter or a non-fatal serious violent assault. The courts, where there is a history of violence conduct, should consider careful all submissions opposing bail pending trial.

State compensation should be appropriate, particularly in the case where the deceased had dependants and was the primary earner. It is, however, difficult to envisage any practical way that the Criminal Injuries Compensation Tribunal could assess awards in respect of pain and suffering, for it is difficult to place a monetary value on such emotions. However, there should be a scheme from which the victims of serious sexual and violent crimes, and homicide co-victims, can receive refunds for counselling and therapy services undergone as a consequence of the psychological injuries inflicted upon them by the actions of the offender. It is also important that claims are processed quickly. Though the Tribunal typically awaits the result of the criminal trial and/or inquest before proceeding to payout compensation, given that there is a deceased and that his killing is unlawful, and that co-victims suffer financial

loss and expenses immediately, efforts should be made to advance, even in part, compensatory payments within six months of a violent death.

Finally, the trauma experienced post-homicide by co-victims is extreme and appears, in many instances, to be intensified by their experiences within the criminal justice system. As a result, it is vital that the families of homicide victims, and, for that matter, all victims of crime are treated, at all times, by all professionals employed within the criminal justice system, be they from the judiciary, the barristers or the public or civil service staff, with respect and consideration given to their needs.

Conclusion

At the outset, I stated that the purpose of this thesis was to draw homicide co-victims into the larger victim debate by analysing the measures of reform sought by Advocates for Victims of Homicide. To this end, I trust I have expounded the arguments raised from these reform proposals in a frank and, I trust, ultimately helpful manner. In doing so, it was my intent that the reader will have gained, en route, a comprehension of the objectionable position homicide co-victims find themselves in within Irish criminal justice and that they themselves will have developed a better appreciation of what it is they are trying to improve. It is also my hope that this thesis shall help inform and enrich future victim-centred debate with regard to this particular subset of victims.

Before providing an update as to what recent developments have occurred since the main body of this text was written, it is useful to recap, very briefly, on what has gone before. In order to contextualise this thesis, it was first necessary to chart the re-emergence of the victim within the arena of criminal justice. Historically, prior to the existence of a legal system as we now understand it, the victim was the instigator of criminal justice, taking it upon himself to seek restitution from his offender in settlement for the harm caused. Later, amidst the budding formalisation of a criminal justice structure, he assumed the mantle of both investigator and prosecutor. He was, however, eventually displaced from this central albeit onerous position by the rise of the modern State and its introduction of public prosecution.

It was, amongst other things, concern with escalating crime rates in the second half of the last century, coupled with the realisation that victims themselves were becoming increasingly disillusioned with and re-victimised by the justice system, and thereby less likely to engage with it, that brought concern for the victim to the fore.

As crime prevention became an uphill if not altogether futile struggle, and as more and more people fell prey to this steady rise in unlawful conduct, it was just a matter of time before the plight of the victim attracted both public and, due to the sheer numbers involved, political interest. Yet while victims gained substantial legal rights in the United States and, largely due to the differences in the structures of its inquisitorial legal systems, procedural roles within the criminal trial in such European countries as France, Germany, Italy and Spain, Ireland has, for the most part, shied away from providing statutory rights for crime victims, and its adversarial legal system remains, both structurally and philosophically, fundamentally incompatible to granting them any procedural or participatory role of note within the criminal trial. Instead, discussion concerning the victim in Ireland has tended, over the years, to centre on his welfare and the provision of support services. Regardless that the victim has now become a ubiquitous entity and theme of criminal justice discourse, helped by some five decades of victim movement activism, he remains somewhat undervalued by every sector of criminal justice, and that system, other than on a superficial level, remains intransigently unresponsive to his perspective.[923]

The focus then narrowed to the group of victims central to this thesis, the families of homicide victims, by chronicling the tumultuous impact a homicide has upon them, detailing how the sudden, violent and horrific characteristics of the killing debilitates and destabilises co-victims, leaving them shocked, confused and exposed to complicated mourning that at its most severe can lead to post-traumatic stress disorder. The aftermath of the killing is of such magnitude that each person affected must be properly recognised as a victim in his own right. In addition, it was demonstrated that the protracted and impersonal nature of the criminal justice system has an attritional effect upon co-victims that further exacerbates their victimisation. Given the increased frequency with which homicide is now perpetrated and the extent of harm the act inflicts upon the families of each victim, it was inevitable that an organisation like AdVic would materialise to campaign for reform.

After setting out the law in relation to murder and manslaughter in Ireland, the offences that affect these co-victims, this thesis next considered the debate of whether to amalgamate those two offences into a single catchall charge of criminal or unlawful homicide, under which mandatory life would be abolished with the charge of murder itself; or instead retain murder as a separate offence but allow each judge discretion as

[923] Shapland J 'Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies', in Crawford A & Goodey J (eds.) *Integrating A Victim Perspective Within Criminal Justice* (Aldershot: Ashgate, 2000)

to the apposite sentence. It is my belief, and one I share with AdVic, that to remove murder from the apex of fatal offences, especially given the deliberate nature of the crime, or to remove the life-sentence as its mandatory consequence, would dilute our reaction to the offence, both legally and socially, representing to many a devaluation of life disrespectful to the victim and his family. For the life-sentence to reflect the intentional and unlawful taking of a life, and for it to have any true sense of retribution and deterrence at its core, it is vital that those so sentenced should spend a considerable period of time in prison before parole, and certainly longer than the current average of just under fourteen years.

Similarly, co-victims perceive manslaughter sentencing as inconsistent and unduly lenient. To allay these concerns, and to honour a long-outstanding Government promise, it is necessary that a set of coherent non-statutory guidelines be introduced that establishes hierarchies of gravity for certain offences and sets norms from which, having due regard to individual circumstances and with detailed explanation, the sentencing judge may depart. These guidelines should take into account the rise in fatal interpersonal violence by duly reassessing previous sentencing standards regarding manslaughter so as to enhance didactically the deterrent element of the punishment. This set of guidelines can be complimented by both the wide dissemination of decisions of authoritative precedent on sentencing ranges from the Court of Criminal Appeal and the implementation of the Irish Sentencing Information System (ISIS) database, the function of which is to marshal information and patterns resulting from different combinations of material case facts. These three developments would greatly assist the judiciary iteratively in achieving consistency, not just in the punishment of manslaughter offenders, but for sentencing in general.

It is somewhat surprising that victims and co-victims alike do not have or demand a greater involvement within the parole process. It would be difficult for the State to deny them some level of formal participation, for once the accused is found by a jury to be guilty he no longer enjoys the protections conferred by his presumption of innocence and instead, in essence, becomes the victim's offender. While it is right that co-victims are unable to influence the length of sentences imposed by the judiciary - for sentencing must be both an objective and consistent endeavour - they do have an understandable interest in the management of those sentences and ought to be formally afforded a voice in what is essentially a concessionary process that is likely to reduce that sentence. Having evaluated the sentencing standards for murder and

manslaughter, and the long-term administration of those sentences, attention then shifted to assessing the array of needs and concerns which homicide co-victims have with the Irish criminal justice system, as articulated by AdVic. In particular, extensive consideration was given to the areas of information, victim impact statements, and the role of the Director of Public Prosecutions.

The major frustration victims have with the system of criminal justice is the lack of accurate and timely information available, both in relation to criminal justice procedures in general and, more specifically, to individual cases. This includes regular updates regarding police progress in investigations; whether an offender has been arrested and if he is on bail or in custody; and the likely dates of court applications, hearings, trials, inquests, parole reviews *et al*. There is an overwhelming need for the establishment of a non-aligned statutory agency to assist and negotiate the victims of serious crime through all of their dealings with the multitude of criminal justice agencies. Doing so would represent a governmental acknowledgment that the criminal justice system has an enormous impact on victims and that the quality of its interface is a major key in determining the ongoing impact the criminal event has upon them. Though we must be wary of the simplistic notion that the criminal justice system's responsibility to the victim can be discharged through the imposition of any one need, if one requirement had to be placed as a priority, information would most certainly be it.

AdVic campaigns ardently for the co-victims of manslaughter *and* murder to be granted a statutory right to present an impact statement before the sentencing of an offender. It identifies impact statements as the only opportunity the family of a homicide victim has to partake in the trial and inform the court of the harm caused. AdVic wants the contents of these statements to be reflected in the sentence handed down, a proposal roundly denounced herein. Instead, having put forth reasons why the contents of impact statements do not at present, and should not in the future, be allowed to influence sentencing - for to do so would potentially remove objectivity and consistency from the process - I proposed a new *modus operandi* for the victim impact statement. In short, to reflect that impact statements have no bearing on sentence, it was recommended that they be presented *after* sentencing, so that the offender, and the public at large, is reminded of the harm caused by his unlawful actions and allows the final words of the proceedings to centre on the deceased victim, delivered by his loved ones.

While the Office of the Director of Public Prosecutions is an independent office, it is not necessary for it to remain as detached from victims as it does in order to maintain its independence. In general, homicide co-victims have little, if any contact with the prosecution, leaving them unprepared for what may occur throughout the trial. It should be formality that a meeting is arranged with homicide co-victims at least a week prior to the trial, so that any questions they may have can be addressed. This meeting should be utilised to explain to co-victims the possible or likely outcome(s) of proceedings. In addition, the Director should initiate a process whereby he can inform co-victims of the reasons why no prosecution was initiated, once this does not call into question the innocence of an individual; why an original charge was subsequently reduced; and, where applicable, why evidence that co-victims were already aware of was not utilised. There is also much sense in the reasoning that as the DPP is a participant in all trials for indictable offences, and as he now has the statutory right to appeal what he considers to be an unduly lenient sentence, that he should be entitled to make a submission to the sentencing judge, after his having due regard to previous sentencing standards in similar cases and any relevant aggravating or mitigating factors, as to what his Office holds to be an appropriate and consistent sentence. This would save public money and court time by reducing the number of prosecution appeals to what are perceived to be unduly lenient sentences, thereby sparing co-victims, save for a defence appeal, the prolongation of the criminal process.

Similarly, homicide co-victims want to ensure that delays in bringing trials before the courts are kept to an absolute minimum, or that those collapsed or directed for retrial are given priority in the court diary, as delays inevitably mean that the ordeal of a pending trial still hangs over them. It is also understandable that they ask to be segregated from the defendant and his family in the courtroom; that if the defendant attacks the character of the deceased he can be cross-examined as to his own character (as is the rule where the victim is alive); that people convicted of a violent crime should not be granted bail pending sentencing; that State compensation awarded by the Criminal Injuries Compensation Tribunal be increased, particularly where the victim was the main earner and bore siblings, and payable where there is a homicide within the family home; that the reasonable expenses of co-victims attending trial, like travel, accommodation and loss of earnings, be met; and that they are treated courteously and fairly by criminal justice professionals throughout the entire legal

system.

In its first three years, AdVic has already witnessed the realisation of a number of its objectives: *viz.*, the training of An Garda Síochána Family Liaison Officers; reserved courtroom seating during the trial; an undertaking by the Central Criminal Court to re-list, without delay, trials collapsed or directed for retrial; the availability of counselling specifically related to post-homicide trauma (albeit subsided by AdVic itself); and free legal advice through the Voluntary Assistance Scheme of the Bar Council. These small developments may well indicate the beginnings of a gradual change where the vicarious victim status of family members is beginning to be recognised and accepted, but AdVic knows there is much more to be done before homicide co-victims, whom they refer to as "the most voiceless of victims"[924], begin hoisting any victory flags.

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[924] As an aside, there is one grouping of victims that has been almost wholly ignored by criminologists, victimologists and, for a variety of different but perhaps obvious reasons, by the crime victims' movement itself - they are the families of serious offenders. Many may find dubious the classification but in several ways the family of a serious offender must also be regarded as amongst *his* victims. First, there is the torment that inevitably flows from the abrupt revelation that a son, father or husband has committed murder, manslaughter, rape, or sexual assault. These families are at a loss for explanation, it is as if they never really knew the offender and must grapple with this new reality that he could perform a crime of such atrocity. Secondly, the conviction can incite feelings of bereavement within families who talk of the physical loss of an offender when he is consigned to prison. It would be easier to bear a death, some parents say, than the imprisonment of a son for so outrageous a crime: 'I would prefer being where I am. I know I haven't got my lovely [son] but I'd prefer being the mother of the son that was murdered, not the mother of that young fella that murdered that nice boy' - Lynch N 'I'd rather be the mother of a murdered son than mother of the murderer' (28 January 2007) *Sunday Independent* 10. It is impossible for, say, a mother to effect a clear moral divide between her and the offender, for he will always be her son and so she finds herself faced with the exceptionally tumultuous task to hate the sin but love the sinner ["A child needs your love most when he deserves it least" - Erma Bombeck]. Thirdly, family members undergo a radical, reductive, contaminating, and undignified transformation of identity. The offender is typically reified by the media and the community into some monster, and it is to this fiend that the family are now ineluctably and rancorously tied to. As a consequence, some find that they are no longer individuals with moral and social attributes independently required but instead become demonised as, say, a murderer's mother or a rapist's brother. In this way close relations become defined by a crime that they themselves did not commit, forced to share the opprobrium which is heaped upon the offender and the offence, resulting in the symbolic loss of a family's collective innocence. Vernacular theorising characteristically blames the family of the offender, specifically if he is still relatively young. This blame brings with it guilt by association, social notoriety and alienation, with many families finding that they need to relocate, particularly where the crime was carried out in or on someone from the vicinity - Howarth G & Rock P 'Aftermath and the Construction of Victimisation: 'The Other Victims of Crime'' (2000) *Howard Journal* 58. Families of serious offenders inevitably find it hard to contend with what has befallen them, there are no scripts to guide them through such experiential disorder. They struggle to normalise the abnormal, rebuild self-respect and reduce their social alienation. Despite some shared features, the plight of the families of serious offenders somewhat understandably evokes less sympathy than that of the families of homicide victims. Nonetheless, the reality is that nobody raises their child to be a killer: 'Perhaps these families are mirror images on either side of the homicide, both being thrown into a situation of horror and helplessness…perhaps the most important conclusion here is that pain is pain and people experience it in similar ways, no matter which side of the homicide they find themselves on' - King K 'It Hurts So Bad: Comparing Grieving Patterns of the Families of Murder Victims with those of Families of Death Row Inmates' (2004) 15(2) *Criminal Justice Policy Review* 193, 208. Nor can these families of serious offenders possess the righteous anger or partake in the vociferous campaigning that so besets the politics of other groups of victims. While their victim status remains somewhat morally ambiguous there is no doubt that they too have suffered a difficult if different tragedy. There is an urgent need for information, comprehension and a practicable analysis of these families on how to restore a

It was noted in the Introduction that as events in criminal justice are so changeable this thesis should be taken as only dealing with the state of affairs as they so existed at the end of March 2008. As if to emphasise the fluidity of criminal justice matters, certain developments have since occurred that have direct bearing on some of the findings and recommendations of my research.

First, the Law Reform Commission announced its third programme of law reform[925], now underway and running until 2014. This will include an examination of the victim within the criminal justice system with specific regard to the communication of information; the anonymity of parties; the right of representation; victim impact statements; and, interestingly, media reporting of crimes and trials. The Commission, following on from consultation with relevant legal professionals and interest groups, is renowned for producing detailed documents, and publications arising from this review will undoubtedly help bring the matter of victims' rights to a head. It will be particularly interesting, especially in light of the arguments advanced herein, how the Commission will propose for the future clarification and development of victim impact statements in general, and specifically for homicide co-victims.

In June, the newly appointed Minister for Justice, Equality and Law Reform, Dermot Ahern, announced a Justice for Victims Initiative.[926] This Initiative is two-fold, containing both legislative and administrative proposals. The Government intend to draft and present before the Dáil a substantial piece of legislative reform in early 2009. Some of the promised features of this Bill include the amending of existing victim impact legislation in order to grant victim status to next-of-kin in homicide cases[927]; new procedures whereby the DPP can apply for a court order to have cases retried where an acquittal arises from an error in law made by the trial judge or where compelling new evidence of guilt emerges after an acquittal; reforms the law of character evidence to enable the prosecution to respond where, during the trial, unwarranted and vexatious imputations are made against the character of deceased or incapacitated victims or witnesses; provides for the advance disclosure to the

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measure of organisation, control and direction to their confused and damaged lives. It is this group that may well next attract the attention of victim research in Ireland.

[925] Though *law reform* is the phrase employed by the Law Reform Commission, it is, in actuality, a *review*, offering proposals that the Government may choose to wholly or partially implement or ignore.

[926] Coulter C 'Minister wants DPP to have right to appeal acquittals' (20 June 2008) *The Irish Times* 1

[927] The right to make an impact statement will be extended to family members in all homicide cases, or where the victim is incapacitated as a result of the crime, or where the victim is a child or is unable to make a statement due to a mental disorder.

prosecution of expert evidence which the defence proposes to introduce; and establishes a written procedure that will allow for the early return of property to victims, including tissue samples, where that property may constitute evidence in criminal trials.

This Bill will take account of several of the recommendations made by the Balance in the Criminal Law Review Group, many of which have nothing at all to do with helping victims and merely exemplifies the on-going political willingness to use vague or misleading language to dress measures that are anti-offender as pro-victim. The Irish Council for Civil Liberties observed:

> The changes that the Minister has proposed would diminish the rights of accused people without improving life for victims of crime. It is a fallacy that taking liberties from accused persons enhance the lives of victims. If the Government is genuinely interested in advancing the situation of victims then it must adopt a rights-based statutory charter for victims.[928]

That the Bill is not solely about victim rights is evidenced by its catchall title, the *Criminal Procedure Bill 2009*.[929] Many will hold the changes it proposes as merely procedural, probably benefiting the process of the justice system more so than the victim *per se*.

Fine Gael TD, Alan Shatter, sponsor of that party's *Victims Bill 2008*, sharply criticised the Minister for holding a press conference "about non-existent legislation related to crime victims whilst planning to reject a fully drafted and comprehensive piece of legislation [already] produced by Fine Gael."[930] The Minister retorted that virtually every section, "line by line", of the proposed Fine Gael *Victims Bill 2008* replicated New Zealand's *Victims' Rights Act 2002*, dismissing it as mere "legislation by Google", insisting that "there is no such thing as a single transferable Bill between jurisdictions", and that "[the Dáil] was not a classroom where you cog homework."[931] Similar ripostes were delivered to the media for some days after, epitomising once

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[928] *ibid*.

[929] The General Scheme of the *Criminal Procedure Bill 2009* was published late December 2008. The Minister for Justice, Equality and Law Reform, Dermot Ahern, in announcing this Bill, stated that it "broadens the participation of victims in the criminal process...[and] will not only give them a voice through the use of victim impact statements, it will also provide for the vigorous pursuit of justice on behalf of victims" – Department of Justice, Equality and Law Reform *Press Release: Government Approves Major Legislative Package that will meet Concerns of Victims of Crime* (28 December 2008)

[930] *ibid*. The question that the *Victims Bill 2008* be read a second time was declared lost by a Dáil vote of 70 No to 53 Yes votes – *Dáil Éireann Parliamentary Debates* 657(4) 25 June 2008, at 790

[931] O'Halloran M 'FF, FG clash over who has best victims' rights plans' (25 June 2008) *The Irish Times* 8

more how the plight of victims is bandied about in an acrimonious game of political point-scoring.

One of the features of the Government's proposed legislation, and arguably the only one likely to benefit victims directly, is the amendment of existing victim impact legislation in order to grant, crucially and for the first time, victim status to next-of-kin in homicide cases. It is probable, in anticipation of the aforementioned review of these statements by the Law Reform Commission, that this legislation will do nothing more than add homicide co-victims to the list of those permitted to deliver a statement, and shall fail to clarify for the judiciary if or how they should properly factor the impact expressed in these statements into the sentence to be passed down. Legislation of this kind really needs to be radical or it is redundant, and it would appear that the inclusion of this measure is both knee-jerk and deflective, a wasted opportunity to reconsider the overall role of impact statements within the criminal process.

More promisingly, in addition to these legislative proposals, the Minister announced a series of administrative moves to increase support to victims. These include the establishment of an Executive Office within his Department to focus on the coordination of the delivery of services nationwide and assess how those currently offered by non-government organisations, like Court Support Services, might be provided in the future by statutory agencies; and a Victims of Crime Consultative Forum, where victim groups will be invited to attend biannual round-table talks to voice their concerns and ideas. The Minister also reconstituted the Commission for the Support of Victims of Crime, which shall continue to distribute funding to victim support groups as well as maintain the momentum, continuity and experience it gained by providing general oversight of services and promoting awareness. These three bodies, none of which provide a centralised information conduit for victims, were all proposed by the Commission for the Support of Victims of Crime in its *Framework Document*, submitted to the Minister in April, where one of its lead findings was "that more could be done within the criminal justice system to support victims and to improve the experience of interacting with the system."[932] However, these administrative measures are but a small, albeit welcome step in the right direction, and the recent economic downturn and resultant Government curb on public

[932] Commission for the Support of Victims of Crime *Framework Document: Recommendations for Future Structures and Services for Victims of Crime* (Dublin: Commission for the Support of Victims of Crime, 2008)

spending must cast some doubt as to the timeframe and scale of these projects.

Later, on 19 September, the Minister for Justice, as part of the Victims of Crime Consultative Forum, met with forty groups involved in providing support to victims about the country, as he "wished to hear first hand the experience of the groups on the ground and their concerns."[933] The meeting also provided him with an opportunity to announce that the planned Victims of Crime Office, a new Executive Office within his Department, was now operational, an office that will play "a key role in seeking to improve coordination and continuity of services to victims of crime, both by NGOs and state agencies."[934]

AdVic was the only group to be granted a private meeting with the Minister that day, itself a gesture of the respect with which it is held in. Discussion concentrated mainly on victim impact statements and the matter of compensation. The Minister reiterated that legislation was on course to be published early next year to extend the right to give impact statements to the family of a homicide victim, and he was receptive to the proposal, as recommended herein, that two impact statements be permitted. This would cater for different relations being entitled to deliver a statement, say both a mother and a husband of the victim, or allow for two statements where there is conflict between certain co-victims. The Minister was, however, firmly opposed to any extension of the scheme for Compensation for Personal Injuries Criminally Inflicted to encompass intra-familial homicides, as the current outlay would increase exponentially.

More recently, on October 22, after a nine-month public consultation process, the Director of Public Prosecutions launched the Reasons Project, a process whereby he is to provide reasons for decisions not to prosecute to the families of victims of crimes involving a death: *viz.*, murder, manslaughter, infanticide, fatal traffic accidents[935], and fatalities in the workplace.[936] In making the announcement, the Director, James

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[933] Department of Justice, Equality and Law Reform *Press Release: Establishment of Victims of Crime Office and a new Commission for the Support of Victims of Crime* (19 September 2008)

[934] *ibid.* Staffing, at present, comprises of a Director, an Assistant Principal, a Higher Executive Officer, an Executive Officer, and two Clerical Officers.

[935] Fatal road traffic accidents must be referred to the DPP, even where only one vehicle was involved and the driver dies. Most traffic accidents involving death are quite contentious as the families of the killed are understandably very upset. However, there are often two accounts of what happened, and no objective evidence to back one side, making it difficult to prove manslaughter or dangerous driving causing death beyond reasonable doubt.

[936] The Director acknowledged that some may be disappointed that rape cases were not included, but "I prefer to [introduce the Reasons for Decisions project] incrementally. You learn things as you go along, and until you start you don't know how resource-intensive it will be. I would have preferred to have had a small dedicated unit to do [this], but that is not possible in the light of recent budgetary restrictions" – Coulter C 'DPP to explain when fatal crimes are not prosecuted' (22 October 2008) *The Irish Times* 5

Hamilton, empathised with victims, commenting "I very much think that if I were in a position of being a victim of crime, I would like to get as much information as I could"[937], though he noted that in homicides it is rare that there is an identifiable suspect who is not prosecuted and that already a victim's family can and do ask for a decision not to prosecute to be reviewed.[938]

Reasons for non-prosecution will, on written request, be issued in writing to members of the deceased's family or household, their legal or medical advisors, or social workers acting on their behalf. However, reasons may not be given where this could expose potential witnesses or others to injustice by taking their good name; reveal the identity or existence of confidential sources; or have an adverse effect on law enforcement. The letter to a family containing the reason(s) not to prosecute will be covered by qualified privilege, though such privilege will not attach to the media or others who might publish it. The entire process will be evaluated in early 2010, and if positive feedback emerges, it is hoped to extend the policy to other serious crimes, notably sexual offences.

The Reasons Project, while only applicable to those unlawful deaths which occur from the date of its announcement, represents a milestone in the recognition of the plight of homicide co-victims, one made all the more significant as it comes from an agency of criminal justice traditionally referenced as the most removed from victims. However, it is strictly a policy to provide reasons for non-prosecution *only*; it does not require the DPP to inform co-victims as to why lesser charges were accepted before or during the trial (though there appears to be some random practice of this), or why evidence already known to them was not brought before the jury.

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[937] Office of the Director of Public Prosecutions *Report on Prosecution Policy on the Giving of Reasons for Decisions* (Dublin: Office of the Director of Public Prosecutions, 2008) 18

[938] Coulter C 'DPP to explain when fatal crimes are not prosecuted' (22 October 2008) *The Irish Times* 5

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Stiúrthóra Ionchúiseamh Poiblí

Reasons Project

It is the intention of the Office of the Director of Public Prosecutions to pilot a policy change on the giving of reasons for decisions not to prosecute. The policy will operate on the following basis:

1. The policy change will be confined to alleged offences where a death has occurred including murder, manslaughter, infanticide, fatalities in the workplace, and fatal road traffic accidents.

2. Reasons for decisions not to prosecute, or to discontinue a prosecution, will be given on request to parties closely connected with the deceased, such as members of the deceased's family or household; their legal or medical advisers; or social workers acting on their behalf.

3. Reasons will be given only in circumstances where it is possible to do so without creating an injustice. This would include situations where the giving of a reason would expose potential witnesses or other persons to injustice such as by taking their good name; reveal the identity or existence of confidential sources or confidential methods or procedures of law enforcement; or have an adverse effect on law enforcement.

4. The reason given should where possible be sufficiently detailed to enable the interested party to understand why the decision was taken.

5. The policy will apply to decisions not to prosecute, or to discontinue a prosecution, made in respect of offences involving a death where the alleged offence occurred on or after 22 October 2008.

6. Reasons for decisions will be communicated to interested parties in writing. It is not proposed within the scope of this pilot policy change to offer face-to-face meetings with interested parties. Persons who come within the scope of paragraph 2 above and who want to know the reason for a decision not to prosecute or to discontinue a prosecution should write to the Director of Public Prosecutions, 14-16 Upper Merrion Street, Dublin 2.

7. The Office of the DPP anticipates this policy will operate at least until 1 January 2010. A comprehensive evaluation of the policy will be undertaken during that period. Subject to a satisfactory evaluation of the operation of the policy consideration will be given to extending the policy to other serious cases including sexual crimes.

8. It is important to note that this new policy is in addition to, and leaves unaltered, the long-standing rights of victims and their families to request the DPP to review a prosecutorial decision; to meet with the prosecution team before a trial; and/or to request the DPP to seek a review of an unduly lenient sentence.

22 October 2008

[extracted from Office of the Director of Public Prosecutions *Report on Prosecution Policy on the Giving of Reasons for Decisions* (Dublin: Office of the Director of Public Prosecutions, 2008) Appendix, 27-28]

Recommendations arising from this Research

It is at this moment in proceedings that one must shape and proffer concrete ideas for action - enough diagnosis, now prescription - time to retrieve and reiterate the various proposals made throughout. The following findings and recommendations are not presented in any specific order of importance, but instead as a homicide co-victim may require them as they are first confronted by and then move through the criminal justice process.

First, it is vital that the rights of crime victims be identified and secured in statute. The term *victim* should be defined in legislation as "every complainant in relation to a crime or offence, and every person who, through or by means of a crime or offence committed by another person, suffers physical or psychological injury or emotional harm, or economic loss, including loss of, or damage to, property, and if a crime or offence committed by a person results in another person's death or in another person being in a state of continuing unconsciousness or suffering serious intellectual disability, every member of the immediate family of the other person." The phrase *every member of the immediate family* should reflect contemporary social arrangements like unmarried or same-sex partners and what are colloquially termed the second families of the victim. It is only by anchoring crime victims rights in statute that they truly become enforceable.

Every victim of crime has the right to be treated with respect and dignity by all organs of the criminal justice system, including the State. When this does not occur there should be in place an independent complaints procedure that can provide an appropriate remedy, be that apologetic, explanatory or compensatory in nature. In addition, all professional participants in the criminal justice process must be mindful of the human dimension to their work, for the expression of humane values within criminal justice ultimately resides within its practitioners. Resultantly, training courses for legal professionals, be they training to be solicitors, barristers, or members of the judiciary, must include a victim awareness module.

Without doubt, the impact of a death notification, regardless of the cause of that death, has a huge and residual impact on family members. It is, understandably, an unwelcome and daunting task for the person whose job it is to break that news and therefore vital that training in death notification is provided as a matter of due course to each An Garda Síochána recruit.

This thesis welcomes the introduction of the Family Liaison Officer scheme and acknowledges that of all criminal justice bodies An Garda Síochána have, in recent times, made the greatest effort to meet the needs of homicide co-victims. Every effort should be made to ensure that there are adequate numbers of family liaison officers trained and available throughout the regions, and that information is provided when and where possible as to the progress of investigations. The remit of the family liaison officer should be as broad as possible, operating not just as a means to gathering information from co-victims required for the investigation but as a two-way intermediate.

There are a growing number of voluntary groups about Ireland providing a wide range of general and specialist support to victims. The Government have proven quite adept at making a virtue of the determination and verve of victim activists, parsimoniously allowing voluntary work to fill the void in services that should be officially provided. Some of these groups operate in isolation, resulting in the costly duplication of services and expenditure. In order to streamline victim support, the Department of Justice, Equality and Law Reform should establish a central coordinating Executive Office for the support of victims of crime. This Office would be responsible for ensuring that services for victims are available regionally; assess how particular services currently provided by voluntary groups may be supplied by statutory agencies in the future; and should develop and implement a strategic policy for future victim support.[939] The funding of victim support groups should be administered on a three-year rollover basis, as opposed to the current year-on-year approach, as this would provide certainty, stability and enable strategic planning for the committees that manage these groups.

A real way of supporting victims is establish a statutory Victim Information Authority, which will meet the informational needs of the victims of serious crime, including homicide co-victims. This Authority would assist homicide co-victims through all their dealings with criminal justice agencies, *viz.*, furnishing them with continuous notification of relevant information from all key figures in the criminal justice system, including the Courts Service, the Parole Board, and the Irish Prisons Service; provide an overview on the nature of formal legal procedures; outline to co-victims why their views are not given effect within the criminal trial, thus reducing any unrealistic expectations they may have of their role or the role of the trial; explain

[939] This was established in August 2009

important legal terms and decisions in user-friendly language; inform them of the purpose of victim impact statements; supply useful telephone numbers and referral to support groups; advise on remedies that are not integral to the criminal justice process, such as the filing of applications for compensation; give practical guidance on handling the media; and house a library of recommended related books and articles so that the co-victim may research further.

This Authority should have operational independence from all other criminal justice bodies and Government departments in the performance of its duties. Each criminal justice agency will be obliged to provide it with information such as court dates; bail and parole hearings; prison release dates *etc.*, so that the co-victim can then obtain all information from this one source rather than having to deal with a variety of different and often difficult criminal justice agencies. As it is the State that prosecutes on behalf of society, thereby laying its legitimate claim to the crime, the victim's personal travails become public issues, and public money and community resources should be utilised to address his needs and assist, as far as is practicable, his recovery.

Furthermore, the Department of Health and Children should provide or make available a system of refunding counselling services undertaken by the victims of serious sexual and violent crimes and homicide co-victims. There is a need for greater State intervention to ensure that all victims of violence have access to bereavement counselling and psychological intervention given by professionals with State-endorsed qualifications. After all, as the State spends large sums to rehabilitate offenders, it is only proper that it also makes provision to rehabilitate victims through counselling.

A Bereaved Relatives Fund, similar to that in operation in England and Wales, should also be established so as to meet the reasonable expenses of co-victims attending homicide trials. These expenses should include transportation and accommodation costs and, where applicable, loss of earnings and child-minding expenses. This Fund should also be made available to the family of any Irish citizen that is the victim of a homicide whilst abroad so that they may travel to that jurisdiction in order to attend related legal proceedings.

It is vital that the Director of Public Prosecutions remains an independent body. However, the DPP should continue to meet with homicide co-victims and to provide them with appropriate information. This meeting, once requested, should take place *at*

least a fortnight prior to the scheduled date of trial. If significant changes occur after that, the Director should convene a second meeting.

The Director should continue to assess the trial scheme recently established by which he is able to provide co-victims with explanations for non-prosecution; for why a particular charge was preferred; or reasons why specific evidence was not brought before the court at trial insofar as this information would not impinge upon the presumption of innocence of any one person. Where there is a threat to that presumption, co-victims should be asked to accept on faith, as is the present case, the decision of the Director in the matter. This will ultimately and only prove acceptable if his Office develops a track record of providing detailed reasons when and where possible.

In light of his right to appeal what he considers an unduly lenient sentence, as per the *Criminal Justice Act 1993*, the Director should be permitted, by statute, to assist the trial judge in his sentencing deliberations, making submissions as to what range of sentence the People would consider appropriate and furnishing the court with distinguishing reasons when his submission is out-of-step with any statutory sentencing guidelines. This would then require the sentencing judge to provide explanation when giving a significantly divergent sentence.

In addition, legislation should be introduced whereby the Director may reopen a case where there is evidence of highly probative new or newly discovered facts which provide compelling evidence of guilt or where it can reasonably be ascertained that a defect in the previous proceedings potentially or actually affected the outcome of the original case.

So as to ensure that co-victims are not facing unacceptable delays, every effort should be made to ensure that homicide trials are listed as soon as is practicable and that cases adjourned, collapsed or directed for retrial be re-listed without delay.

This thesis recognises that the opening of the Dublin Criminal Court Complex in late 2009 will cater for the accommodation concerns of homicide co-victims at court, like reserved seating and separate entrances and restroom facilities. However, this issue needs to be addressed in the increasing number of other locations outside of Dublin where homicide trials are now held.

A person convicted of manslaughter or a non-fatal serious violent assault should not be granted bail where the case is to be adjourned after conviction for sentencing,

save in exceptional circumstances where it is possible that the offender may not receive an actual custodial sentence.

The courts should also be slow to grant a person who has previously been convicted of manslaughter or of a serious violent or sexual assault bail pending trial if they are charged with a further such crime. This may appear to infringe on his presumption of innocence but the courts must be entitled to view the history of serious previous convictions as sufficient grounds for detaining the defendant. This practice would only be acceptable where such trials are prioritised and listed for the earliest possible date, and if the fact that the defendant is remanded in custody is kept from the jury throughout the ensuing proceedings.

It is important that the offence of murder continue to be distinguished as a separate offence, with both the label and its distinct punishment representing society's abhorrence of the crime. The definition of *intent* for murder should be defined clearly in statute. In addition to its ordinary meaning of a conscious objective or purpose, its definition should also embrace the foresight of a virtual certainty. Likewise, if an offender realises his conduct poses a risk of causing death but presses on regardless he should be guilty of murder and not, as present, of the lesser charge of manslaughter. It is also time that the mitigating defence of provocation should also be transcribed in legislation.

Co-victims are often distressed by evidence adduced by the defence that casts aspersions on the character of the deceased. As a result, section 1(f)(*ii*) of the *Criminal Justice (Evidence) Act 1924* should be amended so that where the injured party has died or becomes incapacitated and accordingly cannot give evidence as a result of an assault or other criminal act and the defence attacks the character of that party the shield of protection the defendant enjoys against bad character evidence is dropped and he becomes liable to cross-examination as to his character.

A primary concern of co-victims is the judicial discretion of allowing some to submit victim impact statements, whilst others are refused. Legislation should be introduced that allows a co-victim to present orally an impact statement where the offender is guilty of manslaughter or murder. This should not preclude the co-victim from nominating an individual to make that statement on his behalf once he has so contributed to its contents that it can be taken as a reasonable reflection of the impact felt. While it should be mandatory for the prosecution or some other designated

authority to inform the co-victim of this right, his expression shall remain at all times voluntary.

The impact statement should be defined in legislation, directly referencing its sole communicative function. It must be clearly articulated to victims by informed personnel, supplemented by literature, that these statements do not form any part of the deliberations of the judiciary as to the severity of sentence. So there remains no confusion as to the purpose of the impact statement its presentation should be relocated to immediately after the sentencing of the offender, prior to his removal from the court. In this way, the emotional aspect can be clearly separated from the sentencing process.

The co-victim shall, through the prosecution, disclose the impact statement to all parties as soon as is practicable before the sentencing hearing, enabling the defence and trial judge to review its contents prior to its oral delivery. As the statement will have no effect on sentencing, objections from the defence to part or parts of its contents and any requests for censorship should be carefully scrutinised before being judicially upheld. The co-victim should sign a declaration that the information contained in the statement is true and be made aware that he is prosecutable for providing information before the court known to him to be false, or intended to mislead or damage unfairly the position of the offender or the reputation of the court in the reasonable view of the court or the public at large.

To prevent abuse of the right to give an impact statement *viva voce*, the victim or co-victim should not appreciably stray from his pre-submitted text so as to ire or damage irreparably the position of the offender. If a departure occurs that places in the public domain unfounded or scurrilous allegations against the offender the victim shall be held in contempt of court. The co-victim must not offer any opinion as to how the court should have punished the offender, or use his statement to question evidence presented to the court, or bring before the court evidence that did not form part of the original prosecution case or defence confutation, nor is the flavour of his statement to be such as to bring into disrepute or be contemptuous of the substantive workings of the court.

While there will be an obligation on the court to allow the co-victim emote via his impact statement this should not preclude the court, on its own initiative, to give directions or impose conditions on the statement that may, in the opinion of the court, be necessary to protect the safety, security, emotional welfare or privacy of the victim

or co-victim, or indeed the immediate or long-term security of the offender. This will allow the court, in circumstances where it considers it necessary or appropriate, to direct that all or part of the statement not be disclosed, disseminated or published, protecting an offender from unfounded allegations which are extraneous to the offence for which he was convicted of.

The life-sentence for murder is a representation of society's abhorrence of the act and should be retained as its mandatory punishment. The period of a life-sentence for murder actually served in prison should be longer than the current average of 13½ years, but as an average and in most instances lower than the twenty-five years sought by AdVic. Findings presented here indicate that 18-20 years would be considered a favourable duration, representing as it does the middle ground between present practice and the entreaties of co-victims. To reflect that longer durations of mandatory life will be served in prison, an offender convicted of murder should only be first eligible to have his case reviewed by the Parole Board after a period of nine years has been served. In addition, the judiciary should be permitted to single-out what it considers to be specifically heinous murders by attaching to the mandatory life-sentence an exclusion from the parole process before a specified time of that sentence has been served (*e.g.* ten, twelve or fourteen years). This does not extend the life-sentence for legally, although admittedly rarely in practice, life means life. It does, however, ensure longer imprisonment for what the courts determine to be particularly callous murders.

It is vital that a comprehensive set of non-statutory sentencing guidelines be introduced so as to encourage consistent sentencing for manslaughter and serious crimes generally. These must take into account the rise in fatal interpersonal violence by duly reassessing previous sentencing standards regarding manslaughter so as to enhance the deterrent element of the punishment. This set of non-statutory sentencing guidelines should to be bolstered by a nationwide computerised Irish Sentencing Information System (ISIS) database and the greater dissemination of Court of Criminal Appeal decisions.

So as to avoid future challenges to its work, the Parole Board should be placed on a statutory footing so that it becomes an independent and impartial process that determines applications for release rather than merely advising the Minister for Justice, Equality and Law Reform.

Whilst co-victims should not be allowed to influence the length of sentences imposed by the judiciary, they ought to be afforded a voice in the process that has, at a later date, the potential to reduce that sentence. Therefore co-victims, unless they have recorded a wish to the contrary, should be invited by the Parole Board to make a written submission when it is reviewing the case of an offender convicted of murder or manslaughter. Co-victims, whether they have furnished the Parole Board with a written submission or not, and unless they have recorded a wish to the contrary, should be informed in writing of the decision of the Board, and of any conditions attached to the early release of the offender. Co-victims, unless they have recorded a wish to the contrary, should be informed by the Irish Prisons Service of the approximate release date of the homicide offender.

The implementation of these recommendations would go a significant way toward addressing the many needs and concerns which the co-victims of homicide are currently campaigning for.

Concluding Comments

The broad appeal of victims' rights is easy to understand. If we can't prevent violent crime, and, it can be argued, we have failed rather miserably in this regard, it seems only reasonable that we should do what we can to console and heal those harmed by it. This means ensuring that our justice system eliminates any form of secondary victimisation and includes the victim where and when it can, without sacrificing the necessary protective elements of the defendant.

Yet victims remain frustrated by what they hold to be the impregnability of the criminal justice system as a whole and its overall indifference to their needs and concerns. They are left feeling utterly unimportant, harmed first by the offender, then by the abrasiveness of many of the components of the legal process. Criminal justice itself may well be obdurate, its function limited to a very powerful set of intellectual and institutional structures, but victims articulate legitimate grievances and we must attempt to address these by striving to find alternative methods of conducting the business of the criminal justice system. It should not operate in a vacuum, detached from vindicating the claims or meeting the needs of victims. Even if there is no consensus that victim satisfaction is a necessary *sine qua non* for criminal justice, clearly a system within which the victim's sense of involvement can be enhanced without cost to other interests should be a preferable if not its imperative objective. The high value that we attribute to the principles that underpin it must not prevent us

from occasionally standing back and examining the workings and performance of criminal justice robustly with a critical eye. To paraphrase Dostoevsky, criminal justice can be best judged by observing the degree of civilisation it affords not just its offenders but also its victims. As the Chairman of the Parole Board, Gordon Holmes, so rightly put it:

> There should be a structured, State-controlled body looking after what is a very serious matter. The victims of crime should not be left unaided. Both in the aftermath of serious crime, or when the perpetrators of serious crime have served their sentence, the victims, or in murder cases the victim's family, are at their most vulnerable. They have done nothing wrong. The State owes them focused and organised support.[940]

There is now a growing acceptance of the need to improve the experience of victims within the criminal justice process, and in recent times parts of that system has borne a transitional albeit tentative receptivity towards them. As it comes to terms with the challenge to integrate a victim perspective, the criminal justice system must continue to find appropriate measures to accommodate the victim throughout a structure that traditionally favours the defendant. It is important to remember that the criminal justice system proved itself quite adept in the past at introducing significant measures designed to (rightly) protect and assist the defendant. By comparison, its refusal to do similar for the crime victim is either an illustration of the poverty of its imagination or its lack of concern in the matter. Institutional inertia in this regard is unacceptable. The path for victim reform is uncertain and will be long in gestation, it is not a one-off tick-box exercise but a constant and evolving process. There are no short-term answers or quick-fix solutions, its ultimate destination lies ahead in uncharted waters that will take thoughtful and inspired leadership to steer the ship the right path.

In the wake of spiralling homicide rates, and due in no small measure to the adroit and resolute campaigning of AdVic, the co-victims of homicide have moved to the fore in the victim debate in Ireland. They have been particularly emboldened by what has become a rather mutually beneficial relationship with the media, wherein co-victims have found a forum for their views, and where the media have found a willing human angle for the reporting of homicide:

> In the aftermath of having suffered an indescribable loss, such victims are repeatedly photographed and interviewed in print and broadcast media, inevitably facing the

[940] Parole Board *Annual Report 2006* (Dublin: Parole Board, 2007) 8. See also Rodden M 'Call for State body to help victims of crime' (28 June 2007) *The Irish Times* 7

question, "And how do you feel?" They are asked for their views on the criminal justice system and how well, or badly, they feel it has served them.[941]

In this way, victims' narratives are increasingly undermining the tendency to organise justice around the central axis of the State and the accused.[942] Nevertheless, AdVic seeks no formal standing or participatory role *per se* in the prosecution of an accused, and none of what they seek seriously challenges or has an adverse effect on the necessary due process protections afforded the defendant or the rights of the offender. This stance is welcome, for victim participation in the criminal trial, other than where proper as witnesses, is rejected here wholesale as a threat to the bifurcated, objective and public nature of criminal justice.

It is, however, *vis-à-vis* an array of wholly legitimate yet fairly benign service rights that co-victims make their main demands and indeed such claims place them on *terra firma*. As rigid as the law and its application must be, the workings of statutory agencies and services built around criminal justice need not be so intractable to the concerns of homicide co-victims. There is a real need to introduce measures designed to bolster the so-called social or service rights of the victim, like improving access to information, upgrading court facilities, and widening entitlements to compensation. These reforms are relatively non-contentious, threatening neither the public character of criminal justice nor the due process rights of the defendant, and emanate primarily from the victims' emerging and even inarguable status as consumers of criminal justice.[943]

Those who fear that providing service rights are the thin edge of the wedge to providing participatory rights somewhere further down the line are confusing the motivations of victims. It is important that this debate is not misinterpreted or stultified; homicide co-victims do not seek to dismantle the legal process nor demand a *tabula rasa* so as to reinvent it from first principles. They do not ask to conduct or sing solo but merely that their voices be allowed to join the chorus. From their perspective, they want not to rewrite but re-right the criminal justice system. It is wrong to label or fear victim activism as recalcitrant or dissident behaviour. Indeed, victims in this jurisdiction have consistently displayed reasoned campaigning for what

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[941] Coulter C 'Media must act to ensure crime reporting is fair and balanced' (7 July 2008) *The Irish Times* 11

[942] Crilly M, Fennell C, Kilcommins S & Leahy S 'Making the Voice of Victims Matter' (10 December 2007) *Irish Examiner* 15

[943] Faulkner D *Crime, State and Citizen* (Winchester: Waterside Press, 2001) 232

they seek and their activism, to some extent, holds our criminal justice system to account.

The loss suffered by the relatives of homicide victims is a devastating one, and most are fortunate long-term if they manage to eke out an existence that bears some passing resemblance to a normal life. It is harrowing enough to have to bear the killing of a loved one, but they must also endure a public investigation into that death and attempt to make sense of an unfamiliar and lengthy criminal justice process that has long since marginalised them. Homicide co-victims (and, for that matter, all victims of crime) have done nothing wrong and hold an incontrovertible right to the finest treatment the State can offer. The anguish they experience must never be underestimated or overlooked and should be at the heart of any future debate into meeting the needs and concerns of this particularly traumatised and damaged subset of victims. There can, of course, be no undoing of the killing, but the criminal justice system can help by eliminating insensitive or indifferent services and procedures. The justice system in its totality, from the courts to the prosecution and from the police to the parole system, must find ways to ameliorate the suffering institutionally caused to victims, or at least ensure that it no longer adds to it, and make certain that the seriousness of the unlawful taking of a life is reflected in both the way that system engages with co-victims and, equally importantly, how it manages homicidal offenders. We, as potential homicide victims or co-victims, should demand and expect nothing less.

It is easy to forget in a thesis that has centred on the needs and concerns of homicide co-victims that there is first and foremost a main victim to the crime, the person who was killed. Each time An Garda Síochána fail to deliver a considerate death notification or neglect to keep families informed throughout its investigation; each time the staff of the Director of Public Prosecutions do not take the time to meet with co-victims prior to a trial and prepare them for the various possible outcomes of the proceedings; each time when family members have to sit near the defendants' families in court, or must come into close contact with the defendant or his family when using courthouse facilities; each time the trial judge refers to the deceased victim by surname only or, as has happened, incorrectly; each time the sentencing judge refuses to hear the impact statements of co-victims, or seems more concerned with the individual and mitigatory circumstances of the offender when fashioning his sentence, or releases him on bail pending sentence; each time the parole system

focuses almost exclusively on the rehabilitation of the prisoner and his early release; each time the compensation awarded is inadequate to the needs of victims; and each time any legal professional or staff member of a criminal justice agency treats them badly; the extent that these and similar acts are done is more than just a dereliction of duty by the criminal justice system to its homicide co-victims, leading to renewed despair, it is also the abject and offensive performance of a system that is an insult to the victim whose life was illegally taken. It is the forgetting that at the centre of what is being played out is not how we should try to understand or rehabilitate the homicidal offender, or indeed how necessary it is that homicide co-victims be treated well, although these are both worthy goals, but that what is being played out began as the consequence of a life unlawfully taken, of a mother, a son, a wife, a daughter, a lover, a friend, a person killed. Too often sight of that fact is lost in the processes of criminal justice. Treating the loved ones of that victim with compassion, respect and accountability goes some way to restoring the co-victim's trust in society and, along with the implementation of the subsequent recommendations, is the best way that criminal justice can acknowledge and honour the absent victim.

APPENDIX I

Material Relating to the Postal Survey

A postal survey was conducted to quantify to what extent the legal profession were amenable to many of the changes sought by AdVic.[944] Gathered here is a copy of that postal questionnaire, entitled *What Place for the Families of Homicide Victims in the Criminal Justice System in Ireland? A Survey of Professionals in the Irish Legal System*, which issued in May 2006 as the empirical element of this thesis, together with its associated materials. These are, in order:

- the cover letter that issued with each questionnaire, outlining the name and nature of the research, the sample group chosen, in what way the results would be presented, and assuring respondents of their anonymity;
- the questionnaire itself, annotated to show how responses were recorded;

and letters from

- Professor Caroline Fennell, Dean of the Faculty and Head of the Department of Law, University College Cork, one of my supervisors;
- the Director of Public Prosecutions, James Hamilton, which accompanied each questionnaire sent to his legal staff, stating that as the survey was anonymous personnel should reply with their personal views rather than with those of the Office;
- the then President of the High Court, Mr Justice Joseph Finnegan, and the President of the Circuit Court, Mr Justice Matthew Deery, which were attached to each questionnaire sent to the bench of their respective courts; and
- the tabulated results of the survey.

Survey research carries with it an obligation to follow certain ethical norms and best practice standards. As a researcher I was conscious of this from the outset and every effort was made to ensure a high standard of ethical behaviour was observed throughout. I would, once again, like to thank Doctor Maire Leane, Department of Applied Social Studies at University College Cork, for her advice on empirical research, and Thomas Grall (BSc), for his invaluable assistance in compiling and verifying the results of the survey and for designing the associative tables and figures presented herein. I also thank those who gave of their time to return the questionnaire, and in doing so help make this survey a vital component of my thesis.

[944] See p9

[COVER LETTER]

Anthony McGrath
(home address printed here)
19th May 2006

(name,
firm where relevant,
and address of
recipient printed here)

Dear *(name of recipient printed here)*,

I am a 34 year old student currently researching a PhD through University College Cork (UCC), under the supervision of Professor Caroline Fennell and Dr Shane Kilcommins, which addresses the question *'What Place for the Families of Homicide Victims in the Criminal Justice System in Ireland?'* This is an extremely pertinent and topical issue, and as such I have decided to conduct a survey of professionals in the Irish legal system to assess what level of support may exist for some of the changes currently sought by AdVIC, an Irish lobby group consisting of families who find themselves in such circumstances.

It was decided to choose a constructive sample to survey, thereby focusing on a small group of people who have expert knowledge and experience in the relevant area. The sample determined comprises of –

- 66 judges of the Supreme, High and Circuit Court
- 83 legal staff of the Director of Public Prosecutions Office
- 50 barristers *(chosen from the top recipients under the criminal legal aid scheme 2005)*
- 50 solicitors *(chosen from the top recipients under the criminal legal aid scheme 2005)*

This survey consists of twenty short questions, with an option at the end for those who wish to provide more detailed comments the space to do so. This survey is entirely anonymous, and results will be presented in graph form as part of the completed doctorate. Replies should be returned in the stamped addressed envelope provided before Friday 23 June 2006. If you have any questions regarding this survey, please don't hesitate to contact me at *(email address printed here)*

I am sure you can appreciate the importance of achieving a high return of questionnaires to the overall research being conducted; therefore your cooperation is very much appreciated.

Yours sincerely,

(signed here)

ANTHONY McGRATH

[ANNOTATED QUESTIONNAIRE]

WHAT PLACE FOR THE FAMILIES OF HOMICIDE VICTIMS IN THE CRIMINAL JUSTICE SYSTEM IN IRELAND?

A Survey of Professionals in the Irish Legal System

Conducted by Anthony W. McGrath, BCL, LL.M as part of his PhD research through University College Cork (UCC), under the supervision of Dr Shane Kilcommins and Professor Caroline Fennell.

TO COMPLETE THIS SURVEY, PLEASE TICK BOXES TO THE RIGHT OF YOUR PREFERRED ANSWER.

A) GENERAL:

1. How would you grade the general treatment of families of homicide victims by the Irish criminal justice system?

   VERY POOR [1] POOR [2] AVERAGE [3] GOOD [4] VERY GOOD [5]

2. Should the commitments published in *The Victims' Charter and Guide to the Criminal Justice System* (1999) be safeguarded in legislation?

   YES [1] NO [2] UNFAMILIAR WITH PROVISIONS OF THE CHARTER [3]

3. In England, there is a non-means tested Bereaved Relatives Fund, financed by the Office for Criminal Justice Reform, to retrospectively meet the costs of travelling and accommodation of up to three relatives attending the trial of a person charged with the murder or manslaughter of one of their family. Should there be a similar fund sourced from the Exchequer here in Ireland?

   YES [1] NO [2]

B) INFORMATION:

4. Should there be a state appointed Victim Liaison Officer or Agency who would advise and assist the families of homicide victims, where necessary, through all their dealings with the criminal justice agencies?

   YES [1] NO [2]

5. Should there be a statutory obligation on the Courts Service to inform families of homicide victims of trial dates in advance?

   YES [1] NO [2]

6. Should the family of a homicide victim have a statutory right to be informed of the post mortem results prior to an inquest, which can only occur after a trial?

   YES [1] NO [2]

C) VICTIM IMPACT STATEMENTS:

7. Section 5 of *The Criminal Justice Act, 1993* introduced victim impact statements, by the direct victim, in cases of violent or sexual assaults. Should this legislation be retained?

YES [1] NO [2]

8. A practice has emerged permitting, beyond the direct meaning of s.5 of *The Criminal Justice Act, 1993*, the families of manslaughter victims, in certain circumstances, to make a victim impact statement. Should existing legislation be amended so as to establish this practice as a statutory right?

YES [1] NO [2]

9. In murder cases, should existing legislation be amended so as to permit families to make a victim impact statement so that the convicted is made aware of the harm and hurt he/she has caused by his/her actions?

YES [1] NO [2]

C) THE CHARGES OF MURDER AND MANSLAUGHTER:

10. Should there be the amalgamation of murder and manslaughter into a single statutory charge of criminal homicide?

YES [1] NO [2]

11. If the charge of manslaughter is to be retained, should the offence of murder be amended by legislation to the charge of murder by degrees?

YES [1] NO [2]

D) SENTENCING:

12. Should there be a practice that person(s) convicted of murder, manslaughter or non-fatal serious violent assaults can not to be granted bail where the case is to be adjourned after conviction for sentencing, save in exceptional circumstances?

YES [1] NO [2]

14. How would you rate, through your professional observation, the appropriateness of sentencing in manslaughter cases over the past five years?

VERY POOR [1] POOR [2] AVERAGE [3] GOOD [4] VERY GOOD [5]

15. What would be, in your professional opinion, the desired average duration of a mandatory life sentence served?

9-11yrs	[1]
12-14yrs (CURRENT*)	[2]
15-17yrs	[3]
18-20yrs	[4]
21-23yrs	[5]
24-26yrs	[6]
OTHER(*please specify* in years)	7 Q15Other [ ]

*Justice Minister Mr Michael McDowell, at the launch of the 2005 Annual Report of the Parole Board on 24th March, 2006 stated "I can tell you that, of those prisoners serving life sentences who have been released over the past ten years, the average sentence served in prison is approximately thirteen and a half years."

E) THE PAROLE BOARD:

16. A prisoner serving a mandatory life sentence is eligible to have his/her case reviewed by the Parole Board after 7 years have been served. What should be, in your professional opinion, the desired time frame in which this review can be initiated?

4-6yrs	[1]
7yrs(CURRENT)	[2]
8-10yrs	[3]
11-13yrs	[4]
OTHER(*please specify* in years)	5 Q16Other [ ]

17. In cases characterised by aggravating factors (such as cruelty, use of firearms, political, parliamentary or gangland motivation, or significant premeditation), should the judge be permitted to state, when passing down the mandatory life sentence in murder, that this sentence carries with it, as permitted in other jurisdictions,

a) the classification 'with no parole' ,

YES [1] NO [2]

b) the classification 'with no parole before a certain time' - as permitted in other jurisdictions?

YES [1] NO [2]

18. A family member of the deceased victim is currently permitted to make a written statement to the Parole Board if they themselves contact the Board. Should there be the placing of an onus on the Parole Board, when reviewing each case of a person convicted of murder or manslaughter, to seek a written submission from the family of the deceased person for their consideration?

YES [1] NO [2]

19. Should the family of the deceased person be informed, in writing, of the Parole Board's decision?

YES [1] NO [2]

20. Should the Prison Services inform, by writing, the family of a homicide victim in advance of the date on which the perpetrator of the homicide is to be released or repatriated (this currently only occurs if the family contact the Prison Services and request it)?

YES [1] NO [2]

COMMENTS:

Please add any comments you may have in relation to the matters addressed in this survey or, indeed, any other information you may wish to add relevant to the thrust of this research –
- PLEASE USE A SEPARATE SHEET IF NECESSARY -

THANK YOU FOR TAKING THE TIME TO COMPLETE THIS QUESTIONNAIRE.

Please return in the stamped address envelope provided to Anthony McGrath, 85 Ratoath Estate, Dublin 7

ROINN AN DLÍ
Department of Law

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Coláiste na hOllscoile Corcaigh, Éire
University College Cork, Ireland

Professor Caroline Fennell, BCL (NUI), LLM (Osgoode), PhD (Wales), Barrister-at-Law
Head of Department and Dean of Faculty of Law

15th May, 2006

To Whom It Concerns

Anthony McGrath is a second year Ph.D. student undertaking research in the area of the families of the victims of homicide offences. He has completed a large body of the non-empirical research, including a review of the law on homicide, the re-emergence of victims in criminal justice discourse, and the current law as it relates to victims of crime.

Anthony is now at a stage where he is in a position to commence the empirical component of his research. This consists of a short questionnaire survey to determine feelings on issues relating to the law and victimhood. In this regard I would be very grateful for any assistance that you could provide him with which would assist in ensuring that questionnaires are filled out. The responses will be both anonymous and confidential.

Many thanks for your assistance in this matter.

Yours sincerely,

Professor Caroline Fennell
Dean of the Faculty and Head of Department of Law

Director of Public Prosecutions
An Stiúrthóir Ionchúiseamh Poiblí

16 May 2006

TO: ALL LEGAL STAFF

Re: Questionnaire on Homicide Cases - Doctoral Research

By now you will have received a questionnaire from Anthony McGrath, a doctoral student in U.C.C. This includes a range of questions dealing with the disposal of murder and manslaughter cases in the courts. I understand that Mr McGrath's research centres on the place of the deceased victim's family within the prosecution and the criminal justice system. No doubt the results of the research will be helpful to us all in our work.

I would ask you to take the time to fill out the relatively short questionnaire. This questionnaire is being circulated to the defence and to Judges also. It is important that the research be representative in terms of the prosecution perspective. Replies to the questionnaire are anonymous. Any views expressed will therefore not be attributable to you personally. While the Office has a policy on most, if not all, matters dealt with in the questionnaire it may be that on personal level you would have a different perspective and this allows the scope to reflect those views.

Thanking you for your cooperation.

James Hamilton
Director of Public Prosecutions

14-16 Merrion Street, Dublin 2.
14-16 Sráid Mhuirfean, Baile Átha Cliath 2
☎ 353 1 678 9222 353 1 661 8116 jameshamilton@indigo.ie www.dppireland.ie

AN ARD CHÚIRT
An Ceithre Chúirt
Dublin 7
Tel (01) 8886520



THE HIGH COURT
THE FOUR COURTS
Dublin 7
Fax (01) 8726249

16th May 2006

Mr. Justice Joseph Finnegan
President of the High Court

Mr. Anthony McGrath
85 Ratoath Estate
Dublin 7

Dear Mr. McGrath,

I note that your PhD thesis will address the question "What place for the families of homicide victims in the criminal justice system in Ireland?". I have noted the contents of the questionnaire which you propose requesting Judges of the High Court to complete. I confirm that I am satisfied that your research deserves the support of the High Court Judiciary and I have no objection to you sending the questionnaire to High Court Judges as you envisage and to their answering the same.

Yours sincerely,

Joseph Finnegan

AN CHÚIRT CUARDA
BAILE ÁTHA CLIATH 7

PRESIDENT
Mr. Justice Deery

THE CIRCUIT COURT
FOUR COURTS
DUBLIN 7

TEL: (01) 888 6000
FAX: (01) 872 6750

19th May, 2006

Re: Survey on "What Place for the Families of Homicide Victims in the Criminal Justice System in Ireland"

Dear Judge,

The enclosed survey on this topic is a very worth while exercise and I would request that you try to respond in a positive manner to assist in the completion of the project.

Kind regards.

Yours sincerely,

Matthew Deery.
President of the Circuit Court.

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