Prevention of Benefit from Homicide: A Critical Analysis of the Law Reform Commission's Proposals

This article offers a critique of the Law Reform Commission's recent proposals on the prevention of benefit from homicide. A person who has committed murder or manslaughter could potentially benefit in various ways, e.g. through inheriting from the estate of his or her victim or through the operation of the right of survivorship in the context of a joint tenancy. Cases in the succession law context are currently governed by section 120(1) of the Succession Act 1965, while in other instances an analogous common law principle is applied. In principle, the idea of providing for a more detailed and comprehensive statutory regime is uncontroversial. However, as the article argues, the LRC's proposal in this respect is defective in a number of ways. The article criticises the inclusion of attempted murder as one of the offences triggering the prevention of benefit principle, as well as the exclusion of those guilty of homicide as accessories and the treatment of persons who are unfit to be tried. In addition, the article criticises the LRC's proposals in relation to joint tenancies on the basis that they go beyond what is necessary to prevent the offender from benefitting from the homicide.

In its recent Report on *Prevention of Benefit from Homicide*,[1] the Law Reform Commission has addressed the difficult problems that arise where a person has committed homicide and, if the law failed to intervene, would stand to obtain some form of proprietary benefit as a result of that crime. The potential benefit could arise under the law of succession or due to the operation of the right of survivorship in the context of a joint tenancy or on some other basis, as where the killer is the beneficiary of an insurance policy taken out on the victim's life. The Law Reform Commission identified two related principles of public policy that apply to deny a benefit to the wrongdoer in these kinds of situations. The first is that "no person should be able to benefit from his or her wrongful conduct" and the second is that "no cause of action should arise from one's own unlawful or dishonourable act".[2] Although it was once the case that a felon suffered "civil death" and forfeited all his or her property to the Crown, this conception of forfeiture was abolished by the Forfeiture Act 1870. As a result, it became possible that a person might profit from the commission of a homicide and this required the law to develop specific rules to prevent this from

[1] LRC 114—2015 (July 2015) (henceforth "Report").
[2] Ibid 9.

happening.[3] Although there are differences in terms of detail (and the position has been clarified and/or modified by legislation in some jurisdictions), at a broad level of generality, the law is comparable across common law jurisdictions such as England and Wales, Australia, New Zealand and Canada.[4]

The area is already partially governed by legislation in Ireland. Section 120(1) of the Succession Act 1965 states that:

> "A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising under a will made after the act constituting the offence, and shall not be entitled to make an application under section 117."[5]

However, this provision is part of the codification of the law of succession represented by the Succession Act 1965 and it does not address situations which arise in other contexts. Thus, it had no application in *Cawley v Lillis*,[6] where the dispute concerned the impact, on the ownership of property that had been held in joint tenancy by the husband and wife, of the husband's conviction for the manslaughter of his wife. At the conclusion of her judgment in the case, in which she applied a common law rule analogous to section 120(1), Laffoy J noted that "ideally" there should be legislation in place to govern cases arising in the co-ownership context.[7] Further impetus was given to law reform by the subsequent decision in *Nevin v Nevin*,[8] a succession law case where Kearns P struggled to

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[3] Ibid 9-10. See generally, T G Youdan "Acquisition of Property by Killing" (1973) 89 LQR 235; T K Earnshaw and P J Pace "Let the Hand Receiving it be Ever so Chaste" (1974) 37 MLR 481.
[4] See N Peart "Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia" (2002) 31 Common Law World Review 1; Forfeiture Act 1982; Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 (UK); Forfeiture Act 1995 (New South Wales); Victoria Law Reform Commission *The Forfeiture Rule: Report* (Melbourne, 2014); Succession (Homicide) Act 2007 (New Zealand); *Lundy v Lundy* (1895) 24 SCR 650; *Nordstrom v Baumann* [1962] SCR 147; C Triggs "Against Policy: Homicide and Succession to Property" (2005) 68 Sask L Rev 117 (Canada).
[5] On this provision, see Brian E Spieren *The Succession Act 1965 and Related Legislation: A Commentary* (4th edn, Bloomsbury 2011) 408-11. Section 120(5) clarifies that "[a]ny share which a person is precluded from taking under this section shall be distributed as if that person had died before the deceased."
[6] [2011] IEHC 515, [2012] 1 IR 281.
[7] Ibid 303.
[8] [2013] IEHC 80.

understand an aspect of the wording of section 120(1) and suggested that it would be "of considerable assistance if a suitable amendment … could be effected".[9]

The LRC Report proposed the repeal of section 120(1) and its replacement with a modified, and more detailed, legislative framework which would cover the full range of situations where it is necessary to prevent a person obtaining a benefit from having committed homicide. This article offers a critical assessment of the LRC's proposals. The underlying premise of the LRC's reform proposals (and of the existing law in this area), that a person should not be permitted to benefit from the crime of homicide, is uncontroversial in itself. Complexity arises, however, in terms of the appropriate treatment of the range of circumstances that can arise in practice. Given the constraints of space, the emphasis in the article will be on those aspects of the LRC Report with which the current author does not agree, since it is where different thinking seems to be required that there is the greatest possibility of making a constructive contribution. Part 1 of the article discusses issues related to the scope of the forfeiture rule, i.e. questions concerning the type of offences and offenders that should be covered by that rule. Part 2 then addresses the specific issues that arise in cases involving joint tenancies. It criticises the LRC's proposal that the court would exercise a discretion to determine the parties' respective shares in this situation and suggests an alternative approach reflecting the idea that the law's response should not go beyond preventing the killer from obtaining a benefit.

PART 1: THE SCOPE OF THE FORFEITURE RULE

[9] Kearns P's difficulty related to a difference between the wording of s 120(1) and that of s 120(4), which precludes a person "found guilty" of certain offences against the deceased or his family from insisting upon his or her legal right share (as spouse or civil partner) or from making an application for increased provision under s 117 (as a child of the deceased). This contrasts with the reference in s 120(1) to those who are "guilty". In fact, the wording of s 120(1) reflects the orthodox view (see text to (n 10-13)) that a conviction should not be necessary to trigger the prevention of benefit principle, an approach that would make less sense in the different context of s 120(4). Note that the LRC recommended that s 120(4) be repealed without replacement: (n 1) 52-55, seeming to overlook the non-discretionary nature of a spouse's entitlement to the legal right share. The LRC recommendation would mean e.g. that a spouse who had been convicted of serious sexual offences against the children of the deceased would be entitled to insist upon a legal right share if disinherited (unless, which would not always be the case, this entitlement had been lost in the context of a formal divorce or judicial separation).

This part considers a range of issues relating, broadly speaking, to the range of offences and offenders that should be covered by the forfeiture rule. The LRC's approach was that the absence of a conviction, or even the fact of an acquittal, should not prevent the application of the forfeiture rule.[10] This reflects the existing terms of section 120(1)[11] and the case law of other jurisdictions.[12] If the conviction of the offender were a requirement of the application of the forfeiture rule, there would be no way to prevent a benefit passing to the estate of a murderer who died (perhaps having committed suicide) before being brought to trial or who was a long-term fugitive from justice.[13]

The LRC's proposals focused on the three offences of murder, attempted murder and manslaughter, which are also those listed in section 120(1). This involves the conclusion that all forms of manslaughter should continue to be covered by the forfeiture rule. This makes sense given the LRC's proposal to give the court discretion to disapply the rule in cases involving manslaughter where the circumstances are such that there is little moral blameworthiness associated with the offender's actions.[14]

At one point in the Report, it is stated that "most consultees" took the view that the forfeiture rule should be applied to *inter alia* "cases of assisted suicide".[15] Surprisingly, there is no further discussion of the point in the Report and the offence is not mentioned in the Draft Bill. On balance, the current author takes the view that the inclusion of assisting suicide would, in fact, have been the appropriate choice. Some cases of assisting suicide seem clearly to involve a sufficient level of culpability to justify preventing the perpetrator from benefiting, e.g. where, with the intention of benefitting thereby, the perpetrator plays a crucial role in inducing the deceased to commit suicide; these cases should not be allowed to fall outside the net when it is possible to deal with cases

[10] Report (n 1) 66-67.
[11] See (n 9).
[12] *Gray v Barr* [1971] 2 QB 554; *Helton v Allen* (1940) 63 CLR 691.
[13] Mirroring the approach at common law, the position taken by the LRC was that the applicable standard of proof of guilt should be the balance of probabilities: Report (n 1) 67.
[14] Report (n 1) 47-51. See discussion in the text to (n 105-109). The LRC's view was also that the forfeiture rule should not be extended to cover "other forms of offences that lead to death, such as dangerous driving causing death": (n 1) 47.
[15] Report (n 1) 45. See s 2(2) of the Criminal Law (Suicide) Act 1993.

involving lesser culpability by granting partial or total relief in pursuance of the proposed statutory discretion.[16]

The discussion which follows focuses on three specific aspects of the LRC proposals: (i) the inclusion of attempted murder within the forfeiture rule; (ii) the exclusion of accessories and (iii) the exclusion of those who are unfit to be tried.

1. Attempted Murder

Unfortunately, the LRC did not devote any discussion in its Report to the question of whether attempted murder should be included in a reformed codification of the forfeiture rule, simply assuming that its inclusion was appropriate. The LRC appears to have overlooked the basic point that what distinguishes attempted murder from murder is the survival of the victim. In the succession law context, if the offender has not caused the death of the testator, it cannot be said that allowing him to partake in the testator's estate, when the testator ultimately dies, will allow him or her to benefit from his or her crime. The position is similar in the context of joint tenancies. In that context, the Report states the existing law as follows:

> "If there are two joint owners, the person guilty of murder, attempted murder or manslaughter becomes the full legal owner of that property under the right of survivorship."[17]

This statement is, however, incorrect as it applies to attempted murder. The fact that one of the joint tenants attempts to murder another joint tenant does not trigger the right of survivorship; the victim of the relevant crime is not dead and continues to be a joint tenant in the eyes of the law.

It does not appear that any other common law jurisdiction regards attempted murder as falling within the scope of its forfeiture rule and its

[16] Infanticide also does not appear to be covered by the LRC's proposals. This exclusion may not be logical because, although infanticide is a distinct offence, Irish criminal law effectively equates it with an offence which is covered by the LRC proposals, i.e. manslaughter on the grounds of diminished responsibility (see Infanticide Act 1949, s 1 as amended by s 22 of the Criminal Law (Insanity) Act 2006).
[17] Report (n 1) 19.

inclusion cannot be reconciled with the "prevention of benefit" principle upon which the LRC focused in its Report. The inclusion of attempted murder in section 120(1) of the Succession Act is, in fact, explicable on the basis that it was "framed after a study of articles contained in the French, German and Swiss Civil Codes".[18] The civilian model is based on the different idea of "unworthiness to inherit",[19] a label which is echoed in the title of Part X of the Succession Act 1965.[20] As MacLeod and Zimmerman explain:

> "In none of the modern continental legal systems does the fundamental moral precept that no one should be allowed to benefit from his or her own crime play a central role in rationalizing the unworthiness regime."[21]

Under the civilian approach, a person's conduct may make him unworthy to succeed and this unworthiness can, in principle, result from crimes other than homicide.[22] In some legal systems, the principle can "encompass behaviour which is not even criminal".[23]

It is not easy to find a coherent rationale for the civilian "unworthiness to succeed" approach. The most plausible rationalisation seems to lie in the need to protect the autonomy of the deceased person, whose ability to make an informed choice about the destination of his or her estate can be compromised by the actions of another person, as for example in the case of a homicide committed by a prospective beneficiary. It is true, however, as Zimmermann and MacLeod argue, that "it should, as far as possible, be left to the deceased persons to determine who is to inherit their estate and thus to exclude those regarded by them as undeserving or 'unworthy'".[24] This suggests that the relevant rules

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[18] Dáil Deb 25 May 1965, vol 215, col 2029 (Minister Brian Lenihan).
[19] See generally, Ian Williams "How Does the Common Law Forfeiture Rule Work?" in Birke Häcker, Charles Mitchell (eds), *Current Issues in Succession Law* (Hart Publishing, 2016) 52-53.
[20] "Unworthiness to Succeed and Disinheritance".
[21] John MacLeod and Reinhard Zimmermann "Unworthiness to Inherit, Public Policy, Forfeiture: The Scottish Story" (2012-13) 87 Tulane Law Review 741, 745.
[22] See e.g. *Bürgerliches Gesetzbuch* [BGB] [German Civil Code] § 2339-2345, referred to by MacLeod and Zimmermann (n 21) 746.
[23] Williams (n 19) 52.
[24] (n 20) 785.

should operate only as "a kind of safety net for situations where deceased persons had typically been unable to do so".[25]

In light of the above, the inclusion of attempted murder in the LRC proposals (and in the current law as reflected by section 120(1)) seems questionable. While it is true that a person who has, in the past, attempted to murder another person is likely to be regarded by that other person as "unworthy to succeed", why is it necessary for the law to automatically exclude the perpetrator from inheriting? Under the LRC's proposals (and under the current law), other extremely serious offences against an individual such as rape or assault causing serious harm, or the murder of the individual's spouse, do not serve to make the offender automatically unworthy to succeed. As with these other offences, the victim of attempted murder will normally have the opportunity to take steps, on his or her own initiative, to disinherit the perpetrator, and it is not easy to see the need to single out the offence of attempted murder for special treatment in terms of automatic exclusion of the perpetrator.

In the context of joint tenancies, it is even more difficult to justify the LRC's proposal[26] to treat attempted murder on a par with murder or manslaughter. The LRC's proposal in respect of this situation will be discussed in detail in Part Two of this article but its essence is that the joint tenancy would be severed and the court would have a discretion, in accordance with a list of factors, to adjust the respective fractional shares of the parties under a tenancy in common.[27] The consequence of the LRC's proposal is that, as with the murder or manslaughter of a joint tenant, the attempted murder of a joint tenant would trigger an immediate severance of the joint tenancy. One initial problem with this is that, unlike the disqualification of the perpetrator from inheriting in the succession law context, the severance of a continuing joint tenancy cannot be seen as a simple restriction of the perpetrator's rights. Whether the automatic severance of a joint tenancy is favourable to the perpetrator or to the victim depends on which one ultimately lives longer and, therefore, stands to benefit

[25] Ibid.
[26] Ibid 36.
[27] Ibid 36-37.

from the operation of the right of survivorship. It does not seem that the law should react to the attempted murder of one joint tenant by another by imposing the double-edged consequence of automatic severance, which is (in principle) as likely to benefit the perpetrator as the victim.

In any case, it is difficult to see why the law should regard the attempted murder of one joint tenant by another as justifying legal intervention to alter the nature of the co-ownership between the parties. Under existing law, the relevant crime has no effect on the existing joint tenancy; each party's legal rights remain as before. If one thinks in terms of the prevention of benefit principle, there is therefore no benefit to the perpetrator of which he or she could be deprived. In order to develop an alternative justification for legal intervention, analogous to the civil law approach in the succession law context, it would be necessary to posit a new concept of "unworthiness to remain as a joint tenant with another", which does not appear to be a convincing theoretical option. It must also be taken into account that, under the LRC's proposals, the court would have a discretion to reduce the perpetrator's share under the tenancy in common that would arise upon the severance of the joint tenancy. Unlike preventing the perpetrator of a crime from inheriting from his or her victim, a reduction in the perpetrator's share in co-owned property cannot be seen as depriving the perpetrator of a potential benefit (under the prevention of benefit principle). Neither could it be justified – by analogy with the rationalisation proposed above for the civil law approach in the succession law context – as an intervention by the law to protect the victim's autonomy. This is because, firstly, there is nothing to prevent the victim from taking steps on his or own initiative to sever the joint tenancy and, secondly, the steps available to the victim would not include reducing the perpetrator's fractional share under the tenancy in common that would result. Any reduction in the perpetrator's share would simply amount to the arbitrary imposition, outside of the criminal process, of an additional punishment for the perpetrator's crime.[28]

[28] See further, text following (n 73) below. Although space does not allow this to be worked through in this article, it seems that the LRC's inclusion of attempted murder in its general formulation of the forfeiture principle could have illogical consequences in other contexts, e.g. in relation to pensions or the proceeds of a life insurance policy (see ibid 42-43).

On the whole, it is submitted that the appropriate approach would be to exclude attempted murder from the proposed statutory scheme and, instead, to focus simply on the prevention of benefit through homicide.

2. Accessories

A surprising aspect of the LRC's approach relates to the question of whether the forfeiture rule should apply "to a person who aids, abets, counsels or procures the commission of the homicide offences".[29] Starting from the assumption that the current rule in section 120(1) does not apply to such a person,[30] the LRC concluded that this position should be maintained in its proposed new statutory regime. This approach involved rejecting the view of "most consultees".[31] The LRC's reasoned that "what constitutes such a level of participation can vary enormously and, furthermore, the terms 'aid' and 'abet' are not subject to clear definitions".[32] The LRC emphasised that its Report was "concerned with civil liability … and it should not be presumed that the criminal law liability imposed on those who aid and abet a principal offender should also apply in a civil law setting."[33] Thus, "[g]iven the range of conduct, with highly variable degrees of subjective culpability, that may come within the meaning of 'aiding, abetting, counselling or procuring' the Commission … concluded that in the current context they should not be equated with the act of the person who carries out the offence".[34] The current author's view is that the LRC was mistaken in its view that the current law (whether under section 120(1) or under the common law applicable outside the succession context) treats accessories as outside the forfeiture rule and was seriously misguided in concluding that it would be appropriate to provide for such an exclusion in reforming legislation.

To deal first with the current law, the key point is that a person who has "aided, abetted, counseled or procured" the commission of an offence is simply guilty of the relevant offence. Under the section 7(1) of the Criminal Law Act

[29] Ibid 46.
[30] Ibid 45.
[31] Ibid.
[32] Ibid 46.
[33] Ibid 47.
[34] Ibid.

1997, "[a]ny person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender". This reflects the previous law,[35] under which there is no separate offence that is committed by a person who "aid, abets, counsels or procures" the commission of an offence.[36] The point tends to be taken for granted in textbook discussions of accessory liability and so there are not many crisp statements of it. However, Herring makes the point explicitly when he states that "[t]he accessory is convicted of the same offence as the principal" and "a person who assists in a murder is guilty of the offence of murder".[37] Such an offender, therefore, automatically comes within the common law rule applicable to the offences in question and also within the scope of section 120(1), which refers to those "guilty" of murder, manslaughter or attempted murder. The argument in this paragraph is supported by the fact that it was assumed, without discussion, that the forfeiture principle was applicable in *Nevin v Nevin*,[38] notwithstanding the fact that the person against whom the forfeiture principle was applied, Catherine Nevin, was described at her murder trial as having "had [her] husband assassinated".[39] She had procured his killing by a contract killer or killers and so was convicted of the offence of murder and was, therefore, covered by section 120(1).[40]

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[35] See s 7 of the Accessories and Abettors Act 1861, repealed by sch 3 of the Criminal Law Act 1997. This provision governed felonies, extending the common law rule to the same effect that was already applicable to misdemeanors.

[36] Contrast s 7(2) of the 1997 Act, which creates a distinct offence which is committed where a person "does without reasonable excuse any act with intent to impede [the] apprehension or prosecution" of another person who is guilty of an arrestable offence.

[37] Jonathan Herring *Criminal Law[:] Text, Cases and Materials* (6th edn, OUP 2014) 891.

[38] [2013] IEHC 80.

[39] Irish Times Reporters "Nevin gets life sentence as jury finds she murdered her husband" *The Irish Times* (Dublin, 12 April 2000) 1.

[40] The LRC seems to have regarded as significant (Report (n 1) 45) the fact that the legislation applicable in the United Kingdom, the Forfeiture Act 1982 and the Forfeiture (Northern Ireland) Order 1982 (note also Succession (Scotland) Act 2016, ss 12-17), provides that references to unlawful killing include aiding, abetting, counselling or procuring such a killing: s 1(1) of the 1982 Act; Art 1 of the 1982 Order. The LRC appears to have assumed that this legislation changed the law in the United Kingdom so that, for the first time, the forfeiture rule there would cover the liability of accessories. However, the relevant legislation does not create or restate the forfeiture rule; its function is to give the court discretion to grant relief from the operation of the pre-existing common law rule. That the Forfeiture Act and Order are phrased so as to cover accessory liability, in fact, indicates an understanding by the drafters that the common law principle also covers such liability. This legislation – unlike s 120 of the Succession Act 1965 – does not define its scope of application by referring to persons who are "guilty" of certain listed offences. Instead, reference is made to a person who has "unlawfully killed" another. This wording is not apt to

It has been argued, thus far, that the current law covers those who are guilty of homicide as accessories. In terms of whether the law should be changed to exclude such persons, the reasons given by LRC seem plainly inadequate. In the first instance, it seems doubtful that the civil law should second-guess the criminal law in the manner advocated by the LRC. The definition of accessory liability is regarded as sufficiently clear (in a murder case) to justify stigmatising a criminal defendant who satisfies it as a murderer and subjecting him or her to a compulsory life sentence; can our legal system, at the same time, sensibly regard that definition as too vague to justify imposing the civil law consequence of depriving the accessory of a proprietary benefit?

As well as referring to the lack of clarity around the definition of accessory liability, the LRC also emphasised that such liability could involve a wide range of moral culpability. In response to this, it can again be noted that the criminal law regards the culpability involved as sufficient to justify conviction for the principal offence. There is, in any case, another point to consider. The fact that accessory liability involves a wide range of moral culpability means that, as well as cases where the culpability of the accessory is less than that of the principal, there are also cases where the accessory's culpability is equal to, or greater than, that of the principal. In this context, it has been suggested that "Lady Macbeth was worse than Macbeth".[41] McAuley and McCutcheon make the same point by reference to the examples of "a person who commands the killing of another" and "[t]he leader of a criminal organisation, under whose direction crimes are committed, [but who] keeps his 'hands clean'".[42] It seems clearly inappropriate that the law should be set up so that a murderer can be certain of escaping the consequences of the forfeiture rule, simply by avoiding personally carrying out the murder. The proper approach, it is submitted, is clearly that there should be no special exemption for those who are guilty because they were accessories.[43] Cases where the culpability of the person in question is

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cover an accessory to homicide. This explains the inclusion of a proviso to the effect that "unlawful killing" includes aiding, abetting etc.

[41] Glanville Williams *Textbook of Criminal Law* (Stevens and Sons 1978) 287, quoted in TJ McIntyre, Sinead McMullan, Sean O'Todhga *Criminal Law* (Round Hall 2012) 355.

[42] Finbarr McAuley and J Paul McCutcheon *Criminal Liability: A Grammar* (Round Hall 2000) 453.

[43] Note that this view has recently been taken by the Victoria Law Reform Commission *The Forfeiture Rule: Report* (Melbourne, 2014) 22.

comparatively low would fall to be dealt with under the general discretion which, under the LRC's proposals, would be available to the court to grant relief from the application of the forfeiture rule.[44]

3. Fitness to be Tried

The LRC sensibly recommended[45] maintaining the current position whereby the forfeiture rule does not apply to a person to whom the defence of insanity is available.[46] Unfortunately, the LRC took the view that a similar exclusion should apply where a person has been found unfit to be tried.[47] The rationale for this approach was stated to be that:

> "[T[he arrangements in the *Criminal Law (Insanity) Act 2006* concerning this area of law now clearly provide that a person is either fit to be tried or else is subject to such a severe illness that he or she should not be dealt with in the criminal justice system. In those circumstances, it would not be appropriate to apply the public policy principles to such a person."[48]

However, this seems to overlook a point that is heavily stressed in the Report,[49] i.e. that the application of the forfeiture rule is a civil law matter which does not depend on a conviction and does not involve dealing with the defendant within "the criminal justice system".

The issue of fitness to be tried, which involves an assessment of the defendant's mental state at the time of a possible trial, is logically distinct from the issue of whether the insanity defence would apply to the defendant's prior actions in killing the victim, which involves an assessment of the defendant's mental state at that earlier time. It is possible that, due to a subsequent deterioration in his or her mental state (possibly as a consequence of having

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[44] See text to (n 105-109).
[45] Report (n 1) 58-59; 64-65.
[46] Section 120(1) applies to "a sane person who has been guilty" of one of the relevant crimes. The word "sane" here has become otiose because, under the Criminal Law (Insanity) Act, s 5, the old verdict of "guilty but insane" has become "not guilty by reason of insanity".
[47] Report (n 1) 64-65.
[48] Ibid 64.
[49] See ibid 57-67.

committed the homicide),[50] a person could be found unfit to be tried even though he or she was fully sane at the time of the homicide. The general approach taken by the LRC involves a willingness to apply the forfeiture rule to situations where the defendant has not been the subject of a criminal trial, for example because he or she has died before having been tried for the alleged homicide. Cases where the alleged perpetrator is unfit to be tried should be treated in the same way as any other case where there has been no conviction.[51]

PART TWO: ISSUES IN RELATION TO JOINT TENANCIES

The case where one joint tenant kills another is not covered by section 120(1) of the Succession Act. In the context of a joint tenancy, the killer stands to benefit through the right of survivorship and, where there were initially only two joint tenants, would become the sole owner of the property by virtue of the operation of that right. In terms of preventing the killer from benefitting, the approach that has been adopted "whether in case law or in legislation, in virtually every common law jurisdiction"[52] is that the victim's death is regarded as triggering a severance of the joint tenancy, with the killer and the victim's estate (excluding the killer) holding the property from that time as tenants in common in equal shares in equity. This approach could equally be described as involving a severance in equity of the joint tenancy or as requiring the killer to hold on a constructive trust for himself/herself and the victim's successors in equal shares; there is no practical difference between these two formulations. It has been said that, under this approach, there is "neither a gain nor a loss for any of the joint tenants" with the killer "being prevented from enlarging their share while not being stripped of their existing legal interest."[53] This is the approach that was applied by Laffoy J in *Cawley v Lillis*.[54]

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[50] See *Re Pechar* [1969] NZLR 574, 583, where Hardie Boys J referred to "the possibility of ultimate mental disorder deriving from, rather than being a cause of, the acts themselves".
[51] See text to (n 10-13) above.
[52] Report (n 1) 31.
[53] Victoria LRC (n 16) 76.
[54] [2012] 1 IR 281.

Laffoy J stated in *Cawley* that "ideally, there should be legislation in place which prescribes the destination of co-owned property in the event of the unlawful killing of one of the co-owners by another co-owner".[55] She mentioned that such legislation would have to deal with the changes to the law of co-ownership brought about by the Land and Conveyancing Law Reform Act 2009 (the "LCLRA"). The key provision in this respect is section 30, which makes the prior written consent of all the other joint tenants a prerequisite to any unilateral attempt by one joint tenant to sever the joint tenancy. This provision did not apply to the dispute in *Cawley* because the homicide in question took place prior to the coming into force of the relevant provisions of the LCLRA. Laffoy J also referred to the need to provide a solution to the more complex problems that arise in a situation where there were initially three or more joint tenants.

Although the majority of submissions favoured the "half share" approach that had been taken in *Cawley*,[56] the LRC's Report advocated an approach that had not been mentioned in the preceding Issues Paper[57] and which, therefore, had not been the subject of consultation. This approach, moreover, does not appear to have been favoured in any other jurisdiction up to now. According to the LRC, it "involves a proportionate delimitation of the constitutional property rights of the offender which at the same time reflects the effect of depriving the deceased of his or her right to life."[58] Under the approach in question, the killer would not benefit from the right of survivorship but there would instead be a tenancy in common between the parties.[59] It would be for the court to

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[55] Ibid 303.
[56] Report (n 1) 24.
[57] *Issues Paper on Review of section 120 of the Succession Act 1965 and Admissibility of criminal convictions in civil proceedings* (LRC IP 7—2014).
[58] Report (n 1) 36.
[59] The Report states ((n 1) 36 and (in the Draft Bill) 88) that "the legal and beneficial interests in the property held under the joint tenancy between the victim and the offender shall stand severed from the date when the offence … was committed". This phrasing is difficult to interpret because of the principle that a person who holds property beneficially (i.e. with no trust yet in existence) does not hold separate legal and beneficial interests: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 706E-F (Lord Browne-Wilkinson). One interpretation of the LRC's recommendation is that a severance will occur, at law, at the time that the offence is committed, with the result that no trust comes into existence (so that the LRC proposal is a modified version of Option 2 discussed in the Report (n 1) 21-22). The other reading is that the statement that the legal and beneficial interests "shall stand severed" is intended to convey the fact that a trust has come into existence, with the legal and

determine, in accordance with a long list of factors, the extent of the parties' interests under this tenancy in common on the basis of what is "just and equitable", but there would be a presumption that the victim would hold at least half of the interest in the property.[60] The LRC noted that "the result of this approach may, in a specific case, reduce the offender's percentage to much less than half, and may perhaps approach in some instances close to 0%".[61] However, the LRC took the view that this would not be unconstitutional because it would arise from "a case-by-case approach".[62]

1. Background to the LRC Proposal

The killing of Celine Cawley by Eamonn Lillis set off a "media frenzy", which lasted even past his release from prison after serving his sentence for manslaughter.[63] The dominant narrative in the coverage of the case is illustrated by headlines such as: "Wife-killer Eamonn Lillis now a millionaire thanks to tragic Celine Cawley".[64] The implication of much of the news coverage was that an injustice had been done, with Lillis managing to profit from the crime of killing his wife, notwithstanding the fact that he emerged with only a one-half share in property that had been jointly owned prior to the homicide. The shrill tone of the media coverage is echoed in the Explanatory Memorandum to the Succession (Amendment) Bill 2015, a Private Members' Bill put forward by Senator Feargal Quinn. The Explanatory Memorandum suggested (notwithstanding the actual result in *Cawley*) that legislative inaction has given rise "to a grossly unjust and perverted incentive for a joint tenant with malicious intent to kill another joint tenant" and goes on to state that the fact "[t]hat the law closes its eyes to this perversion of public policy is breathtaking".[65]

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beneficial interests now differing and a severance of the joint tenancy having taken place only in equity (so that the LRC proposal is a modified version of Option 3, discussed ibid 22). This may be a somewhat more artificial reading of the words in the Report but is consistent with the fact that the LRC draws on the logic of "the constructive trust" in support of its recommendation: ibid 33.

[60] Report (n 1) 39. For discussion of the LRC's recommendation in cases where there are three or more joint tenants, see text to (n 102).

[61] Ibid 36.

[62] Ibid.

[63] Conor Lally "Eamonn Lillis case: A Media Frenzy from the Outset", *The Irish Times* (Dublin, 11 April 2015).

[64] Anon *The Irish Independent* (Dublin, 10 April 2015).

[65] Explanatory Memorandum to the Succession (Amendment) Bill 2015, 1.

The proposal in the Bill was that the killer would not only be prevented from benefitting from the right of survivorship but would also lose his pre-existing share in the property. After discussing the Bill in detail,[66] the LRC Report noted that it constituted "a proposal to deprive the offender of property rights".[67] Interestingly, the LRC then suggested that "[t]he key question that therefore arises is whether this is permissible in terms of the constitutional provisions on property rights".[68] There was no discussion of whether the approach in the Bill, even if it were constitutionally permissible, would be desirable in principle. The discussion later moved on to another approach which has the same practical effect as that of the Bill. Under this approach, the property would be dealt with as if the killer had predeceased the victim, with the result that (in a two-party situation) the victim's estate would take full ownership of the property that had been held in joint tenancy. This approach has been taken in "[a] small minority of states [in the USA] such as Massachusetts and North Dakota".[69] This approach received some support amongst consultees but was rejected by the majority.[70] The LRC did not accept that "the 'total deprivation' rule … should necessarily be regarded as being unsuitable merely because it represents a minority approach."[71] Again, this phrasing seems to indicate sympathy with the approach in question. However, the LRC ruled it out, reasoning that it "might well be unconstitutional" because "it would involve an impermissible deprivation of existing property rights".[72] The LRC then argued that "[i]t does not follow from this conclusion, however, that the only alternative to total deprivation … is the 'half share' rule adopted in many jurisdictions".[73] The LRC then proceeded to advance the proposal that has been outlined above.

2. Can the LRC Proposal be Justified?

[66] Report (n 1) 24-27.
[67] Ibid 26.
[68] Ibid 26-27.
[69] Ibid 32.
[70] Ibid 24.
[71] Ibid 32.
[72] Ibid.
[73] Ibid 33.

The LRC proposal represents a novel departure in this area of the law. Unfortunately, its justification is not spelled out in the Report. Therefore, it is necessary in this section of the article to draw out, and evaluate in turn, the possible arguments in favour of the LRC's proposal. In part, these arguments are suggested by various aspects of the detailed list of factors which, under the LRC's proposal, would guide the court's exercise of discretion. This means that the discussion which follows will also involve a consideration of these factors. The ultimate conclusion of the current author will be that the LRC's approach is not a convincing one and should not be supported.

(i) Depriving the Offender

The argument which is implicit in the LRC's discussion – that its proposed approach comes as close as is constitutionally permissible to the "total deprivation rule" – does not take us very far in the absence of an explanation as to why that rule should be regarded as attractive in principle. It comes up against the objection that "it would involve an impermissible deprivation of existing property rights and a reintroduction of the feudal forfeiture doctrines of attainder and escheat which were abolished by the Forfeiture Act 1870".[74] The principle underlying this objection is that the punishment for a crime should be determined by the criminal law, in accordance with the established principles of sentencing, and should reflect the various rationales for criminal punishment: deterrence, rehabilitation and so forth. This means that it would not be appropriate that, in addition to the punishment dictated by the criminal law (which might, in principle, have an impact in property terms, as in the case of a fine), the offender should also suffer a diminution in his property entitlements. It would be arbitrary for an offender who happened to be the co-owner of property with the victim to suffer an additional penalty which would not be visited upon other offenders guilty of the same crime.

The objection to depriving the offender of his property rights is independent of the nature of the crime which the offender has committed. Thus, it does not represent a solution to suggest that the offender would be subject to a

[74] Ibid 32. The LRC used these words in describing the objection to the "total deprivation rule", rather than in relation to its own proposal.

deprivation of property, on top of the appropriate criminal sanction, only on a "case by case basis". If the idea of stripping the offender of some of his assets is wrong in itself (unless it forms part of a sentence for the crime in question), then it is wrong even where the offender has committed a particularly callous crime. This suggests that the objection cannot be overcome simply by means of the introduction of a discretion which focuses, as do factors (h) to (j) in the LRC's proposal, on the gravity of the offence that has been committed.[75] Nor, of course, would it be sufficient in itself to assert that the loss of property rights is a "civil" matter and is "not punitive" in nature;[76] this assertion would have to be justified through the identification of some specific civil law principle or principles that provided a justification for the loss of property rights that was independent of the fact that the offender has committed the crime in question. Possible justifications of this nature are considered in the sections which follow.

(ii) O'Brien v McCann *and Other Benefits Flowing from the Homicide*

The LRC suggested that the decision of Judge Dunne in the 1998 Circuit Court case of *O'Brien v McCann*[77] "indicates that it is already possible under the current law to reduce the share left to an offender well below 50%".[78] In *O'Brien*, a husband had murdered his wife. The husband and wife had owned the family home as joint tenants. As a result of the wife's death, the outstanding mortgage of IR£50,000 was discharged by the couple's insurance company. Judge Dunne held that the effect of the murder was that the joint tenancy between the parties had been severed. She also held that the husband "was not entitled to the benefit of the discharge of what would have been his liability under the terms of the mortgage, a discharge that had occurred by reason of his wrongful act".[79]

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[75] The relevant factors (see Report (n 1) 37) refer to "the nature of the offender's conduct in relation to the offence" and, in particular, whether it was murder or attempted murder or, if it was manslaughter, whether it was voluntary or involuntary; whether it involved diminished responsibility; and whether there was a motive or intention to cause death.

[76] The civil nature of the relevant proceedings is frequently emphasised in Chapter 4 of the Report, in the different context of whether a conviction should be required. In that chapter also, it is stated that the relevant public policy principles are not punitive in their operation: see Report (n 1) 59 and 64.

[77] *The Irish Times* (Dublin, 9 October 1998) 4. The case was mentioned in *Cawley v Lillis* [2012] 1 IR 281, 291. However, Laffoy J merely noted (ibid) that Judge Dunne had decided that "the effect of the murder was to sever the joint tenancy".

[78] Report (n 1) 33.

[79] *The Irish Times* (n 77) 4.

Therefore, she ordered that an amount representing half of the discharged mortgage should be deducted from his share of the proceeds of sale. In linked proceedings, Judge Dunne ordered that the husband should pay the victim's mother IR£9,300 under the Civil Liability Act 1961 "for mental stress and funeral expenses".[80] The husband was also ordered to pay legal costs of IR£20,000. The LRC commented that the final result was that, after various deductions, the husband was left with a sum "which represented … 15.7% of the total value of the family home".[81] The LRC argued that the case showed that "the offender's half share may be further reduced by reference to the underlying basis of a constructive trust, namely to prevent an unconscionable result or to prevent unjust enrichment".[82]

It is submitted, however, that *O'Brien* does not actually support the LRC's proposed position that the court would have discretion "to reduce the 'starting point [of 50%]' for the offender by such amount as the court considers just and equitable".[83] The central point overlooked by the LRC in its analysis of *O'Brien* is that the case involved two separate applications of the public policy principle against a killer profiting from his crime.[84] The first one ensured that the killer did not benefit from the operation of the right of survivorship. The second, and logically distinct, application of the principle ensured that the killer could not profit from an insurance policy that had been taken out on the life of the victim. This is a well-recognised occasion for the application of the principle.[85] As in the English case of *Davitt v Titcumb*,[86] the consequence of preventing the killer from benefitting under the insurance policy was that the money that repaid the mortgage was regarded as emanating from the victim. Thus, the victim had paid

[80] Ibid. See ss 48 and 49 of the 1961 Act.
[81] Report (n 1) 34.
[82] Ibid.
[83] Ibid 35.
[84] Note the comment of Fry LJ in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 158 that "the principle of public policy must be applied as often as any claim is made by the murderess". Another simple example of the application of the rule more than once comes in relation to the joint tenancy situation; the homicide causes a severance and the victim's share is held by her successors. If the killer is one of those successors, the public policy rule (this time as codified in s 120(1) of the Succession Act) applies for a second time to prevent the killer from taking this benefit, with the result that the victim's successor will be determined on the basis that the killer predeceased the victim (s 120(5)).
[85] See *Cleaver* (n 84). Indeed, the Report goes on to discuss *O'Brien* as an example of such an application: (n 1) 41.
[86] [1990] 1 Ch 110.

more than her share of the joint indebtedness and was regarded as being entitled, on the basis of general equitable rules, to a contribution from her co-debtor. This indicates that the fact that Judge Dunne applied the public policy principle to prevent the husband from profiting from the insurance policy was *not* an indication that, in a case in which the parties were joint tenants, the court has an open-ended discretion to reduce the killer's fractional entitlement upon severance on the basis of what seems just and equitable. Similarly, the fact that the killer was liable to pay damages under the Civil Liability Act 1961 and to pay legal costs are logically unconnected to the parties' respective fractional entitlements under the tenancy in common resulting from the severance of the parties' joint tenancy.

Thus, it is not possible to accept the LRC's reading of *O'Brien* as indicating that, even in the absence of legislative reform, the law already allows the court a discretion to adjust the proportional entitlements of the parties under the tenancy in common that results when the homicide creates a severance of the parties' joint tenancy. For the same reasons, one cannot accept as appropriate the LRC's proposal to include, on the list of factors to guide the court in the exercise of a proposed discretion, a reference to whether the homicide triggered a payment under a life insurance policy and to "any civil liability on the part of the offender arising from the act constituting the homicide".[87] Where the offender stands to obtain a benefit from an insurance policy related to a mortgage, the public policy principle is applicable to that benefit but this would be the case even if there were no joint tenancy. This is neatly illustrated by the facts of *Davitt v Titcumb*,[88] where the parties were already tenants in common prior to the homicide. It only causes confusion to sweep logically distinct matters, such as the application of the public policy principle to the proceeds of an insurance policy, or the offender's liability under the Civil Liability Act or to pay legal costs, into a broad judicial discretion to adjust the parties' entitlements in real property that was held in joint tenancy prior to the homicide.

(iii) Justificatory Arguments Suggested by the Inclusion of "Family Law" Factors

[87] See factors (g) and (h) respectively and note also factor (e): Report (n 1) 37.
[88] [1990] 1 Ch 110.

The first four factors in the list put forward by the LRC are adapted versions of those that apply "when property adjustment or pension adjustment orders are made under section 16 of the *Family Law Act 1995*".[89] One of these factors refers to the direct and indirect contributions made by the offender and the victim to the jointly-held property and the second factor covers, in cases where the parties were spouses, civil partners or cohabitants or were parents, guardians or *in loco parentis* to a child or other dependent person, their contributions (broadly defined) to the welfare of the family. Then there are references to "the age and financial needs, obligations and responsibilities" of the offender, and of any child or dependent of the victim.[90]

In terms of why the issue of the parties' contributions to the jointly-held property was regarded as worthy of specific mention, it may be noted that one aspect of the perceived injustice of the outcome in *Cawley v Lillis* was that Lillis emerged with an equal share of the jointly-held assets, even though Cawley had made a greater contribution to the generation of the family's wealth.[91] Leaving aside the situation where the parties are spouses, civil partners or cohabitants, which will be discussed below, it is not easy to see a principled reason why weight should be given to the fact that the victim made a greater contribution to the acquisition of the asset in question (unless a resulting trust arose, leading to a tenancy in common in equity in the proportions of the parties' contributions, in which case there would be no need for the law to intervene to prevent the killer from benefitting).[92] Once one person has made a gift to another person, the recipient becomes the owner and obtains property rights over the subject matter of the gift; the giving of the gift becomes merely part of the history of the matter.

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[89] Report (n 1) 35.

[90] Ibid, factors (c) and (d). Note also the reference to "any income or benefits to which the offender of the victim is entitled, included by or under contract, trust or statute": ibid 35, factor (e). This factor is not one of those which were described as having been adapted from s 16 of the Family Law Act 1995.

[91] Anon "Wife-killer Eamonn Lillis now a millionaire thanks to tragic Celine Cawley" The Irish Independent (Dublin, 10 April 2015).

[92] On the purchase money resulting trust, see Hilary Biehler *Equity and the Law of Trusts in Ireland* (6th edn, Round Hall 2016) 173. As indicated in the text, it would be inappropriate for the legislative regime governing prevention of benefit from homicide to extend to joint tenancies at law where, due to the operation of independent equitable doctrines, there is already a tenancy in common in equity; the right of survivorship to the beneficial ownership of the property is never in play in such a situation. Unfortunately, it does not appear that this point was taken on board by the LRC in formulating its recommendations: see s 46C of the Draft Bill, Report (n 1) 87 (provision applicable where the offender and victim held property under "a joint tenancy").

Therefore, it is as much an interference in the property rights of the killer to divest him of a property right which, as a matter of history, resulted from a gift from the victim as it would be to divest him of another property right. Moreover, it would surely be arbitrary to provide for the cancellation of a gift that has resulted in the joint ownership of property between the killer and the victim but to leave untouched in the hands of the killer any outright gift made by the victim.

Similarly, again considering cases where the parties are not spouses, civil partners or cohabitants, it is not easy to see the logic of taking into account the respective financial positions of the killer and of any dependents of the victim. Why should the homicide be regarded as the trigger for the operation of a new jurisdiction allowing the court to redistribute the property entitlements of the killer and the victim's estate on the basis of an all-things-considered discretion? It should also be noted that, arbitrarily, such a discretion would operate only where the parties happened to hold property under a joint tenancy and would only allow the adjustment of the parties' entitlements in the jointly owned property and not in any other property.

Even where the parties were spouses, civil partners or cohabitants, it does not seem possible to justify allowing the court to adjust the parties' entitlements in the jointly owned property on the basis of the "family law-style" factors that are included in the LRC's proposal. Although this is not articulated in the LRC Report, the underlying premise of this part of the proposal may be a feeling that the killer has deprived the victim of the possibility of making a claim against the killer's wealth. If the parties were married, or in a civil partnership, or were qualifying cohabitants,[93] and if the relationship had broken up during the lifetimes of the parties, or had ended with the death of the killer, the victim would have been able to claim under the applicable legislation. Under such legislation, the victim could have been recompensed for matters such as those identified in the LRC proposal, e.g. the fact that he or she made contributions to the welfare of the family which exceeded those of the other partner. The LRC's thinking may have been that, by killing the victim, the killer has robbed the victim of the potential opportunity to make a legislative claim and that this

[93] Under Part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

should be taken into account when one is considering how the ownership of the jointly owned property should be shared.

This is an interesting argument but there are difficulties. If it were thought necessary to create an avenue of recourse for the estate of a victim of homicide, perpetrated by a spouse or civil partner or qualifying cohabitant, where the victim has been deprived of the opportunity to make a claim for financial provision, it seems clear that this should be done as part of the relevant family law legislation. It would be arbitrary for this jurisdiction to be triggered only where the parties owned property as joint tenants and to stipulate that the jurisdiction can only operate to allow the adjustment of the parties' entitlements to that jointly owned property and, therefore, cannot be applied in relation to any other property of the parties. It should be noted that other jurisdictions have not found it necessary to create this refinement in the family law statutes governing financial provision. This may be because the event of homicide is relatively rare and carries severe criminal law penalties for the perpetrator. Also, it may be explicable on the basis it would not be easy to shape the contours of a property adjustment regime that would apply when a relationship was brought to an end by the fact that the potential claimant was killed by the other partner. It would arguably be difficult to ensure that the exercise of a judicial discretion in such circumstances did not, in practice, result in the stripping of the assets of the killer.

3. A Suggested Approach

It has just been argued that the LRC's proposed approach is not defensible. While it is not perfect, the most attractive solution seems, instead, to be the straightforward approach of treating each party as being equally entitled under a beneficial tenancy in common.[94] In seeking to identify an appropriate framework, an obvious starting point is the proposition that the perpetrator of a crime should not be permitted to profit from his or her crime but, nonetheless,

[94] See I Williams (n 19) 70. More complex approaches have been mooted. See e.g. John Tarrant "Unlawful killing of a joint tenant" (2008) 15 Australian Property Law Journal 224 (surveying various judicial and legislative approaches, as well as advancing his own proposal).

should not be stripped of his or her pre-existing property entitlements (unless this constitutes a part of the criminal law penalty for the crime in question). The approach that has just been mentioned appears to be, insofar as is practically possible, consistent with this proposition. Prior to the homicide, the interest of the killer was capable of being converted into a one-half share under a tenancy in common.[95] Therefore, the value of the killer's interest under the joint tenancy can be seen as identical to the value of a one-half share under a tenancy in common.

It is true that, because of the nature of such ownership, where the parties were joint tenants they were linked together in a "survivorship game", with the winner taking all the ownership in the property. Could it be said that the killer has cheated in this game and that, even if the killer is restricted to a one-half share, he or she has benefitted by avoiding the risk that he or she might have lost his or her interest in the property due to being the first to die? On this question, Laffoy J commented in *Cawley v Lillis*[96] that, just prior to the homicide, there were "a number of possibilities as to the ultimate destination of the joint assets, which would have turned on a number of imponderables, for example, whether one or other of the joint tenants would sever the joint tenancy and which of the joint tenants would die first".[97] She took the view that it was "not possible to form a view, even as a matter of probability, as to where the ownership of those properties would have ultimately vested" if the homicide had not taken place.[98] Therefore, she concluded that adopting the solution of treating each party as equally entitled under a beneficial tenancy in common "viewed objectively at that time, could not be regarded as conferring a benefit on the defendant as a result of the crime he committed".[99] This seems a reasonable conclusion and the solution it suggests has the great advantage of simplicity. In the Irish context, however, a complication arises in the context of land.

(i) The Effect of Section 30 of the LCLRA

[95] As will be discussed, where the property held in joint tenancy is land, the Irish position is complicated by the existence of section 30 of the LCLRA.
[96] [2012] 1 IR 281.
[97] Ibid 300-01.
[98] Ibid 301.
[99] Ibid.

As has been mentioned, section 30 of the LCLRA restricts a joint tenant's ability to sever the joint tenancy. To accomplish a severance, a joint tenant of land must either obtain the prior written consent of all the other joint tenants or else obtain a court order under section 31(2)(e) "dispensing with consent to severance … where such consent is being unreasonably withheld".[100] The resolution of *Cawley v Lillis* was made far easier by the fact that it dealt with a homicide which took place prior to the advent of the LCLRA. Surprisingly, beyond noting the fact that Laffoy J had referred to section 30 in the case,[101] the LRC did not discuss the relevance of the section at all. However, the effect of section 30 is that, in relation to a joint tenancy over land, it is possible to envisage a case where the solution discussed above would confer a benefit on the killer.

Consider a case where, the other party having refused to consent to a severance, a joint tenant made an unsuccessful application to have the court dispense with the need for that consent on the basis that it was being unreasonably withheld. If the unsuccessful applicant were then to kill the other joint tenant, the killer would clearly obtain a benefit if the effect of the homicide were to work a severance. This benefit might have significant financial value if one aspect of the hypothetical fact situation were that the killer was suffering from a terminal illness and the victim had been in good health. On the position taken in this article, the aim of the law should be to ensure that the killer obtains no benefit from his or her crime, while not divesting him or her of any other property which does not represent a benefit attributable to the crime. Thus, the existence of section 30 suggests that it is necessary to qualify the straightforward severance rule that is appropriate in jurisdictions which do not have this quirk in the law of joint tenancies. This qualification would only be applicable to joint tenancies over land since no rule equivalent to that set out in section 30 applies to joint tenancies over other forms of property.

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[100] Although constraints of space prevent the exploration of this point, s 30 is an idiosyncratic provision which is difficult to defend. See Heather Conway "'Leaving Nothing to Chance?': Joint Tenancies, the 'Right' Of Survivorship, and Unilateral Severance" (2008) 8 Oxford University Commonwealth Law Journal 45, esp 65-69. See also John Mee "The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions: Part 2" (2006) 11 CPLJ 91; Una Woods "Unilateral Severance of Joint Tenancies: The Case for Abolition" (2007) 12 CPLJ 47.

[101] Report (n 1) 23. The LRC also mentioned the relevance of s 30, alongside s 31, to cases where there were multiple joint tenants and the surviving innocent joint tenants no longer wished to remain as joint tenants with the offender: ibid 39.

The appropriate response in Ireland appears to be that reforming legislation should require the court to seek, in cases involving land, (i) to ascertain whether the killer would obtain any benefit through achieving the severance of the joint tenancy in circumstances where this would not otherwise have been possible and (ii) if it does appear that the killer would obtain such a benefit, to adjust the parties' entitlements so as to ensure that any benefit is erased. In practical terms, the first step would appear to be for the court to consider the following question: would the court have made an order dispensing with the need for the victim's consent to severance if, on the date of the homicide, the killer had made such an application? The framing of this question assumes that the court's decision should not be influenced by the fact that a homicide, in fact, took place. Obviously, the court might be less well-disposed to the perpetrator of such a serious crime but the point at issue is whether a severance would benefit the killer and this requires a comparison between, on the one hand, the killer's position after the homicide and, on the other hand, the killer's position if there had been no homicide (which position, it is being argued, must be assessed without reference to the fact of the homicide).

If the court did determine that the killer would profit by being able to achieve a severance in circumstances where, if the homicide had not taken place, this would not have been possible, it would then be necessary for the court to assess the extent of this benefit and to take steps to reverse it. This could be achieved by giving the court a discretion to reduce the killer's share under a tenancy in common, which would be narrowly constrained by the requirement to do no more than to eliminate any benefit to the killer resulting from the homicide. To determine the extent of the benefit to the killer, it seems that the court would have to assess the likelihood that, but for the homicide, the killer would have predeceased the victim (without having succeeded in a future application to sever and without having been able to obtain a sale of the property by means of an application under section 31 of the LRCLA). Assistance could be obtained from actuarial calculations of life expectancy but there would inevitably also be an element of judgment that could not easily be reduced to numerical terms.

(ii) Cases Involving Three or More Parties

Additional complications arise where there were three or more joint tenants and one joint tenant has killed another of the other joint tenants. The innocent joint tenant/s have not been complicit in the homicide and there is no reason in principle why they should not benefit from the operation of the right of survivorship as against the victim. The LRC's proposal allows the innocent joint tenant/s to so benefit and this seems to be correct. Thus, the victim's share would disappear due to the operation of the right of survivorship. In order to prevent the wrongdoer from profiting in this circumstance, the LRC recommends that the wrongdoer's share be regarded as having been severed at the moment of the homicide,[102] with a tenancy in common coming into existence between the offender and the surviving (innocent) joint tenant/s. If there were initially (say) four joint tenants, the killer would originally have had the potential, after a severance of the joint tenancy, to have a one-quarter share. With the death of the victim, however, the killer's severed share would be one-third. The LRC's proposal is that the court should have discretion to adjust this share of the killer on the basis of the same factors that have been discussed above as guiding the court's discretion in two-party situations. The LRC's proposal in relation to multi-party cases simply represents an adaptation of its proposal in relation to two-party cases, so that the critique that this article has offered in that respect is equally applicable in the multi-party context.

What is the appropriate approach if one is pursuing the aim, advocated in this article, of seeking to deprive the offender of any benefit flowing from his or her crime, without going further and stripping him or her of existing property rights? At first inspection, it is tempting to argue that the offender's share of the beneficial interest should be reduced so as to allow the victim's estate to retain the value of the victim's original share under the joint tenancy. This would mean that, if there were originally three joint tenants, the offender's one-half share under the tenancy in common with the surviving joint tenant would be reduced

[102] One consequence of this would be that if X, Y and Z were joint tenants and if X killed Y, and then shortly afterwards killed himself, Z would not become the sole owner, even though he or she was the last survivor. Because the need to protect the interests of the victim triggered a severance of the share of X, the killer, no right of survivorship would operate upon X's subsequent death. This is not an ideal outcome but seems to be a necessary consequence of the approach under discussion.

by a one-third share, which would go to the victim's estate, leaving the offender with a one-sixth share in equity. On reflection, the difficulty with this is that it goes beyond preventing the killer from profiting from his crime. The killer began with a (potential) one-third share and, in order to address the consequences of the operation of the right of survivorship in favour of the other joint tenants as well as in favour of the killer, the killer is being left with only a one-sixth share. The aim of preventing the killer from gaining a benefit does not, in principle, extend to the different objective of preventing the victim's estate from losing out to others as a result of the homicide. Preventing the killer from benefitting requires only that the killer's share is reduced to its pre-homicide level; in the three-party situation, that would mean that the victim's estate would receive a one sixth share of the total ownership,[103] leaving the killer with one-third of the ownership. If there were four joint tenants initially, then the killer's share would be reduced from one-third down to his pre-homicide level of a one-quarter (potential) share; so the victim's estate would take a one-twelfth of the total beneficial ownership away from the killer; and so on.

4. A Discretion to Reduce the Victim's Share

Under the LRC's proposal, it would be possible to rebut the presumption that the victim's estate would receive at least 50% under the tenancy in common triggered by the homicide, "the burden being on the offender"[104] in this respect. At first impression, it seems odd that the LRC was willing to contemplate the reduction of the *victim's* share, potentially down to zero. In order to make sense of this aspect of the proposal, it is necessary to understand it as allowing the court a discretion to waive the application of the forfeiture rule against an offender. The LRC later made a broadly similar proposal outside the joint tenancy context, albeit one which was presented differently (and the clarity of the report would have been greatly improved if the link had been expressly made between the two aspects of the LRC's proposals).

[103] This is all that was lost to the killer; the other innocent joint tenant absorbed the other half of the victim's original (potential) one-third share.
[104] Report (n 1) 34.

The proposal outside the joint tenancy context was that the court would have discretion to waive, in whole or in part, the application of the forfeiture rule in cases involving manslaughter. The LRC referred to "the wide variety of circumstances in which manslaughter is committed and the different degrees of moral culpability of offenders that are involved as a result".[105] The approach of the LRC reflects the approach adopted in the United Kingdom[106] and in New South Wales.[107] However, the LRC proposal involves a much more detailed list of factors for the consideration of the court in exercising its discretion.[108] The current author would favour placing more emphasis on the central question of the "culpability attending the beneficiary's criminal conduct"[109] and playing down the potentially distracting detail elsewhere, e.g. in terms of the parties' past contributions to an intimate relationship they might have shared.

Instead of including the joint tenancy situation within the general discretion to relieve against the forfeiture rule that has just been outlined, the LRC proposals rely on a unified discretion – applicable only in the joint tenancy context – to increase or diminish the fractional share of the killer under a post-homicide tenancy in common. This leads to two difficulties. First, it is unsatisfactory that a somewhat different (and even longer) list of statutory factors would apply in the joint tenancy context as compared to other contexts. A second, and more serious, problem is that the LRC's approach means that a person responsible for murder or attempted murder could be granted relief from the application of the forfeiture rule in the joint tenancy situation. There appears to be no justification for allowing this in the joint tenancy context but, in other contexts, restricting the availability of the discretion to cases of manslaughter.

CONCLUSION

[105] Ibid 51.
[106] Forfeiture Act 1982; Forfeiture (Northern Ireland) Order 1982. Note also Succession (Scotland) Act 2016, ss 15-16.
[107] Forfeiture Act 1995.
[108] Report (n 1) 51. The LRC was, it appears, influenced by the comment of Cretney that it could be helpful if legislation of this nature included comparatively extensive guidance along the lines of the factors listed in family law legislation. See ibid 48, citing Stephen Cretney "The Forfeiture Act 1982: the Private Member's Bill as an Instrument of Law Reform" (1990) 10 OJLS 289, 303.
[109] *Dunbar v Plant* [1998] Ch. 412, 438 (Phillips LJ).

This article has highlighted a number of problematic features of the proposals made by the LRC in its Report, relating to the inclusion of attempted murder within the scheme and the exclusion of accessories and those who are unfit to be tried, as well as to the discretionary scheme proposed in relation to cases involving joint tenancies. While the need for statutory reform is arguably not acute given that relevant cases arise relatively infrequently, it is true that legislation could provide necessary guidance in respect of the implications of section 30 of the LCLRA in joint tenancy cases involving land and on the tricky questions raised by the killing of a joint tenant by another where there were originally three or more joint tenants. Another benefit of legislation is that it would also give the courts discretion to disapply the forfeiture principle in manslaughter cases if, in all the circumstances, the culpability of the offender is comparatively low. However, if the LRC's proposals were to be enacted in their current form, the benefits of legislation could well be outweighed by the disadvantages. On the issues highlighted in this article, a rethink is necessary before reform can usefully proceed.