

# ‘Respectable’ victims and safe solutions: the hidden politics of victimology?

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## Abstract

*This paper offers a critique of the dominance that victim discourse has come to occupy in debates about criminal justice in Ireland. It argues that such a discourse works with an unacceptably simplistic notion of the term ‘victim’, it can lead to reforms that result in revictimisation rather than victim empowerment and it distorts the experiences of many crime victims for whom victimisation is inconvenient rather than traumatic.*

**Key words:** victim; crime; Ireland; revictimisation; experience of victims

## Introduction

It has become a truism of criminological discourse to say that the crime victim has been the forgotten actor in the crime equation, ignored by academic theorists and criminal justice policy-makers alike. Whatever the accuracy of this narrative of the absent victim and whatever the accuracy with which it characterises the past, it is now largely of historical interest. As Garland puts it: ‘[I]f victims were once forgotten, hidden casualties of criminal behaviour, they have now returned with a vengeance, brought back into full public view by politicians and media executives.’<sup>1</sup> The victim is now, in Walklate’s words, a ‘dominant symbolic reference point in criminal justice’.<sup>2</sup>

This can be seen in a variety of disparate ways in Ireland. The previous Garda Commissioner has spoken about the need to create ‘a victim-centred, community-focused police service’.<sup>3</sup> This echoed somewhat the thoughts of one of the more recent Ministers for Justice, including Frances Fitzgerald who talked about the need for a policing service that put ‘victims first’<sup>4</sup> and Alan Shatter, who spoke about his intention ‘to ensure that victims and their needs are at the heart of the justice process’.<sup>5</sup> In a later statement, Fitzgerald suggested that this had been achieved, as ‘victims were now being placed at the

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1 David Garland, *The Culture of Control* (University of Chicago Press 2011) 143.

2 Sandra Walklate, ‘Imagining the Crime Victim: The Rhetoric of Victimhood as a Source of Oppression’ (2005) *Social Justice* 32, 89.

3 Conor Lally, ‘Garda Commissioner Makes Sweeping Changes to Force’ *Irish Times* (Dublin, 26 February 2015).

4 Conor Lally, ‘Minister Welcomes Garda Inspectorate Report’ *Irish Times* (Dublin, 12 November 2014).

5 Written Answers, Department of Justice and Equality, *Programme for Government Implementation*, 16 July 2013.

centre of the criminal justice system'.<sup>6</sup> It has suddenly become unfashionable to suggest that that place might be occupied more appropriately by the concept of justice.

Then there is the 'victim test'. When victims of crime or their families emerge from the courts they are routinely asked if the sentence imposed has given them 'closure'. The answers are generally negative and that is not surprising. The expectation of victims is that sentencing will provide 'closure', a term that is somewhat amorphous in its meaning, and yet, while it is something that the criminal justice system seems to have embraced, it is something that sentencing is not designed to provide. The objective of sentencing is justice, fairness and proportionality and not the kind of retaliation on which expectations of 'closure' often seem to be based. However, the failure to provide closure is presented as a failing of the justice system rather than of an unrealisable expectation of crime victims and their families.

Victim discourse has also acquired a role in policy-making. So, for example, groups representing crime victims are asked as a matter of routine newsgathering to comment on the likely efficacy of new criminal justice policies. There is also evidence of victims being used in an argument for longer sentences, a process characterised by Ashworth as 'victims in the service of severity'.<sup>7</sup> Advic, for example, provides services for the families of homicide victims and is a recipient of state funding.<sup>8</sup> But it also campaigns on sentencing and takes the view that the justice system is unbalanced, with offenders having more rights and protections than victims. It wishes 'to ensure that the interests of families of homicide victims are not ignored within the Criminal Justice System and wants to bring about a fairer, more balanced system for such families'. Its aim 'is to advocate for changes that will bring about a rebalancing'.<sup>9</sup>

These examples suggest that victims, victim concerns and victim discourse, what the Department of Justice and Equality calls 'the rights and expectations of victims',<sup>10</sup> are now a central part of how we talk about, and how policy-makers work within, the criminal justice system in Ireland. What is perhaps most remarkable, however, is that this 'sea change' has not been the subject of much critical scrutiny or independent examination, though there are some notable exceptions.<sup>11</sup>

The intention of this paper is to raise a number of questions about this discourse. It will focus on three aspects of it. The first is the concept of victim and what it means. The second is the question of the degree to which victims benefit from the pervasiveness of a victim discourse and from reforms that are justified by reference to their experiences. Finally, it will ask whether the current discourse overstates the experience of victims of crime, and so may contribute to the development of a culture of victimhood in Ireland.

## 1 The concept of a victim: deserving and undeserving?

According to McGrath: 'The broad public appeal of victims' rights is easy to understand'.<sup>12</sup> Part of the attraction of the concept of victim is its apparent simplicity

6 Dan Griffin, 'Judges to Give Reasons for Rulings on Bail' *Irish Times* (Dublin, 24 July 2015).

7 Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Ashgate 2000) 185–205.

8 See <[www.advic.ie](http://www.advic.ie)>.

9 Quote from advice leaflet. See *ibid*.

10 Department of Justice and Equality, *The Community and the Criminal Justice System* (Department of Justice and Equality 2011).

11 See, for example: Anthony McGrath, "'In Whose Service?'" The Use and Abuse of Victims' Rights in Ireland' (2009) 1 *Judicial Studies Institute Journal* 78–96.

12 *Ibid* 78.

and rootedness in common sense. We all 'know' what a victim is and we all can know who is a victim of crime. But is it that simple? Consider these two examples.

On 7 December 2016 a man was attacked in Blackpool, a suburb of Cork City. He was shot in the back and then a number of times in the head. A 'source' told the *Irish Independent* journalist, Ralph Riegel that 'this was a particularly shocking killing because [the man] was shot in a quiet residential area on a busy street'.<sup>13</sup> He was a painter by trade and a father of two young boys. He had been due to marry his fiancé in May 2017. An active member of both the local GAA and soccer teams, he was described at his funeral as 'a good community man'. He had been involved in attempts to rid the local area of illegal drugs. The local Catholic church was full for his funeral and he was buried in what the *Irish Examiner* described as a 'respectful ceremony'.<sup>14</sup> It included a guard of honour from the local GAA club.

On 25 February 2017, a 90-year-old man, a lifelong bachelor who lived alone, was found dead in his farmhouse in an isolated area of county Waterford. He had head injuries. A post mortem subsequently found that he had been murdered. He was described as 'a well-known character in his local area'.<sup>15</sup> If anything was going on, he would be there. He had been at a local tea dance a few days before he was murdered. It was when he failed to show up at the funeral of a man with whom he had been friendly that neighbours went to check on him. The priest told the mourners at his funeral that his death was 'untimely' and the manner in which he died was a source of anger in the local community. His death, they were told, cast 'a long shadow'.<sup>16</sup>

Two separate violent deaths, both shocking in their own way, two crime victims, both worthy of the sympathy that our concern with the plight of crime victims might lead us to anticipate would be mobilised on their behalf and on behalf of the families, friends and neighbours of both men. But that is not how it transpired. The newspapers referred to the first victim, Aidan O'Driscoll, as the 'Beast'.<sup>17</sup> The nickname had suitably demonic and violent associations, but it had been given to him as a teenager for his particular style of playing GAA football and had no relevance to any alleged criminal activities on his part, something that was not highlighted in much of the reporting.<sup>18</sup> He had, according to media accounts, been a member of the Real IRA, an offence for which he had been charged, convicted and imprisoned but the conviction was subsequently quashed on 'a technicality',<sup>19</sup> thus depriving him of any claim to be a victim of a miscarriage of justice. Media accounts implicated him in a series of killings in internecine paramilitary feuds, none of which he was ever charged with and which he obviously was not in a position to refute. But he was not a victim worthy of our sympathy; he was not a 'deserving victim' as his paramilitary activities formed an essential backdrop to his murder.

13 Ralph Riegel, 'Gardaí Investigating Murder of Aidan "The Beast" O'Driscoll Search Cork Properties' *Irish Independent* (Dublin, 26 April 2017).

14 Noel Baker, 'Funeral of Aidan O'Driscoll Hears of the "Futility of Violence"' *Irish Examiner* (Dublin, 16 December 2016).

15 Ralph Riegel, 'Man (26) Charged with Murder of Pensioner Paddy Lyons' *Irish Independent* (Dublin, 1 March 2017).

16 Conor Kane, 'Death of Paddy Lyons Cast a Great Shadow, Funeral Told' *Irish Times* (Dublin, 6 March 2017).

17 See, for example: Barry Roche, 'Head of Real IRA Shot Dead' *Irish Times* (Dublin 8 December 2016).

18 Barry Roche, 'Gardaí Release Suspect in Investigation into Real IRA Murder' *Irish Times* (Dublin, 12 April 2017).

19 Barry Roche, 'File for DPP on Murder of Former Real IRA Chief-of-Staff' *Irish Times* (Dublin 8 June 2017).

By contrast the emotions surrounding the death of Paddy Lyons were characterised by *The Sun* newspaper as ‘Numbness, Sorrow and Grief’.<sup>20</sup> The praiseworthy aspects of his life were emphasised and it was noted that the murder had sent ‘shock’ waves through the local community. Though O’Driscoll had been killed in a more public place, the community in which the killing took place was not accorded the right to be shocked and, indeed, few media outlets asked how the community felt about the murdered man. Moreover, the possibility that he might have been popular in the local area because of his activities against drug dealers was not considered overly relevant.

It would be unwise to overstretch the comparisons and contrasts between the two murders. But they do illustrate an essential point. It is not enough to be a victim of a crime to become a ‘crime victim’. One is a legal classification, the other a ‘social one’. The manifest language of victimology pretends that all victims are a concern; the latent language of victimology does not. It embodies hidden social and probably class-ridden notions of the ‘deserving’ and ‘undeserving’ victims of crime. There are additional qualities and social judgements involved in acquiring the status of the legitimate and deserving victim of crime beyond simply being a victim of crime.

Nils Christie has set out some of these.<sup>21</sup> Victims must be weak in relation to the offender. So it helps to be a woman, a child or just old. Victims must have been going about their legitimate, mundane and everyday lives, so making them blameless for what happened to them. The offender must be unknown to them, thus strengthening the blamelessness of the victim. The offender must be ‘unambiguously big and bad’.<sup>22</sup> Finally, giving them victim status must not threaten any powerful interest in society.

Heber has enlarged on the attributes of the ideal victim.<sup>23</sup> She sets out some further cultural and behavioural characteristics of the ideal victim. The victim must behave like a ‘victim’ with a display of passivity and willingness to accept the sympathy and assistance that is extended to them. They must be seen to be taking the necessary steps to avoid being victimised again and, while they may express feelings like anger, rage and a desire for vengeance, they must do so in moderation. ‘A fundamental requirement’, Heber argues ‘is that the crime victim is innocent and blameless – a prudent citizen’ and so ‘worthy of our sympathy and access to compensation’.<sup>24</sup> So while, as Tham argues ‘everybody is for, and nobody is against the crime victim’, the actual situation is more nuanced.<sup>25</sup> Victims must live up to and embody these characteristics if they are to be seen as ‘deserving victims’.

We can illustrate this with four sets of circumstances in which the status of victim is hard to attain. The first is the counter-intuitive phenomena of ‘repeat or multiple victimisation’. This refers to the degree to which individuals who are victims of crime on one occasion have a serious chance of being victims of crime again. The experience of many crime victims is, in Farrell and Pease’s phrase, ‘once bitten, twice bitten’.<sup>26</sup> This is most apparent in domestic violence. But the levels of repeated or multiple victimisation

20 Ann Moloney, ‘Numbness, Sorrow and Grief’ *The Sun* (Dublin, 5 March 2017).

21 Nils Christie, ‘The Ideal Victim’ in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy* (Palgrave Macmillan 1986) 17–30.

22 Ibid 88.

23 Anita Heber, ‘“Good Versus Bad?” Victims, Offenders and Victim-offenders in Swedish Crime Policy’ (2014) 11 *European Journal of Criminology* 410–28.

24 Ibid 421.

25 Tham, quoted in Heer (n 23) 414.

26 Graham Farrell and Ken Pease, *Once Bitten, Twice Bitten: Repeat Victimisation and its Implications for Crime Prevention* (Police Research Group, Crime Prevention Unit Paper 46, Home Office Police Department 1993).

are also significant in other types of offences such as assault, vandalism, domestic burglary and various forms of car crime.

Watson says that repeat victimisation is 'quite extensive' in Ireland.<sup>27</sup> Victims of domestic violence were not included in her analysis, but half of those in her study who were victims of a criminal incident had been victims in the previous three-year period. Sarma found somewhat lower but still significant levels of repeat victimisation.<sup>28</sup> Ten per cent of those who had been physically assaulted in this period had been victims of assault before and repeat victimisation levels for burglary of, and criminal damage to, residential premises were 'particularly high'.<sup>29</sup>

The *Quarterly Household Budget Survey*<sup>30</sup> asked about repeated experiences of the same crime, although many multiple victimisations can involve different kinds of crimes. Yet, even with this definition, it too has shown that repeat victimisation is significant. For example, it reported that in 2010 more than a quarter of households who experienced vandalism had been victimised more than once before. Most commonly the vandalism involved the breaking into or damaging of motor vehicles. It suggested that the 'real' level of repeat victimisation may well be higher as about 45 per cent of acts of vandalism are not reported to the Gardaí.<sup>31</sup> Van Dijk has suggested that the small group of criminals involved in a significant amount of crime has 'its victimological counterpoint'. This is the 'relatively small section of the public . . . disproportionately often victimized by crime'.<sup>32</sup> Those subject to repeat victimisation are a significant part of the total of crime victims, but do not elicit our sympathy in the same way as others do, as they do not appear to take the appropriate steps to avoid revictimisation.

The second situation is where we ask if being a victim and being an offender are distinct and different statuses; that is, can a clear distinction be drawn between victims and offenders, and, if so, do offenders who become victims of crime qualify to be regarded as victims also? The answer to both questions may well be no. There are many cases where we can make a clear distinction, but equally there are many where it is not possible. This has not been explored in the Irish context, but it has been substantiated in other jurisdictions. Bottoms and Costello refer to this as the 'victim-offender overlap'.<sup>33</sup> This is particularly the case with household offences like burglary. Offenders are willing to report such victimisations, even though the evidence suggests that the 'offences might be disproportionately often committed by acquaintances'.<sup>34</sup> These kinds of findings, Schreck and Stewart say, discredit 'the idea that victims and offenders are distinct entities . . . in fact that they are often the same people'.<sup>35</sup> They concluded that there is one

27 Dorothy Watson, *Victims of Recorded Crime in Ireland: Results of the 1996 Survey* (Oak Tree Press 2000).

28 Kiran Sarma, 'Repeat Victimisation in Ireland' (2003) 24 *Irish Journal of Psychology* 96–113.

29 *Ibid* 111.

30 Central Statistics Office, *Crime and Victimisation: Quarterly Household Budget Survey* (Central Statistics Office 2010).

31 *Ibid* 2.

32 Jan Van Dijk, 'Introducing Victimology' in Jan Van Dijk, Ron G H Van Kaam and JoAnne Wemmers (eds), *Caring for Crime Victims: Selected Proceedings of the Ninth International Symposium on Victimology* (Criminal Justice Press 1999) 1–12.

33 Anthony Bottoms, and Andrew Costello, 'Understanding Repeat Victimization: A Longitudinal Study', in Shlomo Giora Shoham, Paul Knepper and Martin Kett (eds), *International Handbook of Criminology* (CRC Press 2010) 649–80.

34 *Ibid* 127.

35 C J Schreck and E A Stewart, 'The Victim-Offender Overlap and Its Implications for Juvenile Justice' in D M Bishop and B C Feld (eds), *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (OUP 2012) 48–69.

consistent finding in the study of crime victims, 'people who break the law have a higher likelihood of falling victim to crime as well'.<sup>36</sup> 'There are', they argue 'very few examples of pure types of victims'.<sup>37</sup>

So why we are unwilling to recognise offenders who are themselves offended against as crime victims? Part of the problem is that the distinction between offenders and victims is often based on the use of the small number of violent and high-profile offenders as the 'typical criminal' and the elderly and vulnerable individual as the 'typical victim'. O'Connell has shown how the media in Ireland emphasises atypical and violent kinds of crime and frame them within the two ideas – that criminals are unfeeling and unreformable and that victims are typically blameless, vulnerable and unable to protect themselves.<sup>38</sup> If the working assumption is that all offenders lack empathetic feelings, then they do not conform to our notion of a 'victim' when they become one.

Thirdly, there is the difficulty that men face in establishing that they have been victims of crime. We have seen how in cases of homicide there are nuances in the understanding of the 'deserving' victim. The notion that the victim may have contributed to the violence inflicted on him by past violent behaviour is a case in point. But it is by no means confined to homicide. For some other kinds of crime the possibility of there being male victims is simply 'unbelievable'. Male victims of domestic violence are a case in point. While there is no suggestion that there is any equivalence with women in terms of the incidence of domestic violence, the so-called and mythical issue of gender symmetry,<sup>39</sup> men do experience domestic violence. The research of Watson and Parsons is important in this respect.<sup>40</sup> It confirmed that levels of violence against women are substantial in Ireland, but that violence against men is by no means insignificant. They found that: 15 per cent of women and 6 per cent of men have suffered severe domestic abuse at some point in their lives; 13 per cent of women and 13 per cent of men have suffered physical abuse or minor physical incidents; and one in three women and only one in 20 men reported it to the Gardaí. Their study suggests that 213,000 women and 88,000 men in Ireland have been abused at some time in their lives by a partner,<sup>41</sup> though it should not be assumed that the abusive partner is of the opposite sex. Violence can also be a problem in same sex relationships. Neither should it be assumed that the physical or psychological consequences for male and female victims are necessarily equivalent. Nonetheless, as the National Office for the Prevention of Domestic, Sexual and Gender-based Violence says, 'it is now widely accepted in Ireland that both men and women can be victims and perpetrators of violence in the home'.<sup>42</sup> And while the AMEN website may assure us that 'there is no shame in being a male victim',<sup>43</sup> there is.

There is a readily available set of cultural justifications in Ireland to trivialise domestic violence against men and delegitimise males as victims of domestic violence. The AMEN

36 C J Schreck, G C Ousey, B S Fisher and P Wilcox, 'Examining What Makes Violent Crime Victims Unique' (2012) 28 *Journal of Quantitative Criminology* 651–71.

37 *Ibid* 666.

38 M O'Connell, 'The Portrayal of Crime in the Media: Does it Matter?' in P O'Mahony (ed), *Criminal Justice in Ireland* (IPA 2002) 245–67.

39 See, for example, R P Dobash and R E Dobash, 'Women's Violence against an Intimate Male Partner: Working on a Puzzle' (2004) 44 *British Journal of Criminology* 324–49.

40 D Watson and S Parsons, *Domestic Abuse of Women and Men in Ireland: Report on the National Study of Domestic Abuse* (National Crime Council of Ireland 2005).

41 *Ibid* 169.

42 See Cosc website <[www.cosc.ie/en/COSC/Pages/WP09000005](http://www.cosc.ie/en/COSC/Pages/WP09000005)>.

43 See AMEN website <[www.amen.ie](http://www.amen.ie)>.

website reproduces some of these including: 'You must have done something terrible to her to deserve this!'; or '[L]ook at the size of you! Maybe she was just defending herself!'<sup>44</sup> Weiss has pointed out how the gendering or feminisation of victimisation works.<sup>45</sup> She argues that the:

... social expectations of what it is to be a man in our society—as strong, tough, self-sufficient, and impenetrable . . . counter images of victimization in general and sexual victimization in particular. With 'real' men expected to avoid behaviours associated with femininity, men who are overpowered by others may be judged to have failed in their masculine duty to stick up for themselves.<sup>46</sup>

Real men do not get sexually assaulted, either by other men or, most shamefully of all, by women and, if they do, then it is likely that they 'deserve the violence they experience'.<sup>47</sup> Against this kind of background, suppression of the experience and non-reporting are inevitable consequences.

This denial of victimhood to men can also be seen in what might be termed more conventional forms of male violence. It is difficult for youths and young men to establish that they have been victims of assault by other men, particularly when this happens in the night-time economy of drinking and drug-taking. There are two reasons for this. The first is that they may be unwilling to report being assaulted because of the damage that it would do to their sense of masculinity. The second is the fear that they will not be believed. The point about stereotypes of the 'real' man is that they are common to all institutions, such as the police, that deal with violent crime and young men can face a 'credibility' issue in trying to establish that they have been victims of assault rather than being joint participants in a public affray. So, while there is considerable agreement in criminology that men are more likely to be victims of violent crime,<sup>48</sup> this does not automatically entitle them to the status of 'real' victims.

A fourth category of people who find it difficult to achieve the status of victims are those who are involved in issues with powerful groups like the police and the state in the course of which they are denied their rights as citizens, but which is done in ways that make it difficult for them to elicit the kind of public sympathy that is a necessary to achieve the social status of 'victim'. The example of one group and one individual can be used to illustrate the point. Young people are the group. They told an *Irish Times* journalist in Dublin about the persistent problems of being stopped and searched without, they claimed, any good reason.<sup>49</sup> One of them said that:

[W]hen I got pulled the last time they threw me up against the wall and said, 'Empty your pockets . . .' [T]hey flicked the hat off my head and told me to take off my jacket and my shoes. You're just standing there confused.'

Dermot Walsh said that an investigation of this problem by the now defunct National Crime Council confirmed 'the extent to which Gardaí treat these young people as

44 Ibid.

45 Karen G Weiss, 'Male Sexual Victimization: Examining Men's Experiences of Rape and Sexual Assault' (2010) 12 *Men and Masculinities* 275–98.

46 Ibid 277.

47 The quote is from Diane Richardson and Hazel May, 'Deserving Victims?: Sexual Status and the Social Construction of Violence' (1999) 47 *Sociological Review* 308–31.

48 See Weiss (n 45), for example.

49 Patrick Freyne, 'Stop and Search: Garda Harassment or Crime-fighting?' *Irish Times* (Dublin, 22 July 2017).

trash . . . not fellow human beings who are deserving of respect'. As such, this is not a new issue, but has been highlighted in previous research.<sup>50</sup>

Similarly, those who are subject to persistent and unfair pursuit by the Gardaí and by the legal institutions of the state are denied or do not find it easy to achieve the status of victim. The case of Ian Bailey illustrates the point. He was arrested in February 1997 for the murder of Sophie Toscan du Plantier in Bantry in December 1996. Given that he had come to Garda attention for domestic violence in the past, he was not an unlikely suspect. However, Bailey co-operated with the Gardaí, giving everything – samples of hair, blood and DNA – everything, that is, except a confession. The main witness against him withdrew her statement, claiming that the Gardaí pressured her into making it. In 2001 the Director of Public Prosecutions found significant flaws in the 'evidence' against him and said that there were no grounds for a prosecution. Quite simply there was no case for him to answer.<sup>51</sup>

That has not stopped attempts to construct such a case. The *Fennelly Report* concluded that the Gardaí were prepared to 'contemplate altering, modifying or suppressing evidence' that obstructed their attempts to get a conviction.<sup>52</sup> The most recent attempt to extradite him to France to face charges of murder was described by the trial judge as 'an abuse of process'. As Kerrigan put it:

Bailey's intimate dairies were examined, details leaked; every fact that could possibly discredit him was dug up and spread around. His life was destroyed. And after 20 years of intense focus on one man there remains a total – total – absence of hard evidence against him.<sup>53</sup>

Yet he does not merit public sympathy as a victim and his case is remarkable in the degree to which significant public figures in politics, law and academia have remained silent on the issue. There is, in the public perception at least, no smoke without fire.

It is clear from these that the concept of the crime victim that animates victim discourse – the notion that the victim is an 'innocent' and blameless individual and so worthy of our unconditional sympathy – does not reflect the reality of being a victim of crime. There are many additional attributes that the victim must have to qualify as a 'deserving' victim. These are not clearly articulated in victim ideology, but have the capacity to surface in a brutal fashion when the discussion moves on to victim compensation. This is a topic that would repay further research and could investigate the role that social class plays in victimhood. Is it easier, for example, for a young middle-class man to establish that he has been the victim of assault if the alleged offender is working class than it is for a young man from a working-class background to establish that someone from the same background has assaulted him?

## 2 Do victims benefit from a victim discourse?

A central motivating force in many attempts to reform the criminal justice system is to make it more 'victim-friendly'. Such attempts, however, are not always successful. They run the risk of raising victim expectations, but these are not expectations that the system, even a reformed one, can necessarily satisfy. Thus, the question must be asked: do victims benefit from the increasing centrality of a victim discourse?

50 See, for example, Ciaran McCullagh, 'Juvenile Justice in Ireland: Rhetoric and Reality' in T O'Connor and M Murphy (eds), *Social Care in Ireland* (CIT Press 2006) 169.

51 Gene Kerrigan, 'After 20 Years in the Frame, Where is the Evidence against Ian Bailey?' *Sunday Independent* (Dublin, 30 July 2017).

52 *Report of the Fennelly Commission*, 6 April 2017, 105

53 See Kerrigan (n 51).



This has been explored in a number of recent studies. One looked at the long-standing problem of the low prosecution rate for the crime of rape.<sup>54</sup> In England and Wales this has been attributed to the tendency only to prosecute cases where there is a strong likelihood of success. These are ones that fit the image of 'real' rape. That is: the offender is a stranger; the victim is a sober 'respectable' woman; and there is clear evidence of violence. It has been argued by those seeking reform that it is necessary to bring non-stereotypical cases into court to challenge these stereotypes.<sup>55</sup> Such cases would include those where the victim had been drinking, where the victim and offender are known to each other, where there are claims that the behaviour was consensual, and where there were discrepancies in the evidence provided by the victim. Yet, when such an approach is used, it results in the prosecution of a greater number of cases, but this has a paradoxical consequence.<sup>56</sup> There may be a need to bring non-stereotypical cases into the public domain to challenge stereotypes of rape, but it does not necessarily succeed. The evidence suggests that it leads to a higher acquittal rate and may increase victimisation in the short term at least.<sup>57</sup>

The same possibilities of revictimisation exist in relation to the Criminal Justice (Victims of Crime) Bill 2016.<sup>58</sup> This Bill gives legislative substance to the Victims' Directive and as such it is seen as a positive development for victims. The Minister for Justice described it as a 'ground breaking piece of legislation'.<sup>59</sup> Victim groups have also welcomed it. Essentially, it appears to meet the problems with previous approaches to victim needs such as that of the Victims' Charter, first introduced in 1999. These Charters embodied, as Mawby and Walklate, put it, 'an approach based solely on the question of meeting needs, without translating any of these needs into rights'.<sup>60</sup> Under the terms of the new Bill, what previously had been a requirement for the Gardaí and the state has now become a series of rights for the crime victim.

But, as always, the devil is in the detail. If the European Commission feels that a state has not fulfilled its obligations under the terms of the Directive, it can initiate legal proceedings against that particular state. Equally, an individual citizen can ask the European Commission to initiate infringement proceeding against a member state if the citizen feels that the state is not living up to its commitments as set out in the Victims' Directive. However, it has been argued that, where individual victims are concerned, 'it seems unfair and unreasonable to expect a victim to go through the stress and trauma of court proceedings once again'.<sup>61</sup> Hence, the dangers of revictimisation in pursuit of one's rights are significant here.

Then there is the issue of compensation. Under the terms of the European Directive, states are required to ensure that victims 'have appropriate access to compensation' and that member states provide 'fair and appropriate compensation to victims of intentional violent crime'. In Ireland we have the Criminal Injuries Compensation Scheme. It awards

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54 Anna Carline, and Clare Gunby, 'Rape Politics, Policies and Practice' (2017) 56 *Howard Journal of Crime and Justice* 34–52.

55 *Ibid* 43.

56 *Ibid* 48.

57 *Ibid* 43.

58 The Bill was published in December 2016 but has not yet been passed by the Houses of the Oireachtas.

59 Dáil Debates (1 March 2017).

60 Rob Mawby and Sandra Walklate, *Critical Victimology* (Sage 1994).

61 Maria McDonald, 'Overview of New Victims' Rights Directive, Public Interest Law Alliance, July 2013 <[www.pila.ie/resources/bulletin/2013/07/03](http://www.pila.ie/resources/bulletin/2013/07/03)>.

'compensation for expenses and losses suffered as a direct result of a violent crime or whilst assisting or trying to assist in preventing a crime or in the course of saving a life'.<sup>62</sup> It will also consider claims for injuries incurred when going to the assistance of a member of the Gardaí. But the scheme has significant limitations in that it does not cover domestic violence (where the victim and the assailant are 'living together as part of the same household'), and it does not cover traffic offences unless someone deliberately tried to run you down. But what is more important in this context is that, unlike those compensation schemes available in Europe, it does not cover damages for the 'pain and suffering' that a crime has imposed. The exception is where '[i]t will . . . pay mental distress money for immediate family members of a murder victim'. But pain and suffering is covered by the schemes available in Belgium, the UK, Luxembourg, Sweden, Denmark and Finland. In addition, Belgium, Denmark, Finland, France and Sweden give extra compensation for the 'moral damages' inflicted by crime, a phrase that refers to the violation of the victim's personal integrity and covers, for example, the cost of psychotherapy.<sup>63</sup> Moloney argues that the unwillingness of the Irish state to compensate crime victims for the pain and suffering of crime victimisation means that they 'are being discriminated against when it comes to appropriate and fair levels of compensation'.<sup>64</sup> Is this revictimisation under another guise?

What is also unclear is what the consequences will be if the Gardaí or the other institutions of the state fail to respect these rights? If a member of the force does not keep the crime victim up to date with what is happening in the investigation, what difference will it make? If the Director of Public Prosecutions does not inform victims of why the case against particular offenders has been dropped or if they are charged with a lesser offence than victims anticipated, what happens?

Obviously, it can have no implications for the criminal process against the suspected offenders. But, if victims are not provided with relevant information, will they have legal redress and what function would such legal redress serve? Is it possible that these are 'empty rights', simply put in place to demonstrate that we are on the side of victims, another example of symbolic legislation to make a social and political point rather than a legal and enforceable one? Is it just the extension of pointless rights to crime victims, thus resulting in their further victimisation?

The same could well be true for the changes in victim impact statements (VISs). These were first introduced in the Criminal Justice Act 1993 as a formal means through which victims of serious crime could make the court aware of the impact that the crime had on them. It covered both the VIS where the victim tells the court of the impact of the offence on them and the victim impact report (VIP) where another person presents the case on the impact of the offence on the victim. Initially, the right was confined to victims of violence and sexual offences. Under s 27 of the new Bill, the right to make such statements is extended to all crime victims.

The main reason why this may not be a positive, victim-friendly reform is that, as the situation stands at the moment, it is unclear what these statements are intended to achieve. Are they envisioned to be therapeutic in that the public expression of hurt is to be a cathartic experience for a crime victim? Or are they intended to influence the judiciary in the sentencing process by making the individual judge aware of the damage inflicted on

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62 L. Moloney, 'A Commentary on the Limitations of the Irish Criminal Injuries Compensation Scheme', Address to the Federation for Victim Assistance 16 April 2011 (no page numbers).

63 Ibid.

64 Ibid.

the victim by the crime? Or are they both cathartic and punitive? The expectation that making such a statement will give closure to victims by allowing them to influence the outcome of their cases is something which, its critics allege, is both ill-defined and somewhat amorphous in its meaning, and it is also not necessarily something that criminal justice sentencing can allow.<sup>65</sup> Paul Rock has argued that, as these statements do not or are not supposed to influence the sentencing process, their role is in the criminal justice process 'tends to be ill-defined'.<sup>66</sup> What seems to be planned under the 2016 Bill is the extension of an ill-defined process to all victims in a situation where we are unsure what it achieves for the present set of victims who are already allowed to make them.

There are, as Roberts and Manika point out, two opposing models of the VIS.<sup>67</sup> In one, the purpose of the statement is expressive, allowing victims to say what damage has been done to them by the offence. It is not intended to influence the sentence. In the other, it is instrumental: that is, it is intended to have an impact on the sentence of the court.

It is not immediately clear which description best characterises the current Irish use of the VIS. O'Malley has argued that the legislation that introduced the VIS fails to give any guidance on what precise weight is to be assigned to them.<sup>68</sup> According to Guiry, 'judges are expected to treat a VIS with what could be regarded as a genuine but distanced respect'. She goes on to say that 'a VIS does give a judge a unique insight into the effects of crime, but it need not necessarily be used in sentencing'.<sup>69</sup>

The late Mr Justice Carney had a different perspective. He argued that 'victim impact evidence is meant to be of assistance to the judge in selecting the appropriate penalty and not merely therapeutic to the victim'.<sup>70</sup> He said that he has been affected by the nature of the evidence presented in such statements. He did not make clear quite what weight he put on it in when selecting an appropriate sentence, though the statements obviously had some impact on him.

So there is a considerable lack of clarity around the purpose of such statements and around the weight that the courts should place on them. Perhaps more pertinently, it is unclear what attention the courts currently pay to them. If they are not intended to influence sentencing, why should court personnel take anything other than polite notice of them? Rock, for example, has noted how the 'memorialisation of the dead' through the VIS is a deeply emotional event for those delivering them in homicide cases, but they are often met with 'civil inattention by the court'.<sup>71</sup> Similarly, Booth found in Australia that, while judges listened attentively to the statements, other court personnel were not so focused.<sup>72</sup>

If this is the situation in homicide cases, there is no guarantee that the extension of the right to make such statements to all criminal cases will be met by any increased level of enthusiasm or attention by the courts and by court personnel. If benign indifference

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65 See, for example, McGrath (n 11).

66 Paul Rock, "'Hearing Victims of Crime": The Delivery of Victim Impact Statements as Ritual Behaviour in Four London Trials for Murder and Manslaughter' in Anthony Bottoms and Julian V Roberts (eds), *Hearing the Victims: Adversarial Justice, Crime Victims and the State* (Willan 2010) 200–231.

67 Julian V Roberts and Marie Manikas, *Victim Personal Statements: A Review of Empirical Research* (Report for Ministry of Justice 2011).

68 Quoted in Roberta Guiry, 'A Voice for Victims: The Development of the Role of the Victim in the Irish Criminal Justice System' [2005] 4 Cork Online Law Review XII.

69 Ibid.

70 Mr Justice Paul Carney, 'Victim Impact Evidence' *Irish Times* (Dublin, 12 October 2007).

71 See Rock (n 66) 219.

72 Tracey Booth, "'Cooling Out" Victims of Crime; Managing Victim Participation in the Sentencing Process in a Superior Sentencing Court' (2012) 45(2) *Australian and New Zealand Journal of Criminology* 214–39.

is the current mode of reception, then this will inevitably increase if they are required to listen to more of them and this will inevitably be communicated to those making them. More than likely it will be experienced by them as a form of revictimisation, particularly if they are delivered in the random chaos that marks the working of the lower courts where most criminal cases are held in Ireland.

The belief that underpins such reforms is that it is possible through a series of strategic modifications to make the current criminal justice system more victim-friendly and to make it a more suitable vehicle for victim participation and victim satisfaction. It remains an open question as to whether this is possible. McBarnett, for example, maintains that the experiences of victims are not simply a by-product of an insensitive system, but very much at the heart of the criminal trial and their experiences are ones that are shared with defendants.<sup>73</sup> As criminal trials are currently structured, it is in the interests of the defence to undermine the credibility of victims. This is done through the use of various 'discrediting techniques' on them when they appear as witnesses and which victims find upsetting. Equally, it is in the interests of the prosecution to use similar techniques on defendants. For prosecutors, she argues, 'the victim is a problem requiring careful management'.<sup>74</sup> They have developed techniques to ensure that victims do not provide the court with information that might call into question their purity as victims or raise the spectre of any possible contribution they might have made to the offence of which they are claiming to be victims. As Walklate puts it, 'prosecuting counsel in trying to secure a conviction will often cut witnesses short or confine them to very specific answers which victims find difficult to relate to since such a process does not match with their actual experiences of events'.<sup>75</sup> Their situation in the adversarial system is one of vulnerability and potential humiliation.

Thus, it is hardly surprising then that, as Winick puts it, 'victims often experience the criminal process as unfair, disempowering, disrespectful, and an affront to their dignity'.<sup>76</sup> McBarnett extends this by saying that 'if victims feel that nobody cares about their suffering, it is in part because institutionally nobody does'.<sup>77</sup> The position of crime victim will always be a problematic one in an adversarial justice system. Attempts to make it more victim-friendly run the risk of exposing victims to further humiliation and revictimisation. Moreover, attempts to persuade victims that it has become more victim-friendly increase the shock that victims experience when they are exposed to the rigours of an adversarial justice system.

### 3 Overstating the case for victims: victims of crime, but not crime 'victims'?

Arguments about crime victims and proposals for dealing with their concerns depend on a foundation of crime victims who have negative victimisation experiences. It is through official labelling that one acquires the status of victim and through that an entitlement to access the rights of the victim. Some may want this acknowledgment of their status, but it is possible that others do not. Many people may meet the legal specifications of being a victim, but not see themselves in this way. For them, being a crime victim is simply one of the unpleasant costs of modern life, particularly of life in the city. As Rock puts it,

73 Doreen McBarnett, 'Victim in the Witness Box' (1983) 7 *Contemporary Crises* 293–303.

74 *Ibid* 296.

75 Sandra Walklate, *Victimology: The Victim and the Criminal Justice Process* (Routledge 2013) 127.

76 B J Winick, 'Therapeutic Jurisprudence and Victim Participation in Justice' in Edna Erez, Michael Kilchling and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina University Press 2011) 3–14.

77 See McBarnett (n 73) 115.

'being victimised and assuming an enduring social role of victim are not at all the same'.<sup>78</sup> As a result, the state and its official agencies may be more concerned about the victimisation experience than many actual crime victims.

There are a number of arguments to sustain this proposition. One is the question of response rates to victim surveys. There is a growing concern in research circles at the difficulties in getting people involved in survey-based research and a range of strategies have been devised to address this, including offering payment or entry in raffles in return for participation.<sup>79</sup> But, equally, there is the belief that if the issue under investigation is of sufficient interest and topicality to respondents then they will participate. Given the predominance of victim-centred discourse in public debate and the valorisation of crime victims in public discussion, one would anticipate that surveys about crime victimisation would have high response rates. They do not. These low response rates may be understandable in rape and domestic violence where victims may be unwilling or unable to relive their experiences. But response rates are low among victims of all other kinds of crime also.

Just look at two Irish examples of research on crime victims. The Garda Inspectorate sent letters to 158 of the people who had contacted the Gardaí about criminal incidents. They received six responses.<sup>80</sup> Similarly, the study of Kilcommins and his colleagues had a low response rate.<sup>81</sup> Their main questionnaire was distributed by those support organisations who agreed to co-operate to 1050 respondents: 303 were returned, a response rate of just under 30 per cent.

Then there are the people who are victims of crimes, but who do not report them to the Gardaí. Their reasons for non-reporting makes them interesting in this context. They are, as Goodey says, people about whom little is known.<sup>82</sup> It is often assumed that such groups include a preponderance of victims of domestic violence and homophobic assault. The data from victimisation surveys in Ireland suggests that, while this may be true, there is more going on here than is immediately apparent.

For example, the 2006 victimisation survey done by the Central Statistics Office asked crime victims who had not reported their victimisation to the Gardaí why they had not done so:<sup>83</sup> 13 per cent of those who had been victims of burglary said that they 'had solved it themselves'. A further 5.3 per cent said that they did not 'wish to involve the Gardaí'. Where theft without violence was concerned, the relevant figures were 4.1 per cent and 2 per cent. With theft with violence, 8.9 per cent said they 'solved it themselves' and 7.2 per cent did not wish to involve the Gardaí. The relevant figures for assault were 6.9 per cent and 10.9 per cent. This suggests that there may be a parallel system of justice that such victims can access and through which victims can 'solve the problem themselves'. It is one that does not require Garda involvement or the associated apparatus of victim support.

78 Paul Rock, 'On Becoming a Victim' in Carolyn Hoyle and Richard Young (eds), *New Visions of Crime Victims* (Hart 2002) 1–22.

79 See, for example, Sonia Thompson, 'Paying Respondents and Informants' (Social Research Update, University of Surrey 1996).

80 Garda Inspectorate, *Criminal Investigation* (Dublin 2014) 299.

81 Shane Kilcommins et al, *The Needs and Concerns of Victims of Crime in Ireland* (University College Cork 2010).

82 Jo Goodey, *Victims and Victimology: Research, Policy and Practice* (Longmans 2005) 38.

83 Central Statistics Office, *Crime and Victimisation* (Central Statistics Office 2007).

The third piece of evidence is the relatively low levels of engagement with victim support services. We have no data on this in Ireland, but the experiences in England and Wales suggests that it is a lot lower than might be anticipated. Less than 40 per cent of victims of serious crime (defined as a crime where the offender is sentenced to 12 months or more in prison) take up a service offered by the Probation Service to provide them with information on sentencing and subsequent release dates of the person who perpetrated the offence against them. The figure rises to 50 per cent in cases of sexual offences.<sup>84</sup> Williams says that the low take-up may be because the Probation Service provides the service and the perception that it works on behalf of offenders may be a constraining element.<sup>85</sup> Again, this is a plausible but not entirely satisfactory explanation.

These disparate pieces of evidence suggest that many crime 'victims' resist or are indifferent to being so designated. The question is why? One possibility is that crime victimisation may not actually be as traumatic as it is often presented. The received wisdom is that criminal events take their toll, though the exact nature of the effects may differ depending on the individual victim, the particular crime, and the circumstances in which the crime takes place. Thus, it has been established that the effects include: loss of earnings due to time off work; stress and shock at the nature of the invasion implied by a burglary or an assault; the impact on family relationships; and post-traumatic stress syndrome experienced by women who have been victims of sexual assault. 'This', as Walklate puts it, 'amounts to considerable harm done'.<sup>86</sup>

Yet many of the harms are conceived in psychological terms, and the extent to which these are significant, consequential and permanent remains an open question. Watson found that most crime victims do not suffer long-term psychological damage in the shape of increased anxiety, trouble sleeping or difficulties in concentrating.<sup>87</sup> Only 3 per cent of those who were victims of crime that involved some level of violence, suffered permanent or recurring problems such as backache, or headaches. Is it possible, as Watson suggests, that 'crime is often inconvenient rather than traumatic'?<sup>88</sup>

A second possibility is that some victims use other strategies to solve the problem. We have seen how many victims said that they 'solved it themselves' or that 'they did not wish to involve the Gardaí'. These categories have not been explored so quite what is involved in 'solving it themselves' is unknown. If we look at other reasons available to survey respondents we can exclude the level of loss involved and the victim's perception that the Gardaí would not do anything about the offence. This raises the possibility that, for example, many crime 'victims' respond to their victimisation through retaliatory attacks or vigilante justice. Hence, the difficulties that we have seen about making clear and unequivocal distinctions between victim and offender.

A third possibility is that many people have self-defined needs that they believe the services cannot meet, because they do not see themselves as victims in the manner in which they are defined by the relevant service-providers or else they get through the experience in other ways, for example, through relying on intimate and family supports. It is also possible that, although men are more likely to be crime victims than women, they may not see victim organisations as relevant to their experiences. The other possibility is that the designation of victim is a feminised one and so one to be avoided.

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84 Brian Williams, *Victims of Crime and Community Justice* (Jessica Kingsley 2005) 106.

85 Ibid.

86 See Walklate (n 2) 106.

87 See Watson (n 27) 131.

88 Ibid 140.

The implications of the argument being made here is that we may need to be more circumspect in terms of our discussion of crime victims. For many, the experience may be irritating and upsetting, but not sufficient in terms of its long-term impact to warrant the use of the kinds of victim support services that the state provides. Indeed, their concerns may be met in other ways through, for example, some form of financial recompense, an area where the state is a somewhat reluctant participant as evidenced in our discussion of compensation in a European context.

### **Conclusion**

This paper has argued that a discourse that places the victim at the centre of the criminal justice system has the benefit of apparent simplicity, hence making it irresistibly appealing in the new world of populist politics. It conjures up a world of 'respectable' victims and safe solutions that do not threaten the power structure within which crime occurs and within which the criminal justice system is embedded. But it is a discourse that collapses on more sustained interrogation. The status of being a crime victim is not one that is accorded to all victims of crime; it leads to solutions that do not necessarily help victims and it can distort the nature of the experience of being a crime victim, one which for many is not of the significance that victim discourse attributes to it.

Yet the category of 'victim' has enduring attractiveness. Its appeal transcends that narrow focus of crime and has become a dominant frame through which social movements and political groups stake claims to resources and public attention. Moreover, through its combination of victimhood, vulnerability and the need for state protection it reinforces a model of state and professional paternalism that may in the end result in the disenfranchisement, and disempowerment and manipulation of significant sections of the population. It is an ideology that has great potential for rhetorical development, endless scope for expansion and our culture lacks a language through which it can be resisted.

