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The victim in the Irish criminal process: a journey from dispossession towards partial repossession

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Abstract

This article has sought to examine the criminal justice system's interactions with victims of crime. It is a relationship which has changed irrevocably over time. A significant discontinuity occurred in the nineteenth century when a new architecture of criminal and penal semiotics slowly emerged. An institutional way of knowing interpersonal conflict crystallised, one which reified system relations over personal experiences. It also emphasised new ideals and values such as proportionality, legalism, procedural rationality, equality and uniformity. New commitments, discourses and practices came to the fore in the criminal justice network. In modernity, the problem of criminal wrongdoing became a rationalised domain of action, a site which actively distrusted and excluded 'non-objective' truth claims. The state, the law, the accused and the public interest became the principal claims-makers within this institutional and normative arrangement, an arrangement which would dominate criminal and penal relations for the next 150 years. In the last 40 years, the victim has slowly re-emerged as a stakeholder in the criminal process.

Keywords: victims; state; accused; crime victimology; conscious raising

This article will examine the changing role of victims of crime in the Irish criminal process. Their status has not remained static over time. Rather it has been subject to a series of ruptures which have dramatically altered their standing. Under the pre-modern exculpatory justice system which existed in the seventeenth and eighteenth centuries, where wrongdoing was understood as a personal altercation, victims were given primacy as decision-makers. Their ownership of the alleged wrongs meant that their voices – built largely upon subjective experiences – carried a powerful justificatory force. By the mid-nineteenth century, however, the justice system was steadfastly disassociating itself from local and personal determinants. It sought instead to become a more depersonalised, rule-governed affair with the state at the centre. Conflicts were no longer viewed as the property of the parties most directly affected. New imperatives were foregrounded within the criminal justice system, particularly those that emphasised procedure, the ideological neutrality and rationality of the process, and its objectivated nature. In the last 40 years, the criminal justice system has again been changing, moving away from the operational self-enclosure that dominated institutional arrangements under a state-accused model of justice.

The purpose of this article is to trace the epistemic shifts in the ways in which the justice system has depicted and signified the victim. Engaging in such a wide-ranging historical analysis of the institutional status of the victim is of course fraught with dangers. Lawyers who attempt to understand criminal legal method through the prism of

history often fall into the fallacy of creating linear lines of development between the past and the present. Such lines facilitate neat reassuring narratives of continuity, but they often make for poor, uncritical history.[1] Tracing such changes also necessarily involves sweeping generalisations about changes in social life and in the criminal legal structure. Searching for patterns and trajectories of the *Gemeinschaft* and *Gesellchaft* variety can in many instances do violence to historically specific particulars and phenomena that do not fit with the selective frameworks and periodisations adopted. Justice, like most other routine phenomena, has a fluid rhythm that does not easily or naturally lend itself to partition, compartmentalisation and capacious reasoning or inquiry. Formulating concrete systems of justice across 300 years of history necessarily results in some factuality being ignored or under emphasised.

There are still very good reasons for engaging in such an exercise as long as it is remembered that some local particulars might not unerringly conform with the generalised patterns produced. In particular, it can help us to identify and consider different trends, tendencies and currents of reflection that broadly comprise patterns of action vis-à-vis those who are victims of crime. It can therefore serve a very useful heuristic purpose. The intention is that by highlighting the broad historical changes in the assumptions and realities that governed victim relations under pre-modern exculpatory and modern inculpatory models of justice, it will help to amplify the dynamics and principles that shape and determine our current arrangements.

The victim as the principal claim-maker

The justice system that existed in Britain and Ireland in the seventeenth and eighteenth centuries was exculpatory and localised in nature. The 'paradigm of prosecution' was the victim of the crime.[2] Victims were the principal investigators of crime and the key decision-makers in the prosecution process.[3] As Bentham disapprovingly noted:

> The law gives to the party injured, or rather to every prosecutor, a partial power of pardon . . . in giving him the choice of the kind of action he will commence . . . The lot of the offender depends not on the gravity of his offence but on . . . the injured party . . . The judge is a puppet in the hands of any prosecutor.[4]

Victims could elect not to invoke the law and let the criminal act go unpunished; they could engage in a personal settlement or private retribution; or, they could prosecute, but shape the severity of any criminal charge (capital or non-capital) through their interpretation of the facts.[5] Conflicts remained the property of the parties personally affected and this often involved recourse to informal dispute settlement:[6]

> . . .formal prosecution was the exception; negotiation and informal sanction the norm. The major courts had no monopoly over punitive sanctions in the eighteenth century. Indeed, they usually had to content themselves with

1 David Garland, 'Of Crime and Criminals: The Development of Criminology in Britain' in Mike Maguire et al (eds), *The Oxford Handbook of Criminology* (OUP 2002) 7–50; Robert Gordon, 'Critical Legal Histories' (1997) 36 Stanford Law Review 57.

2 Douglas Hay, 'Controlling the English Prosecutor' (1983) 21(2) Osgoode Hall Law Journal 165.

3 Peter King, 'Decision-Makers and Decision-Making in the English Criminal Law, 1750–1800' (1984) 27(1) Historical Journal 25, 27.

4 Jeremy Bentham, *The Rationale of Punishment* (University of London Press 1830) 427.

5 David Philips, 'A New Engine of Power and Authority: The Institutionalisation of Law Enforcement in England 1780–1830' in V A C Gatrell, Bruce Lenman and Geoffrey Parker (eds), *Crime and the Law: The Social History of Crime in Western Europe since 1500* (Europa Publications 1983) 158.

6 Nils Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1–15.

> processing a few scraps and particularly tough morsels which those involved in informal sanctioning processes threw their way or spat out as indigestible, and as therefore requiring the tougher teeth of the criminal law.[7]

If victims did proceed with a prosecution, it was their energy, for the most part, that carried the case through the various prosecution stages. Victims engaged in the fact-finding, gathered witnesses, prepared cases, presented evidence in court as examiners-in-chief, and bore the costs involved.[8] When formal justice was invoked, which was the exception rather than the rule, it relied heavily on victim and popular participation. Formal resolution of grievance remained very much the property of individual victims or associations of victims who monopolised the investigative and prosecutorial functions. Victims could thus assert primacy as claims-makers. Their ownership of the alleged wrongs had a powerful justificatory force, which ensured that their subjective experiences and personal preferences were received relatively unfiltered, and carried meaningful weight. The criminal trial itself was a personal, largely unregulated altercation with the working assumption that the accused was, in the absence of exculpation, guilty. This ensured that the accused was at all times an active, participating trial actor, a vital 'testimonial resource' whose self-exculpatory narrative was closely scrutinised by the judge and local jury in determining culpability. The degree of culpability itself was heavily shaped by moral and local knowledge considerations. Moreover, few restrictions existed on what could be admitted in trial. Most evidentiary facts which had broad probative value as regards the offence committed were heard in open court and required defence rebuttal regardless of their prejudicial effect on the accused.

A state-accused model of justice

A significant discontinuity occurred in the nineteenth century when a new architecture of criminal and penal semiotics slowly emerged. An institutional way of knowing interpersonal conflict crystallised, one which reified system relations over personal experiences. It also emphasised new ideals and values such as proportionality, legalism, procedural rationality, equality and uniformity. New commitments, discourses and practices came to the fore in the criminal justice network. Prosecutorial practices, for example, began to focus on more analytic considerations such as the accused's conduct rather than his or her character. More mechanical determinants (such as rulebook formalism) took priority over contextual experiences. The state came to dominate the crime conflict, positioning itself as the only legitimate means of coercion. Monopolisation of this kind recalibrated the circuits of governance, resulting inter alia in the construction of *l'égalité des arme*s to rebalance dissymmetries in power relations.

The 'incidence of interruptions'[9] were manifold. To begin with, solutions for the problems of crime and violence were increasingly rooted through central authority mechanisms. The era of victim justice as 'accommodation' and theatre was at an end. Conflicts were no longer viewed as the property of the parties most directly affected. Previously strong stakeholder interests such as those of victims and the local community were gradually colonised in the course of the nineteenth century by a state apparatus which acted for rather than with the public. Subjects increasingly ceded 'their authorisations to use coercion to a legal authority that monopolises the means of legitimate coercion and if necessary employs these means on their behalf'.[10]

7 Peter King, *Crime, Justice, and Discretion in England, 1740–1820* (OUP 2000), 22–23.

8 J M Beattie, *Crime and the Courts in England, 1660–1800* (Princeton University Press 1986) 35.

9 Michel Foucault, *The Archaeology of Knowledge* (Tavistock) 3.

10 Jurgen Habermas, *Between Facts and Norms* (Polity Press 2008 repr) 12.

In monopolising the investigative and prosecutorial functions, the state obviously imbalanced the equilibrium in power relations. Though constituted as a rational being, the accused in such circumstances was now seen as vulnerable in that he or she was pitted against the unlimited resources of the state. In this context, it is not surprising that a whole corpus of exclusionary rules and fairness of procedure rights emerged to ensure that the accused was afforded the best possible defence against unfair prosecution and punishment. This was greatly helped by the lawyerisation of the trial process. Since, and to paraphrase Stephen, the state was so much stronger than the individual citizen, and was capable of inflicting so very much more harm on the individual than the individual could inflict upon society, it could afford 'to be generous'.[11] The local victim justice system thus increasingly yielded to a Leviathan criminal justice system that was governed by a new set of commitments, priorities and policy choices.

The prosecutorial system increasingly came to resemble an 'obstacle course' where 'each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process'.[12] Common law and statutory rules were introduced to safeguard those accused of crime. In time, they also increasingly became fused with constitutional jurisprudence and, more recently, with human rights jurisprudence. The institutionalised nature of these accused rights has ensured that they cannot be easily 'trumped' for collective policy reasons such as security and public protection.[13] They remain very much part of the topography in the criminal process, carrying a threshold weight 'which the government is required to respect case by case, decision by decision'.[14]

Moreover, and very much in keeping with the rationalising impulse of the age, the personal knowledge and benevolence of the exculpatory model of justice seemed increasingly arbitrary and overly discretionary. The goal became to 'rout the personal from the courtroom'[15] through establishing a new administrative machinery for investigating, prosecuting, trying and sentencing for criminal wrongdoing. Gradually the trial shifted from an intense local 'kind of morality play'[16] to a more structured affair which relied on ideals such as proportionality, reason, equality and uniformity, where the focus was on the actions rather than the character of the accused. Thus, over the course of the nineteenth century the criminal trial jettisoned its amateur, local, personal and unstructured tendencies. As Wiener suggested:

> [R]emoving the personal element from the workings of the law would, it was hoped, lower the emotional intensity of the subject's relationship to the law. In the place of the metaphors of the family, which encouraged both unpredictability and excessive release of the passions by plaintiffs and accused, the law and its courts were to be imbued with the character of a market, a meeting place of self-contained, self-disciplining individuals rationally pursuing their own interests under the impersonal arbitration and discipline of the unvarying rules of law. Passionate contest was to be placed in the professional hands of lawyers, for whom passion was an instrument of calculation, and

11 J F Stephen, A *History of the Criminal Law of England*, vol I (Routledge/Thoemmes Press 1883) 354.

12 Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 163.

13 Ronald Dworkin, T*aking Rights Seriously* (Harvard University Press 1977) 92–4.

14 Ronald Dworkin, *Law's Empire* (Harvard University Press 1988) 223.

15 Randall McGowen, 'The Image of Justice and Reform of the Criminal Law in Early Nineteenth Century England' (1983) Buffalo Law Review 32, 89, 116.

16 T A Green, V*erdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800* (University of Chicago Press 1988) 363.

> confined by the rules of law, presenting no danger to society. Out of their contest, as out of a noisy but rule-governed marketplace or stock exchange, justice would emerge.[17]

This deep commitment to the reception and observation of unmediated viva voce testimony was grounded in the need to uphold the integrity of the adjudicative process and minimise the risk of misdecision.[18]

This new institutional pattern quickly transcended the victim's interaction with the crime conflict and reshaped how it was presented, addressed, legitimated and concluded. Within such a depersonalised, bureaucratised system, the victim was displaced, confined largely to the bit-part role of reporting crime and of adducing evidence in court as a witness, if needed at all. The victim's space for negotiation and participation in pursuing his or her own interests was thus dismantled by an increasingly State/accused-centred logic of action which sought to institutionalise the politics of pain and disturbing events within an 'iron cage'. Bureaucracy, as Weber informs us, 'develops the more perfectly', the more it is 'dehumanized, the more completely it succeeds in eliminating from official business love, hatred, all purely personal, irrational, and emotional elements'.[19] The functional and impersonal imperatives of a modern criminal justice apparatus did not require the establishment of 'contextual' relations with either the accused or the victim. Instead, it was increasingly organised around a constitutional state and the 'institutionalised fiction' of the 'public sphere as the central principle of its organisation',[20] both of which helped to promote the sense of 'civilized association' and an 'objectivated' criminal process.[21] The adversarial criminal trial – involving 'a contest morphology' that included oral presentation of evidence, lawyer-led questioning, cross-examination by counsel, relative 'judicial passivity' during the guilt-determining phase of the trial, and informational sources secured by both the prosecution and defence – exemplified this objective representation.[22]

From being a cornerstone in the regulation of relations concerning the conflict, victims increasingly found their individual experiences (such a vital currency in the pursuit of justice in the pre-modern era) assimilated into general group will – the public interest. The latter was validated through the institutional architecture of a criminal justice system, whereas the former was increasingly viewed as invalid knowledge given its partiality, subjectivity, emotiveness and unconstrained dimensions, all of which were filtered out by the operations of a justice system. In the course of the nineteenth century, the individual victim's experience was increasingly rendered as part of the fiction of the collective public interest and packaged and presented in institutional terms. The medium of the public interest itself – though represented as a neutral space for reasoning and dialogue – emphasised the values and outlooks of dominant interest groups within the criminal process, ensuring that there would be little alteration in the status quo.

17 Martin J Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England: 1830–1914* (CUP 1990) 66.

18 Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32(2) Journal of Law and Society 294.

19 Max Weber, *Economy and Society*, vol II, G Roth and C Wittich (eds), University of California Press 1978 repr) 975.

20 Jurgen Habermas, *The Structural Transformations of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity Press 2010) 125.

21 Jurgen Habermas, *The Theory of Communicative Action: Reason and the Rationalisation of Society* (Polity Press 2004) 148.

22 Mirjan Damaška, *The Faces of Justice and State Authority* (Yale University Press 1986) 88.

This marked the shift from victim-mediated justice to bureaucratised, state/accused mediated justice. Crime therefore was no longer viewed as a personal altercation, but a phenomenon that required an institutional response demarcated from emotive, subjective and personal references. In creating this 'buffer zone between system and person [by establishing a] zone of indifference'[23] between the lived ontological experiences of the crime conflict and its effective administration, new imperatives could be foregrounded, particularly those that emphasised procedure, the ideological neutrality and rationality of the process, and its objectivated, reasoned nature. The elevation of these imperatives to a 'position of authority' sounded the death knell for emotional and subjective forms of knowledge which were increasingly considered to be 'abnormal, dangerous, [and] half-animal'.[24]

The ontological dimensions of crime – so personal and subjective – were increasingly institutionalised and systematised. The depersonalisation of these experiences occurred via the filtering mechanism of the 'public interest'. In modernity, the problem of criminal wrongdoing became a rationalised domain of action, a site which actively distrusted and excluded 'non-objective' truth claims. The state, the law, the accused and the public interest became the principal claims-makers within this institutional and normative arrangement, an arrangement which would dominate criminal and penal relations for the next 150 years. This newly established configuration suppressed the emotive and personal elements of crime (at least as far as the victim was concerned). It did so by denying ownership claims to victims over the conflict and by removing any pathways which permitted the possibility of personal interest. 'From now on', as Nietzsche notes about interpretation of criminal wrongdoing in modernity, 'the eye is trained for an increasingly *impersonal* evaluation of the deed, and this includes even the eye of the injured party'.[25] Facticity, objectivity, rationality, and neutrality – coalescing with the filtering fiction of the 'public interest' – facilitated this drive from personal to institutional referents. Victims were displaced, rendered neutral by the hegemonic impulses of a state/accused logic of action. They became non-subjects, disenfranchised and dispossessed of all legal and claims rights. They were no longer recognised (or recognisable) in the justice system, their non-status and non-presence legitimate and legitimising features of the modern institutional process.

In addition, the focus of criminal law moved to a more formalised conception of criminal liability. Hierarchy, status, patronage, absolute sovereignty, and moral and discretionary imperatives had no place under this rule of law vista which advocated certainty, permanency, coherency, systematic application and a 'strictly professional legal logic':[26] *veritas non auctoritas facit legem* (truth not authority makes law) became the driving impulse. The private, personal and negotiable elements of the exculpatory process were thus increasingly dismantled by more bureaucratic, rational impulses.[27] As Habermas noted: '[t]he positivization, legalization, and formalization of law meant that the validity of law can no longer feed off the taken-for-granted authority of moral traditions'.[28] Instead, its validity would be based on the systematisation of doctrinal propositions and the emphasis on legal formalism and professional juridical input.[29] The positivization and densification of law also helped to steer the conflict away from local and lay participation.

23 Jurgen Habermas, *The Theory of Communicative Action: The Critique of Functionalist Reason* (Blackwell 2006) 308.

24 Frederich Nietzsche, *The Will to Power: Selections from the Notebooks of the 1880s* (Penguin 2017 repr) 225.

25 Frederich Nietzsche, *On the Genealogy of Morals* (OUP 1998 repr), 56.

26 See Weber (n 19) 885; Habermas (n 20) 53.

27 King (n 3) 25.

28 See Habermas (n 21) 260.

29 Ibid 256.

The initial anchoring point of this more rationalised approach to criminal law was the 'reasonable man', a responsible, rational, self-disciplining subject who, it was thought, was capable of being deterred by a properly proscribed system of criminal laws and a tariff of enforced sanctions.[30] This more codified approach to law also impacted on the image of the human subject who increasingly came to be constituted as a rational, autonomous and self-governing being. This is brilliantly captured by Wiener who noted:[31]

> The ideal of the responsible individual came to stand ever more at the centre of the law. Its administration was overhauled to better embody the assumption that the members of the general public were to be considered more rational and responsible than they had been hitherto . . . A crucial supposition underlying early Victorian law reform was that the most urgent need was to make people self-governing and that the best way to do so was to hold them, sternly and unblinkingly, responsible for the consequences of their actions. Thus in the course of the early to mid-nineteenth century the accused was gradually constructed as an abstract juridical subject who was free and equal, and capable of logically determining what was in his or her best interests. It was accordingly his or her constitution – rather than situation – that became a key legal battleground.

This drift towards the creation of an asocial subject also had important consequences in terms of the penal disposal of convicted offenders. In keeping with the ideology of individualism, rationality and self-governance, judicial sentencing in the nineteenth century increasingly embodied a policy of deterrence and retribution, the former 'to deny the utility of crime, the latter to reconstitute the social contract after breach.'[32] The discourse of individualism and moralisation held that criminal acts – like actions in any other realm where the ideology of economic liberalism could permeate − were the outcome of rational choice, calculation and volition. Such an archetype of sentencing is premised on presumed rationality: 'thus conceived, criminal law becomes a wholly abstract construction, taking cognisance only of the crime, while ignoring the criminal . . . Crime becomes a legal abstraction, after the manner of a geometrical construction or an algebraic formula'.[33] In effect, the system of sentencing created in the mid-nineteenth century focused on the materiality of the crime 'where the subjective criminality of the agent was determined by the objective criminality of the deed', and where the system of disposal for the judiciary rested on 'crystallised' and mechanical punishments.[34] David Garland neatly encapsulated the asocial juridical framework which emerged in the nineteenth century when he suggested:[35]

> The offender is defined as a legal subject, a citizen inscribed with rights and duties, entitled to equal treatment before the law. The State which punishes does so by contractual right in accordance with the terms of a political agreement. Its power to punish has its source in the offender's action – it is the agreed consequences of a contractual breach. The state has here no intrinsic or superior right. It meets the citizen on terms of equality and must not encroach upon his or her rights, person or liberty except in circumstances which are rigorously and

30 Lindsay Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5 Social and Legal Studies 57, 66.

31 Wiener (n 17) 54–5.

32 David Garland, 'The Birth of the Welfare Sanction' (1981) 8(1) British Journal of Law and Society 19.

33 Raymond Saleilles, *The Individualisation of Punishment* (Patterson Smith 1968 repr) 43.

34 Ibid.

35 David Garland, *Punishment and Welfare* (Gower 1985) 18.

> politically determined in advance – *nulla poena sine lege*. In this penal vision we meet the ideology of the minimal legal state, the liberal dream, guardian of the free market and the social contract.

In order to complete the modern picture, there is one further strand that must be traced – the need to individuate justice. Sentencing in the late nineteenth and early twentieth century gradually extricated itself from the assumptions and commitments underpinning mid nineteenth century sentencing practices (individualism, the rationality of offenders and a focus on the proximal conditions of crime) to become a more 'knowledgeable form of regulation' (with an emphasis on individualisation, the distal conditions of crime, and the creation of a plethora of 'non-equivalent' penal disposals). Alongside the 'generous' – and mostly already won – procedural safeguards provided to the accused at investigation and trial stages, a person guilty of a crime became entitled at conviction stage to have his or her individual mitigating circumstances factored into any decision about penal disposal. Justice, it was reckoned, could not be satisfied by 'any penalty which . . . [had] been exactly fixed beforehand'; punishment, from now on, had to 'be fitted to the criminal rather than to the crime'.[36] The all-powerful state had again decided to be generous and noble with its weak enemies as it gradually recoiled from the laissez-faire individualism and the postulate of free will which had been key policy ingredients of sentencing and the social contract for much of the nineteenth century.

A state-accused logic of action thus came to cast a long shadow over criminal process relations in the nineteenth and twentieth centuries. It defined the accused as the primary (exclusive) rights-bearer, with institutional practice heavily coordinated in accordance with this feature. Criminal wrongdoing was increasingly reconstituted as a public matter to be resolved almost exclusively through the prosecution process. Localism and heterogeneity, elements cherished under the old order, were actively jettisoned under this modern arrangement. This must be seen as part of a drive to institutionalise interpersonal conflicts, uncoupling them from everyday practices in lifeworld contexts. A state-accused logic of action came to constitute and demarcate the modern criminal process, mediating all validity claims in respect of the conflict. Criminal wrongdoing became a rationalised domain of action, measured in part by its capacity to filter out non-objective truth claims. Victims who participated in the modern inculpatory process did so as legal subjects, with little or no powers to make decisions about outcomes.

The state could draw upon a centralised police force and a public prosecutor's office which would gather and present evidence in the public interest. As a consequence, in part, of this process of state monopolisation, a discourse and practice of liberal legalism emerged (emphasising the universality, liberty and sameness of the individual person) to rebalance power relations in the justice arena. For the accused, this meant that the justice network was restructured to incorporate a clearer and more substantive body of due process rights that would guarantee, as far as practicable, both substantive and procedural justice. This ensured that the dynamic of the courtroom altered so that the trial gaze re-orientated itself to focus almost exclusively on the prosecution case. Even when convicted of the crime, the offender was still protected from the state − exercising the will of the people − through the entitlement of having a proportionate punishment imposed, one that accorded both with the crime committed and, in time, any relevant individual circumstances.

The reification of these state-accused relations had the effect of excluding the victim, his or her absentee status quickly acquiring a relative permanence, 'fixity' and

36 H M Boies, *The Science of Penology* (G P Putnam's 1901) 114.

immovability. His or her experiences were rooted exclusively through this new institutional framework, ensuring that they were interpreted and understood around an axis that focused on the state, the law, the public interest and the accused. The inculpatory model of justice that emerged zealously neutralised any emotive or personal dimensions to the crime by distilling them into a single, rationally knowable, closed worldview – the public interest. The victim increasingly therefore became a 'non-person in a Kafka play',[37] unable to raise claims about the validity of his or her ontological experiences within this objectivated 'public interest'. His or her voice was not heard − and was not capable of being understood − given the commitments, value choices and governing principles of this new institutional arrangement.

The re-emergence of the victim

In the last four decades, justice systems are partially being reconstructed again, as they demonstrate an increased sensitivity to the needs and concerns of victims of crime. A 'vision of the victim as Everyman' is part of a 'new cultural theme',[38] one which is widely represented in social, political and media circles. It has been suggested that a number of factors has facilitated this increased awareness of victims in western criminal justice systems.[39] To begin with, the introduction of state compensation programmes can be viewed as an early attempt to move victims away from the periphery of the criminal process. In England and Wales, for example, Margaret Fry proposed a scheme of state compensation for the victims of violence as early as 1957. In 1964, a Criminal Injuries Compensation Scheme actually came into operation following the publication of a White Paper, *Compensation for Victims of Crimes of Violence*. Specific victimological studies became more prominent and began to direct the criminological gaze away from its focus on offenders, towards a typology of victims' experiences of the wrongdoing.[40] These studies, among others, were important reference points in generating academic interest in victims of crime. This in turn helped to illuminate the intersectional nature of crime, moving the discourse on from conventional criminological accounts that framed and explained the phenomenon exclusively through offender theories of causation. They were of course followed up by the introduction of mass victimisation surveys, commencing in the 1970s in the US before also being employed in the early 1980s in the UK,[41] which among other things drew attention to the under-recording of crime, repeat victimisation, fear of crime, and victims' experiences with various criminal justice agencies such as the police, prosecutors, trial judges, and other court personnel.[42]

In the Republic of Ireland, studies such as that undertaken by Breen and Rottman,[43] O'Connell and Whelan,[44] and Watson[45] all began to highlight the experiences of victims. They all helped to gather data on experiences of crime and fear of crime, providing

37 Christie (n 6) 8.

38 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001) 12.

39 Mike Maguire, 'The Needs and Rights of Victims of Crime' (1991) 14 Crime and Justice 363.

40 Hans von Hentig, *The Criminal and His Victim: Studies in the Sociology of Crime* (Yale University Press 1948); Marvin Wolfgang, *Patterns of Criminal Homicide* (University of Pennsylvania Press 1958); Menachem Amir, *Patterns in Forcible Rape* (University of Chicago Press 1971).

41 Carolyn Hoyle, 'Victims, the Criminal Process, and Restorative Justice' in Maguire et al (n 1) 398–425.

42 Lynne Henderson, 'The Wrongs of Victims Rights' (1985) 37 Stanford Law Review 937.

43 Richard Breen and David Rottman, *Crime Victimisation in the Republic of Ireland* (Economic Social Research Institute 1984).

44 Michael O'Connell and Anthony Whelan, 'Crime Victimisation in Dublin' (1994) 4(1) Irish Criminal Law Journal 85.

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

insights quite different from institutional representations. However, mass crime victimisation studies had a somewhat sluggish trajectory when compared with other jurisdictions (commencing in the US in 1972 and the UK in 1982), hindered no doubt by the absence of a strong criminal justice research culture and successive governments' dismissive attitude towards policy based on crime data and crime statistics.[46] Notwithstanding such inertia, mass crime victimisation surveys did commence in 1998 with the introduction of a crime segment into the Quarterly National Household Survey (follow-up studies were conducted in 2003, 2006 and 2010). Since 2002, Garda public attitude surveys have also been conducted (though they are not annual); they focus, among other things, on the experiences and fears of crime of individuals.

During the 1970s, the women's movement also began to 'conscious raise' about female victimisation, highlighting previously invisible and unvoiced social problems.[47] Campaigning activists started to establish support networks such as Rape Crisis Centres and Women's Refuge Centres, whilst simultaneously drawing attention to the limitations and challenges posed by an exclusively state/accused model of criminal justice. More specifically, increased self-activism also ensured that victims of crime became more visible again. The first domestic abuse shelter, for example, was established in 1974. The first Rape Crisis Centre was set up in Dublin in 1977 and Derek Nally established Victim Support in 1985.[48] Service provision for victims of crime in the Republic of Ireland has expanded in recent decades. The Victim's Charter, for example, marked an important policy development.[49] This charter was produced by the Department of Justice, Equality and Law Reform in September 1999 (and was revised in 2010), reflecting the 'commitment to giving victims of crime a central place in the criminal justice system'. The needs of crime victims are also addressed by a wide variety of victims' organisations, alliances and associations. Whilst a significant proportion are specialised in nature, dealing with specific types of victim or services, there are also some key national groups.

Increasing concerns about rising crime rates in western countries from the 1970s onwards, and the perceived failure of correctionalist criminal justice projects to rehabilitate offenders, have also had an impact. The noble post-war dream of winning the war on crime also began to fade in western countries from the 1970s onwards as the nihilism of 'nothing works' took hold.[50] As crime became accepted as a normal social phenomenon, discourse and practice moved away from an exclusive focus on normalising the wrongdoer. A new emphasis on pragmatism was espoused, one which was agnostic as regards the social or psychological causes of deviancy. Instrumental reasoning of this kind accepts the normality of crime and seeks strategies and practices to prevent or displace it. The victim is much more central and visible under such a framework of

46 Shane Kilcommins et al, *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration 2004) 72–4.

47 The Irish Women's Liberation Movement was established in 1970, for example, and the Council for the Status of Women was formed in 1973: Ailbhe Smyth, 'The Women's Movement in the Republic of Ireland 1970–1990' in Ailbhe Smyth (ed), *Irish Women's Studies Reader* (Attic Press 1993) 253; Mary Kenny, 'Recollections of the Irish Women's Liberation Movement' (2015) 23(5) History Ireland 48

48 Kathleen Moore Walsh, *Victims' Rights in Ireland: Influences, Illusions and Impacts* (Unpublished PhD thesis, University College Cork) 188.

49 Lillian McGovern, 'The Victim and the Criminal Justice System' in Paul O'Mahony (ed.), *Criminal Justice in Ireland* (Institute of Public Administration 2002) 393; Mary Rogan, 'Victims' Rights: Theory and Practice – Part I' (2006) 24(9) Irish Law Times 140.

50 By 1970 in Ireland, over 30,000 indictable crimes were recorded, representing a doubling-up over a 10-year period. As a result, 'the state penal system grew in both importance and scale in managing deviance'. Kilcommins et al (n 46) 87. Recorded indictable crime rates continued to rise, reaching circa 89,000 by 1981.

understanding. Moreover, and in managing an incident, effective service provision to a victim provides relatively quick, attractive and measurable outputs from criminal justice agencies, at least when compared with more long-term and contingent results such as convictions or successful rehabilitative outcomes. It is not surprising, according to commentators such as Garland, that the 'aim of serving victims has become part of the redefined mission of all criminal justice agencies'.[51] Among other things, it has brought into vogue the question: 'What about the victim?'[52]

Moreover, the revelations brought about as a result of inquiries over the last two decades into Church sexual abuse and institutional abuse which occurred in the carceral archipelago that emerged post-Independence – and the harrowing accounts of the 'endemic' of deaths, beatings, assaults, molestations, rapes, neglect and ritual humiliations – is now very much part of the *Zeitgeist*.[53] Among other things, it has helped to raise experiences of victimhood in the collective conscience, and awareness of illegitimate and abusive hierarchies of dominance. It was aggravated by the horrors of brutal clerical abuses in parishes in different parts of the country. The flood of delayed sexual offence cases coming before the courts from the mid-1990s onwards cast further light on institutions and clerics, but also on the dark dimensions of abuse perpetrated on children by family members, neighbours, teachers and so on.[54] The horrific and tragic details of this maelstrom of abuse details – and the existential despair that it gave rise to – has forced Irish society to confront widespread experiences of victimhood.[55]

Events of this kind were also covered by a media industry that was becoming more specialised and instantaneous.[56] It was also increasingly adept at individualising the experiences of victimhood through focused analysis and imagery. Aside from being conscious-raising, these insights have also contributed to the development of a healthy scepticism of institutions of power, and any uncritical deference to such power. This has been aided no doubt by repeated findings of corrupt practices in political and executive circles. This has, in part, contributed to a growing scepticism about the institutional reification of state functionaries such as the Office of Director of Public Prosecutions and Gardaí.[57] Given the demands for increased accountability and transparency in decision-making structures, government agencies are no longer as free to set their own imperatives, or to claim absolute immunity from scrutiny. Nor can they so easily defend their actions on the basis of the neutrality of their activities, or hide behind a broad-based appeal to public interest considerations or respect for institutions of state power.

The legal system has also acted as a steerer of reintegration. This is occurring through the deliberative capacity of domestic and EU legislatures, and through expansive judicial interpretation of constitutional and Convention texts. The emerging 'rights revolution' is evident in both criminal and civil spheres, and it serves to open up the operational self-enclosure that exists under a state-accused model of justice. Juridification of this kind is

51 Garland (n 38) 121.

52 Maguire (n 39) 368.

53 Mary Raftery and Eoin O'Sullivan, *Suffer Little Children: The Inside Story of Ireland's Industrial Schools* (Continuum 1999).

54 Sinead Ring, 'Analysing Fairness in Context in Historic Child Sexual Abuse Prohibition Applications' (2013) 23(4) Irish Criminal Law Journal 132.

55 Chris Moore, *Betrayal of Trust: The Father Brendan Smyth Affair and the Catholic Church* (Marino Books 1995); Helen Goode et al, *Time to Listen: Confronting Child Sexual Abuse by Catholic Clergy in Ireland* (Liffey Press 2003).

56 Ciaran McCullagh, *Crime in Ireland: A Sociological Introduction* (Cork University Press 1996); Michael O'Connell, ' Portrayal of Crime in the Media – Does It Matter?' in Paul O'Mahony (n 49) 245–67.

57 Vicky Conway, *Policing Twentieth Century Ireland: A History of An Garda Síochána* (Routledge 2013).

providing victims with a stronger legal status and permits their claims to be severed from more public interest considerations. It will help to ensure that the intersubjective dimensions of the crime conflict are increasingly recognised.

Considerations of process fairness now include the victim within its conceptual framework. Whilst previously such deliberations were housed within the more remote medium of the 'public interest', the courts are now becoming more explicit in specifically identifying victims and competing rights. Of course, the regulation of victim experiences in law necessarily involves a level of abstraction and institutionalisation that never fully captures all of the relevant exigencies. Nevertheless, and despite these shortcomings, increasing juridification of the crime conflict, is helping to overcome the previous ambivalence towards victims of crime.

The European Convention on Human Rights is one example of an influential normative legal framework that seeks to extend the reach of rights in the criminal process to include victims of crime. Though the Convention does not explicitly refer to victims of crime, the court has placed obligations on member states under Articles 2 (right to life), 3 (degrading treatment), 6 (fair trial) and 8 (private life): to criminalise wrongdoing; to take preventive operational measures; to protect society from potential dangers; to provide appropriate civil remedies; to investigate and give reasons; and to adequately protect victims and witnesses at various stages in the criminal process.[58] A series of other obligations and safeguards have been interpreted through the provisions. They include, for example, the requirement that states carry out effective investigations of crime. Effectiveness in this context requires public scrutiny to ensure accountability in practice; an efficient and independent judicial system; the hierarchical and institutional independence of those responsible for the investigation of a crime from those implicated in the events; prompt responses by the authorities; the effective implementation of court orders to protect victims; and a legal and administrative framework that adequately protects rights such as bodily integrity and privacy.[59] Such interpretations help to identify more concrete rights for victims of crime, and act as a powerful counterpoint to the hegemonic dominance of state/accused relations.

Conclusion

The 'axis of individualisation'[60] in the criminal justice process − which for so long was directed only at offenders, the causes of their wrongdoing (including 'othering') and their right to protection from the state − has now bifurcated to embrace the multi-faceted experiences of victimhood. This of course disturbs older, hegemonic ways of doing things (an accused/offender-organising logic that infused a police–public interest-prosecutions-prisons model of justice) and the reified, exclusive voices of certain actors that were central to that process (prosecution and defence lawyers, policing authorities, and judges). Its recent emergence must be seen much more as a response to a previous scandalous neglect, as a justified attempt to correct an imbalance in which the victim was

58 *Osman v UK* [1998] EHRLR 228; *X and Y v The Netherlands* [1985] 8 EHRR 2350; *MC v Bulgaria* [2003] ECHR 3927/98); *A v UK* [1999] 27 EHRR 611; *Söderman v Sweden* (2013) EHRR 128, and; *KU v Finland* [2008] 48 EHRR 1237.

59 *Hajduová v Slovakia* (2011) 53 EHRR 8; *Opuz v Turkey* (2010) 50 EHRR 28; *Perevedentsevy v Russia* (2016) 62 EHRR 16; *A v Croatia* (2015) 60 EHRR 26; *Rowe and Davis v UK* (2000) 30 EHRR 1; *Y v Slovenia* (41107/10) 28 August 2015, para 106.

60 Michel Foucault, *Discipline and Punish* (Penguin 1991 repr) 190.

constituted as a 'silent abstraction, a background figure whose individuality hardly registered'.[61]

Victims of crime are again being recognised as a 'community of identity'.[62] This reshapes the construction and presentation of intersubjective criminal conflict, not least because pluralism of this kind generates competing interests, priorities and validity claims in the decision-making process. Momentum of this kind makes it more difficult to rely exclusively on tradition and previously settled conventions of practice. The criminal process is thus slowly moving from a monolithic culture of rights to cultures of rights that reflect 'multiple identities' which are deserving of concern and respect.[63]

61 Garland (n 38) 179.

62 Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (CUP 2008 repr) 135–6.

63 Ibid 178.