

“IN WHOSE SERVICE?” – THE USE AND ABUSE OF VICTIMS’ RIGHTS IN IRELAND

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Victims, previously the forgotten half of the criminal dyad, have now become the ubiquitous theme of criminal justice discourse in Ireland, thanks largely to the adroit and resolute campaigning of victims themselves. The broad public appeal of victims’ rights is easy to understand; for we are each aware of the randomness of crime, that at any unfortunate moment any one of us may find ourselves a victim. However, it is remarkable just how swiftly the political majority have embraced this victims’ movement:

The reaction to what has been described as [the victims’ movement] has been overwhelmingly (and rather surprisingly) non-controversial ... and has not generated any serious criticism, or any meaningful confrontation ... the quasi response to the rhetorical cry of “justice for victims” has been favourable. For a legislative issue to generate so little debate, so little opposition in the highly confrontational, highly partisan world of politics, is extremely unusual. The exceptional speed with which [victims] were rediscovered and their cause adopted by politicians, let alone the political climate that prevailed at the time of their rediscovery, are bound to raise questions about the real interests and motives.¹

It would be a mistake to equate the frequency with which the concerns of victims are cited within the political arena as a benchmark for gauging just how far victims’ rights have come within our criminal justice system. Any victim “rights” in Ireland are emblematic, theoretical and titular rather than real and enforceable; making it a country that talks about doing more than

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¹ Fattah, “The Need for a Critical Victimology”, in Fattah (ed.), *Towards A Critical Victimology* (New York: Palgrave MacMillan, 1992), pp. 3-4.

is actually being done. Current debate on victims in Irish political and criminal discourse may portend a better future but its grammar is, at present, propitiatory. The actual provision of rights for victims is rhetoric not reality, with the gap between writ large.

For example, the most basic and common need referenced by crime victims is the need for information, both in relation to the progress of the investigation and the prosecution specifically, and to the procedures and workings of the legal system generally. While this is by far the easiest and most immediate victim demand that could be met – and there is little, if any objection to providing victims with relevant and appropriate information – there exists no legislative right to information, and no statutory body to oversee its dissemination. Instead, there exists a decade-old *Victims Charter*² that, despite appropriating a tone of rights, does not confer any. This Charter represents little more than a collection of aims that can simply be characterised as good policy, promising victims the fine ideals of efficiency, civility and fairness, but lacking enforceable remedies for non-compliance. Indeed, it is, for the most part, wholly insufficient to the task, emphasising that victims have no rights at all, only mere courtesies and conveniences, to be extended or withheld at the whim of criminal justice agencies.

In the clamour for votes that heralds any election season, victims inarguably receive greater prominence than they do throughout the broad political calendar. For example, the 2007 Election Manifestos of all political parties made promises directly beneficial to the victims of crime. Fianna Fáil proposed the establishment of both a Victim's Council to formulate victim policy and a statutory Victim Support Agency;³ the Progressive Democrats made a commitment to double the funding currently available for victim support work;⁴ Fine Gael⁵ and Labour⁶ both

² *Victims Charter and Guide to the Criminal Justice System* (Dublin: Department of Justice, Equality and Law Reform, 1999), available at <http://www.justice.ie/en/JELR/VictimsCharter.pdf/Files/VictimsCharter.pdf>.

³ *Now, The Next Steps – Fianna Fáil Election Manifesto 2007* (Fianna Fáil, 2007), p. 102.

⁴ *From Good to Great: Continuing Ireland's Radical Transformation – General Election Manifesto 2007* (Progressive Democrats, 2007) p. 30, available at http://www.progressivedemocrats.ie/uploads/images/Manifesto_2007.pdf.

promised the implementation of a new Victims' Rights Charter that would ensure information for victims at all stages throughout the criminal justice process; the Green Party guaranteed that victims would be afforded the same access to legal representation and court access as the accused;⁷ whilst Sinn Féin planned the establishment of a system of consistent victim liaison to ensure that victims, especially those of violent crimes, be kept fully informed throughout the investigation and prosecution process.⁸

Notwithstanding all this political speak of victims' rights, Ireland has no concerted victim strategy, and any existing procedures have been composed entirely randomly with no thought to a grand design or, for that matter, with any meaningful dialogue with, or critical input from, the victims it purports to assist. Victims have gained far less than perceived or promised, with words not deeds, and promises not policies, the norm. So how come victims' rights are invoked so often in political criminal justice debate but without a corresponding rate of affirmative action?

This article examines the ulterior motives behind the political establishment's recent receptiveness to victims' rights, and how, in the current climate of fear and anger surrounding the level of serious crime, it became an irresistible vote-winning tactic to court the victims' movement and, more worryingly, to utilise it so as to pass "retaliatory legislation ... for public display and political advantage".⁹ In the face of long-term governmental inability to tackle the sources of crime, the plight of the victim is subtly misused as a tool to galvanise public support for repressive legislative measures.

⁵ *General Election Manifesto 2007* (Fine Gael, 2007) p. 61. Available at http://www.finegael.ie/uploads/docs/FG_Manifesto_07.pdf.

⁶ *The Fair Society – Labour Manifesto 2007* (The Labour Party, 2007) p. 55, at http://www.labour.ie/download/pdf/thefairsociety_manifesto2007.pdf.

⁷ *Manifesto 2007* (The Green Party, 2007) p. 18, available at http://www.greenparty.ie/en/about/party_archives/election_2007/manifesto_2007/manifesto.

⁸ *General Election Manifesto 2007* (Sinn Féin, 2007) p. 58, available at <http://www.sinnfein.ie/pdf/ElectionManifesto07.pdf>.

⁹ Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), pp. 9 and 143.

Though it originated as an ad hoc challenge to the callous treatment of victims at the hands of the justice system, the victims' movement gained considerable momentum on the back of widespread concern over escalating crime figures. Public unease relating to crime in Ireland peaked precipitously in the middle of the last decade, due primarily to two defining incidents in June 1996 that shook the nation in a textbook case of what sociologists term a moral panic.¹⁰ The first was the fatal shooting of Detective Garda Jerry McCabe, during an attempted robbery of a post office van in Adare, Co. Limerick; the second the killing of *Sunday Independent* crime investigative journalist Veronica Guerin as she sat in her car in Dublin traffic. The extent to which unlawfulness began to resonate with the public was captured by one national poll, which found that though only 8% of the electorate considered law-and-order a main issue of concern in the 1992 general election, this had increased five-fold to 41% come the 1997 election.¹¹ Since then, the electorate's disquiet regarding crime appears to have taken residence in its hierarchy of concerns. The current public pessimism is such that four out of five people rate crime as a serious or very serious problem.¹² As crime prevention is an uphill struggle, and as more and more people fall prey to this discernible rise in unlawful conduct, it was inevitable that victims would become as much the subject of political as criminological attention. After all, if government cannot prevent crime, it should best be seen to be concerned for those who are directly harmed by it.

While victims are a portion of the electorate, it is potential victims who form a significantly larger part. It is these possible victims that are the audience government seeks to satisfy with its victim-orientated initiatives. Yet reforms and schemes promoted as benefiting crime victims – like the Victims' Charter, state compensation, and the introduction of impact statements – often well-intentioned and launched to great fanfare, have done little to alleviate the overall suffering of victims. Instead, they play only a

¹⁰ Cohen, *Folk Devils and Moral Panics* (3rd ed., London: Routledge, 2002).

¹¹ MRBI polls conducted for the *Irish Times*, 17 and 18 November 1992 and 26 and 27 March 1997, respectively.

¹² *Crime and Victimisation Quarterly National Household Survey 2006* (Dublin: Central Statistics Office, 2007), p. 22.

minute and oft-ineffective role at the shallow end of the justice system, more notable for the reforming enthusiasm they attract than for any influence upon victim satisfaction with the criminal process generally. Paradoxically, victim-oriented schemes that are hollow and unfulfilling still prove a vote-winner, since even if dissatisfaction with the particular scheme in question results in users expressing criticisms of it, the larger group of potential victims and the media still view it as a somewhat healthy and worthwhile initiative.

The combination, over recent decades, of the rise in serious crime and the steadily audible voice of the victims' movement, has led government to misemploy the language of victims' rights, and respond with progressively more repressive legislative measures, downgrading expert advice in favour of sound-bite "solutions" and short-term quick fixes, becoming preoccupied with imprisonment and adopting timely and seemingly pro-victim stances to pacify and assuage the victim. This was best evidenced by the controversy surrounding the Criminal Justice Act, 2007, which broadened the categories of offences for which suspects may be detained for seven days; laid down mandatory ten-year sentences for certain drug-related crimes; introduced changes that in essence eroded the right to silence; imposed stricter bail provisions; launched measures on electronic tagging and established a DNA database; all as part of the fight against criminality. Some provisions of the Act, branded by the Minister for Justice, Equality and Law Reform as part of an overall need to "rebalance" the criminal justice system, a political term currently in vogue, were generally regarded as a knee-jerk reaction to appease heightened public fears following a flurry of gangland killings towards the end of 2006 and early 2007. The speedy implementation of the Act frustrated many civil libertarians and legal professionals whose calls for considered debate on its draconian measures fell on deaf political ears.

Such punitive interventions are symptomatic of the reactive nature of Irish criminal justice policy, and its recent tendency to seek inspiration from the more penal disposition of the United States. Accordingly, political discourse regarding criminal policy is slanted so as to invoke a collective anger from the public. This is illustrated by the then Minister for Justice, Michael

McDowell (as a precursor to the Criminal Justice Act, 2007), positing gangland crime as posing as significant a threat to Irish society as paramilitary activities did throughout the times of the Northern Ireland Troubles.¹³ Ironically, the political perversion of talking-up fears of crime will eventually be interpreted as a chronic governmental failure to address the substantive issue.¹⁴

The Criminal Justice Act, 2007, exemplifies how policy-makers are quick to camouflage despotic legislation as victim-centred reform, even when those policies proposed and adopted in their name seldom directly serve victims' interests. In this way, victims are used and abused as mere pawns in the fight against crime, adopted as a means to a political end. This exploitation functions to bolster the perceived legitimacy of government in the face of apparently intractable law-breaking. The victims' movement has certain goals, like harsher sentencing for convicted offenders, which overlap with the crime control model of criminal justice, and for a government getting tough on crime. Empathy for the victim is transformed into rage against the offender, and this transference of righteous anger is politically orchestrated to justify harsher sentences, consolidating law-and-order as a potent societal objective.

There is little doubt that, as crime rates soared, the public became increasingly despondent about the likelihood of rehabilitating offenders. Criminality is deemed by many as a personal choice, a chosen career of wrongdoing, some manifestation of inborn wickedness. Thus, efforts to deter or rehabilitate are tagged as a waste of public money, the only solution instead being punishment and incarceration.¹⁵ By blaming crime on the immutable personal characteristics and choices of individuals, law-and-order theorists choose to overlook that the origins of crime stem from poverty, alienation, lack of education, and general discrimination, or at least dismiss these social causes as insoluble. They argue that the liberal notion of

¹³ Lally, "Dublin murder rate is fastest growing" *Irish Times*, 20 March 2007, p. 4.

¹⁴ James and Raine, *The New Politics of Criminal Justice* (Pearson Education Ltd, 1998), p. 81.

¹⁵ Henderson, "The Wrongs of Victims Rights", (1985) 37 *Stanford Law Review* 937, 947.

rehabilitation as the goal of the justice system has failed, for society always generates new criminals to replace the offenders it puts away. Victimisation is not in decline, and the justice system's tolerance and understanding shown towards its criminals serves only to perpetuate if not encourage the crimes done against society.

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

[An] emergent pattern of adjustment is the tendency of State agencies to give more priority to dealing with the consequences of crime rather than its causes ... there has emerged a new emphasis on tacking the harmful effects of criminal conduct by supporting victims, mitigating crime costs, addressing public fear and reducing insecurity rather than intervening in ways that address crime itself. This is, to some extent, a predictable result of the worsening of crime as a social problem. As its effects become more widespread, so too do the demands for relief from those most affected. But it also represents a strategic shift on the part of criminal justice agencies, whose former claim to be addressing the problem at its roots now appears increasingly empty.¹⁶

With the State proving ineffective against the intangible *causes* of crime, it focuses its attention on the more manageable *consequences* of crime, in particular pandering to retributive sentiments by consigning the offender to harsher punitive measures:

A show of punitive force against individuals is used to repress any acknowledgement of the State's inability to control crime to acceptable levels. A willingness to deliver harsh punishments to convicted offenders

¹⁶ Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), p. 121.

magically compensates a failure to deliver security to the public at large.¹⁷

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

Subsidising voluntary victim support work also enables governments to appear sympathetic to the plight of the crime victim without assuming any direct responsibility for their welfare. The dependency many Irish victim support services, like Support after Homicide, the National Crime Victims Helpline, Court Support Services, and Advocates for the Victims of Homicide, have on official subsidies, for which they annually apply, emphasises that victims remain beholden to the benevolence of government funding, and does little to dismiss notions that they are the objects of charity. At the same time, this reliance on public funding inevitably means that victim groups are unwilling to pose a substantive challenge to government policy.¹⁸ In this way, the State can be said to fund victim support groups as a control mechanism, so as to prevent such groups from mounting a critical attack in what would be an act of biting at the very hand that feeds them.

The reorientation of criminal justice towards the victim in effect connotes a cultural shift in penal thinking that augments the prevailing paradigm of retributive punishment in what has been termed “victims in the service of severity”.¹⁹ Those seeking

¹⁷ Garland, “The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society”, (1996) 36 *British Journal of Criminology* 445, 460.

¹⁸ Shah, *Defending Justice* (Political Research Associates, 2005), p. 206, available at <http://www.publiceye.org/defendingjustice/>.

¹⁹ Ashworth, “Victims Rights, Defendants Rights and Criminal Procedure” in Crawford and Goodey (eds.), *Integrating A Victim Perspective Within Criminal Justice* (Aldershot: Ashgate, 2000), p. 186.

greater accountability for offenders, by understanding them a little less and condemning them a little more, were quick to coerce the victims' movement into a vehicle of support for the punitive and exclusionary policies that have come to characterise present criminal discourse. The language of condemnation and punishment has re-entered criminal dialect, yet what is meant to be the expression of public sentiment is frequently distorted by politically driven proposals:

If victims were once the forgotten, hidden casualties of criminal behaviour, they have now returned with a vengeance, brought back into full public view by politicians and media executives who routinely exploit the victim's experience for their own purposes ... the new political imperative is that victims must be protected, their voices must be heard, their memory honoured, their anger expressed, their fears addressed.²⁰

It is suggested that the whole edifice of the crime victims' movement has largely been built according to the establishment's notions of what victims want or should want.²¹ To treat victims in this paternalistic manner, where they are spoken about or spoken for is to perpetuate past approaches to the victim as the invisible person of criminal justice. However, contrary to the cliché, victims are now not so much forgotten as they are used, for "the sanctified persona of the suffering victim has become a valued commodity in the circuits of political and media exchange".²² The symbolic figure of the victim has become a somewhat celebrated and favoured constituency, routinely viewed functionally in political debate in a manner that is quite often detached from the claims of the organised victims' movement or the aggregated opinions of surveyed victims.

If crime victims are being given a voice, is it their own voice that is being heard, or some carefully stage-managed one

²⁰ Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), pp. 9 and 143.

²¹ Shapland, Willmore and Duff (eds.), *Victims in the Criminal Justice System* (Aldershot: Gower, 1985), p. 2.

²² Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), p. 143.

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

Aside from this governmental exploitation of victims in order to help achieve a tougher approach to crime, victims have recently been caught up in inter-party politics. In June 2008, the Minister for Justice, Equality and Law Reform, Dermot Ahern, announced a *Justice for Victims* Initiative.²³ Some of the promised features of this (still awaited) legislative reform include the amending of existing victim impact legislation in order to grant victim status to next-of-kin in homicide cases; new procedures whereby the Director of Public Prosecutions can apply for a court order to have cases retried where an acquittal arises from an error in law made by the trial judge, or where compelling new evidence of guilt emerges after an acquittal; reforms to the law of character evidence to enable the prosecution to respond where, during the trial, unwarranted and vexatious imputations are made against the character of deceased or incapacitated victims or witnesses; provision for the advance disclosure to the prosecution of expert evidence which the defence proposes to introduce; and establishment of a written procedure that will allow for the early return of property to victims, including tissue samples, where that property may constitute evidence in criminal trials. This legislation will take account of several of the recommendations made by the *Balance in the Criminal Law* Review Group;²⁴ many of which have

²³ See Department of Justice Equality and Law Reform press release, "Dermot Ahern Announces Justice for Victims Initiative", 19 June 2008, available at <http://www.justice.ie/en/JELR/Pages/Dermot%20Ahern%20announces%20Justice%20for%20Victims%20Initiative>.

²⁴ *Balance in the Criminal Law Review Group – Final Report* (Dublin: Dept. of Justice, Equality and Law Reform, 2007). Available at: <http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf>.

nothing at all to do with helping victims, and merely exemplify the ongoing political willingness to use vague or misleading language to dress up measures that are anti-offender as pro-victim. The Irish Council for Civil Liberties observed:

The changes that the Minister has proposed would diminish the rights of accused people without improving life for victims of crime. It is a fallacy that taking liberties from accused persons enhance the lives of victims. If the Government is genuinely interested in advancing the situation of victims then it must adopt a rights-based statutory charter for victims.²⁵

Many will hold the changes proposed as merely procedural, benefiting the processes of the justice system more so than the victim per se.

Fine Gael TD, Alan Shatter, sponsor of that party's Victims Bill, 2008, sharply criticised the Minister for holding a press conference "about non-existent legislation related to crime victims whilst planning to reject a fully drafted and comprehensive piece of legislation [already] produced by Fine Gael".²⁶ The Minister retorted that virtually every section, "line by line", of the proposed Fine Gael bill replicated New Zealand's Victims' Rights Act, 2002, dismissing it as mere "legislation by Google", and insisting that the Dáil "was not a classroom where you cog homework".²⁷ Similar ripostes were delivered to the media for some days after, epitomising once more how the plight of victims is bandied about in an acrimonious game of political point-scoring. It is also true that the Government brought forth its own proposals so that they could then, in a positive light, vote against the opposition's victim reforms without appearing anti-victim.

Even the seemingly benign practicality of restorative justice, presented as a victim-centred mechanism applicable to relatively minor crimes, can be tarnished with cynicism by way of

²⁵ Coulter, "Minister wants DPP to have right to appeal acquittals", *Irish Times*, 20 June 2008, p. 1.

²⁶ O'Halloran, "FF, FG clash over who has best victims' rights plans", *Irish Times*, 25 June 2008, p. 8.

²⁷ O'Halloran (previous note).

its political motivation. Restorative justice, a process whereby all parties with a stake in a particular offence collectively resolve how best to deal with the aftermath of the crime, is an old idea resurrected in new threads, reflecting how disputes were settled and arbitrated in the past.²⁸ It emphasises the human impact of crime by facilitating the views of the victim, allowing him active participation in the course and outcome of his case, offering him material restoration through compensation settlements and emotional restoration in the form of an apology, all as the result of face-to-face mediation with the offender, who himself is held personally accountable for his behaviour and provided with the opportunity to take responsibility for his actions by making amends, thereby enhancing the quality of justice experienced overall for both victims and offenders.²⁹ It is essentially a mediation premise, that promotes a less formal process liberated from the strictures of the courtroom for offences that are considered appropriate for this sort of measure.

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

Whilst it is true that individual victims may have felt some benefit, the motivation for the generation of such schemes has largely come from the general problem with the rising prison population. There has been no demonstrable desire to promote these schemes in terms of benefits to victims. The benefits for offenders seem clearer (especially where his participation results in no sentence to be served) – but the benefits to the State seem clearer still.³⁰

In Ireland, restorative justice is very much in its infancy. An all-party Oireachtas committee recently backed a scheme that

²⁸ Marshall, "Seeking the Whole Justice" in Hayman (ed.), *Repairing the Damage: Restorative Justice in Action* (London: ISTD, 1997), p. 15.

²⁹ Umbreit, Coates and Kalanj, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (Monsey, NY: Criminal Justice Press, 1994), p. 5.

³⁰ Walklate, *Victimology: The Victim and the Criminal Justice Process* (London: Routledge, 1989), p. 129.

involves adult first-time offenders avoiding a custodial sentence if they apologise and make efforts to atone for their crime by working to compensate their victims, and pilot schemes have already successfully taken place in Tallaght and Nenagh. The reasons cited for this initiative were that it may be more effective than jail in steering first-time offenders away from committing further crimes, that the pressure exerted on the court calendar would be eased by the more efficient use of its time, and that the cost of providing free legal aid (which is sourced from public coffers) would be significantly reduced. There was no mention of any benefit to the victim. This is yet again indicative of a contemporary political concern for the position of the crime victim that only finds expression when his interests coincide with theirs.

Discussion of victims' rights has a tendency to be couched in the language of "balance", whereby the rights of the victim are posited as antithetical to those of the defendant, with both sets of rights brandished about like a game of ideological football. The concept of balance stems from the much-repeated claim that for too long offenders have been at the centre of attention in criminal justice, accumulating a series of rights, privileges and protections. Admittedly, it is difficult to dispel the perception that the defendant is laden with rights: he has legal representation which the victim does not, he enjoys the protection of specific constitutional and statutory provisions which the victim does not, he is frequently the focus of attention and concern even if, at times, it is negative in orientation, while the victim is excluded, treated when needed in a most cursory and bureaucratic fashion. Victims, for example, canvass that the right to counsel is the logical complement to the defendant's right to counsel. Hence, calls for victims' rights are typically constructed from and intellectually corralled by comparisons with the extensive protections and entitlements afforded to defendants and offenders: free legal aid, the right to appeal, the huge sums of money spent trying to rehabilitate when so little appears to go to victims in terms of compensation or counselling and so on.

The metaphor of balance has immense and obvious rhetorical appeal. It is hard to deny the reasoning that defendants have a series of rights, so why should not victims too – and as a

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

One does not set out to rebalance something already regarded as properly balanced. One sets out to rebalance something which is malfunctioning, which is out of kilter, which is not working appropriately. Accordingly the persistent use of the term "rebalancing" involves an assumption, which is rarely thought necessary to stand over by rational argument, that the criminal justice system is already gravely out of balance.³¹

However, it is nearly impossible to find equipoise in criminal justice, for to justify true balance both the victim and the offender need to have the same stake and degree of interest in the process that they simply do not have. For example, legal representation for the defendant is crucial to ensure that he receives a fair trial, and is not subject to the unrestrained power and resources of the State; but legal representation for the victim cannot be justified on similar grounds for he is not in such a position of inequality *vis-à-vis* the State.³² The harm for the victim has occurred before the trial insofar that he can usually point definitively at some loss or damage to property, or bear evidence of physical injury. He does not need at trial an assortment of legal protections to lay claim to his victimisation, in the way that the defendant does to lay claim to his innocence, nor has the victim as much to lose – or some may say any *more* to lose – by the ensuing verdict. The defendant, on the other hand, has ample to lose if found guilty. If he is correctly found guilty, he has no one to blame for those losses but himself, but if he is found incorrectly guilty it is a travesty of justice; not only is an innocent person convicted but a guilty one remains at large.

³¹ Hardiman, "Weasel Words and Doubtful Meanings: A Study in the Language of Law 'Reform'", (2007) 2 J.S.I.J. 1, 4-5.

³² Edwards, "An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making", (2004) 44 *British Journal of Criminology* 967, 972.

Therefore the State, because it threatens to revoke his freedom, created the numerous protections now available to the defendant, who is until the end of the process under the presumption of innocence:

If the criminal justice system were ... to focus on the rights of victims to the virtual exclusion of other considerations, there would be a real danger that this would lead perhaps to the almost inevitable assumption that the accused was presumptively guilty of the offence and that the purpose of the criminal law was to punish the offender at the behest of the victim. While the legal system has to improve its engagement with victims, we must be careful that this does not take us down the path of implicit assumptions about guilt or which takes from the established constitutional liberties designed to ensure that the criminal trial is not only fair, but is seen to be fair.³³

As a result, the concept of balance in criminal justice is not something that can be pursued in an absolutist way.

In addition, the language of balance is mere fudge unless proposals are made on a reasonably clear and principled weighting of the interests that come into play.³⁴ Yet amidst all of its dialogue on balance, the victims' movement fails to present any real blueprint for reaching its desired equilibrium:

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

³³ Extract from "Reflections on the Balance in the Criminal Law Review Group Report" (paper presented by Gerard Hogan at the 2nd Annual Criminal Law Conference, *Rebalancing Criminal Justice in Ireland: A Question of Rights*, University College Cork, 29 June 2007).

³⁴ Ashworth, "Victims Rights, Defendants Rights and Criminal Procedure" in Crawford and Goodey (eds), *Integrating A Victim Perspective Within Criminal Justice* (Aldershot: Ashgate, 2000), p. 196.

it amounts to either self-delusion or intellectual dishonesty.³⁵

“Balance” is a euphemism used to promote what amounts to anti-defendant legislation, like the aforesaid Criminal Justice Act, 2007. Indeed, much of what is recommended by the *Balance in the Criminal Law* Review Group – a committee established by the Minister for Justice, Equality and Law Reform in November 2006 to advise on the rebalancing of the criminal law – has no direct benefit for the victim, instead only giving authorities more power for dealing with the offender. In this way, balance is a concept wilfully misemployed.

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

When one considers the list of recent developments in the criminal law it should appear utterly contrarian to suggest that the “pendulum” consistently swings in favour of the accused. It seems that a combination of political sabre rattling and lazy journalese allows that contention to stand relatively unchallenged and effortlessly repeated. When one considers, for example, the Public Order legislation; the amended Offences against the State Acts; the drug trafficking detention provisions; the Bail Act; the sex offenders register; the new drugs offenders register; mandatory sentencing in relation to particular drug offences; the Criminal Assets and Proceeds of Crime legislation; video link facilities for people of particular vulnerability; non-judicial warrants and so on; it is startling that the claim can be made at all.³⁶

The risk of unrestrained state authority, of arbitrary power, and the violation of human rights seem not to figure so prominently in public concern since the resurgence of the crime victim. The necessary due process protections afforded the defendant are no longer seen as they were as recently as three

³⁵ Ashworth, *The Criminal Process: An Evaluative Study* (2nd ed., Oxford: OUP, 1998), p. 30.

³⁶ Gillane, “Balancing the Scales in a Homicide Trial: A Reply”, [2007] 1 J.S.I.J. 30, 32.

decades ago, as assiduously fostered civil or human rights, but instead are increasingly viewed as a horde of technicalities unappreciated by a large portion of the public, who misinterpret them as serving only to protect offenders, willingly oblivious to the value of the presumption of innocence, our gold standard of procedural fairness, believing that these rights should, in honour of the victims, be extirpated from criminal justice.³⁷

To talk of balance, if such a concept were actually possible, invariably means a diminishing of the essential protection afforded to the defendant. In the increasing emphasis on the admittedly seductive concept of finding a balance between competing rights, there is some risk of eroding defendant's rights by stealth, by a cumulative imposition of restrictive provisions. Hence the concept of victim-centred justice is considered axiomatic to reprisal against the offender, a zero-sum game where the interests of victim and offender are assumed to be diametrically contradictory. Criminal justice is the setting for conflicting aims and interests, but some of these, like the protection of the defendant and his presumption of innocence until proven guilty, must always warrant greater protection than others. Yet if reforms ensure that criminal justice policy maximises the totality of freedom for all participants, then an extension of rights to the victim need not always be conterminous with a diminution in the protections afforded the defendant:

Giving effect to the opinion of a victim about, say, the severity of punishment does not increase the freedom of the victim as much as it reduces that of the offender; thus such options should not be sought ... Informing victims of prosecution decisions and the reasons for them, on the other hand, does reduce secondary victimisation and thus increases the freedom of victims without reducing the freedom of suspects. Therefore, this type of victim-right should be provided.³⁸

³⁷ Hardiman, "Weasel Words and Doubtful Meanings: A Study in the Language of Law 'Reform'", [2007] 2 J.S.I.J. 1, 4.

³⁸ Sanders, "Victim Participation in an Exclusionary Criminal Justice System" in Hoyle and Young (eds.), *New Visions of Crime Victims* (Oxford: Hart Publishing, 2002), p. 210.

There is now a growing acceptance of the need to improve the experience of victims within the criminal justice system, and, in recent times, parts of that system have borne a transitional, albeit tentative, receptivity towards them. As it comes to terms with the challenge to integrate a victim perspective, the criminal justice system must continue to find appropriate measures to accommodate the victim throughout a structure that traditionally favours the defendant. It is important to remember that the criminal justice system proved itself quite adept in the past at introducing significant measures designed to rightly protect and assist the defendant. By comparison, its refusal to do similar for the crime victim is either an illustration of the poverty of its imagination or its lack of concern in the matter.

Victims in this jurisdiction have consistently displayed reasoned campaigning for what they seek, and their activism, to some extent, holds our criminal justice system to account. It is important to note that the victims' movement in Ireland does not of itself constitute a threat to the traditional perspectives of criminal justice. It does not seek victim participation in the criminal trial, other than where proper as witnesses, and therefore poses no threat to the bifurcated, objective and public nature of criminal justice. The threat posed comes from the political willingness to harness and manipulate public support for the victim so as to replace considered discourse with vengeful anti-defendantism.³⁹ This political hijacking of the victims' movement to support increasingly punitive measures – with such anti-defendant reform heralded as pro-victim when it does little, if anything, to assist his plight – is wrong.

Finding ways of capturing and engaging the voice of victims in appropriate ways within criminal justice policy and process is now a prerequisite to rebuilding public confidence in the governmental ability to tackle crime, but listening and reacting, as some do, to the noise of that voice rather than to what it is that voice is saying is an offensive and ultimately futile strategy. Genuine concern for the victim should be a persuasive element of modern political and legal discourse on its own merits.

³⁹ Coen, "The Rise of the Victim – A Path to Punitiveness?", (2006) 16 *Irish Criminal Law Journal* 10, 14.

Victims need to be part of the criminal justice agenda because of who they are in their own right, not for how their plight can be better used for other political gains.