AN ENDURING LIBERAL INSTITUTION: HOW NEOLIBERAL VICTIM-CENTRIC REFORMS STRENGTHEN THE LIBERAL CONCEPTION OF THE LEGITIMACY OF THE CRIMINAL TRIAL

Laura Anne Weir

A THESIS SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS OF THE UNIVERSITY OF KENT FOR THE DEGREE OF MASTER OF LAW

Kent Law School, University of Kent, Canterbury

May 2017

Abstract

‘For too long victims have felt they are treated as an afterthought in the criminal justice system. This must change… I am absolutely determined that victims are given back their voice …’ (Damian Green MP, Minister for Victims).[1]

This thesis considers the impact on the legitimacy of the trial of a raft of recent, victim-centric reforms to the English criminal trial process. For some time the conception of the English criminal trial has been as a settled, liberal institution, in the tradition of an adversarial conflict between the state and the defendant. The focus of the proceedings has been on the defendant, and other than usually being the trigger for an investigation, the status of the victim in the trial process has been no different to that of any other witness. The legitimation of the process has rested on the liberal justification of the deprivation of the liberty of the accused only following conviction in a fair system of trial.

Over the past two or more decades there has been a marked, accelerating turn towards the role of the victim in proceedings, both internationally and domestically. It is the contention of this thesis that the host of victim-centric reforms, preoccupied with giving the victim a voice in the English criminal trial, demonstrate “neoliberal” logics of governance according to market-metrics with increased efficiencies and engagement with users of the system, responsibilisation of the victim in the trial process, individualisation and personalisation of the proceedings and enforcing a zero-tolerance to the risks posed by criminals.

The contention of this thesis is that the neoliberal, victim-centric reforms to the English criminal trial paradoxically serve to strengthen the liberal conception of the criminal trial. Such a liberal conception traditionally champions both the participation of the defendant being called to account and due process to protect the defendant against the oppressive exercise of state power. Enhanced perceptions of procedural fairness to victims in the trial process and the expansion of the audience by opening a dialogue between the victim and those in power at points of the trial process that

[1] Ministry of Justice, *Improving the Code of Practice for Victims of Crime Response to Consultation* (CP8(R) 2013) 4.

were previously remote to the victim, in no way diminishes the liberal conception but in fact characterises the legitimation of an enduring liberal trial institution.

Table of Contents

List of Abbreviations

Code – Code of Practice for Victims of Crime

CPS – Crown Prosecution Service

DPP - Director of Public Prosecutions

ECtHR – European Court of Human Rights

EU – European Union

HMCTS – Her Majesty’s Courts & Tribunals Service

HMIC - Her Majesty's Inspectorate of Constabulary

ICC – International Criminal Court

MP – Member of Parliament

NCRS - National Crime Recording Standard

PCCs - Police and Crime Commissioners

QC – Queen’s Counsel

VPS – Victim Personal Statement

VRRS - Victim’s Right to Review Scheme

Acknowledgments

I have received the support, encouragement, expertise and assistance of so many since I embarked on this research and I doubt I will ever be able to repay them all.

I thank Kent Law School who have enabled me to make a seamless move from practice in the court room to teaching in the lecture theatre. In addition, the University of Kent has demonstrated great generosity and patience through my convoluted journey, including an intermission due to the birth of my second child.

I would never have even commenced this thesis without Helen Carr's belief and faith in me. This thesis would never have reached fruition without the enduring support, guidance, encouragement, expertise and provocations of Connal Parsley. I am truly grateful that you, along with Helen, were my supervisors.

I also thank the current postgraduate cohort for their intellectual rigor and especially those who participated in the Foucault reading group.

More personally, my postnatal 'Mummy' and 'Daddy' friends have supported me more than they will ever realise.

The assistance my family have given me has been never-ending in terms of encouragement and childcare duties.

Thank you to my husband, my son and my daughter for inspiring me every day. I dedicate this thesis to you with all my love.

Chapter I. Introduction

The suicide of Frances Andrade after she gave evidence in a criminal trial against the perpetrator of sexual abuse[1] raised the problematic issue of the role of victims in the English criminal trial, whose traditional focus has been on the defendant. The standard account of a criminal trial recognises that the aim is to establish whether the defendant, having been charged with one or more criminal offences, has committed the criminal acts alleged against them; if so whether they have any defence to their actions and if not, to punish the defendant for their criminality.[2] The protection of various rights accorded to the defendant such as the right to participate in their trial and the right to confront those who accuse them, serves to restrain the main aim of the state; establishing who can be punished by ensuring accurate verdicts to the requisite standard of proof,[3] and 'a proper degree of respect for the defendant as a citizen.'[4] Although inadequacies in the trial process from the defendant's perspective have been revealed from accounts of trials involving vulnerable perpetrators like James Bulger's killers,[5] including detachment from the proceedings due to the courtroom layout and incomprehension of the proceedings due to the use of overly legalistic language and unfamiliar practices, the rights accorded to the defendant have been central to criminal trial proceedings, forming the basis of liberal claims to legitimacy, to be considered further below.

Over the past two decades it has been suggested that this traditional conception of the criminal trial is under attack, with many of the principles embodied in the trial process which favour the defendant, such as the right to trial by jury, the right to silence and the shield protecting the defendant's character, being challenged

[1] Peter Walker, 'Frances Andrade killed herself after being accused of lying, says husband' *The Guardian* (London, 10th February 2013) <https://www.theguardian.com/uk/2013/feb/10/frances-andrade-killed-herself-lying> accessed 2 November 2015.
[2] Antony Duff, Lindsay Farmer and Sandra Marshall, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007) 4.
[3] *Woolmington v DPP* [1935] AC 462 confirmed the criminal standard of proof where the prosecution bears the burden of proving the facts in issue as proof 'beyond reasonable doubt'. More recently the Judicial College suggest that juries are told that 'the prosecution must make the jury sure that D is guilty. Nothing less will do' (Judicial College, 'The Crown Court Compendium' (May 2016) <https://www.judiciary.gov.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf> accessed 8 May 2017.
[4] Duff, Farmer and Marshall (n 2) 5.
[5] Blake Morrison, *As if* (Granta Books 2011).

or eroded.[6] At the same time there has been a turn towards the role of the victim, both internationally and domestically. The Rome Statute of the International Criminal Court ("ICC") included ground-breaking victim provisions on the international stage regarding protection, participation, and reparations,[7] 'reflect[ing] a growing recognition of victims' interests in judicial mechanisms.'[8] The participatory provisions embedded in the Rome Statute contained elements comparable to domestic, civil law jurisdictions, such as France and Germany, which resulted in victims having a legal standing in proceedings. Such a standing, as evidenced by specific legal representation, the ability to present evidence in court and the making of statements for sentencing purposes,[9] had no equivalency in English criminal trial proceedings. The effectiveness of the declared purpose of delivering justice to victims, though, is subject to ongoing academic debate, as the opposing interests of the role of the victim and the rights of the defendant to a fair trial collide.[10] It has, for example, been suggested that the victim-centric measures are in fact a means to promote self-legitimation of the ICC, with victims being deemed subjects as a matter of law but as a matter of fact being subjects of manipulation.[11]

In the English criminal trial, unlike in civil law, inquisitorial jurisdictions, there has been no particular role accorded to the victim over and above any other witness in the proceedings. By pitting the state against the individual, the adversarial nature of the trial has not leant itself to bestowing any special status on the victim. Yet over the past two decades or more the criminal trial has undergone a number of victim-centric reforms which purport to give an effective 'voice' to the victims of crime in criminal proceedings.[12] Measures range from the creation of specific posts to champion the rights of victims (such as the Victims' Commissioner), to technological advances to

[6] See for example Duff, Farmer and Marshall (n 2) 1 and Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2(1) Cr. L. & P. 21, 38.

[7] Rome Statute of the International Criminal Court (A/CONF.183/9 of 17 July 1998), Articles 68, 75, and 79.

[8] Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014) 2.

[9] Moffett (n 8) 95.

[10] Moffett (n 8) 3.

[11] From discussions at the Centre for Critical International Law at Kent (Cecil) Second Annual Workshop, 'International Criminal Law and Victims' held at the University of Kent at Canterbury on 16th May 2014.

[12] Ministry of Justice, Improving the Code of Practice for Victims of Crime Response to Consultation (CP8(R) 2013) 4 per Damian Green MP, Minister for Victims.

increase access to information (like the Victims' Information Service), to changes in trial procedure easing the burden of evidence giving on victims, for example the use of pre-recorded evidence then played in court, and restrictions on what can be asked of a victim in cross-examination. These and other reforms are detailed in this chapter further below when looking at the recent turn towards the victim in English criminal trial proceedings. I have selected two particular reforms to focus on in this thesis concerning changes to the role of the victim at either end of the criminal trial process; firstly, when the decision is taken not to charge a suspect with a criminal offence and secondly, when a defendant is sentenced for their criminal acts. As I shall explain below, these two reforms are intended as representative of the swathe of reforms as a whole, and have been specifically chosen since they signify two discreet stages of the criminal trial that were hitherto remote to the victim.

Given the current apparent preoccupation with the voice of the victim at all stages of the criminal trial process, as evidenced by the recent raft of victim-centric reforms, this thesis addresses the enigma of increased focus on victims in a liberal, adversarial, defendant-centric conception of the criminal trial, which champions the participation of the defendant being called to account and due process to protect the defendant against the oppressive exercise of state power. These reforms provoke a question about the overall place, purpose and legitimacy of the trial, given its historic focus on the defendant. It is my contention that the governmental victim-centric reforms reflect neoliberal imperatives including both the personalisation and individualisation of procedures in favour of the victim and the victim's increased responsibilisation. I seek to understand the neoliberal imperatives driving these governmental reforms, to consider their interplay with the liberal trial institution and, consequently, their impact on the legitimacy of the trial. The contention of this thesis is that despite the view of scholars like Wendy Brown, who suggest that neoliberal tendencies undermine liberal public institutions,[13] the victim-centric reforms to the English criminal trial paradoxically serve to strengthen a liberal conception of its nature and legitimacy. Their impact lies in further legitimising the criminal trial through enhanced perception of procedural fairness to victims in the trial process, and

[13] Wendy Brown, *Undoing the Demos* (Zone Books 2015) 39.

expansion of its public audience by opening a dialogue between the victim and those in power at key points within the trial process that were previously remote to the victim.

This thesis divides into four chapters. In this first chapter I trace the rise in the prominence of the defendant and the concomitant fall in the role of the victim in liberal English criminal trial proceedings before introducing the more recent turn towards the victim's voice and the neoliberal motivations behind this volte-face. In the first section, I briefly trace the development of the criminal trial process from trial by ordeal to adversarial conflict in order to introduce the liberal justifications underpinning today's criminal trial which foreground the place of the defendant. In the second section I chart the recent turn away from the traditional positioning of victims on the periphery of defendant-focused criminal proceedings towards privileging them at all stages in the process through a number of victim-centric reforms. In the third section I introduce the notion that these reforms embody neoliberal imperatives which I shall consider in more detail in the following chapters.

In the following two chapters I examine in detail two examples of the recent victim-centric reforms. Amidst a plethora of measures considered below, these reforms demonstrate the impact of victim-centrism on two distinct and different stages of the criminal trial which hitherto had very little direct victim involvement, allowing me to consider the impact of such reforms across the criminal trial process. The first reform, addressed in chapter two, is the Victim's Right to Review Scheme ("VRRS"). The decision whether to prosecute a suspected perpetrator of criminal conduct is taken by the Crown Prosecution Service ("CPS") following an investigation by the police which is often triggered by a complaint from a victim of crime. Other than a requirement to take the victim's views into account, the victim played no role in this decision and there was no way to challenge a decision taken not to proceed with a prosecution, other than by following the usual channels for making a complaint concerning the level of service received from the CPS. The VRRS created a specific mechanism for aggrieved victims to challenge a decision taken by the CPS not to prosecute. The second reform, which is the subject of chapter three, is the Victim Personal Statement ("VPS") scheme. The decision on how to punish a convicted defendant is taken by the Magistrates or Judge at the conclusion of a trial or following a guilty plea. The VPS scheme formalises a mechanism for the victim to express to the sentencing tribunal the impact the offence has had on them and, if they so wish,

provides the opportunity for the victim to read out their statement in court themselves. In my analysis of each of these reforms, I consider what prompted the change that each brought about, the neoliberal imperatives they embody and their lack of impact on the fundamentally liberal nature of the proceedings.

In the final chapter I shall consider the impact of these victim-centric reforms on the legitimacy of the criminal trial, starting with neoliberal paradigms of legitimacy. I suggest that market-centric, consumerist neoliberal models cannot fully handle the particularities of the criminal trial's legitimation. Given this, I turn to consider liberal accounts, which remain more explanatory in understanding the legitimacy of the trial, notwithstanding the neoliberal quality of the trial reforms under investigation. Specifically, I conclude that the victim-centric reforms under discussion can be seen as expanding or shifting the original sense of the audience or interested party under procedural conceptions of legitimation, fostering the dialogic and relational character between the power-holder and the audience that underpins liberal conceptions of legitimacy.

1. The evolution of the relationship between the liberal conception of the criminal trial, the rise of the defendant and the demise of the victim

The modern criminal trial is widely recognised as embodying liberal imperatives in sanctioning the coercive punishment of the defendant who has been fairly convicted of committing an offence. When developing a normative theory of the criminal trial,[14] Anthony Duff, along with his three main collaborators, described the values as 'central to the kind of (roughly) liberal political perspectives to which contemporary western democracies claim to be committed.'[15] For Andrew Ashworth and Lucia Zedner, the paradigm conception of criminal justice is a liberal one encompassing the censure of

[14] Anthony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros collaborated for a three-year Arts and Humanities Research Board funded project developing a normative theory of the criminal trial entitled *The Trial on Trial* which culminated in a three volume publication of the same name. The stated aim of the project was: 'to develop a normative theory that is appropriate to the context in which it is formed and will be applied— that of a twenty-first-century state that purports to be democratic and to respect the set of roughly liberal values that, whatever the controversies about their precise meaning and application, are the common currency of contemporary legal and political debate' (n 2) 10.

[15] Duff, Farmer and Marshall (n 2) 57.

actions previously deemed wrongs under the criminal law and the punishment of those who have been proven to have committed those wrongs in a criminal court. Such proceedings will be fair due to procedural safeguards and their purpose will be to decide whether the defendant did the criminal wrongs by conducting a public examination of the evidence brought by both sides of the dispute.[16] The need to 'respect the autonomy and dignity of individuals'[17] in this process also features in the underlying values as expounded by Ashworth and Zedner. These values have not always underpinned the criminal trial since the requirement to prove guilt based on evidence concerning past events has not always been necessary to justify the deprivation of the accused's liberty. In this part of the chapter I consider how the relationship between the liberal conceptions of the trial, the focus of the proceedings on the defendant and the demise of the role of the victim have evolved. The juxtaposition between the status quo and the recent victim-centric reforms considered thereafter brings the issue of legitimacy of the criminal trial to the fore, but this is discussed later, in chapter four.

One of the liberal values identified by Duff as underpinning today's criminal trial concerns the participation of the defendant who is being called to account, including the opportunity to confront their accusers. Although trial by ordeal is not directly analogous to today's criminal trial, parallels can be drawn between the two processes, particularly in relation to the calling of the accused to account for their actions, albeit before God and their local community rather than an impartial tribunal. Trial by ordeal, typically trial by fire or by water in medieval Europe until its abolition in 1215, did not seek to discover past facts, unlike the focus of today's trial which is seeking to establish the truth of past events based on the evidence presented to the fact finders by the parties to the dispute. Rather it resorted to utilising a physical challenge to resolve a dispute, such as putting the accused's hand in a boiling cauldron to fetch a ring and waiting to see whether their hand burned or not in order to determine guilt,[18] without reference to the actual facts in dispute. So the determination of guilt rested upon the accused although the method and proof of guilt were far removed from today's trial process, given that ordeals were unilateral, usually only undertaken by one party to

[16] Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2(1) Cr. L. & P. 21, 22.
[17] Ashworth and Zedner (n16) 22.
[18] Robert Bartlett, *Trial by Fire and Water* (OUP USA 1986) 4.

the case and they required that the natural elements behave in an unusual way, hot water or iron not burning the innocent for example, or cold water not allowing the guilty to sink. These ordeals were more aimed at discovering the truth of the accused's identity or nature and less the truth of past facts or actions. Michel Foucault commented that, as day to day penal practices changed, simply knowing that the accused had done wrong and punishing them accordingly was no longer enough. Instead, the need to hear the accused give an account of themselves developed. According to Foucault:

> Legal justice today has at least as much to do with criminals as with crimes. Or more precisely, while, for a long time, the criminal had been no more than the person to whom a crime could be attributed and who could therefore be punished, today, the crime tends to be no more than the event which signals the existence of a dangerous element - that is, more or less dangerous - in the social body.[19]

The focus of the ordeal, then, rested on calling the accused to account for the crime rather than on the accused themselves. The importance of the accused's position developed in later centuries.

The stages leading up to the eventual ordeal contained some familiar elements such as the making of an accusation by the victim, which required a prima facie case to be established by the victim although proof to back up the accusation was not a necessary requirement, and a period of negotiation in front of a court when the accused could seek to settle their dispute or advance a defence to the accusation. The role of the victim was limited to the initial stages of the ordeal since it was the court who would then determine what proof would be required such as what ordeal would be faced and how judgment would be reached based on the outcome of the ordeal.[20]

With the cessation of trial by ordeal gradually came an increased role for victims in proceedings, whilst the defendant's place remained a precarious one. As expounded by Paul Gewirtz, 'the earliest court proceedings in England denominated "criminal" were, in fact, private prosecutions brought by the victim directly'.[21] So the victim brought the proceedings against the accused. That said, the precursor to the

[19] Michel Foucault, 'About the Concept of the "Dangerous Individual" in 19th Century Legal Psychiatry' (1978) 1 International Journal of Law and Psychiatry 1 (Alain Baudot and Jane Couchman tr) 2.
[20] Duff, Farmer and Marshall (n 2) 22-25.
[21] Paul Gewirtz, 'Victims and Voyeurs at the Criminal Trial' (1996) 90(3) N.W.U.L.R. 863, 865.

role of prosecutor was in fact a function originally carried out by jurors following trial by jury being established in English criminal trials 'as the Crown gradually assumed the power to punish those who broke the King's peace.'[22] Unlike today's proceedings, juries were self-informing, requiring 'no outside officer to investigate crime and to inform the jurors of the evidence' [23] so the jury had an investigative function as well as a judicial one, basing their decisions on local knowledge and the standing of the accused. Gradually the investigative role of the jury lessened as evidence of the alleged offences was required to be presented at court by the parties. Between the 15th and 18th centuries the criminal trial moved from an inquiry to an altercation as 'the prosecution of crime was becoming more organised and systematic'.[24] During this period trials focused on an altercation between the victim and the defendant with brief oral hearings requiring both parties to speak. The victim's role was pivotal in nature as a 'citizen prosecutor',[25] combining the functions of witness and prosecutor. The defendant was not afforded any of the basic protections typical in a liberal trial, such as advance notice of the charges they faced or any legal representation.[26] Thus the trial process was very remote from the liberal problematics of state and deprivation of liberty that permeate the current trial legitimation under consideration in this thesis.

The progression of the criminal trial from altercation to the more recognisable adversarial trial during the 18th century, marked the start of the regression of the role of the victim and the rise in prominence of the defendant. Although victims initially continued to prosecute many cases, where there was no victim or their evidence was insufficient, justices of the peace became 'back-up prosecutors.'[27] Following the passing of the Treason Trials Act 1696, which permitted legal representation for those accused of treason, there was a subtle shift towards a recognition that those faced with mounting a defence against the might of the state's resources may need legal assistance.[28] Although formally prohibited in all other matters, the 18th century saw the use of defence lawyers gradually increase in the trial, and with this rise came the

[22] Duff, Farmer and Marshall (n 2) 25.
[23] John H. Langbein, 'The Origins of Public Prosecution at Criminal Law' (1973) 17 Am.J.Legal Hist. 313, 314.
[24] Duff, Farmer and Marshall (n 2) 30.
[25] Langbein (n 23) 318.
[26] Duff, Farmer and Marshall (n 2) 29-40.
[27] Langbein (n 23) 323.
[28] Duff, Farmer and Marshall (n 2) 41.

advent of more effective cross-examination of witnesses and the development of exclusionary rules of evidence relating to hearsay, character and confessions which still operate in today's liberal trial process. Additional protections for the defendant came in the passing of the Prisoners' Counsel Act 1836 which permitted defence lawyers to make opening and closing speeches to the jury. Although 18th century trials were still brought by victims as private individuals, the state's involvement grew through for example offering financial incentives to prosecute. These developments combined to turn the proceedings into a more recognisable adversarial arena, with the judge adopting a neutral role as arbiter rather than investigator. This redistribution of roles resulted in the trial moving away from a conflict between victim and accused towards a 'contest between two cases with defence counsel insisting that the prosecution prove (rather than assert) its case through the presentation of evidence, according to the newly formulated standard of beyond reasonable doubt.'[29] This resonates with another liberal value identified by Duff relating to the notion that criminal punishment should only be inflicted upon those found to be guilty of criminal conduct, which introduces the notions of proof, fairness and proportionality. Importantly, this is a turning point for the role of the victim as prosecutions start to be taken out of their hands and into the remit of the state. In chapter two I detail more fully this important step towards the present day position in which the victim plays a limited role at best in the decision whether to prosecute a defendant and the direction of the case at trial.

The criminal trial moving into the 20th century saw a far greater emphasis on the defendant's position, with the role of the victim retreating further into the background. As Gewirtz puts it, 'the victim became a trigger and a witness for the prosecution, rather than the prosecution's director.'[30] The trial became 'reconstructive'[31] in nature due to its lengthening hearings aimed at reconstructing past events to test the guilt of the accused. This foregrounds another prominent liberal justification identified by Duff which is the requirement to establish the factual truth about whether the defendant committed the offence charged against him. As the police took over the prosecution of cases from private individuals, so the number of witnesses called to give evidence increased, including evidence of the police investigation,

[29] Duff, Farmer and Marshall (n 2) 44.
[30] Gewirtz (n 21) 865.
[31] Duff, Farmer and Marshall (n 2) 47.

forensic experts and the accused themselves under the Criminal Evidence Act 1898. Overall, it was the role of the lawyers that dominated this period, bringing a new level of professionalism to the arena and further displacing the role of the victim to the background. The latter part of the 20th century has seen the concept of due process heavily influence the criminal trial, with the state on the one hand aiming to establish the guilt of the accused yet on the other hand 'limit[ing] itself in the means that may be used for this process.'[32] This fits with another liberal value identified by Duff relating to due process imperatives as a way to protect 'citizens against the potentially (and all too often actually) oppressive power of the state.'[33] A number of defendant-centric measures aimed at protecting the defendant to ensure a fair trial were enacted in this period such as protections provided during the investigative process under the Police and Criminal Evidence Act 1984 and increased disclosure of prosecution evidence. Additionally, the role of the judge moved towards an increasingly managerial one to ensure that the trial process was efficient. The establishment of the Crown Prosecution Service to conduct the prosecution of the case against the accused in criminal trials rather than the police executing that role in addition to carrying out the investigation is considered in chapter two. All of which results in the emphasis of the proceedings being focused on the defendant, with the fairness of the proceedings being pivotal to justify the deprivation of liberty.

In addition to the liberal values embedded in the criminal trial already considered above, Duff identified some other liberal features outside of the trial such as that conduct should be criminalised only if it is morally wrong, although this is qualified to take into account the fact that some kinds of immorality should not be criminalised and some criminality contains no immorality such as regulatory offences.[34] Additionally some separation of powers is required so that the legislature make law and the courts apply it, bearing in mind however the distinctive features of common law systems which allow for judge made law where the legislature are silent. These features, combined with those considered above, form a liberal set of values that underpin the criminal trial process and help to contextualise the centrality of the defendant's place within the system.

[32] Duff, Farmer and Marshall (n 2) 51.
[33] Duff, Farmer and Marshall (n 2) 61.
[34] Duff, Farmer and Marshall (n 2) 58.

2. A recent turn to the victim

In this part of the chapter I will be considering the recent shift in focus towards the victim by detailing some of the victim-centric reforms over the past couple of decades. In the following part of the chapter I shall explain why these reforms sit more squarely in neoliberal paradigms of governance. The victim-centric reforms are not, however, the only changes to have occurred in criminal proceedings in recent times. Indeed, a common theme can be seen as emerging in more recent academic writing concerning attacks on the liberal justifications for the trial in general. Ashworth and Zedner suggest that 'some longstanding assumptions about the role and the place of the criminal trial and, it follows, the criminal law are under challenge.'[35] In analysing the threat to these values they explore a number of reforms deviating from this paradigm of the criminal trial, such as diversions away from court limiting the number of cases that can reach trial, the increased use of fixed penalties and preventive orders,[36] and the downgrading of proceedings through the greater use of summary trial and incentives to plead guilty.[37] They consider the changing role of the state and in particular the manifestation of the over-development of the regulatory state as one way of understanding these reforms and conclude that any attempt to undermine the liberal model of the criminal trial must be resisted.[38]

The significance of the recent challenges to this paradigm has an impact on the legitimacy of the criminal trial, as averred by Ashworth and Zedner where they suggest that there is 'growing scepticism about the fitness of the criminal trial to fulfil its purposes.'[39] They attribute this to five main challenges levelled at the present trial system in that it is not cost-effective, preventive, necessary, appropriate or effective.[40] These challenges sit squarely within the neoliberal paradigm of governance according to market metrics. It is in this climate of scepticism that the phenomenon of a recent turn towards the victim's place in the process emerges, which I argue comes from the same neoliberal imperative.

[35] Ashworth and Zedner (n 16) 21.
[36] Ashworth and Zedner (n 16) 38.
[37] Ashworth and Zedner (n 16) 38.
[38] Ashworth and Zedner (n 16) 48.
[39] Ashworth and Zedner (n 16) 22.
[40] Ashworth and Zedner (n 16) 23.

Beginning, as I have established, from a position of marginalisation in the criminal trial process, the role and rights of the victim have been dramatically accentuated over the past three decades, both domestically and internationally, leading Matthew Hall to assert that 'over the last 30 years victims of crime have undergone a radical metamorphosis from the "forgotten man of the criminal justice system" to the subjects of extensive official attention and legislative change.'[41] Domestically, against the history and conceptually settled liberal basis of the criminal trial which emphasised the interests of and in the defendant, a sudden raft of what I consider to be neoliberal reforms appearing to privilege the victim were enacted, particularly between 1997 and 2015. The government rhetoric surrounding these reforms consistently referred to a target of putting victims "at the heart" of the criminal justice system.[42] In a manner fitting this chapter as an introduction, I summarise a number of these victim-centric measures below, returning to focus on two such measures in detail in chapters two and three as indicative of the broader trend towards increasing the role of the victim in criminal proceedings.

A turn to the victim is evidenced in a large spectrum of initiatives spanning both services available to the victim outside of the trial arena and during the trial itself, including the creation of representatives of victims' rights on the national stage, technological tools for victims, and measures designed to ease the burden of giving evidence at court, as introduced above. Initiatives aimed at the provision of services for the victim during their involvement with the criminal justice system included the creation of an increasing number of representatives championing the rights of victims. Two posts were created by the New Labour government; firstly the Victims' Champion in 2009 and then secondly its successor, the Victims' Commissioner.[43] The Coalition government continued the trend by appointing a succession of ministerial roles focusing on the victim along with Police and Crime Commissioners ("PCCs") for each police force with full responsibility for funding local victim services. It is illuminating to consider the relative financial investment in victims by this means: the total funding available for supporting victims in 2015/16 was £89.7 million. Of this, PCCs received

[41] Matthew Hall, 'The Relationship between Victims and Prosecutors: Defending Victims' Rights?' [2010] Crim L R 31, 32.
[42] Home Office, *Justice for All* (Cm 5563, 2002), para 0.2.
[43] Created under the Domestic Violence, Crime and Victims Act 2004, leading to the first appointment to the role in March 2010.

£63.15 million which included £1.35 million to support victims of sexual violence and domestic violence.[44] Just over 70 percent of the budget for supporting victims, therefore, was allocated to PCCs which was a large proportion of the available funding and indicative of the increasing emphasis on victims by allocating resources to dedicated professionals.

Additionally a number of technological advances were made to ease access to information for victims of crime. In 2014 the Ministry of Justice set out their commitments to victims[45] which included the establishment of a new nationwide Victims' Information Service,[46] providing a website with information and advice about what support was available to victims, and how to access it accompanied by a telephone line run by the charity Victim Support. Another innovation concerning access to information was the TrackMyCrime online facility, rolled out to all police forces from January 2015. This service enabled those who had reported crimes to follow the investigation online and make contact with the investigating officer.

Within the trial itself, a number of reforms concerning measures designed to assist non-defendants in giving evidence to the court were created. The Youth Justice and Criminal Evidence Act 1999 overhauled the notion of special measures directions in cases of vulnerable and intimidated witnesses, referring to witnesses who are under 18 at time of hearing, or those for whom the quality of evidence given was likely to be diminished by reason of incapacity or fear or distress at the prospect of testifying.[47] Amended by the Coroners and Justice Act 2009, the measures included the use of screens when giving evidence, the giving of evidence by live link, the use of video recorded evidence-in-chief and the use of video recorded cross-examination or re-examination.[48]

---

[44] Ministry of Justice, 'New national service to help victims' (Press release, 27 August 2015) <https://www.gov.uk/government/news/new-national-service-to-help-victims> accessed 13 March 2016.

[45] Ministry of Justice, 'Our Commitment to Victims' (Policy Paper, 15 September 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/354723/commitment-to-victims.pdf> accessed 13 March 2016.

[46] Launched on 27 August 2015.

[47] Youth Justice and Criminal Evidence Act 1999, ss 16 and 17.

[48] The Youth Justice and Criminal Evidence Act 1999, ss 23-30 set out the full list of special measures.

Another discrete aspect of the trial under reform concerned what questions could be asked of non-defendants whilst giving their evidence. In *R v Edwards*[49] the Court of Appeal upheld the decision of the trial judge, in relation to cross examination of a vulnerable witness, to stop the defence advocate putting the defence case to the prosecution witness or challenging them about what they had said. The Criminal Practice Directions 2015[50] made specific reference to this case[51] and stated that it may be necessary to depart radically from traditional cross-examination to enable a witness to give the best evidence they can.[52] Ground Rules Hearings to plan the questioning of a vulnerable witness in advance of a trial are now a requirement when using an intermediary but the Practice Direction stated that they were also good practice in other cases involving young witnesses or witnesses with communication needs.[53]

The rules concerning the use of hearsay evidence at trial were also reformed in the Criminal Justice Act 2003, impacting on the possibility of having a witness's statement read out to the court in their absence. The admissibility of unavailable witness evidence is dealt with in section 116 of the Act including where the witness does not give evidence through fear.[54] Additionally, for the first time an explicit power is included to admit otherwise inadmissible hearsay if the Judge is satisfied that it is in the interests of justice to do so.[55] Incompatibility issues with the right to 'examine or have examined witnesses against him and to obtain the attendance and examination of witnesses'[56] resulted in the English courts ruling the legislation compatible[57] whilst the European Court of Human Rights ("ECtHR") initially ruled it incompatible[58] when convictions were based on sole and decisive hearsay evidence.[59] Despite Lord Justice Pitchford stating that 'It needs to be at the forefront of the court's mind that the right to

[49] *R v Edwards* [2011] EWCA Crim 3028, [2012] Crim. L.R. 563.
[50] Lord Chief Justice, Criminal Practice Directions [2015] EWCA Crim 1567 issued 29/09/2015.
[51] Criminal Practice Directions (n 50) 3D.4.
[52] Criminal Practice Directions (n 50) 3E.4.
[53] Criminal Practice Directions (n 50) 3E.3.
[54] Criminal Justice Act 2003, s 116(1)(e).
[55] Criminal Justice Act 2003, s 114(1)(d).
[56] European Convention on Human Rights, Art. 6(3)(d).
[57] *R. v Horncastle (Michael Christopher)* [2009] UKSC 14, [2010] 2 A.C. 373.
[58] *Al-Khawaja v United Kingdom* (26766/05) (2009) 49 E.H.R.R. 1.
[59] In *Al-Khawaja v United Kingdom* (26766/05) [2012] 2 Costs L.O. 139 the Grand Chamber have subsequently acknowledged that such evidence would not be automatically inadmissible where there are "counterbalancing factors".

confront the witness represents a cornerstone of a fair trial… If it is to be denied to a defendant it must be only upon a compensatory guarantee of fairness',[60] that case resulted in a conviction based almost entirely on the hearsay statement from a gang-member who had lied to implicate others on previous occasions.

Possibly the most publicised measure favouring the victim has been the Code of Practice for Victims of Crime ("the Code").[61] I consider the Code in further detail in chapter three but since its inception in 2006 it has been promoted as 'putting victims first'[62] by detailing key entitlements of victims such as being kept informed throughout the proceedings. The Code, along with all of the reforms detailed in the previous paragraphs, show a concerted move towards privileging the victim in criminal proceedings.

To handle this breadth of reform in this thesis, and as earlier eluded to, I shall be concentrating on two victim-centric reforms in the following two chapters which typify the underlying motivations and impact of the reforms. The first reform concerns the increased involvement of the victim in the decision to prosecute under the Victim's Right to Review Scheme ("VRRS"), which impacted upon the previous practice of allowing the CPS to decide alone whether to prosecute. The second concerns the Victim Personal Statement ("VPS") scheme which enables victims to write about how criminal conduct has affected them and read out their VPS in court during sentencing if they so wish, marking a change from the previous sentencing exercise, which had focused on the mitigation presented on behalf of the defendant. These are two important measures amid the multitude of reforms privileging victims in recent years. Looking at them in more detail enables both ends of the criminal trial process, being the decision whether to prosecute and then the sentencing of the defendant, both of which having previously been remote to the victim, to be considered. This enables broader generalisations about this turn towards the victim to be made.

[60] *R. v Adeojo (Sodiq)* [2013] EWCA Crim 41 [98].
[61] Ministry of Justice, *Code of Practice for Victims of Crime* (HMSO, 2015).
[62] Code of Practice (n 61) 1.

3. Why these reforms should be understood as neoliberal in nature

This thesis considers recent victim-centric reforms to criminal proceedings in England and Wales as prima facie similarly heterogenous to the liberal account of the legitimacy of the criminal trial that Ashworth and Zedner deem to be under challenge, as considered above. Victim-centric reforms arguably arise from what have been termed "neoliberal" logics of governance, and thus they present an example of the kind of challenge to the liberal institution of the trial which Ashworth and Zedner discredit, albeit with certain particularities which must be taken into account. The question to consider is how, if at all, does such a dramatic neoliberally motivated turn towards the victim impact on the legitimacy of the trial which is rooted in liberal justifications? To address this question, the answer to which on the face of it appears to be that such a turn would destabilise or shift the trial's legitimacy – potentially dramatically - I am going to introduce the main justifications for considering the victim-centric reforms as neoliberal in nature. In the following two chapters I shall then analyse two examples of the reforms considering what led to their creation, how they embody neoliberal imperatives and their impact on impact on the liberal trial institution. In the final chapter I analyse neoliberal and liberal paradigms of legitimacy to understand the impact of these reforms on the legitimacy of the criminal trial.

As eluded to earlier, analogies can be drawn between the victim-centric reforms and the neoliberal paradigm of governing by market metrics. This can be seen in the drive to increase efficiencies in the criminal justice system and increased engagement with the users of the system through surveys and 'brand' recognition. Although the criminal trial itself is arguably not a market but a space away from it, the reforms fit with the neoliberal paradigm of the dissemination of the model of the market to all domains and its configuration of human beings as market actors. By encouraging more active victim participation, the reforms exhibit several typical neoliberal traits, such as the responsibilisation of the victim in the trial process, as opposed to the altogether different situation in which the trial resoundingly responsibilises the defendant. For some time a move towards responsibilisation from the state to public and private agents has been charted in the arena of crime prevention. David Garland considered the identification of those who can reduce criminal opportunities and the techniques of persuasion used to target the public as a whole, raising public consciousness,

interpolating the citizen as a potential victim and creating a sense of duty.[63] These reforms arguably extend this movement from crime prevention to the prosecution of offences. This is exemplified by the many reforms, considered above, which ultimately aim to ensure the victim participates in the trial process, in turn resulting in more viable prosecutions, such as the measures aimed at easing the experience of giving evidence in court including the special measures directions and the restrictions on aspects of cross-examination.

A second neoliberal trait evidenced concerns individualisation. Michel Foucault considered how, in a disciplinary regime, the 'axis of individualization'[64] shifts away from the powerful figureheads to those on whom power is exercised, such as the criminal. These reforms illustrate movement again but towards the victim of crime instead. Garland previously noted that:

> In contemporary penality this situation has been reversed. The processes of individualisation now increasingly centre upon the victim. Individual victims are to be kept informed, to be involved in the judicial process from complaint through to conviction and beyond.[65]

The technological advances enabling victims to access assistance and be kept informed as to the progress of their complaints, identified above, such as Victims' Information Service website and the TrackMyCrime online facility exemplify this process of individualisation.

A third quality evidenced in these reforms that reflects neoliberal paradigms concerns personalisation. The language used in the reforms certainly presents as an appeal to citizenship, by promoting the duty on victims to engage with the criminal justice system whilst importing consumerist ideals such as enhanced services and entitlements. The Code, as earlier mentioned, is an archetypal example of personalisation in that it sets out 'services that must be provided to victims of crime'[66] including enhanced entitlements for victims of the most serious crimes, subject to the making of an allegation of a criminal offence to the police. Even the terminology used when referring to the complainant as 'victim' in the reforms, which I have similarly

[63] David Garland, *The Culture of Control* (OUP 2002) 125.
[64] Michel Foucault, *Discipline and Punishment* (Alan Sheridan tr, Vintage Books 1995) 192.
[65] Garland (n 63) 179.
[66] Ministry of Justice (n 61) 1.

adopted in this thesis, appeals to the individual making the complaint, whilst in fact tending to prejudge the situation. The Code of Practice for Victims of Crime is in itself a misnomer given the possibility of the making of a false allegation, which can lead to criminal charges against the original 'victim'.[67] Similarly, the terminology used in the Victim's Right to Review Scheme, to be considered in detail in the following chapter, alludes to the complainant as the victim, which is arguably a more appealing, emotive title.

A further typical neoliberal trait underlying all of the reforms is the drive to reduce the risks posed by criminals to an increasingly consumer-driven society, detailed in chapter four when looking at the neoliberal state's technique of legitimisation by governing 'through a criminal-consumer double'[68] By engaging the victim with the criminal justice system, the state has a better chance of securing convictions and enforcing a zero-tolerance to criminality.[69] All of these neoliberal paradigms are further considered when analysing the two examples of victim-centric reforms in chapters two and three.

If the motivation for these victim-centric reforms is based in neoliberal rationality, and therefore heterogenous to the liberal, well might we ask whether they disrupt the liberal conception of the trial and its legitimacy? Wendy Brown criticises the rise of neoliberal imperatives through her assertion that the liberal institution is being eroded, since 'governance according to market metrics displaces classic liberal democratic concerns with justice and balancing diverse interests.'[70] For Brown, the liberal democratic social contract is turning inside out. Citizenship concerned with public things and common good is vanishing and liberal democratic justice concerns are receding.[71] However, Brown's analysis appears markedly inappropriate to the 'liberal institution' as manifested in the criminal trial. Indeed, Brown's study does not engage with the trial at all—a highly particular institution, to be sure, but an important one if the concern is with 'liberal democratic justice'. The difficulty with applying

[67] Dealt with under the common law offence of perverting the course of justice or wasting police time contrary to the Criminal Law Act 1967, s 5(2).
[68] Paul A. Passavant, The Strong Neo-liberal State: Crime, Consumption, Governance (2005) 8 Theory and Event (3) [49].
[69] See chapters 3 and 4 below of this thesis for a fuller consideration of Paul Passavant's work on the neoliberal state's zero-tolerance to the risk posed by criminals.
[70] Brown (n 13) 43.
[71] Brown (n 13) 39.

Brown's analysis to the criminal trial is that the state needs to engage the neoliberal subject with the trial process in a complex way in order for the institution to function. There is a paradox here between the idea that human beings are being rendered as human capital, not just for themselves but also for the state, and the tendency of trials to valorise, protect and make central individual experience. As human capital, participants have no guarantee of security, protection or even survival. On the other hand, the reforms in issue here provide significant protections for individual human beings, in this case the victims of criminal conduct. The idea that the subject as human capital "is at once in charge of itself, responsible for itself, yet an instrumentalizable and potentially dispensable element of the whole"[72] cannot be said to apply to victims in the criminal trial whose evidence is often indispensable for successful prosecutions. As we will see more clearly by way of my analysis of specific reforms in chapters two and three, I am showing how and why such reforms came about by focusing on what I perceive to be the neoliberal imperative of giving the victim a voice within the fundamentally liberal trial institution. And in the final chapter, I will argue that this imperative notwithstanding, such reform is ultimately best understood as strengthening the liberal character of the trial institution, rather than undermining it as Brown's much more general thesis would have it. What the reforms do, instead, is expand the audience of the trial proceedings to the victim at points that were previously remote to them and in so doing, act to promote a liberal concept of legitimacy based on its relational and dialogical character,[73] resulting in the endurance of the liberal trial institution.

4. Conclusion

In this chapter I have introduced the issues that underpin the subject-matter of this thesis. The marginalised position of the victim in the criminal trial process, whose traditional focus has been on the defendant, has been established. In tracing the rise in prominence of the defendant and the demise in importance of the victim, the settled conception of the English criminal trial as a liberal institution has been highlighted. It

[72] Brown (n 13) 38.

[73] Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2013) 102 J. Crim. L. & Criminology 119, 129.

is the liberal justifications of the participation of the defendant being called to account and due process to protect the defendant against the oppressive exercise of state power that have legitimised the criminal trial process.

I have illustrated a recent, dramatic turn towards the role of the victim, with the stated aim of putting victims at the heart of the criminal justice system, by detailing a number of victim-centric reforms. It is my contention that these reforms should be understood as neoliberal in nature. I have detailed the neoliberal paradigms exhibited by these reforms including responsibilisation of the victim in the trial process and individualisation and personalisation of the proceedings, leading to the overall effect of engaging victims with the process, which increases the chances of securing convictions and thereby enforces a zero-tolerance to criminality.

I now turn, in chapter two, to consider the first of two victim-centric reforms which typifies the neoliberal imperatives introduced in this chapter. The Victims' Right to Review Scheme illustrates the turn to the victim at an early stage in proceedings when the decision not to prosecute a suspect has been taken by the prosecuting authority.

Chapter II. The Victims' Right to Review Scheme

Chapter one introduced the notion of a turn to the victim in criminal trial proceedings, which had previously focused on the defendant. In this chapter, one of the more recent victim-centric reforms is examined in detail to understand the situation prior to the reform, what lead to the reform, how the reform occurred, the neoliberal paradigms it embodies and its impact on the liberal trial institution.

The limited role undertaken by the victim in the decision whether to prosecute a suspect followed in the tradition of the constrained function of victims in English criminal proceedings. As described in the previous chapter, the focus of these proceedings has been on the adversarial dispute between the state and the defendant.[1] The place of victims in the system generally has been the subject of increasing debate over the past decade or more, following a number of victim-centric reforms impacting upon victims' rights that can broadly be divided into two categories: service rights aimed at facilitating the victims' experience in the system, and procedural rights providing victims with a participatory role in the decision making process.[2]

In this chapter I shall look at a reform which privileges the victim during the decision to prosecute the alleged perpetrator by providing a specific mechanism for a victim to challenge a decision not to prosecute the suspect. This reform illustrates vividly a situation where perceived fairness to the defendant is in direct tension with an increasing consideration of the victim. Originally a decision not to prosecute, once communicated to the suspect, could not be challenged, at least partially out of concern for fairness to the suspect.[3] However, this finality has been gradually eroded to the point where the Victims' Right to Review Scheme ("VRRS") was launched in 2013, enshrining a right of the victim to seek a review of the decision. In looking at this reform I am seeking to understand how it changes the procedural rights of victims to review prosecutorial decisions. It is my contention that the reform exhibits neoliberal characteristics and so I intend to consider both what neoliberal imperatives drove it,

[1] See for example Antony Duff, Lindsay Farmer and Sandra Marshall, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007) 213-214.
[2] Andrew Ashworth, *The Criminal Process* (Oxford University Press 2010) 52.
[3] *Hansard*, HC Written Answers 31 March 1993, col 200.

and the extent to which this reform impacts on the fundamentally liberal nature of criminal proceedings.

First, I shall consider the status of a decision taken on behalf of the state not to prosecute prior to the launch of the VRRS. Such a decision started as a conclusive determination, favouring the rights of the accused. This evolved to a decision that could be reviewed, at the instigation of an aggrieved victim, through the Crown Prosecution Service's ("CPS") general complaints' procedure. I shall then analyse the judgment in *R v Killick*,[4] which triggered the creation of the VRRS. Lord Justice Thomas held that there must be a right for a victim to seek a review of a decision not to prosecute given that such a decision is a final one for a victim. He suggested that the Director of Public Prosecutions ("DPP") reviewed the usage of the complaints procedure as the correct forum to seek a review. I shall then consider the creation of the VRRS and analyse its effectiveness in facilitating the victim's right to review. I will conclude this part by considering whether the position of the victim has in fact changed.

Second, I will look at the neoliberal imperatives embodied in the VRRS. The idea of individualisation of processes away from those with power towards the individual subject, in this case the victim, can be seen in the scheme. Similarly, responsibilisation of the individual, through empowerment, is a prominent feature. The importation of consumerist concepts and zero-tolerance towards criminality can also be found in the content and promotion of the scheme. These paradigms feature heavily in both the substance of the VRRS and also the official rhetoric marking the arrival and benefits of the VRRS.

Third, I shall suggest that the VRRS does not encroach in any meaningful way on the liberal nature of the criminal trial. The fact that it in no way alters the dichotomous nature of the proceedings between the state and the defendant, failing to provide the victim with any increase to their level of participation in decision making, is illustrative of the scheme's limited ambit. This question will be taken up again in chapter four where I shall consider what impact the scheme has on the liberal account of the legitimacy of the trial, instead of its liberal nature, by considering the

[4] *R v Christopher Killick* [2011] EWCA Crim 1608, [2012] 1 Cr. App. R. 10.

enhancement of the victim's perception of procedural fairness as a means of strengthening the legitimacy of the trial process.

1. From an impossibility to a possibility by way of complaint

I start by considering whether, and if so how, a victim could challenge the CPS's decision not to prosecute a suspect prior to the creation of the VRRS.

As we saw in the introduction in the tradition of the English adversarial criminal trial the victim is viewed as having no direct interest in the bringing or eventual outcome of the proceedings. Rather it is the state on behalf of the sovereign who, in addition to providing a facility for determining resolutions for persons in dispute, is a party to that dispute by investigating complaints and then instigating and controlling the conduct of the case for one side of the persons in dispute, the prosecution.[5] Nils Christie argued that the role of the state results in the victim being 'pushed completely out of the arena, reduced to the trigger-off of the whole thing'.[6] In this section I shall illustrate the dominance of the suspect's position in comparison to the place of the victim when reconsidering a decision not to prosecute prior to the VRRS's introduction in 2013, in particular the suspect's expectations having been informed that there would be no prosecution.

The conduct of a case following a complaint was initially, and continues to be, in the hands of the investigatory authorities, most commonly the police acting under the auspices of the Home Office. Prior to the introduction of the VRRS in 2013, if a suspect was identified, arrested and interviewed, the decision whether to prosecute the suspect was taken by the CPS,[7] the independent principal prosecuting authority in England and Wales, in accordance with the Code for Crown Prosecutors.[8] Nothing has changed in this regard following the inception of the VRRS. After reviewing all available evidence the full code test required, and continues to do so post-2013, the prosecutor to apply a two stage test: (i) the evidential stage which considers the

[5] See for example Jenny McEwan, *Evidence and the Adversarial Process – the Modern Law* (2nd edn, Hart Publishing 1998).
[6] Nils Christie, 'Conflicts as Property' (1977) 17(1) Brit.J.Criminol. 1.
[7] Prior to its establishment in 1986 under the Prosecution of Offences Act 1985 it was the police who both investigated and determined whether to prosecute or dispose of the matter in some other way.
[8] Issued by the Director of Public Prosecutions under the Prosecution of Offences Act 1985, s. 10.

sufficiency of the evidence, in that there must be sufficient evidence against each suspect on each proposed charge to provide a realistic prospect of conviction[9] followed by (ii) the public interest test which requires every prosecution to only be brought if it is required in the public interest.[10] The victim played, and continues to play, no direct part in this process over and above possibly providing a witness statement forming part of the available evidence. The only exception to this is that there is a requirement that the circumstances of, and the harm caused to, the victim, including views expressed by the victim about the impact the offence has had on them, be considered under paragraph 4.12 of the Code. At the same time however, this provision is careful to explicitly emphasise that the CPS does not act for the victim. In other words, the decision to prosecute rested, and continues to rest, in the sole domain of the CPS acting independently of the victim or their potential considerations.

Should the decision be taken by the CPS to charge the suspect (either pre or post-2013), the case proceeds to the Magistrates' Court and then depending on the seriousness of the offence possibly the Crown Court. HM Courts & Tribunals Service ("HMCTS"), an executive agency sponsored by the Ministry of Justice, is responsible for the administration of the courts in England and Wales and the CPS remains in control of the prosecution of the case as it progresses through the courts. A 'not guilty' plea will result in a trial and most likely the reappearance of the victim as a witness, either willingly or having been compelled to attend. A 'guilty plea' or finding of guilt by the tribunal of fact will trigger the sentencing of the defendant by the tribunal of law. The role of the victim at the sentencing stage is considered in chapter three below.

Prior to the inception of the CPS on 1st April 1986[11] the policy concerning potential reviews of decisions not to prosecute set by the DPP favoured the suspect's position and took no account of the victim. Once a suspect had been informed of a decision not to prosecute, 'that decision should not remain open for reappraisal and possible reversal, however long a period may elapse.'[12] Within three weeks of the CPS

[9] CPS, The Code for Crown Prosecutors (7th edn, 2013) 6.
[10] CPS (n 9) 7.
[11] Section 1 of the Prosecution of Offences Act 1985 which created the CPS came into force for 8 counties on 1 April 1986 under the Prosecution of Offences Act 1985 (Commencement No. 1) Order 1985/1849 art. 4. The CPS started work in all other areas on 1 October 1986 under the Prosecution of Offences Act 1985 (Commencement No. 2) Order 1986/1029 art. 4.
[12] *Hansard* (n 3).

taking responsibility for prosecutions this absolute finality of a terminatory decision was modified. In April 1986 the then Solicitor-General Sir Patrick Mayhew announced in a House of Commons debate concerning prosecution policy that although the DPP had originally taken the view that once a decision not to prosecute had been communicated to the suspect that decision should be final, he had decided to revise this stance to take into account 'the very rare cases where there is still a practical possibility that further facts sufficient to incriminate the suspect may be uncovered'[13] following a review undertaken only in exceptional circumstances. It was further explained that any decision to reappraise the decision to prosecute could only be taken with the express authority of the DPP or Deputy DPP. In other words, such a course of action required the highest authorisation. At the inception of the CPS it was therefore quite clear that the victim played no active role in the decision making process for instigating proceedings and the victim could not trigger any review of a decision not to prosecute since reviews were reserved for the rare occurrence of fresh incriminatory evidence. Fairness to the suspect, who has been informed that he or she will not face prosecution, was the explicit paramount consideration at this time.

The issue was not raised again in the House of Commons until seven years later, when in March 1993, prompted by the role of Deputy DPP being effectively abolished, the Attorney-General stated that the policy of the DPP was not to revisit the decision not to prosecute save for in special circumstances, unless the initial decision was taken due to evidential insufficiency.[14] He partially clarified what special circumstances might justify the reconsideration of an earlier decision by providing two sample situations. The first concerned what he called 'rare cases' where the original decision was subsequently found to have not been justified. The second concerned cases where it had already been communicated to the defendant that necessary evidence was likely to become available in the near future that needed to be collected and reviewed, which could lead to proceedings being re-instituted.[15] Neither scenario explicitly made reference to the victim's wishes although the first made reference to the need to maintain confidence in the criminal justice system.[16] Arguably it is more specifically the victim's confidence in the system that is being implicitly identified here

[13] *Hansard*, HC Deb 25 April 1986, vol 96, col 640.
[14] *Hansard* (n 3) col 201W.
[15] *Hansard* (n 3) col 201W.
[16] *Hansard* (n 3).

as the justification for revisiting a decision, since it is the victim who would initially have been aggrieved by the terminatory decision and whose confidence would have been lost, particularly given the suggestion that such cases would be rare. Similarly it is surely the impact of the decision on the victim being the basis for the unjust nature of the original decision since the original decision not to prosecute would have caused injustice to the victim of that case? However, neither of these scenarios necessarily triggered or justified a review. It is my contention that such considerations, particularly matters of confidence in the system, are highly relevant to the eventual reform of the mechanism for seeking a review of decisions not to prosecute and I shall consider this in the last part of this chapter when I consider the lack of impact the reform had on the liberal nature of proceedings and again in chapter four when considering the legitimacy of the trial.

Whilst providing this partial clarification of when a terminatory decision could be revisited, the level of authority for taking the decision to review an earlier decision was also changed. The Attorney-General explained that from 1 April 1993 the decision to review an earlier decision could be taken by a chief crown prosecutor, as opposed to the DPP. This is of note since it is a considerable reduction in the level of authority required to take a decision, which is perhaps indicative of a shift in direction towards increased future reviews.

The circumstances for when a decision not to prosecute could be reviewed, as detailed above, where limited. In addition, the process for a victim to pursue such a review was arbitrary. There was no specific procedure for a victim to follow, should they seek to instigate a review of a decision adverse to their position. If a victim was dissatisfied at a decision not to charge, to discontinue or otherwise terminate all proceedings, the CPS handled any request to review the decision as a complaint through the general CPS complaint's procedure, rather than as a distinct request to review a decision. This involved a three tier process for complaints, defined as 'any expression of dissatisfaction about any aspect of service provided by the Crown Prosecution Service.'[17] The only specific provision relating to review requests of decisions not to prosecute in the CPS process manual focussed on expediting such requests through the complaints procedure where the alleged offence was subject to

[17] Lord Justice Thomas set out the CPS complaints procedure in his judgment in *R v Christopher Killick* (n 4) [23] – [28].

a prosecutorial time-limit with internal CPS guidance advocating that decisions should be re-reviewed if likely to be the subject of judicial review. Clearly this was a cumbersome process more suited to complaints concerning the level of service received rather than substantive procedural matters such as the decision not to prosecute.

The only other option open to an aggrieved victim, other than mounting a private prosecution, would have been to seek judicial review of the prosecutorial decision. However, judicial review presents victims with two major difficulties. In hearing a challenge, the High Court would consider only the lawfulness of the decision-making process resulting in the decision not to prosecute, as opposed to the merits of that decision itself. Furthermore, it has been suggested that an aggrieved victim seeking to challenge a decision not to prosecute would have faced significant obstacles, given that courts had 'expressed reluctance to interfere with prosecutorial discretion, emphasising that their power to review decisions is to be used sparingly.'[18] That said, the courts did recognise that this process was the only effective way of achieving some accountability for decisions taken not to prosecute so for example Lord Chief Justice Bingham asserted that 'the standard of review must not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.'[19] It has been noted, however, that despite a willingness on the courts' part to review decisions, victims faced other problems which limited the availability and effectiveness of this course of action such as difficulties in obtaining the reasons for the decisions not to prosecute which were required to mount a judicial challenge but not required to be given by the CPS and the vagueness of the public interest limb of the test to prosecute which hindered successful challenge.[20] Notwithstanding its availability as a possible mechanism for reviewing decisions not to prosecute, judicial review has been described as 'a highly exceptional remedy'[21] leaving the victim with very few effective options to challenge a decision taken not to prosecute a case affecting them. It would

[18] Mandy Burton, 'Reviewing Crown Prosecution Service Decisions Not to Prosecute' [2001] Crim.L.R. 374, 374.
[19] *R. v DPP Ex p. Manning* [2001] Q.B. 330.
[20] Burton (n18) 378, 383.
[21] Keir Starmer, 'Finality in criminal justice: when should the CPS reopen a case?' [2012] Crim.L.R. 526, 529.

seem likely that for most aggrieved victims, their only recourse would have been to try to seek a review through the inappropriate forum of the CPS complaints process by way of complaint.

I move on to consider what changed concerning the victim's ability to seek a review of a decision not to prosecute following a very important obiter dicta comment in the case of *R v Christopher Killick*.[22]

2. Moving away from complaints towards a right to seek a review of a decision

Seeking a review of a decision not to prosecute has now been taken out of the CPS general complaints process and a new, specific scheme has been created to handle such requests. The VRRS was launched by the CPS in June 2013 following a 2011 decision of the Court of Appeal concerning how a victim can seek a review of such a decision. In *R v Christopher Killick* ("*Killick*"), a case concerning failings in the pre-existing complaints procedure, the court specifically gave legal effect to a victim's right to seek a review of a decision not to prosecute.[23] In his judgment Lord Justice Thomas held that 'as a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision.'[24] This links back to my contentions that the special circumstances for reviewing a terminatory decision, particularly in relation to the maintenance of confidence in the system, implicitly referred to the victim, since they were directly affected by the decision not to prosecute.

This recognition of a right on the victim's part to seek a review was a clear departure from the pre-existing ethos, exemplified by the CPS handling such a request under their general complaints procedure, with no specific procedure or guidance relating to this scenario. By articulating the request to review a decision as a right on the part of the victim, not just a mere possibility, the position of the victim as having no interest in the reconsideration of a decision, as considered at the start of this chapter, was changed dramatically.

[22] *Killick* (n 4).
[23] *Killick* (n 4).
[24] *Killick* (n4) [48].

This right is essentially akin to the right contained in a draft European Union ("EU") Directive on establishing minimum standards on the rights, support and protection of victims of crime ("the directive") - published just one month before the judgment in *Killick* was delivered - which provided that "Member States shall ensure that victims have the right to have any decision not to prosecute reviewed."[25] The directive entered into force the following year with this provision moved to Article 11.[26]

I shall first consider what was said concerning how victims could seek a review of a terminatory prosecutorial decision in *Killick*. I shall then explore how the CPS responded to the judgment before considering in more detail how the victim's position has changed under the new scheme.

i. The gauntlet is thrown down in *R v Killick*

The appeal in *Killick* arose from an unsuccessful application to stay a prosecution for sexual offences as an abuse of process. Complaints were made against the appellant by two complainants in February 2006, with his arrest and interview being conducted in April 2006. A decision not to prosecute was made over a year later in June 2007. One of the complainants lodged a complaint which instigated a review culminating in a decision to prosecute over two years later in December 2009, the appellant having previously been told he would not be prosecuted in June 2007. [27]

The initial decision not to prosecute had been taken by a Borough Crown Prosecutor and twice reviewed internally, first by a District Crown Prosecutor and then by a Sector Director before it was communicated to the appellant. Upon receipt of the complaint by the complainants of this decision, the CPS conducted a fresh review of the case by one of the CPS Special Casework Lawyers. During this review an independent Queen's Counsel ("QC") advised that the initial decision not to prosecute was wholly reasonable. The complainants initiated the pre-action protocol which is a requirement prior to, and indicative of an intention towards, issuing proceedings for

[25] Draft Directive of the European Parliament and of the Council of 18 May 2011 establishing minimum standards on the rights, support and protection of victims of crime, Art 10.
[26] Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L 315/57.
[27] *Killick* (n 4) [21].

judicial review; at which stage the CPS instigated a further review of the decision conducted by the Principal Legal Adviser to the Director of Public Prosecutions, who concluded that the appellant should be charged.[28]

The appellant was convicted at trial having made an unsuccessful application to stay the proceedings as an abuse of process.[29] At the appeal it was represented that the proceedings should be stayed because the appellant had been unequivocally informed that he would not be prosecuted, and a fair trial was no longer possible due to the delays in the proceedings. The appeal court determined that the communication with the appellant did not amount to a representation that there would be no prosecution, bearing in mind that his legal representation would have been aware of the rights of the complainants to seek a review by complaint. Delays were found to feature in these proceedings but they were not held to be sufficient to amount to an abuse of process.[30]

In dismissing the appeal, Lord Justice Thomas considered that complainants have a right to have a decision reviewed and that having to make a complaint about a service by the CPS was an inappropriate forum for seeking such a review. In actuality, he suggested, the connotations attached to the term “complaint” could evoke understandable concerns that prosecutors are placed under undue influence as opposed to the making of a request for a review.[31] He observed in his dicta remarks that ‘it must be for the Director [of Public Prosecutions] to consider whether the way in which the right of a victim to seek a review cannot be made the subject of a clearer procedure and guidance with time limits.’[32] His stance in relation to the right of a victim to seek a review of a final decision not to prosecute has been described as ‘emphatic’[33] and it has been suggested that is has ‘bolstered victims’ rights’[34] by recognising that there must be a right to review, rather than simply an administrative process to make a complaint as to the level of service received which may in turn lead to a review. This approach elevates the review above the typical review of decision-making process that

[28] *Killick* (n 4) [20], [23], [27], [28], [35], [36].
[29] *Killick* (n 4) [5] and [6].
[30] *Killick* (n 4) [56].
[31] *Killick* (n 4) [50].
[32] *Killick* (n 4) [57].
[33] Lyndon Harris, ‘The Rise and Rise of the Victim's Voice’ (2013) 177 JPN 473.
[34] Zoe Carre, ‘The failure of R v Killick to give victims of crime a voice’ [2016] 4 NELR 62.

applies in most places in government to something to do with victimhood specifically. I shall be revisiting this notion in chapter four.

It took the DPP some time to respond to the dicta in *Killick*. Indeed additional guidance was provided as to when decisions should be reconsidered shortly after the judgment and one week after the Directive entered into force, without any mention of the mechanism for instigating the review on the part of the Complainant. The then Attorney-General Mr Dominic Grieve made a written statement to the House of Commons announcing the publication of revised guidance by the CPS to prosecutors on the circumstances in which a decision not to prosecute or to terminate proceedings might be reconsidered and the procedure to be followed.[35] The revision attached two more grounds to the existing two grounds for reconsidering a decision detailed above.[36] The additional grounds arose out of earlier actions by the police so firstly where proceedings at the Magistrates' Court were withdrawn due to the police failing to send a file in time for the first hearing and secondly where the police had previously decided to take no further action on a file but later referred the file to the CPS for a charging decision. Again, like in the existing grounds, no specific mention is made to the victim's views in either of these new grounds for reconsidering a prosecutorial decision. In fact, it took two years from the date of judgment in *Killick* for the DPP to publish a revised, discrete scheme for requests to review terminatory decisions.

ii. The challenge is accepted by the DPP

The eventual response by the DPP to the criticism in *Killick* seemingly elevated the position of victims faced with terminatory decisions through the creation of a specific scheme for victims to seek reviews of such decisions. In June 2013 the Attorney-General Mr Dominic Grieve announced in Parliament that the DPP had published interim mandatory guidance to the CPS on handling cases that give rise to a victim's right to review.[37] The Victims' Right to Review Interim Guidance ("Interim Guidance") was to have immediate effect for qualifying decisions defined as decisions taken from 5 June 2013 onwards by the CPS not to charge or to discontinue proceedings or offer

[35] *Hansard*, HC Deb 31 October 2012, vol 552.
[36] See *Hansard* (n 3).
[37] *Hansard,* HC Deb 5 June 2013, vol 563.

no evidence in proceedings.[38] The reason provided for the instigation of this guidance was the judgment in *Killick*.[39] The Interim Guidance applied to all victims subject to a qualifying decision and the term 'victim' was given the same definition as in the Code which is 'Any person who has made an allegation to the police, or had an allegation made on his or her behalf, that they have been directly subjected to criminal conduct under the National Crime Recording Standard (NCRS)'.[40] Victims were to be notified of the qualifying decision and their right to seek a review of it which is triggered by the victim contacting their local CPS office or CPS Direct, whichever body made the initial decision. The underlying logic appears to be the removal of 'complaints' made by victims concerning decisions not to prosecute from the general CPS complaints procedure, and instead instigating a separate scheme dedicated solely to victims' requests for reviews of decisions not to prosecute. Crucially, in creating the VRRS the victim's prominence at this stage in criminal proceedings appears to be greatly increased in that their right to seek a review has a specific scheme with a more straightforward procedure than the previous complaint's route - especially considering that for the first time the victim is expressly informed of that right and procedure at the time they are informed of the decision not to prosecute.

Arguably the VRRS made very little change to the substance of the procedure once a request for a review, rather than a complaint, has been made. The various steps in the procedure, as set out below, are not dissimilar to the previous three tier process detailed above.

First, the VRRS guidance suggested that after initial contact through the VRRS by the victim has been made, it may be possible to resolve the issue locally by helping victims to understand the decision or by looking again at the decision to confirm that it is correct.[41] In other words, by better explaining the decision to a victim, a full blown review may be averted. This may well relate to the ongoing drive to increase efficiencies in the criminal justice system, itself a typical neoliberal characteristic, by saving the time and cost of a full review.

---

[38] CPS, 'Victims' Right to Review Interim Guidance' (June 2013) para 10 <https://www.cps.gov.uk/consultations/vrr_consultation.html> accessed 9 August 2016.
[39] CPS (n 38) para 6-8.
[40] CPS (n 38) para 15.
[41] CPS (n 38) para. 20.

Second, where local resolution does not result in the victim's satisfaction, the decision will be subject to review. This is a reconsideration of the case de novo conducted independently from the original prosecutor and their part of the CPS by the Appeals and Review Unit who need to be satisfied that the earlier decision was wrong in order concerning the two stage Full Code test and that 'for the maintenance of public confidence, the decision must be reversed.'[42] There are prescribed time limits for seeking a review and completing it. Such an independent review is effectively the same as what was previously on offer to the complainant, just with a new scheme name and better communication with the complainant.

The Interim Guidance was subjected to a three month public consultation which received 64 responses, with 15 percent of those from individuals, 34 percent from organisations and 51 percent from criminal justice agencies.[43] The consultation asked five questions concerning the Interim Guidance and the responses to the consultation did not lead to any substantial alterations to the guidance. The changes made before the Final Guidance was published involved increased detail being provided to explain the scope of the guidance, more information on alternative options available to victims challenging decisions and the time limits for this procedure. Thus in substance nothing changed in the scheme. The interim guidance was replaced by the final guidance which came into force on 21 July 2014.[44] The final guidance explains that for cases submitted to the CPS on or after 10 December 2013, the definition of victim, for the purposes of the VRRS has changed under the revised Code as follows to: 'A person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct'.[45]

Arguably this widens the number of people who qualify as a victim for the purposes of the VRRS. Timescales for seeking a review are prescribed and the review

[42] CPS (n 38) para 28-29.

[43] CPS, 'Consultation on Victims' Right to Review Interim Guidance - Summary of Responses' (21 July 2014) <https://www.cps.gov.uk/consultations/vrr_consultation_summary_of_responses.html> accessed 9 August 2016.

[44] CPS, 'Victims' Right to Review Scheme Guidance' (July 2014) <http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html> accessed 29 February 2016.

[45] The previous definition was 'Any person who has made an allegation to the police, or had an allegation made on his or her behalf, that they have been directly subjected to criminal conduct under the National Crime Recording Standard (NCRS)'.

process is established commencing with local resolution by a prosecutor who has not been involved with the case previously and progressing as necessary to independent review by a reviewing prosecutor, independent of the original decision, approaching the case afresh. Certainly the scheme has fulfilled the dicta comments of Lord Justice Thomas in *KIllick* by instigating a clearer procedure and guidance with time limits for the way the right of a victim to seek a review is conducted. The question I shall next consider, however, is whether the new scheme actually changes the substance of the review and consequently the victim's position in the prosecutorial process?

iii. The more things change, the more they stay the same?

Having set out the haphazard arrangements for victims seeking a review of a decision taken by the CPS not to prosecute prior to the creation of the VRRS I then detailed how the VRRS came about following the critical dicta in *Killick* and the substance of the new scheme. In this part of the chapter I shall firstly consider how the VRRS has been lauded by its proponents as a significant advancement for victims caught up on the periphery of an adversarial criminal trial process which denies them the advantages of being a party to the proceedings. Secondly I shall contrast the praise with critiques of the scheme deemed to be too narrow in its reach and arguably paying nothing more than lip service to the victim's rights by failing to alter their position in the prosecutorial process.

Progression

When the DPP Keir Starmer launched the VRRS he emphasised how important the initiative was for victims of crime, exalting the scheme as 'one of the most significant victim initiatives ever launched by the CPS'.[46] Certainly the VRRS has been described as 'an important tool for victims', placing the victim more centrally in the decision to prosecute and enabling them to question decisions taken by the CPS more readily.[47] The scheme has garnered support from those who represent the interests of victims with Javed Khan, the chief executive of the independent charity Victim Support, welcoming the VRRS, indicating that it 'strengthens the rights of victims during the

[46] CPS, 'DPP enshrines victims' right to review of prosecution decisions' (Press release, 4 June 2013) <http://www.cps.gov.uk/news/latest_news/victims_right_to_review/> accessed 8 August 2016.
[47] Harris (n 33) 473.

criminal justice process.'[48] Victim Support is one of the non-governmental agencies which plays a role in a responsibilised system, especially in their mandate as the providers of the free telephone helpline service incorporated in the Victim Information Service.

Stagnation

On the other hand, the reach of the VRRS as to who qualifies to take advantage of it can be criticised, with many victims seemingly falling outside of the scheme due to the decisions impacting on them not being deemed as 'qualifying'. The VRRS itself sets out the three criteria that make a decision a qualifying one[49] and then lists nine cases that do not fall within its scope.[50] Two of these nine scenarios have raised particular concern amongst critics. The first concerns cases where the police exercise their independent discretion not to investigate necessitate the victim to seek a review from the individual police force, essentially giving the victim rights akin to the situation pre-*Killick.* It is difficult to provide a figure as to how many victims this might exclude from the scheme but Her Majesty's Inspectorate of Constabulary ("HMIC") have looked at the extent police recorded crime data can be trusted and concluded that there is an under-recording of 19 percent by the police with over 800,000 crimes reported to the police not being recorded each year.[51] In the sample of decisions researched by HMIC, of the 3246 crimes that were correctly recorded 20 percent were later removed or cancelled as recorded crimes for no good reason.[52] Even before the final guidance was published, concerns were being raised as to the number of victims whose decisions do not amount to qualifying decisions due to this potential lack of referral by the police to the CPS. On 7 January 2014, during the period when the CPS was considering the responses to the three month consultation which had closed on 5 September 2013, Andy McDonald, a Labour member of parliament, asked whether the Attorney-General Mr Dominic Grieve was concerned that the VRRS does not cover

[48] CPS (n 46).
[49] CPS (n 46).
[50] CPS (n 46).
[51] HMIC, *Crime Recording: Making the Victim Count* (HMIC 2014) para 1.16 <http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/crime-recording-making-the-victim-count.pdf accessed 8th August 2016> accessed 29 August 2016.
[52] HMIC (n 51) para 1.17.

cases which are dropped by the police before they reach the CPS.[53] He suggested that fewer cases are being referred to the CPS thus more cases are being dropped at an earlier stage, which seems to be supported by the subsequent HMIC figures. The Attorney-General responded by explaining that there may be other explanations for the fall both in prosecutions and cases being referred for decisions, one of which being that the noticeable fall in crime is leading to fewer cases coming to the police in the first place.[54] In his response he failed to address the actual concern about victims falling outside of the scheme.

The second of the nine scenarios causing particular concern relates to cases which are concluded by way of an out of court disposal.[55] The HMIC looked at 3,842 such disposals and found that 13 percent had been unsuitable for the sanction applied and should have received one which was more severe with the victims' wishes having been properly considered in only 60 percent of the cases which had a victim.[56] These two excluded scenarios alone represent a sizeable proportion of victims who do not benefit from the VRRS, with 13 percent of those missing out inappropriately due to the unsuitability of the decision taken. Julie Hilling, a Labour member of parliament, had earlier put to the Attorney-General that there have been 600 requests under the VRRS since its inception six months earlier and that 'given that level of demand' the Government ought to consider including decisions to caution instead of charge and decisions to alter substantially the original charge. [57] The Attorney-General confirmed that there had been 662 requests of which 18 were upheld (0.02 percent). He stated "I am utterly pragmatic about this; I wish to see victims' rights at the heart of the criminal justice system, but there are significant changes and we need first to see how well the system is operating and, in particular, how it will operate once the CPS responds in February to its consultation."[58] Nothing did change following the consultation in relation to the definition of qualifying decisions, with these criticisms as

[53] *Hansard*, HC Deb 7 January 2014, vol 573, col 166.
[54] *Hansard* (n 53).
[55] Defined in the Guidance as the 'term used to describe alternatives to prosecution such as cautions, conditional cautions and penalty notices for disorder, intended for dealing with low-level, often first-time offending, where prosecution would not be in the public interest' (n43).
[56] HMIC (n 51) para 1.20.
[57] *Hansard* (n 53).
[58] *Hansard*, (n 53).

to the effectiveness of the scheme failing to be addressed yet with the same rhetoric of increased rights and participation of victims being repeatedly emphasised.

Another critique of the effectiveness of the VRRS impacts not on those who do not qualify to use the scheme but upon those victims whose decisions do qualify for the VRRS since the courts have held that it will be very difficult to mount a successful challenge to the decision not to prosecute by way of judicial review proceedings. For example, in *L v DPP*[59] two appellants unsuccessfully sought judicial review of decisions not to prosecute that had already been reviewed by the CPS. Sir John Thomas noted that the new VRRS has consequences for subsequent judicial review proceedings, since where the review can be seen to be 'careful and thorough, proceedings for judicial review to challenge the decision will be the more difficult to advance'[60] unless the decision can be said to involve some unlawful policy, the DPP has failed to act in accordance with his own set policy, or the decision was perverse.[61] The VRRS has therefore effectively limited the availability of judicial review as a means of challenging an adverse decision for the victim. The available data on the CPS website supports this qualitative observation. Between 1 April 2014 and 31 March 2015, in 1,674 cases reviewed by the CPS 210 decisions have been overturned, which accounts for 0.17 percent of all qualifying decisions finalised in the period.[62] The remaining 99.83 percent of aggrieved victims would therefore have difficulty mounting a judicial review of the decision having had it reviewed through the VRRS.

It is my contention that to put into context these diametrically opposed sentiments of both support for and criticism of the VRRS, and to understand the underlying rationale of the scheme, it is necessary to consider the political justifications driving this victim led reform, which I shall do in the next part of this chapter. The VRRS embodies elements of the neoliberal consumer-led discourse by giving the victim, who could be identified as a consumer in the criminal justice system, a perceived voice within the fundamentally liberal trial institution, which traditionally fails to recognise the

[59] *L v DPP* [2013] EWHC 1752 (Admin), (2013) 177 J.P. 502.
[60] *L* (n 59) [9].
[61] Grounds for successful challenges to CPS decisions as set out in *R v DPP ex parte C* (1995) 1 Cr App R 136, 140.
[62] CPS, 'Victims' Right to Review data' (CPS July 2015) <http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/vrr_data/index.html> accessed 29 February 2016.

victim as anything other than another witness. In so doing, it sits squarely in the neoliberal paradigm by exhibiting the traits introduced earlier in chapter one, and to be considered more fully below, such as individualisation and responsibilisation of the victim. And yet by only encouraging more active victim participation, as opposed to bringing about any change as to how the decision whether to prosecute or not is taken, the reforms, despite being neoliberal in nature, fail to impact much on the liberal trial, as considered at the end of this chapter, and its basis for legitimacy, which is the main argument of this thesis, detailed in the final chapter.

I shall next consider how the VRRS embodies the neoliberal discourse before concluding this chapter by inquiring about the effect of the fundamentally neoliberal VRRS on the liberal nature of the trial.

3. A prototypical reform in the neoliberal tradition

Given its negligible impact on the fundamental contest at the heart of the criminal trial, the VRRS cannot be adequately accounted for by the typical liberal justifications for the trial such as the sanctioning of the coercive punishment of the individual who has been fairly convicted of committing an offence. Rather this reform appears to fit with the neoliberal imperatives of extending and disseminating market values to all aspects of life, by encouraging more active victim participation and exhibiting neoliberal traits such as both individualisation and responsibilisation of the victim, as introduced in chapter one. This section shall consider how the VRRS arguably arises from what have been termed "neoliberal" logics of governance by seemingly empowering and incentivising the individual, promoting collaboration rather than tension between the state and the individual.

Wendy Brown talks about neoliberal political rationality emerging as governmentality producing 'subjects, forms of citizenship and behaviour, and a new organisation of the social'[63] which involves 'extending and disseminating market values to all institutions and social action'.[64] In so doing individuals are constructed as self-entrepreneurs, carrying full responsibility for the self, strategizing for him or

[63] Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press 2005) 37.
[64] Brown (n 66) 40.

herself. By considering the evolutions in the criminal justice system by drawing on this analysis of governmentality, the traditional top-down command modality of using the police, the courts and the prisons is being gradually displaced by the newer bottom-up technique of governance by enlisting others and creating new forms of co-operation. Giving the victim a voice in criminal proceedings could be seen as a clear example of this rationality in action, enlisting the victim by empowering them in order to encourage their co-operation in the criminal justice system. The empowerment of having a right to seek a review of a prosecutorial decision terminating the possibility of proceedings— in a newly created, exclusive scheme where previously nothing existed— fits the neoliberal paradigm of the model citizen who strategises for himself and bears responsibility in matters affecting them.

For some time, a move towards responsibilisation from the state to public and private agents has been charted in the arena of crime prevention. David Garland considered the identification of those who can reduce criminal opportunities and the techniques of persuasion used to target the public as a whole, raising public consciousness, interpellating the citizen as a potential victim and creating a sense of duty.[65] One example features in the UK Government's Interdepartmental Circular on Crime Prevention which opened with the declaration that:

> A primary objective of the police has always been the prevention of crime. However, since some of the factors affecting crime lie outside the control or direct influence of the police, crime prevention cannot be left to them alone. Every individual citizen and all those agencies whose policies and practices can influence the extent of crime should make their contribution. Preventing crime is a task for the whole community.[66]

A clear present example of this in action is the anti-terrorism strategies most western liberal democracies have adopted where citizens are asked to be vigilant and report ‘suspicious’ people and things. The VRRS is extending the tenets of responsibilisation from crime prevention to the prosecution of crime. In giving victims the right to question some prosecutorial decisions, the VRRS is seemingly promoting cooperation almost akin to joint responsibility in as much as intervention by victims can lead to reconsideration of the decision as to how to proceed with a case.

[65] David Garland, *The Culture of Control* (OUP 2002) 125.
[66] Home Office, *Crime Prevention Circular 8/1984* (London: Home Office, 1984).

As well as fostering the responsibilisation of the victim, the VRRS promotes the individualisation of proceeding in favour of the victim. Michel Foucault described how in a disciplinary regime 'individualisation is 'descending': as power becomes more anonymous and more functional, those on whom it is exercised tend to be more strongly individualised'.[67] Having already considered the shift in focus from the powerful figureheads to the criminal in chapter one, the VRRS is illustrative of further movement, this time in favour of the victim of crime. In the aforementioned press release accompanying the launch of the VRRS, the then DPP Keir Starmer QC, emphasised how the new scheme was demonstrating how attitudes to victims, previously viewed as bystanders, have changed in that:

> it is now recognised by the criminal justice system that *the interests of justice and the rights of the victim can outweigh the suspect's right to certainty* … It recognises that victims are active participants in the criminal justice process, with both interests to protect and rights to enforce (own emphasis added).[68]

On a practical level, by making reference to the rights of the victim the DPP is seeking to remove any lasting negative connotations from the previous complaints procedure. Arguably though by making reference to active participation of victims in the criminal justice process, the DPP is championing the individualisation of proceedings in favour of victims by giving victims more of an individual voice in managing the course of the proceedings that affect them.

It is my contention that both the responsibilisation of the victim and the individualisation of the process feed into the prevailing issue, which is the overriding imperative of enhancing public confidence in the criminal justice system. This is demonstrated in the language used by those in power when discussing victims of crime as service users[69] and can be explicitly seen when the VRRS is being championed as inspiring confidence in the system. On 23 June 2015 in a debate concerning the work of the CPS the Solicitor General Robert Buckland referred to the VRRS as 'an extra safety valve that goes a long way, as I said in relation to our

[67] Michel Foucault, *Discipline and Punishment* (Alan Sheridan tr, Vintage Books 1995) 192-3.

[68] CPS (n 46).

[69] As an example, during a debate in the House of Commons concerning the work of the CPS, victims and witnesses were referred to as 'service users' see *Hansard*, HC Deb 23 June 2015, vol 597, col 223WH.

strategy, to enhance public confidence in the criminal justice system.'[70] Similarly Keir Starmer argues that the VRRS is justified in adjusting the principle of finality in relation to decisions taken not to prosecute since it increases the public confidence in the administration of justice.[71]

To conclude this chapter I shall explore to what extent the VRRS encroaches on the liberal trial.

4. Failing to put the 'neo' in the liberal trial

We have seen at length how in the context of the introduction of the VRRS, significant reforms have been made to the manner and degree of involvement of the victim in the criminal trial. Moreover, the arguably neoliberal character of these reforms seems to herald a new era for the trial, and one which—following Wendy Brown—we might consider as less than entirely concordant with the trial's liberal underpinnings and rationale. By extending market values to the non-market trial arena, the VRRS has empowered the victim to take some responsibility for decisions affecting their case and individualised the proceedings whilst seeking to enhance confidence in the criminal justice system. Yet closer examination reveals that these reforms, though significant, remain in some sense tangential to both the fundamental business of the trial and its political philosophical rationale. In this section we will see how this is so, since despite the neoliberal imperatives embodied in the VRRS, the liberal nature of the criminal trial remains intact, providing condemnation and punishment for those who break the criminal law in a fair process.

First, consider that the VRRS remains circumscribed to a limited ambit. For example, it in no way alters the fact that it is the CPS who decide whether or not to commence criminal proceedings and if so, who conducts those proceedings, or essentially how they are conducted, thus maintaining the dichotomous nature of the proceedings between the state and the defendant. Certainly the recognition in *Killick* of the victim's right to seek a review of any terminatory decision taken by the CPS prompted the DPP to take such requests for a review out of the general CPS

[70] *Hansard* (n 69) vol 597, col 226WH.
[71] Starmer (n 12) 534.

complaints procedure. In creating the VRRS, victims have a simpler, more accessible, transparent course to pursue yet ultimately the review is conducted by the CPS just as it was under the old complaints procedure. Indeed, by formalising the procedure it would seem that the VRRS has reduced the possibility of successfully seeking a judicial review of the terminatory decision. Jonathan Doak has advanced the view that in the liberal tradition 'the interests of certainty and public policy require that decision-making is always exercised by a non-partisan adjudicator',[72] and indeed, ultimately the decision-making remains with the CPS.

In 2005 Brown spoke of neoliberal governmentality undermining the autonomy of the law and the police amongst other institutions from the market and one another,[73] concluding that 'liberal democracy cannot be submitted to neoliberal political governmentality and survive.'[74] A decade later she reiterates the erosion of the liberal institution when she states that 'governance according to market metrics displaces classic liberal democratic concerns with justice and balancing diverse interests.'[75] Whilst in relation to her own examples these observations carry significant weight, in the particular context of the criminal trial her conclusions are not borne out by the impact of the VRRS. Despite modifying the input of victims at the decision-making stage for whether to commence proceedings, this scheme does not elevate the participating victim to the level of decision maker.

5. Conclusion

To conclude, in this chapter I have analysed one example from a body of recent victim-centric reforms, focusing on why the reform was instigated, by whom and to what end. In so doing, I have established that the VRRS has established a point of contact between the victim and the criminal justice system, to be considered further in chapter 4, through the initiation of a specific scheme, at a stage in the proceedings which was previously remote to them. The scheme bears all the hallmarks of neoliberal rationality, by engaging the victim, as a consumer of the system, in a user-friendly process, in

[72] Jonathan Doak, 'Victims' Rights in Criminal trials: Prospects for Participation' (2005) 22 (2) Brit.J.L.& Soc'y 294, 316.
[73] Brown (n 63) 45.
[74] Brown (n 63) 46.
[75] Wendy Brown, *Undoing the Demos* (Zone Books 2015) 43.

order to individualise the proceedings and responsibilise the victim. And yet, for all the accompanying rhetoric and increased engagement, very little seems to have changed in relation to direct involvement in the prosecutorial decision-making process for victims of crime and indeed for the liberal values underpinning the trial system.

In the next chapter I analyse another reform brought about during the same time period, which impacts the other end of the time-line in typical criminal cases, being the sentencing exercise. In so doing, it will be possible to contrast and compare the impact of these reforms on the criminal justice system in order to consider their broader impact on the legitimisation of the criminal trial in the final chapter of this thesis.

Chapter III. The Victim Personal Statement

In the preceding chapter I considered the motivations for reforming the victim's involvement at an early stage in the prosecutorial process, when the decision had been taken not to prosecute the suspect in the case involving the victim. In this chapter I shall be looking at a reform which privileges the victim at the other end of the process, when the defendant is sentenced, by providing the victim with a specific mechanism to express the impact of the offence to the sentencing tribunal. By focusing on these two particular neoliberal reforms, I shall be able to draw broader conclusions in the final chapter on the impact of the recent victim-centric reforms at large on the existing liberal tradition of legitimacy of the criminal trial.

Under the Victim Personal Statement ("VPS") scheme a victim in criminal proceedings, whilst providing a witness statement to the police detailing what they say happened to them, is entitled to make a VPS setting out the impact the offending behaviour has had on them, be it 'physically, emotionally, financially or in any other way.'[1] This revised VPS scheme is embedded in the Code of Practice for Victims of Crime ("the Code")[2] which details a number of the services and the minimum standards for these services that must be provided to victims of crime by various criminal justice organisations in England and Wales following an allegation of criminal conduct. Since its inception in 2006 the Code has had a number of revisions, with the most recent version coming into effect on 16 November 2015.[3] The VPS scheme was only inserted into the Code during its major overhaul in 2013; the same year as the Victim's Right to Review Scheme was introduced.

Originally the concept of a victim being given the chance to say how a crime had affected them was conceived in the Victim's Charter in 1996.[4] The Charter outlined the standards of service that victims of crime could expect when engaging with the criminal justice system, without providing any legal requirement to deliver such standards. The VPS scheme was formalised by way of Home Office Circular in 2001 following evaluated pilot projects that confirmed a demand for a formal scheme, rather

[1] Ministry of Justice, *Code of Practice for Victims of Crime* (HMSO, 2015) para 1.12.

[2] Statutory authority for the Secretary of State for Justice to issue a Code is found in the Domestic Violence, Crime and Victims Act 2004, s 32.

[3] Code of Practice (n 1).

[4] Home Office, *The Victim's Charter* (London: Home Office, 1996).

than relying upon the generalised standard contained in the Charter that victims of crime should be given the chance to say how the crime had affected them.[5] The stated intention of the VPS scheme contained in the Circular was to 'give victims of crime a more formal opportunity to say how they have been affected by the crime'[6] by giving victims the chance, although not a legal right, to specifically write about how the criminal conduct had affected them when providing a written witness statement. The subsequent inclusion of the VPS in the Code in 2013 not only provided a statutory footing for the scheme, thereby making the opportunity to write a VPS a legal requirement, but also increased its remit by enabling victims to read out their VPS in court during sentencing if they so wished, rather than the CPS prosecutor simply making reference to it on their behalf. It is worth noting that the timing of the VPS scheme achieving statutory recognition coincides with the creation of the VRRS in 2013, as earlier considered in chapter two. The processes leading to these two victim-centric measures are different but I contend that the fact they happened at a similar time helps to illustrate the changing nature of how the criminal trial process is being legitimised, which I shall consider in chapter four.

In looking at this reform I am seeking to understand how it changes the role of the victim in an exercise which traditionally focuses predominantly on the defendant. It is my contention that this scheme, in similarity to the VRRS, exhibits neoliberal paradigms in seeking to individualise the proceedings away from the defendant and towards the victim. Arguably the VPS goes further than the VRRS in fostering the responsibilisation of the victim by providing a mechanism to physically be heard in court at such a key stage in the proceedings. Additionally, in contrast to the VRRS, the VPS scheme displays personalisation traits by appealing to the victim, in language that is indicative of a consumer being afforded enhanced rights, to recount the impact of the crime at a time when an offender, who poses a risk to society, will potentially be removed from society by incapacitation, as elucidated further below in part III of this chapter. I intend to consider the neoliberal imperatives driving this reform and the extent of encroachment on the fundamentally liberal nature of criminal proceedings.

In looking at the reforms to the VPS firstly I shall consider what role the victim traditionally played in the sentencing of the defendant. Secondly I shall explore how

[5] Home Office, *Circular about Victim Personal Statements* (35/2001, 14 August 2001) para 7.
[6] Home Office Circular (n 5) para 2.

the VPS privileges the victim at this stage in the proceedings. Thirdly I shall consider what neoliberal conditions engendered this reform. Lastly I shall consider the impact that this scheme has on the liberal trial institution.

I start by considering to what extent the victim was involved in the sentencing exercise prior to the establishment of the VPS scheme.

1. No place for the victim when sentencing the defendant

The historic change from victims seeking private vengeance to the state initiating both criminal proceedings and punishment, following the centralisation of power, has been well documented[7] and as we saw in the introduction to this thesis, has resulted in victims playing only a secondary role in criminal proceedings. Whilst considering the politico-historical argument that the state took over criminal proceedings from the victim in order to bolster its power, Andrew Ashworth raises three points of principle, derived from normative propositions rather than any jurisprudential or statutory basis, which have a bearing on the nature and extent of victims' rights during sentencing.[8] First, the victim's legitimate interest is not in the form or quantum of the punishment of the offender but rather in compensation and/or reparation from the offender.[9] There are mechanisms in place for compensating a victim of crime, such as the requirement to consider making a compensation order upon conviction for any personal injury, loss or damage instead of, or in addition to, any other penalty[10] or the Criminal Injuries Compensation Scheme for victims of violent crime.[11] Aside from such reparation the victim's interest in the punishment of the offender is deemed by Ashworth to be no greater than any other citizen. Second, the principle of proportionality of sentencing for an offence, whereby there is an equivalence between the seriousness of the offence and the severity of the punishment, goes against victim involvement in sentencing decisions because the views of individual victims may vary.[12] Using the

[7] See for example Edna Erez, 'Victim Participation in Sentencing: Rhetoric and Reality' (1990) 18 JCJ 19.
[8] Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 Brit.J.Criminol 578.
[9] Ashworth (n8) 584.
[10] Powers of Criminal Courts (Sentencing) Act 2000, s130.
[11] Created under the Criminal Injuries Compensation Act 1995, s 1 and in force from 30 September 2012.
[12] Ashworth (n8) 586.

extremities as an exemplar, proportionality would be lost if sentences were augmented by the views of a victim seeking vengeance as opposed to being reduced when the victim has a highly forgiving nature. Last, the fundamental principle of a right to a fair hearing is challenged if a victim plays a part in determining the disposition of a criminal case since a victim cannot be deemed independent or impartial.[13] Consequently the sentencing exercise has focused on the defendant with no specific recourse to the victim. This focus on the defendant, and the points of principle raised by Ashworth, illustrate the liberal values embodied in sanctioning the coercive punishment of the fairly convicted individual by the state, with no particular role or special status for the victim, which are typically recognised as underpinning the criminal trial, as previously considered in chapter one.

Time and again the English courts have underlined that the views of the victim on the appropriate sentence for the defendant are irrelevant, as opposed to the consequences of the offence on them, which are to be taken into account by the court when determining the sentence.[14] In *Attorney General's Reference (No 72 of 1998); R v Hayes*[15], an unusual case in that the victim was a 95 year old lady who was the defendant's Great-Grandmother, Lord Justice Judge emphasised that the views of the victim, for or against the defendant, cannot be taken into account when sentencing, stating that:

> the sentence of the court cannot depend on the wishes of those most affected by the crime under consideration. Crimes perpetrated against vengeful victims would be sentenced differently and much more severely than identical crimes committed against merciful victims. What is more, there are many crimes with more than one victim, and different victims of the same crime might, and sometimes do, take very different views. In addition, many victims simply do not want to have the responsibility or be subject to the inevitable pressures that would be created on them if their views were reflected in the sentencing process. That, many of them feel, is a matter for the court, and they are right.[16]

[13] Ashworth (n8) 586.
[14] See for example Robert Banks, *Banks on Sentence* (11th ed, 2016) 121.13 which summarises several cases on this point such as *R v Perks* (2001) 1 Cr App R (S) 19, *R v Dzokamshure* [2008] EWCA Crim 2458 and *Att-Gen's Ref No 99 of 2009* [2009] EWCA Crim 181.
[15] *Attorney General's Reference (No 72 of 1998); R v Hayes* [1999] Lexis Citation 2096 (Transcript: Smith Bernal), (1999) Times, 5 April.
[16] *Attorney General's Reference (No 72 of 1998); R v Hayes* (n 15).

He concluded by stressing that this does not mean that the victim is to be ignored in the sentencing exercise but that overall responsibility rests with the Judge having taken into account the impact of the crime on the victim. Such judicial responsibility can be contrasted to the neoliberal concept of responsibilisation due to the independence of the judiciary and their separation from the government.

The first shift towards increased victim participation in sentencing in England and Wales emerged in the commitments made by the Government in the revised Victims' Charter[17] which simply communicated to victims that they could expect the chance to explain how the crime had affected them, that their interests would be taken into account and in some circumstances the police would offer them the opportunity to complete a VPS which would be taken into account by the police, Crown Prosecutor, magistrates and judges when making their decisions.[18] Hence VPSs were not restricted to, or indeed directed towards, sentencing decisions but they provided the victim with a mechanism to express the impact of the offence on them for use by multiple agencies concerned in the proceedings against the defendant. However, the direct therapeutic value to victims in writing a VPS has been considered and should not be underestimated.[19] That said, the Charter provided no clarification as to which circumstances would prompt the police to offer a victim the chance to provide a VPS. Further it has been noted that it was unclear whether VPSs were actually meant to inform sentencing decisions at all, with differing opinions being proffered by different criminal justice agencies.[20]

Following pilot projects, the Home Office implemented a formal VPS Scheme nationwide in 2001.[21] This did assist in clarifying whether VPSs were to be used during the sentencing of offenders but arguably led to further ambiguities. The circular stated that the VPS scheme 'is not primarily a sentencing tool … but nonetheless, if a (VPS)

[17] First published in 1990 and revised in 1996.
[18] Home Office Circular (n 4) para 3.
[19] See for example the discussion concerning the victims' psychological healing in Edna Erez, 'Victim Participation in Sentencing: Rhetoric and Reality' (1990) 18 JCJ 19, 23.
[20] Julian V. Roberts and Marie Manikis, 'Victim Personal Statements: A Review of Empirical Research' (University of Oxford 2011) 8 <https://www.justice.gov.uk/downloads/news/press-releases/victims-com/vps-research.pdf> accessed 6 February 2017. Victim Support were said to favour a scheme whereby the VPS was taken into account when deciding whether to prosecute and then bail the suspect, whilst others sought a wider usage of the statements in the sentencing exercise.
[21] Home Office Circular (n 5).

has been made it could prove helpful to magistrates and judges in cases that do involve court proceedings.'[22] Academic comment at the time queried what was meant by the somewhat contradictory phrases 'primarily' and 'it could prove helpful' since they were not further elucidated upon.[23] Adrian Turner opined the scheme as an unhelpful development especially if the victim's views affected sentencing decision-making as 'it will detract from the central notion of criminal law, which is that everyone is a potential victim of crime and, therefore, we all have a stake in the prosecution and punishment of offenders.'[24] Turner went on to list what effectively amount to the typical liberal values embodied in the English adversarial model of criminal trial of 'the public condemnation of crime where consistency, proportionality, detachment and fairness [are the key features]',[25] expressing his concerns that a victim-led system would encroach on these values. Certainly the Circular advised police officers not to promise victims more than the scheme could deliver, stating that should the victim want to express an opinion as to how an offender should be punished, they should be clearly told that judges and magistrates are unlikely to take this into account, although they will have regard to the effect the crime has had on the victim.[26] This seems to reinforce the more pastoral role of the measure, using the VPS as a means for identifying the needs of the victim in the process, rather than providing the victim with a more participatory role in the sentencing process. This is akin to the distinction, previously considered in chapter two, between service rights aimed at facilitating the victims' experience in the system, and procedural rights providing victims with a participatory role in the decision making process.

The Circular clarified the earlier ambiguity as to which victims might be offered the opportunity to complete a VPS by expressing for the first time that all victims should be informed of the process and, should they choose to provide a VPS, it should be taken when their witness statement is taken although it can be provided at any stage of the proceedings.[27] To this extent, in addition to the creation of leaflets for those

[22] Home Office Circular (n 5) para 4.
[23] Adrian Turner, 'The Views of the Victim' (2001) 165 JPN 673.
[24] Adrian Turner (n 23).
[25] Adrian Turner (n 23).
[26] Home Office Circular (n 5) para 12.
[27] Home Office Circular (n 5) para 11.

concerned, the formalisation of the VPS assisted in clarifying its role and usage in proceedings.

The judiciary responded to this development by setting out what a court should do when presented with a VPS.[28] Lord Woolf CJ confirmed that the scheme enabled courts to consider and take a VPS into account prior to sentencing provided the evidence was in a proper form and had been properly served on the defence.[29] It was made very clear, however, that the sentencing exercise remained focused on the Defendant, rather than the victim, since the court was instructed to maintain its attention on the defendant, having 'regard to the circumstances of the offence and the offender taking into account, so far as the court considers it appropriate, the consequences to the victim'.[30] As if to emphasise this point the directions continued by stating that any opinions expressed by the victim as to the appropriate sentence were not relevant and were to be disregarded.[31]

In 2006 the Victim's Charter was superseded by the Code of Practice for Victims of Crime, but the provisions on VPSs were not integrated into it. They remained a national standard rather than having a statutory basis, which could have been provided by the Code. Consequently courts were neither required to inquire about the existence of VPSs nor were they statutorily obliged to consider them, albeit judicial practice directions continued to instruct courts to consider VPSs.[32]

In the next part of this chapter I shall consider the revisions made to the VPS scheme, what triggered the changes and how these changes privilege the victim.

2. A new home for the VPS scheme and for the victim in the court hearing

The VPS was inserted into the revised Code in 2013, providing statutory footing to the previously national standard scheme formalised in 2001. In this part of the chapter I

[28] Practice Statement (Crime: Victim personal Statements) [2001] 1 WLR 2038.
[29] Practice Statement (n 28) C and D.
[30] Practice Statement (n 28) E.
[31] Practice Statement (n 28) F.
[32] Amendment no 22 to the Consolidated Criminal Practice Direction (Criminal Proceedings: Victim Personal Statements; Pleas of Guilty in the Crown Court; Forms) (14 May 2009) III.28.2a, c.

shall consider first the circumstances which triggered the changes to the existing VPS scheme and second the how these changes privilege the victim.

i. The trigger for change

In 2011, ten years after the Government formalised the VPS scheme in England and Wales, the Commissioner for Victims and Witnesses in England and Wales[33] requested a report summarising empirical research into the use of victim statements,[34] as part of her task of garnering and promoting the views of victims in the first 18 months in the newly created post.[35] The report's authors used data derived from victims interviewed for the national quarterly Witness and Victim Experience Surveys conducted between 2007/8 and 2009/10.[36] Their findings revealed that during that period only 42 percent of the victims interviewed recalled being offered the opportunity to make a VPS; of those 55 percent stated that they completed a VPS; and of those only 39 percent felt that the statement had been fully taken into account.[37] The report noted that 'the desire to communicate a message to the court and the offender' was the most frequent reason provided for completing a VPS with some victims wishing 'to influence the severity of the sentence imposed.'[38]

The report also concluded that those victims who did submit a statement appeared more satisfied with the sentencing process than those who chose not to participate.[39] The question of victim satisfaction was considered because one of the reasons for creating VPSs was to promote victim welfare. To evaluate the benefit of VPSs to victims the report authors, Roberts and Manikis, considered existing research in order '(i) to compare satisfaction levels of victims who submit and others who do not; and (ii) to ask the former whether, if they were victimised again, they would submit

[33] A post created under the Domestic Violence, Crime and Victims Act 2004, leading to the first appointment to the role in March 2010.
[34] Roberts and Manikis (n 20).
[35] Commissioner for Victims and Witnesses, 'Annual Report 2010 – 2011' (31 October 2011) 7 <https://www.justice.gov.uk/downloads/news/press-releases/victims-com/cvw-annual-report-2010-11.pdf> accessed 6 February 2017.
[36] Roberts and Manikis (n 20) 15.
[37] Roberts and Manikis (n 20) 3.
[38] Roberts and Manikis (n 20) 3.
[39] Roberts and Manikis (n 20) 3.

another statement.'[40] On the first point concerning satisfaction levels of participants in contrast to non-participants, two studies were considered. In the first study, victim satisfaction equated to whether the victim felt that providing the VPS had been 'the right thing to do' (86 percent) and whether it had made them feel better (almost two thirds).[41] In the second study, victim satisfaction was measured by whether victims were pleased that they had participated (75 percent).[42] On the second point concerning whether victims would submit a VPS again, Roberts and Manikis suggest that affirmative responses indicate a clear measure of victim satisfaction and the consistent outcome of several research projects is that most victims state that they would submit a statement in the future if they were victimised again.[43] The fact that victims were surveyed and victim satisfaction was considered as a criterion in itself is interesting since the use of market research fits squarely into the neoliberal paradigm of governmentality, with 'statistical knowledge fuel[ing] bio-political technologies.'[44]

At around the same time in 2012 the Government were consulting on proposed reforms to the criminal justice system to provide proper protection and support for victims, with the Secretary of State for Justice noting in his foreword to the public consultation that victims too often feel themselves to be an afterthought and 'are sometimes left feeling like mere accessories to the system.'[45] This appears to have been identified as a problem for varying reasons including the lack of information being provided to victims about the progress of the case and yet this surely conflicts with the anti-individualistic rationale for sentencing as earlier considered in this chapter and the work of Turner. As a result of the 350 responses to the consultation, the Government noted that the Code needed updating and launched another consultation in 2013 specifically focusing on the Code.[46] In her foreword to the consultation the Minister for Victims and the Courts detailed how the Government planned to include the VPS

[40] Roberts and Manikis (n 20) 25.
[41] Data taken from Leverick, F., Chalmers, J. and Duff, P. (2007a) An Evaluation of the Pilot Victim Statement Schemes in Scotland. Edinburgh: Scottish Executive Social Research, as considered in Roberts and Manikis (n 20) 25.
[42] Data taken from Hoyle, C., Cape, E., Morgan, R. and Sanders, A. (1998) Evaluation of the "One Stop Shop" and victim statement pilot projects. London: Home Office, Research Development and Statistics Directorate as considered in Roberts and Manikis (n 20) 25.
[43] Roberts and Manikis (n 20) 26.
[44] David Garland, ''Governmentality' and the problem of crime: Foucault, criminology, sociology' (1997) 1(2) Theo.Crim. 173, 180.
[45] Ministry of Justice, *Getting it right for victims and witnesses* (CP3/2012, 2012) 3.
[46] Ministry of Justice, *Improving the Code of Practice for Victims of Crime* (CP8/2013, 2013).

scheme in their revised Code for the first time, indicating that it was hoped that the proposals went some way to redressing the imbalance caused by the Criminal Justice System having 'focused heavily on the punishment of offenders, whilst giving too little heed to the needs of victims' for too long.[47]

Following this consultation, which received 197 formal written responses[48], and due in part by the need to transpose the EU Victims' Directive[49], the Code was revised in 2013 to give victims clearer entitlements and to better tailor service to individual need, including the VPS in the Code as proposed. In his foreword to the Government's response Damian Green MP, Minister for Victims stated 'For too long victims have felt they are treated as an afterthought in the criminal justice system. This must change. … I am absolutely determined that victims are given back their voice and the Victim's Code is crucial to this.'[50] Further updates were made to the Code to complete the formal transition of the Victims' Directive in 2015 with the updated version coming into effect on 16 November 2015.

Next I shall consider how the revised VPS scheme privileges the victim during the sentencing exercise.

ii. The impact of the reform

The VPS scheme was included in the Code when it was revised in 2013 and then updated in 2015, placing the scheme on a statutory footing for the first time.[51] When introducing the revised Code in Parliament, the Minister for Policing, Criminal Justice and Victims Damian Green stated that key improvements to the new Victims' Code included 'strengthening the voice of the victim'[52] by including the VPS in a statutory code for the first time and entitling victims to read their statement aloud in court themselves during the sentencing hearing if they so wished. The rhetoric of enhancing

[47] Ministry of Justice (n 46) 4.

[48] Ministry of Justice, *Improving the Code of Practice for Victims of Crime Response to Consultation* (CP8(R) 2013).

[49] Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L 315/57.

[50] Ministry of Justice (n 48) 4.

[51] Code of Practice (n 1). Chapter 2 includes provision of the VPS scheme in relation to adult victims and Chapter 3 includes details of the scheme for children and young persons.

[52] *Hansard*, HC Written statements 29 October 2013, vol 569, col 45WS.

the role of the victim is further considered below when looking at the neoliberal imperatives embodied in the scheme as time and again, as shall be seen, it is the prominence of the victim's voice that headlines any consideration of this reform.

When considering the substance of the inclusion of the VPS scheme in the Code, there are certainly aspects which appear to privilege the victim beyond what was previously contained in the original VPS scheme introduced in 2001. Yet again, the victim's voice is emphasised with the first paragraph dealing with VPSs stating that 'the VPS gives you a voice in the criminal justice process'[53] although this is clarified with a warning that personal opinions on any eventual punishment of the offender should not be expressed.[54] This ongoing notion of giving a voice to the victim is important since it implies that prior to the reforms they had no or limited say in the proceedings and consequently after the reforms they do have a more pivotal role to play. The concept of having a voice is a powerful one, potentially evoking the ideal of influence over the proceedings. Yet this focus on the victim seems to be in tension with the rehabilitative focus on the defendant, whereby they are encouraged to understand the impact of their actions as detailed in a VPS. The Code continues to detail the scheme talking directly to the victim in terms of their various entitlements firstly to make a VPS, secondly to say whether or not they would like to have it read aloud in court if the suspect is found guilty and thirdly to say whether they would like to read it aloud themselves or to have it read aloud by someone else such as a family member or the CPS advocate.[55] It is then emphasised that it is for the court to decide whether and what sections of the VPS should be read aloud and by whom, taking into account the interests and wishes of the victim and that the court will pass sentence having regard to all the circumstances of the offence and of the offender, taking into account as appropriate the impact of the offence on the victim as set out in the VPS.[56] The most obvious new privilege to the victim is the express provision of the ability of a victim to read out their VPS in court at the sentencing hearing should they so wish.

[53] Code of Practice (n 1) para 1.12.
[54] Code of Practice (n 1) para 1.12.
[55] Code of Practice (n 1) para 1.13 and repeated at 1.20.
[56] Code of Practice (n 1) para 1.21 and 1.22.

Critics, however, have suggested that the VPS scheme embodied in the revised Code changes very little for the victim.[57] Indeed, the courts had already indicated that there was sufficient flexibility for a judge to permit a victim to read out their VPS prior to the revisions in the Code.[58] Lyndon Harris intimates that the changes made were minimal, suggesting that VPSs will be read out by victims with increased frequency, but not by much.[59] Similarly the then Shadow Justice Secretary Sadiq Khan said:

> The Government's Victims' Code is simply an unenforceable piece of paper that will be shoved in a drawer and ignored … the Government's Victims' Code will do nothing to ensure that the Impact Statement is offered to the victim in the first place, and is made available in the court on the day of the hearing. With their toothless code, there'll be no one taking charge of the Impact Statement, meaning it continues to be sidelined.[60]

What is interesting to note about the criticisms of the reform is the common assumption that the VPS scheme should have changed things for the victim and that consequently if nothing changes the reform becomes somehow ineffectual. This stance seems to come from a desire to alter the position of the victim in the proceedings, increasing their powers to affect the outcome of the proceedings. This is not surprising given the language used to herald the scheme as giving victims a voice, as earlier considered. And yet by looking at the reform not from the viewpoint of its practical impact on the proceedings, but in terms of its effect on legitimising the trial proceedings through providing an additional point of contact with the victim, a significant change can be noted and I consider this in chapter four.

In the next part of this chapter I shall consider what neoliberal conditions engendered the revisions to the VPS scheme before I conclude the chapter by considering the impact this scheme has had on the liberal trial institution.

---

[57] Lyndon Harris, 'The Victims' Code -- A Lack of Substance or a Victory for Victims?' (2013) 177 JPN 745.

[58] *R. v. Perkins and Others* [2013] EWCA Crim 323, [2013] 2 Cr. App. R. (S.) 72.

[59] Harris (n 57).

[60] BBC News, 'Victims of crime get chance to speak in court under new code' (BBC News, 29 October 2013) <http://www.bbc.co.uk/news/uk-24710184> accessed 20 October 2015.

3. A fanfare of neoliberal rhetoric

In this penultimate part of the chapter I consider how the VPS scheme, embodied in the Code, exhibits typical neoliberal modes of governance such as individualisation of processes, the responsibilisation of non-governmental actors and the personalisation of procedures. I also consider how by increasing the involvement of the victim in the sentencing of the offender, the neoliberal zero-tolerance of criminality is reinforced.

Starting with the concept of individualisation, in their response to the consultation on improving the Code the Ministry of Justice certainly alluded to individualisation in favour of the victim stating 'the revision of the Victims' Code forms a key part of the Government's strategy to reorient the criminal justice system in favour of the victim to help make the system more responsive and attuned to their needs.'[61] In its introduction the Code states that it 'forms a key part of the wider Government strategy to transform the criminal justice system by putting victims first, making the system more responsive and easier to navigate.'[62] By enabling each individual victim to describe specifically for the court how the offending behaviour has impacted on their lives and even enabling the victim to read out their VPS in court at sentencing should they so wish, the impact of crime is individualised, removing the traditional focus away from the motivations of the offender directly onto how this offence has affected this particular victim. This is in direct contrast to the anti-individualistic values, articulated by Turner and considered above, embodied in the liberal adversarial criminal trial in which the proceedings are brought by the state, not the victim, since everyone has a stake in those proceedings as a potential victim of crime.

This turn towards the processes of individualisation increasingly centring upon the victim bears out what David Garland noted over a decade earlier that 'Individual victims are to be kept informed, to be offered the support that they need, to be consulted prior to decision-making, to be involved in the judicial process from complaint through to conviction and beyond'.[63] Whilst this shift towards the victim has prompted those who represent the defence to respond by voicing their apprehensions, for example 'the concern for defence lawyers and those specialising in criminal

[61] Ministry of Justice, *Improving the Code of Practice for Victims of Crime Response to Consultation* (CP8(R) 2013) 7.
[62] Code of Practice (n 1) 1.
[63] David Garland, *The Culture of Control* (2002 OUP) 179.

appeals is that we are living through another "rebalancing" of our criminal justice system in favour of the rights of victims and moving away from the rights and protections afforded to defendants.'[64]

Turning to the concept of responsibilisation, Foucault describes his concept of governmentality as being:

> at once internal and external to the state, since it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on; thus the state can only be understood in its survival and its limits on the basis of the general tactics of governmentality.[65]

This concept was developed by Garland when he considered the 'predicament of crime control in late modern society.'[66] He set out a number of new modes of governing crime, including what he characterised as 'a responsibilisation strategy.'[67] This strategy involves central government acting upon crime indirectly by galvanizing non-state agencies, organisations and private individuals into action rather than focusing on direct action by state agencies such as the police or courts. I contend that the features he describes can now be extended beyond crime control to the trial and punishment of offenders. By way of example the Code, which now houses the VPS scheme, lists 28 organisations required to provide services to victims not including other organisations, such as the voluntary sector, who may provide victim support services but who are not covered by the Code. The sheer number of organisations listed provides one example of the neoliberal paradigm of responsibilisation in action. The VPS scheme, contained in this Code, is yet another example of responsibilisation by spurring the victims of crime, as private individuals, into action at a stage in the proceedings which is usually confined to state actors such as the police and the prosecutors.

---

[64] Glyn Maddocks, 'Victims' right to review – could it affect the criminal justice system?' (*Halsbury's Law Exchange,* 28 August 2014) < http://www.halsburyslawexchange.co.uk/victims-right-to-review-could-it-affect-the-criminal-justice-system/> accessed 29 February 2016.

[65] Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon, and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991) 103.

[66] David Garland, 'The Limits of the Sovereign State' (1996) Brit.J.Criminol. 445, 446.

[67] David Garland (n 66) 452.

Garland considered the use of publicity campaigns, aimed at raising 'consciousness, creat[ing] a sense of duty, and thus chang[ing] practices'[68] in order to bring about action on the part of these non-governmental agencies or individuals. Such campaigns are used to reinforce the message that the state alone can no longer be solely responsible for preventing and controlling crime and that the individual must play their part in this regard. By codifying and then heralding the rights of victims in publicity which lets victims know that they are no longer an 'afterthought'[69] but have an active role to play in the trial and sentencing process, the Code could be seen as an example of such a publicity opportunity, promoting the voice of the victim, a participant who is of course generally a necessity for effective prosecutions.

Acting in a similar vein, the neoliberal technique of personalisation of proceedings can also be seen at play here. Personalisation consists of the presentation of concepts as an appeal to citizenship whilst in fact importing consumerist ideals. It has been noted that the language used in the Code which contains the VPS scheme, by talking about "enhanced service" and "entitlements", is indicative of treating victims as customers[70] whilst creating that sense of duty for the victim to engage in the criminal justice process.

Another typical neoliberal trait encompasses the need to reduce the risks posed to self-entrepreneurs by criminals. In chapter four I shall consider how Paul Passavant talked about governing through a zero-tolerance mentality whereby certain risks, no matter how small, are intolerable.[71] One such risk is presented by the criminal, a monster who needs to be incapacitated. Passavant made reference to Pat O'Malley who described neoliberalism as entailing two sides – a "soft side" dedicated to consumerism and a "hard side" dedicated to criminological overkill.[72] It is this hard side that I suggest can be seen in action in the VPS scheme, at the expense of defendant rehabilitation, by appealing to the consumerist victim to recount their experiences and the impact of the crime on them in court at the sentencing hearing in order to secure the appropriate punishment of the offender and thus remove one such risk from

[68] David Garland (n 66) 452.
[69] Lyndon Harris (n 57).
[70] See for example Lyndon Harris (n 57).
[71] Paul A. Passavant, 'The Strong Neo-liberal State: Crime, Consumption, Governance' (2005) 8(3) Theory & Event 1, 7.
[72] Passavant (n 71) 3.

society. That is not to say that this is a cynical 'use' of the victim or an illusory practice. The therapeutic benefit to the victim in writing a VPS is in no way disparaged or indeed incompatible with the argument of this thesis (and this particular perspective).

Garland noted an increasingly dualistic and polarising criminology in development, effectively catering for the emerging differing modes of crime governance. He talked about the *criminology of the self,* characterising offenders as rational consumers, invoked to 'routinise crime, to allay disproportionate fears and to promote preventive action.'[73] He contrasted this to the *criminology of the other*, characterising offenders as the threatening outcast, invoked to 'demonize the criminal, to excite popular fears and hostilities, and to promote support for state punishment.'[74] It is this criminological rhetoric of the other that sits squarely in the neoliberal paradigm of zero-tolerance and incapacitation which is embodied in the VPS scheme by seemingly bringing the victim physically into the sentencing exercise.

That said, concerns have been raised as to whether the VPS scheme in fact alters the existing system at all. Glyn Maddocks, a founding Trustee and Board Chair of the Centre for Criminal Appeals stated that 'as the scheme settles down, a concern I have is that this is tokenism. It is about paying lip service to the concerns of victims, and, at worst, cruelly raising their expectations. I'm mindful of victim impact statements and the recent furore over the judge who apparently stated such statements made by bereaved families made "no difference".'[75] This notion of ineffectiveness reverts to the question considered earlier in this chapter of what purpose is being served by this reform. As I contend in chapter four, this is a wider question than simply whether the VPS impacts the sentencing exercise but rather the impact that the existence of the scheme has on the legitimacy of the criminal trial. With this in mind I shall conclude this chapter by considering the impact the VPS has had on the liberal trial institution.

4. Much ado about nothing?

This section will consider the impact the revised VPS scheme has on the latter part of the trial institution involving the sentencing of the defendant. To address the question

[73] Garland (n 66) 461.
[74] Garland (n 66) 461.
[75] Maddocks (n 64).

of whether victims are now being taken into account as a result of changes brought about by the revised VPS scheme there are effectively two issues to consider: firstly, whether the reform to the VPS scheme has affected sentencing in terms of changing any of the fundamental tenets of the sentencing exercise and secondly, whether victims feel more listened to in the process, which in turn leads onto the notions to be discussed in the final chapter concerning the legitimacy of the trial. I conclude that the reform to the VPS scheme has limited impact on the sentencing exercise in court but a far greater impact in terms of the basis for legitimacy of the trial process.

The two key victim entitlements contained in the Code concerning VPSs are firstly the ability to make one, detailing how the crime has affected the victim, and secondly the possibility of the victim reading the VPS aloud or having it read aloud on their behalf, during the sentencing exercise. On the one hand, in relation to impacting on the sentencing exercise, it has been pointed out that neither of these entitlements are new initiatives.[76] The ability to make a VPS, as earlier considered in this chapter, first emerged over twenty years ago in the Victims' Charter which was then formalised in VPS Scheme in 2001. The ability for a victim to read out their VPS in court, although not part of the formalised scheme, was a possibility even before it was included in the Code. In *R v Perkins and Others* the Lord Chief Justice said that 'the application of these principles [as espoused in *Perkins*] means that it will be very rare for the victim to read out his or her statement, but the process is sufficiently flexible for the Judge to permit it in an appropriate case.'[77] Yet on the other hand, when considering whether the substance of the Code in relation to VPSs is simply a restatement of the status quo or purely cosmetic, despite it being billed as a sea change in relation to the involvement of the victim in prosecutions, Lyndon Harris postulates that, although devoid of new initiatives the provisions are 'not cosmetic to victims. The value of being made to feel included is a victory in itself.'[78] The value to the victims is what I shall be considering in chapter four when looking at the interaction of these reforms with the legitimacy of the trial. For now, in relation to sentencing impact, the salient point is the lack of change brought about by the VPS as embedded in the Code compared to the situation immediately preceding it.

[76] For example see Lyndon Harris (n 57).
[77] *R v Perkins and Others* (n 58) [11].
[78] Lyndon Harris (n 57).

In November 2015 the Victims' Commissioner published a report following a review of the VPS scheme which focused on 'whether the VPS system achieves its aim of giving victims a voice and being 'taken into account'.'[79] The use of market research, again, is in itself a typically neoliberal technique of governance according to market metrics by increasing engagement with users through the use of surveys. Having conducted 44 direct interviews with victims and considered feedback from 241 magistrates and 328 victims the report's overall finding was that most cases at court and at parole are finalised without the inclusion of a VPS.[80] Its more specific findings concluded that whilst 'most victims value the entitlement to make a VPS, … victims are generally not clear about how their VPS makes a difference in their case [although] Judges, magistrates and Parole Board members say the VPS is included in their assessment of evidence and informs their decision-making.'[81] A further report conclusion is that there is 'no overall ownership of the VPS process to ensure that it works from beginning to end.'[82]

The report makes reference to the Crime Survey for England and Wales for the year ending March 2015 which indicated that only:

> 13 percent of victims recall being given the opportunity to make a VPS. 47 percent of victims who were given the opportunity to make a VPS actually went ahead and made one. 37 percent wanted their VPS to be read out loud and 65 percent of victims who made a VPS felt that it was taken into account by the criminal justice system.[83]

Given the positive rhetoric surrounding the inclusion of the VPS scheme in the revised Code, including the provision of a statutory footing, an increase in availability and usage of the scheme might be anticipated. Yet when comparing these statistics with the findings of Roberts and Manikis's previously referenced Report,[84] which analysed data from the national quarterly Witness and Victim Experience Surveys conducted between 2007/8 and 2009/10 (three years before the overhaul of the scheme), there is a massive drop in those who remember being offered the opportunity to make a

[79] Victims' Commissioner, *The Silenced Victim: A Review of the Victim Personal Statement* (Crown Copyright 2015) 5.
[80] Victims' Commissioner (n 79) 7.
[81] Victims' Commissioner (n 79) 7.
[82] Victims' Commissioner (n 79) 7.
[83] Office for National Statistics (2015) Statistical bulletin: Crime in England and Wales, Year Ending March 2015 cited in Victims' Commissioner (n 79) 51.
[84] Roberts and Manikis (n 20).

VPS (from 42 percent pre-inclusion in the Code to 13 percent post-inclusion) with a smaller fall in uptake for completing a VPS (55 percent pre-inclusion compared to 47 percent post-inclusion). Interestingly, however, there is a considerable increase in the number of victims who felt that their VPS was taken into account (from 39 percent pre-inclusion to 65 percent post-inclusion). Even taking into account the usual precautions when considering statistical data, it is my contention that the suggested fall in VPSs being offered to victims of crime despite the public drive and measures taken to give victim's a voice in proceedings is indicative of a lack of impact of the scheme on the fundamental tenets of the sentencing exercise. Yet the large increase in feelings of participation and worth by those victims who made a statement indicates a value to the scheme beyond its practical input which I contend can be accounted for when looking at how the criminal justice system is being legitimised which I consider in the following chapter.

5. Conclusion

In conclusion, the VPS scheme privileges the victim of crime by enabling them to provide a statement specifically detailing how the criminal conduct on trial has affected them. This statement can be heard at the sentencing of a defendant, and indeed the victim has the right to read out the statement themselves in court should they wish to do so. The sentencing exercise in recent times has focused on the defendant, exhibiting the typical liberal values of the sanctioning of punishment by the state in a fair process and yet the VPS scheme embodies neoliberal paradigms such as individualisation towards the victim, responsibilisation of the victim and personalisation through consumerist ideals. Despite this increased emphasis towards the victim, the mechanics of the sentencing exercise seem little affected by the scheme. What is affected is the victim's perception of being involved in the process and their subsequent satisfaction. It is my contention that rather than necessarily impacting the criminal process, both the VPS and the VRRS have changed how the process is legitimised, based on tenets of procedural justice from the victim's perspective and the dualistic nature of the evolving dialogue between the victim as audience and the state as power holders. I consider the concept of legitimacy in chapter four, starting with neoliberal paradigms of legitimacy involving the prominence of the market and

economic growth as well as governance through crime, which fail to wholly account for the recent victim-centric reforms. I move on to the more liberal conception of legitimacy involving the expansion or shift in the original sense of the audience or interested party under procedural conceptions which illustrates the dialogic and relational nature of these reforms and the legitimacy of the criminal trial.

Chapter IV. Legitimacy of the trial institution

In chapters two and three of this thesis I have contended that, despite the view of scholars like Brown, who suggest that neoliberal tendencies undermine liberal public institutions, victim-centric reforms to the criminal trial in the UK have limited impact on the liberal conception of the criminal trial. I have argued that after these victim-centric reforms the trial is still fundamentally a liberal institution, providing condemnation and punishment for those who break the criminal law in a process which is fair to both the prosecution and the defence.[1] In this chapter I conclude my study of these reforms by suggesting that what is changing is how the process is legitimised. It is my contention that by bringing the victim into the process at key decision-making points that were previously remote to them, such as the decision whether to prosecute and the decision on how to punish the offender, the victim-centric reforms under analysis enhance the victim's perception of procedural fairness to themselves in the trial process, and provide an opportunity for the victim to engage in a dialogue with those in authority. This in effect expands the audience to increased aspects of the trial process, which in turn strengthens the legitimacy of the trial institution, by more overtly recognising the role of the victim in the criminal justice system, even if that role changes little of substance on a procedural level.

I shall start this chapter by considering two neoliberal paradigms of legitimacy, in order to identify their deficiency in conceptualising the criminal trial. First, Wendy Brown's well-known approach in *Undoing the Demos*, which points to the market — or balance sheet — centric nature of neoliberal legitimacy. Brown's framing, I suggest, cannot adequately handle the particularities of the legitimation of the criminal trial which has a more complicated set of imperatives. Second, and similarly, Paul A. Passavant's argument that a neoliberal state governs through a criminal-consumer double, resulting in justice becoming the hard limit of a softer, consumer-driven society, also fails to sufficiently account for the victim-centric reforms. I shall instead consider how liberal conceptions of the legitimacy of the trial have been formulated,

[1] This is exemplified by the overriding objective in the current Criminal Procedure Rules 2015, set out in Rule 1.1, which states that criminal cases are to be dealt with justly. This is then explained more fully as including the duty to deal with the prosecution and the defence fairly; recognise the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights and respect the interests of witnesses, victims and jurors and keeping them informed of the progress of the case.

making particular reference to the work of Tom Tyler and then Anthony Bottoms & Justice Tankebe, with a focus on the concept of procedural justice. I shall conclude by considering that, despite the neoliberal imperatives embodied in the victim-centric reforms, analyses of legitimation in terms of neoliberalism, although playing a textual role, do little to augment our understanding of the criminal trial. It is in fact liberal accounts of the conceptions of trial legitimacy that remain more explanatory in understanding trial legitimation through an expansion or shift in the original sense of the audience or interested party under procedural conceptions.

1. Neoliberal legitimation

In this part of the chapter I consider Brown's stance on the concept of neoliberalism and legitimacy, as a prominent critic of neoliberalism. I then consider Passavant's work on the neoliberal state's technique of legitimisation by governing through a criminal-consumer double. Brown's focus for the concept of legitimacy rests upon the legitimisation of the state in general terms, with no specific consideration of the criminal trial. Consequently her arguments are not altogether helpful in understanding the legitimacy of the criminal trial in light of the victim-centric reforms, but her paradigm concerning the market-centricity of the legitimacy of the state linked to economic growth and entrepreneurialism is useful so I shall firstly consider how she frames the concepts of legitimacy and legitimation. Secondly, I shall consider why she does not tackle the legitimacy of the criminal trial and thirdly, I shall draw upon some useful aspects of her paradigm. I then turn to Passavant whose work on the positioning of criminal law as the hard limit to a softening state is more relatable to the criminal trial than Brown's analysis, and so consequently more helpful when considering the legitimacy of the criminal trial. Firstly, I shall consider Passavant's framing of state legitimacy as being strengthened by the empowerment of non-state actors. Secondly I shall consider his paradigm of governance through a criminal-consumer double encompassing a zero-tolerance of crime and a logic of consumerism. Although more relatable to the criminal trial, Passavant's neoliberal framing of legitimacy, in similarity to Brown, cannot fully handle the criminal trial and the impact of the victim-centric reforms on its legitimacy. Consequently, having highlighted the limited usefulness of

the concepts of neoliberal legitimacy, I will move on to consider liberal framings of legitimacy.

i. Brown – abatement of liberal concerns of justice

According to Brown 'economic growth has become both the end and legitimation of government'[2] resulting in fundamentally identical conduct of both government and firms, with social responsibility attracting consumers and investors. Her critique is that neoliberalism's construction of persons and states as enterprises is eroding democratic institutions. For Brown, neoliberal reason dictates that a state would lose its legitimacy should it fail to pursue the neoliberal ideology of conducting itself in ways that maximise its capital value through entrepreneurialism and investment.[3] As a consequence of this neoliberal reason, political ends are replaced by economic ones and a range of concerns, including justice, either recede, become subsumed or are radically transformed as they become economised in a project of capital enhancement.[4] Brown further considers the ramifications for justice in the context of the neoliberal vanquishing of *homo politicus* by the ascendancy of *homo oeconomicus*, with human beings being figured as human capital, in that 'liberal democratic justice concerns recede … [as the] … legitimacy and task of the state becomes bound exclusively to economic growth'[5] with the pursuit of justice limited to the advancement of economic purposes.

Yet Brown remains vague as to what she means by the state and vaguer still in her consideration of the concept of justice, with no specific mention of crime or the criminal trial. Brown consistently talks of the state as a whole, or its institutions in general, rather than focusing on specific institutions. For example, when considering the responsibilisation of the state, conforming to the veridiction of the market, she endorses Foucault's thoughts that 'economic metrics govern the institutions and practices of the state, and the state itself is legitimised by economic growth'.[6] Such a

[2] Wendy Brown, *Undoing the Demos* (Zone Books 2015) 26.
[3] Wendy Brown (n 2) 22.
[4] Wendy Brown (n 2) 22.
[5] Wendy Brown (n 2) 40.
[6] Wendy Brown (n 2) 68, making reference to Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Graham Burchell tr, Palgrave Macmillan 2008) 47.

high level of generality in relation to the state and its institutions does little to account for the particularities of the criminal trial.

In relation to matters of justice, Brown makes passing reference to the demise of juridical sovereignty. She considers that the state has been remodelled in the image of the firm, following the citizen-subject's convertion from *homo politicus* to an economic being, *homo oeconomicus,* and neoliberalism economising all spheres of life. This, she suggests, results in the consequence that the state 'gain[s] or lose[s] legitimacy according to the market's vicissitudes'.[7] Foucault characterised *homo oeconomicus* as a subject of interest and identified the problem of whether the subject of interest is capable of being connected to the juridical will.[8] Foucault concluded that 'interest constitutes something irreducible in relation to the juridical will … [and] … the subject of right and the subject of interest are not governed by the same logic.'[9] The challenge for the criminal trial, therefore, which relies on the common concern with justice, is how to garner the participation and support of the subject of interest who is liberated from all concerns with the social or the collective. As Foucault averred 'the market and the [social] contract function in exactly opposite ways and we have in fact two heterogeneous structures.'[10] Whilst not specifically talking about the criminal trial, Brown's framing of the legitimacy of the state and individual actors in purely economic terms cannot handle the juridical imperatives which continue to underlie criminal proceedings.

Brown's description of the rise of state legitimacy based on economic growth and entrepreneurial attributes can be of some use, however, when considering the challenges faced by the criminal justice system in engaging victims and witnesses whose own interests are deemed to focus on self-entrepreneurialism. As Trent H. Hamann explained, *homo oeconomicus* is 'fully responsible for navigating the social realm using rational choice and cost-benefit calculation to the express exclusion of all other values and interests. Those who fail to thrive under such social conditions have no one and nothing to blame but themselves.'[11] If citizens are expected to act as self-

[7] Wendy Brown (n 2) 108.
[8] Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Graham Burchell tr, Palgrave Macmillan 2008) 273.
[9] Michel Foucault (n 8) 274.
[10] Michel Foucault (n 8) 276.
[11] Trent H. Hamann, 'Neoliberalism, Governmentality, and Ethics' (2009) 6 Foucault Studies 37, 38.

entrepreneurs, taking responsibility for themselves in all other aspects of their lives, it is understandable that, when finding themselves as a victim of crime, they would expect to take a more active role in the prosecution of those who have wronged them, rather than simply being the trigger for a process in which they play no other role other than as a potential witness. It is this more active involvement of the victim and its impact on the legitimacy of the trial that I consider in part III of this chapter below. I shall now consider why Passavant's arguments concerning the interaction between the neoliberal state and crime similarly cannot fully account for the victim-centric reforms addressed by this study.

ii. Passavant – governance through a criminal-consumer double

I turn now to Passavant's work on crime, consumption and governance in which he considered that neoliberal conditions have resulted in governance 'through a criminal-consumer double'.[12] By making specific reference to crime as a factor in state legitimacy, rather than Brown's more generalised legitimisation of the State, it is helpful to draw parallels between Passavant's thoughts on state legitimacy and the focus of this work, which is the legitimacy of the criminal trial. I first consider Passavant's stance that the neoliberal empowerment of non-state actors in roles traditionally conducted by agents of the state (such as crime control) actually strengthens the neoliberal state's legitimacy rather than weakening it. A parallel, I suggest, can be drawn with the criminal trial's legitimacy. Secondly, I consider his conclusion that the neoliberal state governs through a criminal-consumer double whereby zero-tolerance of crime and the logic of consumerism underpin state legitimacy, in order to understand the interaction between crime and consumerism on the issue of legitimacy.

Passavant described how the neoliberal state governs at a distance by activating action by non-state organisations, but he conceded that in so doing, rather than being weakened, the neoliberal state has 'enhanced and extended its formal capacities' by making alliances with new organisations and activating governmental powers of non-state actors.[13] By way of example, he cites David Garland's work,

[12] Paul A. Passavant, 'The Strong Neo-liberal State: Crime, Consumption, Governance' (2005) 8(3) Theory & Event 1[49].
[13] Passavant (n 12) [4].

earlier considered in chapter three, concerning the neoliberal state's efforts to control crime by enlisting non-state actors, noting that although such crime control practices are informal in nature, they are linked up to the 'more formal activities of the police themselves'[14] thus complementing and extending 'the formal controls of the criminal justice state.'[15] I contend that this is helpful in reinforcing the neoliberal nature of the victim-centric reforms as considered in chapters two and three, whereby non-state actors, in particular victims of crime, are being enlisted to participate in the criminal justice system at stages which traditionally did not garner their involvement, such as the decision whether to prosecute and the sentencing exercise post-conviction. It also goes some way to understanding how the empowerment of non-state actors, such as victims, can strengthen the legitimacy of a process such as the criminal trial, rather than weaken it. It does little, however, to understand why these governmental reforms, reflecting neoliberal imperatives, have such limited impact on the liberal nature of the trial itself and therefore to comprehend what purpose these reforms serve in legitimising the essentially enduring liberal institution of the criminal trial.

Passavant relied upon Pat O'Malley's analysis of the two sides of neoliberalism (as earlier considered in chapter three), being the consumerist soft side and the criminological hard side, to conclude that the neoliberal state is neither weak nor small.[16] The notion that justice becomes the hard limit of a purportedly softening state whereby the risks posed by criminal 'monsters' are deemed to be intolerable by a consumer-driven society founds Passavant's argument that a neoliberal state 'governs through crime'[17] as evidenced by a number of measures indicating a zero-tolerance mentality.[18] This, he avers, manifests itself in a shift in priority from prosecution of crimes in court to crime prevention.[19] Whilst this may be so, the focus of the victim-centric reforms rests upon the prosecution of offences, although arguably the successful prosecution of criminals could act as a deterrence for the commission of offences. Perhaps the difference between Passavant's view, and that of this thesis, is that he seems interested in the 'outward-facing' *function* of the court, whereas this

[14] David Garland, *The Culture of Control* (OUP 2002) 124.
[15] Garland (n 14) 170.
[16] Passavant (n 12) [5].
[17] Passavant (n 12) [5].
[18] Passavant (n 12) [11], [12], [13].
[19] Passavant (n 12) [20].

study is interested in the court / trial's *nature* or *quality* in itself? The consumerist paradigm can, again, assist in understanding the reforms as neoliberal in nature, as considered in chapter two, but if my analysis is cogent, then Passavant's framework does not help to address the impact of the reforms on the legitimacy of the trial, given that it essentially maintains its liberal nature despite them.

When considering the absence of an impact on the liberal nature of the trial by the neoliberal victim-centric reforms, and using Passavant's model of a criminal-consumer double as an exemplar for neoliberal legitimacy, it is easy to dismiss the reforms as a mere exercise in public relations, designed to appeal to the victim as consumer by dressing up existing rights as new, enhanced consumer-rights designed to ease the incapacitation of criminal monsters. Indeed, whilst considering the Code, which as detailed in chapter three contains the provisions relating to the VPS, Lyndon Harris stated that 'If the Code means that more victims are aware of their entitlements, and the agencies are aware of their obligations, does it matter that it is something of a PR exercise?'[20] To view the victim-centric reforms as public relations exercises in a consumer-led society, particularly in light of my contentions that they do little to change the liberal nature of the trial, without reconsidering the liberal legitimacy of the trial, would miss what I contend is the actual impact these reforms have on the legitimacy of the criminal trial. It is precisely who these reforms are aimed at, or in other words the audience being addressed, and the stage in the proceedings at which that audience is engaged, that necessitate a reconsideration of the liberal framing of the legitimacy of the criminal trial.

To fully understand this impact I shall now consider how liberal conceptions of the legitimacy of the trial have been formulated and then explore how these have been expanded as a result of the neoliberal reforms.

2. Liberal conceptions of the legitimacy of the trial

The two neoliberal notions of legitimacy considered above, based firstly on market or balance-sheet imperatives and secondly on justice becoming the hard limit of a softer,

[20] Lyndon Harris, The Victims' Code -- A Lack of Substance or a Victory for Victims? (2013) 177 JPN 745

consumer-driven society, assist in reinforcing the neoliberal nature of the victim-centric reforms. They fail, however, to account for the legitimacy of the criminal trial in light of the current direction of its reform. In the next part of this chapter I turn, therefore, to consider two liberal notions concerning the legitimacy of the trial, involving firstly the concept of procedural justice and secondly the more dialogic and relational character of legitimacy. I shall then conclude this chapter by using these liberal accounts of the conceptions of trial legitimacy to explore how the victim-centric reforms have led to an expansion or shift in the original sense of the audience or interested party within the process of the legitimation of the criminal trial.

i. Legitimacy based on the notion of procedural justice

In his critique of deterrence as a model for securing compliance with the law and approbation of a self-regulatory approach, 'focussing on engaging people's values as a basis for motivating voluntary deference to the law',[21] Tom Tyler defined legitimacy as 'the property that a rule or an authority has when others feel obligated to voluntarily defer to that rule or authority. In other words, a legitimate authority is one that is regarded by people as entitled to have its decisions and rules accepted and followed by others.'[22] Clearly the criminal trial relies upon such deference both in relation to participation in the proceedings and acceptance of the trial outcome. Tyler talked about legitimacy as a quality that leads others to defer to the legitimate actor rather than pursue their own self-interest.[23] This notion of relinquishing one's own interests for the common good directly conflicts with Brown's contention regarding the demise of citizenship concerned with the public good due to *homo oeconomicus's* approach to everything in market terms,[24] as considered above. It is my contention that these opposing interests can help to understand the reframing of the concept of legitimacy through the victim-centric reforms, considered below. For Tyler, it is 'widespread voluntary cooperation with the law and legal authorities' that allows the authorities to

[21] Tom R. Tyler, 'Legitimacy and Criminal Justice: The Benefits of Self-Regulation' (2009) 7 Ohio St. J. Crim. L. 307.
[22] Tyler (n 21) 313. Tyler attributes this definition to Jeffrey Fagan, 'Legitimacy and criminal justice' 6(1) (2008) Ohio St. J. Crim. L. 123 and Wesley Skogan and Kathleen Frydl (eds), *Fairness and Effectiveness in Policing: The Evidence* (The National Academies Press 2004).
[23] Tyler (n 21) 314.
[24] Brown (n 2) 39.

divert their resources away from the provision of incentives to encourage the maintenance of order, towards other aspects of the system in need of investment.[25] For an adversarial criminal justice system that relies so heavily upon the cooperation of victims and witnesses to prosecute those accused of criminality, this voluntary cooperation is an essential aspect of its legitimacy.

Tyler embarked on a study to provide empirical support for an alternative to the deterrence-led model of legitimacy based instead on the consent and cooperation of the public.[26] The main findings of the study were threefold: firstly, in relation to shaping compliance with the law through legitimacy, the findings indicated that legitimacy trumped considerations of deterrence as motivation for compliance with the law; secondly, that the basis of that legitimacy was embedded in procedural fairness rather than the favourability or fairness of the decisions reached by those in authority; lastly, that procedural justice meant more than an instrumental interpretation based on the opportunity being provided to state one's case prior to a decision permitting indirect control over the proceedings, but rather a non-instrumental meaning could be attributed based on the opportunity to speak to the authorities, regardless of whether such dialogue would influence the outcome.[27] Tom Tyler's surveys led him to conclude that 'it was the perceived procedural fairness of law enforcement authorities, rather than the favourability or the perceived fairness of the outcome of the citizen's encounter with them, that was particularly important in shaping respondents' subsequent compliance.'[28]

Tyler's focus on procedural justice as the basis for legitimacy sits squarely with what he describes as a "reservoir of support" that legitimacy provides for institutions and authorities.[29] Christian Reus-Smit further advocated that 'legitimate actors or institutions can draw upon, or be sustained by, wellsprings of voluntarism that encourage active support, simple compliance, and lower levels of opposition, reducing

[25] Tyler (n 21) 314.
[26] Tom R. Tyler, *Why People Obey the Law* (Princeton University Press 2006) detailed the findings from 1,575 telephone interviews with respondents conducted in 1984 from a random sample of citizens in Chicago, USA and reinterviews with 804 of those respondents one year later. This research was republished in 2006 with a new afterword.
[27] Tyler (n 26) 269-276.
[28] Tyler (n 26).
[29] Tyler (n 26) 281.

the costs of coercion and bribery.'[30] Such voluntarism provides stability but, more pertinently for the criminal trial, it provokes the requisite cooperation that is not in the nature of *homo oeconomicus*. The victim-centric reforms can be seen as a garnering of the victim's support by enhancing the legitimacy for the criminal trial system through the paradigm of procedural justice, whereby the victim has the opportunity to express their chagrin of a prosecutorial decision or elucidate the impact of the offence upon them at sentencing. The favourability to the victim of the outcome of the proceedings, according to procedural justice imperatives, is of little import compared to the fact that they could make themselves heard. It is that support which will sustain the effective working of the criminal justice system through active participation by the victim in the reporting of offences and attendance at trial as a witness when required.

Yet the one-sided nature of procedural justice which relies little upon the dialogue between the authority and the citizen, little on the outcome, but more on the fact that the procedures are fair in reaching that outcome, still cannot fully account for the victim-centric reforms. The relationship between the authority and the citizen needs further explanation, as considered in the next part of this chapter.

ii. Dialogic and relational nature of legitimacy

Bottoms and Tankebe, in their consideration of the concept of legitimacy in criminal justice, noted that in recent years criminological analysis had appreciated the growing importance of the question of legitimacy, particularly in relation to policing and to prisons.[31] Yet the aim of their work was to enhance the conceptual understanding of legitimacy. It was their contention that the concept had not been adequately theorised, especially in relation to its 'dialogic and relational character.'[32] It is this dual and interactive aspect of legitimacy, characterising the relationship between those with power and those who submit to that power, that I seek to employ when understanding the impact of the victim-centric reforms on the legitimacy of the criminal trial. I shall

[30] Christian Reus-Smit, 'International Crises of Legitimacy', (2007) 44 International Politics 157, 169.
[31] Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2013) 102 J. Crim. L.& Criminology 119.
[32] Bottoms and Tankebe (n 31) 129.

explore their concept of legitimacy before employing it to understand the impact of the victim-centric reforms on the legitimacy of the trial process.

Bottoms and Tankebe noted that the dominant theoretical approach to the study of legitimacy was based on the concept of 'procedural justice' as espoused by Tyler and already considered above. Whilst highly complimentary of this amassed body of work, Bottoms and Tankebe supported David Smith's assertions that 'procedural justice [research] work, although powerful, is limited in scope,' and that it was therefore necessary to take 'a wider view of the issues.'[33] Rather than defining legitimacy by focussing on the belief of the citizen that they must follow the decision or rules of an authority, they preferred the 'right to rule' approach based on 'whether a power-holder is justified in claiming the right to hold power over other citizens (and thus to issue decisions and rules that are binding on them).'[34] Bottoms and Tankebe relied on the works of Jospeh Raz and Max Weber to better define legitimacy. In Raz's analysis of claims to legitimacy he suggested that effective power can be subdivided between three groups: (1) people or groups who exert naked power, (2) de facto authorities, and (3) legitimate authorities. The third group's claim to legitimacy is accepted thus they are recognised as having a right to govern.[35] The emphasis for Weber was on the cultivation of legitimacy in that claims to legitimacy by political power-holders are empirically universal, and they are also ongoing (power-holders attempt 'to establish and to cultivate' legitimacy on a continuing basis).[36] Taking into account these two positions Bottoms and Tankebe concluded that:

> legitimacy needs to be perceived as always dialogic and relational in character. That is to say, those in power (or seeking power) in a given context make a claim to be the legitimate ruler(s); then members of the audience respond to this claim; the power-holder might adjust the nature of the claim in light of the audience's response; and this process repeats itself. It follows that legitimacy should not be viewed as a single

[33] David J. Smith, 'The Foundations of Legitimacy', in Tom R. Tyler (ed) *Legitimacy and Criminal Justice: International Perspectives* (Russell Sage Foundation 2007) 30 - 31.
[34] Bottoms and Tankebe (n 31) 124.
[35] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 128, as considered in Bottoms and Tankebe (n 31) 125.
[36] Max Weber, *Economy and Society* (University of California Press 1978) as summarised by Bottoms and Tankebe (n 31) 128.

> transaction; it is more like a perpetual discussion, in which the content of power-holders' later claims will be affected by the nature of the audience response.[37]

Bottoms and Tankebe are effectively extolling the concept of legitimacy as a two-sided, evolving process whereby the power holder modifies their practices in response to the audience in order to maintain their legitimacy, as opposed to the more one-sided approach averred by the concept of procedural justice whereby the power holder maintains their legitimacy whilst the process is deemed to be fair by the audience. The idea of legitimacy being based on a dialogue between the power holder and the audience with an ongoing process of refinement is one that can be used to understand the relationship between the victim-centric reforms and the criminal trial, as I shall now consider. This approach exemplifies liberal conceptions of legitimacy such as working together for the shared interest of the common good rather than the neoliberal conceptions earlier considered in this chapter of self-interest and the promotion of consumerist ideals. I shall use Nils Christie's work to illustrate the issues from a criminal justice perspective looking first at the bringing of prosecutions and then at the sentencing of offenders.

3. The expansion or shifting of the audience to legitimate the trial process

Taking the concept of legitimacy as an ongoing discussion that is both relational and dialogic, as advocated by Bottoms and Tankebe above, I am going to conclude this chapter by considering how the legitimacy of the trial can be understood as strengthened in light of the victim-centric reforms considered in chapters two and three, which expand the audience at key stages of the execution of power in the criminal trial, responding to the need of the victim to be more involved in the proceedings. I shall start by looking at the earlier stage of the criminal trial process when the decision whether to prosecute a suspect is taken and finish with the later stage of the criminal trial process when an offender is sentenced. In so doing I shall rely on Christie's 1977 article on conflicts as property in which he claimed that victims of crime had lost their right to participate in the ensuing conflict to the state and he advocated a procedure to restore participants' rights in their own conflict.[38] By tracing

[37] Bottoms and Tankebe (n 31) 129.

[38] Nils Christie, 'Conflicts as Property' (1977) 17(1) Brit.J.Criminol. 1.

the involvement of the victim in criminal proceedings from instigator to partial participant, I shall illustrate the evolving nature of the discussion between the state as power-holder and the victim as audience, demonstrating that the recent victim-centric reforms can be seen as the next evolution in the relationship, increasing the victim's opportunity to enter into a dialogue with the power-holder and thus increasing the legitimacy of the trial system.

i. The bringing of prosecutions

When proposing a court system to restore the rights of victims of crime to participate in their own conflicts, Christie argued that property in criminal conflicts had been taken away from one of the parties directly involved in the conflict, namely the victim, and vested in the State.[39] He described the reasoning behind this transfer in ownership as emanating from both honourable and dishonourable motives.[40] Whilst the prevention of private vengeance and vendettas continue to provide worthy justification for the State's intervention in criminal conflicts, supporting a need to reduce conflict and protect both the victim and indeed the defendant; the less principled financial motivations of the State profiting from its representation of the victim by receiving money or property from the offender are no longer relevant considerations.

In the English criminal justice system the evolution of the bringing of prosecutions can be traced from pre-1880 when victims or their own lawyers presented the case against the accused, changing to the police having the responsibility for most prosecutions[41] until this responsibility was taken over by the newly created CPS[42] as earlier considered in chapters one and two. Looking at this evolving process, it is evident that with each alteration the victim is further removed from the process. The direct involvement of the victim as prosecutor took a step back when the police took over the role, although I would suggest that there was still a

[39] Christie (n 38).
[40] Christie (n 38) 3.
[41] Prosecution of Offences Act 1879. In the history of the CPS as described on their own website, the first Director of Public Prosecutions was created to take the decision to prosecute in only a small number of important or difficult cases. The prosecution of those cases was then taken over by the Treasury Solicitor. Otherwise the police prosecuted most cases until 1986. CPS website <https://www.cps.gov.uk/about/history.html> accessed 3 November 2016.
[42] Prosecution of Offences Act 1985.

relationship between the victim and the prosecutor since the police would be investigating the offence also and thus interacting with the victim. The creation of the CPS resulted in a second step back on the part of the victim with a new layer of more unapproachable bureaucracy separating the victim from the proceedings since the victim would still be interacting with the police as investigators but not with the CPS as prosecutors.

The justification for removing the prosecution of the offender from the victim and giving the power to the police surely stemmed from the need to legitimise the trial proceedings, regularising the process and reducing the risk of private vengeance. Similarly the creation of the CPS stemmed from the need to legitimise a system which was criticised in the Royal Commission's report in 1981 based on the unreliability of police officers who investigated an offence making a fair decision on whether to prosecute the alleged offender.[43] Arguably the consequence of this removal in a victim's ownership of a dispute has resulted in their denial to the right of full participation in the conflict and has led to the victim dissatisfaction in the system as detailed in chapter two. It is this participation that is seemingly rebalanced by the VRRS. By introducing a formal process for victims to strike up a dialogue with the CPS when the decision has been taken not to prosecute a suspect, the victim's participation in the prosecutorial process is enriched. This in turn, following Bottom and Tankebe's stance on legitimacy as an ongoing discussion as described above, strengthens the legitimacy of the proceedings through the power-holder (CPS) adjusting the process to create a dialogue with, and a relationship to, the audience (victim) at a point in the proceedings which were previously remote to them. In effect, a role is being returned to the victim in the name of legitimacy which was previously removed from them for the same reason. The role is lessened since, as already considered in chapter two, the VRRS simply provides a formal procedure to seek a review of a terminatory decision rather than having a say in the bringing of the prosecution itself but the opening of a dialogue at this stage in the proceedings, and the fostering of a relationship between the CPS as power holder and the victim as audience indicates an expansion of the liberal claim to legitimacy. In effect, this situation retains the centralised power of the prosecutorial state, but offers something to the victim too. Essentially both aspects of legitimacy get to function in tandem. Whether this formal

[43] Royal Commission on Criminal Procedure Report 1981.

or technical inclusion of the victim is enough will be considered at the end of this chapter.

Having considered the decision to prosecute I shall conclude by considering the sentencing of the offender.

ii. The sentencing of offenders

The VPS can be considered in similar terms. Christie describes how a number of losses flow from taking the ownership of conflicts away from victims, for both the victim, society in general and indeed the defendant too.[44] One such loss is expounded as the loss of personalised encounters between the victim and the defendant in that the victim is 'so totally out of the case that he has no chance, ever, to come to know the offender.'[45] In the English criminal trial, after providing an initial witness statement to the police at the start of their investigation, the only direct involvement of the victim in the trial process will be in the giving of evidence as a witness for the prosecution followed by their cross examination by the defence. Should there be a guilty plea, even this involvement will be taken away from the victim, with the sentencing exercise being based on the summary of the evidence provided by the prosecutor only. This lack of contact with the defendant on the part of the victim, according to Christie, manifests itself in feelings of isolation and anger, leaving the victim with a need for understanding that is not resolved.[46]

According to Christie this loss of personalised encounter also impacts on the defendant. Although direct victim participation can be a painful experience for the defendant, he avers that the opportunity to discuss the reasons for the offending behaviour and the losses sustained by the victim with a view to restitution on the part of the defendant, can be equally beneficial for both the victim and the defendant, particularly in making the defendant a participant in how he can make good his wrongs.[47] Effectively Christie is extolling the potential virtues of personal confrontations between victims and defendants in terms of reducing recidivism but

[44] Christie (n 38) 7.
[45] Christie (n 38) 8.
[46] Christie (n 38) 8.
[47] Christie (n 38) 9.

even he accepts that should such an approach have no such impact it is preferable to 'react to crime according to what closely involved parties find is just and in accordance with general values in society'[48] than not. In other words, although Christie's focus is on the reduction of recidivism, he recognises that the opportunity for a personal encounter between victim and offender can be deemed as just, which is arguably indicative of a legitimate process. With the state taking ownership of the punishment of offenders and the sentencing exercise being carried out with a focus on the offender's circumstances, the victim need not be present and the opportunity for any form of encounter is non-existent.

The VPS scheme can be seen as a move towards the sort of personal encounter envisaged by Christie, especially in providing the victim with the opportunity to read out their statement in front of the defendant in court. It does not create the direct dialogue envisioned by Christie but by physically bringing the victim into the sentencing process, opening up another point of dialogue between the power-holder and the victim as audience, the scheme does impact on victims. For victims the opportunity to face the defendant whilst expressing the impact of the offence on their lives provides the chance of a personalised encounter focussed not on the determination of guilt but on the resolution of the matter, albeit a rather one sided encounter. Similarly, should the victim provide a VPS without wishing to attend the sentencing exercise, they do so in the knowledge that their words will be considered by the sentencer, enhancing their relationship to the process through a form of dialogue. This again, following Bottom and Tankebe's conception of legitimacy as earlier considered, strengthens the legitimacy of the proceedings by adjusting the sentencing process to better accommodate the victim's needs to confront the defendant and participate in the process at a point in the proceedings which were previously remote to them.

4. Conclusion

In conclusion, whereas in chapters two and three I established that the neoliberal, victim-centric reforms under analysis have a limited impact on the liberal conception

[48] Christie (n 38) 9.

of the criminal trial, in this chapter I have suggested that these reforms are best understood as contributing to a liberal conception of the trial's legitimacy. Arguably, these innovations have brought about changes in how the trial process is legitimised, but that legitimisation ought to be understood as continuing in the liberal tradition.

The chapter first considered two neoliberal paradigms of legitimacy, and concluded that Brown's market-centric approach could not handle the complicated set of imperatives peculiar to criminal trial legitimation. Passavant's criminal-consumer double approach to state governance, despite having a far more suited analytical approach, is also of limited value in accounting for the victim-centric reforms.

I then turned to consider liberal conceptions of legitimacy. First I considered Tyler's stance which espoused the concept of procedural justice, whereby procedural fairness to the victim outweighs even the perceived fairness of the outcome of the process, and consequently promotes active support for the process. By purporting to give victims a voice, enabling them to make themselves heard, either by challenging an unfavourable prosecutorial decision or by elucidating the impact of an offence at sentencing, the victim-centric reforms promote fairness in aspects of the procedure that were previously remote to the victim, provoking the requisite cooperation that is not usually theorised as part of the nature of *homo oeconomicus*. I next considered the dialogic and relational character of legitimacy advocated by Bottoms and Tankebe, who extolled the concept of legitimacy as a two-sided, evolving, perpetual discussion between the power-holder and the audience, whereby the audience responses provoke the power holder to modify their practices to maintain their legitimacy. The victim-centric reforms have responded to the needs of the victim to be more involved in the proceedings by expanding the audience's ability to participate at key stages of the execution of power in the criminal trial.

This chapter's fundamental argument regarding the function of victim-centric forms in relation to liberal conceptions of the trial takes on added significance in light of how little substantive difference they make to the trial. Recall that in chapters two and three I criticised the degree to which the victim in fact becomes involved in these two key stages of the criminal trial process as a result of the relevant reforms. The VRRS does not incorporate the victim into the actual decision whether to prosecute a suspect, but rather provides a right and mechanism to seek a review of a terminatory

decision. Similarly, VPSs do not change the sentencing exercise, beyond formalising the opportunity for the victim to state the impact of the offence on them. When seen through the paradigm of liberal accounts of the legitimacy of the trial, however, these reforms take on much more significance. The opening up of dialogues between those with the power and the victims as the ‘expanded’ audience for the trial, at these two crucial stages in the proceedings which were previously so remote to victims expands and reinforces the liberal claim to the criminal trial’s legitimacy.

Chapter V. Conclusion

This thesis has studied two victim-centric reforms, which are representative of a swathe of similar reforms in recent years, affecting the English criminal trial process. The purpose of this study has been first, to consider the seemingly neoliberal imperatives embodied in the reforms, second, to investigate what impact, if any, such reforms have had on the fundamentally liberal nature of the trial process and last, to consider their effect, if any, on the liberal account of the legitimacy of the criminal trial.

In the first chapter, the development of the criminal trial was traced from trial by ordeal to adversarial conflict. In this chapter, it was demonstrated that the rise in the prominence of the defendant corresponded with the attendant fall in the role of the victim, and the emergence of the liberal procedural justifications that underpin today's criminal trial. The more recent turn, both domestically and internationally, towards privileging victims, and the neoliberal motivations behind this change of direction were then considered.

In the following two chapters, the VRRS and VPSs were examined in detail to illustrate the impact of victim-centrism on two distinct and different stages of the criminal trial, which hitherto had very little direct victim involvement.

The VRRS affected the initial, pre-trial stage of the criminal process, through the creation of a specific mechanism for aggrieved victims to challenge a terminatory decision taken by the CPS not to prosecute the suspect. First, the evolution of the opportunity for a victim to challenge such a decision was considered, starting from such a challenge being an impossibility due to the conclusive nature of the determination in favour of the defendant, moving to the possibility of a complaint being made through the CPS's general complaints' procedure. Second, the judgment in *Killick*,[1] in which Lord Justice Thomas determined that there must be a right for a victim to seek a review of a decision not to prosecute, and criticised the lack of formal procedure to seek such a review, was considered. Third, the creation of the VRRS was examined and its effectiveness in facilitating the victim's right to review was considered. Fourth, the neoliberal imperatives embodied in the VRRS, including individualisation of processes away from those with power towards the individual

[1] *R v Christopher Killick* [2011] EWCA Crim 1608, [2012] 1 Cr. App. R. 10.

subject and responsibilisation of the individual, through empowerment were considered, along with the importation of consumerist concepts and zero-tolerance towards criminality in the content and promotion of the scheme. Last, it was argued that the VRRS does not encroach in any meaningful way on the liberal nature of the criminal trial. Critiques and statements in support were considered and it was concluded that the scheme's limited ambit in no way altered the role of the victim in the decision whether to mount a prosecution.

The VPS scheme affected the latter, post-trial stage of the criminal trial process by formalising a mechanism for the victim to express to the sentencing tribunal the impact the offence has had on them and, if they so wish, provides the opportunity for the victim to read out their statement in court themselves. First, the limited role of the victim in the sentencing exercise, which focuses so heavily on the defendant, was considered. Second, the privileges bestowed upon the victim under the VPS scheme were articulated. Third, the neoliberal paradigms exhibited in this reform were considered. In particular, the individualisation of proceedings away from the defendant and towards the victim, the fostering of the responsibilisation of the victim by providing a mechanism to physically be heard in court at such a key stage in the proceedings and the personalisation of the process by appealing to the victim, in language that is indicative of a consumer being afforded enhanced rights, to recount the impact of the crime at a time when an offender, who poses a risk to society, will potentially be removed from society by incapacitation were all detailed as embodying neoliberal imperatives. Lastly the limited encroachment that this scheme has had on the liberal nature of the trial institution was averred.

In the final chapter, this thesis considered the impact of these victim-centric reforms on the liberal account of the legitimacy of the criminal trial. Analyses of legitimation in terms of neoliberal, market-centric, consumerist models, although playing a textual role, were rejected as being deficient in fully handling the particularities of the criminal trial's legitimation, which has a more complicated set of imperatives. Liberal accounts of legitimacy, with an emphasis on procedural justice and the dialogic and relational nature of legitimation between the power-holder and the audience, were deemed to remain more explanatory in understanding the legitimacy of the trial, notwithstanding the neoliberal quality of the trial reforms under discussion.

Having considered two examples from a raft of victim-centric reforms that should be understood as part of the neoliberal tradition, this thesis concludes that the liberal nature of English trial proceedings is little changed by such reforms. What is changing is how the trial process is legitimised. Rather than destabilising or surpassing the liberal conception of the legitimacy of the criminal trial, this thesis concludes that such neoliberal reforms act to strengthen the criminal trial as an enduring liberal institution.

Table of Legislation

Coroners and Justice Act 2009

Criminal Evidence Act 1898

Criminal Injuries Compensation Act 1995

Criminal Justice Act 2003

Criminal Procedure Rules 2015

Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L 315/57

Domestic Violence, Crime and Victims Act 2004

European Convention on Human Rights

Police and Criminal Evidence Act 1984

Powers of Criminal Courts (Sentencing) Act 2000

Prisoners' Counsel Act 1836

Prosecution of Offences Act 1879

Prosecution of Offences Act 1985

Prosecution of Offences Act 1985 (commencement No. 1) Order 1985/1849

Prosecution of Offences Act 1985 (Commencement No. 2) Order 1986/1029

Rome Statute of the International Criminal Court (A/CONF.183/9 of 17 July 1998)

Treason Trials Act 1696

Youth Justice and Criminal Evidence Act 1999

Table of Cases

Bibliography

Ashworth A, ‘Responsibilities, Rights and Restorative Justice’ (2002) 42 Brit.J.Criminol 578

—— *The Criminal Process* (Oxford University Press 2010)

—— and Zedner L, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions’ (2008) 2(1) Cr. L. & P. 21

Banks R, *Banks on Sentence* (11th edn, 2016)

Bartlett R, *Trial by Fire and Water* (OUP USA 1986)

BBC News, ‘Victims of crime get chance to speak in court under new code’ (BBC News, 29 October 2013) <http://www.bbc.co.uk/news/uk-24710184> accessed 20 October 2015.

Bottoms A and Tankebe J, ‘Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice’ (2013) 102 J. Crim. L. & Criminology 119

Brown W, *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press 2005)

—— *Undoing the Demos* (Zone Books 2015)

Burton M, ‘Reviewing Crown Prosecution Service Decisions Not to Prosecute’ [2001] Crim.L.R. 374

Carre Z, ‘The failure of R v Killick to give victims of crime a voice’ [2016] 4 NELR 62

Christie N, ‘Conflicts as Property’ (1977) 17(1) Brit.J.Criminol. 1

Commissioner for Victims and Witnesses, ‘Annual Report 2010 – 2011’ (31 October 2011) 7 <https://www.justice.gov.uk/downloads/news/press-releases/victims-com/cvw-annual-report-2010-11.pdf> accessed 6 February 2017

CPS, ‘Consultation on Victims' Right to Review Interim Guidance - Summary of Responses’ (21 July 2014) <https://www.cps.gov.uk/consultations/vrr_consultation_summary_of_responses.html> accessed 9 August 2016

—— ‘DPP enshrines victims' right to review of prosecution decisions’ (Press release, 4 June 2013) <http://www.cps.gov.uk/news/latest_news/victims_right_to_review/> accessed 8 August 2016

—— ‘Victims' Right to Review data’ (CPS July 2015) <http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/vrr_data/index.html> accessed 29 February 2016

—— ‘Victims' Right to Review Interim Guidance’ (June 2013) para 10 <https://www.cps.gov.uk/consultations/vrr_consultation.html> accessed 9 August 2016

—— ‘Victims' Right to Review Scheme Guidance’ (July 2014) <http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html> accessed 29 February 2016

—— The Code for Crown Prosecutors (7th edn, 2013)

Davis R and Smith B, ‘Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise’ (1994) 22 JCJ 1

Doak J, ‘Victims’ Rights in Criminal trials: Prospects for Participation’ (2005) 22 (2) Brit.J.L.& Soc'y 294

Duff A, Farmer L and Marshall S, *The Trial on Trial: Volume 1:Truth and Due Process* (Hart Publishing 2004)

—— *The Trial on Trial: Volume 2: Judgement and calling to account* (Hart Publishing 2006)

—— *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing 2007)

Edwards I, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making’ (2004) 44 Brit.J.Criminol 967

—— ‘Victim Participation in Sentencing: The Problems of Incoherence’ (2001) 40 Howard Journal 39

Erez E, ‘Victim Participation in Sentencing: Rhetoric and Reality’ (1990) 18 JCJ 19

—— Globokar J and Ibarra P, ‘Outsiders inside: Victim management in an era of participatory reforms’ (2014) 20 (1) IRV 169

Fagan J, ‘Legitimacy and Criminal Justice’ (2008) 6 Ohio St. J. Crim. L. 123

Ferguson J and Gupta A, ‘Spatializing states: towards an ethnography of neoliberal governmentality’ (2002) 29 (4) American Ethnologist 981

Foucault M, ‘About the Concept of the “Dangerous Individual” in 19th Century Legal Psychiatry’ (1978) 1 International Journal of Law and Psychiatry 1 (Alain Baudot and Jane Couchman tr)

—— *Discipline and Punishment* (Alan Sheridan tr, Vintage Books 1995)

—— ‘Governmentality’ in Graham Burchell, Colin Gordon, and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991)

—— *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Graham Burchell tr, Palgrave Macmillan 2008)

Garland D, ‘‘Governmentality’ and the problem of crime: Foucault, criminology, sociology’ (1997) 1(2) Theo.Crim. 173

—— *The Culture of Control* (OUP 2002)

—— ‘The Limits of the Sovereign State’ (1996) Brit.J.Criminol. 445

Gewirtz P, ‘Victims and Voyeurs at the Criminal Trial’ (1996) 90(3) N.W.U.L.R. 863

Hall, M, ‘The Relationship between Victims and Prosecutors: Defending Victims' Rights?’ [2010] Crim L R 31

Hamann T, ‘Neoliberalism, Governmentality, and Ethics’ (2009) 6 Foucault Studies 37

Harris L, ‘The Rise and Rise of the Victim's Voice’ (2013) 177 JPN 473

—— ‘The Victims' Code -- A Lack of Substance or a Victory for Victims?’ (2013) 177 JPN 745

Ho H, ‘Liberalism and the Criminal Trial’ (2010) 32 Syd LR 243

Home Office, *Circular about Victim Personal Statements* (35/2001, 14 August 2001)

—— *Crime Prevention Circular 8/1984* (London: Home Office, 1984)

—— *Justice for All* (Cm 5563, 2002)

—— *The Victim’s Charter* (London: Home Office, 1996)

Judicial College, 'The Crown Court Compendium' (May 2016) <https://www.judiciary.gov.uk/wp-content/uploads/2016/05/crown-court-compendium-part-i-jury-and-trial-management-and-summing-up.pdf> accessed 8 May 2017

Langbein J, 'The Origins of Public Prosecution at Criminal Law' (1973) 17 Am.J.Legal Hist. 313

Lord Chief Justice, Criminal Practice Directions [2015] EWCA Crim 1567

Lord Woolf CJ, Practice Statement (Crime: Victim personal Statements) [2001] 1 WLR 2038

Maddocks G, 'Victims' right to review – could it affect the criminal justice system?' (*Halsbury's Law Exchange,* 28 August 2014) <http://www.halsburyslawexchange.co.uk/victims-right-to-review-could-it-affect-the-criminal-justice-system/> accessed 29 February 2016

Marshall S, 'Victims of crime: Their station and its duties' (2004) 7 (2) Critical Review of International Social and Political Philosophy 104

Mastrocinque J, 'Victim Personal Statements: An analysis of notification and utilization' (2014) 14 (2) Criminology and Criminal Justice 216

McEwan J, *Evidence and the Adversarial Process – the Modern Law* (2nd edn, Hart Publishing 1998)

Ministry of Justice*, Code of Practice for Victims of Crime* (HMSO, 2015)

—— *Getting it right for victims and witnesses* (CP3/2012, 2012)

—— *Improving the Code of Practice for Victims of Crime* (CP8/2013, 2013)

—— *Improving the Code of Practice for Victims of Crime Response to Consultation* (CP8(R) 2013)

—— 'New national service to help victims' (Press release, 27 August 2015) <https://www.gov.uk/government/news/new-national-service-to-help-victims> accessed 13 March 2016

—— *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (Cm 8388, 2012)

—— *Transforming the CJS: A Strategy and Action Plan to Reform the Criminal Justice System* (Cm 8658, 2013)

Moffett L, *Justice for Victims before the International Criminal Court* (Routledge 2014)

Morrison B, *As if* (Granta Books 2011)

Passavant P, 'The Strong Neo-liberal State: Crime, Consumption, Governance' (2005) 8(3) Theory & Event 7

Reus-Smit C, 'International Crises of Legitimacy', (2007) 44 International Politics 157

Roberts J and Erez E, Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 IRV 223

Roberts J and Manikis M, 'Victim Personal Statements: A Review of Empirical Research' (University of Oxford 2011) 8 <https://www.justice.gov.uk/downloads/news/press-releases/victims-com/vps-research.pdf> accessed 6 February 2017

—— 'Victim personal statements in England and Wales: Latest (and last) trends from the Witness and Victim Experience Survey' (2012) 13 (3) Criminology and Criminal Justice 245

Starmer K, 'Finality in criminal justice: when should the CPS reopen a case?' [2012] Crim.L.R. 526

—— 'Human rights, victims and the prosecution of crime in the 21st century' [2014] Crim.L.R. 776

Turner A, 'The Views of the Victim' (2001) 165 JPN 673

Tyler T (ed) *Legitimacy and Criminal Justice: International Perspectives* (Russell Sage Foundation 2007)

—— 'Legitimacy and Criminal Justice: The Benefits of Self-Regulation' (2009) 7 Ohio St. J. Crim. L. 307

—— *Why People Obey the Law* (Princeton University Press 2006)

Victims' Commissioner, *The Silenced Victim: A Review of the Victim Personal Statement* (Crown Copyright 2015)

Walker P, 'Frances Andrade killed herself after being accused of lying, says husband' *The Guardian* (London, 10th February 2013) <https://www.theguardian.com/uk/2013/feb/10/frances-andrade-killed-herself-lying> accessed 2 November 2015