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The Case for Restorative Justice in the Treatment of Adult Offenders in Ireland

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The Case for Restorative Justice in the Treatment of Adult Offenders in Ireland

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SUMMARY

This thesis makes the case for *diversifying* the customary means by which Irish criminal justice treats adult offenders, by incorporating into its traditional sentencing calculus methods of "restorative justice". Restorative justice is a method of holistic criminal dispute resolution, of ancient descent, which seeks to repair the diverse harms that crime inflicts on those who suffer its effects directly or indirectly. It aims to restore all of crime's main stakeholders – victim, offender and community – not only materially or financially but also *emotionally* through the post-crime, interpersonal *mediation* of criminal discord in an informal, community setting.

In particular, the thesis supports methods of *court-annexed* restorative justice, in particular Victim Offender Mediation (VOM) and Offender Reparation Projects (ORP), whose joint availability balances the interests of victim and offender in crime's wake, fulfilling restorative justice's *holistic* focus. In light of their achievements to date and their future potential, the extension and promotion of Ireland's pilot VOM and ORP schemes onto a nationwide, legislative footing is firmly backed. Accordingly, the thesis welcomes the Irish government's recent commitment, expressed since the writing of this thesis, to draw up plans for a court-annexed system of nationwide restorative justice in the near future, on foot of the recommendations of an Oireachtas Joint Committee researching the potential for restorative justice in this country.

Crucially, restorative justice is not endorsed as a necessary alternative to mainstream criminal justice. By promoting a court-annexed, fully integrated species of restorative justice, the thesis envisages a *hybrid* model of restorative/punitive criminal justice, under which judges should be free to choose from a sentencing *continuum or menu* featuring a range of restorative and retributive options. Customisation and individualised treatment should be their guide in this task, balanced against the countervailing interests of protecting public safety and publicly condemning serious crime.

There is nothing inherent in a restorative approach that denies the need for punitive sentencing to deal with the social inevitability of chronic, recalcitrant and entrenched offenders. Therefore, punitive and restorative sentencing options can and should co-exist harmoniously on the nation's sentencing schema to be selected in whatever permutation effectively balances the interests of offender and society from case to case, *even* if this involves a *combination* of restorative and more incursive, retributive measures. This prospect, combined with this thesis' argument for restorative justice's extension to *non-minor* crime diverges both from the approach taken by the existing pilot projects and the proposals submitted by the Joint Committee.

Restorative criminal justice is endorsed herein, principally on the basis of its *holistic emotionally therapeutic potential.* The thesis surveys typical negative emotional responses to deviance experienced by victims, offenders and residents collectively. It identifies social and legal stigmatisation, domination and the fear of crime as the principal sources of emotional *disempowerment* that crime's stakeholders tend to suffer in crime's aftermath. However, it proves restorative justice a credible and effective tool of emotional empowerment thanks to its ability to *involve and inform* its participants.

Restorative justice also offers *ancillary* social benefits that are incidental to its emotionally palliative agenda. In particular, it has an appreciable capacity for crime-control. Yet, because of the nebulous terrain of measuring recidivism rates and the meagre evaluation periods accompanying restorative initiatives, which have been disinterred from their indigenous resting places only since the 1970s, restorative justice's crime-control

potential is not afforded undue weight here. The paradigm's insertion into mainstream criminal justice is justified adequately by its emotionally reparative ability. This thesis does not rely on restorative justice's crime-control potential in this respect. Any crime-control it exerts – when and where this occurs – is merely an incidental bonus that stands to boost its appeal.

Restorative justice must be proven not only effective but also *credible* in order to reasonably back its integration into conventional criminal justice. There is a need for widespread approval of restorative techniques in the public, political, legal and particularly the judicial arenas, in order to safeguard a budding system of restorative justice by maintaining a healthy referral-rate to its community-based forums. The need for awareness-raising, education and training is stressed herein for its potential to create an hospitable attitudinal environment for an incoming restorative regime. At the same time, punitive attitudes are tolerable – necessary even – under a truly *hybrid* approach and they must only abate to the degree necessary to avoid suffocating their restorative counterpart.

Restorative justice is endorsed as a credible and effective paradigm that is also compatible with traditional, predominantly retributive criminal justice. Its use should be founded on its own unique merits and not on its remedial potential to "fill the gaps" perceived to weaken certain corners of mainstream justice. It should be measured according to the ambitions it sets for itself and distinguished from other approaches with which it is often confused. To safeguard its credibility, restorative justice must be distanced from simple leniency and other "soft-options". Further, it cannot be equated presumptively with other less-punitive techniques that share some of its values, such as victim support advances, shaming conferences, non-custodial orders and methods of informal and community justice.

Finally, and crucially, this thesis adopts a *cautiously optimistic* attitude to restorative justice's integration into adult criminal justice in Ireland. It identifies several reasons for caution that must be taken seriously when designing an integrated restorative system. Yet, the potential for restorative justice to do more harm than good for crime's stakeholders and the arguable unrealistic expectations it is perceived to have set itself only concretises the need for care, vigilance, pragmatism and commonsense when delineating the conditions of its operation. Yet, quality-control and scrupulous system-design and implementation as well as a continuing alertness to the real risks involved therein, are deemed sufficient to keep an *unavoidably* risky *burgeoning* restorative system from an early grave and safeguard its effective operation into the future.

Optimism is derived not simply from empirical data, whose rudimentary status divests it of considerable probity. *Hopeful* interim empirical overtures to restorative justice's emotionally therapeutic ability are solidified into a sense of cautious confidence by a body of credible theoretical information that corroborates its appeal. Wisdom is derived from established hypotheses such as labelling theory, anomie theory, social disorganisation theory and "broken windows" literature to copperfasten the optimism tentatively aroused by statistical evaluations.

Restorative justice is not new to Ireland. Nor is its harmonious co-existence with punitive sanctions under a diverse *cross-bred* model of restorative/punitive criminal justice. Such an approach characterised Ireland's native Brehon law criminal justice system that operated for millennia until British rule finally suppressed it. It is hoped, however, that with care and precaution, restorative justice's life in Irish criminal justice, has yet to be permanently extinguished. The quality it promises through the diversity and customisation it brings is sufficient to justify its imminent disinterment.

for my parents,

brothers, sister, nieces, nephews and friends

and for Stephen

special thanks to my supervisor Dr. Eoin O'Dell for his support and guidance

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Chapter 1

Make Way for Restorative Justice: Setting a Tone of Cautious Optimism

> Far from wilting in the face of controversy and resistance as so many other justice innovations of recent vintage have, restorative justice appears to be trading the temerity of cautious reform for a kind of swagger. Whether such self-confidence is justified time will tell. It will however, be very difficult to ignore.[1]

1. Setting the Scene: Restorative Justice in Context

This thesis moves for the diversification of Irish adult sentencing practice by incorporating officially into its traditional *modus operandi* a nationwide network of court-annexed restorative justice.[2] It therefore welcomes recent commitment expressed by the Irish government since the writing of this thesis to draw up plans for the implementation of such a system.[3]

The intended result is a *hybrid* model of criminal justice whose sentencing "menu" combines punitive *and* restorative solutions to crime in an holistic, diverse and flexible way, such that the unique features of each crime can be addressed more sensitively from case to case. As such, it aspires to a kind of "best of both worlds" synergy that fuses the best of established criminal practice with the wider social merits of incoming restorative justice. This thesis argues that these superficially incompatible treatment philosophies might be teamed-up harmoniously to provide a united response to criminality that is more than the sum of its parts.[4]

The proposed injection of restorative justice into Ireland's existing penal framework is based on the paradigm's ability to provide *holistic emotional healing* to crime's various stakeholders – victim, offender and community.[5] Restorative justice's effectiveness, credibility and legitimacy are all by-products of its emotionally-therapeutic potential:

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[1] McEvoy, Mika and Hudson, "Practice, Performance and Prospects for Restorative Justice" (2002) 42(3) *British Journal of Criminology* 469, at 475.
[2] The term "restorative justice" is often abbreviated to "RJ", which will appear hereafter in quoted excerpts that adopt it expressly. The full expression "restorative justice" is usually used elsewhere.
[3] *Infra*, at 43.
[4] *Infra*, at 214-215, 329-335, 378-383.
[5] *Infra*, at 32-33, 180-224.

> [T]o be effective, restorative justice needs to recognize the legitimate emotions of those who have been harmed by the offender's actions, provide a means for the expression of these emotions, and create a forum in which the harm caused can be repaired to the satisfaction of those who have directly experienced the harm.[6]

Restorative justice's ability in this respect is sufficiently significant to justify the paradigm's implementation *single-handedly*. However, the prospect of restorative criminal justice might be made *more appealing* by two other potentially constructive spin-offs of its emotionally ameliorative ability. These auxiliary benefits, though commendable and worthy of evaluation, are necessarily limited, unpredictable and to some degree empirically unsubstantiated and/or unquantifiable.

For instance, it will be shown that restorative justice possesses *some* proclivity for crime-control.[7] Additionally, restorative justice's insertion might perform a remedial "gap-filling" function whereby it compensates for certain deficiencies in its mainstream criminal justice host.[8] In fact, there is further potential that traditional and restorative modes of dealing with offenders may interact in a mutually reparative way, intervening to cover one another where they are individually considered to fall short. In this sense, they have been considered "fundamental social correctives" for one another.[9]

At the same time, the mutually compensatory potential of a hybrid model of restorative and traditional criminal justice is necessarily secondary to the value held by each model in its own right and the power unleashed when two *independently effective* sources of social enhancement are teamed up.[10] Restorative justice's addition onto Ireland's sentencing agenda will mean that traditional penalties such as incarceration need no longer be the default option for offenders, not because these penalties are somehow defective (though many would argue that they are),[11] but primarily because new alternatives are *available* – the selection of options has grown.

Regardless of the deficiencies traditionally associated with mainstream criminal justice and quite apart from restorative justice's debatable palliative potential in this regard, the latter could go a long way towards filling the more *non-specific* "room for improvement" that inevitably occupies any criminal justice system.[12] The benefits restorative justice can bring cannot *but* assist conventional criminal justice systems in performing what is a

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[6] Strang, "Is Restorative Justice Imposing its Agenda on Victims?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 94, at 94.
[7] *Infra*, at 33-37.
[8] *Infra*, at 38-41, 109-110.
[9] Crawford and Clear, "Community Justice: Transforming Communities through Restorative Justice?" in McLaughlin, Fergusson, Hughes and Westmarland eds., *Restorative Justice: Critical Issues* (Sage, 2003) 215, at 227.
[10] *Infra*, at 109-110.
[11] *Infra*, at 38-41.
[12] *Infra*, at 45.

gruelling and overwhelming social chore. It is *this* ability that escalates restorative justice's credibility to the degree appropriate to justify its use.

Crucially, the optimism expressed herein with respect to restorative justice's unique talents is tempered with a distinctive note of caution. While restorative justice is a potentially useful resource that *may or may not* rectify assorted deficiencies in established criminal justice, it is by no means a panacea.[13] There are, as later sections will illuminate, several substantial reasons to be wary about modifying the criminal justice system's equilibrium sufficiently to absorb a restorative value-system.[14] Optimism and doubt adopt polar positions along a kaleidoscopic spectrum of academic reaction to restorative criminal justice that ranges from near-evangelical expressions of blinkered confidence to equally dogmatic rejections of *any* framework that deviates from the perceived safe-harbour of well-travelled sentencing paths.[15]

Vigilance to the inevitable element of risk that accompanies the adoption of *any* new justice resource is just as vital as attending to the specific hazards that a particular regime such as restorative justice poses *characteristically*. This is the case regardless of the propitiousness of evidence-based forecasts.[16] Excesses in optimism and pessimism alike are undesirable and are equally likely to prove fatal to restorative justice's successful assimilation into conventional sentencing practice. This thesis seeks out the middle-ground and, travelling soberly along the colourful scale of academic reaction to restorative justice, ultimately alights it with a sense of cautious optimism and measured conviction about the potential benefits of creating an integrated model of restorative criminal justice in Ireland.

This thesis' ultimate blueprint for restorative criminal justice in this country is designed in strict accordance with the distinct dimensions attributed to the paradigm herein. It is only *genuine restorative justice* as defined in the following section – and no other would-be or "wannabe" restorative aspirant – that is deemed capable of producing the range of emotional benefits that are used herein to justify restorative justice's diversification of established sentencing norms.

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[13] *Infra*, at 19.
[14] *Infra*, at 225-259; 324-360.
[15] Ashworth, "Is Restorative Justice the Way Forward for Criminal Justice?" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.* 164, at 176.
[16] *Infra*, at 19-20.

The remainder of this chapter provides a condensed, preliminary overview of some of the burning issues that dominate this thesis' mission to establish the two proofs necessary to reasonably back the prospect of restorative criminal justice in Ireland: (a) the paradigm's credibility and (b) its contextual compatibility.[17]

After having provided a concise introductory definition of restorative justice – distilling what it is, from what it is generally not – the chapter can then proceed to contextualise the paradigm as it is properly understood. Several reasons for caution when contemplating restorative justice's integration, cropping up at various stages throughout this thesis, are sketched out briefly by way of introduction. This is then counterbalanced by a short synopsis of typical optimistic impressions of the paradigm that corroborate both its credibility and contextual compliance. Then, the potential impact of restorative justice's prospective incorporation into Irish criminal justice is roughly drafted according to the predictions that shape the chapters that follow.

This introductory, critical overview of restorative justice and its potential place in Irish criminal justice creates a preparatory wide-shot of the paradigm that serves to contextualise the evaluations and arguments that follow. It also establishes the tone of the research by illuminating the basis for the *cautious optimism* that this thesis is inspired to adopt at every milestone of its critical expedition. Finally, the various objectives steering the thesis are catalogued and its methodology and approach explained.

2. A First Look at a "Third Way" in Adult Criminal Justice: Introducing Restorative Justice

Restorative justice is considered by its proponents a "third way" of administering criminal justice.[18] It is, as Aertsen observes, "resolutely chosen in place of (neo)retributive criminal law and after the collapse of the rehabilitation model."[19] It is a broad concept that is difficult to capture succinctly in any one definition.[20] In its most easy-to-swallow format, it can be summarised simply as: "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the

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[17] *Infra*, at 44-46.

[18] *See* Griffiths, "Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process" (1970) 79(3) *Yale Law Journal* 369; Northey, "Restorative Reintegration", *6th International Conference on Restorative Justice*, June 2003. <http://www.sfu.ca/cfrj/fulltext/northey.pdf> (visited 19 May 2006).

[19] Aertsen, "Restorative Justice in a European Perspective", at para. 3, Restorative Justice Ireland Conference, *Restorative Justice: Examining the Issues*, April 1999. <http://www.extern.org/restorative/99_Conf_Aertsen.htm> (visited 19 May 2006).

[20] *See* Dignan, *Understanding Victims and Restorative Justice* (Open University Press, 2005), at 2-5.

future".[21] Though fundamentally correct and widely-used, this is a condensed vision of a complex paradigm; the ideology of restorative justice is extremely multifaceted.[22]

Untangling the intricacy of restorative philosophy is the purview of Chapter 2. It offers a comprehensive overview of restorative justice and explains its chief philosophical and practical hallmarks by reference to their endurance throughout the history of human disputing.[23] Nonetheless, it is worth cataloguing, as an introductory matter, the most identifiable characteristics of restorative justice.

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> [R]estorative Justice is not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives, our conduct in the workplace, our practice of politics. Its vision is of a holistic change in the way we do justice in the world.[24]

As the above quote suggests, restorative justice's significance transcends the limited realms of the law. In truth, what it offers is a versatile *value-system* that can be implemented to guide all sorts of human interaction. It is, in effect, a "way of life"[25] directing how people can deal with one-another most harmoniously in their everyday lives, including – but not limited to – how they behave at law.

There is one over-arching, guiding objective around which restorative justice's value-system has evolved. It is a philosophical pillar that bears the weight of this thesis' practical vision of the paradigm's ultimate integration: restorative justice aspires to resolve inter-personal conflict through the *emotional restoration* of those traumatised by crime. It does so by engaging victim, offender and community *actively* in the attempted elimination of crime's adverse side-effects.[26] And the traditional means by which restorative justice seeks to empower crime's diverse stakeholders is through its prized procedural centrepiece – victim-offender mediation (hereinafter abbreviated to VOM).[27] Here, offender and victim are treated

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[21] Marshall, *Restorative Justice: An Overview* (HMSO, 1999), at 5.
[22] For an overview of restorative justice, see the following seminal texts, Strang and Braithwaite eds., *Restorative Justice: Philosophy to Practice* (Ashgate, 2000); Consedine, *Restorative Justice: Healing the Effects of Crime* (Ploughshares, 1999); McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.*; Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 1990); Zehr and Toews eds., *op. cit.*; Hudson and Galaway, *The Practice of Restorative Justice* (Criminal Justice Press, 1996); Marshall, *op. cit.*; Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan, 2002).
[23] *Infra*, at 49-86.
[24] Braithwaite, "Principles of Restorative Justice" in von Hirsch, Bottoms, Roach and Schiff eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart, 2003) 1.
[25] *See* Gustafson, "Is Restorative Justice Taking Too Few or Too Many Risks?" in Zehr and Toews eds., *op. cit.* 303, at 303.
[26] *Infra*, at 190-224.
[27] *Infra*, at 184-189.

as "owners" of the conflict between them.[28] Accordingly, they maintain a high degree of involvement and control in its resolution.[29]

Emotional restoration is so critical to restorative justice because, by promoting mediated consensus between adversaries and re-integrating society by restoring at the very least, some modicum of mutual tolerance or understanding, it serves the more fundamental ambition of maintaining wider social harmony. Of course, this ambitious aspiration requires a system of supportive instructions mapping out how it can practically achieved.

To this end, restorative justice has developed its own *value-system*, which is specially designed to enable the paradigm to accomplish its elaborate goals. It enumerates a blend of principles that have accumulated naturally into a cohesive unit due to their combined contribution towards the tripartite restorative goal of *community harmonisation* through *social integration* through *emotional healing*. The significance of restorative principles such as compensation, healing, relationship re-building, rehabilitation, apology, forgiveness and victim-involvement is discussed in Chapter 2's deconstructive overview of the restorative value-system's colourful ancestry.

Restorative justice's classification as a *value-system* conveys that it is a complex, composite concept that is more than the sum of its parts; it is the unique work-product produced by the synergistic amalgamation of several elemental restorative values that co-operate in the interests of greater social harmony. This complex blend of values can therefore be conceptualised as *eligibility criteria* that must be borne in mind when attempting to diagnose a given practice as a *genuine* expression of restorative justice. Hence, the observation of a comprehensive complement of restorative principles is the basic litmus-test for restorative justice.

True restorative justice is the result of fusing as many of its philosophical and practical bastions as are reasonably applicable under the circumstances.[30] Chapter 2 supports this perspective by identifying an ancient and instinctive human tendency – transcending time, location, ethnicity and religion – to *blend* restorative principles and practices in the interests of community harmony.

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[28] On the concept of dispute "ownership", see generally, Christie, "Conflicts as Property" (1977) 17(1) *British Journal of Criminology* 1.

[29] Consedine, "Restorative Justice: The Christian Option", at para. 39. <http://www.stalbans.org.nz/teachings/guests/consedine.htm> (visited 17 November 2005); *infra*, at 190-214.

[30] *Infra*, at 67, 187.

3. Impostors, Look-alikes, Phonies and Dupes: Will the Real RJ Please Stand Up?

The treatment of restorative justice as a value-system is one of two fundamental characterisations of the concept adopted by this thesis that are integral to its findings, yet whose implications carry different weight. The first is its exclusive endorsement of *court-annexed* expressions of adult restorative justice.[31] However, this limited focus is not intended to suggest that non-annexed techniques cannot administer "restorative justice". It merely conveys – for several reasons discussed below[32] – a *preference* for those manifestations of restorative justice that *do* involve state-referral. Alison Morris is correct in her assertion that:

> [t]he essence of restorative justice is not the adoption of one form rather than another; it is the adoption of *any* form which reflects restorative values and which aims to achieve restorative processes, outcomes and objectives.[33]

On the other hand, the "value-system" classification of the concept *does* disqualify practices and philosophies falling outside of its parameters as forms of "restorative justice" and dissociates them from the benefits that this thesis associates with the paradigm. This second classification, unlike the first, is not an expression of preference for one of many "types" of restorative justice; rather, it insists that this "value-system" is the *only* package in which genuine restorative justice can realistically present itself.

Ascribing this composite identity to restorative justice has further consequences for the scope of this thesis. Delineating the dimensions of the paradigm and setting clear boundaries within which its analysis is to be firmly reined, separates genuine restorative justice as understood herein from practices that exceed its definitional limits. In other words, defining what restorative justice *is* also implies what it is *not*. Furthermore, it insulates the "real thing" from objections directed at "impostors, look-alikes, phonies and dupes". By this is meant the philosophies and practices that are confused with restorative justice either intentionally or unintentionally; they either imply a restorative identity deliberately themselves or it is mis-inferred from various external resemblances.

Problems arise when restorative justice suffers the reputation-blow inflicted when impostor practices are condemned in its name. It is vital, in this respect, that restorative justice evades mis-placed attacks on its credibility by dissociating itself from several key processes that are wrongly equated with it within critical academia. The mis-diagnosis of restorative justice evidences a pronounced carelessness in verifying the presence of its

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[31] Of court-annexed processes, a combination of Victim-Offender Mediation (VOM) and Offender Reparation Schemes (ORP) is favoured herein for their ability to implement jointly restorative justice's diverse value-system; *infra*, at 184-189.

[32] *Ibid.*

[33] Morris, "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42(3) *British Journal of Criminology* 596, at 600. [author's emphasis]

various component values within so-called "restorative" processes. Worse still, it might indicate ambivalence, confusion or ignorance about what those components *actually are*.

A trend has emerged amongst those who evaluate restorative criminal justice – from both pessimistic *and* optimistic camps – to rely blindly on prior mis-diagnoses. Critics and advocates alike are inclined to treat *as reliable precedents* previous evaluations of restorative justice that detect it erroneously within counterfeit practices. Worryingly, an assumption that was originally the product of a chain of careless association and lazy academic groundwork can gradually acquire the veneer of an academic certitude. This section aims to undo some of this damage and *set a better precedent* by disqualifying as restorative justice several common forgeries.

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Viewing restorative justice as a chain of interlinking principles, which cannot be broken without a fundamental loss of identity, means that those practices featuring only isolated links cannot claim legitimately to administer full restorative justice. That is not to suggest that the links they *do* possess, for instance a concern for rehabilitating offenders, cannot be restorative in intent; rehabilitation is a cherished component of the restorative value-system in that it aims to restore offenders, yet *alone*, it cannot be used to express restorative justice because it is not locked within a greater chain of restorative principles.

There are several important practices that may possess one or more restorative intention(s) but whose isolation from a supportive cocoon of like-minded co-operative restorative principles undermines their ability to practice "restorative justice". It is crucial, in order to contextualise the findings that follow, that such practices are disconnected from the potential benefits of real restorative justice. However, it is equally important to divorce genuine restorative justice from the *demerits* of its look-alikes. Eliminating the "phonies and dupes" from the equation now as a matter of house-keeping is an important prelude to the extensive evaluation of true restorative justice that follows.

3.1 Community Justice

While the two movements tend to be used interchangeably, and in fact have much in common,[34] it is important to distinguish between restorative justice and "community justice". The confusion of the two paradigms is, to some degree, understandable. Restorative justice places special emphasis on the role of community in neutralising the results of crime.[35] The

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[34] *See* Crawford and Clear, *loc. cit.*

[35] *See* McCold, "What is the Role of Community in Restorative Justice Theory and Practice?" in Zehr and Toews eds., *op. cit.* 155; see also, Zehr and Mika, "Fundamental Concepts of Restorative Justice" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.*, at 42.

community is considered a collective stakeholder in the aftermath of wrongdoing which, like victim and offender, is thought to suffer in its own unique way at the hands of crime.[36] In accordance with this principle of community-recognition, interventions of restorative justice typically take place at a grass-roots, community-level and seek to involve community representatives actively in the alleviation of the social disharmony that crime provokes. As such, restorative justice can be classified safely as a form of community justice.

Yet, the opposite is not necessarily the case; there is no rational basis for deducing that because a mediative technique takes place in the community, involves residents, or claims to administer "community justice" that it is necessarily a form of "restorative justice". Because restorative justice is a value-system, evidence of just one of its constituent restorative principles, e.g. community involvement, does not indicate presumptively the presence of a supportive *network* of restorative values that would otherwise qualify the process as genuine restorative justice. In fact, community justice can manifest itself in policies that are decidedly un-restorative.

> [Community justice] embraces a much wider array of strategies including crime prevention schemes that fall well outside the restorative justice domain ... Such disparate ideas as "zero-tolerance policing", community courts, Neighborhood Watch, and police-probation partnerships can be promoted under the community justice banner ... [37]

Indeed, "community justice" could include justice methods that are significantly *more* repugnant to the values of restorative justice than a zero-tolerant crime policy.[38] While restorative justice values the private, community-driven rectification of crime-induced trauma free from *excessive* state-intrusion, this does not mean that any form of "private justice" is necessarily restorative.

In fact, vigilantism and private vengeance could fall within the related rubrics of "community justice", "community crime prevention",[39] "private justice" or "informal justice",[40] yet they are both fundamentally repellent to restorative justice's peaceful ethic of *dialogic*, negotiated consensus. Still, some fear that systems of restorative justice will effectively legitimise vigilantism.[41]

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[36] *Infra*, at 124-179.
[37] Crawford and Clear, *loc. cit.*, at 216.
[38] *Infra*, at 352.
[39] *Infra*, at 147.
[40] *Infra*, at 61, 238, 307, 336.
[41] von Hirsch and Ashworth eds., *Principled Sentencing* (Hart, 1998), at 303.

As Chapter 5 explains, restorative initiatives such as Truth and Reconciliation Commissions (TRCs) provide valuable mechanisms for re-establishing peace in post-conflict societies.[42] There is a fear, however, that restorative justice could actually *erode* order in conflict-riven societies that are still in the midst of civil unrest. For instance, concern has been voiced that the introduction of *Community Based Restorative Justice* (CBRJ) in loyalist and republican communities in Northern Ireland will do little more in practice than open the floodgates to violent forms of private vengeance and paramilitary justice.[43]

In response to such attempts to equate restorative justice and private "blood-feud", it can be argued that their elemental philosophical incompatibility practically precludes their convergence. In other words, any process that permits acts of private vengeance under its auspices, whether intentional or not, is *simply not an expression of restorative justice* because it offends the basic principle of peaceful non-domination that restorativism seeks to preserve:

> Of course, holding the threat of a punishment beating, of knee-capping, over the head of a person is an intolerable violation of the principle of non-domination. Common ground among all the restorative justice initiatives in Northern Ireland seems to be to transcend this particular form of domination, though there are competing visions of how to accomplish this.[44]

Perhaps it is the case that maintaining state-involvement in *Community Based Restorative Justice* will reduce the likelihood of its *subversion* by violent reprisals.[45] Nevertheless, those techniques that accommodate private vengeance as a form of "community justice" or in the hijacked name of "restorative justice" cannot rationally be equated with the communitarian, non-violent and non-coercive ways of genuine restorativism. As Morris stresses:

> It is true that community justice can be repressive, retributive, hierarchical and patriarchal. But these values are fundamentally at odds with the defining values of restorative justice and cannot, therefore, be part of it.[46]

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[42] *Infra*, at 202-205.

[43] FitzGerald, "Vigilante Groups May be Given Control of the Law" *The Irish Times*, 21 January 2006; FitzGerald, "North's Justice Scheme Threatens Democracy" *The Irish Times*, 4 February 2006; Millar, "Exclude IRA Members from Scheme, Say Tories" *The Irish Times*, 11 January 2006; Millar, "Exclude IRA Members from Scheme, Say Tories" *The Irish Times*, 18 January 2006; Millar, "Policing Board Rejects British Proposals" *The Irish Times*, 19 May 2006; Millar, "SDLP's Wary Response to Hain's Views on Justice" *The Irish Times*, 22 May 2006; Moriarty, "Board Warns Against 'Two-Tier Policing'" *The Irish Times*, 6 December 2005; Moriarty, "SDLP Rejects Criticism of its Justice Scheme" *The Irish Times*, 11 January 2006.

[44] Braithwaite, "Setting Standards for Restorative Justice" (2002) 42(3) *British Journal of Criminology* 563, at 566.

[45] Ashworth, *loc. cit.*, at 169.

[46] Morris, *loc. cit.*, at 609; see also Morris and Young, "Reforming Criminal Justice: The Potential of Restorative Justice" in Strang and Braithwaite eds., *op. cit.* 11, at 23.

This re-emphasises the danger in inferring a comprehensive restorative value-system from the existence of merely one of its principles, any of which are vulnerable to being implemented individually in ways that *insult* true restorativism. Of course, there are degrees of offensiveness to authentic restorative justice. Isolated restorative values may be invoked in a manner that is just shy of the eligibility criteria that would otherwise qualify it as restorative justice.

Moreover, none of this is to suggest that disputing or crime-control customs that are mistakenly associated or aligned with restorative justice, no matter how remiss they are in implementing its full range of values, are inherently without merit. They are neither presumptively ineffective nor socially undesirable – rather, *they are simply not restorative justice* and therefore fail to deliver the unique benefits that this thesis connects thereto. After all, giving life to one restorative principle, whatever its context and though not as socially therapeutic as a complete restorative value-system, is better than eschewing restorative aspirations altogether. It is a footstep along the path to full restorativism.

Finally, while it would be a mistake to infer the existence of a restorative value-system *presumptively* from the existence of just one operative restorative principle, it is possible, where there is *observable evidence* that a form of "community justice" is actually implementing such a value-system, that it *is* in fact administering restorative justice. As Crawford and Clear advise:

> ... when community justice initiatives aim to improve quality of life for victims, offenders, families, and neighbors who happen to live in a place of high crime, then restorative case outcomes may be an important part of the overall approach.[47]

3.2 Victim support

As the chapters that follow will reveal, a prime value occupying restorative theory is the importance of assisting victims in the wake of crime by actively involving them in co-ordinated efforts to annul crime's adverse effects.[48] However, again, just because a process observes one isolated restorative principle does not qualify it as restorative justice; victim-assistance will not indicate restorative justice presumptively in the absence of a supportive scaffold of interlocking restorative goals, such as the rehabilitation offenders or the re-harmonisation of community relations.

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[47] Crawford and Clear, *loc. cit.*, at 216.
[48] *Infra*, at 196-208.

Andrew Ashworth stresses that, despite their common ground,[49] victims' rights developments and restorative justice are not necessarily the same thing and should not be confused.[50] Restorative justice's support for victims' rights does not mean that every alternative project that endeavours similarly is consequently invested with a capacity for restorative justice. Hence, the introduction of Victim Impact Statements[51] as well as the publication of Victims' Charters[52] in criminal justice, while motivated by a concern for victim restoration and arguably a positive step towards remedying a specific imbalance in criminal justice,[53] is not *in and of itself* an expression of restorative justice. An interest or practice can have restorative motivations, but cannot be said to be part of the greater deed of restorative justice without its submersion within a more complex restorative game-plan.

> Positive and welcome as most of these initiatives are, they concern victims' rights and are not RJ. They are attempts to remedy deficiencies in the existing (adversarial) system for the administration of criminal justice, rather than parts of a movement towards a different kind of conflict resolution.[54]

3.3 Rehabilitation

Though an important goal of restorative justice,[55] the rehabilitation of offenders provides yet another example of a restorative practice which, acting alone, must be distinguished from it. Rehabilitative strategies that take place in abstraction from a supportive network of restorative principles cannot be described as producing restorative justice. Examples of such strategies are rehabilitative treatment plans within prisons as well as rehabilitative orders falling into the category of non-custodial sentencing alternatives,[56] such as probation orders,[57] orders of recognisance,[58] adjourned supervision,[59] dismissal and

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[49] Achilles, "Can Restorative Justice Live Up to its Promise to Victims?" in Zehr and Toews eds., *op. cit.* 65, at 71-73; Stutzman and Amstutz, "What is the Relationship Between Victim Service Organizations and Restorative Justice?" in Zehr and Toews eds., *op. cit.* 85; Maguire and Corbett, *The Effects of Crime and the Work of Victims Support Schemes* (Gower, 1987), at 224-225.
[50] *See generally*, Ashworth, *loc. cit.*
[51] *Infra*, at 104-105.
[52] *Infra*, at 106.
[53] *Infra*, at 109-110.
[54] Ashworth, *loc. cit.*, at 165.
[55] *Infra*, at 216.
[56] *See generally*, O'Malley, *Sentencing Law and Practice* (Round Hall Sweet and Maxwell, 2000), at 279-337; Seymour, *Alternatives to Custody* (Business in the Community Ireland in Association with the Irish Penal Reform Trust, 2006), at 6-11. <http://www.iprt.ie/files/iprt/alts_to_custody_report.pdf> (visited 19 February 2007).
[57] Probation of Offenders Act, 1907, s. 2
[58] *See* Misuse of Drugs Act, 1977, s. 28 as amended by the Misuse of Drugs Act, 1984.
[59] Despite its lack of a statutory basis, adjourned supervision has become a common judicial practice in Ireland: see Seymour, *op. cit.*, at 8.

conditional discharge,[60] and suspended sentences.[61] All of these orders can contain curial compulsions to seek treatment for problematic behaviour and/or addictions.

However, to take part in restorative justice, as Bazemore and Bell warn, treatment plans for offenders must be accompanied by measures directed holistically at victims and communities; they must address *other* key restorative values, looking beyond their primary subjects:

> Treatment programs, no matter how effective, are not in themselves restorative. However, such programs can be carried out in more or less restorative ways when these interventions also take into account, to the degree possible, the needs of victims and community.[62]

To this end, Bazemore and Bell propose a "restorative model of rehabilitation"[63] which embeds treatment efforts, as this thesis embeds *all* truly restorative practices, within the context of restorative justice's grander ambition of social harmony: "Working in congruence with each other, the goal for all intervention outcomes is repair, healing and relationship building".[64]

For instance, Ireland's three pilot strategies of restorative justice, analysed more fully in Chapter 8,[65] often include rehabilitative treatment plans similar to those that accompany the non-custodial curial orders mentioned above, but *unlike* court-ordered rehabilitation, they are rooted, as far as possible,[66] in a greater framework of reconciliation and victim-healing.

This is where prison treatment programmes and rehabilitative judicial orders might be perceived to fall short. Prison has been attacked avidly for the alleged deficiencies of its rehabilitative agenda owing to the *unrestorative* and potentially *de-habilitative* environment in which its treatment schemes are embedded.[67] But even in those prisons whose conditions accommodate rehabilitation adequately, victim- and community-needs are unlikely to be met simply because their interests fall outside imprisonment's customary job-description.

Similarly, non-custodial sentencing alternatives with rehabilitative add-ons cannot be classed as expressions of restorative justice, primarily because they focus with excessive exclusivity on offenders. However, they are further isolated from restorative justice because

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[60] Probation of Offenders Act, 1907, subs. 1(1).
[61] The suspended sentence was afforded a statutory basis for the first time by the Criminal Justice Act, 2006, subs. 99(4).
[62] Bazemore and Bell, "What is the Appropriate Relationship between RJ and Treatment?" in Zehr and Toews eds, *op. cit.* 119, at 119.
[63] *Ibid.*, at 120-122; see also, Bazemore and O'Brien, "The Quest for a Restorative Model of Rehabilitation: Theory-for-Practice and Practice-for-Theory" in Walgrave ed., *Restorative Justice and the Law* (Willan, 2002) 31.
[64] Bazemore and Bell, *loc. cit.*, at 121.
[65] *Infra*, at 310-319.
[66] *Infra*, at 187.
[67] *Infra*, at 38-41.

their intrinsic rehabilitative value – a mainstay of restorative justice's value-based to-do list – can also be called into question.

It is possible that the rehabilitative potential of probation, compensation,[68] community service orders[69] and fines is eroded by their failure to teach offenders a "moral lesson". They prescribe and proscribe positive and negative conduct respectively but they do so *without* providing offenders with a direct means of *realising* and *understanding* the moral turpitude of their actions. And, there is no reason to assume that such orders, without doing more, are capable of providing offenders with the "moral education" that moral reform theory[70] deems necessary to catalyse a rehabilitative response. Offenders may well be specifically deterred[71] to some degree by the fearsome prospect of onerous non-custodial penalties, yet they are unlikely to *rehabilitate* unless they are somehow made to truly appreciate and regret their immorality.

> Probation sets limits on what an offender can do. It may require him to stay away from bad influences and try to keep a job, but it doesn't try to show him what he did was wrong. Likewise, community service may introduce the offender to the virtues of helping others, but it too does nothing to show the offender why what he did was wrong. And fines simply transfer wealth from the offender to the state. What's the moral lesson there?[72]

Restorative justice's characteristically holistic vantage point also removes it from the more restricted focus of the "therapeutic jurisprudence" movement,[73] which proposes a "therapeutic" model of criminal justice that places a heavy emphasis on the treatment of offenders. For instance, the therapeutic jurisprudence perspective endorses the use of drug-treatment courts for offenders, such as that currently in place in Dublin.[74] Nevertheless, even this undoubtedly valuable form of healing justice – which admittedly aims to *restore* – cannot be defined as full restorative justice, without *extending* its healing touch to victims and communities, when and where their needs can also be met. Although restorative justice

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[68] *Infra*, at 106-108.
[69] *See* Criminal Justice (Community Service) Act, 1983.
[70] *See* Hampton, "The Moral Education Theory of Punishment" (1984) 13 *Philosophy and Public Affairs* 208; Garvey, "Can Shaming Punishments Educate?" (1998) 65 *University of Chicago Law Review* 733.
[71] *Infra*, at 252.
[72] Garvey, *loc. cit.*, at 771.
[73] For an overview of the therapeutic jurisprudence movement, see generally, Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); Wexler, "Therapeutic Jurisprudence" (2004) 20 *Touro Law Review* 353; Wexler and Winnick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996); Schma, "Therapeutic Jurisprudence: Recognizing Law as One of the Healing Arts" (2003) 82 *Michigan Bar Journal* 25.
[74] *Infra*, at 308; Fulton Hora, Schma and Rosenthal, "Therapeutic Jurisprudence and the Drug Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America" (1999) 74 *Notre Dame Law Review* 439.

is capable of absorbing the rehabilitative thrust of therapeutic jurisprudence,[75] and in this sense the two are certainly like-minded, the variation in their relative scopes mean that they are far from interchangeable.

All of these rehabilitative initiatives belie the holistic schema of true restorative justice. That said, it is incorrect to presume that rehabilitative measures operating just beyond the boundaries of restorative justice are inherently unsuited to their task. Though Bazemore and Bell would insist that restorative rehabilitation is likely to work more effectively than less holistic models,[76] there is no reliable basis for concluding that the latter offer innately deficient answers to the problem of rehabilitating offenders. Such models will inevitably work with varying degrees of success from site to site – variability in their abilities to rehabilitate is assumed. What *cannot* be assumed, however, is their classification as restorative justice.

3.4 Alternatives to Custody

Alternatives to custody cannot be diagnosed reliably as expressions of restorative justice. This is because it is unsafe to classify restorative justice as a necessary alternative to custodial penalties.[77] While restorative justice and imprisonment might appear to share a *prime facie* incompatibility, this thesis operates from the fundamental premise that they are mutually tolerant paradigms.[78]

At the very least however, though differently-focused and certainly differently-abled, restorative justice and traditional retributive responses to crime such as incarceration are treated herein as co-operative post-crime devices of *equal* importance. Although restorative justice views imprisonment as the last resort in sentencing and undoubtedly *prefers* to operate as an alternative thereto, nothing in its value-system rejects outright the ubiquitous need to incapacitate dangerous offenders under fitting circumstances.[79]

A golden thread that will re-appear time and again throughout this thesis is its insistence that restorative justice should not be used to completely subvert or conclusively supplant traditional state-administered penalties,[80] which are, on their own merits, indispensable instruments of social-control. As Seán Aylward, the Secretary General of Ireland's Department of Justice has stressed when contemplating a prospective model of

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[75] Immarigeon, "Can Drug Courts & Restorative Justice Co-Exist?" (2003/4) 16 *VOMA Connections* 4 <http://voma.org/docs/connect16.pdf>
[76] *See* Bazemore and Bell, *loc. cit.*
[77] *Infra*, at 378-383.
[78] *Infra*, at 214-215, 329-335, 378-383.
[79] *Ibid.*
[80] *Ibid.*

restorative criminal justice in Ireland, restorative justice must be "rooted within the jacket of the criminal justice system" and should not be permitted to become a "state within a state".[81]

It is important to emphasise here that mainstream answers to crime include not only traditional punitive responses such as imprisonment but also more contemporary, less incursive non-custodial penalties such as community service orders and suspended sentences. Non-custodial orders like these may appear to share more with restorative justice than the punitive tradition out of which they grew. After all, as emphasised above, some non-custodial obligations, by requiring offenders to pursue therapeutic counselling, aspire towards the important restorative goal of rehabilitating offenders. However, the *isolation* of this rehabilitative goal from a *full range* of restorative objectives disqualifies such orders as restorative justice.[82]

Therefore, the punitive thrust of contemporary sentencing methods need not equal that of incarceration to distance them from restorative justice. All existing sentencing conventionalities, regardless of the variations in their punitive vigour that have crept in as criminal justice has diversified gradually over time, should be viewed *in parallel* with restorative justice, *unless* they implement a comprehensive system of restorative values. Mainstream and restorative frameworks can feasibly occupy distinct philosophical spheres while still co-operating within the same operational domain. There is no need to blur their boundaries in an unconvincing attempt to force them together. For, with mutual tolerance and co-operation, diversity between differently-abled sentencing paradigms is a good thing – it promotes quality through choice.[83]

3.5 Shaming

As Chapter 6 reveals, restorative justice must be distanced from the process of deliberately "shaming" offenders in the interests of their rehabilitation.[84] There are various models of so-called "reintegrative shaming" in place around the world that claim to derive their restorative identity from their shaming agendas.[85] Yet, the intentional arousal of shame in offenders is entirely at odds with restorative justice because it ultimately serves to *reinforce* rather than reverse offenders' feelings of disempowerment in crime's aftermath.[86]

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[81] Seán Aylward, speaking to the Oireachtas Committee on Justice, Equality, Defence and Women's Rights, cited in Wall, "Group to Produce New Proposals on Restorative Justice" *The Irish Times*, 19 October 2006.
[82] *Supra*, at 8.
[83] *Infra*, at 354.
[84] *Infra*, at 243-249.
[85] *Infra*, at 244.
[86] *Infra*, at 243-249.

Shame is a generally adverse emotion that Chapter 3 associates with victims' and offenders' experience of the post-crime period.[87] It erodes perceptions of self-worth and if anything, impedes emotional closure and reform. On the other hand, restorative justice seeks to *undo* the enfeebling emotions – including shame – that can afflict victims and offenders alike in crime's wake. It achieves this, as Chapter 5 explains, by *empowering* crime's primary stakeholders with a high level of involvement and knowledge in its remedial processes.[88]

This is not to suggest that so-called "shaming ceremonies" cannot administer restorative justice. In fact, as Chapter 6 speculates, their empowering, rehabilitative successes are probably *because* of their factual restorative identities and not their fictional ability to shame. Shaming can be considered a "phantom" accompaniment to restorative justice. That "shaming" is even taking place in a so-called "shaming ceremony" can be little more than an illusion. While its arousal may or may not occur as a natural incident of an offender's coming to terms with his wrongs, its *intentional* arousal and its *manipulation* towards rehabilitative ends are elusive tasks impeded by the mental autonomy of its hosts – neither task can be reliably performed or verified.[89]

Shaming is ultimately humiliating, disempowering and prohibitive of personal transformation. When and where it is encountered, it must be resolutely attacked if emotional healing is to take place. However, if and where emotional empowerment is achieved under the perceived auspices of a "shaming" figment, it can be more rationally attributed to the implementation of a restorative value-system that operates beneath the opaque smokescreen of "reintegrative shaming". As Chapter 6 concludes, while the deliberate "shaming" of wrongdoers can be an imaginary accompaniment to real restorative justice, its intentional pursuit lies strictly outside of a restorative value-system.

4. Reasons for Caution

4.1 Introduction

Several significant objections to restorative justice underlie this chapter's call for balance in gauging the desirability of its integration into Irish criminal justice. Its appeal to emotions and its elemental desire for peace and order makes restorative justice relatable on a human level. This has prompted Levrant and associates to surmise that restorative justice's appeal "lies more in its humanistic sentiments than any empirical evidence of its

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[87] *Infra*, at 87-123.
[88] *Infra*, at 190-214.
[89] *Infra*, at 247.

effectiveness".[90] As Chapter 2 will illustrate, restorative justice is a mode of conflict resolution that has been used nigh-instinctively throughout history to re-knit the social relations that crime is perceived to rupture. There is, however, a *danger* in its emotional appeal, which is arguably responsible for the undue optimism, idealism and exaggeration that weaken various corners of scholarship on restorative justice.[91]

The following section recites, by way of introduction, key objections to restorative justice, the majority of which will be considered more deeply later. These concerns stimulate a tone of balance and care to contextualise but also *to temper* the confidence this thesis derives from the chapters that follow about the potential for an integrated model of restorative criminal justice in this country.

There are various platforms from which people seek to challenge restorative justice. Some question its ability to make good on its bold promises. Others attack the deficiencies of practices and philosophies that they have *mis-diagnosed* as restorative justice, such as informal justice, community justice or shaming practices, which were expressly *dissociated* from restorative justice above.[92] Other critics question restorative justice's ability to meet the various standards set for conventional criminal justice, such as proportionality and procedural fairness. However, the breadth of dissent on restorative justice can be captured within six distinct categories expanded below: empirical weakness,[93] harmful consequences,[94] unrealistic expectations,[95] incompatibility with the values of criminal justice,[96] incompatibility with the prevailing consensus on criminal justice[97] and misplaced objections.[98]

A flexible principle that recurs when responding to various criticisms of restorative justice is that the paradigm should not be expected to meet standards higher than those customarily set for and/or met by mainstream criminal justice. Rather, it should be measured against the claims specifically made for it – the benchmarks it characteristically sets itself. In particular, "... restorative justice should not be criticized for not solving an issue that has plagued conventional justice systems for years."[99]

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[90] Levrant, Cullen, Fulton and Wozniak, "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited" (1999) 45(1) *Crime and Delinquency* 3, at 16.
[91] *See* Daly, "Restorative Justice: Moving Past the Caricatures", Restorative Justice and Civil Society Conference, Australian National University, Canberra, 16-18 February 1999. <http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper2.pdf> (visited 19 May 2006); Daly, "Restorative Justice: The Real Story" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.*, 195.
[92] *Supra*, at 8-17.
[93] *Infra*, at 19.
[94] *Infra*, at 20.
[95] *Infra*, at 22.
[96] *Infra*, at 26.
[97] *Infra*, at 29.
[98] *Infra*, at 31.
[99] Morris, *loc. cit.*, at 601.

Restorative justice is no panacea for every ill considered to de-stabilise conventional justice systems nor should it be "oversold"[100] as such. It must be borne in mind, then, when processing the voice of dissent paraphrased below, that restorative justice is endorsed in its own right; as such, it should be neither condemned nor marginalised for its inability to provide some kind of magic cure-all for every flaw or limitation thought to beset criminal justice's long-standing *status quo.*

4.2 Empirical Weakness

Some critics set their sights on restorative justice as an empirically weak phenomenon, which as such, cannot yet deserve the respect it commands.[101] Though a paradigm of ancient descent, as Chapter 2 will reveal,[102] the newer "second-wave" of restorative justice is of more recent vintage – the first modern-day revival of restorative justice came as late as the mid-1970s.[103] The result of this *newness* is an unavoidably "thin empirical record"[104] that is starved of authority by necessarily brief evaluation periods – a factor that denudes the overall cogency of even the most propitious interim empirical overtures to the concept's effectiveness in reaching its goals.

However, three important factors are invoked throughout this thesis, which downplay the corrosive influence that restorative justice's weak empirical profile exerts over the paradigm's credibility. First, though necessarily inconclusive due to limited temporal perspective on past restorative events, the available empirical data considered herein that reflects positively on restorative justice, is at the very least, promising.[105] While time will eventually tell the degree of optimism that befits restorative criminal justice, statistics considered herein *have value* – they accommodate a cautiously positive and hopeful response to the paradigm's admittedly lofty claims.

Second, it is fair to surmise that a proportion of the scepticism about restorative justice's empirical strength derives from the improbability of it living up to the *wild claims* set for it by some of its advocates. Emotional or "evangelical" accounts of restorative justice read as rash worship driven more by obedient "faith" in a restorative "creed" than level-headed objective persuasion. When restorative justice is treated with blind optimism or as an

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[100] Ashworth, *loc. cit.*, at 176; Daly, "Restorative Justice: The Real Story", *loc. cit.*, at 195; Daly, "Restorative Justice: Moving Past the Caricatures", *loc. cit.*

[101] Ashworth, *loc. cit.*, at 174.

[102] *Infra*, at 80-83.

[103] The Canadian Mennonite Church was behind the first real modern attempt to revive restorative justice when in 1974, a victim-offender reconciliation programme was established by a Mennonite probation officer in Kitchener, Ontario; see Peachey, "The Kitchener Experiment" in Wright and Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Sage, 1989) 14.

[104] Daly, "Restorative Justice: The Real Story", *loc. cit.*, at 195.

[105] *Infra*, at 229-230, 237.

article of faith, excessive claims are made for it that empirical data, regardless of its bulk, is unlikely to meet.

Restorative justice must be judged on its own merits and not on its ability to outperform conventional criminal justice. As such, it must be proven worthy of integration into the criminal justice system in its own right, not simply as an ameliorative device. While restorative justice may or may not patch up deficiencies in criminal justice from case to case, its introduction should be unreliant on such an ability, which is, if and when it arises, a mere *fringe benefit* of an independently beneficial and justifiable regime.[106] The case for restorative criminal justice should not rest on its supremacy over traditional criminal justice, but on its own unique abilities and its potential to augment the quality of criminal justice *by diversifying it.*[107]

Andrew Ashworth observes that "[m]uch of the evidence fails to achieve the standards which ought to be expected if assertions of superior effectiveness are to be made."[108] This is unsurprising. Endorsements of restorative justice should abandon inflated expectations and adopt more realistic justifications for its integration into criminal justice. By setting it realistic, attainable standards and resisting unrestrained excitability, the empirical data yielded by restorative practices are more likely to be afforded the weight they realistically deserve.

Third and finally, the case for restorative criminal justice made herein is not only empirically-based. It is the result of combining statistical *and theoretical* evidence. The influence of theoretical data is emphasised below where its ability to *strengthen* the tentative confidence stirred by superficially positive empirical data is stressed.[109]

While the limitations of available statistical endorsements of restorative justice account partially for the first half of this thesis' cautiously optimistic approach, the aforementioned three factors contribute to the second.

4.3 Harmful Consequences

A significant criticism of restorative justice is that it threatens to do more harm than good for victims and offenders.[110] Yet, practices that harm rather than heal crime's stakeholders by eschewing fundamental components of the restorative value-system are not and cannot be considered expressions of restorative justice. The identification of flawed, incomplete attempts at implementing a system of restorative values – particularly those

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[106] *Infra*, at 38-41, 109-110.
[107] *Infra*, at 48, 354, 359, 367-369, 380.
[108] Ashworth, *loc. cit.*, at 174.
[109] *Infra*, at 46-47.
[110] *Infra*, at 225-250.

whose restorative intentions yield *anti-restorative* results on a consistent basis – is not a sound basis for attacking genuine restorative justice.[111]

Bad practice in forums that claim to administer restorative justice simply nullifies that claim retrospectively.[112] Techniques that start out administering restorative justice can be divested of that ability by poorly safeguarded standards. It is, however, illogical to blame the defects of initiatives meeting that fate on a justice model that those defects preclude them from implementing. Instead, the logical targets of critique are the individuals responsible for establishing and operating regimes blighted by bad practice – not their unfulfilled restorative goals. Good intentions cannot rationally be punished for their subversion by bad conduct.

Nevertheless, the risk that prospective strategies might be stripped of their restorative identity by *harming* those sought to be *helped* is a reason for justifiable caution.[113] As such, aspects of restorative justice that are alleged to fuel its potential for harm must be taken seriously. On the other hand, as Chapter 6 insists, the more those aspects can be minimised or proved irrelevant or inapplicable to the particular vision of restorative justice endorsed herein, the more reasonable and absorbable is the element of risk involved in integrating restorative justice into established sentencing patterns.[114]

Although an inevitable risk that will threaten *any* criminal justice model, the potential for restorative justice to further disempower its already socially and legally disempowered participants[115] holds special significance when a strategy *specifically promises* empowerment, healing and restoration for victims and offenders. After all, it is such strategies that will receive the most scrutiny in this respect. Therefore, the risk of u-turning from its original palliative purpose to actually *harm* wrongdoer and wronged is a worthy cause for caution when integrating restorative justice into conventional criminal justice. Accordingly, the alarm-bells raised by those who oppose it on this basis should be earnestly heeded.

On the other hand, Chapter 6 will prove restorative justice's threat of harm to victims and offenders alike to be (a) smaller, (b) not as problematic and (c) easier to overcome, than its critics would maintain.[116] Consequently, the *prima facie* caution that its risk of damaging crime's primary stakeholders inspires is off-set by the optimism mustered when that risk is properly measured and contextualised.

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[111] *Infra*, at 250.
[112] *Infra*, at 232-233, 242-243.
[113] *See* Gustafson, *loc. cit.*, at 305.
[114] *Infra*, at 250.
[115] *Infra*, at 87-123.
[116] *Infra*, at 225-259.

4.4 Unrealistic Expectations: Four Doubts about Restorative Justice

Another reason for treading cautiously when contemplating an integrated model of restorative criminal justice is the ambitiousness of its objectives. Doubt is routinely expressed about restorative justice's ability to reach its elaborate targets. However, in order to reasonably back plans to inject it into mainstream criminal justice, dubiousness about restorative justice must be transformed into confidence. Still, that confidence must be moderated – *not crushed* – by sensible, proportionate amounts of caution and care, which can be measured by calculating the validity, relevance and gravity of four chief doubts expressed regularly about the feasibility of restorative justice's various objectives.[117]

4.4.1 Doubts about the Prospect of Voluntary Offender-Participation

Some perceive *informal justice* as a disingenuous legal mechanism that uses latent forms of coercion to dupe its participants into "choosing" its processes. [118] This is thought to override people's free-will and covertly demote to a mere "fiction"[119] the voluntariness of their accession to informal forums. Restorative justice, which is characteristically, though not integrally,[120] administered in informal environments, has not escaped this criticism.[121] Chapter 6, however, responds to such a qualm with four important rejoinders that discredit restorative justice's coercion-based assault.

First, as Chapters 6[122] and 9[123] demonstrate, resisting using restorative justice as a necessary alternative to mainstream criminal justice will reduce the incentive to feign compliance with it. This thesis proposes treating restorative justice as either an alternative *or a complementary* treatment-avenue for offenders, depending on the unique features of the crime and criminal in question. This assertion harmonises with the call issued throughout this thesis for a diverse and holistic "treatment menu" from which judges should select freely so that they can *customise* offenders' post-crime obligations.[124]

Secondly, a degree of coercion is inevitable in any system of criminal justice – whatever its philosophy of choice – that seeks to hold wrongdoers accountable for their actions.[125] Mainstream criminal justice itself relies on coercion to compel offenders to

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[117] *Infra*, at 251-259.
[118] *Infra*, at 238-239.
[119] Abel, "The Contradictions of Informal Justice" in Abel ed., *The Politics of Informal Justice Volume I* (Academic Press, 1982) 267, at 292.
[120] *Infra*, at 181.
[121] Mika, Achilles, Halbert, Stutzman Amstutz and Zehr, "Listening to Victims: a Critique of Restorative Justice Policy and Practice in the United States" (2004) 68(1) *Federal Probation* 32, at 33-34; *infra*, at 239-241.
[122] *Infra*, at 239.
[123] *Infra*, at 378-383.
[124] *Infra*, at 28, 210, 325-325, 329, 378-379.
[125] *Infra*, at 240.

participate in its processes and comply with its demands. Therefore, restorative justice should not be penalised for failing to outdo its mainstream counterpart by purging its processes completely and unrealistically of coercive forces.[126]

Thirdly, Chapter 6 emphasises the reality that not all offenders will "take the bait" and submit to perceived incentives.[127] Fourth and finally, it may be the case that even if offenders are induced into VOM, the process may still prove worthwhile in light of the residual benefits to victim and offender alike, which coercion cannot inhibit entirely, *once inside* restorative forums.[128]

4.4.2 Doubts about the Potential for Offenders to Change

There are several factors that will be used in Chapter 6 to temper scepticism about restorative justice's transformative ability for offenders. The first factor to be considered is that while full rehabilitation is an ideal to which restorative justice aspires, it is no doubt an elusive and ambitious goal. But this does not imply that anything short of full rehabilitation has no worth.[129] To the contrary, restorative justice is a worthwhile venture once it sets an offender *at some stage* along the road to complete rehabilitation and reintegration.[130] This principle is particularly relevant when arguing for the use of restorative justice to assist non-minor offenders.[131] Restorative justice is no panacea for the social pathology of deviance and cannot repair offenders fully with robotic perfection. It should neither be relied upon for doing so, nor condemned for not.

Second, Chapter 5 describes how restorative justice is specially equipped to set offenders squarely on the road to reform.[132] Through its empowering ability, restorative justice holds considerable potential to remedy the various manifestations of emotional trauma that Chapter 3 associates with criminal activity and the impact of social and legal stigmatisation.[133] Offenders' emotional empowerment by the *involvement and knowledge* that restorative justice offers them can erode their resistance to reform.[134]

The success of restorative justice's rehabilitative efforts is difficult to measure. It cannot be derived reliably from post-mediation statistics that measure recidivist crime because they themselves are inherently unreliable.[135] While it is therefore injudicious to be

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[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*
[129] *Infra*, at 210, 251.
[130] *Ibid.*
[131] *Infra*, at 383-386.
[132] *Infra*, at 208-214.
[133] *Infra*, at 87-123.
[134] *Infra*, at 208-214.
[135] *Supra*, at 19-20; *infra*, at 216-319.

too optimistic about restorative justice's ability in this regard, it is equally hasty to adopt excessive scepticism. The empirical information available, though inconclusive, is at least hopeful and the *combination* of statistical and hypothetical indications of restorative justice's rehabilitative potential arouses a cautiously optimistic attitude to its implementation.

Finally, it is fair to say that existing penal regimes struggle to rehabilitate offenders in a consistent and comprehensive way. At the very least, there is room for improvement, though some might argue that mainstream criminal justice fails more dramatically in this regard.[136] If and where the latter assertion is true, it may be the case that restorative justice could provide an ameliorative remedy – filling a gap in mainstream criminal justice by outperforming it in an important area. Nevertheless, as stressed and re-stressed throughout this thesis, restorative justice should not be rejected because it fails to do better than conventional criminal justice. Its performance can only be measured fairly against the ambitions it sets itself. Benefits falling outside the value-system that encourages reliance on restorative justice are merely ancillary, bonus by-products of its primary emotionally-therapeutic ambitions.

4.4.3 Doubts about the Limited Role of Deterrence

Chapter 6 acknowledges restorative justice's nominal capacity for deterrence as a vehicle of crime-control.[137] It attributes the paradigm's limited ability in this respect to (a) its therapeutic ethic, (b) the voluntariness of its techniques and (c) their relative privacy.[138] Nonetheless, it refuses to accept that restorative justice's marginal deterrent ability de-values it to any significant degree, particularly one that would jeopardise its integration into established sentencing practice.

First, as this chapter will later illuminate, restorative justice's modest deterrent potential does not prevent it from controlling crime in society – at least *to some degree*.[139] Deterrence is indeed a central method by which criminal justice systems stifle criminality. *Specific deterrence* involves dissuading individual ex-offenders from re-offending once they leave the criminal justice system. This contrasts to *general deterrence*, which involves the dissuasion of the general public from engaging in criminal acts.[140] Yet, there is another crucial means by which crime can be stymied: the rehabilitation of offenders – a talent of restorative justice described later in this chapter.[141] As Greenwood stresses:

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[136] *Infra*, at 38-41.
[137] *Infra*, at 252-254.
[138] *Infra*, at 252.
[139] *Ibid.*
[147] *See* McGuire, *What Works: Reducing Reoffending* (Willan, 1995), at 10-12; O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice* (Cork University Press, 2000), at 1.
[141] *Infra*, at 34-36.

> Bringing criminals … back into the web of constraints that is a functioning society is precisely the track that seems likely to work for the legitimate function of criminal law: to reduce crime.[142]

Both deterrence and rehabilitation are effective catalysts of crime-control that merit significant attention when considering the appropriate treatment for a given offender.[143] For this reason, they have long numbered amongst the various principles that sculpt common law sentencing policy.[144]

Chapter 6 explains that, rather than relying on its admittedly deficient deterrent impact, restorative justice suppresses secondary deviance (the object of specific deterrence) through its rehabilitative potential.[145] Furthermore, it subdues primary deviance through its re-balancing impact over crime-suppressive social commodities such as social integration and collective efficacy.[146]

Of additional significance here, is the possibility that restorative justice's rich moral content *requires* its indifference to deterrence – an arguably amoral, utilitarian concept.[147] Either way, much of this is arguably moot because reducing re-offending is not really an ambition of restorative justice but an incidental benefit of its primary emotionally-therapeutic agenda.[148] And since it does not *rely* on this fortunate side-effect for legitimacy, nor for credibility (though it may boost both), restorative justice cannot be rejected fairly for its alleged inferiority to conventional criminal justice in controlling crime. Even Andrew Ashworth, a critic of restorative justice, acknowledges this principle, stating "I do not believe it is necessary to claim superior efficacy for RJ."[149]

Finally, even if restorative justice *did* place greater emphasis on its crime-control potential, there is little to indicate that mainstream criminal justice can do substantially better in this respect. This invokes the oft-cited principle that restorative justice should be immune to fatal condemnation for failing to *outdo* an established criminal justice model in the performance of any of its central tasks, amongst which crime-control ranks the highest.

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[142] Greenwood, "Restorative Justice and the Jewish Question" (2003) 1 *Utah Law Review* 533, at 562.
[143] *See generally*, *People (A.C.) v. O'Driscoll* (1972) 1 Frewen 352, at 359, Walsh J.; *State (Stanbridge) v. Mahon* [1979] IR 214, at 218, Gannon J.; *People (D.P.P.) v. W.C.* [1994] 1 ILRM 321, Flood J.
[144] *See generally*, Ashworth, *Sentencing and Criminal Justice* (Butterworths, 2000), at 64-74; Ashworth, "Sentencing" in Maguire, Morgan and Reiner eds., *The Oxford Handbook of Criminology* (Oxford University Press, 2002) 1076, at 1077-1081; O'Malley, *op. cit.*, at 3, 61-67; Bean, *Rehabilitation and Deviance* (Routledge and Kegan Paul, 1976); O'Mahony, *Criminal Chaos: Seven Crises in Irish Criminal Justice* (Roundhall Sweet & Maxwell, 1996), at 121-122.
[145] *Infra*, at 253.
[146] *Ibid.*
[147] *Ibid.*
[148] Morris, *loc. cit.*, at 606.
[149] Ashworth, "Is Restorative Justice the Way Forward for Criminal Justice?", *loc. cit.*, at 175.

4.4.4 Doubts about the Social Impact of Restorative Justice

Doubt has been expressed about restorative justice's ability to provide a significant social benefit.[150] Sceptics have challenged most vociferously the paradigm's socially reintegrative influence and its ability to tackle criminality's socio-demographic determinants.

Several important rejoinders are issued in this respect. First, restorative justice's ability to reintegrate fragmented social conditions relies on a realistic understanding of the process of social reintegration, whose threshold of restoration is *lower* than might be thought, prioritising the restoration of *mutual-tolerance* over the creation of amicable alliances out of thin air.[151]

Second, as explained later, *no* criminal justice model – restorative or otherwise – can alleviate *all* of criminality's underlying social predictors. This is predominantly because criminal justice is too remotely positioned to achieve the comprehensive resolution of the vast issues of social injustice that are entangled inextricably with the problem of deviance in society. This is a role best performed by intimate social groupings, lobbyists and victims' and offenders' representatives.[152]

Thirdly, while an all-encompassing impact on crime's complex social correlates is out of reach for restorative justice, it can suppress *some of them* such as high fear of crime, social disintegration and flagging collective efficacy.[153]

Finally, restorative justice may be better entrusted with *preserving* social justice due to its low tolerance of imprisonment – a notorious vehicle of disintegration, injustice, and unemployment.[154]

4.5 Incompatibility with the Principles of Irish Criminal Justice

Various elements of restorative justice's value system might appear fundamentally at odds with some of the most basic characteristics and goals of common law criminal justice. However, it is a primary goal of this thesis to reveal the potential for a synergistic collusion between these seemingly divergent paradigms and to emphasise their shared capacities for mutual tolerance. Proving the potential for uniting these seemingly irreconcilable paradigms is an essential prelude to endorsing a system of integrated restorative criminal justice here in Ireland.

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[150] *Infra*, at 255.
[151] *Ibid.*
[152] *Infra*, at 256.
[153] *Infra*, at 257.
[154] *Ibid.*

Chapter 8 considers three key incompatibilities that might be inferred from the contrasting foci of restorative and punitive criminal justice models. It proceeds to prove them largely irrelevant, inapplicable or fictitious such that they are unlikely to provide substantial obstructions to restorative justice's integration into Irish sentencing practice.

4.5.1 Incompatibility with the Principle of Consistent Sentencing

Chapter 8 ponders how restorative justice's addition onto Ireland's existing sentencing menu is likely to affect the criminal justice system's ability to provide consistent sentences. It identifies two implications of restorative justice's incorporation that pose potential threats to the principle of consistency. The first can be discounted on the basis that it stems from a mis-interpretation of restorative justice's value-system and is therefore inapplicable. The second is deemed to pose a real but *justifiable* threat to sentencing consistency. Both are sketched out briefly below.

4.5.1.1 Victim-Involvement and Inconsistency

As Chapter 8 explains, people regularly misinterpret restorative justice as a philosophy in favour of affording crime victims a direct role in the sentencing of their offenders.[155] If this were true, restorative justice would provide a sure source of disparity and fundamental unfairness as vindictive and forgiving victims alike would see their offenders punished in wildly inconsistent ways. In actual fact, restorative justice *opposes* this extent of victim-empowerment because of its emphasis on fairness and balance as between disputants. It avoids empowering one party at the expense of the other in a zero-sum way,[156] partially *because* of the prejudicial outcomes of the inconsistency likely to be produced.[157] As Martin Wasik cautions:

> Reparation turns both upon the differing practical abilities of offenders, and the differing predilections of victims ... [A]llowing victims to influence the form that reparation should take can lead to inconsistency and injustice.[158]

Chapter 8 invokes these factors to conclude that restorative justice's critique on the grounds that its empowerment of crime victims poses an unacceptable threat to sentencing consistency is unsound, misconceived and unconvincing. It is therefore highly unlikely to obstruct restorative justice's assimilation into traditional sentencing practice.

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[155] *Infra*, at 324.
[156] *Infra*, at 102.
[157] *See generally*, *R. v. Hird* [1998] 2 Cr. App. R. (S.) 241 (CA (Crim Div)).
[158] Wasik, "Reparation: Sentencing and the Victim" [1999] *Criminal Law Review* 470, at 478-479.

4.5.1.2 Widening Judicial Discretion and Inconsistency

The extension of judicial discretion that is achieved when sentencing options are diversified by restorative justice is considered in Chapter 8 as another potential source of sentencing inconsistency.[159] Yet, although adding restorative justice onto Ireland's sentencing menu may well increase the risk of judicial inconsistency parallel to increased choice, there are several reasons why this fails to pose a significant hurdle to restorative justice's incorporation.

First, some degree of inconsistency is inevitable within any criminal justice system lacking clear-cut sentencing guidelines. This includes mainstream criminal justice in Ireland.[160] Secondly, inconsistency is a necessary, absorbable and *justifiable* by-product of restorative justice's customisation or "controlled variation" of offenders' treatment, which is designed to maximise individual prospects of rehabilitating.[161] Thirdly, the *court-annexed* variety of non-binding, voluntary[162] restorative justice endorsed in this thesis means that offenders are free to choose between individualised treatment and guarantees of consistency. The gateway back to the perceived uniformity of mainstream justice is always ajar after an offender's initial referral to restorative justice.[163]

Chapter 8 further argues that what restorative justice lacks in consistency of outcome, it can make up for in consistency of approach and implementation.[164] Accordingly, while some degree of consistency can be sacrificed to the superior interest of individualised, rehabilitative treatment, restorative strategies should observe – as far as practicable, given their individual objectives and the limitations of criminal justice generally – what is a valuable protection against *unnecessarily* unfair, disproportionate and disparate sentencing.

4.5.2 Incompatibility with the Need to Punish Offenders

The assumption that restorative justice is inherently incompatible with the need to punish offenders is erroneous and will be challenged at various stages throughout the ensuing chapters.[165] This rebuttal is a common thread that occupies a position of central significance to the conclusions arrived at herein. The importance of maintaining state-control over criminal conflict, the inevitability of crime and recalcitrant offenders in society, the limitations of non-custodial measures in this respect, as well the historical fusion of

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[159] *Infra*, at 325.
[160] *Ibid.*
[161] *Infra*, at 326-328.
[162] *Infra*, at 238-241, 382-384.
[163] *Infra*, at 328.
[164] *Infra*, at 329.
[165] *Infra*, at 214-215, 329-335, 377-383.

restorative ideals with retributive practicalities, all underlie this thesis' binary vision of a hybrid model of restorative criminal justice.[166]

Chapter 8 performs an important task towards establishing the compatibility of restorative and retributive justice models. It demonstrates that two apparently clashing cornerstones of restorative and retributive philosophies – forgiveness and punishment respectively – are in fact mutually reconcilable concepts that can co-exist harmoniously under the one criminal justice canopy.[167] Their mutual tolerance is considered representative of the wider compatibility of their parent justice models.

As Chapter 8 stresses, forgiveness does not negate the need to punish – it is not necessarily synonymous with mercy.[168] Moreover, there is a long-established relationship between criminal justice systems and forgiveness that has only atrophied in recent times.[169] Chapter 8 further confirms the importance of maintaining an overarching *state-centred* justice model under which different philosophies and practices – such as restorative justice – must take effect.[170] Finally, it finds no evidence within restorative philosophy of an *outright* intolerance towards punitive justice.[171] As such, there are no real philosophical obstructions to restorative justice's incorporation into an otherwise predominantly retributive justice framework.

4.5.3 Incompatibility with the Public Administration of Justice

While on first glance, the relative privacy of restorative strategies might appear to offend the important constitutional mandate of justice in public, Chapter 8 proves that, in fact, it poses little threat to the paradigm's constitutionality.[172] First, the court-annexed, voluntary species of restorative justice envisaged in this thesis maintains constant access to public justice for its participants who are free to depart the process at any stage in favour of curial process. Furthermore, even if they stay, the matter will be re-referred to court on the completion of restorative processing.[173]

Secondly, legal precedent suggests that even *non-annexed* restorative justice would be highly unlikely to be considered "the administration of justice" in accordance with *Bunreacht na Éireann* such that Article 34.1's mandate of public justice would apply to it.[174] Finally, it is arguable that, in any case, the interest of justice being administered in public

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[166] *Infra*, at 335.
[167] *Infra*, at 329-335.
[168] *Infra*, at 331.
[169] *Infra*, at 332.
[170] *Infra*, at 333.
[171] *Ibid.*
[172] *Infra*, at 336-337.
[173] *Ibid.*
[174] *Infra*, at 337.

should be subordinated to the more fundamental interest of justice simply being administered.[175]

4.6 Incompatibility with Prevailing Consensus on Criminal Justice

Chapter 8 emphasises the importance of ensuring that an incoming hybrid model of restorative criminal justice is compatible with prevailing public,[176] political,[177] and judicial[178] consensus on criminal justice. Ideally, a new restorative system will be *introduced* into a receptive, readied socio-political environment. However, public and judicial support for such an innovation can also be earned "after-the-fact" of its official establishment, which could invite controversy or dissent from various quarters subsequent thereto. Such voices can be silenced in this event with the help of sincere political dedication to restorative justice, education and general awareness-raising efforts.[179]

One thing is certain: a degree of compatibility with prevailing attitudes to crime – whether pre-existing or subsequently-earned – is pivotal to the endurance and effectiveness of an integrated model of restorative criminal justice. The degree of compatibility required to preserve restorative justice's life-span cannot be predicted reliably in advance. Accordingly, one can only speculate about the quantities of public, political and judicial backing that will be required to *at least* prevent its demise or *at best* ensure its success. At this point, the most that can be asserted is that an incoming innovation should resist offending the prevailing sensibilities of those expected to establish, run and use it *so much so* that it becomes unsustainable.

Neither is it easy to forecast the degree of attitudinal compatibility that is likely to exist. Acquiring even an accurate, up-to-the-minute snap-shot of popular opinion is difficult enough, let alone obtaining a window into its future status. Thus, it may be the case that the best indicator available in the present is the past: one can look to the track-records of the nation's people, politicians and judges respectively to predict their likely hostility or hospitality to the injection of alternative values into long-established criminal justice traditions.

Chapter 8 then, assumes a doubly-speculative role: on the one hand, it estimates the degree of compatibility required between restorative justice and prevailing opinion to support the paradigm's integration; on the other, it speculates about the likelihood of such

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[175] *Ibid.*
[176] *Infra*, at 338-350.
[177] *Infra*, at 350-354.
[178] *Infra*, at 355-359.
[179] *Infra*, at 360.

compatibility *existing* in the near future; it asks "what are the chances of a hybrid justice model slipping harmoniously into Ireland's wider socio-legal landscape?"

It concludes that the possibility of restorative justice – or indeed any novel justice tactic – facing an obstructive degree of attitudinal opposition cannot be discounted entirely. No reform is risk-free and the fledgling stages of any incoming regime will always be fraught with uncertainty. This is the height of its vulnerability to demolition by myriad threats *including* insufficient support, without which a *voluntary* strategy such as VOM could not maintain sufficient referrals to justify its use.

Consequently, caution will *always* be necessary in order to maintain a self-preservating degree of correspondence between a justice model and the perspectives of those whom it involves. That said, Chapter 8 concludes that with due care, political sincerity, and adequate encouragement, restorative justice's prospective infusion into mainstream sentencing is unlikely to be fatally challenged by extensive public, political or judicial dissent.[180]

4.7 Misplaced Objections

There is one residual category of objections to restorative justice. It catches a miscellany of criticisms directed towards practices and philosophies that exceed the scope of this thesis for one of two reasons: either they fall outside the parameters of the specific court-annexed brand of restorative justice endorsed herein *or* they are simply not "restorative justice" in accordance with its "value-system" definition submitted above.[181]

For instance, criticisms aimed at practices intended to *shame* offenders are not criticisms of restorative justice, given their mutual incompatibility explored in Chapter 6.[182] Similarly, scepticism about "community justice" or "informal justice" has no *prima facie* applicability to restorative justice because although restorative justice can occupy either category, that occupation cannot be reliably presumed; various expressions of community justice, as outlined above, can take decidedly *unrestorative* forms.[183]

However, the misdiagnosis of genuine restorative justice as – for instance, shaming or community justice, whose benefits actually stem from their emotionally therapeutic ends – does not defend such practices from criticism that is otherwise valid. Hence, criticisms that claim to target "restorative justice" must be treated with deserved respect and caution, lest mis-used labels be allowed to mask certain strategies' restorative content and the deficiencies that could lurk inside.

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[180] *Ibid.*
[181] *Supra*, at 5-6.
[182] *Infra*, at 243-249.
[183] *Supra*, at 9.

Furthermore, because this thesis limits its endorsement to two specific *court-appended* varieties of *adult* restorative justice, attacks on other expressions of restorative justice, such as juvenile diversion or indigenous justice models – though important elsewhere – hold little weight here.

5. Reasons for Optimism

The above objections' inapplicability and/or irrelevance to this thesis' preferred formula of restorative justice combined with the ease with which they might be overcome certainly subdues the tone of caution that accompanies the prospect of restorative reform and *in general* fosters a more optimistic outlook than might otherwise be adopted.

However, there are four more direct sources of optimism about the rewards of restorative justice's incorporation into Irish sentencing practice. The first pair relates to restorative justice's potential talents and the second pair relates to the context into which they might be fitted. Since all of these causes for positivity constitute the principal foci of Chapters 5-8, each will be summarised concisely at this interval.

5.1 The Emotional Benefits and Social Impact of Restorative Justice

Chapter 5 evaluates restorative justice's capacity for holistic emotional healing.[184] It concludes that restorative justice holds valuable potential to deliver on this ambitious promise by soothing the post-crime emotional distress likely to be suffered uniquely by victim, offender and community. Restorative justice's strength in this regard is attributed to its special talent for *empowering* crime's stakeholders who have each suffered the emotionally deleterious effects of the unique stakes they each hold in the offence.[185] The paradigm's special empowering potential is attributed in Chapter 5 to its ability to offer crime's co-participants a high degree of *involvement* and *knowledge* throughout the process of resolving crime's adverse emotional side-effects.[186]

However, the reparative impact of restorative justice's emotionally therapeutic achievements is likely to extend beyond the individuals touched by crime. In fact, as Chapter 5 will reveal, the cumulative impact of restoring victims and offenders emotionally is restorative justice's inherent ability to break the cycle of fear of crime in society.[187] Better still, by suppressing crime's main collective emotional trauma, restorative justice is capable

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[184] *Infra*, at 181-224.
[185] *Ibid.*
[186] *Ibid.*
[187] *Infra*, at 205-223.

of replenishing key social commodities that advance social harmony, such as social integration and collective efficacy.[188]

Restorative justice's emotionally therapeutic potential with the ancillary societal reforms that it offers is presented as it has throughout the paradigm's lengthy evaluative literature as a worthy, stand-alone justification for its use in criminal justice.[189] So socially-propitious are its possible results that restorative justice's mere *potential* in this regard might be considered sufficient to justify its use:

> If this sort of healing is *possible* for victims and prisoners alike, how can it possibly be conscious for our governments not to provide such a resource for those who seek it?[190]

5.2 The Crime-Control Potential of Restorative Justice

There are two potential means by which restorative justice could reduce the crime rate. However, the contribution of these hypothetical modes of crime-control to a reduction in crime is difficult to quantify reliably. Because of this limitation, restorative justice's crime-shrinking potential is treated as an unpredictable by-product of its primary emotionally therapeutic value.

The ambiguity surrounding restorative justice's crime-control potential probably accounts for David Garland's marginal treatment of the paradigm in *The Culture of Control* – a comprehensive, landmark overview of social control and criminal justice in Britain and America.[191] Whilst recounting the "deluge" of alternative crime-control mechanisms that arrived in those jurisdictions from the 1970s – around the time of the informal justice movement – Garland affords restorative justice only a fleeting mention.[192] Moreover, the concept does not number amongst those early initiatives that Garland considers to have subsequently evolved into "important elements in the crime control field", such as community-based policing and privatized corrections.[193]

Given the empirical opaqueness that obscures a clear image of restorative justice's crime-control potential,[194] combined with the various limitations thereon[195] and the

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[188] *Infra*, at 216-221.
[189] *See generally*, Niro, "Healing Victims, Offenders and Communities: Restorative Justice" [1999] *Illinois Bar Journal* 568; Williams, "Negotiation as a Healing Process" (1996) 1 *Journal of Dispute Resolution* 1; Poulson, "A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice" (2003) 1 *Utah Law Review* 167.
[190] Gustafson, *loc. cit.*, at 306. [emphasis added]
[191] Garland, *The Culture of Control* (Oxford University Press, 2001).
[192] *Ibid.*, at 104.
[193] *Ibid.*, at 105.
[194] *Supra*, at 19-20; *infra*, at 35, 316-319.
[195] *Infra*, at 35-36.

questionable social impact of any criminality it *does* subdue successfully,[196] Garland's treatment of the paradigm is unsurprising. Restorative justice is not a dominant form of crime-control and, for the reasons outlined below, it is unlikely to become so. Accordingly, its substantive omission from a book that surveys the culture of crime-control, even in jurisdictions in which restorative justice thrives, is to be expected.

None of this is to suggest, however, that restorative justice's capacity for crime-control is irrelevant. Where it occurs, it is a significant ancillary merit of restorative justice's emotionally restorative intentions and stands to boost the paradigm's credibility and the appeal of its insertion into mainstream criminal justice. It is on this basis that it deserves exploration.

5.2.1 Suppressing Primary Deviance

Chapters 4 and 5 conclude that restorative justice's emotionally reparative ability to break the cycle of fear of crime is likely to exert *some* reductive influence over the crime rate by preventing people's initial descent into deviance. This is because alleviating the mutual mistrust and suspicion aroused by fear of crime, enhances residents' social integration and sense of collective efficacy, both of which exert suppressive influences over the development of criminality.[197] Furthermore, Chapter 4 concludes that the positive social impact of such commodities is likely to be felt more dramatically in the most crime-ridden, divisive social settings where the social value of fear-reduction might be greatest.[198]

Still, there is no reliable means by which to gauge restorative justice's fear-quelling impact given its reciprocal entanglements with complex conditions such as social cohesion and collective efficacy, which are themselves empirically-evasive, fluctuating social currents.

5.2.2 Suppressing Secondary Deviance

The second means by which restorative justice could potentially control crime is through its *rehabilitative* ability.[199] Achieving rehabilitative results for offenders is likely to reduce the probability of recidivism. As Chapter 5 explains, one means of doing so is to tackle the emotionally deleterious process of labelling offenders,[200] with which Chapter 3 associates some, though not all,[201] secondary deviance. Initial excitement is curbed however, by four important factors that militate against affording restorative justice's capacity for preventing re-offending *undue* weight.

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[196] *Infra*, at 36.
[197] *Infra*, at 170-176.
[198] *Infra*, at 127.
[199] *Infra*, at 208-217.
[200] *Ibid.*
[201] *Infra*, at 111-112.

First, the recidivism rate for those graduating from restorative institutions is notoriously difficult to measure, given the "dark figure" of unreported crime and the unknown variable of unapprehendable and unidentifiable offenders. Traditional criminal justice's ability to quash reoffending is equally obscured by these problems; in fact, *any* justice model's suppressive macro-influence over recidivist crime evades reliable measurement on these grounds.

Secondly, however, restorative justice suffers an extra set-back in the identification of its rehabilitative potential. As described above, its ability to simply test its prevention of reoffending amongst a given subset of participating offenders is weakened due to the necessarily short evaluation periods that accompany such a newly-resurrected justice model.[202] These evaluative limitations dampen the hopes – at least to some degree – that superficially impressive empirical case-studies initially inspire about restorative justice's ability to prevent re-offending.[203]

Thirdly, restorative justice suffers an additional body-blow that mainstream criminal justice generally evades. This is due to a limitation afflicting one of its central strategic expressions – VOM.[204] VOM's potential impact on the crime rate is gravely constrained by the reality that many crimes do not even involve an *identifiable* victim and offender. Worse, not all victims even realise their victimisation. As Braithwaite speculates, it is possible that "most victims are victims of white-collar crimes without ever coming to realize this".[205] Of course, offenders who are "left in the lurch" by unwilling or unwitting victims will not go unaided and can proceed to avail of the back-up option of the Offender Reparation Project (ORP).[206] Nonetheless, this does not change that fact that the overall number participants in restorative processes will have been reduced by the inevitable non-participation of many crime victims.

Therefore, only a fragment of community crime can be referred to VOM – the brand of court-annexed restorative justice preferred herein.[207] Even in the unlikely event that VOM routinely cured the deviance of each and every one of its participants completely, its overall impact on macro-level community crime would surely be modest.

Fourth and finally, the social significance of any crime-control potential possessed by restorative projects such as VOM and ORPs is subdued further on the grounds that many offenders will simply not be suitable for referral to restorative justice. Some offenders are

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[202] *Supra*, at 19-20.
[203] *See for instance*, Nugent, Umbreit, Winnamaki and Paddock, "Participation in Victim-Offender Mediation Reduces Recidivism" (1999) 3 *VOMA Connections* 1, 11.
[204] *Infra*, at 187-189.
[205] Braithwaite, "Restorative Justice: Optimistic and Pessimistic Accounts" (1999) 25 *Crime and Justice* 1, at 79.
[206] *Infra*, at 184-187.
[207] *Infra*, at 187-189.

remorseless, recalcitrant and entirely immune to the feelings of shame and powerlessness that the labelling process otherwise stimulates in less hardened specimens.[208] While this thesis certainly endorses the use of restorative justice for serious criminals, even in tandem with punitive treatments,[209] perpetrators who occupy the aforementioned category of defiance will be better suited to the back-up avenue of exclusively punitive sanctions.[210]

Restorative justice's ambit will inevitably be limited by the ubiquity of serial criminals. The fewer participants passing through restorative processes, the more limited their potential impact on the crime rate. So, even in the unlikely event of restorative justice stifling secondary deviance in *all* of its participants successfully, limitations on eligibility will curtail both its potential impact and its social significance.

The culmination of these four prohibitive realities paints a sobering picture of the socially-transformative potential of restorative justice's real, yet ambiguous, crime-control potential. Braithwaite recognises restorative justice's restrictiveness in this respect:

> Because more than 90% of victimizations will always be untouched by state restorative justice processes, preventative effects of restorative justice interventions would have to be massive to register any measurable impact on the overall crime rate.[211]

So, not only is restorative justice's potential to curb crime in the first place open to debate, but so is the social significance of any crime it *does* curb by restraining successfully the secondary deviance of its participants.

The principle was introduced above that restorative justice's core potential lies in its holistic, emotionally-therapeutic potential for crime's individual and collective stakeholders.[212] While this has yet to be established at this point pending Chapter 5's extensive evaluation, it is crystal clear that whichever talents restorative justice *relies upon* for its credibility and to justify its use, they do not include the control of crime.

This is not to suggest that restorative justice's potential to stifle secondary deviance is socially insignificant. To the contrary, its methods of so-doing merit considerable contemplation throughout the chapters that follow since:

> ... the economic and protective value to the community of reoffending for that minority of offenders who do find their way into the criminal justice system should not be discounted.[213]

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[208] *Infra*, at 111-112.
[209] *Infra*, at 370-384.
[210] *Infra*, at 112.
[211] Braithwaite, "Restorative Justice: Optimistic and Pessimistic Accounts", *loc. cit.*, at 80.
[212] *Supra*, at 1-2.
[213] Braithwaite, "Restorative Justice: Optimistic and Pessimistic Accounts", *loc. cit.*, at 81.

5.3 The Historical Affinity between Irish Criminal Justice and Restorative Justice

Chapter 7 scans the timeline of Ireland's legal heritage to discover evidence of a special place for restorative justice throughout the history of Irish criminal justice. Particular emphasis is placed upon the restorative characteristics of the Brehon law – a form of native Irish customary law that combined restorative *and* retributive answers to crime for over a millennium.[214]

Chapter 7 concludes that the Brehon law's enduring spirit of restoration is unlikely to have been distinguished entirely from Ireland's legal subconscious.[215] Even if it has, however, the *historical* affinity between restorative and Irish criminal justice creates at least the potential for modern contextual compatibility between the two; it inspires optimism about restorative justice's future fit within Irish society. This optimism can only be significantly dampened by proof of the disintegration of Ireland's long-standing bond with restorative dispute resolution since its high-water-mark in Brehon times.

5.4 The Modern Affinity between Irish Criminal Justice and Restorative Justice

Chapter 8 fails to adduce proof that might rebut Chapter 7's presumption of compatibility between Ireland's legal and cultural identity and restorative justice. To the contrary, it identifies several modern-day indicators that the historical affinity mentioned above, though thinned, is more or less intact to this day. It determines that restorative values – both individual[216] and combined[217] – are operative within the contemporary landscape of Ireland's adult and juvenile justice systems. These signals of lingering mutual sympathies between Irish law on the one hand and restorative justice on the other confirm the optimism aroused tentatively in Chapter 7.

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[214] *Infra*, at 271-304.
[215] *Infra*, at 303-304.
[216] *Infra*, at 306-309.
[217] *Infra*, at 309-323.

6. Predicting the Impact of Restorative Justice's Integration

6.1 Impact on Existing Sentencing Policy: Gap-Filling as a Potential but Non-Pivotal By-Product of Restorative Justice's Integration

As emphasised throughout this chapter, restorative justice's proposed addition onto Ireland's traditional sentencing menu is justified sufficiently by the potential benefits of its holistic, emotionally-healing manifesto.[218] Its admittedly auxiliary potential to reduce crime – though a bonus – simply makes it a more attractive option.

Restorative justice's remedial potential to "fill gaps" in conventional criminal justice has been treated similarly.[219] The possibility that restorative justice can understudy established practice might heighten its appeal, yet neither its credibility nor the justifiability of its use are conditioned on such an ability. Instead, they are tied strictly to its potential to provide holistic emotional catharsis for victims, offenders and communities and the socially-beneficial side-effects that are unleashed thereby.

Nonetheless, it is worth contemplating restorative justice's potential to patch-over various defects in Irish sentencing practice as and when they arise. For instance, it is arguable that the Irish criminal justice system's traditional sentencing customs pay insufficient heed to addressing the *emotional* effects of crime, concentrating instead on rectifying the offender's symbolic affront to the state's rules through the infliction of proportionate harm.[220]

A possible target of such a critique is a perceived judicial *over-reliance* on imprisonment.[221] Paul O'Mahony suspects that "Ireland uses imprisonment as a punishment more freely than almost all other Western European countries".[222] Perhaps such a sweeping statement goes too far. Either way, Kilcommins and colleagues report a rate of increase in prison numbers in Ireland between 1997 and 2002 that has been much higher than its European counterparts.[223] Moreover, there are indications that prison is being used as a "revolving door" institution providing short-term shelter[224] for minor offenders such as fine-

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[218] *Supra*, at 1-2.
[219] *Supra*, at 2.
[220] *Infra*, at 108-110, 117.
[221] O'Mahony, "We Over-Rely on Jail Deterrent" *The Irish Times*, 23 March 2006; O'Donnell, "The Cost of an Infatuation with Locking Up People" *The Irish Times*, 22 December 2004; Bacik, "The Practice of Sentencing in the Courts" in O'Mahony ed., *Criminal Justice in Ireland*, *op. cit.* 348, at 367-369; Whitaker, *Report of the Committee of Inquiry into the Penal System* (Stationery Office, 1985); *National Crime Forum Report 1998* (Office of Public Administration, 1998), at 139-147; O'Donnell, "Imprisonment and Penal Policy in Ireland" (2004) 43 *The Howard Journal of Criminal Justice* 253; O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 16, 69.
[222] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 51.
[223] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration, 2004), at 249-250.
[224] Almost 60% of those imprisoned in 2005 received sentences of six months or less and 39% received terms of three months or less: see The Irish Prison Service, *Annual Report 2005* (Department of Justice, Equality and Law Reform, 2005), at 11-13.

defaulters and first-time offenders.[225] At most, it could be said that Irish judges possess "an infatuation with locking people up".[226] There is, however, *at the very least*, a pronounced "bias towards custody" amongst the Irish judiciary.[227]

All this could mean that non-custodial sentencing alternatives, such as community service orders, probation orders and suspended sentences, though popular,[228] are not being *maximally* exploited by the judiciary. Alternatively, it could simply indicate a shortage of middle-ground treatment options for offenders for whom neither custodial options *nor* existing non-custodial alternatives provide an *appropriate* response. In this case, judicial reliance on imprisonment could merely symbolise a gap in the existing range of sentencing options, created by a lack of remedies that eschew simple "leniency" in favour of *treating* offenders effectively in a challenging and morally educative way.[229]

This is a gap that this thesis believes restorative justice could fill, providing a rehabilitative, non-custodial alternative or indeed add-on to punitive options that is far from a "soft-option" for offenders.[230] In sum, it could be *insufficient diversity* in sentencing that underlies the nation's relatively high judicial recourse to incarceration, particularly for minor and first-time offences and not necessarily a corresponding degree of punitiveness.[231]

The reason that excessive custodial sentencing might be deemed to offend restorative justice's ethic of emotional healing lies in state of the nation's prisons. The Irish government has come under fire for its alleged failure to provide adequate funding for emotionally

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[225] UCD's recent recidivism study found that 56% of Irish prisoners are in custody for minor offences such as fine defaulting and motoring offences for terms of less than three months: see UCD Institute of Criminology, *Recidivism Study* (University College Dublin, 2006), cited in O'Keeffe, "Report of the Rapporteur to the Joint Committee on Justice, Equality, Defence and Women's Rights on the Potential Benefits of Restorative Justice Methods in Ireland" in Joint Committee on Justice, Equality, Defence and Women's Rights, *Report on Restorative Justice* (Houses of the Oireachtas, 2007) 3, at 1-5; Seymour and Costello, *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody* (Probation and Welfare Service, 2005); *National Crime Forum Report 1998*, *op. cit.*, at 140; O'Donnell, "Challenging the Punitive Obsession" (1998) 8 *Irish Criminal Law Journal* 51.

[226] O'Donnell, "The Cost of an Infatuation with Locking Up People", *loc. cit.*

[227] O'Donnell, "Crime and Justice in the Republic of Ireland" (2005) 2(1) *European Journal of Criminology* 99, at 121; O'Donnell, "Imprisonment and Penal Policy in Ireland", *loc. cit.*, at 256-259; see also, O'Donnell, "The Enthusiasm to Incarcerate is Difficult to Justify or Understand" *The Irish Times*, 4 November 2005.

[228] Seymour, *op. cit.*, at 6; see also, Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 267.

[229] *Infra*, at 117.

[230] *Infra*, at 252.

[231] *See* Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 251; *infra*, at 355-359.

reparative, rehabilitative treatment and support services for prisoners,[232] particularly the most emotionally vulnerable such as the mentally ill[233] and those suffering from addictions.[234]

Moreover, some of the worst adversities commonly associated with prison-life in general have been identified in the *Irish* prison system – conditions such as poor sanitation,[235] humiliation,[236] over-crowding, [237] bullying, [238] ill-health, [239] idleness and institutionalised apathy,[240] sexual abuse,[241] and suicide.[242] Paul O'Mahony condemns the Irish prison system on this basis:

> The experience of imprisonment in Ireland is punitive, damaging and painful in a myriad of ways beyond the mere loss of liberty and, in many quarters, it is expected to be so. The reality of prisons is not only remote from the noble sentiment that prisoners should suffer only deprivation of liberty and no further punishment, it makes a mockery of it. For many prisoners, the conditions and regimes they experience are brutal, dangerous and demeaning – a nightmare world of insanitary, overcrowded, threatening, depersonalising, disease-ridden and drug-infested horrors.[243]

While the presence and seriousness of such conditions will inevitably vary from prison to prison and from time to time, their cumulative impact *where and when they do arise* is to conceal from prisoners' the motivation to reform. To the contrary, such emotionally

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[232] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 14-15, 38-44; Whitaker, *op. cit.*; *National Crime Forum Report 1998*, *op. cit.*; Kinlen, *Second Annual Report of the Inspector of Irish Prisons and Places of Detention for the Years 2003-2004.* <http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6BMJC7-en/$File/AnnualRpt2.pdf> (visited 23 April 2006).

[233] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 38-44; Whitaker, *op. cit.*; The Committee for the Prevention of Torture and Inhuman or Degrading Treatment for Punishment, *Report on Irish Places of Detention* (Council of Europe, 1995).

[234] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 38; O'Mahony, "Social and Psychological Aspects of Drug Treatment and Rehabilitation" in O'Mahony ed., *Criminal Justice in Ireland*, *op. cit.* 759, at 762-767.

[235] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 9, 12, 36-44; Whitaker, *op. cit.*; *National Crime Forum Report 1998*, *op. cit.*, at 149; O'Mahony, *Criminal Chaos: Seven Crises in Irish Criminal Justice*, *op. cit.*, at 103-105.

[236] *National Crime Forum Report 1998*, *op. cit.*, at 150; see Cleary, "Crime Forum Report Suggests Parole Review Board and Claims Prison Does not Work" *The Irish Times*, 30 November 1998.

[237] *See* McCullagh, *Crime in Ireland: A Sociological Introduction* (Cork University Press, 1996), at 195; McCullagh, "The Social Analysis of the Irish Prison System" in O'Mahony ed., *Criminal Justice in Ireland*, *op. cit.* 595, at 598-599; O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 38-39; Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 237-238.

[238] Leddy and O'Connell, "The Prevalence, Nature and Psychological Correlates of Bullying in Irish Prisons" (2002) 7 *Legal and Criminological Psychology* 131.

[239] *See* Allwright, Barry, Bradley, Long and Thornton, *Hepatitis C and HIV in Irish Prisons: Prevalence and Risk* (Stationery Office, 1999); Hannon, Kelleher and Friel, *General Healthcare Study of the Irish Prisoner Population* (Stationery Office, 2000).

[240] O'Mahony, *Criminal Chaos: Seven Crises in Irish Criminal Justice*, *op. cit.*, at 105-107.

[241] *See National Crime Forum Report 1998*, *op. cit.*, at 157.

[242] McCullagh, *op. cit.*, at 205-206; O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 41.

[243] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 9.

adverse conditions could *exacerbate* offenders' mental instability and thereby actually *inflate* their propensity for crime.[244] Loy asserts that:

> Prison settings dehumanize; they offer no way for prisoners to deal with their feelings of guilt and their need for forgiveness ... prison reinforces the low self-confidence and sense of self-failure that lead many prisoners to offend.[245]

On this basis, Ireland's prison-system has been slated as "ill-suited to the task of rehabilitating offenders and preventing them from re-offending."[246] If this is true, its effect will undoubtedly be magnified by the government's ambitious and expensive prison expansion plans.[247]

If its critics are correct and Irish criminal justice really is so ill-equipped to rehabilitate offenders by failing to provide them with adequate emotionally therapeutic conditions and services, then it is certainly feasible that restorative justice's rehabilitative potential might assist it in this regard.

The above critique of Irish sentencing policy is provided simply to exemplify one area in which restorative justice could potentially perform a *remedial* function. However, irrespective of the critique's validity and regardless of restorative justice's alleviative potential in this respect, the paradigm's prospective place in Irish criminal justice is justified sufficiently by the emotional benefits it offers in complete indifference to the relative effectiveness of mainstream criminal justice. It *can* fill gaps in criminal justice, such as the neglect of crime's emotional fall-out, but it by no means *has to* in order to legitimise its presence.

Restorative justice is therefore a credible and promising prospective *addendum* to mainstream criminal justice that could first and foremost *supplement* and *expand* Ireland's sentencing habits. Depending on one's perspective on the Irish criminal justice system and the quality of its administration, restorative justice might be considered a remedial device. The point to stress is that, in order to survive, it need not sell itself as such.

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[244] *Ibid.*, at 7; see also, Soering, *An Expensive Way to Make Bad People Worse: An Essay in Prison Reform from an Insider's Perspective* (Lantern Books, 2004).
[245] Loy, "How to Reform a Serial Killer: The Buddhist Approach to Restorative Justice" (2000) 7 *Journal of Buddhist Ethics* 145, at 146. <http://ccbs.ntu.tw/FULLTEXT/JR-MISC/10178.htm>
[246] *National Crime Forum Report 1998*, *op. cit.*, at 139.
[247] *Infra*, at 376.

6.2 Effect on Judicial Discretion: For a *Laissez-Faire* Approach

This thesis will later explore the potential mechanisms by which restorative justice might be integrated least violently into the Irish criminal justice system.[248] It further contemplates the ideal features of a system of court-annexed restorative justice in this country.[249]

Chapter 9 speculates that the wisest method of restorative justice's integration may be to simply add it to the existing menu of sentencing options and *trust* the judiciary to utilise it in appropriate circumstances.[250] Discretion-trimming provisions that compel judges to consider restorative referrals are opposed predominantly on the basis that they can be circumvented with relative ease by creative judges wishing to avoid them.[251] Whether a mandatory sentencing provision or a statutory compulsion to consider restorative justice, restrictions on judicial discretion are unpopular amongst judges[252] who are capable, ironically, of *exploiting* their existing discretion to dodge laws that seek to shrink it.[253]

The judiciary, therefore, is effectively free to resist incoming sentencing techniques whether or not they are placed under any legal obligation to apply or consider them. As such, the survival of fledgling sentencing mechanisms lies practically, if not theoretically, in the hands of the judges – *regardless of what is said in legislation.* As Chapter 8 acknowledges, the support of the judiciary is crucial to the maintenance of restorative referral numbers and therefore, the ultimate survival an entire restorative system.[254] This reality will likely outlive any attempts to force judges statutorily to back restorative justice.

Restorative justice – like any newly appointed regime – must absorb the inevitable risk of judicial rejection. However, that risk can be mitigated by ensuring – as far as practicable – a sufficiently receptive judicial context exists prior to restorative justice's incorporation. This could insulate a newborn hybrid system from the fatal threat of judicial opposition or indifference before it ever finds its feet. Thus, the risk of judicial rejection is both *absorbable* – it will accompany any incoming practice and must be surmounted if it is to be successful – and *shrinkable* by ensuring, as far as possible, compatibility with prevailing judicial consensus. This can be achieved largely through judicial training and awareness-raising efforts.[255]

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[248] *Infra*, at 362-374.
[249] *Infra*, at 362-386.
[250] *Infra*, at 373-374.
[251] *Infra*, at 369-370.
[252] *See* O'Donnell, "Seam of Policies Opening Up in 1996 has been Exhausted" *The Irish Times*, 19 June 2006.
[253] *Infra*, at 369-370.
[254] *Infra*, at 355.
[255] *Infra*, at 358-359.

Fortunately, the said risk is unlikely to be significant in an Irish context in any event. Of course some judges will inevitably exploit restorative justice more than others – it is without question that some members of the judiciary will be sceptical about incoming changes to long-established norms, particularly changes that, on face value, may seem at odds with traditional criminal justice's largely retributive persona.

However, as Chapter 8 concludes, there is no reason at this point to rush to predict any *specific* judicial aversion to restorative justice.[256] In fact, judges' liberal use of non-custodial penalties suggests a general willingness to explore less punitive sentencing options.[257] This stands restorative justice in good stead.

7. Thesis Objectives and Approach

This thesis makes a case for incorporating a comprehensive restorative value-system into adult criminal justice in Ireland through the establishment of a nationwide network of court-annexed restorative justice that combines the strategic duo of VOM and ORPs. This proposal has come to reflect the substance of governmental plans, announced in the last month, to consider its options in terms of the imminent establishment of a state-wide restorative justice programme.

In January 2007, Minister for Justice, Michael McDowell, on foot of the recommendations of the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights[258] announced his intentions to establish a *Working Group* to draw up proposals for a nationwide programme of restorative justice.[259] At this preliminary stage in the process, the government's anticipated provision for restorative justice is, for the most part, to be welcomed. Still, undue optimism must be curtailed on two important bases.

First, although the future image of restorative justice in this country can be *estimated* by reference to the well-received recommendations of the Joint Committee, it will only really materialise when those of the *Working Group* – or *National Commission on Restorative Justice* as it has now been entitled[260] – are submitted and approved at a later date. It is only then that the desirability and quality of a *particular* restorative system can be properly judged. Therefore, while the Minister's announcement is undoubtedly a significant landmark in restorative justice's development in Ireland, only time will tell whether the eventual

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[256] *Ibid.*
[257] *Ibid.*
[258] *See* Houses of the Oireachtas, "Report on Restorative Justice by Joint Committee", *Press Release*, 22 December 2006. <http://www.oireachtas.ie/viewdoc.asp?DocID=6755> (visited 2 January 2007).
[259] O'Keeffe, *loc. cit.*; Wall, "Group to Produce New Proposals on Restorative Justice" *The Irish Times*, 19 October 2006; Reid, "Prison Sentence Alternative Promoted by Report" *The Irish Times*, 3 January 2007; Reid, "McDowell to Establish Restorative Justice Body" *The Irish Times*, 4 January 2007.
[260] O'Brien, "Study of Restorative Justice Plan" *The Irish Times*, 10 March 2007; O'Brien, "New Justice System for Lesser Crimes" *The Irish Times*, 12 March 2007.

structure and content of such a system, if and when it is established, will garner applause, indifference or doubt.

Secondly, several important reasons to tread carefully when integrating restorative justice into established sentencing practice are identified and evaluated throughout this thesis.[261] Chapter 6, in particular, predicts several key implications of restorative justice's proposed incorporation that provoke various degrees of scepticism about so-doing. While none of these factors is ultimately considered so significant as to evade successful suppression or moderation with due care and vigilance, they must nonetheless be taken on board by the instigators of a hybrid system and monitored meticulously lest they prove perilous to the survival of an inherently vulnerable infant system.[262]

In this respect, the insights, proposals and warnings that inform and sculpt this thesis' central endorsement of restorative justice could amalgamate to form a helpful blueprint for restorative change in this country. The nature and scope of Ireland's seemingly forthcoming system of restorative criminal justice have yet to be thrashed out in any detail. As such, the proposals circulating at present, which arise predominantly from the recommendations of the Oireachtas Joint Committee, embody a range of necessarily tentative principles and practices that need to be evaluated and verified before they can be meaningfully judged.

Consequently, the role of this thesis can be considered one of guidance. Its wide-angle perspective on restorative justice, subsuming insights into its history, philosophy, objectives, limitations, scope and potential, yields an informed determination of the appropriate features of a culturally-sensitive system of restorative justice in Ireland. It conducts sufficiently extensive groundwork on the topic of restorative justice to yield an informed range of proposals as to its ideal future position in this country. In sum, this thesis' greatest value could lie in the relevance of its content to the debate as to how and on what terms restorative justice should be injected into adult criminal justice in Ireland in the near future.

7.1 Objectives: Credibility, Compatibility and Co-operation

Deserting, for the moment, the uncertain terrain of governmental good intentions, in order to legitimate the specific recommendations made in this thesis with respect to its "best of both worlds" vision of restorative/punitive criminal justice, two essential factors must be established; these are: (a) restorative justice's *credibility* and (b) its contextual *compatibility*. Establishing the former is the shared responsibility of Chapters 2-6. Chapters 7-9 confirm the latter; they conclude the case for restorative criminal justice in Ireland by contemplating the

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[261] *Supra*, at 17-32; *infra*, at 225-259, 324-360.
[262] *Infra*, at 258-259.

method, nature and impact of its integration into existing sentencing patterns and how it is likely to *co-operate* with established norms.

The credibility of the incoming paradigm must be verified by measuring and confirming its ability to reach the targets to which its value-system aspires. Central here is the repeated principle that restorative justice's strengths or weaknesses cannot be fairly determined by comparing it to the relative adequacy of existing sentencing practice. Restorative justice implements an independent value-system that lays claim to sufficient benefits of its own accord to justify its insertion into the *general room for improvement* that will inevitably inhibit criminal justice's *optimum* administration.

Chapter 2 starts the ball rolling in terms of demonstrating restorative justice's credibility. It introduces restorative criminal justice as a paradigm of time-honoured global repute by identifying its historical predominance over millennia and across ethnic and spiritual boundaries. The chapter reveals a ubiquitous tendency throughout the history of human disputing to implement the principles and practices now accumulated under the modern rubric "restorative justice" to provide an intuitive first response to crime *while maintaining back-up punitive sanctions.* Chapter 2 thereby lends significant corroborative value to this thesis' argument for the amalgamation of punitive and restorative sentencing options under modern conditions.

Restorative justice's credibility is further verified by the confirmation issued collectively by Chapters 3-5 that it possesses substantial promise make good on its pivotal undertaking to provide holistic emotional healing to each of crime's main stakeholders. Having derived from restorative justice's emotionally-reparative potential an inherent integrity sufficient to warrant its use, its more unquantifiable ability – namely, its proclivity for crime-control due to its rehabilitative and fear-assuaging capacities – is also established. This simply reinforces the merit in combining restorative and retributive sentencing options. While restorative justice's credibility is by no means *dependant* on its appetite for curbing crime it is nonetheless enhanced thereby; its potential in this regard will undoubtedly heighten its appeal.

The second scrutiny required to establish the case for restorative criminal justice in Ireland – outlined briefly above – [263] is carried out in Chapters 7 and 8 wherein the concept's compatibility with Ireland's legal and cultural identity is confirmed. Chapter 9 then proceeds to ponder how and in what format restorative justice might be inserted into contemporary Irish criminal justice.[264] It anticipates how this newcomer is likely to co-operate with its superficially contrary mainstream host.

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[263] *Supra*, at 37.
[264] *Infra*, at 361-388.

On a general level, this thesis seeks to demonstrate that the quality of criminal justice in this country can be heightened by adopting a non-exhaustive "continuum"[265] of credible, effective sentencing options, which have been chosen specifically for their logically-derived potential to offer diverse, socially-beneficial responses to crime. More specifically, however, it aims to prove that restorative justice qualifies as such an option.

7.2 Methodology and Approach

Owing to the relative recentness of restorative justice's revival, this thesis comes at a time when either condemning or defending what is an *empirically vulnerable*[266] philosophy invariably involves pitting speculation with speculation.[267] John Braithwaite, a prominent academic voice on restorative justice recognises this important reality:

> [E]valuation research on restorative justice is at such a rudimentary stage that our claims about what is good practice and what is bad practice can rarely be evidence-based. [268]

But this fact does not render any less compelling, academically valid or indeed helpful to the government's forthcoming decisions in the area, hypotheses within the scholarly dialogue on alternative justice that offer credible *theoretically-deduced* claims as to how restorative justice is likely to work best. An inequity between the availability of reliable empirical and probative hypothetical data does not belittle the utility of contributions on the subject *per se*, nor does it divest them presumptively of their intellectual merit.

What need to be avoided are disreputable, hypothetical approaches to restorative justice that are discredited by their tendency for exaggeration, imbalance, advocacy, "romance" and "story-telling". There is an important distinction to be drawn here between such objectionable hypothetical appraisals of restorative justice and those that undertake a balanced and comprehensive "full social and criminological evaluation".[269] It is the latter approach to which this thesis aspires, whatever the balance of its statistical and hypothetical resources.

Statistical evidence is obviously influential and provides a seedbed from which cautious hope for restorative justice germinates. At the same time, because of its obvious weaknesses, this thesis' ultimate endorsement of restorative justice is bound to invoke *hypothetical evidence* of its merits. It relies on the *educated conjecture* to be derived from

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[265] Zedner, "Reparation and Retribution: Are They Reconcilable?" (1994) 57 *Modern Law Review* 228, at 250.
[266] Ashworth, "Is Restorative Justice the Way Forward for Criminal Justice?", *loc. cit.*, at 174.
[267] Morris, *loc. cit.*, at 600.
[268] Braithwaite, "Setting Standards for Restorative Justice", *loc. cit.*, at 565.
[269] Ashworth, "Is Restorative Justice the Way Forward for Criminal Justice?", *loc. cit.*, at 176.

several longstanding and credible sociological and criminological theories, such as labelling,[270] anomie,[271] "broken windows"[272] and social disorganisation.[273]

The blue-print for restorative change in this country that this thesis will finally tender is necessarily based – at least partially – upon hypothetical foundations; it is designed according to the symbiotic collusion of statistical and theoretical ovations for restorative criminal justice, tempered however with the caution aroused by the fact that success is never assured, *regardless of available data.*

8. Conclusion

This thesis emphasises the importance of questioning the subsistence of the *status quo* in criminal justice – pondering the reasons for continued reliance on the principles and practices that have sculpted common law criminal justice systems for centuries. It is useful to distinguish those features whose roots lie in rational, cognitive soil from those that could be branded the fruit of historical happenstance, misadventure or ethically objectionable policies unrelated to the control of crime. Equally as telling is the feat of understanding why long-established patterns are not different – why they have failed to evolve in *different* ways.

The original intentions that founded the established norm of state-centric criminal justice may have been commendable e.g. the prevention of blood-feud and private vengeance.[274] Still, as Chapter 3 will reveal,[275] it is dangerous to assume that those intentions endured as nobly throughout common law criminal justice's subsequent meandering evolution.

This thesis fiercely supports the preservation of the state's authority over matters of crime-control on the basis that it best approximates an impartial, observable, publicly accountable vector of social regulation. This perspective underlies this thesis' rejection of an abolitionist approach to law reform as well as its call for a hybrid model of *integrated* restorative criminal justice.

Interestingly, however, these and other justifications used in modern times to validate or vindicate state-controlled justice retrospectively did not necessarily prompt its original establishment. Delving into Ireland's criminal justice past, it is arguable that its British-inspired criminal justice model derived less from a measured brainstorm about achieving optimum effectiveness and more from the greed and megalomania of British

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[270] *Infra*, at 111-122.
[271] *Infra*, at 159-168.
[272] *Infra*, at 144-145.
[273] *Infra*, at 165-166.
[274] *Infra*, at 96.
[275] *Infra*, at 96-98.

monarchs,[276] Irish vanity about the image of the fledgling state[277] and arguably, having no better ideas when and where performance problems arose:

> As often happens, an institution that does not fulfil its original purpose continues to exist for other reasons-in this case because, to tell the truth, we do not know what else to do ... [278]

Indeed, some believe that when criminal justice systems outlive their original justifications in this way, they acquire an "arbitrary status"[279] that divests them of their contemporary validity:

> Originally, the state wanted to take over criminal proceedings from victims as an assertion of power, and also to raise revenue, and what now passes for "normal" is simply a usurpation which has no claim to be the natural order.[280]

This thesis opposes the arbitrariness of customary responses to crime; the practices and philosophies that sculpt criminal justice must be logically and rationally justifiable in accordance with modern values. To this end, it proposes logical justifications for preserving the *status quo*; it gives to criminal justice policies that have survived seemingly arbitrarily for centuries a retrospective rhyme and reason.

However, it is also ambitious and opposes limiting the potential of existing justice frameworks by resisting their infiltration by other philosophies and practices that can be justified with equal logic in a modern setting. This thesis demonstrates that restorative justice is just one means by which existing criminal justice traditions can be *diversified synergistically* by effective and credible new mechanisms.

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[276] *Ibid.*
[277] *Infra*, at 291-292.
[278] Loy, *loc. cit.*, at 146.
[279] Ashworth, "Is Restorative Justice the Way Forward for Criminal Justice?", *loc. cit.*, at 171.
[280] *Ibid.*

Chapter 2

Authenticating and Defining Restorative Justice by Reference to its Spiritual Ancestry: Tracing Back a Basic Legal Instinct

1. Introduction

As its title indicates, this chapter has two principal objectives. First, it takes a preliminary step towards establishing restorative justice's *credibility*. As Chapter 1 indicated, this is a task of vital importance to this thesis' mission to establish the paradigm's legitimacy and effectiveness.[1] Only by doing so can restorative justice's incorporation into traditional Irish sentencing practice be unreservedly promoted. Of course, the ambitious undertaking to establish the concept's credibility is delegated not only to the chapter at hand. It is a burden spread evenly between Chapters 2-7.

Chapter 2 fulfils its undertaking in this regard by stressing the *magnitude* of restorative justice's influence over how humans have resolved conflict throughout history. It demonstrates the breadth of the paradigm's ubiquitous predominance across a diversity of religious and indigenous traditions. Moreover, it reveals that restorative justice's philosophy and practice have survived millennia of legal and cultural flux and continue, to this day, to shape patterns of disputing in diverse settings across the globe. Restorative justice's remarkable international endurance, its long-standing intuitive appeal and the respect and reliance it has consistently commanded are all emphasised as cogent indicators of its world-wide repute.

Confirming restorative justice's global esteem – this chapter's primary objective – paves the way conveniently for its second. For, restorative justice's authentication happens to provide an ideal *definitional* opportunity in which restorative justice's unique value-system can be explored and expanded; the paradigm's most recognisable values, characteristics and tendencies – introduced briefly in Chapter 1 – are illuminated here concurrent with the chapter's primary documentation of restorative justice's rich evolutionary path.

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[1] *Supra*, at 44-45.

1.1 Spiritual Roots in Context

Evidence of restorative philosophy abounds from the annals that record people's elemental desire to publish and protect collective norms.[2] The most fruitful depictions of this evolution are provided by the instructive legacies of various spiritual teachings – both religious and aboriginal. They reveal that the most cherished values of what is nowadays labelled "restorative justice" all have their roots in primitive religious and cultural traditions. The ethos of restoration has long occupied a pivotal role in sculpting sacred teachings on constructive human interaction across a diversity of ethnicities and creeds.

It must be stressed, however, that the objective here is to explain a *modern* formula by reference to *ancient* teachings and not the other way around. The teachings of "restorative justice" existed long before they were commingled consciously under this title. In fact, a critical understanding of this thesis is that while "restorative justice" is a relatively new label, what it describes is *not* a novel innovation. As Daniel Van Ness observes, restorative justice's modern renaissance yields little more than "new wine from old vines".[3]

Therefore, the most prominent present-day *strategic* expressions of restorative justice such as VOM, ORPs or Family Group Conferencing (FGC), far from ushering in a ground-breaking legal formula, are largely *disinterring* or *re-awakening* a corpus of pre-existing philosophy and practice. Hence, it is not appropriate to conceptually force ancient legal regimes around a new theoretical framework, stretching them to conveniently fit its academically-calculated dimensions. Instead, this chapter surveys the ancient spiritual *roots* of the various components of restorative justice's value-system that have inspired the content of its present-day resuscitated format.

A primary task in this respect is to comb the landscape of religious and then indigenous customs for evidence of restorative philosophy's guiding influence over the maintenance of community harmony. Evidence is provided by the detection of the main thematic emblems of the recent "new wave"[4] of restorativism within a diverse blend of spiritual teachings – such as the importance of rehabilitation, compensation, apology and forgiveness, negotiated consensus through direct victim-offender contact and the informal, community-centred resolution of local discord.[5] Then, restorative justice's survival-power will be confirmed by documenting its *modern use* within models of "spliced" or "hybrid"

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[2] *See* Delgado, "Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice" (2000) 52 *Stanford Law Review* 751.
[3] Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice" (1993) 4 *Criminal Law Forum* 251, at 276.
[4] Bazemore and Griffiths, "Conferences, Circles, Boards, and Mediation: The 'New Wave' in Community Justice Decisionmaking" (1997) 59(2) *Federal Probation* 25.
[5] *Infra*, at 51-78.

justice wherein traditional retributive justice models are *supplemented* with the restorative legal traditions of the world's aboriginal populations.[6]

2. A Multi-Faith Review of Restorative Justice

2.1 Restorative Justice in Jewish Law

Judaism has developed principally around the teachings of the *Torah*.[7] The written *Torah* consists of the first five books of the Old Testament, known as the Hebrew Bible. The *oral Torah*, on the other hand, interprets the most influential Jewish texts to produce a verbally-circulated recital of their teachings, including those relating to law and order. One text that holds particular significance in the development of the Jewish legal tradition is the *Talmud*, a written compendium of oral legal teachings, completed around the sixth century.[8] It is therefore the *Torah* and the *Talmud* from which Jewish legal teachings substantially derive.

Jewish legal instruction embodies several of the ideological hallmarks of restorative justice.[9] The principal values and characteristics that have come to construct the modern image of "restorative justice" similarly characterise Jewish law; the *Halakhah*,[10] the legal limb of Jewish religious theory is infused with a particularly strong restorative flavour.

Like restorative justice, ancient Hebrew justice treated crime as a "violation of people and relationships". [11] Crime destroyed *shalom*, an ideal, cohesive state of "wholeness" in which a community was believed to function most harmoniously.[12] Deviance was considered socially disintegrative in that it ruptured "right relationships",[13] destroying community solidarity and cohesion – the raw material of *shalom*. Echoing the Hebrew perspective on crime's choking impact on social interaction, this thesis will later suggest a reciprocal

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[6] *Infra*, at 78-84.

[7] Segal, "Jewish Perspectives in Restorative Justice" in Hadley ed., *The Spiritual Roots of Restorative Justice* (State University of New York Press, 2001) 181.

[8] *See* Rich, "Halakhah: Jewish Law, Judaism 101". <http://www.jewfaq.org/halakhah.htm> (visited 25 November 2002).

[9] *See generally*, Lerman, "Restorative Justice and Jewish Law" (1998) 9(1) *Newsletter of the European Forum for Victim-Offender Mediation and Restorative Justice* 2; Lerman, "Underlying Principles: Restorative Justice and Jewish Law" (1998) 2(2) *Full Circle: Newsletter of the Restorative Justice Institute* 2; Segal, *loc. cit.*, at 181; Greenwood, "Restorative Justice and the Jewish Question" (2003) 1 *Utah Law Review* 533.

[10] Rich, *loc. cit.*

[11] Zehr, *op. cit.*, at 181-184; see also, Zehr and Mika, "Fundamental Concepts of Restorative Justice" in McLaughlin, Fergusson, Hughes and Westmarland eds., *Restorative Justice: Critical Issues* (Sage, 2003) 40, at 41; Zehr, "Justice: Retribution or Restoration?", at para. 21. <http://www.afsc.org/pwork/0499/049910.htm> (visited 19 January 2006).

[12] *See* Van Ness, *loc. cit.*, at 254; for an overview of the concept of *shalom*, see Yoder, *Shalom: The Bible's Word for Salvation, Justice and Peace* (Faith & Life Press, 1987); see also, Van Ness, "Shalom" <http://pfi-rj.mooball.net/chapel/articles> (visited 16 February 2006).

[13] *See* Zehr, *loc. cit.*; Consedine, *Restorative Justice: Healing the Effects of Crime* (Ploughshares, 1999), at 149-151.

feedback relationship between social disintegration and crime: Chapter 4 will argue that social fragmentation produces crime and *vice versa* – it is both a cause and consequence of deviance.[14]

Jewish law responded to crime with a variety of techniques designed to make a community whole again by restoring *shalom*. One of the prime restorative tactics emerging from Jewish legal theory is the *rehabilitation* of offenders with a view to *reintegrating* them into their communities. The ideal of rehabilitation is embodied in the word *Teshuvah*, meaning "return" [15] – a concept sharing strong parallels with the philosophy of restoration.[16]

Lerman recounts the ancient establishment of *Airey Miklat* or "cities of refuge"[17] to which offenders guilty of unintentional murder would routinely retreat.[18] However, unlike the cities of 18th century Australia to which droves of British criminals were banished in an act of permanent social cleansing, the Hebrew cities had a *rehabilitative* purpose. They were inhabited by *Levites*, learned teachers of exemplary moral character who were installed as positive role models whose "good example" was intended to reform exiled miscreants.[19]

Some socially-beneficial future role was envisaged for society's wrongdoers on their anticipated "return" from what was a *temporary* state of outlawry. Reflecting modern restorativist theory,[20] reintegration was a core goal of Jewish law. Rather than perceiving and treating criminals as irredeemable and unworthy of a second chance at life in the mainstream, Jewish law perceived reform as a viable and worthwhile avenue, even for the most serious offenders.[21]

The *Torah* does not advocate the use of prisons *per se*.[22] Although the Hebrew cities of refuge provide the earliest known form of "protective custody", their dominant objective was the pursuit of atonement and reform through self-reflection rather than simple containment.[23] The colonies were entered voluntarily by wrongdoers who were free to bring their families in tow. That an offender's accession to *VOM* should be *voluntary* is a

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[14] *Infra*, at 124-179.
[15] *See* Lipskar, "A Torah Perspective on Incarceration as a Modality of Punishment and Rehabilitation", at para. 22. <http://www.jlaw.com/Articles/PrisonersRights.html> (visited 16 February 2006).
[16] *See* Norman, "Tzedek Tzedek Tirdof: Jewish Values and Criminal Justice", at para. 4. <http://www.beittshuvahla.org/Winter%202003%20Bulletin.htm> (visited 18 February 2006).
[17] *See* Harary, "Incarceration as a Modality of Punishment", at para. 16. <http://www.jlaw.com/Articles/ch_incarceration.html> (visited 23 January 2006); Lerman, "Restorative Justice and Jewish Law", *loc. cit.*, at 2; see also Zehr, *op. cit.*, at 147; Lipskar, *loc. cit.*, at paras 14-20.
[18] *See Deuteronomy* 19; all biblical extracts used in this chapter are taken from *The New Jerusalem Bible* (Darton, Longman and Todd, 1990).
[19] This idea of "teaching by example" reflects the "models of helping" discussed in Chapter 5: *infra*, at 220.
[20] Van Ness, "Restorative Justice: International Trends", Victoria University, Wellington, New Zealand, 7 October 1998, at 4. <http://www.restorativejustice.org/rj3/Full-text/dan/Victoriatalk.pdf>
[21] This is in tune with Chapter 9's argument that *restorative justice* should be extended to non-minor criminals: *infra*, at 383-386.
[22] *See* Lipskar, *loc. cit.*; see also, Harary, *loc. cit.*
[23] Harary, *loc. cit.*, at para. 16.

prominent accent of Chapters 6[24] and 8.[25] It is believed that in order to achieve *maximum* emotional catharsis, reconciliation and personal reform, a restorative opportunity must be grasped freely, sincerely and without *undue* incentive or coercion.[26]

So, it is wrong to classify the *Airey Miklat* as "prisons".[27] The cities could actually be better conceptualised as sanctuaries[28] aimed at *improving* the conditions in which wrongdoers lived. Refugees were provided with a nurturing habitat that offered a humane standard of local amenities and personal sustenance.[29] This "primitive" system contrasts to the arguably objectionable standards of hygiene and sanitation said to pervade Ireland's modern-day prison system.[30]

Jewish law's preference for *rehabilitative* confinement over mere containment is demonstrated by the kinds of punishments traditionally meted out there-under. Sentences were commonly community-based and cleverly designed not only to restore victims but to simultaneously offer offenders a transformative opportunity. For instance, the *Torah* provides that thieves may be required to work for their victims as punishment. This is a symbiotic arrangement in which the victim receives the benefit of the offender's service and the offender gains an opportunity to reform by holding down honest employment.[31]

Jewish law's emphasis on the community's role in conflict resolution connects it to yet another restorative trait common to ancient justice systems.[32] The burden of rehabilitating offenders is believed to fall, at least partially, on the community. The above example of pursuing reform by temporarily transplanting offenders into supportive, instructive social environments exemplifies this principle.

Restoring victims was also central to Jewish law's accent on repairing the harm done by crime and re-establishing *shalom*.[33] Tangible losses were recovered through *compensation*, another device prized by restorative justice's modern-day persona as a means of recovering the tangible losses incurred by victimisation.[34] *Shillum* is the Hebrew word for restitution, yet it implies more than compensation for compensation's sake. It is derived from

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[24] *Infra*, at 238-241.
[25] *Infra*, at 380-383.
[26] *Some* degree of coercion is arguably inherent in the concept of state-run criminal justice: *infra*, at 240.
[27] Lipskar, *loc. cit.*, at 3.
[28] Zehr, *op. cit.*, at 147.
[29] Harary, *loc. cit.*, at para. 16.
[30] *Supra*, at 38-41.
[31] *See* Segal, *loc. cit.*, at 186.
[32] *Infra*, at 273-275.
[33] Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice", *loc. cit.*, at 254.
[34] Walgrave, "Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime" in von Hirsch, Roberts, Bottoms Roach and Schiff eds., *op. cit.* 61.

the same etymological root as the word *shalom* and envisages the restoration of community peace through compensatory gestures.[35]

The Hebrew Bible offers thorough instruction on how wrongs are to be compensated. For example, *Exodus* 21 sets down a sophisticated system of compensation for injury. This insightful passage enumerates various restorative acts to be performed by those whose wrongful conduct incurred medical expenses, humiliation, time off work and/or pain and suffering for their victims.[36]

> If people quarrel and one strikes the other a blow with stone or fist so that the injured party, though not dead, is confined to bed, but later recovers and can go about, even with a stick, the one who struck the blow will have no liability, other than to compensate the injured part for the enforced inactivity and to take care of the injured party until the cure is complete.
> – *Exodus* 21:18-19.

Exodus 22 similarly catalogues a range of compensatory gestures designed to restore victims of theft.

> If anyone entrusts money or goods to someone else's keeping and these are stolen from that person's house, the thief, if he can be discovered, will repay double.
> – *Exodus* 22:6

The detailed compensatory prescriptions set out throughout Exodus 22 have proved influential throughout the indigenous legal traditions of Christianised nations. For instance, as Chapter 7 explains, the native Irish laws of compensation under the Brehon Laws were modelled remarkably closely around this passage.[37]

Like modern-day restorative endeavours such as VOM and ORPs, Jewish law encouraged direct victim-offender confrontation.[38] Being the main co-participants in crime, wronged and wrongdoer were considered of vital relevance in the resolution of its troublesome aftermath. This thesis will later argue that the exchange of apology and forgiveness that direct interpersonal contact can facilitate provides a useful vehicle by which restorative practices can achieve optimum emotional healing for victims and offenders.[39]

Jewish law also accentuated the important ideal of apologetic exchange within the confrontational process. In fact, echoing a modern-day plea-bargain,[40] it provided for the

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[35] Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice", *loc. cit.*, at 254; see also, Colson, "Truth, Justice, Peace: The Foundations of Restorative Justice" (1998) 10 *Regent University Law Review* 1, at 6-8.
[36] *See* Segal, *loc. cit.*, at 188.
[37] *Infra*, at 281.
[38] Segal, *loc. cit.*, at 184.
[39] *Infra*, at 190-196.
[40] *Infra*, at 240.

avoidance of certain penalties in exchange for a confession, a first step towards repentance, remorse and apologetic amends.[41] Apologies were further encouraged by an absolute prohibition on the use of confessions in the criminal adjudication process;[42] as a result, an offender could accept responsibility freely through an offer of apology without the fear of it provoking criminal liability.[43]

Repentance was valued not only for its ability to alleviate victims' suffering; it was also pursued for the emotionally therapeutic, potentially rehabilitative influence it was known to exert over offenders. Its importance is still demonstrated by the Jewish festival of Yom Kippur – an opportunity to atone (*vidui*) for sins between humans and the Creator.[44]

The penitent act of a wrongdoer, according to Jewish law, should be counter-balanced with compassionate treatment, including mercy and, ideally, forgiveness[45] from both victims and communities alike.[46] Acts of restitution were considered merely symbolic of a willingness to atone and victims were encouraged to waive compensation so as to encourage offenders to recognise their wrongdoing, accept responsibility, and embrace reform.[47]

Jewish law's community-focused, informal approach to conflict resolution[48] further demonstrates its restorative focus.[49] While, as later chapters explain, informality is not an *indispensable* component of restorative justice's value-system, it has tended to characterise its administration throughout its long tradition.[50] Gulack recounts that during the *Talmudic* era, due to restrictions on Jewish judicial authority, arbitration courts became the standard venue for litigation.[51] Jewish courts, generally speaking, favoured an inquisitorial model of criminal process over an adversarial Roman one.[52] Moreover, Jewish law avoided the use of professional attorneys and instead preferred direct, unobstructed contact between both victim and offender and disputants and judge. Its preference for informally-administered,

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[41] *See* Segal, *loc. cit.*, at 187.
[42] *See* Greenwood, *loc. cit.*, at 540.
[43] *See* Bader, "'Forgive Me Victim For I Have Sinned': Why Repentance and the Criminal Justice System Do Not Mix -- A Lesson From Jewish Law" (2003) 31 *Fordham Urban Law Journal* 69.
[44] Lerman, "Restorative Justice and Jewish Law", *loc. cit.*, at 2.
[45] *See* Lerman, "Forgiveness in the Criminal Justice System: If it Belongs then Why is it So Hard to Find?" (2000) 17(5) *Fordham Urban Law Journal* 1663; see also, Dorff, "The Elements of Forgiveness: A Jewish Approach" in Worthington ed., *Dimensions of Forgiveness: Psychological Research and Theological Forgiveness* (Templeton Foundation Press, 1998) 29.
[46] *See generally*, Levine, "Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought" (2000) 27 *Fordham Urban Law Journal* 1677.
[47] Segal, *loc. cit.*, at 185.
[48] *See* Greenwood, *loc. cit.*, at 554-555.
[49] On the centrality of community in restorative justice, see McCold, "What is the Role of Community in Restorative Justice Theory and Practice?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 155; see also, Zehr and Mika, *loc. cit.*, at 42; *supra*, at 8; *infra*, at 273-275.
[50] *Infra*, at 181, 241-242.
[51] Gulack, *A History of Jewish Law* (Hebrew University Press, 1939), at 178-179.
[52] Segal, *loc. cit.*, at 184.

confrontational justice that encourages inter-party mediation and reparation echoes modern procedural techniques, such as VOM and ORPs, which have evolved to give restorative justice a contemporary expression.[53]

Possibly the most probative evidence of Jewish law's enlightened, flexible and pragmatic attitude to social control is its use of *both* retributive and restorative treatments. A fundamental precept of this thesis is that restorative justice, while divergent to retributive philosophy in many ways,[54] does not necessarily deny the inescapable societal demand for punitive necessities such as incarceration.[55] The need to punish is a ubiquitous inevitability in life, required to protect law-abiding society from its most threatening members. Rather than denying this truth, restorative justice simply treats retributive interventions as a last resort in treating offenders, to be used in circumstances in which public safety requires them.[56]

Reflecting a prime tenet of this thesis, Jewish law appreciated the need for both restorative and retributive tactics.[57] While restorative techniques were the preferred means of tackling the negative effects of wrongdoing, the unavoidable necessity of punishment was sensibly conceded.[58] While modern restorativism would not stretch to accommodate it, even corporal punishment[59] was condoned under certain circumstances (as it was under Ireland's own ancient hybrid criminal justice system that operated in Brehon times).[60] As Segal observes:

> The ancient rabbis were well aware of the law's obligation to impose suffering on criminals ... From this perspective, any stance that entirely rejects judicial punishment seems seriously flawed with respect to its understanding both of prevailing legal ideologies, and of the role of punishment in a Restorative Justice paradigm ... Admittedly, there is nothing in the model of Restorative Justice that would contradict the need for the fair and impartial imposing of punishments on wrongdoers.[61]

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[53] *See* Van Ness, "Restorative Justice: International Trends", *loc. cit.*

[54] For a catalogue of the key differences between the foci of restorative and retributive justice, see Zehr, *op. cit.*, at 211-214.

[55] *Infra*, at 214-215, 329-335, 378-383.

[56] *Infra*, at 209-210, 218, 257, 334, 380.

[57] *See* Lerman, "Restorative Justice and Jewish Law", *loc. cit.*, at 2.

[58] *See generally*, Mackey, "Punishment in the Scripture and Tradition of Judaism, Christianity, and Islam" in Day and Laufer eds., *Crime, Values and Religion* (Ablex Publishing Corporation, 1987) 23.

[59] Some argue that the use of force to safeguard *shalom* is not necessarily incompatible with restorative justice: Van Ness, "Force and Restorative Justice", *2001 Kuyper Lecture*, 1 November 2001, Gordon College, Wenham, Massachusetts.
<http://downloads.weblogger.com/gems/cpg/2001KLD.VanNessResponse.pdf> (visited 23 February 2006); see generally, Zedner, "Reparation and Retribution: Are They Reconcilable?" (1994) 57 *Modern Law Review* 228.

[60] *Infra*, at 283.

[61] Segal, *loc. cit.*, at 189-190.

Greenwood also stresses the need for an accompanying source of retributive justice to handle crimes for which restorative interventions are unsuitable. Neither Segal nor Greenwood is sufficiently naïve to assert restorative justice's sufficiency to resolve all of the adverse consequences of *every crime*. Restorative tactics are certainly preferred but retributive measures provide regrettable but prudent last resorts in many instances:

> ... Jewish history, indeed human history, makes clear the limits of this limited criminal law. There are times when we must stand up in outrage at offenses against our common morality or the norms of society. There are crimes for which no restitution and perhaps no human forgiveness is possible. Then violence in return for violence may be the only answer--but only if it works. The justification for criminal law must be that in fact it reduces crime.[62]

Jewish law's focus on achieving the peaceful,[63] community-centric resolution of inter-personal conflict through reconciliation, restoration and rehabilitation bonds it to the modern model of restorative justice. Jewish legal theory emerges as an important source of many of the closely-held principles of the modern restorativist movement, upon which this thesis will rely in building a case for the expanded use of restorative criminal justice in adult sentencing in Ireland.

2.2 The Spirit of Restorative Justice in Buddhism

> If there is no path to peace, then peace itself must be the way.[64]

Buddhism's centremost aspirations of *peace* and *harmony*, which infuse every facet of its philosophy, are deeply enriched by restorative principles. It is unsurprising then, that the Buddhist perspective on deviance and its management possesses a distinctive restorative flavour. In fact, the Buddhist perspective on crime is saturated by many of the same key restorative themes detected above within its Jewish counterpart.

On the most fundamental level, Buddhism, like Judaism, treats crime as having undermined social harmony by destroying or damaging important interpersonal relationships. Accordingly, it stresses, as more contemporary expressions of restorative justice still do,[65]

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[62] Greenwood, *loc. cit.*, at 560.

[63] *See* Firestone, "Judaism on Violence and Reconciliation: An Examination of Key Sources" in Heft ed., *Beyond Violence: Religious and Social Transformation in Judaism, Christianity and Islam* (Fordham University Press, 2004) 74; Greenberg, "Religion as a Force for Reconciliation and Peace: A Jewish Analysis" in Heft ed., *op. cit.* 88.

[64] Loy, "Healing Justice: A Buddhist Perspective" in Hadley ed., *op. cit.* 81, at 92.

[65] On the importance of the concepts of social harmony and inter-personal relationships to the modern concept of "restorative justice" in its modern formulation, see Napolean, "By Whom and By What Processes, is Restorative Justice Defined, and What Bias Might this Introduce?" in Zehr and Toews eds., *op. cit.* 33, at 37-40.

the importance of re-harmonising social relations in the wake of crime;[66] its approach to neutralising crime's adverse social impact is therefore largely *socially integrative*.

Its methods of social re-harmonisation through relationship re-building are revealed in key Buddhist texts such as the *Lions Roar Sutta*[67] and the *Vinaya*.[68] Yet, Buddhism's restorative identity is not only evident from the means it *adopts* to alleviate crime's side-effects – in fact, it is equally apparent from the means it *rejects*. An obviously restorative lesson from Buddhism's peace-centred tracts is its distaste for vengeance, violence and retribution. Buddhists are taught that violence only begets more violence and so on; Buddhism eschews the notion that wrongs must be repaid with proportionate wrongs and that those who offend must accept their "just deserts". Instead, Buddhism prescribes more therapeutic, *emotionally cathartic* antidotes to criminality.[69]

This thesis operates from the understanding that crime is a societal inevitability and as such, creative means of tackling it must be consistently innovated and adapted as society gradually metamorphoses.[70] Buddhism appreciates this reality.[71] It understands that all humans are prone to imperfection.[72] Greed, delusion and ill-will will forever blight human-nature and it is normal and inevitable that people will sometimes succumb to sinister, anti-social tendencies.[73]

At the centre of this principle is Buddhism's belief in the transience of life.[74] It recognises that people, like all other things, are highly adaptable and amenable to change; they can fall easily into both positive and negative behaviour patterns – virtue and vice – as easily as they fall out of them; there are no character flaws that are irreversible or indelible. Accordingly, Buddhist philosophy emphasises the feasibility of human betterment and reform. It therefore treats deviance, like other negative states, as an entirely curable defect.[75]

The medium through which Buddhists seek to inspire personal improvement is *enlightenment* – a transformative, yet elusive state of harmony and self-awareness pursued through meditation and reflection.[76] Enlightenment is the catalyst for all positive change. It

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[66] Loy, "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 90.
[67] *See* Loy, "How to Reform a Serial Killer: A Buddhist Approach to Restorative Justice" (2000) 7 *Journal of Buddhist Ethics* 145, at 151. <http://ccbs.ntu.tw/FULLTEXT/JR-MISC/10178.htm>; Loy, "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 84-86.
[68] Loy, "How to Reform a Serial Killer: A Buddhist Approach to Restorative Justice", *loc. cit.*, at 153; "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 86-89.
[69] Loy, "Healing Justice: A Buddhist Perspective", *loc cit.*, at 87-90.
[70] *Supra*, at 1; *infra*, at 378-379, 386.
[71] Loy, "How to Reform a Serial Killer: A Buddhist Approach to Restorative Justice", *loc. cit.*, at 154.
[72] Loy, "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 87.
[73] *See generally*, Pepinsky, "Peacemaking in Criminology and Criminal Justice" in Pepinsky and Quinney eds., *Criminology as Peacemaking* (Indiana University Press, 1991) 299; see also, Loy, "How to Reform a Serial Killer: A Buddhist Approach to Restorative Justice", *loc. cit.*, at 147.
[74] Loy, "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 88.
[75] *Ibid.*, at 88-89.
[76] *Ibid.*, at 87.

yields a cleansed, emotionally-refreshed state that is hostile to deviant tendencies and accommodates only virtuous motivations. Buddhism seeks to curtail deviant behaviour through the emotional healing that is produced when people reflect calmly on the assured viability of their impending ascent into virtue.

This causal nexus between enlightenment and the abandonment of deviance shapes the "punishments" endorsed by Buddhism. Probation is a typical punishment, designed for its facilitation of self-reflection.[77] Once their probationary period ends, offenders are considered rehabilitated, readily accepted into their communities and reinstated to their prior position without stigma, humiliation or contempt. Buddhism's emphases on rehabilitation, reintegration and forgiveness combine to offer former deviants a realistic and genuine second chance at life.

Buddhism's emphasis on rehabilitation resounds from the theory of *karma*. Though the concept is usually associated with the notion of reaping what one sows, Loy insists that *karma* was never used, as might be imagined, to justify punishment.[78] Instead, "punishments" such as probation, like the Hebrew cities of refuge,[79] were intended to transform and improve offenders' lives. Buddhism teaches that "punishment" in the sense of inflicting proportionate harm on offenders, is complete as soon as a rule is breached; people are punished *by* and not *for* their sins.[80]

Like Judaism, Buddhism urges its followers to show compassion and empathy towards wrongdoers.[81] The implied premise is that, because of the ease with which people acquire deviant behaviour patterns, the positions of offender and victim could be quite easily reversed under different circumstances. The virtuous are encouraged to relate to and familiarise with the temporarily vice-ridden, to whom they are different only by degree. The need to view our victimisers as ourselves is a principle resounding from this thesis' exploration of the concept of forgiveness[82] – an ideal occupying a position of priority on restorative justice's wish-list. As Christina Baldwin states, forgiveness "is the act of admitting that we are like other people".[83]

Buddhism shares much with the philosophy of the modernly-conceived paradigm of restorative justice. The connection between the two philosophies is vividly apparent in Van

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[77] Loy, "How to Reform a Serial Killer: A Buddhist Approach to Restorative Justice", *loc. cit.*, at 157.
[78] *Ibid.*, at 146.
[79] *Supra*, at 52-53.
[80] Loy, "How to Reform a Serial Killer: A Buddhist Approach to Restorative Justice", *loc. cit.*, at 156.
[81] Loy, "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 95.
[82] *Infra*, at 194.
[83] Baldwin, *Life's Companion: Journal Writing as a Spiritual Question* (Bantam, 1990) cited in Murphy *et. al.*, *Ninth Annual Stein Center Symposium*, "The Role of Forgiveness in the Law" (2000) 27 *Fordham Urban Law Journal* 1349, at 1395.

Ness and Strong's following statement, as they explore reintegration as a central tenet of *modern* restorative theory:

> Reintegration requires that we view ourselves (and others) as a complex measure of good and evil, injuries and strengths, and that while we resist and disparage the evil and compensate for our weaknesses, we also recognize and welcome the good and utilize our strengths.[84]

Another principle that is common to both restorative justice and Buddhism is the importance of victim-offender confrontation. This captures the idea of parties' "owning" the conflict between them, a concept that has long occupied the foreground of modern scholarship on informal justice.[85] The dialogic pursuit of mutual-understanding and mediated inter-party reconciliation has survived to shape modern restorative strategies such as VOM.[86] Tibetan law codes provided for a "getting together payment" to be levied on crime's participants to finance a meeting between them.[87] The parties would eat and drink together with a view to promoting consensus and settlement. The reconciliation process was, however, voluntary[88] – a requirement identified herein as a necessary characteristic of an ideal system of court-annexed restorative justice in Ireland.[89]

Should inter-party negotiation fail, a process akin to modern-day mediation took place. Mediation between victim and offender is treated in this thesis as an ideal manifestation of restorative justice because of its ability to breathe life into a comprehensive array of restorative values, particularly when combined with the back-up option of the ORP.[90] According to Buddhism, when party-controlled resolution failed, an external unofficial conciliator would intervene to arbitrate the dispute informally.[91] The following up-to-date definition of mediation reveals a pronounced crossover between old and new in this respect; according to Levi, "[m]ediation is an alternative to adjudication in which a neutral third party who has no final decisionmaking authority intervenes in negotiations to assist resolution of conflict".[92]

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[84] Van Ness and Strong, *Restoring Justice* (Anderson Publishing, 1997), at 118; see also, Van Ness, "Restorative Justice: International Trends", *loc. cit.*, at 4.
[85] Christie, "Conflicts as Property" (1977) 17(1) *British Journal of Criminology* 1; Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 *Georgetown Law Journal* 2663.
[86] *Infra*, at 187-189.
[87] Loy, "How to Reform a Serial Killer: A Buddhist Approach to Restorative Justice", *loc. cit.*, at 154.
[88] Loy, "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 90.
[89] *Infra*, at 238-241, 382-384.
[90] *Infra*, at 184-187.
[91] Loy, "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 90.
[92] Levi, "The Role of Apology in Mediation" (1997) 72 *New York University Law Review* 1165, at 1169.

The *informality* of arbitrated settlements under both Buddhist and Jewish legal traditions connects it to another characteristic of modern restorative interventions. Contemporary restorative techniques, such as VOM, fit snugly under the umbrella concept of *informal justice*. Since the 1950s,[93] the informal justice movement has promoted a miscellany of non-curial, informal alternatives to adjudication designed to avoid the perceived rigidity, capriciousness, inefficiency and anomalies of formal court adjudication.[94]

It is interesting that Buddhism's endorsement of informal arbitration was inspired by similar efficiency and flexibility gains. Arbitration was chosen, as are similar informal, mediative process today, for the *perceived advantages* they hold over more formal options.

> The most common type of judicial process was internal settlement by the parties themselves. If that did not work, their private and unofficial conciliators could be tried; this way usually preferred because it was informal, saved reputations, allowed flexible compromises, and was much less expensive. A third process involved visiting judges at home to get their informal opinion on the best way to proceed. Official court proceedings were a last resort.[95]

Nonetheless, it must be re-stressed that restorative justice, though an important member of the movement towards informal justice, *relies neither for its credibility nor to justify its implementation*, on any perceived advantages it holds over formal justice. This is the case despite informal justice, the wider category from which restorative justice is drawn, having been fuelled initially by its perceived efficiency gains. After all, as later stressed, informality is not even an intrinsically necessary component of restorative justice – it is merely a practical characteristic it has acquired over time.[96]

Given its focus on the maintenance of peace and harmony and its belief in the malleability of human motivation, Buddhism possesses a strong and predictable affinity with the principles that mould the restorative response to crime.

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[93] As far back as 1957, Lon Fuller devised and taught a college course based on earlier drafts of his paper, "The Forms and Limits of Adjudication" [1978] *Harvard Law Review* 353, which might be considered the starting point of the informal justice movement.

[94] Burger, "Isn't there a Better Way?" (1982) 68 *American Bar Association Journal* 274; Burger, "Agenda for 2,000 A.D. – A Need for Systematic Anticipation" (1976) 70 *FRD* 83; Cannon, "Contentious and Burdensome Litigation: A Need for Alternatives" (1983) 31 *UCLA Law Review* 4; Rice, "Mediation and Arbitration as a Civil Alternative to the Criminal Justice System" (1979) 29 *American University Law Review* 17; efficiency-based critiques of formal justice were largely inspired by the 1906 speech of Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1936) 20 *Journal of the American Judicature Society* 178.

[95] Loy, "Healing Justice: A Buddhist Perspective", *loc. cit.*, at 90-91.

[96] *Infra*, at 181.

2.3 Restorative Justice and Islam

Unlike Buddhism and Christianity, Islam provides a more surprising source of restorative principles. The perceived improbability of the Islamic legal tradition harbouring restorative ambitions may account for the relatively small amount of research documenting the overlap between the two ideologies.[97] Still, the two seemingly divergent philosophies are far from alien to one another. The influence that restorative values exert over Islam's legal customs provides a striking insight into the *diversity* of religious traditions touched by restorative justice.

The use of strongly retributive, retaliatory and barbaric punishments that has come to define Islam is diametrically opposed to the therapeutic, reparative ways of restorative justice. Punishments such as stoning,[98] amputation and *fatwa* administered according to *Shari'a law*[99] are particularly shocking to Western sensibilities. The Western media continuously dwells on the perceived "dark side of Islam".[100] It expresses Occidental "islamophobia"[101] of what has been judged as a "blood thirsty" Islamic punitive obsession[102] that flouts basic standards of human rights and motivates terrorism.[103] Despite the popularity of such views, it is, however, erroneous to deduce an exclusive causal connection between Islam and extreme punishment.[104]

Because there is no single Islamic criminal justice system and no unified body of Islamic legislation, there is substantial diversity in the means by which justice is

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[97] *See generally*, Ammar, "Restorative Justice in Islam: Theory and Practice" in Hadley ed., *op. cit.* 161; Ammar, "Is there Restorative Justice in Islam?" in Safty ed., *Leadership, Islam and Globalization* (Bahcesehir Universitesi Yayinlari, 2003) 30.

[98] *See* Koinange, "Woman Spared Nigeria Stoning Death" *CNN.com*, 25 March 2002. <http://archives.cnn.com/2002/WORLD/africa/03/25/nigeria.sharia/index.html>

[99] On *Shari'a* law, see generally, Haleem, Sherif and Daniels eds., *Criminal Justice in Islam: Judicial Procedure in the Shari'a* (I.B. Tauris, 2003); see also, McCoubrey and White, *Textbook on Jurisprudence* (Oxford University Press, 1999), at 106-119; Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964).

[100] O'Brien, "Why We Cannot Ignore the Dark Side of Islam" *The Irish Times*, 9 July 2005; Smyth, "Media Have Duty Not to Inflame Religious Hatred" *The Irish Times*, 13 August 2005.

[101] *Meeting the Challenge of Islamophobia*, Symposium, 24 May 2006, Dublin Castle, Ireland.

[102] For a defence of the "barbarous" punishments administered according to *Shari'a* law, see Sanusi, "Between the Shariah and 'Barbarism'" <http://www.nigerdeltacongress.com/barticles/between_the_shariah_and.htm> (visited 17 February 2006); see also, Ahmad, "In Defense of 'Shariah'" *Taipei Times*, 23 August 2002. <http://www.taipeitimes.com/News/editorials/archives/2002/08/23/165272>; Mohammed, "Lashing, Stoning, Mutilating: Islamic Law is Barbaric and Outdated: Defend the Case of Islam" <http://www.jannah.org/morearticles/4.html> (visited 16 February 2006).

[103] *See* Oglesby, "Beheadings Pervert Legitimate Law" *CNN.com*, 21 July 2004. <http://www.cnn.com/2004/WORLD/meast/07/21/beheading.background/index.html>

[104] See Bill, "Islam: Misunderstood Throughout the World" <http://www.stanford.edu/~jamila/islam-misunderstood.html> (visited 18 February 2006); see also, Gillespie, "Strategic Logic, Not Religion, Drives the Suicide Bomber" *The Irish Times*, 16 July 2005; Jansen, "Narrow View of Islam Drives the Warriors Dedicated to Defeat the West" *The Irish Times*, 30 July 2005; Wright, "Extremism Feared Equally by Muslims - Poll" *The Irish Times*, 16 July 2005; Downes, "Dialogue is Needed, Says Irish Islamic Cleric" *The Irish Times*, 8 August 2005.

administered across Muslim nations. Given that *Shari'a* law is selectively applied, it is revealing that even those Islamic jurisdictions that have evaded its influence, administer a distinctively retributive brand of criminal justice. Bearing this in mind, it can be deduced that the Muslim world's preference for retribution is nurtured more by prevailing contextual conditions such as the effects of colonisation, war and political unrest than by Islam itself, as arguably sensationalised media reports are wont to imply.

Ammar stresses that the severely retributivist sentencing administered in Islamic territories does not derive from any Qur'anic teaching that condones or commands gruesome acts of vengeance. Quite apart from any religious influence, heightened reliance on extreme punishments can be more accurately described as a product of the volatile social and political histories that have shaped the Muslim world.

> ... extreme measures of justice and the call for their implementation in the formal system are inherent neither in the Islamic message nor the Muslim people. Such extreme miscarriages of justice must be understood within the socio-economic and political contexts of particular societies and have a number of causes: maldevelopment, lack of genuine democratic dialogue, deteriorating educational systems, shrinking employment opportunities, and the disparity between the oil-rich countries and other Muslim nations ... Muslims are governed by undemocratic institutions, by values of consumerism, by a New World order where the law of military might reigns over justice, and by patriarchal norms that bend Qur'anic prescriptions.[105]

The politically chaotic conditions that have come to trouble and define Islamic nations continue to obstruct the *official* infiltration of restorative, healing methods into their criminal justice systems: "In this contemporary reality of Muslims, any potential for restorative justice within the criminal justice system has been blocked by external conflicting norms of injustice."[106]

Yet, the impermeability of modern-day Islamic criminal justice systems to restorative techniques is not to suggest that Islam, in its teachings, is devoid of restorative intent. In fact, there are strong connections between the Muslim faith and the major features of the modern-day "restorative justice". In stark contrast to its media-sculpted public persona as a vengeful, merciless and malevolent force, Islam itself, *as distinct from the identity it derives from surrounding social context*, can be fairly described as considerably restorative.

Islam's teachings are replete with restorative principles. The Islamic classification of criminal offences is known as *fiqh*,[107] under which crimes are divided into three categories according to their seriousness. Crimes occupying each category are treated with varying

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[105] Ammar, "Restorative Justice in Islam: Theory and Practice", *loc. cit.*, at 166, 173.
[106] *Ibid.*, at 173.
[107] *Ibid.*, at 165.

kinds and degrees of restorative intervention. *Tazir*[108] crimes are considered the least serious and involve breaches of private rights, whereas *Quisas*[109] and *Hudad* [110] offences include the gravest, most socially intolerable manifestations of criminality.[111]

The first restorative cornerstone that Islam holds in high regard is the importance of rehabilitating criminals. Traditionally, *Tazir* offenders face incarceration, yet imprisonment was not originally intended as the harshly retributive punishment some might consider it today. Imprisonment was originally intended as a path to personal transformation and traditionally, inmates were treated mercifully, with respect and dignity.[112] As Chapter 1's fleeting survey of popular disgruntlement with its treatment of offenders revealed,[113] it may be that the Irish prison system could learn much from the Islamic approach to custody.

Whilst Islam's default vision of imprisonment as rehabilitative has not changed, changing social conditions throughout the Muslim world symbolised by colonisation and war, have certainly altered Islamic nations' philosophies of imprisonment. Prisons provide an apt example of how punishments that were originally intended as restorative have *become* increasingly retributive in the context of contemporary conflict.[114]

The Islamic legal model echoes another dominant aspect of restorative theory that is heavily stressed throughout this thesis. It endorses the use of both restorative and retributive treatment options for offenders; whilst it recognises their divergent philosophies, it views neither option as negating the utility of the other. Islamic legal custom, like its Jewish equivalent, recognises wisely that, in order to achieve maximum social-control and having regard to the varying magnitude of different offences, restorative and retributive treatments should not be treated as mutually exclusive measures.

This thesis concurs intensely with this approach and insists that, despite its theoretical opposition to retributive theory, there is nothing within the philosophy of restorative justice to deny punitive measures any relevance or utility, at least *as a last resort* in stamping out serious crime. As Chapter 9 insists, the two ideologies share theoretical *but not practical* incompatibility.[115] Irish sentencing policy's mere *diversification* by restorative

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[108] *See* Ibrahim and Mehemeed, "Basic Principles of Criminal Procedure under Islamic Shari'a" in Haleem, Sherif and Daniels eds., *op. cit.* 17, at 20-21; Hussein, "Basic Guarantees in the Islamic Criminal Justice System" in Sherif and Daniels eds., *op. cit.* 35, at 44-45.

[109] Sherif, "Generalities on Criminal Procedure under Islamic Shari'a" in Haleem, Sherif and Daniels eds., *op. cit.* 3, at 6; Hussein, *loc. cit.*, at 43-44.

[110] Hussein, *loc. cit.*, at 37-43; Sherif, *loc. cit.*, at 5; Ibrahim and Mehemeed, *loc. cit.*, at 18; Haleem, "Compensation for Homicide in Islamic Shari'a" in Sherif and Daniels eds., *op. cit.* 97, at 103.

[111] *See generally*, Ammar, "Restorative Justice in Islam: Theory and Practice", *loc. cit.*, at 166-175.

[112] *Ibid.*, at 173-174.

[113] *Supra*, at 38-41.

[114] Ammar, "Restorative Justice in Islam: Theory and Practice", *loc. cit.*, at 173.

[115] *Infra*, at 378-383.

justice in order to produce a more varied "continuum"[116] of treatment options in no way requires the elimination of *existing* options; nor does it merit the more radical abolition of imprisonment and criminal justice as we know it. [117] To the contrary, all it requests is tolerance, flexibility and co-operation between new and old sentencing customs. As Lerman stresses:

> A total overhaul is not what is needed: our current adversarial and retributive system is necessary for many criminal cases where there is a real question of culpability, and where there is a need to separate a predatory individual from society.[118]

Echoing the perspective that this thesis adopts, Islamic legal theory merely *prioritises* the use of restorative justice as a first resort under circumstances appropriate to its intercession. However, it accepts as a practical matter the realistic necessity of a "just deserts" penal model that uses penalties such as incarceration to contain criminality for the greater good.

Virginia Mackey's summary of the Qur'anic approach to crime confirms not only Islam's preference for the *restorative* treatment of crime's aftermath but also its concession to the universal necessity of dealing punitively with certain offenders:

> The tenets of the Qur'an could be characterized as the foundations of a theology of restoration. What God "says" in the Qur'an about punishment is that those who wish to obey God's law will not engage in the *hadd* crimes or in any act which lacks integrity toward God or other human beings. If an offense is committed, restitution should be made. If an offender repents, the Imam can pardon and an act of expiation can be performed. If an offender does not repent, or if a victim does not forgive, penalties may be exacted. *Forgiveness between human beings is considered a virtue. However, crimes against God should not be overlooked.*[119]

Islamic law proposes the use of far-reaching restorative methods to deal with *Quisas* crimes.[120] They include mostly murders and assaults but despite the seriousness of such crimes, they are handled with a high degree of restorative intervention. This practice reflects Chapter 9's recommendation that restorative interventions should not be confined exclusively to the most minor offenders.[121] Rather, the emotionally restorative benefits for

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[116] Zedner, *loc. cit.*, at 250.
[117] *See generally*, Bianchi and Van Swaaningen eds., *Abolitionism: Towards a Non-Repressive Approach to Crime* (Free University Press, 1986); Christie, *Limits to Pain* (M. Robertson, 1982); see also, Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice", *loc. cit.*; Ashworth, *loc. cit.*; Van Ness, "A Reply to Andrew Ashworth" (1993) 4 *Criminal Law Forum* 301.
[118] Lerman, "Restorative Justice and Jewish Law", *loc. cit.*, at 2.
[119] Mackey, *loc. cit.*, at 57. [emphasis added]
[120] Ammar, "Restorative Justice in Islam: Theory and Practice", *loc. cit.*, at 170-172.
[121] *Infra*, at 383-386.

even the most serious offenders *and their victims* of participating in reparative processes are sufficient to justify their use.

The legitimacy of this kind of "high-risk" use of restorative interventions rests on the additional proposal that restorative measures should never be considered *necessary alternatives* to retributive punishments.[122] A hybrid model of restorative criminal justice maintains a vital safety-net that catches those offenders whose *entirely restorative* treatment is most unlikely to bear rehabilitative fruit.

A community-involved, mediative procedure is recommended for *Quisas* crime. Like similar models under both Buddhist and Jewish law, its underlying objective is to repair the relationships ruptured by crime. The aim is to achieve *solh*,[123] a concept meaning reconciliation that bears close parallels with the Hebrew ideal of *shalom*.[124] As under modern-day VOM, disputes are mediated by a community-appointed arbitrator whose duty it is to facilitate consensus non-coercively.

Islam, like Judaism, also advocates the use of *compensation* to reverse symbolically the harm inflicted on victims of crime.[125]

> The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any forgiveness is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude. This is a concession and a mercy from your Lord.[126]

Two forms of compensation were offered to victims and their families respectively – *errish*, compensation for injury[127] and *diyya*,[128] compensation for loss of life. Interestingly, as Chapter 7 remarks, they share a substantial correspondence with *éraic* and *díre* – the chief varieties of compensation utilised under Ireland's native Brehon Law.[129]

The compensatory process reveals the centrality of victims and their representatives in the resolution of conflict. Islamic victims have the power to pursue or terminate the resolution process by either accepting or rejecting an offer of compensation. The active involvement of crime victims is an elemental aspiration of restorative justice,[130] although it is counterbalanced by an equal focus on involving and assisting offenders. Chapter 6, in particular, accentuates restorative justice's *holistic*, *fair* and *balanced* approach to addressing

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[122] *Infra*, at 378-383.
[123] Ammar, "Restorative Justice in Islam: Theory and Practice", *loc. cit.*, at 171.
[124] *Supra*, at 51-52.
[125] Haleem, *loc. cit.*; see also, Mackey, *loc. cit.*, at 55.
[126] *al-Baqarah*:178; *Sura* 2:178: see Mackey, *loc. cit.*, at 56.
[127] Ammar, "Restorative Justice in Islam: Theory and Practice", *loc. cit.*, at 170-171.
[128] *Ibid.*; Ibrahim and Mehemeed, *loc. cit.*, at 19; Hussein, *loc. cit.*, at 43.
[129] *Infra*, at 280-281.
[130] *See* Van Ness, "Restorative Justice: International Trends", *loc. cit.*, at 4; Consedine, "Restorative Justice: The Christian Option", at para. 35. <http://www.stalbans.org.nz/teachings/guests/consedine.htm> (visited 17 November 2005); Strang, *op. cit.*

the needs of victims and offenders alike and condemns processes that seek to assist one stakeholder at the expense of another.[131] It is only where one party is unavailable that unilateral assistance is tolerable under a genuinely restorative system; impossibility is a viable defence in this respect.[132]

An offer of compensation is treated as symbolic of an offender's desire to atone. Islam encourages its errant followers to repent for their sins: "If anyone does evil or wrongs in his own soul but afterwards seeks Allah's forgiveness, he will find Allah oft-forgiving, most merciful".[133]

> If two men among you are guilty of lewdness, punish them both. If they repent and emend leave them alone; For God is oft-returning, most merciful. God accepts the repentance of those who do evil in repentance and repent soon afterwards; to them will God turn in mercy: For God is full of knowledge and wisdom.[134]

As these passages reveal, Islam, in near-biblical spirit, emphasises God's mercy and compassion in order to motivate its followers to forgive – a vital step along the path to *solh*: "[i]f a person forgives and makes reconciliation, his reward is due from Allah".[135] Its devotion to forgiveness aligns Islam to yet another restorative mainstay, whose connection to emotional healing is explored in detail in Chapter 5.[136]

Islam's emphasis on forgiveness is connected closely to its discouragement of revenge. Victims are expected to treat their offenders mercifully, tolerantly and with compassion, patience and empathy so as obstruct the desire to avenge and accommodate forgiveness. The following passage signals the reluctance with which Islam endorses *at most* a policy of proportionate harm, which, like the proposed interpretation of *lex talionis* under biblical law below,[137] intends to *limit* rather than *prescribe* retaliation. What Islam *prefers* however, is the exercise of self-restraint when it comes to confronting one's offender, exchanging the urge to avenge for the desire to forgive.

> And if ye do catch them out, *catch them out no worse than they catch you out*: But if ye show patience, that is indeed the best course for those who are patient. And do thou be patient, for thy patience is but from God; nor grieve over them: and distress not thyself because of their plots. *For God is with those who restrain themselves*, And those who do good.[138]

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[131] *Infra*, at 233, 242-243.
[132] *Infra*, at 186-187.
[133] al-Nisa:110: Ammar, "Restorative Justice in Islam: Theory and Practice", *loc. cit.*, at 167.
[134] *Sura* 4:15-17: see Mackey, *loc. cit.*, at 56.
[135] al-Shura:40: Ammar, "Restorative Justice in Islam: Theory and Practice", *loc. cit.*, at 167.
[136] *Infra*, at 193-196.
[137] *Infra*, at 74-75.
[138] *Sura* 16:126-128: see Mackey, *loc. cit.*, at 56. [emphasis added]

Islam offers a plentiful though possibly *surprising* source of restorative principles that rivals competently the more obvious restorative foundations of the Buddhist and Jewish legal traditions.

2.4 Restorative Justice and Biblical Law

> You will not harbour hatred for your brother. You will reprove your fellow countryman firmly and thus avoid burdening yourself with a sin. You will not exact vengeance on, or bear any sort of grudge against the members of your race, but will love your neighbour as yourself. I am Yahweh.
> – *Leviticus* 19:17-18

The Bible provides a valuable stockpile of teachings on crime and its resolution. Its various instructions on how is right to respond to wrongdoing rest on both retributive and restorative theoretical foundations. In a general sense, the Old Testament is associated with retributivism and punishment while the New Testament is considered more restoratively-focused. However, the accumulated wisdom of *both* Testaments can be fairly said to lie *predominantly* on restorative foundations.

The Bible's legal teachings are immersed substantially in the philosophy of restoration. The same restorative hallmarks that infuse Buddhist, Jewish and Islamic perspectives on crime are also scattered throughout the Bible. The foregoing analysis of Jewish law has already highlighted some key restorative accents sweeping throughout the Hebrew Bible. These include the importance of pursuing *shalom* through reparative acts such as forgiveness, repentance, restitution and reconciliation.[139] This section examines the course of these chief restorative themes as they flow from Old to New Testaments, leading them beyond the limited confines of the Hebrew Bible.

A major restorative principle shaping biblical justice is the importance of forgiveness. The facilitative concepts of tolerance, empathy, compassion and mercy are afforded a significance that reflects their ability to encourage forgiving acts. Christians are urged to emulate God's own forgiving, compassionate and merciful character.

> Yahweh, Yahweh, God of tenderness, and compassion, slow to anger, rich in faithful love and constancy, maintaining his faithful love to thousands, forgiving fault, crime and sin.
> – *Exodus* 34:6-7

> What god can compare with you for pardoning guilt and for overlooking crime? He does not harbour anger for ever, since he delights in showing faithful love.
> – *Micah* 7:18

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[139] *Supra*, at 51-52.

> Yet, if you forgive others their failings, your heavenly Father will forgive you yours.
> – *Matthew* 6:14

The Bible's accent on forgiveness is closely related to its proscription on judging others, including wrongdoers, too harshly. Mercy, compassion, tolerance and empathy are encouraged on the understanding that all people share a fundamental likeness. The Bible, like Buddhism, teaches victims to acknowledge humbly the resemblances they share with their criminal counterparts and to recognise in tolerant spirit that under different circumstances, their positions could be quite easily reversed. It urges people to view themselves "as all in the same camp – brothers and sisters with varying strengths and weaknesses".[140]

> Do not judge, and you will not be judged because the judgements you give are the judgements you will get, and the standard you use will be the standard used for you. Why do you observe the splinter in your brother's eye and never notice the great log in your own.
> – *Matthew* 7:1-4

> Always treat others as you would like them to treat you; that is the Law of the Prophets.
> – *Matthew* 7:12

> And you must love the Lord your God with all your heart, with all your soul, with all your mind and with all your strength. The second is this: You must love your neighbour as yourself.
> – *Mark* 12:30-31

The importance of the concept of forgiveness in the Bible, whether it is captured in parables recounting Jesus' grandest acts of forgiveness[141] or in His various commands to be merciful, can be attributed to its ability to provide a gateway to reconciliation, another crucial component of restorative justice.[142]

> It is all God's work; he reconciled us to himself through Christ and he gave us the ministry of reconciliation. I mean, God was in Christ reconciling the world to Himself, not holding anyone's faults against them, but entrusting them with the message of reconciliation.
> – *2 Corinthians* 5:18-19

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[140] Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at para. 21.
[141] *See John* 8:1-11; *Mark* 2:2-12; *Luke* 19:1-10
[142] *See* Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at paras 21-24.

Recalling the above study of Hebrew law, the importance of reconciliation lies in its ability to mend the social bonds that crime fractures. The Bible's permanent ambition is the pursuit of sufficient social cohesion and harmony to induce a state of *shalom*. Achieving inter-party amends provides a vital means of doing so. As Thorburn observes, "[r]econciliation and restoration of broken relationships is at the heart of the Gospel".[143]

Another restorative element that can be plucked directly from biblical text is the offender's duty to make his victim(s) whole through restitution:

> The person must confess the sin committed and restore in full the amount owed, with one-fifth added. Payment is to be made to the person wronged.
> – *Numbers* 5:7

In terms of the appropriate *mode* of compensation, as mentioned above, the *Book of Exodus* contains rigorous instructions on how to compensate for injury and theft.[144]

The Bible's provision for compensation reflects not only restorative justice's reconciliatory dimension, but also its emphasis on *involving* victim and offender actively in the resolution of crime's negative results. The premise is that victim and offender, as co-participants in the crime in question, are the "owners"[145] of the conflict that inspired it[146] and as such, they are the primary stakeholders in its outcome. Accordingly, they should maintain a high level of control over the nature of that outcome.

Biblical law's community-level method of conflict resolution invests it with a sense of informality that is also characteristic of restorative justice.[147] Ordinary people would bring their disputes to the city gates to be adjudicated by a legal assembly composed of local elders.[148] Reconciliation was pursued by finding practical solutions or "settlements" as opposed to win/lose results – which are equally opposed by restorative justice's holistic, win/win ambitions.[149]

In *Exodus* 18, Moses establishes a system of judges to assist him in the resolution of citizen's legal problems. Instead of identifying their role as one of attributing blame, or establishing "zero-sum" outcomes,[150] Moses foresaw the judges as *facilitators* of inter-party

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[143] *See* Thorburn, "Restorative Justice: Some Biblical Perspectives" PFI Toronto Convocation, 2003, at 6. <www.restorativejustice.org/resources/docs/thorburn3> (visited 24 May 2006).
[144] *Supra*, at 54.
[145] Christie, *loc. cit.*; Menkel-Meadow, *loc. cit.*
[146] Morris and Young, "Reforming Criminal Justice: The Potential of Restorative Justice" in Strang and Braithwaite eds., *op. cit.* 11, at 14.
[147] *Supra*, at 22; *infra*, at 181, 241-242.
[148] *See* Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at para. 20; see also, Zehr, *op. cit.*, at 140.
[149] *Infra*, at 233, 242-243.
[150] *Infra*, at 102, 242.

"satisfaction". [151] In this sense, they share common ground with modern-day mediators whose wings are equally clipped in terms of their ultimate decision-making authority: they are empowered only to assist parties in reaching voluntary consensus within a traditionally informal, non-coercive environment.

However, the ease with which the unmistakable emblems of "restorative justice" can be identified in the Bible can be matched effortlessly by the simplicity in locating elements of retribution and vengeance. McElrea warns that:

> ... [t]here is also a darker side of Old Testament justice – where the loss of one eye allowed the plucking out of another, where terrible retribution could be wrought upon people guilty only by association, where adultery was a capital offence, where redemption often seemed impossible.[152]

The Bible contains a number of oft-cited teachings, which, *on face value*, might appear to exemplify a sinister preoccupation with vengeance:

> I shall perform frightful acts of vengeance and inflict furious punishments on them; and they will know that I am Yahweh, when I exact my vengeance on them.
> – *Ezekiel* 25:17

> Vengeance is mine; I will pay them back.
> – *Hebrews* 10:30

At the same time, the perception that Christianity condones proportionate harm and "tit-for-tat" justice sits awkwardly with the Bible's (and the Christian churches') parallel emphases on tolerance, forgiveness and mercy. This apparent inconsistency has prompted a number of eminent scholars to argue for a *restorative interpretation* of even the most superficially retributive biblical extracts. [153] C.F.D. Moule, in particular, pioneered this perspective in his memorable 1965 article, "Punishment and Retribution: An Attempt to Delimit Their Scope in New Testament Thought".[154] He argued quite radically that "...the word 'punishment' and other words related to it (especially 'retribution') have, if used in their strictly correct sense, no place in the Christian vocabulary".[155]

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[151] *Exodus* 18:23
[152] McElrea, "A Christian Approach To Conflict Resolution", *Australasian Christian Legal Convention*, 1-4 February 2001, at 2. <www.restorativejustice.org/resources/docs/mcelrea1> (visited 18 February 2006).
[153] *See* Zehr, *op. cit.*, at 126-157; Allard and Northey, "Christianity: The Rediscovery of Restorative Justice" in Hadley ed., *op. cit.* 119; Consedine, *op. cit.*, at 147-156; Consedine, "Restorative Justice: The Christian Option", *loc. cit.*; McElrea, *loc. cit.*; Moule, "Punishment and Retribution: An Attempt to Delimit Their Scope in New Testament Thought" in Moule, *Essays in New Testament Interpretation* (Cambridge University Press, 1982) 235; Marshall, *Beyond Retribution: A New Testament Vision for Justice, Crime, and Punishment* (William B. Eerdmans Publishing Company, 2001).
[154] Moule, *loc. cit.*
[155] *Ibid.*, at 236.

The thrust of Moule's thesis is that any sort of vengeance that the Bible condones is, at least in the New Testament, exclusively at God's initiative. According to Moule, Christians are in fact, explicitly discouraged from taking revenge. To the contrary, they are urged to live peaceably together, resisting the temptation to retaliate.

> Never pay back evil with evil, but bear in mind the ideal that all regard with respect. As much as possible, and to the utmost of your ability, be at peace with everyone. Never try to get revenge: leave that, my dear friends, to the Retribution. As scripture says: Vengeance is mine – I will pay them back, the Lord promises.
> – *Romans* 12:17-19

Even the more *prima facie* retributive Old Testament teachings proscribe revenge in favour of love, tolerance and mercy.

> You will not harbour hatred for your brother. You will reprove your fellow countryman firmly and thus avoid burdening yourself with sin. You will not exact vengeance on, or bear any sort of grudge against, the members of your race, but will love your neighbour as yourself.
> – *Leviticus* 19:17-18

Crucially, however, Moule implies that even the vengeance that God claims for His exclusive jurisdiction is, to all intents and purposes, a last resort – a final option required to control society's most dangerous so as to preserve social harmony. There is nothing offensive to the restorative ideology in this stance. Restorativists must foresee – albeit reluctantly – the rational need for punishment stemming from the inevitability of conflict that is unsuited to an *entirely* restorative response.[156] In exercising "vengeance" then, God can be viewed as resigning Himself to the need to curb the omnipresent disobedience that will always threaten *shalom*, rather than pursuing painful ends for pain's sake. Moule explains that if God:

> ... has willed the dire consequences that ensue on sin, it does not necessarily follow that he has willed them retributively, punitively. It may be that he has willed them as the only way of doing justice to the freedom and responsibility of the human personality, as he has created it.[157]

So, the punishment that God reserves to His own higher discretion as a last resort assault on criminality, far from opposing, actually complies with restorative principles. Restoration is ideal, but where the circumstances and actors involved in crime's resolution are intractable, more punitive options become *necessary*. This understanding is impressively developed in the Bible. It is a principle that takes centre-stage in this thesis, which promotes

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[156] *Infra*, at 214-215, 329-335, 378-383.
[157] Moule, *loc. cit.*, at 237.

the combination of restorative and retributive sentencing options to achieve better quality criminal justice through diversity.[158] It is worth emphasising, however, that restoration is the *preferred means* of resolving criminal discord *where possible* and the Bible's acknowledgement of the periodic need to resort to retributive responses does little violence to this principle. It remains that "[r]estoration, not retribution, is the hallmark of God's justice and is God's final word in history".[159]

This weighty conclusion is buttressed by the many references to restorative principles pervading the Bible's teachings, of which those listed above are just some. The Bible contains a wealth of teachings evincing the importance of restorative concepts such as forgiveness, mercy, compassion, reconciliation, repentance, restitution and community-justice. However, it benefits from a fresh burst of support from more contemporary authorities on biblical justice who give the theme renewed salience.

Howard Zehr – "a modern prophet of restorative justice,"– [160] emerges as a prominent successor to Moule who advances Moule's thesis on the Bible's restorative interpretation. Zehr argues that the retributive message commonly inferred from the Bible's most superficially emphatic endorsements of retaliation can be tempered by the ideas of *shalom* and *covenant*.

The biblical covenant involves God's constant "calling-forth" of His followers to a future promise or *covenant*,[161] whose fulfilment will bring *shalom*.[162] The promise involves the exchange of reciprocal responsibilities and commitments between God and His people. [163] The covenant is forward-looking and encourages people to follow God's word so as to preserve the "right relationships" that foster social harmony, solidarity and cohesion – preludes to *shalom*. Motivation to perform is provided by the prospect of a more harmonious society, but also by God's "righteous acts of salvation" – His side of the bargain.[164]

The guiding force of the biblical covenant further instils in biblical justice the ethic of restoration. Since the covenant was directed towards the health and well-being of the community, biblical justice focused on devices such as negotiation, settlement and satisfaction to pursue *shalom*. In contrast to present-day criminal justice, biblical justice expressed little concern with immediate transgressions of law, the individuals responsible for them, or the adversarial application of legal rules to conclusively address them:

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[158] *Infra*, at 214-215, 329-335, 354, 378-383.
[159] Marshall, *op. cit.*, at 199.
[160] McElrea, *loc. cit.*, at 2.
[161] Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at para. 18; Consedine, *op. cit.*, at 148-151.
[162] Zehr, *op. cit.*, at 130-132; see also, Zehr, "Justice: Retribution or Restoration?", *loc. cit.*, at para. 14.
[163] *See* Zehr, *op. cit.*, at 133-135.
[164] *Ibid.*, at 133.

> ... [I]t was the spirit, not the letter, of the law that mattered ... [it] provided principles for use in settling disputes, not bases for establishing guilt and meting out punishment ... Law was intended as a means, not an end. It was an instrument for building shalom, for building relationships that are all right. Its characteristic purpose was not to punish, but to redeem, to make things right.[165]

Biblical justice locked its gaze on the *outcome* of informal, negotiated consensus and assessed holistically its impact on the equilibrium of the entire community.

> The test of justice in the biblical view is not whether the right rules are applied in the right way. Justice is tested by the outcome. The tree is tested by its fruit. It is the substance, not the procedure, that defines justice.[166]

Zehr suggests that if prime Biblical references to retaliation or revenge were properly interpreted in accordance with the aforementioned ideals of *shalom* and covenant, they would take on a distinctively *restorative* character. There are three principal excerpts that are typically used to exemplify the Bible's endorsement of retribution: the Bible's trio of references to the "eye for eye, tooth for tooth" motto of proportionate harm.

> Anyone who injures a neighbour shall receive the same turn, eye for eye, tooth for tooth. As the injury inflicted, so will be the injury suffered.
> – *Leviticus* 24:19-21

> Life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.
> – *Deuteronomy* 19:21

> If further harm is done, however, you will award life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stroke for stroke.
> – *Exodus* 21:23-25

The "eye for an eye" catchphrase is popularly treated as an expression of the law of proportionality or *lex talionis*,[167] which is commonly perceived to *direct* the infliction of proportionate harm on those who have sinned. However, a restorative gloss has been variously applied to this perceived pillar of biblical retribution. Rather than an *encouragement* of fitting revenge, it has been argued that it closer resembles a *limitation* on revenge – a prohibition on performing disproportionate retaliation or claiming excessive restitution;[168] in other words, it is advising "[d]o this much, but only this much".[169] After all,

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[165] *Ibid.*, at 144.
[166] *Ibid.*, at 140; see also, Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at para. 19.
[167] *See* Zehr, *op. cit.*, at 147-150; Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at para. 15.
[168] *See* Mackey, *loc. cit.*, at 27; see also, Zehr, *op. cit.*, at 146, 149; Consedine, "An Irish Way Forward", Restorative Justice Ireland Conference, *Restorative Justice: Examining the Issues*, April 1999, at para. 20. <http://www.extern.org/restorative/99_Conf_Consedine.htm> (visited 18 November 2005).

as Mackey explains, the word "talionis" is closer to "restitution" in meaning than "retaliation".[170] Consedine argues that:

> ... the scriptural quote most abused and taken out of context has been that of "an eye for an eye". Public perception of its meaning is usually the opposite of what is intended. The concept of *lex talionis*, the law of proportionality, simply says that you should never claim more than the value of what is damaged ... Martin Buber, the famous Jewish scholar, in his German translation of the Scriptures translates "an eye for and eye and a tooth for a tooth" as "an eye for the value of an eye, a tooth for the value of a tooth".[171]

This perspective attempts to remove apparent contradictions that obscure and mis-diagnose the arguably substantially restorative underpinnings of biblical law. The New Testament rejects clearly the Old Testament's sporadic references to revenge. The proportional ethic of "eye for eye" justice, whether it was meant as a command to retaliate or a limitation on revenge, was replaced with turning the other cheek, giving one's cloak and going the second mile.[172] It was no longer enough to "love your neighbour";[173] now, in a call for mercy and compassion, people were encouraged to love their enemies too.[174] It would therefore be unwise to allow the three most oft-cited references to retaliation, whatever their intentions, to shape one's perspective of biblical law when the encouragement of mercy appears several hundred times, particularly in the superseding justice of the New Testament.[175]

The "limitation on retaliation/restitution" interpretation adopted by Zehr, Consedine and Mackey seems convincing and not only because of its ability to reconcile the seemingly divergent punitive philosophies of both Testaments. Even in the Bible itself,[176] *Deuteronomy* 19:21 is given the sub-heading "Limits of Retaliation". Whether or not this heading is as originally intended or a translational or editorial addition, its presence alone lends further credibility to the belief that the "eye for an eye" analogy was intended to *limit* rather than *prescribe* retaliatory gestures.

Archbishop Desmond Tutu has also lent his support to this interpretation in a recent article in *The Irish Times*. He suggests that the Bible's "eye for an eye" warning is intended to *limit* accountability for a crime solely to the individual perpetrator so as to *proscribe* excessive acts of revenge.

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[169] Zehr, "Justice: Retribution or Restoration?", *loc. cit.*, at para. 12.
[170] Mackey, *loc. cit.*, at 27.
[171] Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at para. 15.
[172] *Matthew* 5:38-48
[173] *Leviticus* 19:17-18
[174] *See* Mackey, *loc. cit.*, at 40.
[175] *Ibid.*
[176] *The New Jerusalem Bible*, *op. cit.*

> That biblical adage was in fact invoked originally to curb blood feuds from claiming the innocent relatives of the person who committed the killing. "An eye for an eye" asks that the culprit should be the sole target, and not others, whose only crime was to be related to him. So the "eye for an eye" adage was not intended to mean what it has come to mean, namely that killing be paid for by another killing.[177]

The retributive motivations of the "eye for an eye" mantra is further undermined by a number of biblical references that appear to completely contradict or renege on any vengeful intent it may have possessed previously. For example, *Matthew* 5:38 appears to u-turn from the typically "Old Testament" retributive command traditionally perceived to embody *Leviticus* 24. In a remarkable act of retreat, the verse specifically *rejects* revenge and calls for tolerance, mercy and compassion in its place – the incoming restorative kernels of New Testament justice:

> You have heard how it was said: *Eye for eye and tooth for tooth.* But I say this to you: offer no resistance to the wicked. On the contrary, if anyone hits you on the right cheek, offer him the other as well, if someone wishes to go to law with you to get your tunic, let him have your cloak aswell.
> – *Matthew* 5:38

According to Thorburn, this short passage's withdrawal from retribution is intended to warn against over-relying on any one overarching justice model. He believes that it counsels people to abandon strict reliance on a punitive justice policy and instead "live as reconcilers and not dividers".[178] Although the accuracy of this interpretation will never be verified, it is valuable because it reveals the degree of sophistication, enlightenment and social-understanding that could have guided the Scriptures' teachings on crime and its resolution.

Furthermore, Thorburn's construction of *Matthew* 5:38 uncovers a potential "*de*-volution"– a marked philosophical regression – that might have taken place over the last millennium to produce less flexible, more static, bureaucratic, reform-phobic attitudes to how criminal justice should be administered. Thorburn's thesis suggests that while ancient legal models may be considered primitive because of their *age*, this is not necessarily deducible from their *content*. There is potentially much to learn from the pragmatic, sophisticated and progressive crime-control philosophies underlying so-called "primitive" justice models. This understanding highlights the potential value in looking backward in order to move forward in criminal justice – a possibility pondered in an Irish context throughout Chapter 7.[179]

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[177] Tutu, "Justice that Heals is Better than Justice as Retribution" *The Irish Times*, 18 January 2006.
[178] Thorburn, *loc. cit.*, at 5.
[179] *Infra*, at 271-304.

In essence, this theory emits a resounding call for the *diversification* of inflexible, homogeneous or stagnant criminal justice regimes (regardless of their relative effectiveness). In particular, it provides significant justification for the introduction of restorative principles as effective "first resort" interventions against contemporary criminality. With regard to *Matthew* 5:38, Thorburn inquires:

> Isn't He really saying here that *an eye for an eye and a tooth for a tooth* is all very well – but there is a better way. Isn't He really saying that to build our approach solely on the retributive model is too narrow and if we are to be truly insightful we must be prepared first to take on board the uncomfortable truths about our own lives. Isn't He really pointing out that if we look to law to live by, to define our community and to regulate our behaviour, then we will indeed get rules; we will indeed be governed by regulations. But if we look to principle to live by, we could be regulated by morality and ethics, with all behaviour being governed by one overarching law, described by Jesus as the greatest or most important, first to love God with all one's heart, mind, soul and strength, and secondly, to love one's neighbour as oneself.[180]

Thorburn's message summarises an important argument tendered in Chapter 1: that any one justice model, on its own, is insufficient for the optimum administration of criminal justice. It will *necessarily* be too narrow, limited and inflexible to guide *single-handedly* a nation's criminal justice system with any great success.[181] In an Irish context, the best means of achieving this is to *supplement and diversify* the nation's predominantly retributive justice tradition with a more community-embedded system of restorative justice.

Biblical justice provides a treasure-trove of restorative teachings. Not only does it contain an impressive array of references to several core restorative themes and values, but it, interpreted in the suggested manner, makes a convincing case for greater recourse to restorative justice in contemporary criminal sentencing. Its community focus, its refusal to concentrate exclusively on the "end" that is punishment, its resistance to relying stubbornly on the letter of the Bible's law (but rather treating it as a starting point for discussion or a set of wise indications) combined with its emphasis on negotiated outcomes, append retrospectively to biblical justice several key badges of restorative justice's contemporary expression.

The Bible's wisdom on dispute resolution is particularly sophisticated. One of its core emphases is the importance of preserving society's integrative balance in order to control deviance. This theory was before its time and bears arresting parallels with

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[180] Thorburn, *loc. cit.*, at 5.
[181] *Supra*, at 48; *infra*, at 354, 359, 367-369, 379.

Durkheimian *anomie* theory emerging in the latter part of the 19th century.[182] The connection between social disintegration and criminality will be forged later in Chapter 4.[183]

Most importantly, in tune with this thesis' vision of "crossbred" criminal justice, biblical justice perceives restorative justice's role as *complementary* to, rather than a necessary substitute for retributive justice. Both justice models are valued equally for their different yet co-operative abilities.

3. Evidence of Restorativism throughout the World's Indigenous Legal Traditions

> The history of restorative justice is really found in the history of the world's peoples.[184]

Just as they have influenced the legal traditions of a spectrum of religious faiths,[185] the principles of restorative justice have permeated the means by which the world's indigenous populations handle conflict. The legal heritage of aboriginal peoples is composed of the same basic configuration of restorative principles that has shaped religious instruction on crime and its management for millennia. Tribal and indigenous customary laws continue to operate around a restorative skeleton of informal, community-centred, inter-party confrontational justice that is aimed at restoring community peace and harmony by repairing the relationships fractured by crime.[186]

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Today, restorative customary law falls into two categories. First, there is a series of key reparative legal customs that have withstood colonisation and continue to govern conflict resolution in indigenous communities around the world.[187] They are unique for their resilience; their continued existence testifies to their ability to survive the aggressive colonisation process that claimed so many of their counterparts.[188] They range from the

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[182] *Infra*, at 159-168.
[183] *Ibid.*
[184] Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at para. 27.
[185] In addition to its influence over the aforementioned legal customs of Jewish, Islamic, Buddhist and Christian traditions, Hadley also relates restorative justice to the legal philosophies of Hinduism, Sikhism and Chinese spirituality: see Neufeldt, "Justice in Hinduism" in Hadley ed., *op. cit.* 143; Singh, "Sikhism and Restorative Justice: Theory and Practice" in Hadley ed., *op. cit.* 199; Hui and Geng, "The Spirit of Restorative Justice in Chinese Culture" in Hadley ed., *op. cit.* 99.
[186] *See* Pecos Melton, "Indigenous Justice Systems and Tribal Society" (1995) 79 *Judicature* 126; Ross, "Restorative Justice: Exploring the Aboriginal Paradigm" (1995) 59 *Saskatchewan Law Review* 431.
[187] Williams, "Criminal Justice, Democratic Fairness, and Cultural Pluralism: The Case of Aboriginal Peoples in Canada" (2002) 5 *Buffalo Law Review* 451, at 478-483; Bradford, "Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution" (2000) 76 *North Dakota Law Review* 551.
[188] *See* Findlay, "Decolonising Restoration and Justice: Restoration in Transitional Cultures" (2000) 39(4) *Howard Journal of Criminal Justice* 398; Cunneen, "Restorative Justice and the Politics of

spiritual practices of sovereign Native American nations,[189] to the tribal-based healing techniques Papua New Guineans,[190] to the restorative ways of Ireland's Brehon law considered in Chapter 7.[191]

The insularity and cultural independence of the world's nomadic people has allowed some of them to maintain their restorative legal traditions. For example Palestinian Arabs continue to administer their own brand of mediative tribal law inherited from the area's desert-dwelling Bedouins.[192] Indigenous law is administered informally as an expression of Palestinian independence from Israel. Following the first *Intifada* in 1988, there was a mass retreat back to traditional dispute resolution to avoid turning to the Israeli courts to litigate inter-Palestinian disputes. Hence, Palestinian customary law still operates as an important political emblem of hostility to Israeli rule.[193]

The world's gypsy population also sustains its restorative legal heritage. The legal tradition of Romani gypsies around the world contains dominant restorative features.[194] Romani Law – sometimes considered more of a "Romani Religion" [195] – provides a body of divinely-ordered rules of morality and purity. Inter-party negotiation is the first resort in a conflict situation. Failing this, informal community mediation is an option. Alternatively, disputants may seek redress from a *Divano*, an informal decision-making body of community elders who offer non-binding advice and recommendations.

Decolonisation" in Weitekamp and Kerner eds., *Restorative Justice: Theoretical Foundations* (Willan, 2002) 32; Consedine, "Restorative Justice: The Christian Option", *loc. cit.*, at paras 27-30.

[189] Zion, "The Dynamics of Navajo Peacemaking" (1998) 14(1) *Journal of Contemporary Criminal Justice* 58; Zion, "How the Infidels Can Save the Law" *Brehon Law Project Symposium, 2002*, Dublin, Ireland, 11-13 January 2002; Yazzie, "Navajo Justice: Traditional Tribal Peacemaking Heals Rather than Punishes" (2000) 1(5) *Flagstaff Tea Party* <http://www.flagteaparty.org/Publications/Dec2000/Pages/NavajoJustice.html>; Yazzie, "'Hozho Nahasdlii' – We Are Now In Good Relations: Navajo Restorative Justice" (1996) 9 *St. Thomas Law Review* 117; Brown, "The Navajo Nation's Peacemaker Division: An Integrated Community-Based Dispute Resolution Forum" (2000) 24(2) *American Indian Law Review* 297.

[190] Banks, "Victims in the Village: Aspects of Restorative Justice in Papua New Guinea" (1999) 6 *International Review of Victimology* 377.

[191] *Infra*, at 271-304.

[192] *See* Irani and Funk, *Rituals of Reconciliation: Arab-Islamic Perspectives* (Joan B. Kroc Institute for International Peace Studies, 2000). <http://www.ciaonet.org/wps/fun01/fun01.html> (visited 3 March 2006).

[193] *See generally*, Terris and Inoue Terris, "A Case Study of Third World Jurisprudence--Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society" (2002) 20 *Berkeley Journal of International Law* 462; Braithwaite, "The Fall and Rise of Restorative Justice" in Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 1, at 3-4; Hutchinson, "Wi'am: Palestinian Conflict Resolution Center" (1999) July-August *New World Outlook*. <http://gbgm-umc.org/nwo/>

[194] *See* Weyrauch, "Romanyia: An Introduction to Gypsy Law" (1997) 45 *American Journal of Comparative Law* 225; Weyrauch and Bell, "Autonomous Lawmaking: The Case of the 'Gypsies'" (1993) 103 *Yale Law Journal* 323.

[195] Kanwar, "Preserving Gypsy Culture through Romani Law in America" (2000) 24(4) *Vermont Law Review* 1265.

American Gypsies have the back-up option of a *Kris* – a more formalised panel of wise men who administer justice in a setting that is closer to a court than a *Divano*.[196] This illustrates their recognition of the need for back-up formal alternatives where restorative measures are inappropriate.[197] Common remedies include community-service and compensation. Violence is discouraged and used only as a last resort and the death penalty is virtually unknown. The parallels between Gypsy law and the restorative features of key *religious* legal teachings, Jewish law in particular, are striking.[198] The common ground shared between the restorative traditions of religions and cultural groups conveys just how naturally and intuitively diverse world peoples have uniformly come to reason that crime should, first and foremost, be dealt with restoratively.

Secondly, several jurisdictions, cognisant of their colonial justice models' much-maligned "irrelevance" to native communities, have attempted to diversify their criminal justice traditions by instilling them with various restorative aboriginal legal customs, usually involving some manner of VOM. [199] This approach merges new with old in the hope of a synergistic, *culturally appropriate* outcome. It involves a "process whereby the best of the traditional ways [are] retained while allowing adaptation and adjustment to the new ways of the newcomers".[200] Suitable restorative, aboriginal techniques are effectively grafted or "piggybacked"[201] onto existing criminal justice frameworks to produce a new "second-wave" generation, "indigenised",[202] "spliced"[203] or "collaborative" justice model.[204]

Collaborative efforts between formal criminal justice systems and indigenous communities have taken place in diverse settings around the globe, from the United States[205] and Australia,[206] to Fiji, [207] Rwanda,[208] the Canadian Eastern Arctic[209] and Nigeria.[210] There

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[196] *Ibid.*

[197] *Infra*, at 275.

[198] Carmichael, "Gypsy Law and Jewish Law" (1997) 45 *American Journal of Comparative Law* 269; see also, Weyrauch, "Oral Legal Traditions of Gypsies and Some American Equivalents" (1997) 45 *American Journal of Comparative Law* 407.

[199] For a critical discussion of the relationship between aboriginal justice and restorative justice, see Rudin, "Aboriginal Justice and Restorative Justice" in Elliot and Gordon eds., *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Willan, 2005) 89.

[200] Blue and Blue, "The Case for Aboriginal Justice and Healing" in Hadley ed., *op. cit.* 57, at 64.

[201] Daly K., *loc. cit.*, at 8, 10.

[202] Findlay, *loc. cit.*, at 401-404.

[203] Daly K., "Restorative Justice: Moving Past the Caricatures", Restorative Justice and Civil Society Conference, Australian National University, Canberra, 16-18 February 1999. <http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper2.pdf> (visited 19 May 2006).

[204] *See* <http://www.collaborativejustice.ca>; <http://www.collaborativejustice.org>

[205] Costello, "Walking Together in a Good Way: Indian Peacemaker Courts in Michigan" (1999) 76 *University of Detroit Mercy Law Review* 875; Zion, "The Dynamics of Navajo Peacemaking", *loc. cit.*; Ulrich, "Widening the Circle: Adapting Traditional Indian Dispute Resolution: Methods to Implement Alternative Dispute Resolution And Restorative Justice in Modern Communities" (1999) 20 *Hamline Journal of Public Law and Policy* 419; Tebben, "Trifederalism in the Aftermath of Teague: The Interaction of State and Tribal Courts in Wisconsin" (2001-2002) 25 *American Indian Law Review* 177.

[206] Braithwaite, "Resolving Crime in the Community: Restorative Justice Reforms in New Zealand and Australia" in Martin ed., *Resolving Crime in the Community: Mediation in Criminal Justice* (Institute for

are, however, a number of celebrated examples of spliced justice that are worth considering briefly.

As Chapter 7 will explain,[211] New Zealand has succeeded in reviving and implementing an indigenous Maori method of community justice[212] through its statutory Family Group Conferencing system, a regime that has brought the nation to the cutting edge of worldwide restorative reforms. New Zealand's *Children, Young Persons and their Families Act, 1989* established a mandatory system of restorative referrals for juveniles coming before the courts. Young offenders can now expect to be transferred routinely from the ordinary courts to a restorative "conferencing" initiative. The referral programmes implement a traditional Maori disputing technique whereby the families (*whanau*), tribal subsets (*hapu*) and tribes (*iwi*) of victim and offender are engaged actively in the reconciliation process.[213]

While conferencing models and various other First Nations' resolutionary methods[214] have been tested informally in Canada,[215] the North American collaborative justice movement is more characteristically associated with its resurrection of the *sentencing circle*.

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the Study and Treatment of Delinquency, 1994) 5; Boersig, "Indigenous Youth and the Criminal Justice System in Australia" in Elliot and Gordon eds., *op. cit.* 115; Moore and O'Connell, "Family Conferencing in Wagga Wagga: A Communitarian Model of Justice" in Alder and Wundersitz eds., *Family Conferencing and Juvenile Justice* (Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, 1994) 15; Umbreit and Zehr, "Restorative Family Group Conferences: Differing Models and Guidelines for Practice" (1996) 60(3) *Federal Probation* 24.

[207] *See generally*, Findlay, *loc. cit.*

[208] Daly, E., "Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda" (2002) 34 *New York University Journal of International Law and Politics* 355; Day, "Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations: A Case Study of Rwanda" (2001) 16 *Georgetown Immigration Law Journal* 235; Sarkin, "The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide" (2001) 45 *Journal of African Law* 143; Roberts, "Restoration and Retribution in International Criminal Justice" in von Hirsch, Bottoms, Roach and Schiff eds., *op. cit.* 115, at 126-128.

[209] Zellerer, *loc. cit.*

[210] Elechi, "Victims under Restorative Justice Systems: The Afikpo (Ehugbo) Nigeria Model" (1999) 6 *International Review of Victimology* 359; Elechi, "Doing Justice Without the State: The Afikpo (Ehugbo) Nigeria Model of Conflict Resolution" (1996) 20 *International Journal of Comparative and Applied Criminal Justice* 337.

[211] *Infra*, at 265-268.

[212] *See* Durie Hall, "Restorative Justice: A Maori Perspective" in Bowen and Consedine eds., *Restorative Justice: Contemporary Themes and Practice* (Ploughshares, 1999) 25; Tauri, "Family Group Conferencing: A Case Study of the Indigenisation of New Zealand's Justice System" (1998) 10 *Current Issues in Criminal Justice* 168; Tauri and Morris, "Re-forming Justice: The Potential of Maori Process" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.* 44; Pratt, "Colonization, Power and Silence: A History of Indigenous Justice in New Zealand Society" in Galaway and Hudson, *Restorative Justice: International Perspectives* (Criminal Justice Press, 1996) 137; Consedine, *op. cit.*, at 80-96; *contra*, see Daly, K., "Restorative Justice: The Real Story" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.* 195, at 200-201.

[213] Hakiaha, "What is the State's Role in Indigenous Justice Processes?" in Zehr and Toews eds., *op. cit.* 356; see also, Tauri and Morris, *loc. cit.*, at 46-47.

[214] For instance, the *Pipe Ceremony*, the *Sweat Lodge*, the *Medicine Wheel* and the *Vision Quest*: see Blue and Blue, *loc. cit.*, at 69-78.

[215] On the Edmonton community conferencing model, see Griffiths, "The Victims of Crime and Restorative Justice: The Canadian Experience" (1999) 6 *International Review of Victimology* 279, at 283-287.

This offers another well-documented example of the move to graft indigenous *healing* methods onto mainstream criminal justice. [216]

Circle sentencing was originally revived in 1991 by judges and community justice groups in the Yukon Territory, Canada, although it now operates sporadically throughout the entire country.[217] It can be described as an "updated version" of the traditional sentencing and healing techniques of Canada's aboriginal peoples.[218] Offenders pleading guilty are referred to circle sentencing at various points after formal apprehension; the process can operate as an alternative to a formal court hearing *or* as a diversion there-from. It is holistically community-focused – the circles are usually composed of community representatives, victims, offenders, their families as well as representatives from the state criminal justice system – prosecutor, defence counsel and police officers.[219]

The process therefore merges formal and informal to aspire for a more satisfying overall outcome. One feature of the circle sentencing process that holds particular interest to this thesis is that it is not intended as a *necessary alternative* to formal state sentencing. Even offenders who graduate successfully from a circle sentencing referral will still be eligible for incarceration.[220] This feature sets the circle sentencing model apart from similar pilot referral schemes currently in place in Ireland.[221] Chapter 9 criticises Ireland's restorative interventions for their automatic preclusion of curial sentencing once satisfactory compliance is achieved.[222] It promotes the permissible combination of even most successful restorative referrals with curial sentences once the circumstances are judged to rationally require it.

The formal revival of the circle sentencing tradition in Yukon owes much to the "healing circles" revived by the Manitoba Ojibway First Nation community of *Hollow Water* in 1986.[223] This circle process was established to deal specifically with the isolated problem of sexual abuse in the area. It used community-based, dialogue-driven conference-style tactics to elicit a staggering 52 admissions of guilt out of a local population of just 600

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[216] Smith, "Peacemaking Circles: The 'Original' Dispute Resolution of Aboriginal People Emerges as the 'New' Alternative Dispute Resolution Process" (2003) 24 *Hamline Journal of Public Law and Policy* 336; Blue and Blue, *loc. cit.*, at 75-79; Bazemore and Griffiths, *loc. cit.*; Zehr, *op. cit.*, at 260-262; Griffiths, *loc. cit.*, at 287-288; Green, "Aboriginal Community Sentencing: Within and Without the Circle" (1997) 25(1) *Manitoba Law Journal* 77; Stuart, "Circle Sentencing: Turning Swords into Ploughshares" in Galaway and Hudson eds., *op. cit.* 193.

[217] Bazemore and Griffiths, *loc. cit.*

[218] *Ibid.*

[219] Griffiths, *loc. cit.*, at 287.

[220] *Ibid.*

[221] *Infra*, at 310-319.

[222] *Infra*, at 378-383.

[223] *See* Lajeunesse, *Community Holistic Circle Healing: Hollow Water First Nation, Aboriginal Peoples Collection* (Supply and Services, 1993); Braithwaite, "Restorative Justice and Social Justice" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.* 159; Williams, *loc. cit.*, at 478-483; Griffiths, *loc. cit.*, at 283; Blue and Blue, *loc. cit.*, at 78-79.

residents.[224] There have been only two known cases of reoffending.[225] As in Yukon, the Hollow Water initiative kicked in once an offender pleaded guilty in a formal court. However, this time, compliance with a "healing contract" – the culmination of the entire healing process – acted as an *alternative* to state sentencing.

The idea of "splicing" old with new – for the most part, formal and retributive with informal and restorative – is premised upon the perceived compatibility between restorative and retributive justice. The "indigenisation" or "collaboration" movement therefore operates from a similar philosophical platform to this thesis; it acknowledges that retributive sanctions will always be required because of humans' innate imperfection and crime's resultant ubiquity.

Neither model is perfect – restorative justice is by no means a panacea for criminal justice, nor does it rely on its gap-filling potential to justify its use.[226] But the *union* of retributive and restorative philosophies under an extended "continuum" of sentencing options holds substantial potential to offer criminal justice its best chance yet – at least since colonisation – to reach its ambitious goals. The concept of spliced criminal justice exemplifies an important principle permeating this research – that improved quality *can* be achieved through improved *choice*.[227]

4. Reconciling Religious and Indigenous Traditions as the "Spiritual Roots" of Restorative Justice

It is no stretch to classify religious instruction as a prime "spiritual root" of "restorative justice" as it is now conceived. This can be logically derived from the above exploration of the ancestral relationship between key religious legal traditions and the academically-designed ingredients of contemporary restorativist theory. On the other hand, it may – on face value – appear tenuous to suggest that aboriginal customary law provides another "spiritual" origin. However, the "spiritual" nature of indigenous conflict resolution materialises on closer inspection.

The validity of indigenous legal customs' categorisation as "spiritual" turns, quite naturally, on the definition of the latter term. Michael Batley eschews a reading of spirituality that involves a necessary sense of affinity with the supernatural.[228] Instead, he prefers Willard's[229] conventional Christian interpretation that perceives spirituality as inextricably

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[224] Braithwaite, *op. cit.*, at 25.
[225] Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Penguin, 1996), at 36.
[226] *Supra*, at 34-41; *infra*, at 109-110.
[227] *Supra*, at 48; *infra*, at 354.
[228] Batley, "What is the Appropriate Role of Spirituality in Restorative Justice?" in Zehr and Toews eds., *op. cit.* 365, at 366.
[229] Willard, "Spiritual Disciplines in a Postmodern World" (2000) 27(2) *Radix Magazine Inc.* 26.

enmeshed in the process of personal transformation i.e. internal personal betterment. However, there is nothing exclusively Christian about this construction. In fact, it echoes Buddhism and Judaism's joint emphasis on achieving personal enlightenment and rehabilitation through self-reflection. Accordingly, the emotionally transformative ambitions that motivate so many indigenous justice traditions attribute them a distinctive "spiritual" identity.

Secondly, the emotionally cathartic influence of indigenous healing techniques could *inflate* the sense of spirituality that surrounds them. Reconciliation through direct interpersonal contact and emotional transformation are likely to be emotionally-charged processes involving intense and overwhelming emotions such as fatigue, fear,[230] elation, anxiety and relief. From this perspective, *all* restorative justice is spiritual.[231]

> When responding to a conflict or crime incident, we are dealing with a situation that touches the heart of the human condition and experience. Something has gone wrong; someone has not behaved as they should and others have been harmed in the process … Viewed from an perpetrator's point of view, the values of restorative justice – such as accepting responsibility, offering an apology, making a commitment to change behavior and make restitution – show us the way out.[232]

The *extent* of world-wide aboriginal recourse to restorative principles also attests to their spiritual dimension. As the above survey has demonstrated, the seemingly primordial human impulse to neutralise crime's side effects restoratively is one that has transcended diverse cultural and ethnic boundaries. This indicates the gradual evolution of universal, visceral instincts or "spiritual truths" about how is right to interact with others, which happen to be largely restoratively motivated.[233]

Finally, the restorative disputing methods of certain aboriginal peoples are explicitly rooted in their *spiritual beliefs*. Native American healing techniques, in particular, are premised upon the oral spiritual lore of First Nations Peoples. For example, the healing achieved through the Native American *Pipe Ceremony* is attributed to the mystical intercession of sacred characters that feature in ancient spiritual teachings.[234] Such processes aspire, through meditation, to open communication channels to "the Creator" who is best positioned to restore community peace and harmony.

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[230] *Infra*, at 228, 230-231.
[231] Batley, *loc. cit.*, at 371, 375.
[232] *Ibid.*, at 369.
[233] *Ibid.*, at 370.
[234] Blue and Blue, *loc. cit.*, at 72-75.

5. Conclusion

Nothing in this chapter is intended to suggest that there is any *implicit* role for religion in a secular legal philosophy such as restorative justice.[235] In fact, Jerome Auerbach argues that – under contemporary American conditions at least – law has *replaced* religion as society's pilot belief system: "Law is our national religion: lawyers constitute our priesthood; the courtroom is our cathedral, where contemporary passion plays are enacted".[236]

This is so, of course, unless room is explicitly made for spirituality in the law. This occurred, for instance, when successive New Zealand governments afforded official status to traditional Maori spirituality, to the point that "it is invoked in ceremonial occasions, mentioned in public policy documents and reflected in the minutiae of statutory language in important legislation".[237]

Rather than attributing any particular legal role to spirituality, this chapter simply aims to demonstrate the cultural breadth and remarkable endurance of restorative legal traditions around the world *by reference* to their spiritual origins. Using a religious perspective to reveal restorative justice's historical predominance is simply this chapter's chosen method by which to discharge the primary role assigned to it at the outset – to initiate the gradual process of establishing restorative justice's *credibility* – a task completed by Chapters 3-7.

At the same time, it is not suggested that religion has no influence whatsoever over lawmaking. There is an obvious, though subtle nexus between religion and law: religious values are deeply embedded in cultural norms, which in turn shape the contours of the law. As Loy suggests: "questions of fairness and justice cannot be *completely* separated from the religious perspectives from which they historically derive."[238] To deny this link would be absurd, but it would be equally foolish to conceive of restorative justice as "a religious concept" under its present guise. While its principles have religious roots, their combination under the contemporary heading of "restorative justice" is entirely secular; restorative principles were originally religiously-ordained but they have evolved over the centuries to form an autonomous legal paradigm that befits the religiously non-aligned expectations of Western society.

Discharging its secondary definitional obligation, this chapter highlighted several common threads that weave throughout the world's religious and indigenous legal traditions. These dual sources of law share substantial common territory in this regard and it is fair to

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[235] Bader, *loc. cit.*
[236] Auerbach, *Justice Without Law?* (Oxford University Press, 1983), at 9.
[237] Ahdar, "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments" (2003) 23(4) *Oxford Journal of Legal Studies* 611, at 635.
[238] Loy, "Healing Justice: A Buddhist Approach", *loc. cit.*, at 81. [emphasis added]

say that they continue to match the key dimensions of Marshall's *modern* definition of restorative justice, introduced in Chapter 1,[239] whereby "parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future".[240]

The modern "second wave" of restorativism has effectively gathered up into one cohesive category a scattered array of the world's common legal themes and customs and united them under a new collective name and identity. The elements that compose the modern restorative equation have long pre-existed their recent union under the title "restorative justice". Accordingly, restorative justice is – regardless of its academically-attributed meaning – an amalgamation of the restorative customs common to the world's ancient legal traditions; what it is not, is a novel paradigm of modern legal invention.

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[239] *Supra*, at 5.
[240] Marshall, *Restorative Justice: An Overview* (Home Office, 1999), at 5.

Chapter 3

Crime's Emotional Side-Effects for its Primary Stakeholders: The Disempowering Influence of Social and Legal Stigmatisation over Victim and Offender

1. Introduction

As Chapter 1 stressed, it is restorative justice's *emotionally therapeutic potential* upon which its credibility depends.[1] Its talent for holistic, multi-party emotional healing justifies the paradigm's integration into established sentencing trends. The first step towards confirming restorative justice's ability in this vital respect is to identify the typical emotional injuries it might be invoked to alleviate.

Chapters 3 and 4 are dedicated to this end. They diagnose crime's adverse emotional side-effects for its various co-participants. Only then can Chapter 5 gauge restorative justice's ability to offer effective palliative responses thereto. The present chapter addresses crime's *individual* emotional side-effects for its primary stakeholders – victims and offenders – after which Chapter 4 will undertake an identical scrutiny with respect to residents' *collective* experience of community crime.

This chapter identifies *disempowerment* as the dominant catch-all category of emotional damage into which crime's unique emotional consequences for victims and offenders can be collated and filed. It also points the finger of blame squarely towards society and the legal system as prime reinforcers and potential escalators of the powerlessness that tends to afflict crime's primary stakeholders in its aftermath. Chapter 5 can then proceed to demonstrate those qualities of restorative justice that predispose it to the task of reversing power imbalances effectively for victim and offender.

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[1] *Supra*, at 33.

2. The Primary Victim: A Double Dose of Indignity

> [C]rime is in essence a violation: a violation of the self, *a desecration of who we are*, of what we believe, of our private space. Crime is devastating because it upsets two fundamental assumptions on which we base our lives: our belief that the world is an orderly, meaningful place, and our belief in personal autonomy. Both assumptions are essential for wholeness.[2]

The emotional trauma endured by crime victims derives from two major sources. Obviously, the commission of the crime itself is primarily emotionally deleterious. Yet, there is a secondary source of emotional injury to victims – the legal system, which tends to banish victims to the margins of criminal process, neglects their emotional needs and thereby subjects them to what is effectively "secondary victimisation".

Victims' primary emotional responses to their victimhood, outlined below, are therefore reinforced and intensified by their secondarily traumatising treatment within criminal process. Both primary and secondary sources of victims' post-crime emotional suffering will be considered in turn.

2.1 Primary Trauma: The Impact of the Offence

Victims suffer emotionally in the immediate aftermath of crime due to the psychologically depreciative impact of a primary two-stage mental process. The stages combine to exert a *humiliating* impact on those who have been victimised. The first stage is a feeling of degradation at the hands of crime to which a victim might respond "I feel insulted, humiliated and robbed of my dignity *by being told that I am weak*".

The second stage is the *internalisation* of the social stereotypes of victimhood that associate that status with powerlessness and personal atrophy.[3] Victims arrive at a point of self-identification as fragile, paralysed or vulnerable. In other words, they begin to see themselves as their offender saw them at the time of the offence – ripe for exploitation. They might then respond to their victimisation with: "*I believe* that I am weak".

Both responses can be characterised as the products of emotional disempowerment.[4] Victims are initially disempowered when offenders usurp their personal liberty and harm their personal interests. However, victims' sense of power is undermined more dramatically when they come to accept the sense of powerlessness that society associates with their status

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[2] Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 1990), at 24. [emphasis added]

[3] *See generally*, McBarnett, "Victim in the Witness Box—Confronting Victimology's Stereotype" (1988) 7 *Contemporary Crises* 279.

[4] Zehr, *op. cit.*, at 204.

and arrive at a point of personal-identification therewith. [5] In this sense, crime may be seen as a transaction in which power is exchanged – it is wrongly usurped from victim by offender.[6]

The logical source of emotional redress for crime victims then, is the redistribution of power between wrongdoer and wronged, returning to the victim the ill-gotten power stolen by the perpetrator. The emotionally ameliorative impact of this symbolic balancing act is to *restore* to victims their sense of social value, dignity, autonomy and control. Both vehicles of disempowerment – (a) initial humiliation and (b) subsequent internalisation – combine to shape victims' primary emotional reactions to crime. Each process will be contemplated below.

2.1.1 Crime Conveys a Humiliating, Disempowering Message to its Victims

> Denial of victims' autonomy by offenders is in large part what makes being a victim so traumatic. To be whole we need some sense of being in control of our own lives and destinies. To have that taken away suddenly, arbitrarily, frighteningly, is intensely dehumanizing. Offenders turn victims into objects, into "things," robbing them of power over their own lives. This is deeply degrading.[7]

The emotional repercussions of crime for a victim are many and diverse. The sense of *degradation* that crime induces in crime victims is manifested by a range of negative feelings such as shame, insult, fear, depression, lethargy, guilt, anger, confusion, humiliation and embarrassment. [8] Combined, these responses exert a corrosive influence over one's senses of dignity and self-esteem.[9]

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[5] Viano, "Victimology Today: Major Issues in Research and Public Policy" in Viano ed., *Crime and its Victims* (Hemisphere, 1989) 3, at 5-7.
[6] Zehr, *op. cit.*, at 55; *infra*, at 207.
[7] Zehr, *op. cit.*, at 52.
[8] *See generally*, *ibid.*, at 19-25; Lurigio and Resick, "Healing the Psychological Wounds of Criminal Victimization: Predicting Postcrime Distress and Recovery" in Lurigio, Skogan and Davis eds., *Victims of Crime: Problems, Policies and Programs* (Sage, 1990) 50; Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002), at 102-113; Strang and Sherman, "Repairing the Harm: Victims and Restorative Justice" (2003) 15 *Utah Law Review* 15; Shapland, Willmore and Duff eds., *Victims in the Criminal Justice System* (Gower, 1985), at 106; see also, Strang, "Is Restorative Justice Imposing its Agenda on Victims?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 94, at 99-103; Waller, "The Needs of Crime Victims" in Fattah ed., *The Plight of the Victim in Modern Society* (Macmillan, 1989) 252, at 263, 266-267; Elias, *The Politics of Victimization* (Oxford University Press, 1986), at 116-118; Watson, *Victims of Recorded Crime in Ireland* (Oak Tree Press, 2000), at 208-214.
[9] Murphy and Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1988), at 25; Strang, *op. cit.*, at 19; Murphy *et. al.*, *Ninth Annual Stein Center Symposium*, "The Role of Forgiveness in the Law" (2000) 27 *Fordham Urban Law Journal* 1349, at 1362; Ammar, "Forgiveness and the Law—A Redemptive Opportunity" (2000) 27 *Fordham Urban Law Journal* 1583, at 1585.

> People respond to crime in diverse and sometimes surprising ways. Feelings of fear, shame, resentment, anger against the offender, ... humiliation and a variety of other emotions are all very common. For some, a need to protect themselves from further offences, or a total feeling of disempowerment and an inability to cope are also common. For others, there may be total withdrawal or even refusal to believe that the crime has occurred. Physical symptoms include an inability to sleep or concentrate, being jumpy and easily startled. In some cases, victims' self-esteem and social lives may suffer.[10]

Murphy and Hampton assert that the indignity and humiliation provoked by crime are inextricably linked to one's having been told symbolically that they are weak through the medium of their exploitation or "moral injury" by another person.[11] Victimisation can be conceptualised as a means by which wrongdoers attempt to *empower themselves* through the symbolic communication – using humiliation and domination – of their perceived moral, social or physical superiority to their victims.[12] Murphy and Hampton describe the emotional consequences of this process for the crime victim:

> One reason we so deeply resent *moral injuries* done to us is not simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages*—symbolic communications ... Intentional wrongdoing *insults* us and attempts (sometimes successfully) to *degrade* us-and thus it involves a kind of injury that is not merely tangible and sensible. It is moral injury, and we care about such injuries ... Most of us tend to care about what others ... think about us ... *Our self-respect is social* in at least this sense, and it is simply part of the human condition that we are weak and vulnerable in these ways. And thus when we are treated with contempt by others it attacks us in profound and deeply threatening ways.[13]

The extent and severity of emotional damage is likely to increase proportionately with the severity of the offence. Strang observes that the most intrusive crimes are usually the most stressful for victims.[14] This is because they take victims by surprise and upset their emotional equilibrium by damaging their senses of self, autonomy, order, control or predictability in everyday activities, which are so central to their identity.[15] Offences of a sexual nature are known to induce particularly intense emotional reactions.[16]

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[10] McGovern, "The Victim in the Criminal Justice System" in O'Mahony ed., *Criminal Justice in Ireland* (Institute of Public Administration, 2002) 393, at 395.
[11] Murphy and Hampton, *op. cit.*; *ibid.*
[12] *See generally*, Human Dignity and Humiliation Studies Website: *Breaking the Cycle of Humiliation.* <http://www.humiliationstudies.org>
[13] Murphy and Hampton, *op. cit.*, at 25. [emphasis added]
[14] Strang, *op. cit.*, at 18.
[15] *Ibid.*
[16] Shapland, Willmore and Duff eds., *op. cit.*, at 107.

2.1.2 The Internalisation of Social Stereotypes Fuels Victims' Self-Assessed Powerlessness

Society tends to "label" crime victims with an indiscriminate, socially-prescribed identity.[17] Responses to crime percolate throughout society and fuse to form generalised judgements that subsume a kind of "short-list" of traits considered typical of those who have been victimised. In this regard, the most common reactions to the victimisation of others such as moral panic,[18] fear of crime,[19] shock, sympathy and pity commingle to yield public pronouncements or expectations of victimhood – a hypothetical, socially-constructed victim stereotype.

> Social learning ... enables us to develop a concept of being a victim ... [V]ictims are expected to express gratitude for sympathy or other compensating behaviour, and should not be perceived as exaggerating the extent of harm suffered or of excusing opportunities presented for suspending the expectations others normally have of them. Conversely, a victim should not appear to enjoy her or his suffering, and should try to avoid, in the future, the circumstances that occasioned it. A victim may also be expected to express anger, and possibly vindictiveness against those who caused the harm, but here again, such sentiments have traditionally been expected to be constrained within tolerated limits.[20]

The most prominent popular assumption is that victims are powerless and submissive. As Crawford and Goodey suggest, the victim-label is "under-cut with overtones of passivity and weakness".[21] Yet, victims' perceived vulnerability underlies the tendency to presume that all victims are "ideal".[22]

The socially manufactured label of victimhood is typically based around an assumption that all victims are blameless, unlucky examples of the exploitation of the weak by the strong. As Price-Lofton observes, "When a law is broken, we Westerners seek to identify the 'bad guy'. If there is a victim, that person is usually viewed as the 'good guy'".[23] Further, Crawford and Goodey remark that the stereotypes of the "ideal victim" have even penetrated the academic world: "... theories on victim aetiology and appropriate criminal justice responses were originally developed with an image of the "ideal" victim in mind".[24]

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[17] On the process of labelling victims, see generally Crawford and Goodey eds., *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, 2000), at 79-82.
[18] *Infra*, at 141, 221, 343-345.
[19] *Infra*, at 124-179.
[20] Crawford and Goodey eds., *op. cit.*, at 81-82.
[21] *Ibid.*
[22] Christie, "The Ideal Victim" in Fattah ed., *From Crime Policy to Victim Policy* (Macmillan, 1986) 1; Crawford and Goodey eds., *op. cit.*, at 22; see also, Dignan, *Understanding Victims and Restorative Justice* (Open University Press, 2005), at 167-178; Shapland, Willmore and Duff eds., *op. cit.*, at 66-67, 188-190.
[23] Price Lofton, "Does Restorative Justice Challenge Systemic Injustices?" in Zehr and Toews eds., *op. cit.* 381, at 384.
[24] Crawford and Goodey eds., *op. cit.*, at 22.

Still, a blanket assumption that all victims are ideal *or otherwise* is little more than an empirically unsubstantiated stereotype, which as such, should be resisted. [25]

Another facet of this popular false impression, particularly in the field of restorative justice, is the assumption that all victims are "ideal" or "good" *in the aftermath of an offence*, in that they are uniformly willing to submit peacefully to a restorative, mediative reconciliation with their offender. Again, this is a fiction that should be avoided. First, there is evidence to suggest that, while participation rates are generally high in restorative interventions,[26] many victims decline involvement because of the emotional trauma associated with confronting one's offender.[27] Furthermore, as Strang advises, "some victims have merciless and punitive attitudes which remain unaltered by anything an offender does or says".[28]

While the passivity and powerlessness attributed to crime victims is presumptively part and parcel of some socially-determined "ideal" character, it in fact threatens to demoralise and insult. Ironically, the powerlessness that society associates with crime victims is itself a source of their disempowerment. This happens when victims "internalise" society's pronouncement of their weaknesses by heeding stereotypes and defining themselves by them. This involves, in essence, a process of *self-labelling*, as victims come to see themselves as society and their offenders do – as powerless, frail and corruptible.[29] In this sense, it is true that "[v]ictimization strikes the victim's sense of ownness".[30] A more comprehensive overview of the internalisation process is provided later in the more literature-rich field of the labelling of deviants.[31] Similar logic applies to the experiences of both victim and offender in this respect.

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[25] Strang, *op. cit.*, at 209.

[26] Umbreit, Coates and Vos, "Victim-Offender Mediation: Three Decades of Practice and Research" (2004) 22(1-2) *Conflict Resolution Quarterly* 279, at 285; Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" (1999) 25 *Crime and Justice* 1, at 22; Moore and O'Connell, "Family Group Conferencing in Wagga Wagga: A Communitarian Model of Justice" in Alder and Wundersitz eds., *Family Conferencing and Juvenile Justice* (Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, Canberra, 1994) 15.

[27] *Infra*, at 228, 230-231; Reeves, "The Victim Support Perspective" in Wright and Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Sage, 1989) 44, at 52.

[28] Strang, *loc. cit.*, at 103.

[29] *See* Viano, *loc. cit.*, at 5-7.

[30] *Ibid.*, at 7; on victimisation's impact on victims' sense of identity, see generally, Rock, "On Becoming a Victim" in Hoyle and Young eds., *New Visions of Crime Victims* (Hart, 2002) 1, at 13-22; see also, Zehr, *op. cit.*, at 24.

[31] *Infra*, at 111-122.

2.1.3 Empowerment Relieves Crime Victims' Primary Trauma: Defeating the Processes of Humiliation and Self-Labelling

In order to heal the emotional trauma inflicted on victims by the humiliation of victimisation and the internalisation of disempowered stereotypes, they must be empowered to rediscover and recapture their self-respect, self-esteem and sense of self-efficacy. One means of doing so is by enabling victims to *reassert and re-publish* their strength, courage and resilience to others around them.[32] This offers victims an opportunity to cast off, in one fowl swoop, the shadow of powerlessness attributed to them by their offenders, the legal system and society at large.

> In addition to her relations both to the offender and to the larger community, the victim's relation to herself has been called into question. In a sense, the criminal has challenged the notion that the victim is a person of equal worth and value. In the aftermath of crime, the victim may feel compelled to reassert her own sense of identity and self-worth. [33]

Hence, Howard Zehr is clearly on point when he asserts that "the issue of personal power—its deprivation and its reassertion—is fundamental to the victim experience".[34]

However, the re-discovery of self-respect can be interpreted not merely as a tool of power redistribution, but as something of a moral duty.[35] According to Murphy, the moral obligation to respect all individuals imposes an implied and fundamental mandate to respect oneself. Consequently, in the wake of crime, it is imperative that victims re-affirm their self-worth *outwardly* as a bridge to re-capturing a sense of it themselves *internally.*

> Failure to respect another human being properly runs contrary to one's moral duty. Failure to respect oneself is no less of a moral offense ... As a rational being, the victim is morally obligated in the first instance to respect, or in this case reassert, her own self-worth.[36]

From Murphy's perspective, it becomes crucial that whatever steps are taken after the commission of an offence and whichever remedial measures are pursued, whether retributive or reparative, victims must be sure to avoid further sacrificing their self-respect. A victim must avoid acting in such a way that confirms or endorses the immoral message conveyed to them by their offender – that the victim is "less worthy than [the offender] is, so unworthy that he may use [the victim] merely as a means or object in service to his desires and

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[32] Zehr, *op. cit.*, at 52.
[33] Ammar, *loc. cit.*, at 1585.
[34] Zehr, *op. cit.*, at 52-53.
[35] Murphy *et. al.*, *loc. cit.*, at 1357-1359.
[36] Ammar, *loc. cit.*, at 1586.

projects".[37] Hence, for conflict resolution to safeguard the emotional welfare of victims properly – whether it takes the form of VOM, family group conferencing or conventional court adjudication – it *must* be preservative of the victim's selfhood. Only then will it have *moral value.*

While Chapter 9 would counter that the moral motivation of what happens in the aftermath of an offence is not necessarily integral to emotional healing,[38] Murphy's thesis is still instructive. It reveals that the opportunity to publicise one's strength and autonomy and controvert established stereotypes is an important means by which crime's negative emotional side-effects might be assuaged effectively for victims of crime. This need to reassert oneself derives not from any moral duty but rather constitutes the rational step of rebuilding the emotional ruins razed by crime. Crime damages a victim's sense of identity and self-worth – therefore, it is logical that those values must be rediscovered, re-published and defended in post-crime strategies.

So, victims' re-acquaintance with their temporarily stolen senses of autonomy, control and self-esteem holds considerable potential to reverse the emotional disempowerment inflicted primarily by the act of victimisation. However, it has further obvious potential to insulate victims to the equally emotionally deleterious process of label internalisation. The more empowered they feel in crime's aftermath, the less vulnerable they will be to attitudinal manipulation by emotionally damaging social stereotypes.

Yet, there is another vital means by which the internalisation process can be prevented: by attacking the labelling process at its root. But, in order to do so, the underlying triggers of social stereotyping must be properly identified and understood. The following section identifies the legal system as a prime culprit in the creation of negative labels of victimhood.

2.2 Secondary Trauma: The Legal System Victimises the Victimised – The Big Downs and Small Ups of Victim-Empowerment in Common Law Criminal Justice

> The state is not just the arbiter in a trial between victim and offender; the state is the victim ... If victims feel that nobody cares about their suffering, it is in part because institutionally nobody does.[39]

The above quote evokes a popular perspective on common law criminal justice – explored below – which charges it with distancing the crime victim from its processes so

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[37] Murphy *et. al.*, *loc. cit.*, at 1362.
[38] *Infra*, at 382.
[39] McBarnett, *loc. cit.*, at 300.

much so that, apart from their testimonial value, they effectively become irrelevant.[40] They are treated as extraneous stakeholders in the prosecutorial process who are bound to follow its progress in paralysed submission from its outermost limits. The legal system's perceived immobilisation of victims in crime's aftermath threatens to reinforce or worse, exacerbate their pre-existing feelings of powerlessness described above. Again, the appropriate remedy for this is *empowerment*, a talent that Chapter 5 will later associate with restorative justice.[41]

The following discussion explains that, while Irish criminal justice far from abandons crime victims – in fact, efforts to boost their relevance have accumulated over recent years[42] – the role of the victim relative to those of offender and state remains decidedly diminutive.[43] In general, defendant and prosecutor still assume the starring roles in a criminal justice system into which victims are slotted periodically in lesser, supporting capacities. Hence, victims' relative subordination to offender and state has outlived recent attempts to flesh out their role. Victims of crime in Ireland continue to occupy a position of *comparative* powerlessness around the fringes of criminal justice.

To contextualise victims' *current* level of recognition in Irish criminal justice, an overview of their treatment throughout the history of Irish law's direct forerunner – the English common law – is preliminarily provided. It reveals that the role of the crime victim in criminal justice has not always been as narrow as it appears today; in essence, the gradual disempowerment of crime victims only began to gather pace as the English common law concretised centuries ago. Only with adequate historical perspective can the significance of modern criminal justice's comparatively neglectful attitude to crime victims be fully contextualised.

2.2.1 Victim-Exclusion: The Legacy of the Common Law

The last one thousand years have seen the gradual erosion of victims' rights to participation within common law criminal process. Probing the roots of English law, the birthplace of common law criminal justice, reveals that it, like many of its foreign counterparts,[44] had restorative origins.[45] Restorative modes of handling inter-personal conflict thrived alongside the private vengeance and blood feuds that were commonplace in primitive systems of private justice operating in societies obsessed with kinship and blood-allegiance. Early English law absorbed a host of restorative features. [46]

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[40] *Infra*, at 98-100.
[41] *Infra*, at 180-224.
[42] *Infra*, at 104-108.
[43] *Infra*, at 118-110.
[44] *Supra*, at 83-84.
[45] Strang and Sherman, *loc. cit.*, at 16.
[46] *Ibid.*; Wright, *Justice For Victims and Offenders* (Waterside Press, 1996), at 11-20.

First, up until England's invasion by William the Conqueror, the victim, rather than the state, was the party to whom the offender made direct reparation.[47] Victims represented not only the harm inflicted to themselves but also the intangible harm suffered by a community when its harmony was disrupted by local crime. Schafer understandably considers this period of history "the golden age of the victim".[48]

As a result of the desire to restore pre-existing conditions, compensation was heavily used. As Ammar notes, even violent offenders had means of "making the victim whole".[49] Yet, by making compensatory payments to victims or their families according to detailed payment schedules, offenders were also "buying back" the community peace that their offence had breached.[50]

In restorative spirit, offender and victim, rather than offender and state, were juxtaposed under early English law and treated as "co-owners"[51] of the conflict between them.[52] This cornerstone of early English law, along with its emphases on community harmony, direct victim-offender contact, compensation and victim-redress evinces its marked resemblances to the ancient restorative ideology pervading religious and indigenous legal traditions since time immemorial.[53] It also shares visible parallels with the restorative dimensions of Ireland's *Brehon* legal system examined later in Chapter 7.[54]

It was not long, however, before the requirement of payment to the state crept in. Initially, the justification for such a levy was reasonable – commendable even: to prevent the social tensions arising from private justice from turning into bloodshed. Victims required protection from offenders' retaliation and offenders from vengeful or vindictive victims. Unfortunately, with the monarchy's mounting sway around the twelfth century and the centralisation of the state, the motivations underpinning offenders' liability to the state (which would lead to the eventual ouster of the victim from criminal process) stood unconvincingly upon less virtuous foundations.

The Norman invasion of Britain marked a turning point away from a restorative understanding of crime and prompted the gradual erosion of victim-involvement in criminal

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[47] Walklate, *Victimology: The Victim and the Criminal Justice Process* (Unwin Hyman,1989), at 108.
[48] Schafer, *The Victim and His Criminal* (Random House, 1968).
[49] Ammar, *loc. cit.*, at 1589.
[50] Walklate, *op. cit.*, at 108; see also, Harding, *Victims and Offenders*, NCVO Occasional Paper Two (Bedford Square Press, 1982), at 2; Weitekamp, "The History of Restorative Justice" in Johnstone ed., *A Restorative Justice Reader: Texts, Sources, Context* (Willan, 2003) 111, at 116.
[51] Christie, "Conflicts as Property" (1977) 17(1) *British Journal of Criminology* 1; see also, Ashworth, "Some Doubts About Restorative Justice" (1993) 4 *Criminal Law Forum* 277; Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 *Georgetown Law Journal* 2663.
[52] *See* Wright, *op. cit.*, at 11-20.
[53] *Supra*, at 49-86.
[54] *Infra*, at 271-304.

justice.[55] William the Conqueror, finding that his hold over his subjects was faltering, implemented a new strategy of fines to be paid by offenders not to their victims, but for the first time, to the state.[56] The system was aimed at establishing the superiority of state over church in an effort to curry public allegiance.

> William the Conqueror and his successors found the legal process an effective tool for establishing the preeminence of the king over church in secular matters, and in replacing local systems of dispute resolution ... Thus the king became the paramount victim, sustaining legally acknowledged, although symbolic, damages.[57]

The state then, was substituted for the victim in representing the damage that crime caused to the community. Around 1180, Henry II made the Crown the official victim of all felonies.[58] The *true victim's* injury would now go unrepresented.

> ... the king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction on the public rights belonging to that community, and is therefore the proper prosecutor for every public offence. [59]

Apart from asserting the *power* of government, state levies for rule-breaking were further motivated by *monetary* greed. Wright recounts that in 1255, Henry III was in need of funds and ordered his justices to impose monetary penalties on offenders.[60] It appears that these fines constituted a valuable source of income for the state, while lacking the unpopular stigma of taxation. Ziegenhagan reports that during the thirteenth century, money collected from fines constituted one-sixth of the King's revenue.[61]

This is the obvious origin of state-centred justice in which offender and state gradually coalesced as chief parties to crime and its resolution, while the victim faded into ever-increasing obscurity. Norwegian criminologist, Nils Christie perceives the replacement of victim with state as a process by which the latter "steals the conflict" from the former. [62] He condemns the state's usurpation of victims' participatory role in the resolution of conflicts to which they were, originally, direct and indispensable participants:

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[55] *See* Daly, "Restorative Justice: The Real Story" in McLaughlin, Fergusson, Hughes and Westmarland eds., *Restorative Justice: Critical Issues* (Sage, 2003) 195, at 201; Weitekamp, "The History of Restorative Justice" in Bazemore and Walgrave eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press, 1999) 75, 87-88; see also, Strang and Sherman, *loc. cit.*, at 16.
[56] Walklate, *op. cit.*, at 109; Christie, "Conflicts as Property", *loc. cit.*
[57] Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice" (1993) 4 *Criminal Law Forum* 251, at 256.
[58] Strang and Sherman, *loc. cit.*, at 16.
[59] Jones ed., *Blackstone*: *The Sovereignty of the Law* (Macmillan, 1973), at 187.
[60] Wright, *op. cit.*, at 14.
[61] *See generally*, Ziegenhagen, *Victims, Crime and Social-Control* (Praeger, 1977).
[62] *See generally,* Christie, "Conflicts as Property", *loc. cit.*; in support of Christie, see generally, Ashworth, *loc. cit.*; see also Menkel-Meadow, *loc. cit.*; Reeves, *loc. cit.*

> The victim is a particularly heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise. And not only does the state take the compensation. But above all he has lost participation in his own case. It is the Crown that comes into the spotlight, not the victim. It is the Crown that describes the losses, not the victim ... It is the Crown that gets a chance to talk to the offender, and neither the Crown nor the offender are particularly interested in carrying on that conversation ... *Something that belonged to [the victim] has been taken away.*[63]

Modern day common law criminal justice appears then as the distant progeny of an archaic, monarchic lust for power and wealth. In the years following the initial reorientation from restorative to retributive justice, victims' status has suffered steady erosion. Walklate notes that the ultimate demise of victim-centric criminal justice came with the introduction of the police force in the United Kingdom between 1820 and 1850.[64] Even as late as the early nineteenth century, the victim retained a significant role at least in *commencing* a prosecution.

> ... the burden of prosecution really did rest on private individuals ... It was up to the individual who had been harmed by an offence to ensure that the offender was prosecuted; [and] the eventual responsibility for carrying through the prosecution rested with the aggrieved citizen.[65]

The discussion that follows confirms that the marginalisation of the crime victim has now concretised into a characteristic badge of common law criminal justice today.

2.2.2 Common Law Criminal Justice Today: A Continuing Theme of Disempowerment?

> ... many victims experience frustration and alienation from the criminal justice system because of a routine lack of communication, a perceived lack of procedural fairness, as well as dissatisfaction with the outcome of their case, owing to their exclusion from the decision-making process—or, indeed, any input at all beyond their role as witness for the prosecution.[66]

Heather Strang pioneers contemporary opposition to common law criminal justice's neglect and marginalisation of crime victims, [67] as it is popularly perceived. [68] In the above

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[63] Christie, "Conflicts as Property", *loc. cit.*, at 7-8. [emphasis added]
[64] *See* Walklate, *op. cit.*, at 111; see also, Philips, *Crime and Authority in Victorian England: The Black Country 1835-1860* (Croom-Helm, 1977); Robinson, *Victim-Offender Mediation: Limitations and Potential* (University of Oxford Probation Studies Unit, Centre for Criminological Research, 1996).
[65] Philips, *op. cit.*, at 96.
[66] Strang, *op. cit.*, at 23.
[67] *Ibid.*
[68] *See* Symonds, "The Second Injury to Victims" in Kivens ed., *Evaluation and Change, Special Issue* (Minneapolis Research Foundation, 1980) 36; Shapland, "Victims and the Criminal Justice System" in Fattah ed., *From Crime Policy to Victim Policy: Reorienting the Justice System, op. cit.* 210; McGovern, *loc. cit.*; Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press,

quote, she identifies the legal system as a potential source of victims' *secondary* exploitation whereby their imposed isolation from criminal process only exacerbates the sense of powerlessness that already afflicts them.

The legal system, like the criminal, is said to drain victims of their perceived value – in this case *testimonial* – and cast them aside after their utility is exhausted. Traditionally, the state is said to afford crime victims a role in the prosecutorial process only to the extent to which they are willing to provide evidence to support it.[69] Strang remarks that this tactic reflects the state's treatment of victims as mere "court-fodder".[70]

Shapland identifies the paradox implicit in the victim's simultaneous use and neglect in criminal justice.[71] The victim becomes no more dispensable than when the offender has pleaded guilty. In this scenario, the victim is regarded as supernumerary – there is no incentive to preserve good relations with someone who serves no prosecutorial purpose.[72] Scheingold and colleagues exemplify victims' frustrations by relating the experience of one victim of sexual assault:

> I realised that it was a *criminal* [her emphasis] justice process and there was no room, according to the court's interpretation, any place for the victims to assert their rights … There's no connection between me and the crime. The crime happened to me but it was the state prosecuting this man … *I was just a piece of evidence*.[73]

It is not always the case, however, that all victims are treated alike. Some believe that victims who fail to meet the "ideal" form described by Christie,[74] are dealt an even poorer hand in criminal justice.[75] Victims who are not stereotypically "ideal" can be viewed by the criminal justice system as more deserving of victimisation. Some – for instance those working in the sex industry – may find that their lifestyles are deemed to justify their suffering. They are considered to have "asked for it" – to have *invited* crime by choosing a high-risk lifestyle. Society and the legal system are said to withhold sympathy for victims who depart from the ideal archetype of "innocence". This constitutes yet another source of

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1996), at 1-4; Shapland, Willmore and Duff eds., *op. cit.*, at 14-96; Zehr, *op. cit.*, at 55; Christie, "Conflicts as Property", *loc. cit.*; Sanders, "Victims' Participation in an Exclusionary Criminal Justice System" in Hoyle and Young eds., *op. cit.* 197; Barton, "Empowerment and Retribution in Criminal Justice" in Strang and Braithwaite eds., *Restorative Justice: Philosophy to Practice* (Ashgate, 2000) 55; Shapland, "Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies" in Crawford and Goodey eds., *op. cit.* 147, at 147-149; see generally, Fattah ed., *The Plight of Crime Victims in Modern Society*, *op. cit.*; Strang, *loc. cit.*, at 96; Walklate, *op. cit.*, at 123-128.

[69] Strang, *loc. cit.*, at 96

[70] *See* Strang and Sherman, *loc. cit.*, at 37.

[71] *See generally*, Shapland, "Victims and the Criminal Justice System", *loc. cit.*

[72] *See* Strang, *op. cit.*, at 11.

[73] *See* Scheingold, Olson and Pershing, "Sexual Violence, Victim Advocacy and Republican Criminology: Washington State's Community Protection Act" (1994) 28(4) *Law and Society Review* 729, at 737. [emphasis added]

[74] *See generally*, Christie, "The Ideal Victim", *loc. cit.*

[75] Crawford and Goodey eds., *op. cit.*, at 22.

trauma for a certain proportion of crime victims, onto whose already mounting emotional distress, it is generously plied.

> ... women with independent lifestyles and who were regarded as sexually liberated (for example prostitutes or even the sexually promiscuous) were not, and continue not to be, given the degree of due process and service provision as victims who comply or fit criminal justice constructions of the deserving victim.[76]

Modern common law criminal justice has therefore come under a barrage of criticism for the emotionally-destructive impact of its treatment of crime victims. It is accused of anything from simple neglect, to exploitation to actually *blaming* certain victims for their exposure to crime. This is, however, a one-sided perspective. On the flip-side, concerted efforts to rectify this perceived imbalance by *enhancing* victims' rights have strengthened and solidified around the world over recent decades.

An overview of the two principal victims' rights movements is tendered below with two ends in mind. First, it will emphasise the sheer strength of popular disgruntlement with the treatment of crime victims throughout Europe and America. Secondly, reserving judgement as to the state of common law criminal justice *generally* and also, therefore, as to the validity of the above perspective, the ensuing analysis of the victims' rights lobby enables the *more germane* determination of the extent to which its demands and international achievements have been taken on board in Ireland specifically.

2.2.3 "One Small Step": Surveying the Victims' Movement

While common law criminal justice suffered substantial criticism for its perceived resistance to victim-inclusion, clutching stubbornly to the now "traditional" dyadic partnership of state and offender, the academic world began to champion victims' interests. Although the world's victims' movements[77] did not begin in earnest until the 1970s, from as early as the 1950s, experts from a variety of fields began to sympathise with the plight of the victim in criminal justice. A movement developed that was dedicated to urging improved recognition, involvement, treatment and compensatory rights for victims in criminal process.

Margery Fry, a leading figure in the *Howard League for Penal Reform* in England and Wales, emerged as a pioneer of reparative, victim-focused justice.[78] Her 1951 book,

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[76] *Ibid.*

[77] For an overview of worldwide victims' movements, see Strang, *op. cit.*, at 26-34; see also, van Dijk, "Ideological Trends within the Victims' Movement: An International Perspective" in Maguire and Pointing eds., *Victims of Crime: A New Deal?* (Open University Press, 1988) 115, at 122-126; Duff, "The Victims' Movement and Legal Reform" in Maguire and Pointing eds., *op. cit.* 147; on the victims' movement in Britain, see Shapland, Willmore and Duff, *op. cit.*, at 1-3.

[78] *See* Walklate, *op. cit.*, at 113.

Arms of the Law,[79] resurrected the forgotten restorative English tradition of direct offender-victim reparation.[80] Fry then headed the campaign to secure compensation for crime victims in England and Wales. She drew inspiration from indigenous peoples, such as those considered in Chapter 2,[81] who continued to adhere to informal, reparation-based native justice models. In fact, as Rock remarks, Fry was one of the first to marry social anthropology to penal reform, something that has subsequently become commonplace in contemporary literature.[82] Breaking new ground by using alternative and aboriginal justice models to inspire law reform, Margery Fry can be credited with opening the debate on victims' rights within common law criminal justice.[83]

Another significant contributor to the fledgling victims' movement was psychologist Arthur Eglash. In the late 1950s, he implemented notions of restoration, healing and victim-involvement to advance a model of "creative restitution".[84] Like Fry, Eglash placed direct offender-victim amends at the centre of his theory. He predicted that the *human contact* necessitated by the process of creative restitution would yield positive, reparative and rehabilitative results for participating victims and offenders.

It is therefore clear that the evolving tradition of "spliced" or "indigenised" justice hybrids discussed in Chapter 2,[85] owes a considerable amount to victimology's early pioneers, such as Fry, Eglash and their contemporaries,[86] who first proposed the *re-establishment* of restorative aboriginal legal traditions.

When the victims' movement took off properly in the 1970s, however, it became clear that it would not necessarily retain the restorative spirit that characterised the work of Fry and Eglash. The movement became divided. It branched into two divergent factions – the United States' and European victims' movements. While both were concerned with safeguarding the victim's welfare in criminal justice, they were founded on philosophies that were directly opposed.

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[79] Fry, *Arms of the Law* (Gollanez, 1951).
[80] *Supra*, at 96.
[81] *Supra*, at 78-85.
[82] Rock, *Helping Victims of Crime: The Home Office and the Rise of Victim Support in England and Wales* (Clarendon Press, 1990), at 54.
[83] On Fry's importance to the victims' movement, see Walklate, *op. cit.*, at 113; Robinson, *op. cit.*, at 10; Strang, *op. cit.*, at 6.
[84] *See* Eglash, "Creative Restitution: Some Suggestions for Prison Rehabilitation Programs" (1958) 20 *American Journal of Corrections* 20; Eglash and Papanek, "Creative Restitution: A Correctional Technique and Theory" (1959) 15 *Journal of Individual Psychology* 226; see also, Gehm, "Victim and Offender Face to Face" (1995) *Federal Probation* 94.
[85] *Supra*, at 78-85.
[86] Other early works in victimology include, Von Hentig, *The Criminal and His Victim* (Yale University Press, 1948); Mendelsohn, "Une Nouvelle Branche de la Science Bio-psycho-sociale: Victimologie" [1956] *Revue Internationale de Criminologie et de Police Technique* 10; Wolfgang, *Patterns in Criminal Homicide* (University of Pennsylvania Press, 1959).

The United States' model, the real starting point of the world's victims' movements, was "rights-focused" and had a distinctive punitive, retributive edge. It drew largely on both the American civil rights and women's movements. Responses to crime were considered part of a "zero sum game", meaning that any improvement in victims' rights were expected to *necessarily* involve a proportionate dilution of offenders' rights and *vice versa*.[87]

Criminal justice was believed to create binary win/lose rather than win/win outcomes. Perceiving that offenders had "too many rights", the movement sought to tip the balance in favour of victims. Geis remarks that the perception that victims are "good people" who have been injured by "bad people" underlies the American victims' movement.[88] The philosophy appears to promote punishing offenders for the disparity in victim/offender treatment over hundreds of years; offenders' rights must be curtailed so that the suffering of victims can end. This is an illogical assumption that abandons blindly the ideal but very real prospect of achieving win/win legal outcomes.[89] It is unfair and irrational to persist in wreaking some sort of archaic, nonsensical vengeance on offenders as a class, in the name of victim-assistance. It certainly defeats the peaceful and holistic interests of restorative justice.

Further, this "zero-sum" American approach is premised on the erroneous stereotype that victims as a class are vengeful. Just like the aforementioned assumption that all victims are forgiving, the stereotype that labels them uniformly vindictive is equally objectionable. Such a sweeping, unsubstantiated misapprehension is an inappropriate foundation for law reform.

The European victims' movement, in contrast, was "support-focused". Developments involved lobbying for improved treatment and reducing victims' suffering through the therapeutic assistance of support networks. In contrast to developments in the US, European advances have taken place predominantly in the voluntary sector, operating *outside* the criminal justice system. The European model is single-mindedly victim-oriented. It seeks to ease victims' emotional suffering through its blinkered dedication to them and their unique issues. It does *not* condition its ability to assist crime victims on a simultaneous diminution of offenders' rights.

While inherently indifferent to offender-healing and as such, failing to envisage win/win scenarios *specifically* in tune with restorative justice's holistic vision, the European model *at the very least* neither prescribes win/lose nor proscribes win/win outcomes in criminal dispute resolution. The way forward for win/win outcomes is therefore unimpeded

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[87] Strang and Sherman, *loc. cit.*, at 35-36; see also, Elias, *op. cit.*, at 231; Erez, "Victim Participation in Sentencing: Rhetoric and Reality" (1990) 18 *Journal of Criminal Justice* 19, at 28-29; *infra*, at 233, 242-243.

[88] *See generally,* Geis, "Crime Victims: Practices and Prospects" in Lurigio, Skogan and Davis eds., *op. cit.* 251.

[89] *Infra*, at 233, 242-243.

by the "support-focused" European movement but seriously obstructed by the American "zero-sum" philosophy.

Differently motivated as these two victims' movements have been, it is crucial nevertheless to recognise the common ground they share. Despite their differences, they both ultimately aspire towards the improvement of victims' rights:

> The "victim movement" is a social movement that takes many forms worldwide, ranging from a support-focused openness to restorative alternatives through to an extreme rights-focused retributiveness. Varied as its forms have been, the characteristic they have in common, not only across this movement but in common with the other great social movements of this century, is a shared sense of injustice.[90]

One impact of the victims' movements that warrants crucial assessment is the degree of success they achieved in securing concrete change. Concern for the victim has undoubtedly spilled over from the field of victimology and flooded the domain of international law. This is born out by the policies of international super-structures such as the United Nations and the European Union. Both have enunciated strategies and guidelines to enhance victim-participation in criminal justice.[91] The following discussion considers the victims' movement's influence over *Irish* criminal justice.

2.2.4 "Too Little Too Late?": Considering Victim-Empowerment in Irish Criminal Justice

The position of the victim in Irish criminal justice has undergone a discernable improvement in recent years thanks to three principal advances in the field. The introduction of (a) victim impact statements, (b) a victims' charter and (c) compensation entitlements has certainly exerted *some* empowering impact over victims of crime in Ireland.

Unfortunately, however, it is not the *kind* of empowerment that Chapter 5 associates with victims' emotional healing. While undoubtedly valuable, this trio of recent reforms fails to provide crime victims with the degree of *involvement* and *knowledge* that Chapter 5 deems necessary for their *optimal* emotional empowerment.[92] Accordingly, it can be said that the

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[90] Strang, *op. cit.*, at 26.

[91] *See* United Nations General Assembly, "The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", Adopted by General Assembly resolution 40/34 of 29 November 1985; van Dijk, *Regaining a Sense of Community and Order*, General Report of the Sixteenth Criminological Research Conference of the European Committee on Crime Problems (Dutch Ministry of Justice, 1985); Council of Europe, Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings OJ L82, 22 March 2001, 1-4; Commission of the European Communities, *Crime victims in the European Union: reflections on standards and action*, European Commission, 1999 COM (1999) 349 final; Commission of the European Communities, *Compensation to crime victims*, European Commission 2001 COM (2002) 537 final.

[92] *Infra*, at 180-224.

Irish criminal justice system is insufficiently equipped to exert any *substantial* ameliorative influence over the powerlessness that afflicts people after their victimisation.

2.2.4.1 Victim Impact Statements

Victim Impact Statements – introduced into Ireland by the Criminal Justice Act, 1993[93] – are certainly empowering in so far as they afford crime victims a voice within the prosecutorial process.[94] At the same time, they have been widely criticised for *over-empowering* victims in this respect – a claim premised on the assumption that sentencing judges will allow varying experiences of victimhood to justify excessive disparity in the treatment of perpetrators of the same offence.[95] From this perspective, victim impact statements are objectionable because they afford crime victims an excessive and improper *de facto* sentencing role that promotes the inconsistent treatment of offenders.[96]

However, while victim impact statements threaten to over-empower the victimised in one respect, they can in fact under-empower them in others, thereby reinforcing the sense of powerlessness that tends to grip them post-crime.[97] This is because victim impact statements fail to provide crime victims with the *kind of involvement* that Chapter 5 declares an essential pre-condition to their emotional healing.[98] By this is meant active, dialogic, *participatory* involvement. This would not embrace any indirect sentencing role that is effectively conferred by the *judicial application* of victims' documentary evidence at sentencing.

Victims' active, dialogic engagement is preferred here because it provides them with the opportunity to vent, negotiate, respond, listen and be listened to. As Chapters 4 and 5 will confirm, these are all crucial vehicles of victims' post-crime empowerment because they allow victims to gain closure on distressing events and re-capture their senses of relevance and autonomy.

Sanders stresses the causal nexus between victims' *participative* involvement in criminal justice and their emotional empowerment. He dissociates this preferred brand of participation from the aforementioned variety, which threatens to empower victims so *excessively* that they are effectively permitted to usurp obliquely and unwittingly a potentially constitutionally intolerable quantity of judicial sentencing discretion.[99]

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[93] Criminal Justice Act, 1993, s. 5.
[94] *See generally*, Carey, "Victims, Victimology and Impact Statements" (2000) 10(3) *Irish Criminal Law Journal* 8; O'Malley, "Punishment and the Moral Luck: The Role of the Victim in Sentencing Decisions" (1993) 3 *Irish Criminal Law Journal* 40; Guiry, "A Voice for Victims: The Development of the Role of the Victim in the Irish Criminal Justice System" [2005] *Cork Online Law Review* XII.
[95] This assumption has been born out empirically, see Erez and Tontodonato, "The Effect of Victim Participation in Sentencing on Sentence Outcome" (1990) 28(3) *Criminology* 451.
[96] Ashworth, "Victim Impact Statements and Sentencing" [1993] *Criminal Law Review* 498, at 507.
[97] *Supra*, at 88-93.
[98] *Infra*, at 196-207.
[99] *Infra*, at 370.

> Only a genuinely *participative* system can treat victims with the respect they deserve without giving them the power to influence decisions that are not appropriately theirs.[100]

Sanders favours face-to-face meetings, such as those facilitated by VOM. It is this kind of active, confrontational involvement through which victims are most likely to acquire sufficient *knowledge* – (a) about the crime and the criminal in question and (b) about the prosecutorial process – to empower them emotionally. Chapter 5 explains that the opportunity to become properly informed in these respects provides an effective means by which to destroy the perceptions of irrelevance, insignificance and vulnerability that crime tends to provoke in its victims.[101] In this respect, it is arguable that the victim impact statement provides:

> ... too little inclusion or extra knowledge and understanding ... Genuinely participative systems, on the other hand, more frequently provide what victims need in order favourably to judge the process and to be more greatly satisfied as a result.[102]

Finally, in addition to their potential to offer crime victims *insufficient* empowerment, victim impact statements have also been charged with *actively disempowering* them. This allegation is rooted in the possibility that victim impact statements' could emotionally *harm* victims by stimulating a fear of aggressive reprisals from offenders and/or their representatives.[103]

Victim impact statements arguably constitute the most dramatic change in the area of victims' rights in Ireland over the last fifteen years. Nonetheless, their potential to expand victims' input in criminal justice, at least in a manner that promotes the satisfaction of their emotional needs, is doubtful. [104]

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[100] Sanders, "Victim Impact Statements: Don't Work, Can't Work" [2001] *Criminal Law Review* 447, at 458.
[101] *Infra*, at 201-205.
[102] Sanders, "Victim Impact Statements: Don't Work, Can't Work", *loc. cit.*, at 457.
[103] *Infra*, at 230; *contra*, Erez, "Whose Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice" [1999] *Criminal Law* Review 545, at 550-551.
[104] Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 1995), at 310.

2.2.4.2 The Victims' Charter

As the above account of victim impact statements emphasised, involvement is a valuable source of knowledge for crime victims in criminal justice. Importantly, however, involvement should be the appropriate *starting-point* in this relationship if optimum empowerment is to take place. Victim-involvement advances along a spectrum of empowerment as it produces sufficient knowledge to maximise the empowering potential of a given process. Crime victims can of course be informed *without* an active participatory role in criminal justice. However, knowledge is unlikely to satisfy victims on its own because of its limited solitary capacity for emotional empowerment and restoration:

> The general message from our research, and experience in other jurisdictions, is that schemes that provide information to victims without interaction and discussion with them do not in themselves increase satisfaction with the criminal justice system.[105]

This is arguably where Ireland's Victims' Charter[106] falls short. It promises information, decency, civility and courtesy to crime victims in criminal justice, without any specific guarantee to enhance their *involvement* therein. Therefore, while the Charter constitutes an important freeze-frame in Ireland victims' rights movement and has received substantial praise on that basis,[107] its significance is substantially curtailed because of its inherently limited empowering potential. It also lacks some legitimacy because it provides no specific means of enforcing the various duties it imposes. All in all, the Victims' Charter provides a noteworthy, but decidedly modest advance in the field of victims' rights in Ireland.

2.2.4.3 Compensation Entitlements

There are two different avenues – one statutory and one non-statutory – through which victims of crime can acquire compensation for their losses in Ireland without instituting civil proceedings. First, compensation orders were introduced into Irish law by the Criminal Justice Act, 1993.[108] The Act entitles the court, in any case where an offence involves personal injury or loss of property, to make a compensation order in favour of the injured party in lieu of, or in addition to, any other penalty.

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[105] Sanders, "Victim Impact Statements: Don't Work, Can't Work", *loc. cit.*, at 452.
[106] Department of Justice, Equality and Law Reform, *Charter of Victims' Rights in the Criminal Justice System* (Stationery Office, 1999); see also, Department of Justice, Equality and Law Reform, "Victims' Charter and Guide to the Criminal Justice System" <http://www.justice.ie/80256E010039C5AF/vWeb/pcJUSQ65GED5-ga> (visited 30 January 2006).
[107] *See* Sheridan, "Victims Receive Rightful Place in Justice System" *The Irish Times*, 18 September 1999 wherein it is reported that Lillian McGovern, then chief executive of Victim Support praised the new Victims' Charter for the crucial reason that "[i]t means no fudging anymore. It's all been pinned down".
[108] Criminal Justice Act, 1993, s. 6.

Secondly, the Criminal Injuries Compensation Tribunal (C.I.C.T) is a non-statutory scheme funded by the Department of Justice, Equality and Law Reform, which provides compensation in respect of "expenses and losses incurred as a direct result of a crime of violence, or while assisting or attempting to assist in the prevention of a crime or the saving of a human life".[109] Applications for compensation under the scheme can be made by victims themselves or by a voluntary agency such as Victim Support on their behalf.

While both forms of compensation successfully recalibrate the tangible and financial power-balance disturbed by an offence – and should be praised for doing so – they do little to empower victims *emotionally*. This is because they fail to offer crime victims any real right of *active participation* in criminal justice, identified above as a critical trigger of knowledge, confidence and ultimately the relinquishment of one's sense of powerlessness.

What is interesting about compensation orders is that they, like many advances in the field of victims' rights and indeed non-custodial orders generally, are commonly misdiagnosed as expressions of restorative justice. [110] As Chapter 1 indicated, this is probably due to the affinity such orders share with *isolated* principles of restorative justice. However, without accumulating a *comprehensive range* of restorative principles into one cohesive value-system, none of these strategies could be considered legitimate administrators of restorative justice.[111]

The specific restorative value omitted from Ireland's system of compensation orders, which denies it a restorative identity regardless of restorative justice's devotion to the principle victim-compensation, is its failure to recoup crime's emotional as opposed to financial and material losses. And the system's deficiency in this respect is fuelled, at least partially, by its omission to involve and accordingly inform victims to any appreciable degree.

Bearing in mind that restorative justice is much more than – (a) a non-custodial alternative,[112] (b) an endeavour to assist crime victims[113] or (c) a "soft option" devotee of leniency for leniency's sake[114] – provokes a significant revelation here. It reveals that the use of compensation orders in Ireland or indeed any other presumptively alternative or light-handed punishment actually erodes rather than enhances criminal justice's restorative content. It does so by forgetting one of restorative justice's most indispensable and integral principles and therefore *corroborates* the perspective held by critics such as Heather Strang

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[109] Department of Justice, Equality and Law Reform, *loc. cit.*, at 32.
[110] *Supra*, at 7-17.
[111] *Ibid.*
[112] *Supra*, at 15-16.
[113] *Supra*, at 11-12.
[114] *Supra*, at 39; *infra*, at 330, 366.

that, "[c]ourt processing neglects the non-material dimensions of victimization, that is, psychological and emotional consequences such as mistrust, unresolved anger, and fear."[115]

2.2.5 Room for Improvement

The three advances evaluated above provide admittedly memorable moments in the history of victims' rights in Ireland. Taken together, they aspire to empower crime victims more than ever before and in fact, they may well have succeeded. This is not to accept, however, that they are doing enough. They still fail to involve and inform crime victims *adequately* and *in the way necessary* to secure their emotional restoration by reversing crime-induced feelings of powerlessness. It is not, therefore, correct to consider them expressions of restorative justice. Besides, they are already disqualified as such by their incomplete restorative value-system: their one-sided victim focus belies restorative justice's holistic agenda of balanced emotional aid for victim and offender equally.

On the other hand, in their effort to assist crime victims, these three developments do at least *attempt* to give effect to a prominent restorative principle. Although their intentions fail to give rise to full "restorative justice", they are nonetheless restoratively directed. As such, as Chapter 8 suggests, it may be that these and other attempts to introduce isolated restorative principles into the Irish legal system could indicate that the country is moving gradually along a "restorative scale" whose eventual destination may well be full restorative justice.

Still, there is substantial room for improvement within Irish criminal justice in which the emotional needs of crime victims could be addressed more thoroughly, diligently and sincerely than they are at present. Sheridan lamented in 1999, well after the introduction of the victim impact statement and the compensation order, that victims *continue* to suffer the disempowering impact of their ongoing marginalisation and careless treatment at the hands of Irish criminal justice; neither advance appeared to prevent crime victims being:

> ... relegated as a piece of evidence to the back of the court, already frozen by injury, by the alien atmosphere, by being forced to share a waiting space with the accused's scowling relatives – only to be told casually as the judge rises hours later that her presence wasn't required after all.[116]

Whether the victims' charter, with its questionable policing, has improved this state of affairs, is doubtful. A substantial back-catalogue of media-disgruntlement with the Irish government's provision for victims' needs since the charter's inception testifies to its

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[115] Strang, *op. cit.*, at 118.
[116] Sheridan, *loc. cit.*; see also, McGovern, *loc. cit.*, at 394.

unfulfilled potential in this regard.[117] Moreover, the Irish criminal justice system has encountered additional criticism elsewhere.[118] McGovern asserts that in spite of recent ameliorative efforts, the victim in the Irish prosecutorial process is still "required solely as a witness for the state".[119]

In light of the above, there is considerable evidence to suggest that Irish criminal justice is failing to meet victims' emotional needs sufficiently to undo the emotional damage that crime characteristically inflicts upon them. Not only does it fail to offer them *sufficient* sources of empowerment, but it threatens to reinforce or worsen the existing feelings of powerlessness that people derive routinely from their victimisation.

And it is the *criminal justice system* that is the appropriate arena in which victims' treatment should be improved. While backing from one's community, or local Victim Support branch provides valuable local reinforcement for the crime victim,[120] only the criminal justice system itself can fulfil the debt it has gradually accumulated in favour the those it has, for so long inconvenienced, ill-treated and traumatised. After all, it is only the *perpetrator* of harm that can meaningfully assume responsibility there-fore and account accordingly to those it has injured.

2.2.6 Restorative Justice, Empowerment and Gap-Filling

Chapter 1 introduced a principle that is fundamental to this thesis' promotion of restorative criminal justice: that while restorative justice is capable of "filling gaps" in the criminal justice system into which it is inserted, it does not *rely* on its remedial potential for its credibility or to justify its integration.[121] Restorative justice's capacity to compensate for the shortcomings of traditional criminal justice, when and where they arise, is merely an incidental bonus of the paradigm's primary emotionally therapeutic value.

Having said that, the degree of *contrast* between the values that shape restorative and traditional criminal justice systems respectively creates obvious room for gap-filling between host system and invitee. The latter – restorative justice – would be introducing a *different balance of values* into a pre-existing justice model. As such, a "gap" in the host model can be

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[117] "McDowell Urges Review of Supports for Rape Victims" *TCM Breaking News*, 20 January 2005. <http://archives.tcm.ie/breakingnews/2005/01/20/story185619.asp>; Murray, "Crime Victims Not Getting Help Because of Legal Restrictions" *The Irish Examiner*, 30 March 2001; "Raw Deal for Male Victims for Domestic Abuse" *The Irish Examiner*, 3 January 2004; Cleary, "No Funding for Battered Men" *Sunday Business Post*, 19 June 2005; Dooley, "Call for Victims to Have a Bigger Say" *The Irish Times*, 7 March 1998; "We Are Failing the Victims of Domestic Violence" *The Irish Examiner*, 27 June 2001; "Waterford Victim Support Shackled In Desire to Help Victims of Crime!" *Waterford News and Star*, 31 August 2001.

[118] On the marginalisation of crime victims in Ireland, see *National Crime Forum Report 1998* (Office of Public Administration, 1998), at 49-68; McGovern, *loc. cit.*

[119] McGovern, *loc. cit.*, at 394.

[120] *Infra*, at 232.

[121] *Supra*, at 38-41.

defined as space either for the recognition of previously absent values or for a greater emphasis on pre-existing ones.

One value that restorative justice's arrival is likely to alter within mainstream criminal justice is its emphasis on repairing crime's *emotional* losses for its victims. As conceded above, Irish criminal justice by no means ignores victims' emotional needs in a blanket way.[122] Nonetheless, on the whole, it tends to place less emphasis than restorative justice on tackling crime's emotional results. This is because, traditionally, formal criminal justice has tended to concentrate on rectifying crime's material losses and punishing offenders' symbolic affront to state rules. Thus, restorative justice's transplantation, with its unique value-system in tow, would simply inflate, advance *or upgrade* a pre-existing value in Irish criminal justice.

It is important, however, to identify the significance of such a reorientation. For the purposes of this chapter, the significance of elevating a restorative value's priority in the criminal justice system lies *not* in its remedial impact over the system's overall functionality in performing its main objectives. Its remedial impact is questionable anyway: for instance, as previously argued, the crime-control potential of prioritising emotional healing can be neither confirmed reliably nor, therefore, used to justify restorative justice's integration.[123]

Instead, the real value in the "gap-filling" achieved when restorative justice heightens its host's dedication to emotional healing lies in its positive impact over victims and offenders. As this chapter explains, certain victims and offenders suffer emotionally because of the criminal justice system's potentially disempowering impact over them,[124] which can potentially co-exist alongside inadequately implemented rehabilitative and victim-assisting advances. This chapter explains that strengthening the criminal justice system's emphasis on restoring crime's emotional consequences provides an effective means by which to stymie its emotionally disempowering potential.

Judgement is reserved here as to how the insertion of restorative values is likely to affect the criminal justice system's overall fulfilment of its traditional objectives. Regardless of whether or not those values' prior de-emphasis can be considered an inherent *deficiency* of criminal justice, restorative justice's integration is significant, for the purposes of this chapter, because it stands to make victims' and offenders' progression through criminal justice easier.

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[122] *Supra*, at 103-104.
[123] *Supra*, at 33-36.
[124] *Infra*, at 117.

3. The Offender: The Impact of "Deviantization"

3.1 Labelling Theory in Context

The consequences of "labelling" require further attention when contemplating crime's negative emotional impact on offenders. *Labelling theories* become vitally instructive in this regard. Arguably, labelling theories in their general thrust are portable; they can be applied inexhaustibly to any scenario in which people appear to fulfil the prophecies of their socially-imposed "tag". For instance, while labelling theory was created specifically to explain the post-crime experience of deviants, it can be imported to inform retrospectively the foregoing study of the psychological impact of victims' internalisation of negative stereotypes.[125]

Offenders too can be traumatised by crime. Many will experience the decay of self-image and self-worth involved in the societal-application of any negative stereotype.[126] The work of theorists such as Becker,[127] Lemert,[128] Kitsuse,[129] and Gove[130] on the psychological internalisation of deviant-status inform this inquiry heavily.

The original labelling theorists were concerned exclusively with the mental manifestations of socially constructed labels on *deviant* labelees. Given this focus, the seminal literature on labelling falls more appropriately for elaboration at this juncture. Furthermore, while victims may experience labelling as a secondary source of trauma, it is arguable that the label of criminality constitutes the *primary* means by which offenders suffer psychologically from crime. Therefore, from a purist perspective, labelling theories can be considered more germane to the emotional experiences of offenders along the path of criminality.

Prior to charting offenders' emotional responses to labelling or "deviantizing",[131] one essential caveat must be entered: these are merely probable or potential responses. Not every offender will internalise criminal stereotypes nor suffer the disempowered self-image they

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[125] *Supra*, at 91-93.

[126] MacNair, *Perpetration-Induced Traumatic Stress: The Psychological Consequences of Killing* (Praeger, 2002); Zehr, "Commentary: Restorative Justice: Beyond Victim-offender Mediation" (2004) 22(1-2) *Conflict Resolution Quarterly* 305; Zehr, *op. cit.*, at 33-44.

[127] Becker, *The Outsiders: Studies in the Sociology of Deviance* (Free Press, 1963); Becker, "Whose Side Are We On?" (1967) 14 *Social Problems* 239.

[128] Lemert, *Social Pathology: a Systematic Approach to the Theory of Sociopathic Behavior* (McGraw-Hill, 1951); Lemert, *Human Deviance, Social Problems and Social-Control* (Prentice-Hall, 1967).

[129] Kitsuse, "Societal Reaction to Deviant Behavior: Problems of Theory and Method" (1962) 9 *Social Problems* 247; Kitsuse, "Deviance, Deviant Behavior and Deviants: Some Conceptual Problems" in Filstead ed., *An Introduction to Deviance: Readings in the Process of Making Deviants* (Markham, 1972) 233; Kitsuse, "The 'New Conception of Deviance' and its Critics" in Gove ed., *The Labelling of Deviance: Evaluating a Perspective* (Sage, 1975) 273.

[130] Gove ed., *op. cit.*

[131] Schur, "The Concept of Secondary Deviation: its Theoretical Significance and Empirical Elusiveness", unpublished manuscript, cited in Schur, "Comments" in Gove ed., *op. cit.* 285, at 288, 294.

can nurture. As such, not every offender will be a suitable candidate for restorative processes such as VOM, which Chapter 5 considers powerful remedial devices against label-related disempowerment.[132] Far from feeling shame, disempowerment and *resignation* to a deviant future, there will always be those whose criminal identity will stimulate a sense of satisfaction, fulfilment, rebellion and a sincere devotion to a criminal way of life. This reality forms one of several foundations for this thesis' *hybrid* vision of criminal justice, according to which restorative treatments are prioritised but can be dispensed with swiftly in favour of more punitive options where the crime or criminal warrants them.[133] Offenders who resist or are immune to the emotional ramifications of the labelling process can be dealt with appropriately with traditional punitive sanctions.

The goal of this chapter then, is merely to isolate those potential emotional side-effects suffered by offenders in crime's aftermath *to which restorative justice might offer a therapeutic response*. Chapter 5 will then proceed to illustrate exactly how restorative justice is specially equipped to do so.[134] Under a hybrid system, the state's largely punitive criminal justice procedures will provide the more appropriate avenue for the most hardened, recalcitrant offenders who are least suited to restorative processing. Labelling theories offer a compelling explanation for the phenomenon of criminal self-identification, in cases in which this does in fact occur and to which, as Chapter 5 reveals, restorative justice can provide an effective remedy.

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The rhetoric of the internalisation of socially-constructed labels, expounded by eminent labelling theorists such as Howard Becker, borrows much from pre-existing wisdom. In fact, contemporary labelling theories have their roots in the "symbolic interactionist" teachings of earlier writers such as Cooley and Mead. Cooley developed the concept of the "looking glass self".[135] It symbolised people's imagined image of themselves reflected from others in their social circles; people tend to define themselves according to how they imagine others see them. This concept is deeply ingrained in the labelling theorists' hypothesis on the internalisation of deviant stereotypes.

George Mead's work has been equally influential to the evolution of labelling philosophy.[136] Like Cooley, he emphasised the *social nature* of self-perception – that it is something cultivated within a social context and cannot exist in objective isolation. Self-

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[132] *Infra*, at 184-187.
[133] *Infra*, at 378-383.
[134] *Infra*, at 180-224.
[135] *See generally*, Cooley, *Human Nature and the Social Order* (C. Scribner's Sons, 1902).
[136] *See generally*, Mead, *Mind, Self, and Society* (University of Chicago Press, 1934); see also, Lemert, "Beyond Mead: The Societal Reaction to Deviance" (1974) 21 *Social Problems* 457.

image is socially moulded in that it derives from the mind's perception and interpretation of social symbols and interactional influences. The crucial joint contribution of both Mead and Cooley is their shared emphasis on the influence of social factors – first, over what behaviour is considered conventional (acceptable) or unconventional (unacceptable) and second, over how those who breach society's prescribed conventions come to perceive themselves.

In 1938, Tannenbaum published a statement accepted as a landmark of what is today known as the "social reaction" or "labelling" perspective.[137] The following passage contains the basic philosophical kernel from which writers such as Lemert and Becker would later develop their respective theories on criminal labelling:

> The process of making the criminal is a process of tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious; it becomes a way of stimulating, suggesting, emphasizing, and evoking the very traits that are complained of. *The person becomes the thing he is described as being.*[138]

3.2 The Socialisation of Deviance

Edwin Lemert's principal contribution is his classification of primary and secondary deviance.[139] He used the term *primary deviance* to describe the offending act that attracts the initial label. *Secondary deviance* denotes the behaviour that labelling is thought to subsequently stimulate in offenders. This conduct is driven by what can be considered crime's secondary emotional effects, which are independent of those triggered by perpetration alone.

The theories of Becker and Lemert can be combined to yield a conflation of common themes and principles relevant to offenders' post-crime psychology. However, as a preliminary matter, it is appropriate to consider how the phenomenon "deviance" was conceived by the champions of labelling theory. Numerous definitions have been suggested. For example, Edwin Schur posits that:

> [h]uman behaviour is deviant to *the extent that* it comes to be viewed as involving a personally discreditable departure from a group's normative expectations, *and it elicits* interpersonal or collective reactions that serve to "isolate," "treat," "correct," or "punish" *individuals* engaged in such behaviour.[140]

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[137] *See* Gove, "The Labelling Perspective: An Overview" in Gove ed., *op. cit.* 3, at 3.
[138] Tannenbaum, *Crime and the Community* (Columbia University Press, 1938), at 19-20. [emphasis added]
[139] *See generally*, Lemert, *Social Pathology: a Systematic Approach to the Theory of Sociopathic Behavior*, *op. cit.*
[140] *See* Schur, *Labeling Deviant Behaviour: Its Sociological Implications* (Harper and Row, 1971), at 24. [author's emphasis]

Becker contrasts highly divergent definitions of deviance to reveal the degree of fluctuation inherent in the social demarcation of behavioural boundaries. On the one hand:

> [t]he simplest view of deviance is essentially statistical, defining as deviant anything that varies too widely from the average. When a statistician analyzes the results of an agricultural experiment, he describes the stalk of corn that is exceptionally tall and the stalk that is exceptionally short as deviations from the mean or average. Similarly, one can describe anything that differs from what is most common as a deviation.[141]

But on the other hand:

> [a] less simple but much more common view of deviance identifies it as something essentially pathological, revealing the presence of a "disease." The human organism, when it is working efficiently and experiencing no discomfort, is said to be "healthy." When it does not work efficiently, a disease is said to be present. The organ or function that has become deranged is said to be pathological.[142]

Its variety of meanings emphasises that deviance is not something that can be explained in a contextual vacuum. It is entirely socially-constructed; its meaning depends wholly on social context and prevailing socially-embedded normative consensus. In essence – and given the inevitable variation in social standards across diverse times and locations – deviant behaviour can be *any* behaviour so long as it is condemned by like-minded societal consensus. Becker's inclusive interpretation of deviance, given its inextinguishable connection to prevailing social tolerances, justifies his classification of drug users[143] and "dance musicians"[144] as deviant according to the conservative or "square" [145] sensibilities of mainstream 1960s America.

> ... *social groups create deviance by making the rules whose infraction constitutes deviance*, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is *not* a quality of the act the person commits. But rather a consequence of the application by others of rules and sanctions to an "offender." The deviant is one to whom that label has successfully been applied; *deviant behaviour is behaviour that people so label.*[146]

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[141] Becker, *op. cit.*, at 4.
[142] *Ibid.*, at 5.
[143] *Ibid.*, at 41-53.
[144] *Ibid.*, at 101-114.
[145] *Ibid.*, at 85-91.
[146] *Ibid.*, at 9 [emphasis added]; see also, Erikson, "Notes on the Sociology of Deviance" (1962) 9 *Social Problems* 11; Gove, "The Labelling Perspective: An Overview", *loc. cit.*, at 4; Young, J., "Breaking Windows: Situating the New Criminology" in Walton and Young eds., *The New Criminology Revisited* (Macmillan Press, 1998) 14, at 18.

3.3 The "Internalisation" of the Deviant Label

The labelling literature describes an important emotional response to being stereotyped that was mentioned briefly above: the internalisation of deviant-status.[147] This involves a process of "self-labelling" in which wrongdoers accept and embrace her socially imposed deviant role and come to define themselves thereby. As Cooley's "looking glass self" model depicted, offenders come to imagine others' perception of them in their social group and then judge themselves according thereto. They acquire a *socialised* vision of themselves.

> ... humans assess not only the bodies they encounter for correspondence to models of pivotal categories; they also assess themselves. They assign themselves as instances of, as being, one or another kind of social object. This subjective process may be referred to as *personal identification.*[148]

Labelees arrive at a point of criminal self-identification, which involves "the act of making an inward confession, admission, or boast: 'I am a ...' followed by such a word as thief, rapist, or alcoholic, or whatever the category may be".[149]

3.4 Secondary Deviance

The self-labelling process must have consequences itself. The study of secondary deviance is a particularly valuable legacy to the understanding of the adverse emotional impulses that wrongdoing stimulates. Secondary deviance describes the sequential psychological and *behavioural* implications of the application of a deviant stereotype.[150]

The theory of secondary deviance suggests that a deviant self-image arouses even more deviant conduct. In this sense, the label of deviance becomes something of a self-fulfilling prophecy: people become what they have been socially deemed to be. Becker describes how rule-breakers come to accept deviance as their master-status. Rule-breakers who undergo the labelling process become "outsiders" in society and are denied opportunities for reform; the exit from the prophecy of their label is thereby sealed.[151]

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[147] On the process of self-labelling, see generally, Lofland, *Deviance and Identity* (Prentice Hall, 1969), at 121-154; Tittle, "Labelling and Crime: An Empirical Evaluation" in Gove ed., *op. cit.* 157, at 163-171; Sagarin and Kelly, "Sexual Deviance and Labelling Perspectives" in Gove ed., *op. cit.* 243, at 249; see generally Becker, *op. cit.*

[148] Lofland, *op. cit.*, at 129. [emphasis added]

[149] Sagarin and Kelly, *loc. cit.*, at 249.

[150] *See* Bernburg, Krohn and Rivera, "Official Labeling, Criminal Embeddedness, and Subsequent Delinquency" (2006) 43(1) *Journal of Research in Crime and Delinquency* 67.

[151] *See generally*, Becker, *op. cit.*

Deviant labelees begin to identify with other rule-breakers and eventually see "normal" society as "other" and its members as "outsiders".[152] In this sense, they are stigmatising the "squareness"[153] of the mainstream society that originally stigmatised them. The result of labelees' growing alignment with other wrongdoers is the generation of what Becker terms "deviant subcultures". These close-knit cliques are a manifestation of labelees' integrated independence from the disapproval of mainstream society. Sub-cultural solidarity, on this scale, leads to further rule-breaking as labelees live out the socially-constructed characteristics of their group. This sets the rule-breaker on the path to what Becker terms a "deviant career".[154] This step copperfastens offenders' deviant self-image and seals the exit from a life of crime.

> A final step in the career of a deviant is movement into an organized deviant group. When a person makes a definite move into an organized group—or when he realizes and accepts the fact that he has already done so—it has a powerful impact on his conception of himself. A drug addict once told me that the moment she felt she was really "hooked" was when she realized she no longer had any friends who were not drug addicts.[155]

Gove also emphasises the adverse effects of secondary deviance and its potentially permanent corrosion of offenders' objective and subjective former selves:

> ... once a person has been labelled a deviant—and particularly if that person has passed through a degradation ceremony and been forced to become a member of a deviant group—the person has experienced a profound and *frequently irreversible* socialization process. He or she has not only acquired an inferior status, but has also developed a deviant world view and the knowledge and skills that go with it. And perhaps equally important, he or she has developed a deviant self-image based upon the image of him- or herself received through the actions of others.[156]

3.5 The Emotional Consequences of Label Internalisation and Secondary Deviance

The study of secondary deviance reveals two chief *psychological* experiences for offenders relevant to this chapter; first, there is the emotional impact of the self-labelling process and second, the emotional trauma attached to one's subsequent descent into further deviance and entrenchment within a deviant subculture.

The psychological consequences of self-labelling are numerous. Internalising negative stereotypes and identifying oneself as deviant is destructive of one's self-image.

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[152] *Ibid.*, at 86.
[153] *Ibid.*, at 90.
[154] *Ibid.*, at 25-39.
[155] *Ibid.*, at 38.
[156] Gove, "The Labelling Perspective: An Overview", *loc. cit.*, at 7. [emphasis added]

Perceiving oneself as deviant can inspire feelings of guilt, shame and self-loathing. As Becker remarks, this can culminate in a desire to punish oneself.[157] The marginalisation inherent in acquiring deviant status and the acceptance of this "outsider" identity can deplete drastically an offender's sense of self-worth.

Offenders' pre-existing identities gradually disintegrate as the effects of labelling erode their dignity, pride, confidence and sense of belonging within their communities. Offenders suffer the *disempowering* impact of being isolated from mainstream society. This social filtration can be an insulting, demoralising, degrading and embarrassing experience for offenders and can spark sentiments of anger and frustration. They then seek to recapture and reassert their sense of identity and power by joining ranks with those who have suffered similar exclusion.

Offenders' sense of disempowerment in this regard can be further exacerbated by their involvement in what Garfinkle terms a "degradation ceremony".[158] By this, Garfinkle refers to the indignity accompanying wrongdoers' progression through the legal system. The stereotypes and character-judgements that sculpt their encounters with legal professionals and their participation in legal forums are said to reinforce offenders' newly-acquired deviant self-image. Hence, the legal system emerges as both a central labelling power and a reinforcer of pre-existing socially-imposed deviant tags. In Ireland, it is fair to suggest that the legal system's arguably lack-lustre approach to rehabilitating offenders surveyed in Chapter 1, arising from (a) the state of the Irish prison system[159] and (b) the lack of a "moral education" in even treatment-based non-custodial orders,[160] serves to reinforce the stereotype of the inherently irredeemable and irreversibly "deviant" societal *outlaw*.

All of the above sentiments can be intensified through secondarily deviant behaviour (and the enhanced involvement with criminal justice that it likely involves). Whether an offender's marginalisation results in isolated acts of recidivism, affiliation with deviant groups or subcultures, or a full-blown criminal career, the common consequence is the cementing of his or her deviant identity and the advancement of the emotional disempowerment associated therewith.

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[157] Becker, *op. cit.*, at 31.
[158] Garfinkle, "Conditions of Successful Degradation Ceremonies" (1956) 1 *American Journal of Sociology* 420.
[159] *Supra*, at 38-41.
[160] *Supra*, at 14.

3.6 Defending Labelling Theory

As stressed at the commencement of this overview,[161] the internalisation of deviant stereotypes constitutes one likely source of emotional damage for offenders. This will by no means occur in all or even most cases; it simply provides, when and where it does materialise, one particular manifestation of emotional trauma to which, as Chapter 5 will confirm, restorative justice can provide an effective remedy.

Not all rule-breakers will be equally susceptible to the process of internalising labels. Different people will have varying degrees of emotional robustness and hence, varying capacities for deflecting the emotional ramifications of the labelling process. Some will resist its effects completely, while others will succumb to the internalisation process while resisting the next level of sub-cultural entrenchment.

> Obviously, everyone caught in one deviant act and labelled a deviant does not move inevitably toward greater deviance in the way the preceding remarks might suggest. The prophecies do not always confirm themselves, *the mechanisms do not always work.*[162]

The attachment of labels appears to be the only constant in the labelling scenario. The lifespan of the deviant label can be divided into three main stages:

Stage One: Label is attached.

Stage Two: Label is internalised – Primary Emotional Trauma.

Stage Three: Secondary Deviance, whether:

(a) Isolated Recidivism,

(b) Affiliation with subculture, or

(c) Deviant career

Label is reinforced – Secondary Emotional Trauma.

The point at which an offender leaves the labelling process and avoids the emotional effects of continued involvement will depend on a number of factors such as his or her peculiar emotional and psychological attributes. Moreover, the degree of public condemnation for the offender's behaviour and hence the *weight* of the label applied will vary with the magnitude of his or her crime(s). The more intolerable the crime, the heavier the label and as such, the harder it will be to shake its influence. Being labelled pathological and dangerous is likely to yield a stronger emotional reaction than being branded a petty thief.

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[161] *Supra*, at 115.

[162] Becker, *op. cit.*, at 36. [emphasis added]

The fact that any offender can depart the labelling cycle at one of a number of exit points does not undermine the validity of the labelling perspective. This is because it can still be said that *should offenders feel traumatised* throughout the short and/or long-term aftermath of their offence, the labelling process is likely to be the reason. Nevertheless, the dominant challenges to labelling theory have sought to undo labelling theory based on its selective applicability.

Critics have sought to destabilise labelling theory on the basis that it claims a uniform, sweeping applicability to which it cannot live up in practice. For instance, labelling perspectives have been attacked on the basis that – through the uniformity they allegedly claim – they make insufficient allowance for the possibility of offenders' *departure* from a labelling cycle and their subsequent reform. Gove, in particular, criticises labelling theory for giving insufficient attention to the possibility of what he calls "the shift to normalcy".[163]

However, there is nothing in labelling theory to suggest that departure and reform are impossible. Reform is merely rendered *less likely* given the transformation of the identities of those remaining at stage two and beyond. On the other hand, for offenders who never progress past stage one, reform is arguably more feasible.

Becker himself foresees the departure of deviants from the process after stage one and their subsequent volitional reform. Gove roots the will to abandon a deviant lifestyle firmly in the deterrent effects of both societal reaction and the harshness of a deviant lifestyle. Yet, Becker agrees. He too highlights deterrence as a core motivation for reform. Ironically, Gove's stance is reconcilable with Becker's. His belief that they differ obscures a reality of concurrence. Becker, like Gove, believes that:

> [a]pprehension may not lead to increasing deviance if the situation in which the individual is apprehended for the first time occurs at a point where he can still choose between alternate lines of action. *Faced, for the first time, with the possible ultimate and drastic consequences of what he is doing,* he may decide that he does not want to take the deviant road, and turn back. If he makes the right choice, he will be welcomed back into the conventional community; but if he makes the wrong move, he will be rejected and start a cycle of increasing deviance.[164]

Labelling theory is intended to operate with neither mechanical uniformity nor perpetual repetition – it does not claim a robotic applicability. Every person who breaks a rule does not end up flowing off some infallible labelling production-line with identically assembled mental configurations. Instead, labelling perspectives provide a stable hypothesis for crime's *likely, potential or typical* emotional side-effects for its perpetrators. Variability is assumed.

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[163] Gove, "The Labelling Perspective: An Overview", *loc. cit.*, at 16.
[164] Becker, *op. cit.*, at 37. [emphasis added].

Variables such as the prejudicial application of labels along class lines[165], the erroneous labelling of innocent non-rulebreakers[166] or changes in what is considered deviant over time,[167] do not alter the conclusions that (a) deviant behaviour is behaviour that people so label and (b) some offenders will endure consequent emotional trauma, the seriousness of which will depend on their point of departure from the labelling cycle. These are the conclusions relevant to this section's psychological focus. As such, they are undisturbed by objections based on the irregularity of various aspects of the labelling experience.

Labelling theory has been subject to considerable attack on a number of other grounds[168] – for instance, that it is ambiguous,[169] fails to identify the *kind of social reaction* that identifies behaviour as deviant,[170] or that deviance should not be equated with rule-breaking at all.[171] However, this section is not concerned with the entirety of labelling philosophy, nor can it vouch for the soundness of its every inference.

There is but one settled and credible area of labelling philosophy that can be distilled from any surrounding ambiguity and dissent to inform the study of offenders' post-crime psychology: that is the "self-labelling" process and its potential intensification by secondary deviance. Only attempts to undermine this facet of labelling theory could be fatal to this section's endorsement of it. Therefore, criticism of the labelling theorists that is based, for example, on their handling of the issue of primary deviance and their assertions about the motivations behind original criminal acts is irrelevant here given this chapter's honed focus.

John Kitsuse criticises the common "self-fulfilling prophecy" interpretation of secondary deviance i.e. that those labelled deviant will live out their acquired stereotype by re-offending.[172] He argues that this reading is not true to Lemert's original definition of secondary deviation, arguing that Lemert's vision was far more complex.

However, the interpretation that Kitsuse opposes simply constitutes an altered state into which labelling theory has naturally metamorphosed as the dialogue thereon has evolved. There is no evidence that the "self-fulfilling prophecy" theory is intended to echo with purist precision the definitive tenets of labelling theory's original formulation for all time; that would defy progress. Pre-existing legal theories, whatever their content, will

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[165] *Ibid.*, at 12, 33; see also, Tittle, *loc. cit.*, at 163-164.
[166] *See* Becker, *op. cit.*, at 9, 12-14; Kitsuse, "The 'New Conception of Deviance' and its Critics", *loc. cit.*, at 279, 280.
[167] Young, J., "Writing on the Cusp of Change" in Walton and Young eds., *op. cit.* 259, at 273.
[168] *See generally*, Kitsuse, "The 'New Conception of Deviance' and its Critics", *loc. cit.*
[169] Kitsuse and Spector, "Deviance and Social Problems: Some Parallel Issues" (1975) 23 *Social Problems* 584.
[170] Gibbs, "Conceptions of Deviant Behavior: The Old and the New" (1966) 9 *Pacific Sociological Review* 9, at 14.
[171] Katz, "Deviance, Charisma and Rule-Defined Behavior" (1973) 20 *Social Problems* 186.
[172] Kitsuse, "The 'New Conception of Deviance' and its Critics", *loc. cit.*, at 281-282.

inevitably tranform as they are constrained and expanded by the academic wranglings of their owners' successors.

Though clearly informed by *and building on* Lemert's basic concept, the self-fulfilling hypothesis is merely an addendum thereto – a newer, more accommodating costume into which the original theory can now step. After all, the pre-existing dimensions of its untampered state will remain forever within the records of legal academia. Therefore, the "self-fulfilling prophecy" stance can be viewed a new guise for labelling theory. It was intended to follow on from or expand Lemert's limited definition, not (mis)interpret it. If Lemert's contribution was in designing the term "secondary deviance" to describe offenders' socially-prescribed reactions to labelling, then the proponents of the "self-fulfilling prophecy" approach have merely taken the next logical step of describing what those reactions are likely to be.

Furthermore, the "self-fulfilling prophecy" perspective was in keeping with the theories on deviance that *pre-dated* Lemert. Tannenbaum, for instance, the "grandfather of labelling theory"[173] had asserted in his crucial statement decades earlier that: "[t]he person becomes the thing he is described as being."[174] Therefore the "self-fulfilling prophecy" hypothesis does not need to be legitimated by finding common ground with Lemert or anybody else; it is already a historical bastion of the fledgling labelling movement. Even if it *did* require legitimation by overlapping symmetrically with earlier theory – which is absurd – it shared enough with Tannenbaum to bolster its credibility.

Labelling theory has received substantial support, which challenges arguments against its practical applicability.[175] Thomas Scheff imports Becker's hypotheses successfully into his study of mental health.[176] He uses labelling theory to describe how people are labelled mentally-ill in order to explain certain rule-breaking behaviour that society struggles to categorise. Schur applies labelling theory to the phenomenon of female stereotyping. He submits that American women are automatically labelled deviant by a male-dominated society.[177] Consequently, women are said to accept and internalise the deviant label and limit their life choices accordingly. Labelling theory has also been implemented to determine the emotional consequences of a host of other labels, for instance: alcoholism,[178]

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[173] Townsend, "Frank Tannenbaum: Dramatization of Evil", at para. 15. <http://www.criminology.fsu.edu/crimtheory/tannenbaum.htm> (visited 8 May 2006).
[174] Tannenbaum, *op. cit.*, at 19-20.
[175] Gibbs, "Issues of Defining Deviant Behavior" in Scott and Douglas eds., *Theoretical Perspectives on Deviance* (Basic Books, 1972) 39.
[176] *See generally*, Scheff, *Being Mentally Ill: A Sociological Theory (*Aldine, 1978); see also, Scheff, *Labelling Madness* (Prentice-Hall, 1975); Pfohl, *Images of Deviance and Social-control: A Sociological History* (McGraw-Hill, 1994).
[177] Schur, *Labeling Women Deviant: Gender, Stigma, and Social-control* (McGraw-Hill, 1983).
[178] *See* Robins, "Alcoholism and Labelling Theory" in Gove ed., *op. cit.* 21.

mental retardation,[179] physical disability,[180] juvenile delinquency,[181] drug addiction[182] and sexual deviance.[183]

Despite its critique, the core philosophical centre-piece of labelling theory that this chapter endorses has survived intact: that offenders *can* experience emotional disempowerment through their internalised "deviantization" and the reinforced deviance it secures.

4. Conclusion

This chapter has explained how treating victims and offenders as simply "good" or "bad" according to preconceived stereotypes is potentially disempowering. Victims and offenders alike suffer primary and secondary emotional pain as a result of their labelling, stereotyping and stigmatisation by society and the legal system. The process of *self-identification* as either victim or deviant is particularly destructive of pre-existing perceptions of dignity and self-worth.

Over-simplified, black-and-white characterisations of victims and offenders also promote the false impression that criminality is determined *exclusively* by the malevolent decisions of society's "evil" subset. In reality, as later chapters reveal, crime is a by-product of a diverse *spectrum* of underlying socio-economic causes – a reality obscured by crude generalisations. As Price Lofton observes:

> Such labels support the myth that crime is entirely the result of isolated decisions of a single individual, rather than a manifestation of a flawed society. Such labels support the status quo in that they hold the individual responsible for harms without *looking at all the factors that gave rise to those harms or seeking to heal all the harms* experienced, not just one particular harm that we've chosen to label a "crime".[184]

Moreover, such simplifications threaten to cultivate the widespread belief that community crime consists predominantly of random, erratic and unpredictable acts of individual malice. Such a misinterpretation risks escalating the public's fear of crime to disproportionately high levels which, as Chapter 4 will illustrate, seriously undermines social harmony and can ultimately prove *crime-provoking.*[185]

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[179] *See* Gove, "Labelling and Mental Illness: A Critique" in Gove ed., *op. cit.* 35; see also, Scheff, *op. cit.*
[180] *See* Gordon, "Examining Labelling Theory: The Case of Mental Retardation" in Gove ed., *op. cit.* 83.
[181] *See* Hirschi, "Labelling Theory and Juvenile Delinquency" in Gove ed., *op. cit.* 181.
[182] *See* McAuliffe, "Beyond Secondary Deviance: Negative Labelling and its Effects on the Heroin Addict" in Gove ed., *op. cit.* 205; Becker, *op. cit.*
[183] *See* Sagarin and Kelly, *loc. cit.*
[184] Price Lofton, *loc. cit.*, at 385. [emphasis added]
[185] *Infra*, at 124-179.

The legal system holds considerable power to prevent or dramatically subdue the labelling process. This is because it constitutes a primary feeder of disempowered stereotypes to the general public. It conveys to society that victims are weak and irrelevant by treating them as such.[186] Equally, when and where it neglects to provide appropriately for offenders' rehabilitation,[187] the legal system teaches society that offenders are irredeemable and unworthy of reform.

In sum, if the Irish criminal justice system commits itself fully to the pursuit of emotional, not just financial, material or state-payable symbolic reparation, it will stand a better chance of reversing the powerlessness that crime imposes on its primary stakeholders. One means of empowering the legal system to perform this task, as the following chapters will attest, is to inject it with a substantial dose of restorative justice in the guise of a nationwide system of court-annexed VOM. The reconciliation that VOM pursues is, after all, "based largely on breaking down stereotypes and the victim and offender arriving at a new understanding of each other".[188]

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[186] *Supra*, at 94-110.
[187] *Supra*, at 117.
[188] Chupp, "Reconciliation, Procedures and Rationale" in Wright and Galaway eds., *op. cit.* 56, at 63.

Chapter 4

Crime's Emotional Side-effects for the Community: Contemplating Fear of Crime

> It is to be hoped ... that society, while taking all proper steps to protect itself, will continue to educate itself to be less sensitive to the stimulus of horror and indignation, less prone to emotions of fear or vengefulness, and more aware of the contribution to crime made by the deficiencies in its own structure and operations.[1]

1. Fear of Crime in Context

This chapter accepts the baton of inquiry from Chapter 3 and resumes the identification of crime's negative emotional symptoms for its stakeholders. Like its forerunner, Chapter 4 sets an emotionally therapeutic agenda for restorative justice. It diagnoses another strain of trauma suffered by those who have been exposed to crime. Then, Chapter 5 establishes restorative justice's *credibility* as a potentially effective medicinal response to the various species of emotional injury identified throughout Chapters 3 and 4.

Chapter 3 isolated the likely consequences for the *individuals* occupying the epicentre of crime's concentric emotional fall-out zone – victim and offender. Chapter 4 now retreats outwards to examine crime's impact on those who suffer its shockwaves more peripherally: it contemplates *collective* emotional reactions to crime – those experienced by residents of whole communities on a joint basis. This represents the aggregate emotional fall-out of the widespread individual experience of crime. As David Garland posits:

> Today, there is no such thing as victimless crime. If no one in particular is harmed by the conduct in question, this does not prevent the invocation of a collective victim—"the community" and its "quality of life"—that is deemed to suffer the ill-effects that must always flow from prohibited behaviour...[2]

Fear of crime is crime's principal communally-suffered, negative emotional side effect. [3] Nevertheless, like crime itself, fear of crime possesses sufficient social ubiquity[4] to

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[1] Whitaker, *Report of the Committee of Inquiry into the Penal System* (Stationery Office, 1985), at 29.
[2] Garland, *The Culture of Control* (Oxford University Press, 2001), at 181.
[3] For an overview of fear of crime, see generally, Gabriel and Greve, "The Psychology of Fear of Crime" (2003) 43(3) *British Journal of Criminology* 600; Skogan and Maxfield, *Coping with Crime: Individual and Neighborhood Reactions* (Sage, 1981); Box, Hale and Andrews, "Explaining Fear of Crime" (1988) 28(3) *British Journal of Criminology* 340; Conklin, *The Impact of Crime* (Macmillan, 1975); Ditton and Farrall eds., *The Fear of Crime* (Ashgate, 2000); Garofalo, "The Fear of Crime: Causes and Consequences" (1981) 72(2) *Journal of Criminal Law and Criminology* 839; Hale, "Fear of Crime: A Review of the Literature" (1996) 4 *International Review of Victimology* 79.

earn a corresponding measure of implied social utility. Both crime and fear of crime are comparable to physical pain in this respect:[5] all three phenomena are generally *negative* – they are unwelcome deviations from an otherwise healthy state, but that is not to deny them an underlying social value that accounts for their admittedly regrettable omnipresence.

Both crime and pain diagnose trauma or infirmity within their supportive super-structures – society and the human body respectively. Crime points to stress or strain between people and groups and identifies aspects of the social order with which an evolving society has become increasingly dissatisfied.[6] This paves the way for reform and normative progress as public tastes and tolerances ebb and flow.

Fear of crime also has diagnostic value.[7] It can convey the need for more aversive or precautionary action against crime and inspire prudent defensive measures that actually insulate society from the adverse effects of the deviance within its ranks. Garofalo recognises the utility in fear of crime's otherwise unfortunate inevitability:

> *The complete absence of fear is dysfunctional because the individual is not motivated to take reasonable cautionary measures*, such as avoiding the possibility of being alone at night in obviously dangerous places or not engaging in verbally aggressive behaviors in situations which can be expected to elicit physically aggressive responses from others ... a small amount of fear is functional because *it is sufficient to produce reasonable caution.*[8]

So, at least in a society in which a complete absence of crime is *implausible*, it seems that a *total disinclination* to fear it is socially undesirable.

Despite the arguable social utility that under-girds their social ubiquity, one still cannot reasonably deny that society would be better off *without* crime *and* the fear of it, or with as little as possible of these commodities. Fear of crime, like crime itself, is generally-speaking, a damaging social pathology for three distinct reasons.

First and foremost, fear of crime is not only a consequence but also *a cause* of crime. This reciprocal relationship is known as a "feedback loop".[9] Fear of crime is a complex and duplicitous social phenomenon that lurks menacingly around crime's shoots while simultaneously prowling its roots. As a strand of group-life that stands to shed significant light on the dynamics that stimulate crime's life-cycle, fear of crime merits considerable scrutiny:

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[4] Liska, Lawrence and Sanchiro, "Fear of Crime as a Social Fact" (1981-1982) 60 *Sociological Forum* 760.
[5] Mays compares crime to pain: see Mays, *Crime and the Social Structure* (Faber and Faber, 1967), at 68-69.
[6] *Ibid.*
[7] Garofalo, *loc. cit.*
[8] *Ibid.*, at 856. [emphasis added]
[9] Markowitz, Bellair, Liska and Liu, "Extending Social Disorganization Theory: Modeling the Relationships between Cohesion, Disorder, and Fear" (2001) 39(2) *Criminology* 293, at 297.

> Although researchers have enthusiastically studied the causes of crime, they have not given as much attention to the study of its consequences. Yet, if crime is as pervasive and ecologically distributed as our theories and research suggest, then it seems reasonable to assume that crime has consequences for the social order. *If some of the consequences in turn influence the social conditions that cause crime, then our theories cannot continue to ignore this, but they must incorporate and model these processes.*[10]

This unique feedback relationship that connects crime to people's collective fear of it and *vice versa* is depicted in the following diagram, known hereinafter as the "fear cycle", whose various stages will be explained below.

Figure 1



The second reason for caution when it comes to fear of crime's sinister persona dwells within in the above tri-stage cycle. Stages 2 and 3 illustrate that the social disintegration provoked by fear of crime provides the catalyst by which the latter stimulates crime itself. Yet, as the following analysis will reveal, social disintegration is a socially-destructive hazard *in its own right*; regardless of its propensity to promote deviance,[11] social mal-cohesion forces people apart into mutually mistrustful social isolation, destroys collective morale and reduces residents' conjoint capacity for informal social-control. [12]

Third and finally, fear of crime is not always produced at levels that promote its limited diagnostic utility. Only a degree of fear that reflects crime's threat in the community *accurately* will arouse objectively justified supplemental precaution: i.e. proportionate fear will promote proportionate caution. However, as this chapter confirms, people often become *more* fearful of crime than its factual prevalence in their community or their demographic vulnerability warrant.[13] Excessive fearfulness, unlike its proportionate counterpart, lacks

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[10] *Ibid.*, at 314. [emphasis added]
[11] *Infra*, at 159-168.
[12] *Infra*, at 146-159.
[13] *Infra*, at 131-132.

social utility. To the contrary, it produces a wave of social disintegration that serves little protective purpose and potentially, according to stage 3 above, threatens to replicate crime – its source – as a result.

This chapter closes by isolating three anti-fear strategies that hold considerable potential to break the cycle of fear: (a) reintegrating society,[14] (b) improving "collective efficacy"[15] and (c) educating residents about their real vulnerability to victimisation.[16] Chapter 5 then confirms that court-annexed varieties of restorative justice, such as VOM and ORPs, provide potentially effective modes of dispensing all three of these fear-assuaging remedies. It thereby breathes life to the latter half of this thesis' "cautiously optimistic" attitude towards restorative justice's incorporation into Irish sentencing practice.

Optimism about this prospect derives from two different benefits of restorative justice's tri-partite fear-quashing potential. First and most vitally, improving community-cohesion and collective efficacy and correcting common misapprehensions about crime's local predominance are all generally socially-beneficial achievements and their pursuit is justifiable on this basis alone.

Secondarily, however, according to stage 3's central hypothesis, these three *generally* socially-ameliorative feats hold *some specific* crime-control ability. However, their potential in this regard is unquantifiable, eluding reliable detection in society.[17] As such, it is necessarily auxiliary to the paradigm's more general, primary social merits. That said, the very real *existence* (if not the overall *impact*)[18] of restorative justice's capacity for crime-control is socially significant and deserving of recognition, regardless of the difficulty in quantifying it.

The phenomenon of *disproportionate* fear of crime will undergo considerable scrutiny throughout the ensuing analysis. It has, after all as Chapter 8 later explains, played an important role in shaping Irish society over recent years.[19] This kind of fear is significant because it can *create* crime seemingly "out of nowhere"; the cycle of fear describes how deviance can germinate out of little more than an *undue* preoccupation with security amongst the residents of relatively low-crime areas.

This does not imply, however, that residents of comparatively low-crime zones are better suited to, or more deserving of restorative justice and the social rewards it brings. To the contrary, there is arguably a greater social need for the socially re-harmonising and/or crime-reductive incidents of restorative justice in crime-ridden communities whose

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[14] *Infra*, at 170-174.
[15] *Infra*, at 174-176.
[16] *Infra*, at 176-178.
[17] *Supra*, at 33-36; *infra*, at 169.
[18] *Supra*, at 34-36.
[19] *Infra*, at 337-350.

members' fears are proportionate to the very real dangers that group-life presents them. At the same time, the trio of anti-fear tactics that this chapter identifies[20] and Chapter 5 associates with restorative justice[21] are directed towards the suppression of *all* fear of crime – whatever its relation to objective risks.

Social reintegration and the improvement of collective efficacy both suppress fear generally, while educating residents about the real risks inherent in group-life specifically counters disproportionate fear.[22] In this sense, education acts as a back-up means of ensuring that the fear of crime that is not eradicated by restorative justice – for it is a social inevitability: all pain is bad – is, as far as possible, maintained within proportionate levels, which are most likely to invoke the concept's diagnostic social value. Therefore, restorative justice stands – at the very least – to restrict fear of crime to a socially-functional variety. At best, it can suppress *all species* of what is a generally bothersome societal pest.

This chapter moves only for the suppression of a particularly socially-malevolent kind of fear of crime: that is, a long-term, cognitive[23] or anticipatory[24] fear. By this is meant an *enduring anxiety* about the threat of future victimisation that influences the long-term tactics by which people seek to avert the perceived threat of local crime. This variety of fear can be distinguished from the transitory, adrenaline-fuelled fear produced in the heat of a criminal event.

This latter, less socially-menacing form of fear is aroused under the stressful circumstances of an imminent or ongoing criminal perpetration. Accordingly, it prompts mostly short-lived physical results in its subjects, such as sweating or an elevated heart-rate.[25] On the other hand, a long-term, anticipatory fear of crime – though it is unreliant on people's past victimisation – is more likely to be stirred and subsequently maintained by the very *fact* of one's victimisation than by the stressful circumstances thereof.[26]

This chapter will focus exclusively on this more durable kind of cognitive fear because of its pronounced capacity for social disintegration. It is more likely to trigger mutual mistrust amongst residents than a temporary "heat of the moment" sense of panic and it is this sense of inter-resident wariness that causes people to retreat from group-life into the

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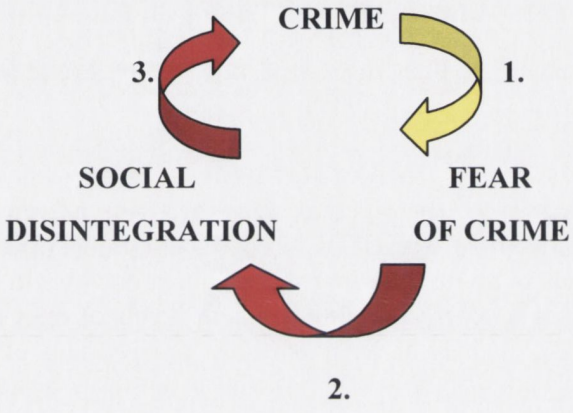
[20] *Infra*, at 168-178.
[21] *Infra*, at 215-223.
[22] *Infra*, at 168-178, 215-223.
[23] Ferraro and LeGrange, "The Measurement of Fear of Crime" (1987) 57 *Sociological Inquiry* 70.
[24] *See* Garofalo, *loc. cit.*, at 841.
[25] On the distinction between cognitive and short-term emotional fear, see Skogan and Maxfield, *op. cit.*, at 49; see also, Liska, Sanchiro and Reed, "Fear of Crime and Constrained Behavior: Specifying and Estimating a Reciprocal Effects Model" (1988) 66(3) *Social Forces* 827, at 835; Ferraro and LeGrange, *loc. cit.*; Gibson, Zhao, Lovrich and Gaffney, "Social Integration, Individual Perceptions of Collective Efficacy, and Fear of Crime in Three Cities" (2002) 19(3) *Justice Quarterly* 537, at 561.
[26] *See generally*, Skogan, "The Impact of Victimization on Fear" (1987) 33(1) *Crime and Delinquency* 135.

perceived safe-harbour of insular social groupings.[27] The result is social disintegration as the fear of future misfortune sweeps throughout society, driving people apart, severing group-ties as it does so.

The following sections explain the three stages in the fear cycle diagrammed above. They demonstrate the reciprocal causal relationship between crime and fear and identify the adverse social conditions that catalyse that bond.

2. Stage One: Crime Causes Fear of Crime

Figure 2



When people become fearful of crime, a complex cognitive process is set in motion according to which they estimate subconsciously their individual vulnerability to victimisation. [28] Initially, residents may be unsure about how fearful to be. This is because they are generally unaware of the magnitude of the threat that local crime *actually* poses them, having regard to the local crime rate and their individual socio-demographic traits. As such, they cannot design or tweak their personal security policies to reflect their objective degree of susceptibility to crime *accurately*.

To ascertain their appropriate fear-levels, residents look to clues both internally within their personal make-up and externally throughout their communities that signal or *imply* their degree of personal vulnerability to crime. Then, armed with these clues, they can alter their fear-levels and adjust the nature and intensity of their crime-avoidance tactics to match their *inferred* likelihood of future harm.

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[27] *Infra*, at 146-149.

[28] *See* Perloff, "Perceptions of Vulnerability to Victimization" (1983) 39(2) *Journal of Social Issues* 41; Sacco and Glackman, "Vulnerability, Locus of Control, and Worry About Crime" (1987) 6(1) *Canadian Journal of Community Mental Health* 99; Ferraro, *Fear of Crime: Interpreting Victimization Risk* (State University of New York Press, 1995).

While it is correct to assert *in a general sense* that crime causes the fear of it, levels of fear and precaution are shaped more by the overall "atmosphere" of crime in society. Crime's greater contextual landscape is made up of a variety of personal and environmental signposts that convey to residents the degree of anxiety and cautiousness that they should feel about their prospects of being victimised.

The "clues" that prompt subjective evaluations of risk *include* the crime rate[29] but are not limited to it. This is evident from the very real phenomenon of *disproportionate* fear of crime – anxiety about future harm that exceeds (a) crime's factual seriousness in a given locale and (b) people's demographically-determined vulnerability to it.[30] Even residents of comparatively low-crime communities are capable of experiencing amplified levels of anxiety about the safety of group-life.[31] This provides much food for thought. Clearly, under such circumstances, factors other than the crime rate are responsible for augmented fear levels. Henig and Maxfield acknowledge this reality:

> Scholars have begun to realize that fear of criminal victimization does not automatically decline along with crime rates. Recent public opinion polls have shown that while fear tends to go up with increasing crime, declines in the crime rate are not always accompanied by corresponding drops in levels of fear. (Erskine, 1974). Fear ... ought to be regarded as at least partially independent of the actual threat of crime.[32]

There are four potential sources, social and personal, from which residents typically estimate their senses of personal vulnerability to being victimised in their communities. Each and every such source is capable of provoking a degree of fear that is *proportionate* to residents' risk of exposure to local crime. This occurs when people interpret internal and environmental signposts correctly.

Several of these four potential signposts, however, are more likely than others to sponsor proportionate fear levels. For instance, learning the crime rate from a reliable source is likely to muster a *justifiable* quantity of fear – one that performs the socially-useful purpose of maintaining existing prudence or inspiring the additional caution necessary to minimise rising risks. This is fear of crime in its most acceptable state, given that it is an otherwise undesirable social infirmity.[33]

On the other hand, other signals of vulnerability are commonly *mis*interpreted. People tend to use them to over-estimate their sensitivity to crime and the outcome is a

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[29] Block and Long, "Subjective Probability of Victimization and Crime Levels: An Econometric Approach" (1973-1974) 11 *Criminology* 87.
[30] *Infra*, at 133-138.
[31] Henig and Maxfield, "Reducing Fear of Crime: Strategies for Intervention" in Ditton and Farrall eds., *op. cit.* 489
[32] *Ibid.*, at 490.
[33] *Supra*, at 124-125.

disproportionate fear of crime – one that surpasses the crime rate and people's demographic vulnerability to becoming victims. Chapter 8 will later address the disproportionate fear of crime that has gripped the Irish public, with varying intensities, over the last decade or so.[34]

One result of this species of excessive fear is that the people who are traditionally considered the least objectively at risk from crime are frequently the most afraid it.[35] Conversely, evidence suggests that those who are presumed to be most at risk, for example young men, are commonly the least concerned about crime.[36] This phenomenon has become known as the "fear of crime paradox" and has undergone extensive consideration within the literature on fear of crime.[37]

Again, as stressed in the introduction, both proportionate and disproportionate levels of public fearfulness are equally in need of suppression;[38] fear of crime, whatever its intensity or perceived justification, is an unwelcome social current that wreaks an invidious rampage over society's delicate equilibrium. Proportionate and disproportionate varieties of fear are differentiated herein, not because either one possesses a superior *inherent need* to be suppressed, but simply because their respective social impacts differ.

Proportionate fear of crime must be minimised first and foremost because all fear of crime is undesirable despite its conceded functionality at levels that match objective risks. But proportionate crime also warrants containment on the grounds that it tends to afflict genuine crime hot-spots. These typically socio-economically weak communities are most in

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[34] *Infra*, at 337-350.

[35] *See generally*, Rosenthal, "The Cage of Fear in Cities Beset by Crime" *Life*, 11 July 1969; Cutler, "Safety in the Streets: Cohort Changes in Fear" (1980) 10(4) *International Journal of Aging and Development* 373; Smith and Tortensson, "Gender Differences in Risk Perception and Neutralizing Fear of Crime: Toward Resolving the Paradoxes" (1997) 37(4) *British Journal of Criminology* 608; Liska, Sanchiro and Reed, *loc. cit.*; Dooley, "Forum Told Youth Face Higher Risk from Crime" *The Irish Times*, 14 March 1998; Pelfrey Sr. and Pelfrey Jr., "Fear of Crime, Age, and Victimization: Relationships and Changes Over Time" in Moriarty and Jerin eds., *Current Issues in Victimology Research* (Carolina Academic Press, 1998) 13.

[36] *See generally*, Garofalo and Laub, "Fear of Crime: Broadening Our Perspectives" (1978) 3(3-4) *Victimology: An International Journal* 242; Skogan and Maxfield, *op. cit.*, at 68; Gibson, Zhao, Lovrich and Gaffney, *loc. cit.*, at 540; McGarrell, Giacomazzi and Thurman, "Neighborhood Disorder, Integration, and the Fear of Crime" (1997) 14(3) *Justice Quarterly* 479, at 480; Stanko, "The Case of Fearful Women: Gender, Personal Safety and Fear of Crime" (1992) 4 *Women and Criminal Justice* 117.

[37] *See generally*, McIntyre, "Public Attitudes toward Crime and Law Enforcement" (1967) 324 *The Annals of the American Academy of Political Science* 41; Riger, Gordon and LeBailly, "Women's Fear of Crime: From Blaming to Restricting the Victim" (1978) 3(3-4) *Victimology: An International Journal* 174; Mugford, "Fear of Crime – Rational or Not? A Discussion and Some Australian Data" (1984) 17(4) *Australia and New Zealand Journal of Criminology* 267; Balkin, "Victimization Rates, Safety and Fear of Crime" (1979) 26 *Social Problems* 343; Lindquist and Duke, "The Elderly Victim at Risk: Explaining the Fear-Victimization Paradox" (1982) 20 *Criminology* 115; Stafford and Galle, "Victimization Rates, Exposure to Risk, and Fear of Crime" (1984) 22 *Criminology* 173.

[38] *Supra*, at 125.

need of the socially beneficial incidents of fear-suppression, such as social reintegration,[39] increased collective efficacy,[40] and potentially, less crime.[41]

On the other hand, the reduction of disproportionate fear is justified on the basis of its *gratuitous* disintegration of society. Because it typically afflicts inhabitants of relatively low-crime regions, it lacks the residual justification that it is diagnosing a genuine need for greater security. Moreover, the social disintegration it produces could potentially *create* a crime problem according to stage 3 in the fear cycle, where there was none before.[42] Each potential contributor to fear of crime will be specifically evaluated below for its relative propensity to inspire disproportionate and proportionate levels of fear of crime.

Leaving the crime rate to one side, three alternative social and personal factors from which people self-assess their vulnerabilities to crime are examined below. As Warr acknowledges, simply reducing crime's frequency is unlikely to be sufficient to reduce the fear of it. [43] Fear's *other* correlates, lying latently within society's interactional undergrowth and hiding deep within residents' demographic and experiential characters, must also be subdued:

> Policy formulation in criminology has traditionally rested on a simple premise: To reduce the social consequences of crime, simply reduce crime. Yet if some purported consequences of crime are in fact independent of crime itself, then that premise becomes indefensible. For example, Lewis and Maxfield have argued that, "to the extent that fear [of victimization] can be identified as a problem independent of the crime rates, policy makers should begin to explore ways to reduce fear independent of policies directed at reducing the incidence of crime."[44]

These three alternative triggers of proportionate and disproportionate fear of crime are evaluated consecutively below.

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[39] *Infra*, at 170-174.
[40] *Infra*, at 174-176.
[41] *Infra*, at 168-179.
[42] *Infra*, at 159-168.
[43] Warr, "The Accuracy of Public Beliefs About Crime" (1982) 20(2) *Criminology* 185, at 186.
[44] *Ibid.*

2.1 Social and Personal Vulnerability Trigger Fear of Crime

2.1.1 Experiential Vulnerability

Many have hypothesised a directly proportionate causal relationship between people's past victimisation and their present fearfulness of crime;[45] from this perspective, fear of crime is treated, in effect, as a fear of *re-victimisation.* Growing support for this viewpoint has culminated in what is known as the "experiential" or "victimisation" perspective on fear of crime. It provides a cogent explanation for *at least some* of the fear of crime that drifts throughout communities so universally, yet so ominously. The perspective's considerable enfeeblement by several substantial limitations prevents it from accounting comprehensively for the sum of societal fear of crime; its flaws consign it to the humble ranks of *potential* or *partial* contributors thereto.

Various studies have discredited the conclusiveness with which the victimisation perspective equates fear of crime with the fear of re-victimisation, identifying potential for a mismatch between these seemingly related phenomena.[46] They indicate that while prior victimisation undoubtedly provokes anxiety about repeat harm, victims are no more likely to experience fear of crime than their non-victim counterparts; in essence, many more people are afraid of being victimised than have *previously been* victimised.[47] The victimisation perspective is undermined further by the finding that people tend to fear the least frequent (generally the most serious) crimes the most: people are most afraid of the crimes to which they are collectively subjected the least.[48]

Furthermore, there is no guarantee that even those who have been victimised the most regularly will experience a fear of re-victimisation. The existence or intensity of such as fear will depend on various factors, such as one's degree of emotional robustness,[49] the

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[45] *See* Skogan, *loc. cit.*, at 152; Yin, "Fear of Crime Among the Elderly: Some Issues and Suggestions" (1980) 27(4) *Social Problems* 492; Gomme, "The Role of Experience in the Production of Fear of Crime: A Test of a Causal Model" (1988) 30(1) *Canadian Journal of Criminology* 67; Scott, "Stranger Danger: Explaining Women's Fear of Crime" (2003) 4(3) *Western Criminology Review.* <http://wcr.sonoma.edu>; Henig and Maxfield, *loc. cit.*, at 490-491.

[46] *See generally*, Hale, *loc. cit.*; Winkel, "Fear of Crime and Criminal Victimization" (1998) 38(3) *British Journal of Criminology* 473; Garofalo, "Victimization and the Fear of Crime (1979) 16(1) *Journal of Research in Crime and Delinquency* 80; Baumer, "Testing a General Model of Fear of Crime: Data from a National Sample" (1985) 22 *Journal of Research in Crime and Delinquency* 239; Box, Hale and Andrews, *loc. cit.*; Thompson, Bankston and St. Pierre, "Parity and Disparity Among Three Measures of Fear of Crime: A Research Note" (1992) 13(4) *Deviant Behavior* 373; McGarrell, Giacomazzi and Thurman, *loc. cit.*

[47] *See* Skogan and Maxfield, *op. cit.*, at 59.

[48] *Ibid.*, at 60, 68.

[49] Denkers and Winkel, "Criminal Victimization and Well-being: A Prospective Study on the Direct and Buffering Effects of Personality Traits" in Redondo, Garrido, Perez and Barberet eds., *Advances in Psychology and Law: International Contributions* (De Gruyter, 1997) 77; Skogan, *loc. cit.*, at 142-143; see also, Agnew, "Neutralizing the Impact of Crime" (1985) 12 *Criminal Justice and Behavior* 221.

availability of social support[50] to comfort and reassure them[51] as well as the relative seriousness of the offence:

> ... any victimization experience *that does not create serious harm* ... might actually aid the victim in forming a more realistic assessment of the nature of crime, thereby reducing fear of crime.[52]

Taken a stage further, it might be the case that people actually feel reassured by their prior victimisation, reasoning that their chances of a repeat episode have been reduced considerably thereby.[53] On this basis, prior exposure to crime can actually subdue rather than escalate people's fear of re-victimisation.[54]

The fear of re-victimisation can also atrophy over time. As time goes on, memories fade and the window of re-occurrence is perceived to gradually close. Former victims may eventually relinquish their fears of what is now considered an eventuality that has lapsed.[55]

While hardly all-encompassing, people's prior victimisation provides one potential trigger of fear of crime. And it seems equally prone to mustering proportionate and disproportionate varieties, exhibiting no specific tendency towards either, whose predominance will depend on the specific characteristics of the ex-victim and their surrounding social environment.

So, fear of crime is captured *fully* by neither the crime rate nor ex-victims' fears of re-victimisation. Other triggers of fear of crime are evidently at work.[56]

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[50] Kaniasty and Norris, "Social Support and Victims of Crime: Matching Event, Support and Outcome" (1992) 29(2) *American Journal of Community Psychology* 211.

[51] *See generally*, Sacco, "Social Support and the Fear of Crime" (1993) 35(2) *Canadian Journal of Criminology* 187; Agnew, *loc. cit.*; Riger, "Crime as an Environmental Stressor" (1985) 13(3) *Journal of Community Psychology* 270; Fattah and Sacco, *Crime and Victimization of the Elderly* (Springer-Verlag, 1989); Lurigio and Resick, "Healing the Psychological Wounds of Criminal Victimization: Predicting Postcrime Distress and Recovery" in Lurigio, Skogan and Davis eds., *Victims of Crime: Problems, Policies and Programs* (Sage, 1990) 50.

[52] *See* Yin, *loc. cit.*, at 497. [emphasis added]

[53] For an assessment of the frequency of repeat victimisation, see Johson, "New Insights into the Spatial and Temporal Distributions of Repeat Victimisation" (1997) 37(2) *British Journal of Criminology* 224; Watson, *Victims of Recorded Crime in Ireland* (Oak Tree Press, 1999), at 100-146.

[54] *See generally*, Box, Hale and Andrews, *loc. cit.*, at 352; Sparks, Genn and Dodd, *Surveying Victims: A Study of the Measurement of Criminal Victimization* (Wiley, 1977), at 209; Yin, *loc. cit.*, at 497.

[55] Box, Hale and Andrews, *loc. cit.*, at 352.

[56] *See* Warr, *loc. cit.*; Lewis and Maxfield, "Fear in the Neighborhoods: An Investigation of the Impact of Crime" (1980) 17 *Journal of Research on Crime and Delinquency* 160, at 186-187.

2.1.2 Socio-Demographic Vulnerability

The "vulnerability perspective" on fear of crime theorises that certain socio-demographic groups suffer enhanced vulnerability to victimisation because of the unique physical or social limitations of their status.[57] Certain categories, such as women, the elderly and people of low socio-economic standing are said to feel less able to deflect the onset or adverse results of crime because of their characteristic weaknesses.

There is little margin for *disproportionate* fear under such a theory. It is tempting to assume that the fear experienced by women and the elderly due to their relative physical inferiority to their typical assailants – men – is excessive in light of the frequency with which they are victimised.[58] In fact, some argue that the physical vulnerability felt by these groups stems more from *admitting* their weaknesses than from the weaknesses themselves.[59]

However, the fact that women and the elderly generally encounter comparatively less crime than men[60] or the young[61] does not destroy the possibility that they are victimised more often than is traditionally assumed and that as such, their fear is warranted in light of the threat posed thereby. Nor does this fact destroy the *rationality* of their fear of crime, regardless of objective risks, which arises out of their diminished physical capacity to cope with both the perpetration and, importantly, the short or long-term consequences thereof.

2.1.2.1 Women's Vulnerability

Given the notorious "dark figure"[62] of crime against women due to the under-reporting of domestic and sexual crime, women are undoubtedly more likely to experience such crimes than official statistics suggest.[63] There is nothing to indicate that women's fear

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[57] *See generally*, Braungart, Braungart and Hoyer, "Age, Sex and Social Factors in Fear of Crime" (1980) 13(1) *Sociological Focus* 55; Skogan and Maxfield, *op. cit.*; Warr, "Fear of Victimization: Why Women Are and the Elderly More Afraid?" (1984) 65(3) *Social Science Quarterly* 681; Toseland, "Fear of Crime: Who is Most Vulnerable?" (1982) 10(3) *Journal of Criminal Justice* 199; LeGrange and Ferraro, "The Elderly's Fear of Crime" (1987) 9(3) *Research on Aging* 372; Tullach, "The Meaning of Age Differences in Fear of Crime: Combining Quantitative and Qualitative Approaches" (2000) 40(3) *British Journal of Criminology* 451.

[58] Warr, "Fear of Victimization: Why Are Women and the Elderly More Afraid?", *loc. cit.*; Cutler, *loc. cit.*

[59] Killias and Clerici, "Different Measures of Vulnerability in their Relation to Different Dimensions of Fear of Crime" (2000) 40 *British Journal of Criminology* 437.

[60] *See generally*, Garofalo and Laub, *loc. cit.*; Skogan and Maxfield, *op. cit.*, at 68; Gibson, Zhao, Lovrich and Gaffney, *loc. cit.*, at 540; McGarrell, Giacomazzi and Thurman, *loc. cit.*, at 480.

[61] Pain, "Old Age and Victimisation" in Davies, Francis and Jupp eds., *Victimisation: Theory, Research and Policy* (Palgrave Macmillan, 2003) 61; Dooley, *loc. cit.*; Cutler, *loc. cit.*

[62] *See* Skogan, "Dimensions of the Dark Figure of Unreported Crime" (1977) 23 *Crime and Delinquency* 41; Young, J., "Risk of Crime and Fear of Crime" <http://www.malcolmread.co.uk/JockYoung/RISK.htm> (visited 24 March 2006); O'Connell and Whelan, "Crime Victimisation in Dublin" (1994) 4 *Irish Criminal Law Journal* 85, at 85-88; Watson, *op. cit.*, at 13-16.

[63] *See* Hamner and Saunders, *A Well-Founded Fear: A Community Study of Violence to Women* (Hutchinson, 1984).

of crime factually outweighs their frequency of victimisation, taking into account the ubiquitous problem of under-reporting.

While it is established that women are victimised comparatively less than men on an official, general international level, their factual frequency of and vulnerability to victimisation will obviously vary across different sites. For instance, while O'Connell and Whelan's research into crime in 1990s Dublin revealed that women were more prone to victimisation than men,[64] national research from a similar period continued to reflect the official international consensus that the opposite is generally the case.[65]

O'Connell and Whelan accepted that their findings were "at variance with British, American, and general international findings".[66] Still, their research, which is based on victimisation surveys rather than official statistics, goes a considerable way towards exposing a remarkably pronounced "dark figure" of female victimisation in Dublin. In this regard, it is possible that the disparity between the findings of nation- and Dublin-wide crime studies is due to the latter's special ability to reveal "dark" crime statistics, while the former was based entirely on official, reported figures.

Established generalisations break down from area to area when survey data are examined in priority to official records. In Dublin at least, and presumably in other regions around the world, it seems that women's fear of victimisation could be a *proportionate reflection* of their objective likelihood of encountering crime.

However, even where objective risks are factually low, given the *physical* nature of sexual crime, women's concerns about their relative physical inferiority to men seem justified and rational. It is fair to say that for many women, "fear of crime is fear of rape"[67] or other crimes of male physical domination.[68] This is a rational fear originating from women's prediction that their relative physical weakness to men will undermine dramatically their ability to endure both the onset and aftermath of a physical offence. It is therefore quite rational that the prospect of even the most *objectively unlikely* physical crime – in light of the potential seriousness of its consequences – constitutes a considerable source of trepidation for women. The result is that women's fear in this regard can be rationally – even if not objectively – well-founded.

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[64] O'Connell and Whelan, *loc. cit.*
[65] Watson, *op. cit.*, at 253.
[66] O'Connell and Whelan, *loc. cit.*, at 100.
[67] Warr, "Fear of Victimization: Why Are Women and the Elderly More Afraid?", *loc. cit.*, at 700; on women's fear of rape, see generally, Warr, "Fear of Rape Among Urban Women" (1985) 32 *Social Problems* 238; see also, Gordon and Riger, *The Female Fear* (Free Press, 1989).
[68] Ferraro, "Women's Fear of Victimization: Shadow of Sexual Assault?" (1996) 75 *Social Forces* 667.

2.1.2.2 The Elderly's Vulnerability

There is evidence to suggest that the elderly are criminalised more often than traditionally thought.[69] This rebuts the suggestion that their fearfulness is irrational or excessive.[70] Again, O'Connell and Whelan, surveying crime in Dublin, found that the elderly's likelihood of victimisation in Dublin was out of synch with international data.[71] Probability of victimisation does not deplete monotonically with increasing age. Instead, it peaks at middle-age (46-55) and declines thereafter.[72] Interestingly, this finding accords with research undertaken on a national basis.[73]

However, even accepting the conventional wisdom that age is reliably inversely proportionate to the risk of being victimised, for the elderly, as for women, fear of crime is proportionate to and justified by their vulnerability to the *consequences of crime*, rather than objective risks. Elderly people may feel less able to cope with the physical and psychological effects of crime, given their affliction by physical disability, senility and illness.[74]

Old age has also been associated with a heightened sense of "cultural" vulnerability.[75] This is considered the product of a geriatric tendency to romanticise the past, which causes older people to reminisce erroneously that society used to be safer and more integrated. They therefore feel that their safety is being eroded gradually by an increasingly disorderly society. The result is that the elderly may experience a sense of vulnerability to crime that is quite independent of their objective chances of encountering it.

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These alternative sources of personal vulnerability rationalise and justify a fear of crime that is proportionate thereto. While it may be disproportionate in light of objective risks derived from (a) the crime rate and (b) one's socio-demographic character, it is not excessive or unjustified in light of the diminished ability of certain groups to cope with the sudden disruption, injury and expense that crime inevitably incurs. It is the *rationality* of the anxiety and precaution exhibited by females and the elderly, which generally precludes their fears from reaching excessive heights.

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[69] Pain, "Elderly Women and Violent Crime: The Least Likely Victims?" (1995) 35 *British Journal of Criminology* 584.
[70] Ferraro deconstructs the notion of the elderly's "irrational" fear: see Ferraro, *op. cit.*
[71] O'Connell and Whelan, *loc. cit.*
[72] *Ibid.*, at 101.
[73] Watson, *op. cit.*, at 253.
[74] Pain, *loc. cit.*, at 66-67; Ross, "Fear of Victimization and Health" (1993) 9 *Journal of Quantitative Criminology* 159.
[75] Hood and Joyce, "Three Generations: Oral Testimonies on Crime and Social Change in London's East End" (1999) 39(1) *British Journal of Criminology* 136.

The brand of fear suffered by women and the old, because of their self-assessed limitations, is inevitable, natural, rational, and not of a type that is particularly amenable to alleviation by *better educating* elderly people about the reality of objective risks.[76] Even if they were informed in precise terms of crime's relative triviality in their communities, neither group would likely relinquish their fears, given the onerous consequences that the most severe (though improbable) crimes bring.

2.1.3 Socio-Economic Vulnerability

The vulnerability model suggests that ethnic minorities[77] and the poor[78] experience a higher level of fear of crime that their socio-economically stronger co-residents. Yet, the heightened fear experienced by society's "have-nots" can be attributed *quite rationally* to their corresponding heightened risk of victimisation.[79] Given such groups' concentration within high-crime, poverty-stricken, inner-city zones combined with their enfeebled economic capacity to compensate for crime's potential losses,[80] the fear of crime suffered by the economically underprivileged, *above and beyond being rational*, actually appears *objectively proportionate* to their risk of victimisation.[81]

O'Connell and Whelan's interpretation of the 1994 Dublin Crime Survey once again threw the cat amongst the pigeons in terms of conventional wisdom on the demographic determinants of vulnerability to crime. Pre-empting subsequent national data,[82] the authors found a likelihood of victimisation that grew parallel to Dubliners' socio-economic status. It may be that the class divide in Dublin in 1994 was smaller than that typically defining international research sites.

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[76] On educational approaches to rectifying older people's misconceptions about their risk of victimisation, see Walklate, *Victimology: The Victim and the Criminal Justice Process* (Unwin, Hyman, 1989); Norton, "Crime Prevention Education for Elderly Citizens: Fear of Crime and Security Conscious Behavior" (1982) 7 *Criminal Justice Review* 9; on "tell the truth campaigns", see Skogan, "Public Policy and the Fear of Crime in Large American Cities" in Gardiner ed., *Public Law and Public Policy* (Praeger, 1977) 1, at 10; see also, Henig and Maxfield, *loc. cit.*, at 495.

[77] Skogan and Maxfield, *op. cit.*, at 73-74; Moeller, "Fear of Criminal Victimization: The Effect of Neighborhood Racial Composition" (1989) 59 *Sociological Inquiry* 209; Liska, Lawrence and Sanchiro, *loc. cit.*; Toseland, *loc. cit.*; Parker and McMorris, "Fear of Crime and the Likelihood of Victimization: A Bi-ethnic Comparison" (1993) 133 *Journal of Social Psychology* 723; Parker, "Black-White Differences in Perceptions of Fear of Crime" (1988) 128(4) *Journal of Social Psychology* 487.

[78] Taylor, Gottfredson and Bower, "Block Crime and Fear: Defensible Space, Local Social Ties, and Territorial Functioning" (1984) 21 *Journal of Research in Crime and Delinquency* 303; Taylor and Hale, "Testing Alternative Models of Fear of Crime" (1986) 77(1) *Journal of Criminal Law and Criminology* 156; Will and McGrath, "Crime, Neighborhood Perceptions, and the Underclass: The Relationship Between Fear of Crime and Class Position" (1995) 23(2) *Journal of Criminal Justice* 163; Garofalo, "The Fear of Crime: Causes and Consequences", *loc. cit.*, at 849.

[79] Mayhew, *The 1998 British Crime Survey* (HMSO, 1989); Wohlfarth, Winkel, Ybema and van den Brink, "The Relationship Between Socio-Economic Inequality and Criminal Victimization: A Prospective Study" (2001) 36(7) *Social Psychiatry and Psychiatric Epidemiology* 361.

[80] Garofalo, "The Fear of Crime: Causes and Consequences", *loc. cit.*, at 849.

[81] Skogan and Maxfield, *op. cit.*, at 74.

[82] Watson, *op. cit.*, at *xxix*.

Similarly, a TNS MRBI opinion poll carried out in 1997 revealed that those on higher incomes were more likely to have been or to have known a crime victim over the previous year than the less well off.[83] The survey concluded that 59% of people occupying the highest income group had such direct experiences of crime compared with between 3% and 33% of those in lower income groups.[84]

The conventional hypothesis on the proportionate relationship between low socio-economic standing and vulnerability to crime might well be generally reliable but its applicability will vary across locations that possess varying gaps between rich and poor, different degrees of poverty and more or less local disorder.

2.2 Indirect Victimisation Triggers Fear of Crime

People's fear of crime can also be aroused by their indirect or vicarious victimisation. This occurs when residents are provided with second-hand information about the victimisation of their co-residents and become fearful of meeting a similar fate. In such a case, people estimate their own vulnerability to crime by reference to the perceived vulnerabilities of their peers. There are two principal sources of information about crime that are charged with stimulating estimations of personal vulnerability to victimisation and a corresponding fearfulness of community crime; they are inter-resident communication and the depiction of crime in the media.

With respect to the first category, what is known as a "talk-knowledge-fear" process is said to occur,[85] instilling fear in those privy to second-hand accounts of local crime. When residents are regaled with stories of criminal victimisation in their locale, they are prompted to speculate about their own vulnerability to a similar doom. They do so by substituting themselves mentally for the real victim in a feat of "imagined participation"[86] in the events relayed to them.

They then undertake a process of "downward comparison"[87] with the true victim, which depends on the degree of socio-demographic correspondence between them. The "similarity hypothesis"[88] suggests that the greater similarity (e.g. geographical,[89] social[90] or

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[83] Maher, "Most People Fear Crime is Getting Worse and are Unhappy with What's Being Done" *The Irish Times*, 3 February 1997.
[84] *Ibid.*
[85] Skogan and Maxfield, *op. cit.*, at 188.
[86] *Ibid.*, at 164.
[87] Van Beek Gert, "Fear of Crime: Feeling (Un)safe and (Insecure) in the Risk Society", at 7. <http://www.statbel.fgov.be/studies/ac084_en.pdf> (visited 19 September 2005).
[88] *See* Winkel and Vrij, "Fear of Crime and Mass Media Crime Reports: Testing Similarity Hypotheses" (1990) 1(3) *International Review of Victimology* 251; see also, *ibid.*; Skogan and Maxfield, *op. cit.*, at 163, 172, 260.
[89] Skogan and Maxfield, *op. cit.*, at 260.
[90] *Ibid.*

psychological)[91] that people can detect between themselves and those who have actually been victimised, the more vulnerable they will consider themselves to suffering similar peril. Moreover, people will not only assess *their own* sensitivity to crime. They will also gauge the vulnerabilities of their loved ones by ascertaining similar parallels.[92] The result is an intensified fear for one's own safety as well as the welfare of any dependent and supportive others.

This process of indirect victimisation can certainly account for levels of fear and precaution that mirror objective risks of harm. It is, however, particularly prone to provoking disproportionate fear of crime. This is because of the inevitable risk of inaccuracy, bias, unreliability and deceit, which causes several sources of second-hand crime-information to exaggerate the severity of local crime. The result is an inflated sense of personal susceptibility to crime and a corresponding *unwarranted* level of fear.

Human error is one factor that threatens to jeopardise the accuracy of reports conveyed by word of mouth. Important aspects of an offence can be lost or distorted through a "Chinese whispers" network of casual rumour, gossip or innuendo. Moreover, the desire to exaggerate, sensationalise or embellish accounts is an inevitable tendency in human story-telling. [93] Neurologists call it "confabulation":

> The intriguing possibility is that we simply do not have access to all of the unconscious information on which we base our decisions, so we create fictions upon which to rationalise them ... it is an unsettling thought that perhaps all our conscious mind ever does is dream up stories in an attempt to make sense of our world.[94]

Crucially, this particular proclivity for hyperbole is unconsciously expressed. It does not describe deliberate efforts to misinform or lie, but rather an innocent, yet unavoidable cognitive inclination towards the dramatic:

> [Confabulation] isn't fibbing, as there is no intent to deceive and people seem to believe what they are saying. Until fairly recently it was seen simply as a neurological deficiency – a sign of something gone wrong. Now, however, it has become apparent that healthy people confabulate too.[95]

Inter-resident misinformation, whether intentionally designed or a product or mere "confabulation" is likely to create an image of community crime that is grimmer than the reality. In fact, the urge to "story-tell" has been targeted as a source of exaggerated romanticism about the merits of restorative justice that can ultimately weaken the concept's

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[91] *See generally*, Winkel and Vrij, *loc. cit.*
[92] Sacco, *loc. cit.*, at 191.
[93] *See* Phillips, "Everyday Fairytales" (2006) 192(2572) *New Scientist* 32.
[94] *Ibid.*, at 36.
[95] *Ibid.*, at 32.

cause.[96] The outcome of inflated tales of the victimisation of fellow residents is one means of mustering levels of fear that are excessive in light of actual risks.

Information obtained through the media can be similarly tainted. The media has been variously attacked for its tendency to distort, exaggerate and sensationalise the realities of crime in society.[97] It has been subject to scathing criticism for its use of several tactics designed to generate intentionally a "moral panic"[98] about crime in society by deliberately exaggerating its severity.[99] Such strategies include "creating news",[100] "selling fear"[101] or "fear mongering"[102] and intentionally inventing fictional "crime-waves".[103]

In essence, the media is accused of laying an emphasis on crime that is unwarranted by its factual prevalence. For instance, it has been charged with over-representing serious crime by dedicating a quantity of airtime and column inches to violent offences that bears little relation to the statistical frequency of such crime in society.[104] Warr suggests that "[t]he media are most likely to report precisely those crimes that are least likely to occur".[105]

Residents can infer quite reasonably from exaggerated media depictions of crime that it poses them a greater threat than it actually does. As such, they assess their vulnerability to crime as particularly pronounced. The outcome, again, is a disproportionate fear of crime and this induces residents to constrain their ordinary behaviour to a corresponding, though objectively unnecessary degree.

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[96] *Supra*, at 3.

[97] Williams and Dickinson, "Fear of Crime: Read All About it?" (1993) 33(1) *British Journal of Criminology* 33; O'Connell, "The Portrayal of Crime in the Media – Does it Matter?" in O'Mahony ed., *Criminal Justice in Ireland* (Institute of Public Administration, 2002) 245; Ditton and Duffy, "Bias in Newspaper Reporting of Crime News" (1983) 23(2) *British Journal of Criminology* 762; Marsh, "A Comparative Analysis of Crime Coverage in Newspapers in the United States and Other Countries from 1960 to 1989: A Review of the Literature" (1991) 19 *Journal of Criminal Justice* 67.

[97] *See* O'Connell, *loc. cit.*; O'Connell, "Is Irish Public Opinion Towards Crime Distorted by Media Bias?" (1999) 14(2) *European Journal of Communication* 191; O'Connell, "Taking Wrongs Seriously: Public Perceptions of Crime Seriousness" (1996) 36(2) *British Journal of Criminology* 299; O'Connell, "The Raw and the Cooked – Two Types of Public Opinion" (1997) 6 *Papers on Social Representations: Threads of Discussion.* <http://www.psr.jku.at/PSR1997/6_1997OConn.pdf> (visited 12 March 2006).

[98] Daly, Y., "The Changing Irish Approach to Questions of Criminal Justice: Media Portrayal, Moral Panic and Myopic Politics" [2003] *Cork Online Law Review* X; for an overview of the concept of the moral panic, see generally, Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Blackwell, 1994).

[99] Kerrigan and Shaw, "Crime Hysteria" *Magill*, 18 April 1985; McCullagh, *Crime in Ireland: A Sociological Introduction* (Cork University Press, 1996).

[100] Tuchman, *Making News* (Free Press, 1978).

[101] Warr, "Fear of Crime in the United States: Avenues for Research and Policy" (2000) 4 *Criminal Justice* 451, at 479-480.

[102] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice* (Cork University Press, 2000), at 24.

[103] William and Dickinson, *loc. cit.*, at 34.

[104] *See* O'Connell, "Is Irish Public Opinion Towards Crime Distorted by Media Bias?", *loc. cit.*; O'Connell, "The Portrayal of Crime in the Media – Does it Matter?", *loc. cit.*; O'Connell, "Taking Wrongs Seriously: Public Perceptions of Crime Seriousness", *loc. cit.*; O'Connell, "The Raw and the Cooked – Two Types of Public Opinion", *loc. cit.*

[105] Warr, "Fear of Crime in the United States: Avenues for Research and Policy", *loc. cit.*, at 467.

Apart from the news media, television has been targeted as a source of fear of crime. Gerbner and Gross argue that television tends to portray the "world out there" as a "mean and scary place" by transmitting regular images of extreme violence.[106] Their "cultivation thesis"[107] suggests that viewers begin to relate the real world to the "high risk" imaginary world depicted by television. This confusion of fact and fiction creates a sense of risk and insecurity. Therefore, those who watch the most television will feel a greater vulnerability to violent crime than those who watch comparatively less.[108]

David Garland also makes the connection between television portrayals of crime and their audience's tendency to dramatise or over-estimate the crime problem in their region, viewing criminals as "more numerous, more threatening, and more dangerous than they typically are".[109] Television, he argues, by providing us with an outlet for the subconscious fears and resentments that shape our reactions to rising crime, actually increases crime's salience in everyday life:

> These media representations undoubtedly give shape and emotional inflection to our experience of crime, and do so in a way that is largely dictated by the structure and values of the media rather than the phenomena it depicts. Television's selective coverage of factual crime stories and its unrealistic crime dramas tend to distort public perceptions of the problem ... This is not to say that the media has *produced* our interest in crime ... My point is rather that the mass media has tapped into, then dramatized an reinforced, a new public experience—an experience with profound psychological resonance ... [110]

On the other hand, various writers have attempted to *downplay* the connection between media crime depictions and fear of crime, suggesting that public beliefs about crime are more accurate than ever.[111] Nevertheless, there is overwhelming evidence suggesting that (a) the public is generally ignorant to the realities of local crime[112] and (b) these misperceptions are shaped by media-distortion. At least in an *Irish* context, Michael O'Connell has constructed a stable, empirically-constructed case for the susceptibility of public opinion to media-distortion. He concludes that:

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[106] Gerbner and Gross, "Living With Television: The Violence Profile" in Ditton and Farrall eds., *op. cit.* 167.
[107] *Ibid.*, at 189.
[108] *Contra*, see Doob and McDonald, "Television Viewing and Fear of Victimization: Is the Relationship Causal?" in Ditton and Farrall eds., *op. cit.* 197; Heath and Petraitis, "Television Viewing and Fear of Crime: Where is the Mean World?" in Ditton and Farrall eds., *op. cit.* 207.
[109] Garland, *op. cit.*, at 157-158.
[110] *Ibid.*, at 158.
[111] Warr, "The Accuracy of Public Beliefs About Crime", *loc. cit.*; Roshier, "The Selection of Crime News by the Press" in Cohen and Young, *The Manufacture of News* (Sage, 1973) 28; Quinney, *The Social Reality of Crime* (Little Brown, 1970); Conklin, *op. cit.*; McIntyre, *loc. cit.*
[112] Roberts, "Public Opinion, Crime and Criminal Justice" in Tonry ed., *Crime and Justice: An Annual Review of Research* (University of Chicago Press, 1992) 99; see also, O'Connell, "Victims and Sentencing" in Department of Justice, Equality and Law Reform, *Working Together: An Integrated Approach to Victims of Crime* (Stationery Office, 1998) 52.

> Criminological assumptions about the public perception of crime as an outcome of media representations clearly can be considered top-down in approach, ie public opinion about crime is shaped by the media ... the top down assumptions made by criminologists are valid and ... media portrayal is a major determinant of a distorted public perception of crime ... It is argued that this explains why public perception of crime in Ireland is discordant with the relatively low crime rates prevailing in the country.[113]

People are more attuned than ever to the political and corporate corruption undermining the media's legitimacy and credibility. Media-scepticism is high as a result.[114] Still, there is no escaping the immense *potential* that the media holds to manipulate public opinion on a range of matters, including crime.

However, it is the misinformation that emerges from *more intimate, interpersonal communication* between residents that is most likely to arouse a magnified sense of hypersensitivity to crime and the excessive fear it creates. Residents are more likely to trust more familiar, intimate social attachments such as neighbours and friends as sources of information on local crime. Yet, it is this natural trust of one's acquaintances that accommodates a key source of incorrect crime information and ultimately inspires disproportionate fear. Skogan and Maxfield also favour the "similarity hypothesis" in explaining indirect victimisation.

> ... we prefer the explanation that people look to sources of information which are more personal and close to home for guidance in making judgements about how crime affects their lives. This is certainly in accord with our findings. When people hear about nearby events, and they think the victims are "people like them," they are afraid.[115]

In sum, while their potential to convey *accurate* crime information allows the media and inter-resident dialogue to account for a fear of crime that is *proportionate*, their respective inclinations towards the dramatic associate them more intimately with fear of a *disproportionate* variety. However, indirect victimisation cannot account for *all* such fear; a further potential contributor thereto is contemplated next.

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[113] O'Connell, "The Portrayal of Crime in the Media – Does it Matter?", *loc. cit.*, at 261-262.
[114] *Outfoxed: Rupert Murdoch's War on Journalism.* <http://www.outfoxed.org> (visited 21 May 2006); Fritz, "Restoring Public Trust" <http://www.gloabaljournalist.org/archive/Magazine/director-19994q.html> (visited 10 September 2005); "Democratizing the Media" <http://www.cyberjournalist.net/news/001945.php> (visited 10 September 2005).
[115] Skogan and Maxfield, *op. cit.*, at 182.

2.3 Environmental Disorder Triggers Fear of Crime

The disorder or "incivilities"[116] perspective on fear of crime identifies aspects of a community's social and physical ecology that residents tend to interpret as real or symbolic threats to their safety.[117] These are observable environmental conditions from which people infer that their vulnerability to local crime is high or rising. Such fear-provoking phenomena have become known as the "signs of crime"[118] – social and physical visual cues that symbolise a decline in social-control as crime triumphs over attempts to stem it.

Incivilities or signs of disorder can be described as "low level breaches of community standards that signal an erosion of conventionally accepted norms and values."[119] They are visual indicators of decaying neighbourhood order and social-control. *Social* incivilities consist of violations of tolerated standards of behaviour. They include loitering, public drunkenness, noisy neighbours, begging, loud parties, drug use and "hey honey" hassles. *Physical* incivilities on the other hand include broken windows, abandoned cars, derelict buildings, signs of drug use, graffiti and vandalism.[120]

Wilson and Kelling, in their landmark article exploring the relationship between local disorder and fear of crime, emphasise the destructive impact that enduring incivilities exert over residential harmony.[121] They suggest that signs of physical deterioration erode inter-resident trust and thereby discourage residents' collusion to fight crime in concert. The result is a deficit in informal social-control as united attempts at re-establishing local order are abandoned in favour of social retreat and self-preservation.[122] The community then becomes an even more attractive situs for crime and delinquency.

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[116] Signs of disorder are now more popularly dubbed "incivilities", a label that was first used by Lewis and Maxfield, Lewis and Salem, and Hunter; Lewis and Maxfield, *loc. cit.*; Lewis and Salem, *Fear of Crime: Incivility and the Production of a Social Problem* (Transaction Books, 1986); Hunter, "Symbols of Incivility: Social Disorder and Fear of Crime in Urban Neighborhoods", Annual meeting of the American Society of Criminology, Dallas, Texas, 8-12 November 1978.

[117] *See generally*, Skogan, *Disorder and Decline: Crime and the Spiral of Urban Decay in American Neighborhoods* (Free Press, 1990); Skogan, "Fear of Crime and Neighborhood Change" in Reiss and Tonry eds., *Communities and Crime* (University of Chicago, 1986) 203; LeGrange, Ferraro and Supancic, "Perceived Risk and Fear of Crime: Role of Social and Physical Incivilities" (1992) 29(3) *Journal of Research in Crime and Delinquency* 311; Skogan and Maxfield, *op. cit.*; Gibson, Zhao, Lovrich and Gaffney, *loc. cit.*; Garofalo and Laub, *loc. cit.*; Lewis and Maxfield, *loc. cit.*; Taylor and Hale, *loc. cit.*; Box, Hale and Andrews, *loc. cit.*; Robinson, Lawton, Taylor and Perkins, "Multilevel Longitudinal Impacts of Incivilities: Fear of Crime, Expected Safety, and Block Satisfaction" (2003) 19(3) *Quantitative Criminology* 237; Taylor, "The Incivilities Thesis: Theory, Measurement and Policy", United States National Institute of Justice, 1999. <http://www.ncjrs.org/txtfiles1/170610-2.tct> (visited 10 September 2005).

[118] Stinchcombe, Adams, Heimer, Scheppele, Smith and Taylor, *Crime and Punishment in Public Opinion: 1948-1974* (United States National Opinion Research Center, 1978).

[119] LeGrange, Ferraro and Supancic, *loc. cit.*

[120] Skogan and Maxfield, *op. cit.*, at 92-94.

[121] Wilson and Kelling, "Broken Windows" (1982) 211 *Atlantic Monthly* 29; see also, Kelling and Coles, *Fixing Broken Windows* (Free Press, 1996).

[122] *See* Skogan, *op. cit.*, at 48.

Because the "signs of crime" can be detected visually in real-time and within one's own neighbourhood, they create an automatic sense of personal applicability. The disorder model therefore offers an important example of another potentially influential – though *symbolic* rather than explicit – source of information about the scale of local crime and the status of ongoing attempts to combat it.

Again, the potential for error threatens to contaminate the interpretation of these visual cues and provoke over-estimations of risk, creating disproportionate fear. For instance, it is possible that incivilities will *misrepresent* the gravity of a community's crime-problem. This occurs where social-control begins to prosper and the crime rate starts to decline as a consequence. Such an improvement may be the result of a hard-hitting crime policy such as "zero-tolerance" that exerts a relatively instantaneous effect on the crime rate.

However, the signs of disorder will not abate automatically proportionate to a drop in crime: the *evidence* of high crime can survive its factual reduction. Accordingly, the recovery of order can be obscured beneath a stubborn veil of visual decay that serves to maintain residents' excessive fears about the threats pervading their social environment. People encountering incivilities could permit them subconsciously to heighten their sense of personal vulnerability to crime and effect a proportionate rise in their anxiety about future harm, *despite* the absence of a correlative *objective* threat.

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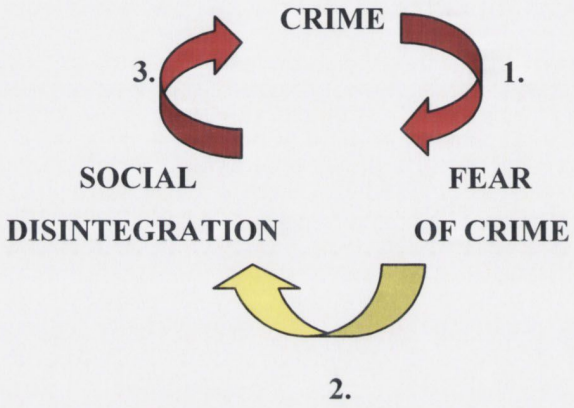
Fear of crime is a social phenomenon that is entangled inextricably within the complex social interactions that create society's elaborate fabric. This section has demonstrated that self-assessed vulnerability to crime – the raw material of fear – is born of *residents' perceptions* of community crime. Some perceptions are accurate and engender proportionate concern – the fear created when residents correctly or rationally estimate their objective susceptibility to crime and amend their behaviour accordingly.

However, people are equally prone to misperceiving crime's threat to their interests. Residents overestimate their vulnerability regularly either because of their own misinterpretations or the inherent inaccuracy of external information about crime and social-control. Therefore, if restorative justice is to alleviate the crime-induced emotional harm occasioned not only to victim and offender but also to whole communities collectively, it must do two things. First and foremost, it must lower the crime rate. However, in order to achieve *maximum* fear-suppression, restorative justice *cannot ignore* the other triggers of fear of crime that lurk within the depths of complex social relationships. Nonetheless, as Skogan and Maxfield counsel:

> This does not mean that "crime does not make a difference". Rather, it suggests that the locus of fear ... is to be found elsewhere, in [people's] vulnerability to crime, in concern about its potential consequences, in things that happen to their friends and neighbors, in what they hear is happening in their neighbourhoods, and in other vicarious sources of crime information.[123]

3. Stage Two: Fear of Crime Causes Social Disintegration

Figure 3



3.1 Fear of Crime and Inter-Resident Trust

This section explains fear of crime's tendency towards social disintegration.[124] Residential fear undermines social cohesion by depleting levels of inter-resident trust, a valuable social commodity that fuels collective attempts at informal, community-level social-control.[125] Interpersonal trust is vital to maintain the social solidarity, community spirit and collective mobilisation required for residents' involvement in less formal, community strategies, such as restorative justice. As such, inter-resident trust and the social cohesion and collective energy it supports are central to the success of initiatives such as VOM and ORPs on which this thesis calls for extended reliance in the treatment of adult offenders in Ireland.[126]

Because fear of crime erodes inter-resident trust, if restorative justice can successfully curb that widespread fear, it will not only assuage the collective emotional stresses of victimisation, but it will boast far more: it will produce simultaneously the kind of close-knit, dynamic social conditions that encourage *informal* social-control.

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[123] Skogan and Maxfield, *op. cit.*, at 63-64.
[124] *See generally*, Conklin, *op. cit.*; Hartnagel, "The Perception and Fear of Crime: Implications for Neighborhood Cohesion, Social Activity and Community Affect" (1979-1980) 58 *Social Forces* 176; Liska, Sanchiro and Reed, *loc. cit.*; Skogan and Maxfield, *op. cit.*
[125] *See* Walklate, "Crime and Community: Fear or Trust" (1998) 49(4) *British Journal of Sociology* 550.
[126] *Infra*, at 187-189.

Informal crime-prevention can take on various guises – it can range from community groups meeting to discuss local affairs, to residents' associations coordinating unofficial responses to local problems such as drug-dealing or vandalism, to groups who meet intermittently to protest against local crime problems or simply to remove local "signs of disorder" such as graffiti or litter in an effort to "clean up" their community.

Crucially, however, informal crime prevention also includes residential involvement in court-annexed restorative initiatives, such as the VOM and ORPs that this thesis will ultimately endorse.[127] Such community-rooted restorative endeavours fit neatly within Graham and Bennett's inclusive vision of community crime prevention:

> Community crime prevention is defined as encapsulating both situational measures and measures to prevent criminality within a community-based framework of action ... including measures which emphasise the need to change the social, economic and demographic conditions which are believed to sustain crime in communities including the development and strengthening of communities as well as measures which emphasise the need to involve members of communities in reducing opportunities for community offences.[128]

Because informal processes such as VOM and ORPs are conditional upon the presence of inter-resident trust, its preservation is paramount. One obvious means of maintaining trust is by suppressing the social conditions that deplete it. The following section charts how *fear of crime* disintegrates society and compromises informal community crime-prevention by undermining inter-resident trust. Therefore, fear of crime's suppression will perform an important secondary task central to the success of court-annexed restorative interventions: the restoration of inter-resident trust.

3.2 Fear of Crime, Precautionary Conduct and Social Retreat

A collective fear of crime sets another socially disintegrative cycle into motion. People respond to their fear with mistrustful, suspicious attitudes to those around them.[129] They begin to probe society for potential sources of future harm. As a result, residents imagine "internal enemies" all around them who could strike without warning from unexpected quarters. Rather than viewing their surrounding social context as a potential support-system, people come to perceive it as something threatening – a potential hive of concealed deviants poised to violate their interests. Fear of crime, then, becomes a near-xenophobic[130] fear and mistrust of strangers.[131]

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[127] *Ibid.*
[128] Graham and Bennett, *Crime Prevention Strategies in Europe and North America* (HEUNI, 1995), at 71.
[129] Conklin, *op. cit.*, at 248.
[130] On the connection between xenophobia and fear of crime, see Brooks, "The Fear of Crime in the United States" (1974) July *Crime and Delinquency* 241; Conklin, *op. cit.*; Hackler, Kwai-Yiu Ho and Urquhart-

Residents' mutually mistrustful scepticism prompts precautionary behaviour designed to avert their future chances of being victimised. There are two chief varieties of precautionary conduct. The first method by which people respond to the fear of their co-residents is by constraining their ordinary conduct.[132] They attempt to restrict the degree of social interaction involved in their day-to-day lives, shunning unnecessary social contact to keep potential enemies at bay.

Fleeing from perceived danger, people *retreat* into their most trusted, intimate social cliques. They withdraw gradually from group-life, interacting with fewer and fewer others. Conklin predicts that this wave of fear-driven retreatism will eventually culminate in a "culture of avoidance"[133] wherein people retire from communal life to such a degree that "man becomes trapped in his own fortress".[134] Similarly, Skogan and Maxfield recognise that the fear of victimisation, i.e. the fear of an *unknown* social variable, can render people "'prisoners of fear' barricaded behind doors and unwilling to risk any but the most necessary excursions."[135]

The second key form of precautionary conduct inspired by fear is the intensification of ordinary security tactics. People might turn to high-intensity security policies to avert the perceived risk of injury by invaders to their homes and businesses.[136] High-intensity strategies include the use of watchdogs, home alarm systems, window bars, weapons,[137] electric fences and surveillance equipment. People may also resort to lower-intensity expressions of personal security to reflect obvious dangers, such as staying away from high-crime areas at night, installing a burglar alarm, and generally using "street-sense" when out and about.[138]

One's security policy – whatever its intensity – is likely to reflect the nature of the fear that provoked it. Proportionate fear of crime will prompt proportionate caution. On the other hand, disproportionate fear of crime will produce *excessive* security policies that are unmerited by objective risks; they exceed people's chances of exposure to crime having regard to the crime rate and their demographic features.

Ross, "The Willingness to Intervene: Differing Community Characteristics" (1974) 21 *Social Problems* 328.

[131] On fear of strangers, see generally, Conklin, *op. cit.*, at 87-88; see also, Scott, *loc. cit.*; McIntyre, *loc. cit.*; Garofalo and Laub, *loc. cit.*

[132] *See* Liska, Sanchiro and Reed, *loc. cit.*; see also Conklin, *op. cit.*, at 131-153; Skogan and Maxfield, *op. cit.*, at 186; Miethe, "Fear and Withdrawal from Urban Life" (1995) 539 *The Annals of the American Academy of Political and Social Science* 14.

[133] *See generally*, Conklin, *op. cit.*, at 131-153.

[134] *Ibid.*, at 105.

[135] Skogan and Maxfield, *op. cit.*, at 186.

[136] *Ibid.*, at 207.

[137] *See* Bankston and Thompson, "Carrying Firearms for Protection: A Causal Model" (1989) 59 *Sociological Inquiry* 75.

[138] Garofalo, "The Fear of Crime: Causes and Consequences", *loc. cit.*, at 856.

A contemporary "obsession" with personal precaution demonstrates a disproportionately fearful public. This is evidenced by the *overuse* of the high-intensity security measures listed above. It is further demonstrated by developments such as the rise of the "gated community", a preoccupation with insurance and loss reduction and an increased reliance on private security. For example, Kennedy remarks that "the total number of private security guards in the United States now exceeds the number of public police officers".[139]

Skogan and Maxfield distinguish prudent, proportionate protective measures from an unjustified *fixation* on security. The former provide a useful way for people to strike the right balance in dealing with local crime. They allow residents to act with sufficient precaution to avoid distinct perils while constraining their behaviour no more than is objectively necessary:

> ... a large proportion of city residents who habitually do simple, routine things that may have the effect of reducing their chances of being assaulted or robbed ... Suttles (1972) has pointed out that these both are characteristic ways in which urban dwellers find security. He found that in a high crime neighbourhood residents tended to segregate their activities in time and space to avoid particularly risky circumstances ... As a result, *residents of the area could coexist with crime* and contending social groups, creating order and reducing their chances of victimization in a potentially threatening environment.[140]

At the other extreme, *disproportionate* caution could create a "culture of fear" that lacks a justifiable basis. It develops when over-estimations of vulnerability grow to unnecessarily vertiginous heights, assuming an hypnotic influence over society:

> ... increases in the intensity of fear quickly become dysfunctional ... because responses, both behavioural and attitudinal, go beyond what is necessary to prevent victimization and produce effects such as unnecessary avoidance of potentially rewarding social interactions and unwarranted distrust of others.[141]

It is such a trend that has prompted Miethe, for instance, to question whether urban residents have embraced protective conduct to such an extent that they have effectively "withdrawn" from organised society.[142] Miethe questions whether fear of crime has totally incapacitated urban residents to the degree that they have retreated from involvement in urban life. Proportionate and disproportionate levels of fear of crime clearly exert very different respective influences over society's attitude to security and risk-avoidance.

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[139] Kennedy, "Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers" (1995) 105 *Yale Law Journal* 761, at 766.
[140] Skogan and Maxfield, *op. cit.*, at 188. [emphasis added]
[141] Garofalo, "The Fear of Crime: Causes and Consequences", *loc. cit.*, at 856.
[142] *See generally*, Miethe, *loc. cit.*

3.3 Fear of Crime and Collective Efficacy

This section explains how fear of crime, by curtailing normal social interaction, can inspire so much retreatist individualism that people begin to abandon their concern for others. It is important at this stage, however, to note the differing social impacts of proportionate and disproportionate levels of fear in this regard.

A fear of crime that is proportionate will inspire a prudent degree of precautionary social retirement while disproportionate fear will muster a degree of *unwarranted* withdrawal from group-life. Yet, as the remainder of this section will reveal, *any* social retreatism that fear of crime stimulates is generally socially damaging – whether or not it is proportionate to real risks or indeed rational in light of the costs involved.[143]

As stressed earlier, [144] the concession of its diagnostic utility does not undermine fear of crime's general societal pestilence. So reducing fear is a generally productive task. Additionally, however, as stage 3 will hypothesise, reducing all fear – proportionate and disproportionate – is likely to reduce the seriousness of the crime problem out of which it arose. [145] In contrast, simply *maintaining* fear at proportionate levels is akin to taking a pain-killer to mask on-going physical discomfort. It is not devoid of benefit because it successfully relieves a painful symptom and might be the only viable course of action if its source is advanced. However, just as diagnosing and treating cancer – a potential cause of physical pain – serves the body's long-term well-being better than a quick-fix pill, tackling crime – the underlying *cause* of fear of crime – serves society's greater welfare better than the quick-fix remedy of maintaining fear at proportionate levels.

Therefore, despite the respective challenges of their practical diminution, fear of proportionate and disproportionate species are lumped together as a cohesive target of eradication smack-bang at the centre of restorative justice's emotionally-therapeutic agenda.

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Fear causes residents to become self-centred, prioritising self-protection over the welfare of their wider social network. As a result, individual acts of altruism decline.[146] Jennie McIntyre observes that:

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[143] *Supra*, at 135-139.
[144] *Supra*, at 124-125.
[145] *Infra*, at 159-168.
[146] Conklin, *op. cit.*, at 248; see also, Elias, *The Politics of Victimisation* (Oxford University Press, 1986), at 128-129.

> [a]s social integration is reduced and fear of crime becomes fear of the stranger, the social order is further damaged. Not only are there fewer persons on the street and in public places than there might be, but persons who are afraid may show a lack of concern for each other. The logical consequences of this reduced sociability, mutual fear, and distrust can be seen in the reported incidents of bystanders indifferent to cries for help.[147]

The decline of beneficent acts is unfortunate given their potential to inspire "copy-act" behaviour by their observers.[148] It seems that generosity begets generosity and the loss of this chain-reaction is regrettable in a society that is already suffering division, retreat and atomisation. It serves only to exacerbate the existing current of individualism and self-preservation[149] that the fear of crime, through the vehicle of mistrust, washes over whole communities:

> By disrupting the delicate nexus of ties, formal and informal, by which we are linked with our neighbours, crime atomizes society and makes of its members mere individual calculators estimating their own advantage, especially their chances of survival amidst their fellows.[150]

Fear-inspired distrust and social division destroys residents' *motivation* to look beyond their own egocentric interests and act for the greater good.[151]

The sense of poor "self-efficacy"[152] or "individual ability" that thwarts *individual* motivation to act for the good of another[153] has more socially significant *cumulative* consequences. The distrust provoked by residents' fear of crime and the disintegration born of social retreat similarly destroys residents' collective motivation to act for the greater good by uniting to exert informal crime-control.[154]

It is not only restorative advocates and informal justice proponents who promote informal social-control. Fear of crime scholars have also considered it a valuable, possibly even superior mode of crime-control to traditional state justice.[155] Jane Jacobs, for example, considers a society's "intricate network of voluntary controls and standards among the

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[147] McIntyre, *loc. cit.*, at 41.
[148] On the impact of "models of helping", see generally, Hackler, Kwai-Yiu Ho and Urquhart-Ross, *loc. cit.*; Henig and Maxfield, *loc. cit.*, at 493.
[149] *See* Skogan and Maxfield, *op. cit.*, at 185.
[150] Wilson, *Thinking About Crime* (Basic Books, 1975), at 21.
[151] *See* McMillan and Chavis, "Sense of Community: A Definition and Theory" (1986) 14 *Journal of Community Psychology* 6.
[152] For an overview of the concept of self-efficacy, see generally, Bandura, "Self-Efficacy: Toward a Unifying Theory of Behavioral Change" (1977) 84(2) *Psychological Review* 191.
[153] Bandura, "Fearful Expectations and Avoidant Actions as Coeffects of Perceived Self-Inefficacy" (1986) 41 *American Psychologist* 1389.
[154] Conklin, *op. cit.*, at 248.
[155] *Ibid.*, at 9.

people themselves" an important element of successful crime-control.[156] Similarly, John Conklin observes that:

> [c]rime reduces trust and attachment to neighbours and to the community as a whole. By reducing solidarity, it weakens informal social-control in the community, which is probably more effective in preventing crime than formal methods of social-control such as the police.[157]

However, as emphasised from the outset, sufficient justification for recourse to less formal alternatives to mainstream criminal justice, such as restorative justice,[158] is provided by the benefits they provide in their own right; they need not be proven superior to existing conventions, nor are they intended to replace them.[159] This does not mean that informal crime-control *cannot* outperform mainstream efforts – this may well occur from time to time and from place to place.[160] The point is that its implementation is justified, whatever its comparison to the mainstream. Any momentary advantages over traditional criminal justice are simply fortunate incidents of an independently beneficial regime, which is primarily intended as a supplement, not a necessary substitute to conventional criminal justice, whatever its shortcomings.[161]

A fear-driven decline in social integration destroys collective motivation for informal social-control because of a correlative decline in an important trust-based social phenomenon known as "collective efficacy".[162] The concept has its roots in the study of residents' "willingness to intervene" for group protection.[163] It denotes the degree of mobilisation or collective energy shared by residents to act jointly and informally for the common good.

Morenoff and colleagues have defined collective efficacy in similar terms. They consider it: "a conjoint capability for action to achieve an intended effect and hence, an active sense of engagement on the part of residents".[164] Collective efficacy is, therefore, a

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[156] Jacobs, *The Death and Life of Great American Cities* (Vintage Books, 1961), at 32.
[157] Conklin, *op. cit.*, at 9.
[158] Though informality does not number amongst restorative justice's *indispensable* values, it has been a consistent characteristic of restorative dispute resolution for millennia: *supra*, at 22; *infra*, at 181, 241-242.
[159] *Supra*, at 38-41, 109-110.
[160] *Ibid.*
[161] *Infra*, at 214-215, 329-335, 378-383.
[162] *See generally*, Gibson, Zhao, Lovrich and Gaffney, *loc. cit.*; Morenoff, Sampson and Raudenbush, "Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence" (2001) 39(3) *Criminology* 517; Taylor, "Fear of Crime, Social Ties, and Collective Efficacy: Maybe Masquerading Measurement, Maybe Déja-vu All Over Again" (2002) 19(4) *Justice Quarterly* 773; Sampson, Raudenbush and Earls, "Neighbourhoods and Violent Crime: A Multilevel Study of Collective Efficacy" (1997) 277 *Science* 918.
[163] Hackler, Kwai-Yiu Ho and Urquhart-Ross, *loc. cit.*; for a discussion of the many guises of what has recently become known as collective efficacy, see Taylor, "Fear of Crime, Social Ties, and Collective Efficacy: Maybe Masquerading Measurement, Maybe Déja-vu All Over Again", *loc. cit.*, at 782, 787-788.
[164] Morenoff, Sampson and Raudenbush, *loc. cit.*, at 521.

quality on which residents' willingness to come together to engage in methods of community-level dispute resolution, such as restorative justice, is strictly conditioned.[165]

Sampson and Raudenbush view collective efficacy as a vital precondition to effective social-control. They estimated a reciprocal effects model of the relationship between collective efficacy and serious violent crime within 195 Chicago neighbourhoods. [166] Their findings reveal significant reciprocal effects between collective efficacy and violent crime: when collective efficacy is low, violent crime increases and *vice versa.* This verdict offers *some* important empirical support for the *crime-control* potential of strategies such as restorative justice that are produced or maintained by high levels of collective efficacy.[167]

Importantly, however, the presence among residents of a shared and solidified impetus to act in the common good necessarily implies a high degree of *pre-existing* social integration. The *esprit de corps* symbolised by a community's healthy level of collective efficacy is necessarily born of its equally healthy integrative balance. People are unlikely to intervene for the good of their wider social network without shared social bonds that are sufficiently strong to prompt the desire to act in concert. Echoing this reality, Morenoff and associates describe collective efficacy as "cohesion coupled with social-control".[168] In a similar vein, Sampson, Raudenbush and Earls define the concept as "[s]ocial cohesion among neighbors combined with their willingness to intervene on behalf of the common good".[169]

Therefore, social integration and collective efficacy share a linear connection. They involve, in essence, varying degrees of a community's potential energy measured along a progressive evolutionary scale of social integration. Collective efficacy, then, is a more socially sophisticated by-product of high-levels of social integration.[170] Tight social cohesion will have the effect of improving residents' perceptions of their joint capacity for informal social-control and as such, will blossom into collective efficacy, a concept that includes, though is not limited to social integration.

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[165] *Infra*, at 219-221.

[166] *See generally*, Sampson and Raudenbush, "Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods" (1999) 105 *American Journal of Sociology* 603.

[167] *Infra*, at 219-221.

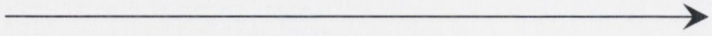
[168] Morenoff, Sampson and Raudenbush, *loc. cit.*, at 553.

[169] *See* Sampson, Raudenbush and Earls, *loc. cit.*, at 918.

[170] This is a connection that is theorised by proponents of *social disorganisation theory* who posit that integration through well-developed local networks can enhance a community's ability to exert social-control: *infra*, at 165-166; see Shaw and McKay, *Juvenile Delinquency and Urban Areas* (University of Chicago Press, 1942); Shaw, Zorbaugh, McKay and Cottrell, *Delinquency Areas* (University of Chicago Press, 1929); on the work of Shaw and McKay, see generally, Markowitz, Bellair, Liska and Liu, *loc. cit.*; see also, Bursik, "Social Disorganization and Theories of Crime and Delinquency: Problems and Prospects" (1988) 26(4) *Criminology* 519; Bellair, "Social Interaction and Community Crime: Examining the Importance of Neighbor Networks" (1997) 35(4) *Criminology* 677; see also, Skogan and Maxfield, *op. cit.*, at 98-107.

> It is likely that social integration is only the starting point for the formulation of positive perceptions of one's neighbourhood environment. It is facilitative but not a sufficient condition ... social integration is antecedent to collective efficacy, which represents a starting point on a continuum ranging from social integration, on one end, to collective efficacy on the other.[171]

Figure 4



Poor Integration **Improving Integration** **Collective Efficacy**

Clearly, fear of crime's crippling impact on levels of social integration will exert an equally destructive influence over residents' collective efficacy. Therefore, the mistrust and suspicion aroused by fear of crime not only undermines a community's sense of "togetherness" and cohesion, it further jeopardises that community's ability to regulate itself informally by wreaking a contemporaneous assault on its residents' sense of collective efficacy.

Accordingly, there are two tasks that Chapter 5 must prove restorative justice capable of performing if it is to earn the credibility this thesis eventually accredits it. If restorative justice, through VOM and ORPs can stifle fear of crime successfully at its root by preventing overestimations of personal vulnerability to crime, it can curb the crime that the next section proves to emerge from social mal-integration while secondarily reducing the opportunistic crime that conditions of poor informal social-control will inevitably attract. Restorative justice's potential for crime-control is therefore twofold.

3.4 Fear of Crime and Social Disintegration

John Conklin introduces the concept of fear of crime to challenge Émile Durkheim's thesis that crime, far from disintegrating, actually *improves* social cohesion.[172] It is an argument that, on face value, shocks the conscience given the longstanding, visceral human understanding that crime *fractures* social relations. This is one of mankind's most elemental beliefs that Chapter 2 found to resound uniformly from a diversity of ancient religious and indigenous legal traditions. Consider for instance the Hebrew Bible's emphasis on

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[171] Gibson, Zhao, Lovrich and Gaffney, *loc. cit.*, at 538, 539.

[172] *See* Durkheim, *The Division of Labor in Society*, translated by Simpson (Free Press, 1933), at 102-103; Catlin ed., *Durkheim: The Rules of Sociological Method*, translated by Solovay and Mueller (The Free Press, 1938), at 67; see generally, Durkheim, *Suicide*, translated by Spaulding and Simpson (Free Press, 1951).

maintaining *shalom* – a harmonious state of "right relationships" that suffers constant disturbance by the disruptive, fragmentative influence of crime.[173]

Durkheim believed that crime tends to unite people as they gather in joint indignation at breaches of shared rules and rally to manage crime informally: "Crime brings together upright consciences and concentrates them ... If the offense is serious, the whole group attacked masses itself in the face of the danger and unites, so to speak, in itself."[174] Conklin, however, uses the disintegrated and individualistic social conditions that are cultivated by residents' fear of crime to reject Durkheim's standpoint. Conklin asserts a negative connection between crime and levels of social integration *that is catalysed* by fear of crime.

In forging the connection between fear of crime and social disintegration, Conklin, like other fear of crime scholars,[175] is forced to acknowledge an important possibility: that individual protective behaviour might actually *allay* the fear of crime. However, Conklin uses his rejection of this possibility to dismantle the entirety of Durkheim's thesis on crime's integrative value. Conklin concedes that people may well unite in crime's aftermath, but that the objective of such perceived solidarity will invariably be the egoistic desire to safeguard *individual* interests:

> ... Durkheim's idea that crime brings people together does not seem generally valid. Crime may augment social interaction under certain circumstances and in limited ways, but this is usually for mutual self-protection rather than because people feel closer to others with whom they share the violated norms.[176]

Conklin further acknowledges that interaction aimed at enhancing *individual safety* may be helpful in reversing individual fear-levels. However, he insists that acts of individual defence generally obstruct a community's global sense of security – that the alleviation of individual fear through individual precaution can jeopardise residents' *collective safety*, thereby augmenting their shared fear of crime:

> People often react to their fear of crime by reducing contact with others and by avoiding situations that might lead to their victimisation. They also take various security measures, such as purchasing firearms or installing burglar alarms. These changes harm the community at the same time that they may protect specific individuals.[177]

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[173] *Supra*, at 51-52.
[174] Durkheim, *The Division of Labor in Society*, *op. cit.*, at 102-103.
[175] Liska, Sanchiro and Reed, *loc. cit.*, at 829; Skogan and Maxfield, *op. cit.*, at 262.
[176] Conklin, *op. cit.*, at 68.
[177] *Ibid.*

Conklin's submission that a pre-occupation with individual safety thwarts that of the group and thereby aggravates residents' collective fear, reflects the chief thrust of J.Q. Wilson's "reciprocal relation concept".[178] Wilson's theory blames individual acts of personal precaution for interfering with collectively exercised group-level protection. The abandonment of group-level answers to crime to enable residents to take care of their individual security leaves the wider community generally vulnerable to crime.

The neglect or de-prioritisation of collective attempts to safeguard the entire community from crime means that only those who are equipped to implement tactics of personal security will be insulated from victimisation. Those who lack the resources or mental or physical capacity to organise their own protection will become vulnerable in the absence of a community plan undertaken for the protection of all. Skogan and Maxfield observe that:

> [t]hese precautionary tactics are passive, not aggressive actions against crime. They leave potential offenders untroubled, displacing their attention onto others who are less watchful ... While being wary may protect individuals from harm, such wariness probably does not have any preventative payoff for the community as a whole.[179]

Clotfelter agrees:

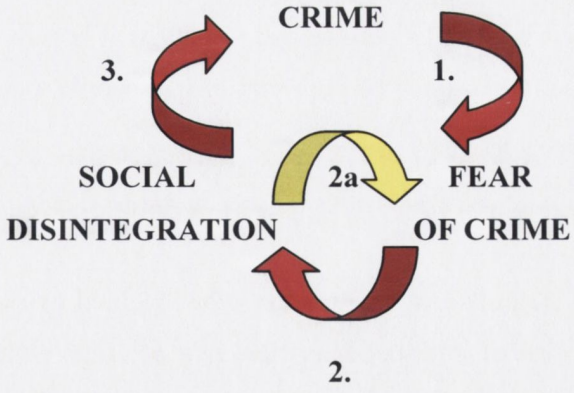
> It is quite possible that some of the very measures taken by individuals for protection may actually decrease the safety of other households by interfering with routine neighborhood surveillance.[180]

The above research reveals two important realities. First, it illustrates how a diminished sense of individual sensitivity to crime can actually enhance collective vulnerability thereto. As such, a mass subsidence in individual fear is likely to be accompanied by a corresponding escalation in *collective* anxiety. This illuminates a mini-feedback loop lurking within the complexity of the fear cycle: as Liska *et. al.* hypothesise, "fear and constrained behaviour are part of a positive escalating loop (fear constrains social behaviour which increases fear)".[181] In other words, fear produces social disintegration, which in turn is capable of exacerbating fear of crime. The original cycle of fear and crime can therefore acquire an additional dynamic, 2a, depicted in yellow below:

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[178] *See generally*, Wilson, *op. cit.*
[179] Skogan and Maxfield, *op. cit.*, at 262.
[180] Clotfelter, "Urban Crime and Household Protective Measures" (1977) 59(4) *Review of Economics and Statistics* 499, at 499.
[181] *Ibid.*

Figure 5



The second insight emerging from the research is that the individually-motivated social interaction that Conklin accepts can arise from crime does not nullify the argument that crime is overall socially disintegrative. This is because the insular connections that such actions solder cannot be said to be broadly socially cohesive. A merger of society's most privileged few (those with the best physical, mental and financial resources) to secure their own individual safety, abandoning those who are less equipped to do so, is – though integrative on a small-scale cliquish level – actually widening the broader social chasm between society's "haves" and "have-nots".[182] Hence, low-level attempts to co-ordinate to safeguard privileged interests, far achieving broad social integration, ultimately fragment and divide.

This understanding reflects Mark S. Granovetter's warning that strong localised social ties are not presumptively always desirable. [183] They inevitably create small, exclusive groups at the expense of wider social connections i.e. bridges *between* groups. Granovetter argues that the social rivalries produced by small-scale integrated hubs actually compromise widespread social cohesion; it is difficult to produce a cohesive social chain when the members of each of its potential links are too devoted to their group to trust those occupying links outside of it. As a result "each person is tied to every other in his clique and to none outside".[184]

This is the likely result of subordinating informal, group-level social-control to individual preservation, a feat best achieved by the most economically strong and as such, *possibly the least vulnerable to crime*. The union of one group to the exclusion of another, in this case the most in need of protection, serves to reinforce, rather than counter social division and inter-group enmity. Granovetter emphasises the need for *some* weak ties to

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[182] This phrase recalls Galanter's landmark article, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95.
[183] *See generally*, Granovetter, "The Strength of Weak Ties" (1973) 78(6) *American Journal of Sociology* 1360.
[184] *Ibid.*, at 1373.

foster sufficient inter-clique trust and interaction to create a *balanced blend* of social connections. Paul E. Bellair concurs, stressing that society will benefit not only from strong or weak social ties, but from a balance of both that brings people together while inhibiting excessive exclusivity between groups.[185]

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The discussion of stage two in the fear cycle has yielded two important revelations. First, because of its depletion of inter-resident trust, fear of crime atomises society, forcing people apart into insular, nucleic social hubs. The study of this process reveals that social disintegration qualifies as a community disorder that restorative justice should tackle in order to obstruct residents' fear of crime. But second, this section has also accented some of the adverse consequences of low social cohesion, such as low collective efficacy and ailing informal social-control, both of which restorative justice might rectify indirectly by reducing fear levels.

This multi-tiered perspective on fear-suppression is intended to demonstrate restorative justice's potential efficacy not only at mitigating crime's negative emotional side-effects, but also at targeting their underlying root – crime itself – to which they are umbilically connected.

Yet, the control of crime alone is not sufficient to combat its disintegrative social incidents. This is because even the most successful crime-control strategies do little damage to the *fear of crime* through which crime indirectly provokes the mistrustful relations that drive people apart.

> Fighting crime has taken the place of addressing the deeper social problems which this country faces … it is not surprising that those who can afford to have "locked themselves into gated monocultural enclaves."[186]

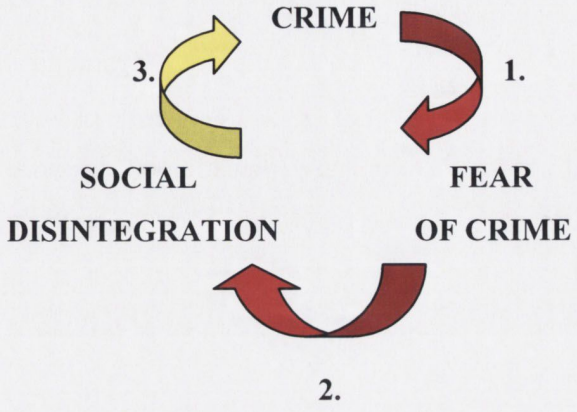
In order to reverse the protective social detachment that crime stimulates, fear of crime must be seriously challenged by isolating and suppressing its various social and personal contributors including *but not limited to* the crime rate.[187]

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[185] Bellair, *loc. cit.*
[186] Young, D, *loc. cit.*, at 132.
[187] *Supra*, at 129-146.

4. Stage Three: Social Disintegration Causes Crime – Lessons from Anomie Theory

Figure 6



"The real explanation for crime lies in Durkheim's anomie."[188] Anomie theory is a philosophy that has developed and concretised over more than a century[189] to provide a supportive and credible basis for the argument that social disintegration causes crime. It describes how low social cohesion contributes to crime through the concurrent erosion of a community's regulatory capacity.

The theory rejects the individualistic perspectives that attribute criminality to psychological, biological, or moralistic internal factors. Instead, it proves that crime is a *social* phenomenon whose extent and character varies with the "metabolism" of greater society,[190] a metabolism that is largely regulated by levels of social integration.

Observing the theoretical undulations that have guided its meandering progression over decades, one solid foundational hypothesis has withstood the test of time to occupy the heart of anomie theory: the understanding that people's compliance with social norms is determined, at least in part, by aspects of the social environment, in particular levels of integration and regulation in society.

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[188] Lunden, "Pioneers in Criminology – Émile Durkheim" (1958) 49 *Journal of Criminal Law* 2.

[189] The theory emerges in the writings of Émile Durkheim in the late 1800s and has recently been resurrected after a fall from vogue in the 1970s: see Passas and Agnew eds., *The Future of Anomie Theory* (Northeastern University Press, 1997); Diane Vaughn also resurrects anomie theory to explain institutionalised deviance at NASA: Vaughn, *Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA* (University of Chicago Press, 1996); for a consideration of the significance of Passas and Agnew's landmark disinterment of anomie theory, see Pettit, "Book Review" (1999) 31(2) *Crime, Law and Social Change* 156.

[190] Powell, "Crime as a Function of Anomie" (1966) 57 *Journal of Criminal Law, Criminology and Political Science* 161, at 161.

Émile Durkheim was the original godfather of anomie theory.[191] He introduced the concept of anomie in his 1893 work *The Division of Labour in Society*[192] and elaborated it four years later in *Suicide.* [193] In *Suicide*, Durkheim attempted to explain suicide, a striking example of an apparently individually motivated, private act of deviance, exclusively by reference to wider *social* factors. This would be a revolutionary finding in Durkheim's day up until which suicide had been considered principally psychologically determined.[194] By explaining such an intensely personal kind of deviance in terms of wider *sociological causes*, Durkheim intended to scaffold his sociological explanation for deviance and crime generally.

While his attempt to explain crime purely by reference to the social environment fell victim to mortal critical dismantlement,[195] nonetheless, Durkheim made a major contribution to the understanding of crime. He demonstrated the degree of influence that prevailing social dynamics exert over human behaviour.

Suicide became an important platform for the related concepts of *anomie* and *egoism*, social currents identified by Durkheim that explain the impact of social disintegration upon human behaviour. According to Durkheim, sudden changes in society, good or bad, disturb society's integrative equilibrium and thereby alter people's willingness to observe its rules when pursuing their desires. It is fair to say that in order to understand the connection between social factors such as disintegration and deviance, neither anomie nor egoism should be considered in isolation.[196] They are necessarily intertwined and merge to form the united focus of modern anomie theory.

Egoism is a social current of excessive individualism[197] that invades society when sudden changes unsettle it causing a "great collective shock".[198] Durkheim believed that such a jolt to a community's "collective conscience" disturbs its equilibrium and provokes criminality by destroying social attachment. Fractured bonds to mainstream groups such as

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[191] For an overview of Durkheim's works, see generally, Lunden, *loc. cit.*, Giddens, *Émile Durkheim: Selected Writings* (Cambridge University Press, 1972); Marks, "Durkheim's Theory of Anomie" (1974) 80(2) *American Journal of Sociology* 329; Lukes, *Émile Durkheim: His Life and Work* (Penguin Press, 1973); Jones, *Émile Durkheim: An Introduction to Four Major Works* (Sage, 1986); Dohrenwend, "Egoism, Altruism, Anomie and Fatalism" (1959) 24(4) *American Sociological Review* 466.
[192] Durkheim, *The Division of Labor in Society*, *op. cit.*
[193] Durkheim, *Suicide*, *op. cit.*
[194] *See* Freud, *Mourning and Melancholia*, Penguin Freud Library Vol. 11 (Penguin Books, 1991); Menninger, *Man Against Himself* (Harcourt, Brace and World, 1938).
[195] *See* Jones, *op. cit.*, at 93, 101, 108; Downes and Rock, *Understanding Deviance* (Oxford University Press, 1998), at 120, 135-138; O'Donnell, *An Introduction to Sociology* (Macmillan, 1981), at 315; Lukes, *op. cit.*, at 217-222.
[196] Marks, *loc. cit.*, at 332-333.
[197] *See* Dohrenwend, *loc. cit.*
[198] Marks, *loc. cit.*, at 357.

family,[199] church, political party and local community[200] engender widespread social disintegration, which Durkheim believed was a chief cause of crime.

Egoism explains how the individualism created by the depletion of group ties entices people to pursue deviant means of reaching their goals. Therefore, community crime is rooted in *group dynamics* and will fluctuate according to people's degree of attachment thereto: "The first origins of all social processes of any importance should be sought in the internal constitution of the social group."[201]

"Progress" – in particular the changes associated with the process of urbanisation and the onset of modernity – has long been blamed by anomie theorists for creating the socially disintegrated conditions that provide a perfect breeding ground for criminality.[202] As Durkheim argued, "[t]he entire morality of progress and perfection is … inseparable from a certain amount of anomie".[203]

Gripped and shaped by a wave of enhanced wealth, consumerism,[204] capitalism and increased industrialisation[205] *urbanities* have occupied pride of place within anomie literature. The isolation, rootlessness, autonomy and depersonalisation of urban life have long provided a case-study for the interaction between social transition, disintegration and crime.[206]

> The urbanism thesis, developed by Wirth and critically evaluated by Fischer, suggests that large cities are associated with normative conflict, individualism, depersonalization, breakdowns in both primary relationships and informal social-controls, and geographical mobility, which lead to harmful psychological states such as alienation, powerlessness, anxiety, and fear.[207]

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[199] *See* Cohen and Felson, "Social Change and Crime Rate Trends": A Routine Activity Approach" (1979) 44(4) *American Sociological Review* 588, in which the authors establish a connection between deviant behaviour and the routine abandoned when family and household connections are lost.

[200] *See generally*, Sampson, "Local Friendship Ties and Community Attachment in Mass Society: A Multilevel Systemic Model" (1988) 53(5) *American Sociological Review* 766; McMillan and Chavis, *loc. cit.*; for a discussion of potential sources of community attachment, see generally, Janowitz and Kasarda, "Community Attachment in Mass Society" (1974) 39 *American Sociological Review* 328.

[201] Durkheim, *The Rules of Sociological Method*, *op. cit.*, at 113. [author's emphasis].

[202] *See generally*, Durkheim, *Suicide*, *op. cit.*

[203] *Ibid.*, at 364.

[204] For an examination of the behavioural implications of social individualism, see Wilkins, *Consumerist Criminology* (Gower, 1990).

[205] Marcson ed., *Automation, Alienation, and Anomie* (Harper and Row, 1970); Merton, "The Machine, the Worker, and the Engineer" (1947) 105 *Science* 79.

[206] *See generally,* Wirth, "Urbanism as a Way of Life" (1938) 44(1) *American Journal of Sociology* 1; Guterman, "In Defense of Wirth's 'Urbanism as a Way of Life'" (1969) 74(5) *American Journal of Sociology* 492; Axelrod, "Urban Structure and Social Participation" (1956) 21(1) *American Sociological Review* 13; Janowitz and Kasarda, *loc. cit.*; Sampson, *loc. cit.*; Bursik, *loc. cit.*

[207] Liska, Lawrence and Sanchiro, *loc. cit.*, at 763.

Anomie theorists have focused with similar zeal on the disintegrative impact of the changes heralded by modernity. Education's widening of intellectual horizons is said to expand personal choice.[208] Enhanced choice and opportunity steers people away from the stabilising influence of their social groupings to pursue the pastures new opened up by enlightened thought. As a consequence, people avoid the pre-destined life paths that their membership of traditional groups once designated for them. This new mindset allows people to detour onto their own self-made routes. One's future is no longer pre-destined according to the dictates of his or her social characteristics, such as socio-economic class, gender, age, race or location. Instead, modernity offers self-determination and refuses to cap individual potential, regardless of one's social characteristics.

> ... identity is no longer a matter of ascription but one of achievement: whereas in earlier times individuals were born into traditional society and its preconstructed conditions, in reflexive modern times, individuals must construct their biographies on their own. The tradition biography becomes a "reflexive" (Giddens, 1991) or "do-it-yourself" (Beck & Beck-Gernsheim, 2002) biography: "decisions on education, profession, job, place of residence, spouse, number of children and so forth, no longer can be, but must be made" (Beck, 1992b: 135).[209]

The disintegrated social conditions associated with urbanisation and modernity are capable of spawning criminal conduct. Society gradually breaks down as people are lured away from their familiar groupings by the distractions of economic and educational betterment. Turning away from their social seedbeds, residents devise their own individual means of achieving their personal goals. They become driven by self-interest and neglect to consider the wider implications of their actions over others. Individualism thrives as concern for the welfare of one's social group is subordinated to personal pursuits.

Durkheim argued that it is this sense of individualism and self-imposed social alienation[210] that causes people to eschew the need to measure their behaviour against the normative standards of their various social clusters. Instead, they "innovate"[211] their own means of achieving their ambitions, blind to the moral boundaries of their wider social networks.[212] People's actions must now only accord with their own *personal* sense of legitimacy. The result is often deviant behaviour as the egoist is:

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[208] Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press, 1991); Giddens, *The Consequences of Modernity* (Polity Press, 1992); Luhmann, *Risk: A Sociological Theory* (Walter de Gruyter, 1993); Beck, *Risk Society: Towards a New Modernity* (Sage, 1992).
[209] Van Beek Gert, *loc. cit.*, at 25.
[210] *See* Seeman, "On the Meaning of Alienation" (1959) 24 *American Sociological Review* 783.
[211] Merton, *Social Theory and Social Structure* (Free Press, 1957); Merton, "Social Structure and Anomie" (1938) 3(5) *American Sociological Review* 672.
[212] *See* Cloward, "Illegitimate Means, Anomie and Deviant Behavior" (1959) 24(2) *American Sociological Review* 164; on Cloward's individual-level, opportunity-based extension of Durkheim's thesis, see Menard, "A Developmental Test of Cloward's Anomie-Opportunity Theory" in Passas and Agnew eds., *op. cit.* 142.

> ...left with nothing but his own egocentric goals which become preponderant over those of the community; *he recognizes no other rules of conduct than those based upon his private interests.*[213]

Encapsulated in a social vacuum of self-interest, people lack the social attachment and solidarity that provides them with an object superior to their own desires. Durkheim felt that man's happiness requires an object transcending it, that a concern for the welfare of others provides the sense of security and belonging that ultimately supplies the motivation to live. Therefore, trapped in an egoistic, integrative void, man is "thrown upon himself", "bereft of reasons for existence"[214] and can, under extreme circumstances of social seclusion, commit suicide.

Anomie is a social current that is connected to the emergence of egoism. [215] In essence, it is a *consequence* of egoism's under-integration, which is capable of producing criminality in its own right. Anomie describes the state of de-regulation, de-classification, or normlessness[216] that arrives when people lose the *regulatory influence* of the mainstream groups from which progress has sealed their withdrawal.

When the pursuit of the personal rewards promised by abrupt social transition distracts and divorces people from their social networks, not only do they lose their sense of belonging and attachment, they also lose the normative prescriptions and proscriptions that groups use to keep their members in check preventing them from overstepping the boundaries of legitimate action as dictated by a common credo or belief-system.

So, when people lose the *integrative* capacity of their social groupings, they consequently are denied their *regulatory* influence and enter a state of anomic, normative confusion. The coincidence between social integration and regulation indicates a corresponding convergence between the phenomena of egoism and anomie. These are separate processes that are "embedded in a single holistic context".[217]

> Small wonder that egoism and anomie "have a particular affinity for one another" as "it is almost inevitable that the egoist should have some tendency to non-regulation; for since he is detached from society, it has not sufficient hold upon him to regulate him."[218]

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[213] *See* Nisbet, *The Sociology of Émile Durkheim* (Spectrum, 1965), at 49. [emphasis added]
[214] *Ibid.*
[215] Marks, *loc. cit.*
[216] *See* Dohrenwend, *loc. cit.*, at 472-473.
[217] Marks, *loc. cit.*, at 332.
[218] *Ibid.*

Overcome by the egoistic tendencies invoked by rapid social change, people lose the deterrent quality once provided by the regulatory constraints of community-embeddedness. Durkheim believed that the value of this kind of control lies in its ability to attach limits to personal achievement. Authoritative social groupings can curb their members' desires and give them a realistic expectation of what is attainable in life having regard to the availability of lawful means. In essence, they set realistic limits on residents' individual senses of personal potential.

However, when group-life breaks down and its regulatory influence is lost, desires are no longer held in check. People no longer know their limits and begin to aspire for ends that may be unattainable by lawful means.[219] Under such circumstances, "the limits are unknown between the possible and the impossible, what is just and what is unjust, legitimate claims and hopes and those which are immoderate".[220] Unfettered personal desires and a sense of unlimited choice and unfulfilled potential sets in motion a race for an unattainable goal. The inadequacy of lawful channels to achieve newly elevated, remote ambitions causes people to turn to alternative, deviant avenues.

Anomie then, can be understood as a discrepancy between expectation and fulfilment[221] – a divergence between ends and means.[222] In fact, the deviance associated with this sense of "blocked opportunity" forms the centrepiece of Robert Merton's *strain theory*.[223] Merton concentrates on this elemental limb of Durkheim's thesis and explains how a disparity between desired ends and lawful opportunity undermines social attachment and stimulates people's autonomous turn to "illegitimate means".[224] Such a disjuncture is said to emerge when society's emphasis on certain goals and the restrictiveness of its prescribed norms vary independently of one another.[225]

Durkheim used the premise that "insatiable appetites", "overweening ambition", or "fevered imaginations" are a sure source of human misery, to relate anomic conditions to suicide.[226] He considered untrammelled ambition a social pathology, which he dubbed "the

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[219] *See* Cloward, *loc. cit.*, at 165-166.
[220] Durkheim, *Suicide*, *op. cit.*, at 253.
[221] Powell, *loc. cit.*, at 169.
[222] For an up-to-date assessment of the anomic ends/means disparity created by the sweeping influence of capitalism and market forces, see Rosenfeld and Messner, "Markets, Morality, and an Institutional-Anomie Theory of Crime" in Passas and Agnew eds., *op. cit.* 207.
[223] Merton, *op. cit.*; Merton, "Social Structure and Anomie", *loc. cit.*; Cloward, *loc. cit.*, at 166-167; for a more recent evaluation of Merton's blocked opportunity model of deviance, see Hagan and McCarthy, "Anomie, Social Capital and Street Criminology" in Passas and Agnew eds., *op. cit.* 124.
[224] Merton, *op. cit.*, at 131-194; Cloward, *loc. cit.*
[225] Cloward, *loc. cit.*, at 166.
[226] Durkheim, *Suicide*, *op. cit.*, at 256.

malady of infinite aspiration":[227] "[t]o pursue a goal which is by definition unattainable is to condemn oneself to a state of perpetual unhappiness".[228]

Durkheim made a substantial contribution to the understanding of crime in society. He revealed that people are led down a path of deviance by a loss of social attachment and the social regulation it provides and that this occurs when society undergoes dramatic transformations that obscure the boundaries of human behaviour beneath the distracting promise of personal gain.[229]

This basic hypothesis survived the ensuing years of anomie scholarship relatively unscathed. Durkheim's chief successors maintained it as the central tenet of their research.[230] For instance, it formed the theoretical skeleton around which Travis Hirschi developed his "control theory" of crime and deviance.[231] While there was some inconsistency in Durkheim's work in his sporadic tendency to segregate the concepts of social regulation and integration,[232] Hirschi concretised their connection. His focus lay on the regulatory, deterrent influence of social attachment.

> Hirschi's interpretation of Durkheim has become known as the "control theory" in sociological jargon, implying that individuals with strong attachments to mainstream groups (e.g. family, school, church) are held in check, or controlled, from committing deviant acts.[233]

Hirschi argued that when social disintegration destroys attachment to such groups, their regulatory authority lapses and people descend into deviance.

Anomie theory also supplied the inspiration for *social disorganisation theory*. Social disorganisation theorists, whilst validating and expanding anomie theory, approach the topic of community integration from a different angle. They avoid the anomie theorists' individual, micro-sociological focus and concentrate instead on the implications of anomie theory (and

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[227] *See* Durkheim, *Moral Education*, translated by Wilson and Schnurer (Free Press, 1961), at 40; Downes and Rock, *op. cit.*, at 115.
[228] Durkheim, *Suicide*, *op. cit.*, at 247-248.
[229] *See* Currie, "Market, Crime and Community: Towards a Mid-range Theory of Post-industrial Violence" (1997) 1(2) *Theoretical Criminology* 147 who discusses the "marketization" of violence, denoting how the pursuit of private gain is likely to breed high levels of violent crime.
[230] *See generally*, Coser, *The Functions of Social Conflict* (Routledge and Kegan Paul, 1956); Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (John Wiley and Sons Inc., 1966); Cohen, "The Sociology of the Deviant Act: Anomie Theory and Beyond" (1965) 30(1) *American Sociological Review* 5; Powell, *loc. cit.*; Merton, *op. cit.*; Merton, "Social Structure and Anomie", *loc. cit.*; Merton, "The Machine, the Worker, and the Engineer", *loc. cit.*; Hirschi, *Causes of Delinquency* (University of California Press, 1969).
[231] Hirschi, *op. cit.*
[232] *See* Marks, *loc. cit.*, at 332-333.
[233] *See* Lee Carter, "Anomie Theory, Control Theory, and Understanding Crime", at para. 4. <http://wps.ablongman.com/ab_henslin_essentials_5a/0.7490.648416-.00.html> (visited 20 April 2005).

control theory in particular) on a community's collective ability to exert informal social-control.[234]

Social disorganisation theory evaluates how a community's degree of social integration affects its ability to regulate itself. Bursik acknowledges the connection between the two theories, but distinguishes their different foci. He remarks that social disorganisation theory is "basically a group-level analog of control theory and is grounded in very similar processes of internal and external sources of control".[235]

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Anomie theory is highly instructive to the interpretation of the connection between social disintegration, *whatever its source*, and crime. It provides the philosophical premise for McCullagh's hypothesis that "radically individualistic societies tend also to be radically punitive ones".[236] Anomie theory's relevance to this chapter lies in its ability to explain the social processes by which fear of crime, a proven vector of social segregation, produces crime indirectly.

The culture of fear, mistrust and interpersonal suspicion that Conklin associates with conditions of excessive personal precaution shares much with Durkheim's egoism. In the former instance, it is the fear of crime that is pulling people apart rather than abrupt social transition or incoming normative renovation, yet the results are the same: residents retreat from group life and sever the social attachments that were once forged outside the inner sanctum of their most trusted social cocoons.

Excessively strong local ties are fused within families and tight social subsets at the expense of wider, inter-group bridge-building. Therefore, *both* sudden social metamorphosis and fear of crime can produce the kinds of conditions of which Granovetter is so critical – those in which broad social integration is sacrificed to more intimate group-level connections.[237]

The result of the social disintegration pervading both Durkheim and Conklin's case studies is a widespread sense of self-sufficiency, isolation, and alienation. Durkheim's re-consideration of the social consequences of egoism in *Moral Education* reveals how losing one's crucial "inclination toward collective life"[238] destroys the "capacity for giving, for

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[234] Shaw and McKay, *op. cit.*; Shaw, Zorbaugh, McKay and Cottrell, *op. cit.*; Bursik, *loc. cit.*; Markowitz, Bellair, Liska and Liu, *loc. cit.*; Bellair, *loc. cit.*; Skogan and Maxfield, *op. cit.*, at 98-107; Sampson and Groves, "Community Structure and Crime: Testing Social Disorganization Theory" (1989) 94 *American Journal of Sociology* 774; Sampson, "Linking the Micro- and Macrolevel Dimensions of Social Organization" (1991) 70 *Social Forces* 43.

[235] Bursik, *loc. cit.*, at 521.

[236] McCullagh, "The Social Analysis of the Irish Prison System" in O'Mahony ed., *op. cit.* 595, at 611.

[237] *Supra*, at 157-158.

[238] Durkheim, *Moral Education*, *op. cit.*, at 233.

devoting one's self"[239] that is so essential to the related sequential phenomena of individual happiness, the avoidance of deviance and collective harmony.

> If, then, with the exception of the family, there is no collective life in which we participate, if in all the forms of human activity—scientific, artistic, professional, and so on—in other words, in all that constitutes the core of our existence, we are in the habit of acting like lone wolves, our social temperament has only rare opportunities to strengthen and develop itself. Consequently, *we are inevitably inclined to a more or less suspicious isolation*, at *least in regard to everything concerning life outside the family*. Indeed, *the weakness of the spirit of association* is one of the characteristics of our national temperament. *We have a marked inclination toward a fierce individualism*, which makes the *obligations of social life appear intolerable to us* and which prevents us from experiencing its joys.[240]

This important passage illuminates the common ground shared by anomie and fear of crime theorists. It demonstrates the similarity between the by-products of anomic conditions on the one hand and fear of crime on the other.

Still, anomie theory has more to teach us about the process by which mal-integrated conditions cause crime. It reveals that social disintegration, whether it is prompted by social transition *or* collective fearfulness, inspires criminal behaviour by denying people the deterrent influence provided by membership of social groups and the sense of "belonging" it supplies.

As people withdraw from social networks, they lose a higher object of concern and respect, the prospect of whose disturbance by its members' deviance norally deters normative breaches that could damage group interests. By considering the greater *collective* shockwaves of *individual* behaviour, people are held in check by a concern for the welfare of an entity greater than themselves.

More crucial, however, is the loss of the regulatory, restrictive influence of social embeddedness whereby the collective ethos, identity and normative framework of social groupings control members' behaviour. Overall, the sense of rootedness and solidarity offered by group membership acts as an incentive to respect its normative limits. People exchange obedience for the superior "quality of life" merits of group-membership.

Therefore, the means by which fear of crime indirectly causes crime itself is more complex than merely producing social withdrawal. Fear produces crime obliquely by replicating the egoistic (disintegrative) *and consequent anomic* (de-regulated) conditions that Durkheim and his descendants describe. Anomie theory counsels that it is not only the disintegrative impact of fear that accounts for heightened crime, but the attendant regulatory implications of waning social attachment.

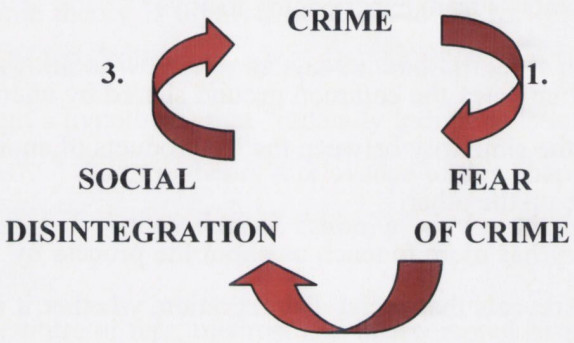
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[239] *Ibid.*, at 102.
[240] *Ibid.*, at 233-234. [emphasis added]

A considerable piece of wisdom to be plucked from anomie scholarship and engaged in contemplating strategies for suppressing fear of crime, is that social attachment, through its regulatory strength, brings some immunity from crime itself. It thereby stifles fear that is proportionate to the crime rate, while leaving intact that fear that is stirred by other factors such as media-distortion[241] and socio-demographic vulnerability.[242]

5. Setting an Agenda for Fear-Suppression: Three Challenges for Restorative Justice

Figure 7



The foregoing research reveals that there are three main social features whose fluctuating levels contribute to residents' collective fear of crime: (a) *social disintegration*, (b) the associated commodity *collective efficacy* and (c) residential vulnerability to *external misinformation.* Naturally then, there are three corresponding means of neutralising fear of crime, halting the fear cycle at its various stages: (a) rectifying a community's integrative balance, (b) improving collective efficacy and (c) educating residents about the realities of crime in their locale so as to boost their immunity to innocent misinformation and/or intentional manipulation.

The unique reflexive interactions that compose fear's complex life-cycle mean that suppressing fear of crime will exert various knock-on effects throughout the community. This is evident simply from the means by which fear can be combated; social reintegration, the enhancement of collective efficacy and the education of residents are all independently socially-meritorious achievements in their own right, irrespective of their fear-quenching potential. In other words, the erosion of fear of crime is accompanied by other *generally socially-beneficial* incidents.

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[241] *Supra*, at 141-143; *infra*, at 343-344; O'Connell, "Is Irish Public Opinion towards Crime Distorted by Media Bias?", *loc. cit.*; *National Crime Forum Report 1998* (Office of Public Administration, 1998), at 27-28; Kerrigan and Shaw, *loc. cit.*; O'Connell, "The Portrayal of Crime in the Media", *loc. cit.*

[242] *Supra*, at 135-139.

However, the three socially-constructive incidents of fear-suppression are themselves capable of conveying certain *crime-quelling* fringe benefits. The above dissection of anomie theory illustrated the ubiquitous causal connection between social disintegration and crime.[243] Therefore, improving society's integrative balance should exert some crime-reductive impact.[244] Furthermore, improving collective efficacy – people's conjoint inclination towards preserving the common good – is likely to thwart local crime by inspiring cohesive strategies of informal crime-control.[245] Unfortunately, however, the crime-fighting effects of social reintegration and heightened collective efficacy are difficult to gauge.[246]

The quantity of crime-control for which these vital social re-balancers might be responsible is obscured within a dense, complex and numerically intangible labyrinth of fluctuating social interaction. Social integration and collective efficacy are elusive societal commodities that evade concrete measurement. Without a reliable means of capturing these feral species from the murky wilderness of group-life for accurate measurement, their alleviative impact on the crime rate, though real, will also evade dependable calculation.

Their crime-control capacities, because of their evasion of concrete appraisal, are therefore not independently relied upon herein to justify recourse to social reintegration and enhanced collective efficacy. Instead, their potential for reducing crime is treated as just one strand of their generally socially-beneficial potential of which their fear-suppressive influence is another key component.

The following sub-sections will consider the three prime methods of allaying residents' collective fear of crime in the community: social reintegration, enhanced collective efficacy and residential education. The more of these three tactics that can be simultaneously directed towards retarding each element of the fear cycle, the higher the likelihood of altogether immobilising it. Chapter 5 can then proceed to determine how and to what extent restorative justice is equipped to perform them. In this sense, then, the following three sub-sections set a fear-control mandate for restorative justice.

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[243] *Supra*, at 159-168.
[244] *Infra*, at 216-218.
[245] *Infra*, at 219-221.
[246] *Supra*, at 33-36.

5.1 To Improve Society's Integrative Balance

> [T]he only remedy for the ill [of egoism] is to restore enough consistency to social groups for them to obtain a firmer grip on the individual.[247]

This chapter determined that people's collective fear of crime cultivates community conditions resembling Durkheim's *egoism*, a state of excessive individuation produced by residents' withdrawal from group-life.[248] It is likely that such an "ethic of individualism"[249] is responsible for the "real and widespread"[250] fear of crime which, as Chapter 8 explains,[251] has pervaded Irish society to differing degrees over the last decade or so.[252]

Some of the fear that infuses Irish society is probably proportionate to a *long-term* rise in the crime rate over several decades. Accordingly, O'Mahony suggests that:

> ... *the last twenty or thirty years* have seen a very dramatic decline in the average Irish person's sense of personal security and interpersonal trust, related to the greatly increased crime rate.[253]

However, just as fear of crime theorists would predict, the evidence suggests that the overall degree of fear experienced by Irish people is objectively unjustified by more short-term fluctuations in objective risks; it *exceeds* the crime rate. [254] While Irish crime might be higher now than three decades ago, there was a massive 20% decline in the number of indictable offences in Ireland between 1995 and 1999,[255] which has stayed low in comparison with other European countries since then.[256] As Chapter 8 concludes, despite an appreciable "cooling off" in levels of *disproportionate* fear of crime amongst the Irish population since its high-water-mark in the mid- to late-1990s,[257] Irish people are still prone to overestimating crime's seriousness,[258] and therefore, still possess *some degree* of disproportionate fear.[259]

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[247] Durkheim, *Suicide*, *op. cit.*, at 373.
[248] *Supra*, at 160-166.
[249] *National Crime Forum Report 1998*, *op. cit.*, at 35; McCullagh also recognises the individualisation of Irish social conditions: see McCullagh, *loc. cit.*, at 611; see also, Allen, *The Celtic Tiger: The Myth of Social Partnership in Ireland* (Manchester University Press, 2000); O'Mahony, *op. cit.*, at 33.
[250] *National Crime Forum Report 1998*, *op. cit.*, at 10.
[251] *Infra*, at 338-350.
[252] Maher, *loc. cit.*; McCullagh, *op. cit.*, at 9-11, 103; see also O'Connell, "Is Irish Public Opinion towards Crime Distorted by Media Bias?", *loc. cit.*; see also, Whitaker, *op. cit.*, at 29.
[253] O'Mahony, *op. cit.*, at 33. [emphasis added]
[254] *Infra*, at 346.
[255] O'Mahony, *op. cit.*, at 25.
[256] O'Connell, "Assessment of the Crime Rate in Ireland – Issues and Considerations" in O'Mahony ed., *op. cit.* 116; O'Mahony, *op. cit.*, at 51.
[257] *Infra*, at 340-346.
[258] *Infra*, at 346; Maher, *loc. cit.*; O'Connell, "Taking Wrongs Seriously: Public Perceptions of Crime Seriousness", *loc. cit.*
[259] *Infra*, at 346.

It seems that the symptoms of anomie and egoism still inhabit the progressive conditions characterising contemporary Irish society and that they are the likely provokers of excessive anxiety about crime. The 1998 National Crime Forum Report highlighted the wave of "self-interest" created by entrepreneurship and economic success in Ireland. The report paints a grim image of a society that is becoming increasingly defined by the anomic and egoistic influences of progress, drawing a direct connection between individualised social conditions and crime. The report's language reflects Merton's "blocked opportunity" or "ends/means discrepancy" model of anomie that links an absence of lawful methods of achieving uncapped goals to the "innovation" of "illegitimate means":[260]

> ... the ethic which sees self-interest and material gain as the necessary driving force of all activity poses a major difficulty in any effort to inculcate good citizenship and socially responsible behaviour ... Perhaps the message that goes out is that self-interest is the engine of an effective society and that any restraint on that self-interest (especially by the better-off) is to be viewed with suspicion. If that is so, then it should not be surprising *if those who are deprived and have little opportunity of promoting their material well-being by lawful means, apply the message to their own case and use the only means at their disposal, which may be criminal and antisocial, to achieve material well-being.*[261]

Echoing the language of anomie theory, the report expresses added concern over the loss of an overarching, greater social ambition to which residents can aspire individually. It laments the contemporary disintegration of traditional regulatory authorities such as politicians and church leaders upon whom it calls to re-define social ambitions and re-set the aspirational limits needed to hone realistic public expectations:

> ... there is a responsibility on those who primarily shape public attitudes to create a climate in which the philosophy is interpreted and applied in a morally responsible way. Those opinion-formers include not only politicians, church leaders and the media, but also prominent citizens, parents and teachers. *We all need to have a vision of the kind of society we would like to see*, to debate it, to reach as much consensus as possible and to work for its realisation. *Today, we seem to lack a clear vision of the society we would like – a vision that inspires or defines our policies.*[262]

Paul O'Mahony similarly attributes a rise in deviance in Ireland over the last 40 years to the "progress" that has transformed the nation so rapidly and dramatically. He blames an escalation in Irish people's turn to criminal means on the country's progression from an unmodernised, agriculture-centred, Catholic nation with high emigration to one suddenly gripped by industrialisation, economic growth, consumerism, materialism, urbanism and changes in the family structure. The latter features constitute the crime-stimulating hallmarks

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[260] *Supra*, at 164-165.
[261] *National Crime Forum Report 1998*, *op. cit.*, at 36. [emphasis added]
[262] *Ibid.*, at 36-37. [emphasis added]

of an increasingly individualised, disintegrated society.[263] In perfect accordance with an "anomie" formula, it can be said that the social detachment that Ireland's modernisation has produced has fuelled a breakdown in traditional sources of social-control, in particular, the Catholic Church and the family unit.[264]

The age-old anomie equation, then, has full modern applicability in a contemporary Irish setting. Abrupt social transformation has brought normative confusion, individualism and fear, all of which have undermined attachment to traditional regulatory groups and the rules they prescribe for their members in fulfilling their goals. O'Mahony's discussion of social change and crime in Ireland manifestly evokes the unmistakable, inimitable language of anomie theory:

> [The last quarter of the twentieth century] has witnessed a *rapid process of industrialisation and urbanisation* and the opening-up of Ireland to the powerful influence of global media, international market forces and the values of *consumerism, individualism and materialism*. These *profound changes* have been concentrated into a relatively *short time-frame* and have, therefore, been particularly *intense and disturbing* ... Social realities and social structures are metamorphosing before people's eyes but in an *unplanned, unpredictable*, perhaps indescribable way. The *old order of values has been challenged* and, indeed, largely dismantled ... The *rapid evolution* into a developed, affluent, high-technology driven economy has also been accompanied by an *abrupt* and profound *secularisation*.[265]

So, the effects of social disintegration that have thus far been studied in a theoretical vacuum, finally re-emerge to find practical applicability under modern *Irish* conditions.

The reintegration of community relations constitutes one obvious step in seeking to (a) mitigate or reverse the damage caused by fear of crime, including the production of crime itself and (b) destroy the fragmented conditions proven to sustain that fear.[266] Therefore, a successful attempt at social reintegration will *prevent* stage three of the fear cycle but it will also stymie the return journey of the mini-feedback loop shared between social disintegration and fear of crime depicted in Figure 5;[267] that is, it will prevent the social disintegration produced by fear reciprocally supporting an even greater fear of crime.

Social re-integration is a delicate task that must be carried out with care. This chapter emphasised the need for balance between weak and strong social ties.[268] It is not a case of "the stronger the better" when it comes to identifying the inter-resident bonds most likely to boost social cohesion. Instead, what should be pursued is "quality over quantity" and *quality*

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[263] O'Mahony, *op. cit.*, at 24, 33.
[264] *Ibid.*, at 33-34; see Family Law (Divorce) Act, 1996; Judicial Separation and Family Law Reform Act, 1989.
[265] O'Mahony, *op. cit.*, at 33-34. [emphasis added]
[266] *Supra*, at 156-157.
[267] *Supra*, at 157.
[268] *Supra*, at 157-158.

social integration requires a careful balance of loose and tight bonds: enough tight connections to mesh people together within supportive, trust-woven groups, but enough weak ones *within those groups* to facilitate inter-clique bonding. The result will be a cohesive, yet tolerant social network that has avoided the potentially disintegrative impact of excessive intra-group insularity.

However, apart from reducing fear indirectly by lowering the crime rate, social re-integration may be capable of tackling fear of crime more directly. Drawing on the wisdom of the anomie theorists, Garofalo and Laub famously attribute people's level of fearfulness about crime to the degree of "unease" they experience as a result of the social detachment and mistrust that characterises rising urbanism.[269]

Garofalo and Laub explain that social transformation instils in residents "some sort of unfocused, or multifocused, anxiety or mistrust which leads to uneasiness and discomfort".[270] Fear of crime is said to be just one manifestation of this more diffuse sense of "general urban unease" that impacts people's overall quality of life as they struggle to adjust to changing social conditions. As Liska and colleagues observe: "Garofalo and Laub suggest that fear of crime may be part of this psychological syndrome which is linked to problems in contemporary urban living."[271]

It is thought that the normative confusion and sense of unknown potential that accompanies social transition can invest residents with what is essentially a "fear of the unknown". This includes a fear of crime, which is itself often an unknown variable. Similarly, Hale attributes fear of crime to a wider sense of "insecurity with modern living" that is provoked by progress' blurring of social boundaries (anomie).[272] Hope and Sparks also link fear of crime to the egoistic, excessively individuated conditions created by change, renewal and de-traditionalisation.

> Sometimes the question of fear seems chronically enmeshed with the dynamics of detraditionalisation and an accompanying sense of disruption of formerly settled moral and customary orders.[273]

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[269] Garofalo and Laub, *loc. cit.*; see also, Hale, "Fear of Crime and Quality of Life: A Test of Garofalo and Laub's Model" (1988) 13(1) *Criminal Justice Review* 13; Taylor and Hale, *loc. cit.*; Liska, Lawrence and Sanchiro, *loc. cit.*; Williams and Dickinson, *loc. cit.*

[270] Garfalo and Laub, *loc. cit.*, at 246-248.

[271] Liska, Lawrence and Sanchiro, *loc. cit.*, at 763.

[272] Hale, "Fear of Crime: A Review of the Literature", *loc. cit.*, at 84.

[273] Hope and Sparks, "Introduction: Risk, Insecurity and the Politics of Law and Order" in Hope and Sparks eds., *Crime, Risk and Insecurity* (Routledge, 2000) 5; for a similar view, see Bauman, "Social Issues of Law and Order" (2000) 40(2) *British Journal of Criminology* 205.

People respond to normative confusion and the breakdown of traditional loci of social-control, such as family and church, with insecurity, fearfulness and a marked intimidation about the future. [274] This includes a fearfulness of future victimisation. Urban unease, then, can be described as at worst, a state of "gnawing existential mistrust",[275] created when anomic and egoistic currents engulf communities in the midst of sudden social change. A particularly germane contemplation of the "quality of life" understanding of fear of crime is performed by Johnny Connolly who considers its applicability in the context of drug use in Dublin's inner-city.[276]

Considering this "urban unease" derivative of anomie theory, it can be surmised that social re-integration may be capable of much more than merely tackling fear of crime obliquely by curbing crime itself. In fact, it is further equipped to target fear more directly by neutralising the social conditions of individualism and mistrust said occur when progress widens the goalposts of personal potential.

Pursuing social re-integration has further beneficial implications however. If it can be maintained at sufficiently high levels or rather, if its "quality" is of a sufficiently high *equilibrial standard*, social reintegration is capable of cultivating collective efficacy. Collective efficacy, like social reintegration, holds dual benefits: first, it constitutes another effective device in the demolition of fear of crime and second, it is an undoubtedly beneficial social commodity in its own right that would enhance any community.

5.1 To Improve Collective Efficacy

This chapter revealed the linear, progressive connection between social integration and collective efficacy.[277] At advanced levels, social integration ignites the collective spirit required to motivate communal acts of informal social-control. Therefore, there is no doubt that if, as suspected, social individualism has tightened its grip in Ireland over recent decades and egoism has taken hold, collective efficacy must be struggling. So, if social reintegration is required to reverse this wave of self-interest, collective efficacy is presumptively in need of a correlative, incidental boost thereby.

If court-annexed restorative strategies such as VOM and ORPs can improve social integration to this degree, they will be capable of controlling crime indirectly by promoting the kind of community conditions that cultivate a "willingness to intervene" for the common

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[274] *See generally*, Lohman, "Fear of Crime as a Policy Problem" (1983) 8(1-2) *Victimology: An International Journal* 336; Balkin and Houlden, "Reducing Fear of Crime through Occupational Presence" (1983) 10(1) *Criminal Justice and Behavior* 13.
[275] Van Beek Gert, *loc. cit.*, at 30.
[276] Connolly, "Drugs, Crime and Community in Dublin: Monitoring Quality of Life in the North Inner City", research project submitted to the Supply/Control Committee of the North Inner City Drugs Task Force, at 66. <http://www.ndc.hrb.ie/downpdf.php?pdf=1527-1420.pdf&id=1527> (visited 12 May 2006).
[277] *Supra*, at 153-154.

good. By inspiring "community crime prevention", collective efficacy offers residents a valuable key to the communal management of both crime and the fear it produces.

However, collective efficacy is also capable of tackling fear of crime directly. It does so by inspiring residents' *positive perceptions* of their community.[278] The perception that one's community is poised to intervene on behalf of the greater good through co-ordinated attempts at informal social-control, gives residents a heightened sense of safety. This perception of community-controlled collective security dilutes residents' sense of vulnerability to crime, which in turn diminishes their fear levels. In addition to their own individually-adopted strategies of self-defence from crime, people are soothed by the reinforced protection offered by group-level strategies of informal crime-control, whether they are community "clean up" projects or "outsourced" restorative initiatives such as VOM.

This second altruistically-motivated layer of "back-up" protection further serves to maintain and encourage inter-resident trust. Residents' perception of helpful neighbours who are willing to rise up to protect collective interests jointly obstructs the suspicion, mistrust and egoistic social isolation that would otherwise emerge under less cohesive, fear-riven conditions. The safety and security delivered by this extra tier of protection engenders tolerance, interdependence, increased interaction and inter-neighbour trust and solidarity. Neighbours are considered potential sources of aid and support rather than latent "internal enemies".[279] In this sense, it seems that social integration and collective efficacy co-exist symbiotically: social integration enhances collective efficacy and *vice versa* – they share a positive, escalating feedback connection.

If restorative justice can improve residents' collective efficacy, it will be attacking the fear cycle from two angles. First, by enhancing collective efficacy, restorative strategies such as VOM and ORPs hold substantial potential to stifle fear of crime directly by instilling in residents positive perceptions of community-mobilisation. Second, by promoting informal social-control, a growth in collective efficacy can act to *reduce community crime*.

Crime-control alone, while insufficient to eliminate fear of crime comprehensively, offers a basic means of attacking a generally negative social pathology at its root. By reducing the crime rate, fear of crime's diagnostic social utility in diagnosing the need for extra precaution to take account of rising crime[280] is immediately nullified. Yet, while crime-control provides a fundamental mode of pre-empting the need for proportionate fears, it is insufficient to stifle the various other sources of anxiety that can contribute to the collective fear of crime *irrespective* of the crime rate.[281]

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[278] *See* Gibson, Zhao, Lovrich and Gaffney, *loc. cit.*
[279] *Supra*, at 147.
[280] *Supra*, at 125.
[281] *Supra*, at 133-146.

5.3 To Educate Residents about the Realities of Local Crime

The quote that opened this chapter expressed the hopes of the Whitaker Report of 1985[282] that Irish society would become more attuned to crime's less obvious social triggers and adopt a more temperate, less fearful attitude to crime. The need for this kind of attitudinal reorientation endures undiluted to this day. As Chapter 8 recounts, the dramatic means by which crime is portrayed within politics and through the media, pushed Irish society into state of hypersensitive "high-alert" to crime during the 1990s.[283] While the sense of widespread *panic* about the crime problem appears to have subsided since then, fear of crime of a disproportionate variety still arguably pervades the Irish populace.[284]

Minister for Justice, Equality and Law Reform, Michael McDowell has recently acknowledged this state of affairs. He has more or less admitted that his hard-hitting and expensive "law and order" responses to crime are designed to reflect the public's *unjustified fear of crime* rather than an objective need for them:

> While the number of crimes per head of population is significantly lower now than it was 10 years ago *it should be no surprise that people continue to have a fear of crime.* For this reason I have increased the budget of An Garda Síochána by 39% to over 1.3 billion Euro; I am putting huge numbers of extra Gardaí on our streets and; I will shortly have in place strong legislative measures to deal with, in particular, gun crime and anti social behaviour.[285]

This uncovers the anomaly that justice policy in this country is, at least to some degree, fictionally-determined. Public misconception is eminently capable of steering government crime policy in abstraction from the magnitude of the crime problem itself.

And it seems absurd that correctable public misconceptions are being permitted to fuel what are unnecessarily incursive, expensive and ultimately fear-*escalating* crime policies in this country. (The possibility that vote-grabbing underlies this approach inevitably rears its ugly head).[286] As explained above, residents' education about their objective vulnerabilities to local crime is specifically intended to combat this kind of objectively unjustified fear of crime.[287]

While social reintegration and the improvement of collective efficacy both aim to *eliminate* as much fear of crime as possible, it is, at the end of the day, a recurring social

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[282] Whitaker, *op. cit.*, at 29.
[283] *Infra*, at 339-345.
[284] *Infra*, at 347.
[285] McDowell, in Department of Justice, Equality and Law Reform , "Minister Publishes Preliminary Results of Public Survey on Crime and Law Enforcement", *Press Release*, 22 March 2006. [emphasis added] <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6N6PCZ-en> (visited 17 February 2007).
[286] *Infra*, at 342-343, 352.
[287] *Supra*, at 128.

inevitability. As such, it – like crime itself – is unlikely to be wholly eradicated. The second-best option to fear's comprehensive obliteration, however, is its confinement within *proportionate levels* – those that tally with crime's objective threat to residents or are at least, rational in terms of vulnerable groups' inability to cope with the losses certain crimes impose.[288]

One means of achieving this back-up goal is by attuning residents – through some form of local crime-education – to the real risks facing them, having regard to the crime rate and their socio-demographic vulnerabilities. Education through widespread awareness-raising about crime in Ireland may therefore provide a means of keeping the lingering fear of crime that reintegration and boosted collective efficacy fail to eliminate to proportionate levels.

If restorative justice can educate residents about the realities of local crime and the true magnitude of objective risks, it will reduce residents' susceptibility to inaccurate or misleading external accounts of local crime, thereby insulating them against attempts to manipulate or misinform. Accurate, up-to-date information on local crime can bypass the "cognitive shortcut"[289] that takes place when people are taken in by the easy-to-swallow, distorted depictions of crime that are spoon-fed to them regularly by the media. Armed with accurate knowledge on the state of local crime and its threat to various demographic groups, residents are less likely to mis-assess their personal vulnerability to victimisation.

Education not only stymies residents' gullibility to warped *external* accounts of local crime – it also stands to stifle the tendency among residents to "confabulate"[290] producing equally warped – though arguably less culpable – *internal* depictions of crime. For, as the preceding research deduced, information conveyed informally by word of mouth *between residents* probably wields the most influence over personal estimations of vulnerability to crime and as such, is most likely to stimulate disproportionate fear.[291]

This educational task may seem a tall order for restorative justice, but as Chapter 5 will reveal, it is just one of a range of measures that restorative justice is adept at performing in order to suppress the negative emotional shockwaves that crime releases into the community.

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[288] *Supra*, at 135-139.
[289] O'Connell, "Victims and Sentencing", *loc. cit.*, at 53.
[290] *Supra*, at 140-141.
[291] *Supra*, at 143.

6. Conclusion

> For over two decades, criminologists have argued that the stressful reactions to victimization are not restricted to those who experience its effects directly (Conklin 1985; Lewis 1981; Skogan and Maxfield 1981; Riger 1985). This literature suggests that the fear of crime may itself be seen as a form of psychological distress which lessens the quality of life, restricts access to social or cultural opportunities, and undermines the social integration of local communities.[292]

As Furstenberg observes astutely, "[t]he relationship between crime and its consequences is neither obvious nor simple".[293] This chapter has attempted to elucidate this connection by exploring the complex relationship between crime and one of its chief emotional side-effects – the fear of crime. By explaining the various interactions that compose the cyclical relationship between fear and crime, a trio of effective fear-quenching tactics has been identified.

An ideal criminal justice model will be one that addresses as holistically and comprehensive as possible a wide array of crime's causes and consequences and resists the temptation to focus exclusively on eradicating any one. It will be a highly pliable, dynamic, enlightened and responsive entity that adjusts its philosophy and practice as variations in its social context demand.[294] On the one hand, it will recognise the necessity of punishing and containing offenders under fitting circumstances in order to properly address crime's social consequences.[295] On the other hand, it must do more; an ideal criminal justice system will additionally seek to resolve – as much as a criminal justice system *can*[296] – crime's *social* causes, such as low residential cohesion and collective energy. It does so for two distinct reasons: first, because their suppression is likely to provide *some* crime-control value (albeit unquantifiable) and second, because they are generally negative societal hindrances in their own rights that cultivate a destructive collective *emotional* mindset amongst residents.

To summarise, this chapter has illustrated that fear of crime is a particularly vitriolic social phenomenon. It is undoubtedly a negative condition in its own right – it is, after all, an emotion that is built around stress and alarm. Moreover, despite its limited diagnostic social functionality,[297] it provokes knock-on conditions such as mutual mistrust and social division, which are – regardless of *their own* knock-on impact – independently undesirable afflictions for any community.

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[292] Sacco, *loc. cit.*
[293] Furstenberg, "Fear of Crime and its Effects on Citizen Behavior" in Biderman, ed., *Crime and Justice* (Nailburg, 1972) 83.
[294] *Supra*, at 1; *infra*, at 378-379, 387.
[295] *Infra*, at 214-215, 329-335, 378-383.
[296] *Infra*, at 256.
[297] *Supra*, at 125.

However, fear of crime is particularly problematic because as a *consequence* of crime, its aforementioned penchant for social atomisation also makes it a potential *cause* thereof.[298] Accordingly, it shares a reciprocal "feedback" relationship with crime itself that is catalysed by universally adverse social afflictions such as social mal-integration and waning collective efficacy. Fear of crime's variously socially-destructive character clarifies the case for its suppression.

The chapter finally identified three principal modes of suppressing fear of crime, or at the very least keeping it within proportionate levels – those that mirror crime's objective social reality. These are reintegrating society, improving collective efficacy and educating residents. Importantly, the potential fulfilment of these three tasks yields sufficient independent social merit to justify criminal justice's dedication thereto irrespective of their potential to either moderate fear of crime and/or control crime itself. Just as it can be said that fear of crime, like pain, is a generally negative deviation from a state of well-being, social integration and collective efficacy can be considered generally positive social phenomena that are integral to a society's health.

Nevertheless, it is the *combination* of the potential benefits of this fear-suppressive trinity that create the most cogent case for making the alleviation of residents' collective fear of crime a realistic goal for criminal justice. It is possible that (a) their innate desirability, (b) their fear-reductive ability and (c) their crime-control potential may arguably exert the *most* socially ameliorative effect in (a) the most generally underprivileged, (b) the most fear-troubled and (c) the most crime-riven communities respectively. However, every one of these benefits can be said to be generally socially desirable in and of itself, *in any community* and regardless of the correlation between residents' fear of crime and crime's objective threat.

As the following chapters will explain, encountering restorative justice means that the search for an adaptable, holistic justice model that can provide these diverse social advantages is over.

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[298] *Supra*, at 159-168.

Chapter 5

Restorative Justice Holds the Equation for Emotional Healing: [Involvement + Knowledge = Empowerment]

> [T]o be effective, restorative justice needs to recognize the legitimate emotions of those who have been harmed by the offender's actions, provide a means for the expression of these emotions, and create a forum in which the harm caused can be repaired to the satisfaction of those who have directly experienced the harm.[1]

1. Introduction

Previous chapters have considered the typical emotional responses that crime elicits from those who perceive its effects either directly or indirectly. Chapter 3 charted crime's various emotional repercussions for victims and offenders. Then, in Chapter 4, fear of crime was targeted as the principal means by which residents tend to experience crime's indirect emotional shockwaves on a collective, community basis.

The foregoing analysis has revealed how the emotional negativity provoked by crime, whether it is indignity, humiliation or fear and whomever its host, is broadly socially destructive. Offenders' ouster from mainstream society,[2] victims' stigmatisation and marginalisation from criminal justice[3] and crime's destruction of social attachment[4] all inspire social retreat and division. They destroy the harmonious relations and the inter-resident trust and tolerance that are so vital to collective efficacy – the raw material of informal social-control.[5]

Aside from identifying the *kinds* of emotional responses traditionally stimulated by crime, Chapters 3 and 4 have also explored the *processes* by which crime arouses them, paying particular attention to the roles of fluctuating social dynamics such as social integration and collective efficacy. Chapter 4 exposed the devastating impact that waning levels of these crucial social balancers exert first, on the fragile collective emotional equilibrium of the community and second, on residents' shared propensity for informal social-control. The preceding two chapters have provided a lexicon of crime-induced psychological experience and its wider social implications.

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[1] Strang, "Is Restorative Justice Imposing its Agenda on Victims?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 94, at 94.
[2] *Supra*, at 111-122.
[3] *Supra*, at 88-110.
[4] *Supra*, at 129-158.
[5] *Supra*, at 174-176.

Like Chapter 4, this chapter focuses on the informal and community-centric dimensions of restorative justice. While expressions of "community justice" cannot presumptively be equated with restorative justice, the latter places considerable emphasis on the role of community in alleviating crime's adverse side-effects.[6] Similarly, informal justice is not necessarily synonymous with restorative justice and *vice versa*,[7] even though restorative justice has customarily assumed informal, community-level expressions throughout history.[8]

While informality has become an habitual, intuitive feature of restorative practices throughout their historical evolution and has prompted restorative justice's modern classification as one expression of informal social-control,[9] it is *not* an indispensable component of restorative justice's value-system; informality has certainly become a long-established priority to restorative justice but not one whose dilution would strip a given strategy of its restorative character.

1.1 Heal How? Restorative Justice Empowers

This chapter demonstrates that the emotionally therapeutic ability of community-embedded restorative strategies such as VOM and ORPs lies in their *empowering* potential for crime's main stakeholders – victim, offender and community. It attributes such techniques' talent for multi-party empowerment to their concurrent tendencies to (a) *involve* and (b) *educate* those passing through their ranks.

The link between restorative justice's capacity for empowerment and its emotionally palliative potential rests on the important premise that crime's emotionally depreciative side-effects for its various co-participants share one important characteristic: they all exert a *disempowering* impact on their sufferers.[10] Crime stimulates individual and group-level perceptions of incapacity which, real or imagined, tend to live out their prophecies. Crime enfeebles victims and offenders individually and disempowers the residents of the communities it troubles on a collective level.

So, as Chapter 3 explained, this powerlessness – this personal or collective social paralysis that can afflict crime's stakeholders – provides a category under which crime's various psychological symptoms can be organised.[11] Perceptions of indignity, embarrassment, elevated vulnerability to crime and low self- or collective efficacy all

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[6] *Supra*, at 8-11.
[7] *Supra*, at 22; *infra*, at 241-242.
[8] *Supra*, at 49-86; *infra*, at 273-275.
[9] *Supra*, at 147.
[10] *See* Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 1990), at 52-57.
[11] *Supra*, at 87.

constitute the emotional manifestations of the deeper psychological pathology of disempowerment, which people contract from their encounters with crime.

Restorative justice can moderate feelings of disempowerment first, thanks to its ability to *involve* all parties holistically in the resolution of crime's adverse effects and second, because of the *education* that such involvement inevitably brings.[12] This is captured in the simple tripartite equation entitling the present chapter: "Involvement + Knowledge = Empowerment". This chapter describes how restorative justice's typically informal, community-centric pursuit of meaningful inter-party reconciliation provides a potentially effective means by which feelings of powerlessness might be transformed into empowerment, confidence and control.

The chapter also explains how the involvement and knowledge offered by restorative initiatives such as VOM hold appreciable potential to reverse crime's disempowering emotional imprints on victims, offenders and communities. Restorative justice restores victims' senses of confidence, autonomy and dignity, all of which are corroded by (a) their social stigmatisation,[13] (b) their fear of re-victimisation[14] and (c) their overpowerment by offenders[15] – a trio of negative events that tend to afflict people during and after their victimisation. Offenders too are empowered emotionally by restorative justice's assault on the emotionally hazardous consequences of labelling.[16] Finally, residents are empowered communally by restorative justice's fear-suppressive potential, which transforms feelings of precaution, panic and retreat[17] into awareness, authority and a conjoint mobilisation against common threats such as crime.[18]

This chapter concludes that court-annexed restorative justice provides a potentially valuable method of alleviating crime's adverse emotional afflictions for its stakeholders. Restorative justice's empowering ability in this respect imbues its non-curial, mediative practical expressions with a deserved hue of optimism, which underlies this thesis' ultimate endorsement of a hybrid model of restorative criminal justice in Ireland. However, as Chapter 6 later advises, the optimism mustered in this chapter about restorative justice's prospects in this country must be tempered by a justifiable, though *manageable* note of caution.[19]

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[12] *Infra*, at 190-214.
[13] *Supra*, at 88-94; *infra*, at 196-205.
[14] *Supra*, at 133-134; *infra*, at 197-198, 205-207.
[15] *Supra*, at 88-90; *infra*, at 207.
[16] *Supra*, at 111-122; *infra*, at 208-214.
[17] *Supra*, at 147-149.
[18] *Infra*, at 215-223.
[19] *Infra*, at 250, 258-259.

1.2 Why Heal? Recalling the Social Benefits of Emotional Healing

It is worth re-asserting here the social significance of restorative justice's emotionally therapeutic potential. Chapter 1 introduced the prioritised duo of social benefits that is summoned when restorative justice frees a resident-base from some degree of its shared crime-induced trauma.[20]

First and foremost, releasing residents from damaging emotions such as indignity, shame, embarrassment, humiliation and fear possesses an obvious degree of inherent social merit; these are, after all, generally undesirable sources of emotional distress and their suppression *cannot but* be beneficial to the combined emotional well-being of the community at large.

Secondly, as Chapter 4 indicated, neutralising the mental adversity that sponsors scepticism, mistrust, precaution and retreat is bound to yield positive rewards for social integration and collective efficacy – broadly beneficial societal attributes.[21] This undeniable social value is a relatively straightforward, yet amply sufficient justification for the use of restorative justice. As Chapter 1 stressed, no more *must* be proven with respect to restorative justice's abilities in order to incorporate it legitimately into existing criminal practice.[22]

However, this is not to suggest that restorative justice is incapable of towing along in its wake an accompaniment of *fringe benefits* that also feed the resolve to use it. As Chapters 1 and 4 indicated, restorative justice holds ascertainable, though probably immeasurable, potential to control crime.[23] While this is merely a by-product or *bonus* of restorative justice's more dominant agenda to pursue emotional catharsis for crime's stakeholders, it is still significant because it stands to *bolster* restorative justice's credibility, which, given the potential for attitudinal resistance to its innovative techniques,[24] is a task of considerable importance. Restorative justice's crime-control potential will be explored later where its ability to suppress primary deviance as an off-shoot of its fear-control mandate and secondary deviance as a result of its rehabilitative attack on the labelling of offenders[25] is demonstrated.[26]

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[20] *Supra*, at 32-33.
[21] *Supra*, at 168-179.
[22] *Supra*, at 33.
[23] *Supra*, at 19-20, 33-36, 168-179.
[24] *Infra*, at 337-359.
[25] *Infra*, at 208-214, 253.
[26] *Infra*, at 215-223, 253.

After tendering a preliminary overview of the two key court-annexed restorative strategies backed throughout this thesis, this chapter will proceed to evaluate restorative justice's empowering potential for victim and offender in crime's emotionally turbulent aftermath. The chapter then turns to scrutinise restorative justice's potential for empowering whole communities whose communal emotional responses to crime were illuminated in Chapter 4.

1.3 What Heals? VOM and ORPs as the Weapons of Choice against Post-Crime Trauma: "Bargaining in the Shadow of the Law"[27]

The emotionally palliative potential of *court-annexed* techniques of restorative justice is demonstrated in this chapter. This thesis favours these particular *semi-curial* manifestations of restorative justice for six principal reasons: (a) they maintain the state's role in criminal justice,[28] (b) they conquer net-widening,[29] (c) they protect the defendant's procedural rights,[30] (d) they safeguard sentencing consistency,[31] (e) they give comprehensive effect to restorative justice's colourful value-system,[32] and (f) they have been used with considerable success just beyond the margins of Irish criminal justice officialdom.[33]

Two particular strategies of court-appended restorative justice are specifically endorsed herein on the basis of their ability to implement jointly a comprehensive restorative value-system as well as the optimism to be derived from their experimental, limited *yet promising* use around the fringes of adult criminal justice in Ireland.[34] These are VOM (Victim-Offender Mediation) and ORPs (Offender Reparation Projects).

As always, optimism that is drawn impulsively from superficially propitious statistical data must be tempered with restraint; as Chapter 1 explained, the relative newness of restorative justice's "second coming" dilutes in strength the paradigm's most celebrated *prima facie* statistical successes.[35] Again, optimism about restorative justice is enrobed in a shroud of caution. Nonetheless, as Chapter 8 illustrates, while the empirical successes of the Irish pilot schemes must be contextualised and moderated with realism having regard to their

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[27] This phrase was adopted by Mnookin and Kornhauser to describe the informal mediation of divorce cases: Mnookin and Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950; see also, Alfini and McCabe, "Mediation in the Shadow of the Courts: A Survey of the Emerging Caselaw" (2001) 54 *Arkansas Law Review* 171.
[28] *Infra*, at 335-336.
[29] *Infra*, at 236.
[30] *Infra*, at 237-243.
[31] *Infra*, at 327.
[32] *Infra*, at 187-189.
[33] *Infra*, at 310-319.
[34] *Ibid.*
[35] *Supra*, at 19-20.

youth and restricted scope, it is undeniable that their achievements are impressive and provide considerable hope and inspiration about the way forward for Irish criminal justice.[36]

The emotionally cathartic potential of court-appended restorative techniques such as VOM and ORPs is attributed simply to their community-level merger of victim and offender rather than any *specific* procedural trait of either. As Chapter 4 stressed, court-referred restorative forums fall neatly under the heading of informal social-control or "community crime prevention",[37] due to the degree of residential involvement they invite and their rehabilitative, restorative agendas. Their emotionally-soothing impact over crime's various stakeholders derives from their grass-roots basis, as offenders are "outsourced" from the formal court-system into their communities of care for customised, therapeutic intervention.

An in-depth consideration of the ideal *procedural* features of these twin tactics of court-annexed restorative justice is delayed until Chapter 9 where it is argued that a modified version of the pilot referral system currently operating in Ireland should be afforded an official, nationwide footing.[38] A cursory overview of their various procedural commonalities will suffice for the purposes of this chapter.

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Recalling the defining components of restorative justice's value-system outlined throughout Chapters 1 and 2,[39] VOM and ORPs are enmeshed in a shared ethos of informal victim-offender confrontation, reparation, rehabilitation, reconciliation and disputant-"ownership" of conflict. However, their *philosophical* commonalities have spawned a corresponding range of *procedural* parallels. Both techniques involve the referral of offenders from the official state-courts for restorative intervention under the jurisdiction of informal, resident-driven community forums.

Residentially composed community panels[40] decide on the nature and degree of restorative intervention required for every offender. They frame "actions plans" for offenders that contain a list of reparative and rehabilitative tasks to be performed within a prescribed time-frame.[41] A performance report is prepared and forwarded to a sentencing judge who, if

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[36] *Infra*, at 316-319.
[37] *Supra*, at 147.
[38] *Infra*, at 362-386.
[39] *Supra*, at 5-8, 49-86.
[40] *See* Cunneen, *Nenagh Community Reparation Project Evaluation 2004* (Probation and Welfare Service, 2004), at 20-21; for an overview of restorative strategies involving community reparative boards and neighbourhood or "citizen" panels, see Schiff, "Models, Challenges and The Promise of Restorative Conferencing Strategies" in von Hirsch, Roberts, Bottoms, Roach and Schiff eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart, 2003) 313, at 323-324; Kurki, "Evaluating Restorative Justice Practices" in von Hirsch, Roberts, Bottoms, Roach and Schiff eds., *op. cit.* 292, at 304-306.
[41] *Infra*, at 312.

an offender's compliance is deemed inadequate, will consider the appropriateness of further restorative and/or punitive sanctions. Offenders who satisfy the demands of the community panel are released without conviction or further curial punishment.

While both VOM and ORPs are endorsed herein, VOM holds special significance and is therefore favoured as a first resort restorative device throughout the course of this chapter. First, VOM is more likely to accommodate real-time, contemporaneous verbal exchanges between victim and offender. It accents face-to-face dialogue, which facilitates mutual understanding and consensus and ultimately promotes apologetic ritual better than less direct avenues of victim-offender discourse.

On the other hand, while ORPs certainly encourage victim-involvement and often provide for mediative techniques, unlike VOM, they can still proceed in the victim's absence. In fact, over a year-long period between 2003 and 2004, not one victim took part in a pilot ORP running in Ireland.[42] While they certainly assist those crime victims who agree to participate, ORPs can equally exist simply for the purposes of reforming offenders. This indicates, as does their name, that ORPs – *Offender* Reparation Projects – place more emphasis on assisting wrongdoer than wronged.

It might be assumed that this shift in favour of one particular stakeholder denudes ORPs of a measure of their restorative character by defying the ethic of holistic, balanced support governing restorative justice's value-system. Chapters 1 and 6 demonstrate that processes claiming to administer restorative justice while abandoning or subverting the interests of either victim or offender could be "restorative justice" in name only.[43] Yet, ORPs' preference for offenders' interests serves a very practical function, which does not purport to limit victims' rights in the name of a "zero-sum" exploitative attempt to assist their victimisers.

Instead, ORPs are designed for circumstances in which victims' interests cannot be met as comprehensively as under VOM. This occurs where a victim refuses *any* restorative interaction whatsoever with their offenders or where a victim assents only to *indirect* contact, such as by mail or by proxy, that excludes them from VOM. It also arises where there is no ascertainable victim of a certain offence. Under all of these circumstances, ORPs offer essential "back-up" support to offenders who would otherwise be deprived of restorative assistance. In such an event, ORPs ensure that the absence of a victim to whom offenders' acts of atonement can be directed will not deny offenders a viable avenue of reform through rehabilitative tasks.

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[42] Cunneen, *Nenagh Community Reparation Project Evaluation 2004* (Probation and Welfare Service, 2004).

[43] *Supra*, at 7-8; *infra*, at 232-233, 242-243.

Therefore, ORPs' restorative character remains intact despite their perceived favouritism for offenders, because of the *impossibility* of implementing a full restorative value-system; impossibility *is* a valid defence to a strategy's incomplete restorative agenda and does not undermine its administration of restorative justice.[44]

1.3.1 VOM in Context: A Recent History of an Ancient Device

VOM seeks to achieve *emotional* restoration for crime's various stakeholders.[45] As revealed later on in this chapter, it does so by facilitating post-crime apologetic ritual, which is capable of involving, educating and thereby *empowering* victims and offenders.[46] In terms of its origins, Chapters 2 revealed that VOM has taken place in practice, though not in name, throughout the legal traditions of numerous world religions and indigenous peoples.[47] Uniting victim and offender in therapeutic spirit has long been considered an obvious, intuitive step in repairing the inter-personal relationships that crime fractures to jeopardise wider social harmony.[48]

VOM underwent its most recent *official* disinterment in Kitchener, Ontario, Canada in 1974, [49] an event that has been held responsible for "rekindling" modern interest in restorative justice in the West.[50] VOM was subsequently adopted in the United States in the late 1970s[51] after which it thrived for decades in the guise of *Victim Offender Reconciliation Programs* (VORPs).[52]

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[44] *Supra*, at 66-67.

[45] On VOM generally, see Mika, "Special Issue: Victim-Offender Mediation: International Perspectives on Research, Theory and Practice" (1995) 12(3) *Mediation Quarterly* 199; Messmer and Otto, *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation* (Kluwer, 1992); Gehm, "Victim and Offender Face to Face" (1995) 59 *Federal Probation* 94; Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (Criminal Justice Press, 1994); Umbreit, *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research* (Jossey-Bass, 2001); Robinson, *Victim Offender Mediation: Limitations and Potential* (Centre for Criminological Research, University of Oxford, 1996).

[46] *Infra*, at 190-196.

[47] *Supra*, at 49-86; for an overview of restorative justice's predominance as a natural response to crime in many societies, see Braithwaite, "Restorative Justice" in Tonry ed., *The Handbook of Crime and Punishment* (Oxford University Press, 1998) 323.

[48] *Supra*, at 49-86.

[49] The Canadian Mennonite Church was behind the first real modern attempt to revive indigenous restorative traditions back in 1974: *supra*, at 19, n. 103: see Zehr, *op. cit.*, at 158-160; Peachey, "The Kitchener Experiment" in Wright and Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Sage, 1989) 14; Roberts and Roach, "Restorative Justice in Canada" in von Hirsch, Roberts, Bottoms, Roach and Schiff eds., *op. cit.* 237, at 239-240.

[50] Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" (1999) 25 *Crime and Justice* 1, at 2.

[51] VOM was first used in the United States in Elkhart, Indiana through an organisation called *Prisoners and Community Together*.

[52] Zehr, *op. cit.*, at 158-174; Price, "Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders" <http://www.vorp.com/articles/justice.html> (visited 12 October 2005); Niemeyer and Shichor, "A Preliminary Study of a Large Victim/Offender Reconciliation Program" (1996) 60 *Federal Probation* 30.

VOM has become increasingly widespread in both its geographical ambit and the kinds of criminal matters to which it has come to be applied.[53] Despite their plentiful manifestations and whether court-annexed or community-instigated, all victim-offender programmes share common features. First, they all embody the main characteristics of mediation: "an alternative to adjudication in which a neutral third party who has no final decisionmaking authority intervenes in negotiations to assist resolution of conflict".[54] Implied in this formula is the obvious, eponymous dynamic of direct victim-offender dialogue.[55] Finally, the entire process is guided by a supervisory restorative philosophy that seeks to attain emotional closure[56] for all those touched by crime through reparation, reconciliation, rehabilitation and reintegration.

There is a variety of peace-making strategies within the worldwide administration of criminal justice, all of which implement restorative value-systems. Family Group Conferencing,[57] Truth and Reconciliation Commissions (TRCs),[58] Juvenile Reparation Orders[59] and Restorative Cautioning[60] are all restoratively directed and hold considerable potential for multi-party emotional catharsis. VOM, however, has a special affinity with restorative justice thanks not only to its inter-personal apologetic potential, but also to the length of its history therewith compared to other non-curial resolutionary tactics. Still, disregarding its ancient religious and cultural roots, one might marvel at the pace of restorative justice's modern resurrection. Mark Umbreit refers to VOM as "the most widely

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[53] *Supra*, at 81-83; *infra*, at 385.
[54] Levi, "The Role of Apology in Mediation" (1997) 72 *New York University Law Review* 1165, at 1169.
[55] Gehm, "Victim and Offender Face to Face", *loc. cit.*
[56] *See* Strang and Sherman, "Repairing the Harm: Victims and Restorative Justice" (2003) 15 *Utah Law Review* 15, at 33.
[57] *Supra*, at 81; *infra*, at 266; see generally, Dignan and Marsh, "Restorative Justice and Family Group Conferences in England: Current State and Future Prospects" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.* 105; Umbreit and Stacey, "Family Group Conferencing Comes to the US: A Comparison with Victim Offender Mediation (1996) 47(2) *Juvenile and Family Court Journal* 29; Moore and O'Connell, "Family Conferencing in Wagga Wagga: A Communitarian Model of Justice" in Alder and Wundersitz eds., *Family Conferencing and Juvenile Justice* (Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, 1994) 15; Griffiths and Taylor, "The Victims of Crime and Restorative Justice: The Canadian Experience" (1999) 6(4) *International Review of Victimology* 279, at 283-287; Morris and Maxwell, "Restorative Justice in New Zealand: Family Group Conferences as a Case Study" (1998) 1(1) *Western Criminology Review*. <http://wcr.sonoma.edu/v1n1/morris.html>
[58] *Infra*, at 202-205.
[59] *See* the United Kingdom's Crime and Disorder Act, 1998; Mediation UK, *The Rough Guide to Restorative Justice and the Crime & Disorder Act* (Mediation UK, 2001); Masters, "What Happens When Restorative Justice is Encouraged And/Or Guided by Legislation?" in Zehr and Toews eds., *op. cit.* 227, at 232-237.
[60] *Infra*, at 319-323; Young and Goold, "Restorative Police Cautioning in Aylesbury – from Degrading to Reintegrative Shaming Ceremonies?" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.* 94; Hoyle, Young and Hill, *Proceed With Caution: An Evaluation of Police Led Restorative Justice* (Joseph Rowntree, 2002); Wilcox, Young and Hoyle, *Two Year Resanctioning Study: A Comparison of Restorative and Traditional Cautions*, Home Office Online Report 57/04 (Home Office, 2004) <http://www.homeoffice.gov.uk/rds>

developed expression of restorative justice, with more than 25 years of experience and numerous studies in North America and Europe".[61]

VOM has been widely studied, both from abstract, theoretical perspectives and by way of concrete, empirical analysis of existing VOM initiatives around the world, particularly in Australasia,[62] North America[63] and the United Kingdom.[64] For the purposes of this study, it is not necessary to probe in any far-reaching way the *procedures* that embody VOM in different cultural and legal settings. Instead, the core argumentative thrust of this research relies mainly on VOM's simple ability to unite victim and offender. From the mere *coming together* of wrongdoer and wronged – the primary achievement of VOM – a hive of debate on the potential restorative results of inter-disputant confrontation is launched.[65] This chapter's key submissions then, are rooted in the hypothetical individual and global repercussions of victim meeting offender in a court-annexed restorative forum.

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[61] Umbreit, *What is Restorative Justice*? (Centre for Restorative Justice & Mediation, University of Minnesota), at 1. <http://2ssw.che.umn.edu/rjp/resources/documents/cumb99c.pdf> (visited 29 October 2005).

[62] Goodyer, "Rethinking Justice in New Zealand – A Critical Assessment of Restorative Justice" (2003) 9 *Canterbury Law Review* 179; Morris and Maxwell, "Restorative Justice in New Zealand" in von Hirsch, Roberts, Bottoms, Roach and Schiff eds., *op. cit.* 257; Braithwaite, "Resolving Crime in the Community: Restorative Justice Reforms in New Zealand and Australia" in Martin ed., *Resolving Crime in the Community: Mediation in Criminal Justice* (Institute for the Study and Treatment of Delinquency, 1994) 5.

[63] *See* Umbreit, Coates and Vos, "The Impact of Victim-Offender Mediation: Two Decades of Research" (2001) 65 *Federal Probation* 29; Umbreit and Coates, "Cross-Site Analysis of Victim-Offender Programs in Four States" (1993) 39(4) *Crime and Delinquency* 565; Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation*, *op. cit.*; Umbreit, "Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment" (1998) 1(1) *Western Criminology Review*. <http://wcr.sonoma.edu/v1n1/umbreit.html>; Umbreit, "The Development and Impact of Victim-Offender Mediation in the United States" (1995) 12(3) *Mediation Quarterly* 263.

[64] Umbreit and Roberts, *Mediation of Criminal Conflict in England: An Assessment of Services in Coventry and Leeds* (Centre for Restorative Justice & Mediation, University of Minnesota, 1996). <http://ssw.che.umn.edu/vjp/resources/resource.htm> (visited 20 March 2005); Ruddick, "A Court-Referred Scheme" in Wright and Galaway eds., *op. cit.* 82; Doolin, Enterkin, Goldie, Hale, Maguire, Netten, Newburn, Sharpe, Uglow and Miers, *An Exploratory Evaluation of Restorative Justice Schemes* (Home Office, 2001); Marshall, "Restorative Justice on Trial in Britain" in Messmer and Otto eds., *op. cit.* 15; Wynne, "Leeds Mediation and Reparation Service: Ten Years Experience with Victim-Offender Mediation" in Galaway and Hudson eds., *Restorative Justice: International Perspectives* (Criminal Justice Press, 1996) 445.

[65] *See* Williams, "Negotiation as a Healing Process" (1996) 1 *Journal of Dispute Resolution* 1.

2. VOM Empowers Victims and Offenders

2.1 Empowerment and Healing through Apologetic Ritual

Party-centric strategies like VOM can heal aggrieved victims and offenders by empowering them in two distinct ways. First, restorative justice *involves* victims and offenders. By affording them a central participatory role in rebuilding crime's wreckage, it allows them to *experience justice directly* instead of sifting through second-hand information from the side-lines of curial process:

> When someone simply informs us that justice has been done and that we should now go home (as victims) or to jail (as offenders), we do not experience that as justice. Justice which is actually lived, experienced, may not always be pleasant. But we will know that it has happened because we have lived it rather than having it done for us. *Not simple justice, but the experience of justice must occur.*[66]

Secondly, victims and offenders are empowered by the heightened knowledge and awareness that increased involvement brings:

> An important part of justice is the exchange of information—about each other, about the facts of the offense, about needs. Victims want answers to their questions about what happened, why it happened, and who did this thing. Offenders need to understand what they have done and to whom. Faces should take the place of stereotypes ... The exchange of such information is crucial, and ideally, it can occur through direct interaction ... Mediation between victim and offender is one approach to justice which meets these criteria. Victim-offender mediation empowers participants, challenges misattributions, provides for an exchange of information, and encourages actions aimed at making right.[67]

Restorative techniques such as VOM – through the empowerment that accompanies the degree of involvement and knowledge they offer – boost participants' sense of self-determination, self-efficacy and personal and social worth. They can thereby reverse the mental negativity embodied in the self-deprecation, shame and fear that previous chapters have charged crime with stirring.

This high degree of involvement and understanding that community-level restorative interventions offer victims and offenders, thereby extending to them a trove of empowering potential, is thanks largely to such strategies' accommodation of *apologetic ritual* – the exchange of apology and forgiveness between disputants.

The value of apology and forgiveness lies in their potential, when combined, to encourage participants' *involvement* in remedial dialogue, which in turn, *educates* them about crime, offenders and even themselves, in the admittedly lofty hope of achieving full

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[66] Zehr, *op. cit.*, at 203. [emphasis added].
[67] *Ibid.*, at 204-205.

emotional restoration for victim and offender. [68] This section offers a brief, philosophical overview of the symbiotic twosome of apology and forgiveness. Each phenomenon will be analysed separately for its general benefits. Then, the paradigms will be merged and considered in tandem as twin elements of one cohesive ritual. Their combined therapeutic synergy can then be evaluated.

2.1.1 An Overview of Apology

> At heart, the apology depends on a paradox. No matter how sincere, an apology cannot undo what was done, and yet "in a mysterious way and according to its own logic, this is precisely what it manages to do".[69]

Apology has been defined as a "speech act" that should contain the words "apologise" or "sorry".[70] Elsewhere, it has been argued that "[w]hatever else is said or conveyed, an apology must express sorrow."[71] These simple and relatively inclusive formulations suffice to describe the superficial aspects of an apology appropriate to this section. They resist absorbing stipulations as to sincerity or motivation, as more elaborate definitions tend to do. The implications of these secondary features will be assessed at a later stage.[72]

This section summarises apology's general benefits. As such, it concentrates on what apology *does* rather than probing the metaphysical profundity of what it *is*. Apology's most significant function is its ability to offer emotional closure to victims and offenders alike.[73] It forms a crucial first leg of an apologetic "ritual" or "ceremony" which, when completed by the victim's forgiveness, exerts an empowering and reconciliatory effect over both wrongdoer and wronged.

With respect to its empowering ability, apology can be conceptualised as a valuable mode of power redistribution between victim and offender.[74] The psychological plight of crime victims in the wake of victimisation was described in Chapter 3, which comprehensively analysed and catalogued the sources of crime victims' internalised sense of

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[68] Marshall and Merry eds., *Crime and Accountability: Victim-Offender Mediation in Practice* (Home Office, 1990), at 182-185; Dignan, "Repairing the Damage: Can Mediation Be Made to Work in the Service of Diversion?" (1992) 32 *British Journal of Criminology* 453, at 460; Maxwell and Morris, *Family, Victims and Culture: Youth Justice in New Zealand* (Victoria University, 1993), at 117-118; Strang, *op. cit.*, at 113-118; Strang and Sherman, *loc. cit.*

[69] Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, 1991), at 5.

[70] This definition is offered by Owen and cited by Heather Strang: Strang, *op. cit.*, at 21.

[71] Tavuchis, *op. cit.*, at 36.

[72] *Infra*, at 240-241.

[73] *See* Lavery and Achilles, "Apologies: Balancing the Needs of Victims and Offenders" (1999) 3 *VOM Connections* 6, 10.

[74] Price, *loc. cit.*

powerlessness. It targeted three potent contributors to their sense of social and legal weakness and vulnerability to exploitation: first, the experience of direct victimisation itself,[75] second, society's stigmatising response thereto[76] and third, victims' "secondary victimisation" by the legal system.[77]

This chapter advocates the use of apologetic justice in re-calibrating power differentials between victim and offender, but also between victim and state. The peculiar means by which apologetic dialogue exerts its empowering influence will be explained later when addressing in finer detail the emotionally ameliorative benefits of restorative initiatives for victim and offender respectively.[78]

Apology boasts dual sources of psychological therapy; in addition to its talent for empowerment, it can heal crime's emotional wounds through its *reconciliatory potential.* The literature that evaluates VOM as a vehicle of apologetic justice deposits a weighty accent not only on the individual emotional restoration obtained through the receipt of apologetic or forgiving "speech-acts", but more generally on the interpersonal "reconciliation" that VOM can facilitate. The soldering of once shattered social relationships, not only between victim and offender but between mainstream society and offender, complements the personal emotional succour obtained by each party individually. As Wagatsuma and Rosett conclude straightforwardly in their landmark article on apologetic culture in Japan, "apology is an important ingredient in resolving conflict".[79]

Jonathan R. Cohen volunteers a residual, catchall miscellany of apology's curative effects.[80] Aside from its empowering and reconciliatory roles, Cohen commends apology's ability to "subtract insult from injury", reduce the likelihood of future antagonistic behaviour between the parties, and promote spiritual and psychological growth.[81]

A core contributor to apology's ability to promote inter-party consensus, is its encouragement of forgiveness, a capacious resource for resolutionary strategies that holds massive healing potential. While the offer of an apology constitutes a key means of eliciting forgiveness, this will happen neither always, nor predictably:

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[75] *Supra*, at 88-90.
[76] *Supra*, at 91-92.
[77] *Supra*, at 93-110.
[78] *Infra*, at 196-214.
[79] Wagatsuma and Rosett, "The Implications of Apology: Law and Culture in Japan and the United States" (1986) 20 *Law and Society Review* 461, at 493.
[80] *See* Cohen, "Advising Clients to Apologize" (1999) 72 *Southern California Law Review* 1009, at 1018-1023.
[81] *Ibid.*

> [T]he act of forgiving can never be predicted; it is the only reaction that acts in an unexpected way and thus retains, though being a reaction, something of the original character of action. Forgiving, in other words, is the only reaction which does not merely re-act but *acts anew and unexpectedly, unconditioned by the act which provoked it* and therefore freeing from its consequences both the one who forgives and the one who is forgiven. [82]

Nonetheless, Nicholas Tavuchis is correct to identify apology's main value as enshrined in its *potential* to inspire forgiveness and the vast remedial power it possesses:

> ...the singular achievement of apologetic discourse paradoxically resides in its capacity to effectively eradicate the consequences of the offense by evoking the unpredictable faculty of forgiveness.[83]

The point to be stressed at this early juncture is that apology is a device that is capable of producing emotional restoration effectively through empowerment and reconciliation. In its ability to repair both the relationships and the psychosomatic equilibrium that crime disturbs, apology is a valuable restorative resource. Nicholas Tavuchis, an eminent advocate of apologetic ritual, praises what he dubs "the almost miraculous qualities of a satisfying apology".[84]

It is to the emotionally palliative role of forgiveness, the pathway from apology to full reconciliation, to which this chapter now turns.

2.1.2 An Overview of Forgiveness

Forgiveness, in its most accessible state can be described as an expression of people's readiness to relinquish their natural and normal craving for revenge[85] against their victimiser. This is a popular reading of forgiveness that Desmond Tutu adopts in his exploration of the needs of South African victims of apartheid. He memorably construes forgiveness as "waiving one's right to revenge".[86] Similarly, Lerman endorses Robert Enright's belief that forgiveness indicates a "willingness to abandon one's right to resentment, negative

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[82] Arendt, *The Human Condition* (University of Chicago Press, 1958), at 241. [emphasis added]
[83] Tavuchis, *op. cit.*, at 6.
[84] *Ibid.*, at vii.
[85] On the normalcy of *initial*, pre-restorative justice vengeful desires provoked by victimisation, see generally, Murphy, "Two Cheers For Vindictiveness" (2000) 2(2) *Punishment and Society* 131; Murphy *et. al.*, *Ninth Annual Stein Center Symposium*, "The Role of Forgiveness in the Law" (2000) 27 *Fordham Urban Law Journal* 1349, at 1360-1361; Strang, *loc. cit.*, at 101, 103; Still, restorative justice ultimately seeks the suppression of vengeful sentiments through forgiveness: see Munn, "Restorative Justice: An Alternative to Vengeance" (1993) 20 *American Journal of Criminal Law* 99.
[86] *See generally*, Tutu, *No Future Without Forgiveness* (Rider, 1999); for additional approval of this revenge-based definition of forgiveness, see generally, Arendt, *op. cit.*; see also, Murphy *et. al.*, *loc. cit.*, at 1353-1358.

judgement, and indifferent behavior toward one who unjustly injures us."[87] Finally, Martha Minow, in her impressive evaluation of retributive and restorative responses to mass atrocities, asserts that "[t]hrough forgiveness, we can renounce resentment, and avoid the self-destructive effects of holding onto pain, grudges and victimhood".[88] However, as important as attempting to identify what forgiveness *is*, is the task of clarifying what it *is not*.

There are several ways in which victims react to crime that are easily mistaken for forgiveness. Murphy stresses, for example, that conceding that one's victimisation was justified or excused on legitimate grounds is not and should not be confused for forgiveness.[89] Under such circumstances, there is effectively nothing to forgive because the offence was justified (e.g. by self-defence) or excused (e.g. by the defence of insanity): the mental element of the would-be criminal transgression is absent.

> Another concept from which forgiveness must be distinguished is reconciliation. Because forgiveness is often a precursor to reconciliation, the two paradigms are easily confused. Though forgiveness is capable of fostering sincere inter-party amends, both concepts are mutually exclusive: a victim can offer forgiveness without seeking to reconcile with his offender. Moreover, there can be reconciliation without forgiveness, where disputants arrive at a truce – a mutual undertaking to end conflict while refraining from forgiving.[90]

A striking instance of reconciliation without forgiveness is the outcome of the South African Truth and Reconciliation Commission.[91] The commission was instated to oversee and enable South Africa's transition from apartheid to democratic government. To this end, it decided to resist prosecuting individuals for atrocities committed under the aegis of previous governmental action. Instead, amnesties were offered to those willing to come forward and admit responsibility for prior evil acts. [92] Wrongdoers escaped prosecution in return for full

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[87] Lerman, "Forgiveness in the Criminal Justice System: If it Belongs, Then Why is it So Hard to Find?" (2000) 27 *Fordham Urban Law Journal* 1663.

[88] Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press, 1998), at 14.

[89] *See* Murphy *et. al.*, *loc. cit.*, at 1355.

[90] McThenia and Shaffer, "For Reconciliation" (1985) 94 *Yale Law Journal* 1661.

[91] On the operation of the South African Truth and Reconciliation Commission, see generally, Minow, *op. cit.*, at 52-90; Sarkin, "The Truth and Reconciliation Commission in South Africa" (1997) 23(1/2) *Commonwealth Law Bulletin* 528; Asmal, "Truth, Reconciliation and Justice: The South African Experience in Perspective" (2000) 63(1) *Modern Law Review* 1; Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford Press, 2001); Markel, "The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States", *South Africa's Truth Commission: A Symposium* (1999) 49(3) *University of Toronto Law Journal* 389; Dyzenhaus, "Debating South Africa's Truth and Reconciliation Commission" (1999) 49(3) *University of Toronto Law Journal* 311; Hayner, "Fifteen Truth Commissions—1974 to 1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* 597, at 625-627, 632-634; *The Official Truth and Reconciliation Website.* <http://www.doj.gov.za/trc>; Biggar ed., *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, 2003).

[92] On the justice of amnesties, see Markel, *loc. cit.*; Goldstone, "Past Human Rights Violations: Truth Commissions and Amnesties or Prosecution" (1999) 51(2) *Northern Ireland Law Quarterly* 164.

confessions. This process sought to encourage the "letting go" of past events, gaining closure on decades of genocide and achieving emotional healing for those who suffered its effects. Its goal was to enable a mass advancement into a just and democratic future, leaving behind the pain of apartheid, while at the same time, refusing to forget its history.[93] What the TRC was not, was a framework for forgiveness:

> I do not so easily see this process as one of forgiveness, however. No change of heart was required or even sought from the victims—no overcoming of such vindictive feelings as resentment and hatred. All that was required of them was a willingness to accept this process as a necessary means to the future good of their society.[94]

Finally, in completing any overview of forgiveness, it is crucial to acknowledge its emotionally reparative effect. Like apology, forgiveness has much to offer in the way of reversing the disintegrative damage inflicted by crime, by re-knitting severed social connections between victim and criminal and the social subsets from which they are symbolically drawn.

> What is annulled in the act of forgiveness is not the crime itself but the distorting effect that this wrong has upon one's relations with the wrongdoer and perhaps with others.[95]

And, as Gorringe asserts, it is forgiveness' encouragement of inter-personal empathy through an understanding of the "mutuality of guilt" that enables it to mend ruptured social relations. Hence, forgiveness, by reattaching people to others and therefore to their communities, exerts an emotionally cathartic influence on each of the parties thereto.

> Forgiveness is not condoning or excusing. It is neither overlooking a wrong nor trying to forget about it … Rather, the real moment of forgiveness comes only when we consider the offender in new ways as a vulnerable person and look at the wrong as an event and not some ongoing trauma. *This will be the beginning of emotional healing, and at that point forgiveness is a creative act which heals by restoring people to community.*[96]

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[93] On the importance of remembering past atrocities, see Hamber, "Remembering to Forget: Issues to Consider when Establishing Structures for Dealing with the Past" in Hamber ed., *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition* (INCORE, 1998) 56.
[94] Murphy *et. al.*, *loc. cit.*, at 1357.
[95] North, "Wrongdoing and Forgiveness" (1987) 62 *Philosophy* 409, at 500.
[96] Gorringe, *God's Just Vengeance: Crime, Violence and the Rhetoric of Salvation* (Cambridge University Press, 1996), at 265. [emphasis added]

This reflects the common human understanding that an offender's most damaging feat is his violation of human relations rather than his transgression of state rules.[97] This implies that in seeking to resolve the effects of an offence, its relational damage must be addressed *as well as* its affront to state laws. This need becomes particularly urgent when one considers the secondary side-effects of the social disintegration produced by fragmenting social ties; Chapter 4 explained how a decline in social cohesion can destroy collective efficacy and informal social-control and generate even greater crime and a heightened fear of it amongst residents.

2.2 Restorative Justice Empowers Victims: Challenging Stigma, Fear and Domination

The most valuable outcome of a conflict resolution according to victims, above and beyond attaining material reparation,[98] is often *emotional* restoration.[99] That victims often emerge from crime in an emotionally disempowered state was a key finding of Chapter 3.[100] The sense of internalised weakness and passivity produced by social and legal stereotyping was identified as the prime emotional pandemic from which victims of crime typically suffer.[101] This section prescribes VOM as a potent antidote to victims' crime-induced emotional disempowerment.

VOM, such as that operating experimentally in Ireland[102] contains key ingredients necessary to reverse crime's disempowering results; the enhanced *involvement* and *knowledge* that VOM offers crime victims catalyses the reaction that transforms feelings of disempowerment into those of empowerment, self-efficacy and control:

> ... unless important stakeholders are actively involved in formulating an agreement or resolution, they will be less likely to feel ownership over it, will be less likely to be committed to honouring it, and will be less likely to feel satisfied with it.[103]

As Chapter 3 explained, Irish criminal justice has undergone a discernable reorientation towards recognising and safeguarding victims' rights over recent years.[104] This

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[97] Zehr, *op. cit.*, at 181-184; see also, Zehr and Mika, "Fundamental Concepts of Restorative Justice" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.* 40, at 41; *supra*, at 51.
[98] Strang and Sherman, *loc. cit.*, at 34.
[99] Marshall and Merry, *op. cit.*, at 182-185; Dignan, *loc. cit.*, at 460; Strang, *op. cit.*, at 88-118; Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation*, *op. cit.*, at 95-96; Strang, "Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration" in Morris and Maxwell eds., *Restoring Justice for Juveniles: Conferences, Mediation and Circles* (Hart, 2001) 183.
[100] *Supra*, at 88-94.
[101] *Ibid.*
[102] *Infra*, at 310-311.
[103] Barton, "Empowerment and Retribution in Criminal Justice" in Strang and Braithwaite eds., *Restorative Justice: Philosophy to Practice* (Ashgate, 2000) 55, at 66.
[104] *Supra*, at 103-109.

took place primarily through the adoption of Victim Impact Statements, a Victims' Charter and the provision for statutory and non-statutory compensation entitlements.[105] While these advances are certainly commendable for their underlying spirit, their *practical application* raises vexed issues and there is a danger that they might be perceived as little more than hollow attempts to appease victims' groups. Chapter 3 explains that all three advances are problematic. Because of the insufficient involvement and knowledge they offer, they fail to afford victims of crime the *type* of empowerment necessary for optimal emotional healing.[106]

More could certainly be done to assist victims in Irish criminal justice, which, as Chapter 3 lamented, still tends to exclude them from the "sanctity" of its inner caucus.[107] VOM, on the other hand, emerges as an effective means by which victims can reclaim an active role in crime's remedial aftermath. It offers crime victims the *right type* of empowerment by affording them high levels of involvement and knowledge. The emotional restoration that this provides reverses victims' internalised notions of weakness, inefficacy and vulnerability.

To enter one caveat here, care must be taken to strike a careful balance of victims' rights so as to ensure that they are sufficiently extensive to offer victims' adequate protection, respect and involvement yet not so broad that they infringe offenders' rights, breach standards of fundamental fairness, undermine judicial discretion or foster inconsistent sentencing.[108]

Apart from the legal system, Chapter 4 identified another important source of victims' disempowerment that is ripe for reversal by restorative justice. The fear of re-victimisation,[109] like most species of fear of crime, provokes social retreat, unnecessarily precautionary conduct and diminished perceptions of personal efficacy. It is important to recognise the fear-provoking impact of victimisation as *many* victims, though not all having regard to their varying coping abilities,[110] will experience some anxiety about re-exposure to crime and suffer the disempowering consequences thereof.[111]

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[105] *Ibid.*
[106] *Ibid.*
[107] *Supra*, at 108-110.
[108] *Infra*, at 323-324; see generally, O'Malley, "Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions" (1993) 3 *Irish Criminal Law Journal* 40; Erez, "Victim Participation in Sentencing: Rhetoric and Reality" (1990) 18 *Journal of Criminal Justice* 19; Erez and Tontodonato, "The Effects of Victim Participation in Sentencing on Sentencing Outcome" (1992) 9(3) *Justice Quarterly* 393; Joutsen, "Victim Participation in Proceedings and Sentencing in Europe" (1994) 3 *International Review of Victimology* 57; Rubel, "Victim Participation in Sentencing Proceedings" (1986) 28 *The Criminal Law Quarterly* 226.
[109] *Supra*, at 133-134.
[110] *Ibid.*
[111] *See* Skogan, "The Impact of Victimisation On Fear" (1987) 33(1) *Crime and Delinquency* 135, at 152; Yin, "Fear of Crime Among the Elderly: Some Issues and Suggestions" (1980) 27(4) *Social Problems* 492; Gomme, "The Role of Experience in the Production of Fear of Crime: A Test of a Causal Model" (1988) 30(1) *Canadian Journal of Criminology* 67; Scott, "Stranger Danger: Explaining Women's Fear of Crime"

Using Chapter 4's findings on crime's *collective* emotional results to understand *individual* experience, reveals an important reality: that residents' individual reactions to crime are the commingled ingredients of the collective emotional state of entire collectivities. Therefore, many micro-level popular responses to victimisation – in this case the fear of re-victimisation – amalgamate to contribute to a macro-level atmosphere of fear that can be attributed fairly to the whole community; the merger of popular individual reactions begets the shared psychological state of the community at large. As such, an important overlap between the foci of Chapters 3 and 4 materialises. Chapter 4 adds the fear of re-victimisation to Chapter 3's existing catalogue of victimisation's emotional side-effects.

There are three main methods by which VOM neutralises each of the core brands of emotional distress experienced by crime victims: by reversing the psychological impact of labelling, by alleviating the fear of re-victimisation and finally, by redressing the power imbalance between wrongdoer and wronged. Each method will be considered below.

2.2.1 VOM Reverses the Psychological Impact of Stigmatisation

Through its potential for apologetic discourse, VOM can defeat the enervating impact of self-labelling, by *empowering* primary victims.[112] Victim-offender dialogue reverses the sense of personal and social atrophy experienced by victims in two key ways. First, by giving them a central participatory role in the resolution process, victims are empowered by the sense of *involvement*, influence and control they acquire over the destiny of their dispute.

Secondly, the opportunity to confront their offenders has the potential to inform victims about the circumstances of their victimisation; acquiring *knowledge* about the reasons underlying their violation can exert an empowering influence over victims of crime. The third way that VOM empowers victims is by redressing the power differentials that perpetration lodges awkwardly between victim and offender.

(2003) 4(3) *Western Criminology Review*. <http://wcr.sonoma.edu>; Henig and Maxfield, "Reducing Fear of Crime: Strategies for Intervention" in Ditton and Farrall eds., *The Fear of Crime* (Ashgate, 2000) 489, at 490-491; Watson, *Victims of Recorded Crime in Ireland* (Oak Tree Press, 2000), at 238-239.

[112] Zehr , *op. cit.*, at 205.

2.2.1.1 Involvement and Empowerment

> Enhancing the degree of control that disputants enjoy over the resolution of criminal conflict is self-evidently empowering. Restorative strategies such as VOM boost dramatically victims' sense of importance in criminal disputing, since a prominent complaint among crime victims is that they do not feel "part of" the formal prosecution process.[113]

As Achilles observes, restorative justice aims to reflect victims' centrality in crime by promoting them to stakeholders in the resolution of its aftermath. Crime, unlike the legal system, is highly personal. It is frequently born of inter-personal interaction, confrontation and conflict. The personalised conditions under which crime so often *occurs* should be equally echoed in the methods by which it is *resolved.*

> As I see it, the promise of restorative justice is the elevation of victims to the position of stakeholders in a justice process that starts immediately at the point of harm. They are no longer relegated to the sidelines, dependent on someone else to let them in.[114]

As such, the rise of victim-focused restorative techniques rings in a new dawn in victim-recognition, respect and empowerment through increased (yet moderated)[115] involvement.[116]

The victim's symbolic substitution for the state in restorative justice is premised on the principle that disputants "own" the conflict between them. Emerging systems of state-centred, formal justice have been accused of "stealing" conflict from those between whom it arose. [117] In this light, VOM can be viewed as one means of returning conflict to its rightful owners for resolution according to their own unique needs.

Victims in particular, who have by far the smallest role to play in formal criminal adjudication, gain the most significant power-boost from their new position at the centre of the disputing process.[118] Victims' promotion from bit-part or "court-fodder"[119] to respected,

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[113] Strang and Sherman, *loc. cit.*, at 21-22; Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press, 1996), at 192-193; Shapland, "Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies" in Crawford and Goodey eds., *Integrating a Victim Perspective within Criminal Justice* (Ashgate, 2000) 147, at 152-153.

[114] Achilles, "Can Restorative Justice Live Up to its Promise to Victims?" in Zehr and Toews eds., *op. cit.* 65, at 65.

[115] *Supra*, at 104-105; *infra*, at 323-324.

[116] Herman, "Is Restorative Justice Possible Without a Parallel System for Victims?" in Zehr and Toews eds., *op. cit.* 73.

[117] Christie, "Conflicts as Property" (1977) 17(1) *British Journal of Criminology* 1; see also, Ashworth, "Some Doubts About Restorative Justice" (1993) 4 *Criminal Law Forum* 277; Menkel-Meadow, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)" (1995) 83 *Georgetown Law Journal* 2663.

[118] For example, Strang, in her study of victim-offender mediation in Canberra, Australia found that informal "conferencing" between disputants was more successful in granting participatory roles to crime victims than normal curial resolution: see Strang, *op. cit.*, at 122-126, 130.

[119] Strang and Sherman, *loc. cit.*, at 37.

empowered actors in criminal justice could potentially reduce their post-crime trauma by a considerable margin.

Expanding victims' participatory role in conflict resolution conquers the key emotional symptoms of labelling diagnosed in Chapter 3. The sense of control and influence that victims acquire is directly opposed to, and as such shatters the badge of passivity and irrelevance that they once donned.[120] The centrality of crime victims' position in restorative justice, involving a direct, dialogue-driven opportunity to convey their perspective on the offence, provides them with an ideal opportunity by which to *reassert* themselves in the wake of their victimisation, to the legal system, to society, and importantly, to their offenders.[121] It is arguable that the *most empowering* by-product of restorative justice's involvement of crime victims is the opportunity to be listened to.[122] Victims can thereby *recapture* their senses of control and self-confidence, which were temporarily jeopardised by crime, and recover the sense of power that their offenders wrongfully usurped.

Moreover, incorporating restorative justice's empowering and inclusive attitude to crime victims into existing state justice systems will divest the latter of their tendency, identified in Chapter 3, to "feed" negative victim stereotypes to the general public.[123] It thereby suppresses a root contributor to social stereotyping.

The emotionally reparative results of VOM are supported by Australian academic, Heather Strang. In her survey of the victim-offender *Reintegrative Shaming Experiments* (RISE) in Canberra,[124] Strang contrasts the emotionally restorative potential of VOM to that of traditional curial justice.[125] While Chapter 6 expressly divorces restorative justice from attempts to *shame* offenders, it argues that many so-called "shaming" ceremonies – including RISE – succeed, not because of their arousal of shame, but simply because of their "VOM-style" union of victim and offender to achieve dialogue-driven consensus.[126] Strang's report suggests that mediative inter-disputant contact outperforms court-administered criminal justice significantly in the achievement of emotional healing for crime victims.

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[120] *Supra*, at 88-110.
[121] *Supra*, at 92.
[122] *See* Pranis, "Restorative Values and Confronting Family Violence" in Strang and Braithwaite eds., *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 23; on the importance of listening in restorative justice, see also, Mika, Achilles, Halbert, Stutzman Amstutz and Zehr, "Listening to Victims: a Critique of Restorative Justice Policy and Practice in the United States" (2004) 68(1) *Federal Probation* 32.
[123] *Supra*, at 123.
[124] *See also*, Sherman, Strang and Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments* (Research School of Social Sciences, Australian National University, Canberra, 2000). <http://www.aic.gov.au/rjustice/rise/recidivism>; Strang and Sherman, *loc. cit.*
[125] *See generally*, Strang, *op. cit.*
[126] *Infra*, at 244.

In Strang's study, victim-offender conferencing boasted a dramatic alleviative influence over sentiments of shame and embarrassment,[127] levels of dignity, self-respect and self-confidence.[128] Moreover, it outdid court resolution in achieving a sense of "emotional settlement"[129] and "closure"[130] for crime victims. Only 9% of victims whose cases received restorative intervention claimed that they would still harm the offender, compared to almost half of those whose cases were resolved curially.[131]

2.2.1.2 Knowledge and Empowerment

> The way in which restorative justice interventions are structured provides much greater opportunity for victims to know about the progress of their cases than is available when cases are processed through the courts ... Instead of the justice system informing victims retrospectively on the state of play, as happens with court-processed cases, restorative justice intrinsically requires victims to know what is happening.[132]

As English philosopher Francis Bacon said famously, "knowledge is power".[133] Enhancing victims' *awareness* about first, the process through which their conflict is to be neutralised and second, the circumstances of their victimisation, invests them with a sense of control and confidence. VOM's ethos of party-centrality and its practical manifestation in the form of direct victim-offender confrontation ensures that victims remain *informed* throughout the mediation process.

VOM's respect for victims' need for information throughout the resolution process,[134] contrasts to their treatment by formal criminal justice. Chapter 3's survey of the victim's role in common law criminal justice,[135] echoed Heather Strang's conclusion that: "[w]hen victims are not required as witnesses, courts tell victims nothing about their cases."[136] This is probably too strong a statement with respect to Irish criminal justice. The adoption of a Victims' Charter has at least *articulated* a victim's right to be informed during the course of a prosecution. Nonetheless, as Chapter 3 asserts, there is much to be done to ensure that that right is practically respected.[137]

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[127] Strang, *op. cit.*, at 108-110.
[128] *Ibid.*, at 104.
[129] *Ibid.*, at 110.
[130] *Ibid.*, at 112-113.
[131] *Ibid.*, at 138.
[132] Strang and Sherman, *loc. cit.*, at 26.
[133] *See* Henry, *Knowledge is Power: Francis Bacon and the Method of Science* (Icon, 2002); Bacon, *Essayes, Religious Meditations, Places of Perswasion and Disswasion* (Haslewood Books, 1924).
[134] Strang, *op. cit.*, at 118-122.
[135] *Supra*, at 95-109.
[136] Strang, *op cit.*, at 118.
[137] *Supra*, at 108-109.

In her appraisal of the RISE programme, Strang found momentously that conference victims expressed substantially more satisfaction (79%) with the amount of information available to them than court victims (14%).[138] In fact, she discovered that the lack of available information for victims was the single greatest reason for their dissatisfaction with a court-processed resolution.[139] Umbreit[140] and Shapland[141] also assert that the predominant improvement that victims seek to their treatment by the justice system is increased *information*, in particular about the development of the prosecution. For instance, victims want to know when the perpetrator was caught, what the charges were, whether he was in custody or on bail, when the court appearances would be, whether the offender was convicted and what kind of sentence would be served.[142]

2.2.1.2.1 Knowledge is Power: Learning from the TRC Movement

The opportunity provided by criminal mediation to gain a trove of information about crime and its resolution has an important healing function. It allows victims to discard their internalised feelings of victimhood by surrendering their socially-prescribed victim-identity and recapturing their pre-crime selves. This is evidenced by the experiences of victims of mass atrocities who seek emotional restoration through Truth and Reconciliation Commissions (TRCs) around the world. Truth commissions are established in transitional societies to attain emotional closure for victims of human rights abuses[143] by "opening up" the oppressive systems under which they suffered.

By encouraging victim-offender dialogue, confessions and story-telling, a range of truths can be revealed to victims. Armed with such knowledge, former victims are empowered to advance onwards towards a peaceful and democratic future. They can thereby relinquish some of the powerlessness that characterised years of their oppressive domination by malevolent forces. Hamber and Stauffer remark that some people will continue to feel like

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[138] Strang and Sherman, *loc. cit.*, at 26-27.
[139] Strang, *op cit.*, at 119.
[140] Umbreit, "Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice" (1989) 53(3) *Federal Probation* 52, at 52, 55; see also Strang and Sherman, *loc. cit.*, at 6-7.
[141] Shapland, "Victims and the Criminal Justice System" in Fattah ed., *From Crime Policy to Victim Policy: Reorienting the Justice System* (Macmillan, 1986) 210, at 213-216.
[142] *Ibid.*, at 213.
[143] Abuses such as unexplained disappearances, kidnapping, genocide and mass killing, usually resulted from draconian military regimes, dictatorships and civil conflict. On disappearances in countries such as Argentina, Uganda, Bolivia and Uruguay, see, Nowak, "Monitoring Disappearances: The Difficult Path from Clarifying Past Cases to Effectively Preventing Future Ones" (1996) 4 *European Human Rights Law Review* 348; also, see generally, Hayner, *loc. cit.*

victims "until the truth is discovered and at that point they will be able to call themselves survivors".[144]

The transformation from victim to survivor is an important outcome of the emotional reparation also achieved in VOM. It constitutes a process by which the dignity that was expended by victimisation is reimbursed to victims by their enhanced *knowledge* about prior abuses. They are *dignified* with answers. In this sense, it can be understood that an important means by which knowledge empowers victims is by dignifying them:

> But what can the truth do? It can dignify. To tell the truth about a murder in a way that gives it public recognition reasserts the worth of victims and their relatives. In publicising the truth, a community affirms that what happened, and those to whom it happened, matter. This is the beginning of the vindication of the victims, which is no small part of justice.[145]

The operation of numerous TRCs around the globe has emphasised the importance of disclosing the *truth* underlying past atrocities in order to gain closure on past events.

> Establishing a truth commission is only one of the steps necessary in order to move a nation towards peaceful reconciliation and respect for human rights ... But officially establishing the truth about the past can be critical to a society's coming to terms with a period of widespread abuses.[146]

The emotionally therapeutic value of gaining information and knowledge about the circumstances of one's victimisation is reflected by the growing recognition of a human right to truth.[147] The Geneva Conventions[148] and the Universal Declaration of Human Rights[149] contain provisions that mandate respect for victims' entitlement to information and knowledge in the aftermath of wrongdoing. The huge accent on opening up, owning up, and speaking the truth that inhabits the academic discourse on truth commissions is embodied in a resounding emphasis on the need to "name names"[150] in post-conflict peacemaking. Chipoco Caceda recommends that a *complete truth*, wherein individual responsibility is made public, will outperform mere partial disclosure at achieving emotional redress.[151]

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[144] Hamber and Stauffer, "Putting a Face on the Past: Survivor-Offender Mediation and the Truth and Reconciliation Commission" Seminar No. 1, 1996, Centre for the Study of Violence in Reconciliation, Johannesburg, South Africa. <http://www.csvr.org.za/papers/papbh&cs.htm>
[145] *See* Biggar, "Jury Still Out on Truth Commission for Northern Ireland" *The Irish Times*, 15 October 2004.
[146] Hayner, *loc. cit.*, at 655.
[147] Chipoco Caceda, "Forgiveness and International Amnesty" in Murphy *et. al.*, *loc. cit.*, at 1429.
[148] *See* Protocol I Additional to the Geneva Conventions of 12 August 1949, U.N. Doc. No. A/32/144, Sec. III, art. 32 (1977) establishing a right of families to know the fate of their members.
[149] *See* Article 19 of the Universal Declaration of Human Rights.
[150] On "naming names" generally, see Hayner, *loc. cit.*, at 647-650.
[151] Chipoco Caceda, *loc. cit.*, at 1429.

> Without truth there can be no forgiveness. Without knowing who has done what and how they did it there can be no forgiveness; without the actors, the victimizers, the perpetrators, admitting their responsibility for these acts, and thereby verifying this truth, the conditions for forgiveness will not exist.[152]

Caceda's accent on the importance of mediated truths in pursuing mass healing under TRC initiatives can be readily transported and translated into the more intimate realms of VOM. While in VOM, the perpetrator's identity is evidently *known*, the admission of responsibility and *full* disclosure of information regarding the circumstances of and motivations for the offence are still of significant emotional benefit. Solving various elements of the "mystery" of victimisation is necessary to optimise victims' chances of attaining full emotional settlement. This involves their final release from the paralysing grip of negative victim-stereotypes.

In terms of *mass* healing under TRC initiatives, some have argued *against* the healing ability of disclosure. However, arguments fail to hold water in the more intimate situational context of VOM.[153] For instance, Dan Markel is reluctant to link healing to truth. He warns that:

> [b]y concerning itself with the degree to which the information will heal, and, therefore, selecting which parts of various stories to emphasize, the truth commission risks insinuating itself in a relationship of forgiveness that it has already stated is one that it cannot govern: the relationship between victim and offender.[154]

Mass forgiveness might be a pipedream for TRC hearings given the sheer number of emotionally-scarred victims, the difficultly in enticing wrongdoers to make full confessions, the logistic difficultly in holding large numbers of wrongdoers legally accountable for their actions[155] and the particularly serious nature of the crimes that invariably involve large-scale human rights violations. This shortcoming is typically conceded within the philosophical credo that governs most truth commissions. On the other hand, forgiveness *between one victim and one offender* is quite feasible through VOM. Further, while forgiveness is by no means a certainty, it is an enduring aspirational cornerstone of the VOM process. Forgiveness, however hard to predict, will inevitably constitute an ideal, yet realistic outcome of victim-offender mediations.

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[152] *Ibid.*, at 1430.
[153] Markel, *loc. cit.*
[154] *Ibid.*, at 411.
[155] On the promises and pitfalls of international prosecution, see Sharp, "Prosecutions, Development, and Justice: The Trial of Hissein Habré" (2003) 16 *Harvard Human Rights Journal* 147, at 151-156.

Brandon Hamber echoes Hayes' mantra that "just revealing is not healing" under TRC initiatives.[156] Both assert that emotional healing is dependent not only upon the disclosure of theretofore unattainable information, but also on the *structural framework* that facilitates it. VOM, however, is a process that is logistically easier to facilitate than TRC hearings; each session must bring together one single binary unit – one victim and one offender. It lacks the same challenges that the pursuit of mass healing faces in providing a suitable framework that is strong enough to bear the brunt of mass disgruntlement and mass wrongdoing.

On the other hand, it is considerably more realistic, by comparison, to expect emotional satisfaction to flow from the basic, binary union of victim and offender in a safe and fair environment. That said, procedural safeguards are always essential in any mediative structure to ensure fundamental fairness[157] and crucially, voluntariness.[158] However, because a singular episode of VOM is a much smaller, simpler feat to stage than say, a TRC hearing, its therapeutic potential is less reliant upon complex structural systems that must be broadly acceptable to a divided and angry public scrutinising its every move. VOM's healing capacity is therefore less likely to become obstructed by more practical, structural concerns.

In sum, acquiring knowledge through VOM that delivers a complete truth about the circumstances of victimisation possesses the most healing potential for victims of crime. This is because it is the most *empowering* result that could emerge from VOM proceedings. Accordingly, the degree of empowerment that victims will gain from participation in VOM will be largely proportionate to the amount and completeness of the *knowledge* they derive there-from. Hence, the healing that results from an augmented sense of control and a recaptured sense of dignity and self-worth depends on the amount of knowledge attained in any one victim-offender meeting.

2.2.2 VOM Reverses the Fear of Re-victimisation by Enhancing Inter-Resident Trust

VOM possesses the important ability to directly augment victims' feelings of safety and security in their communities. This indirectly strengthens inter-resident trust and the result is an abatement in crime victims' fear of re-victimisation. This hypothesis is born out empirically by the results of Heather Strang's survey of Canberra's RISE programme. She found that participation in restorative justice generally reduced respondents' post-crime

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[156] *See generally*, Hamber, "A Truth Commission for Northern Ireland?" in Hamber ed., *op. cit.* 79.
[157] *See generally*, Stulberg, "Fairness and Mediation" (1998) 13 *Ohio State Journal on Dispute Resolution* 909.
[158] *Infra*, at 238-241, 381-383.

feelings of fear and anxiety,[159] while improving their senses of safety,[160] security[161] and trust.[162] Mark Umbreit concluded similarly in his study of four VOM programs in the United States.[163] He found VOM highly effective at reducing people's fear of re-victimisation: "Before mediation, 25% of victims were afraid the offender would hurt them again … After mediation, only 10% of victims thought the offender would revictimize them."[164]

VOM's ability in this regard can be attributed to two different factors. First, a system of VOM in the community acts as a visible indicator of strong informal social-control and high collective efficacy. The micro-level ingredients of Chapter 4's macro-level logic can be imported here to explain VOM's ability to suppress the fear of re-victimisation. Chapter 4 explained how residents' positive perceptions of greater community mobilisation against social disorder can cultivate intensified feelings of safety, security and inter-resident trust.[165] It then assessed the *cumulative* effects of the consequent erosion of *individual* fear levels.[166] However, it is the individual, micro-level manifestation of growing inter-resident trust that is most germane here. Individual anxiety about future harm, which *includes* former victims' fears of re-victimisation, can be radically diminished by the visibility of collective, altruistic attempts at preserving the wellbeing of the common good. People feel doubly protected, first by their own individual security tactics and second, by the back-up support offered by their supportive social network.

The second method by which VOM stands to allay victims' worries about re-victimisation is through the *knowledge* that accompanies their active *involvement* in the mediative process. The information obtained throughout a VOM is capable of calming some victims' fears of future harm by revealing to them the *randomness* of their persecution. As a Garda source close to the Garda Restorative Justice Programme governing juvenile crime in Ireland[167] has said:

> Victims can be reassured, *it takes some of the mystery and the fear of the unknown out of it.* Victims learn that they have not been personally targeted and are reassured they are unlikely to be a victim again.[168]

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[159] Strang, *op. cit.*, at 107-108; Strang and Sherman, *loc. cit.*, at 32.
[160] Strang, *op. cit.*, at 96-100; see also, Strang and Sherman, *loc. cit.*, at 29-30.
[161] Strang, *op. cit.*, at 100; Strang and Sherman, *loc. cit.*, at 30.
[162] Strang, *op. cit.*, at 104-107; Strang and Sherman, *loc. cit.*, at 31-32.
[163] *See* Umbreit, *Restorative Justice for Victims, Communities and Offenders* (Center for Restorative Justice and Peacemaking, University of Minnesota, 1996).
<http://ssw.che.umn.edu/rjp/resources/documents/cctr96a.pdf> (visited 12 December 2004).
[164] *Ibid.*, at 4.
[165] *Supra*, at 175; Gibson, Zhao, Lovrich and Gaffney, "Social Integration, Individual Perceptions of Collective Efficacy, and Fear of Crime in Three Cities" (2002) 19(3) *Justice Quarterly* 537.
[166] *Supra*, at 176-179.
[167] *Infra*, at 320.
[168] Cited in Breslin, "One Third of Young Offenders in Unique Initiative Re-offend" *The Irish Examiner*, 10 May 2003. [emphasis added]

2.2.3 VOM Reverses Power Imbalances

VOM's devotion to individual victim-empowerment effects a symbolic power redistribution between wrongdoer and wronged; it allows victims to regain the sense of personal power and autonomy of which their offenders deprived them.[169] Chapter 3 emphasised the transactional nature of crime, which inevitably involves an exchange of power between criminal and victim.[170] Crime therefore creates a disequilibrium of power between crime's stakeholders, which demands redistribution in order to restore a victim's sense of power, dignity, self-efficacy and confidence. An apology, delivered in the course of VOM, returns to the injured party the ill-gotten power usurped by the criminal.

However, it is important to note the duality in an offender's treatment in VOM: power is both given and taken away. While VOM is equipped to divest criminals of the emotional power they pillaged wrongfully from their victims *during the course of the crime*, it is also capable of *empowering* offenders in a contrasting way *after the offence.* The next section will consider VOM's potential to empower offenders by heightening their confidence in their ability to achieve future reform. Obviously, the post-crime return of power to offenders is entirely forward-looking; it seeks to restore a specific *kind of power* – that which offenders lose through shame, stigma and self-labelling. Accordingly, it exerts no retrospective validation of the power that offenders acquired through the domination of their victims.

2.2.4 Restorative Justice's Victim-Empowerment: Prioritising its Selling Points

The diversifying value absorbed by mainstream criminal justice with respect to victims' empowerment by an integrated model of restorative justice is not simply the greater involvement of crime victims but *the pursuit of their emotional healing.* Of course, their heightened participation in criminal justice is the means by which those ends are ultimately achieved: emotional catharsis is pursued by empowering victims, which is pursued in turn by augmenting their degree of involvement and knowledge in criminal justice.

A careful distinction must therefore be drawn when ascertaining restorative justice's main selling point with respect to its assistance of the victimised. As emphasised repeatedly throughout this thesis, it is restorative justice's *emotionally therapeutic* value that justifies its use. This might *require* that victims are afforded more productive roles in criminal justice[171]

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[169] Umbreit, "Restorative Justice for Victims, Communities and Offenders", *loc. cit.*, at 1; Delgado, "Prosecuting Violence: A Colloquy on Race, Community, and Justice" (2000) 52 *Stanford Law Review* 751, at 758.
[170] *See* Zehr, *op. cit.*, at 52-57.
[171] Strang, *op. cit.*, at 58-59.

and as such, this becomes a central task for restorative justice, but it is not its original intent. Though victim-involvement is likely to be a well-received achievement in its own right, (there is certainly room for improvement within this facet of Irish criminal justice),[172] it is important to remember that it is pursued in the overarching interest of *holistic, multi-party emotional healing.*

So, just like its crime-control potential, restorative justice's capacity to offer increased involvement to victims – though inherently valuable and potentially credibility-boosting for the paradigm – is simply a vehicle of attaining emotional restoration. It is self-evident that restorative justice cannot be equated all attempts to control crime. Yet, it could be more unexpected to divorce restorative justice from endeavours to improve the position of crime victims in criminal justice. As Chapters 1 and 3 stressed, victims' rights developments and restorative justice are not necessarily one and the same, despite the latter's respect for the former. [173] They should not, therefore, be presumptively equated.

2.3 Restorative Justice Empowers Offenders: Attacking the Labelling Process with Involvement and Knowledge

Offenders, like victims, can be disempowered by their involvement in crime.[174] Many offenders will suffer the enervating impact of the negative self-image bequeathed to them by society's application of subsequently internalised deviant labels.[175] Wrongdoers may start to view themselves as they feel others do – pathological, beyond redemption, "lost causes" that are abandoned by a "mainstream" society to which they are taught they can no longer contribute. As Chapter 3 concluded, there are two main results of the labelling process for offenders. The primary result is an emotional reaction. The second is behavioural – the *physical* expression of a rule-breaker's primary emotional response.[176]

As Chapter 3 explained, some offenders identify with the prevailing imagery of deviance and accept it as their new "master status", allowing it to supersede their pre-existing social and personal identity.[177] The treatment of offenders by the legal system does little to ease the emotional adversity provoked by the process of social stigmatisation. If anything, offenders' encounters with the legal system are likely to *exacerbate* the dehumanising impact of labelling. Hence, the emotionally depreciative results of labelling sprout from social *and* legal roots.

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[172] *Supra*, at 108-109.
[173] *Supra*, at 11-12, 107.
[174] *Supra*, at 111-122.
[175] *Ibid.*
[176] *Supra*, at 115-116.
[177] *Supra*, at 115.

Formal criminal justice is certainly capable of treating offenders as devoid of social value and presumptively deserving of proportionate harm when they make insufficient provision for their rehabilitation.[178] While rehabilitation is undoubtedly an objective of Irish criminal justice, it is arguable that the Irish government is still first, failing to provide adequate rehabilitative services for offenders,[179] which offer them the "moral lesson" that is so central to *genuine* reform[180] and second, neglecting to encourage offenders' participation in rehabilitative services that *are* available.[181] Moreover, the nation's prison system is arguably more likely to nurture, rather than cure deviant behaviour.[182] Yet, whether or not such dramatic statements are fair, it is certainly true that Irish criminal justice could *better* prioritise rehabilitation.

At the very least, it can be said that any criminal justice system will inevitably possess ample room for improvement in performing what is an overwhelming and difficult social chore.[183] Moreover, according to one of this thesis' centremost premises, restorative justice's unique talents – of which achieving rehabilitation through empowerment is just one – adequately justify its incorporation into mainstream criminal justice regardless of the comparative strengths thereof.

Retributive criminal justice's primary objective is to incapacitate and punish. However, unless such responses are legitimate, proportionate and necessary in order to uphold public safety with respect to a particular offender or offence, this thesis maintains that they should be considered a last resort.[184] Sentencing judges should consider, first and foremost, the suitability of restorative treatments to every case before them. It is only when restorative treatments are either conclusively discounted or deemed insufficient in themselves that more incursive penalties should be selected and applied; these will, therefore, either substitute *or supplement* restorative options.

Varying combinations of different sentencing options – retributive and restorative – must be invoked to properly balance the needs of both society *and* wrongdoer from case to case. Potential results could include a sentence that is entirely restorative, one that combines

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[178] *Supra*, at 117.
[179] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice* (Cork University Press, 2000), at 14-15, 38-44; Whitaker, *Report of the Committee of Inquiry into the Penal System* (Stationery Office, 1985); *National Crime Forum Report 1998* (Office of Public Administration, 1998); Kinlen, *Second Annual Report of the Inspector of Irish Prisons and Places of Detention for the Years 2003-2004.* <http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6BMJC7-en/$File/AnnualRpt2.pdf> (visited 23 April 2006); *supra*, at 38-41.
[180] *Supra*, at 14; *infra*, at 247-249, 253, 326, 368, 382-383.
[181] *See* comments of Gordon Holmes, chairman of the Parole Board, cited in "Concern Over Decline in Sex Offenders Taking Prison Programmes" *BreakingNews.ie*, 24 August 2005. <http://archives.tcm.ie/breakingnews/2005/08/24/story217665.asp>
[182] *Supra*, at 38-41.
[183] *Supra*, at 2-3.
[184] *Infra*, at 218, 257, 292, 339, 334, 380, 387.

restorative with retributive treatments, or one that is exclusively retributive such as a single custodial sentence. The proposed availability of these alternatives reflects this thesis' ideal vision of a sentencing or treatment "menu" within Irish criminal justice that lists a "continuum" of restorative and retributive options from which judges should choose freely yet carefully in light of the characteristics of a particular crime.

The typical behavioural reaction to offenders' psychological response to labelling is what is known as *secondary deviance*.[185] Often (but not always),[186] offenders' disempowering assumption of negative stereotypes leads them down a path of reinforced deviant behaviour that can lead to a deviant "career".[187] Encountering both a society and legal system that seek to banish them into a purgatory of social obsolescence, offenders can self-diagnose a terminal deficiency of social utility. This perceived decline in personal autonomy means that simply sinking deeper into a criminal sub-culture becomes an increasingly attractive alternative to re-entering the mainstream.

The plights of victim and offender possess some striking parallels. They both suffer the disempowering impact of labels that are attached to them by society, but also by the legal system. It is interesting to compare the legal system's ouster of victims to the *margins of legal process* to its ejection of offenders to the *margins of society*. The disservice that criminal justice traditionally does to victims and offenders alike, by marginalising and neglecting them, was recognised by the recent report of the Oireachtas Joint Committee on restorative justice's future role in Ireland:

> With the rise of the modern state's assumption of the investigative, prosecutorial and enforcement functions, crime has been treated primarily as a disruption of the state's security. Consequently, less emphasis was given to the emotional and social hardships to victims in criminal courts. There has been growing recognition that by marginalising offenders and victims, traditional retributive methods do not always advance the interests of the offender, the victim or society in the manner intended.[188]

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[185] *Supra*, at 115.
[186] *Supra*, at 111-112.
[187] *Ibid.*; Farrington, "Human Development and Criminal Careers" in Maguire, Morgan and Reiner eds., *Oxford Handbook of Criminology* (Oxford University Press, 1994) 511; Becker, *The Outsiders: Studies in the Sociology of Deviance* (Free Press, 1963).
[188] O'Keeffe, "Report of the Rapporteur to the Joint Committee on Justice, Equality, Defence and Women's Rights on the Potential Benefits of Restorative Justice Methods in Ireland" in Joint Committee on Justice, Equality, Defence and Women's Rights, *Report on Restorative Justice* (Houses of the Oireachtas, 2007) 3, at 4.

The powerlessness emanating from established social and legal attitudes to criminals can be neutralised by the degree of *involvement* that VOM offers them. Granting offenders the opportunity to mend fractured relations with their victims can reverse negative self-perceptions by conveying to offenders that they are both capable and worthy of reconciliation, reform and reintegration.

Like victims, offenders are further empowered by the degree of centrality, involvement and control they enjoy over the navigation of the mediation process. Arthur Eglash recognises the chief advantages of mediation for an offender's psychological state. He suggests that reparation's rehabilitative effect is achieved in two ways: first, by offering the offender a chance to engage in "some purposeful activity" which would enhance self-esteem and second, by enabling the offender's release from feelings of guilt.[189]

Moreover, interpersonal dialogue with their victims can yield *knowledge* and better still, an understanding of the painful, disempowering experience that is victimisation. Just as victims consistently report valuing emotional over material reparation in VOM,[190] offenders are similarly said to value the explanatory opportunity VOM provides over the minutiae of a restitution agreement.[191]

VOM also provides the opportunity to break down stereotypes that prevail *between disputants*; in particular, dialogue with one's offender can educate a victim about the realities of occupying deviant-status, thereby shattering preconceived generalisations and stereotypes brought to the mediation. Accordingly, it can be imagined that the wholehearted incorporation of VOM into formal criminal justice might reorient public opinion on offenders considerably, destroying negative "black-and-white" stereotypes[192] and replacing them with more realistic insights:

> ...inaccurate stereotypical views of offenders built up through gossip, hearsay, other media and fragments of police information could be corrected by meetings where offenders and victims get to see sides of their whole person.[193]

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[189] *See* Williams, "Reparation and Mediation in the Criminal Justice System" (1986) 136 *New Law Journal* 1106, at 1107.

[190] Marshall and Merry, *op. cit.*, at 182-185; Dignan, *loc. cit.*, at 460; Strang, *op. cit.*, at 88-118; Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation*, *op. cit.*, at 95-96; Strang, "Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration", *loc. cit.*

[191] Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation*, *op. cit.*; Umbreit, *Mediation of Criminal Conflict: An Assessment of Programs in Four Canadian Provinces* (Center for Restorative Justice and Mediation, University of Minnesota, 1995); Umbreit and Roberts, *loc. cit.*

[192] *Supra*, at 122.

[193] Williams, "Reparation and Mediation in the Criminal Justice System", *loc. cit.*, at 1107.

Offenders are essentially granted a "second chance" by those who have been wronged, both victim and community alike. A victim's mere voluntary agreement to speak with an offender sufficiently conveys this willingness. Forgiveness (perhaps an ideal but ultimately a feasible outcome of VOM) provides stronger evidence of a victim's reluctance to "give up on" an offender as mainstream society and the legal system tend to. Being offered this safety net by which to rescue them from the usual self-fulfilling prophecy of their status, offenders stand a better chance of pursuing reform and ultimately achieving genuine rehabilitation and reintegration.

Again, like victims, offenders benefit from the enhanced knowledge and control that VOM offers its participants. Unlike victims however, offenders already occupy a central role in the formal prosecution process. Nonetheless, this centrality is predominantly symbolic. Practically-speaking, VOM offers offenders a greater opportunity to navigate *personally* how their crime is processed.

First, the amount offenders wish to disclose and the attitude they bring to the table in VOM (e.g. apologetic or impenitent) will determine the quality of the outcome. Furthermore, as VOM initiatives, including Ireland's pilot VOM project,[194] provide, offenders' willingness to participate and general demeanour under conditions of mediation might be taken into account in gauging their compliance with restorative orders and the corresponding residual need for a custodial sentence. This is a favourable means of dealing with offenders. Again, the mixture of retributive with restorative treatments is endorsed in fitting instances, the retributive branch abating where appropriate, according to an offender's compliance with restorative duties, such as satisfactory participation in VOM.

2.3.1 Restorative Justice's Offender-Empowerment: Prioritising its Selling Points

It is important to note, however, that restorative justice's reliable *achievement* of rehabilitation through its attack on the labelling process need not be established in order to justify the paradigm's use; full rehabilitation is an ambitious and elusive goal for any criminal justice model.[195] Instead, restorative justice's incorporation is justified sufficiently by the potential emotional healing that accompanies *attempts* to achieve complete rehabilitation by suppressing the labelling process. Full rehabilitation is an ideal and if and when it is achieved, it is a fortuitous bonus of the emotional empowerment that restorative justice otherwise offers offenders. Nonetheless, recourse to restorative justice is not conditioned on its potential to create wholesale reform.

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[194] *Infra*, at 310-311.
[195] *Infra*, at 251.

This is not to downplay too aggressively restorative justice's very real potential to secure offenders' complete rehabilitation. Allowing offenders to conquer the self-destructive emotional repercussions of their deviance enables restorative structures to re-release empowered, more confident and contributing members into their communities. Its enduring dedication to the facilitation of reparation, forgiveness and sincere inter-party amends gives restorative justice, through its largely mediative processes, definite potential to yield win/win legal outcomes:

> If the individual maintains a reasonable degree of equity in his exchanges with others—pays his debts, rights his wrongs, returns 'gift' for 'gift'—he ensures continuing contact, and experiences a sense of integration with others ... By mediating and reparating, offenders who would otherwise be pushed to the margins of society and treated with suspicion, fear, and hatred, could be reintegrated into the "community".[196]

Restorative justice's use of apologetic justice in particular holds significant potential to yield rehabilitative outcomes. In fact, Maxwell and Morris found that offenders who refused to apologise were three times more likely to re-offend than those who apologised.[197]

There are also numerous American and Australasian empirical studies whose data support restorative justice's rehabilitative effect by testifying to its prevention of re-offending.[198] While admittedly, empirical data on restorative justice are at a relatively rudimentary stage and as such, cannot be afforded *too much* weight,[199] positive outcomes – at the very least – provide *hopeful* interim indications of the paradigm's potential ability. They certainly should not be discarded and in fact, give rise to cautious levels of optimism.

Finally, while the complete rehabilitation of its participants may be a pipedream for many restorative initiatives, there is undeniable merit in partially rehabilitative results.[200] There is incontrovertible value in the perpetrator of a series of assaults graduating from a

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[196] Williams, "Reparation and Mediation in the Criminal Justice System", *loc. cit.*, at 1107.
[197] Maxwell and Morris, "Research on Family Group Conferences with Young Offenders in New Zealand" in Hudson, Morris, Maxwell and Galaway eds., *Family Group Conferences: Perspectives on Policy and Practice* (Federation Press, 1996) 107.
[198] On the rehabilitative impact of Canberra's Reintregrative Shaming Experiments (RISE), see Strang, *op. cit.*; Sherman, Strang and Woods, *op. cit.*; Strang and Sherman, *loc. cit.*; Strang, Barnes, Braithwaite and Sherman, *Experiments in Restorative Policing: A Progress Report on the Canberra Reintegrative Shaming Experiments (RISE)* (Australian Federal Police and Australian National University, Canberra, 1999); for a comprehensive overview of key American empirical studies that confirm VOM's suppression of re-offending, see Nugent, Umbreit, Winnamaki and Paddock, "Participation in Victim-Offender Mediation Reduces Recidivism" (1999) 3 *VOMA Connections* 1, 11; for further examples of empirical evidence connecting victim-offender contact to low recidivist rates, see generally, Kurki, *loc. cit.*, at 297-303; Maxwell and Morris, *Understanding Re-offending: Full Report* (Institute of Criminology, Victoria University of Wellington, 1999); Maxwell and Morris, "Restorative Justice and Reoffending" in Strang and Braithwaite, *Restorative Justice: Philosophy to Practice*, *op. cit.* 93; for an overview of recidivism rates for Irish restorative interventions, *infra*, at 315-319.
[199] *Supra*, at 19-20.
[200] *Infra*, at 251.

restorative forum in the diluted guise of a sporadic offender or petty thief. Though an offender might resist the extensive rehabilitation necessary to dissolve comprehensively or permanently all of his deviant tendencies, he may surrender a portion of the unlawful patterns out of which a particular VOM arose. So, where complete rehabilitation is improbable, VOM is still capable of facilitating a wrongdoer's first tentative steps towards reform. Under such circumstances, there can be no doubt that the restorative intervention's influence over the offender has had a distinctly rehabilitative flavour.[201]

Restorative justice need not rely on its rehabilitative or related crime-control abilities as its principal selling points. The advertisement of its *general emotional benefits* for crime's stakeholders should suffice in this respect. Still, its capacity for cutting crime through the rehabilitative results of suppressing labelling and its negative emotional by-products certainly does restorative justice's reputation no harm; in fact, it could offer the paradigm a dramatic and potentially important credibility boost.

2.4 Restorative Justice, Criminal Justice and Emotional Healing: For the Co-operation of the "Differently Abled"

Clearly, restorative techniques are at least capable of out-performing curial justice in attending to crime's emotional injuries. This is certainly evidenced by Strang's above findings with respect to the healing of victims.[202] This reveals a particular divergence between the *values* prioritised by restorative justice and mainstream criminal justice. Yet, as Chapter 1 warned, comparisons between restorative and mainstream criminal justice models should not be overly relied upon to justify the integration of restorative values. Yes, comparisons indicate variances between the values prioritised by each system and as such identify potential for those systems to cross-pollinate each other in the name of diversity. However, it is rash to rush to judgement about their respective abilities to administer criminal justice – their shared end – simply on the basis of their differing means of doing so.

Chapter 1 emphasised that in order to justify restorative justice's integration, it need only improve criminal justice through the synergistic diversification of its foci.[203] In staking a claim for itself within conventional sentencing practice, restorative justice need not *rely* on any superiority to mainstream criminal justice. That claim is adequately made by reference to

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[201] Rössner, "Mediation as a Basic Element of Crime-Control: Theoretical and Empirical Comments" (1999) 3 *Buffalo Criminal Law Review* 211; Nugent, Umbreit, Winnamaki and Paddock, "Participation in Victim-Offender Mediation and Reoffense: Successful Replications?" (2002) 11 *Research in Social Work Practice* 5; Nugent and Paddock, "The Effect of Victim-Offender Mediation on Severity of Reoffense" (1995) 12 *Mediation Quarterly* 353; Nugent, Umbreit and Williams, "Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Deviant Behavior: A Meta-Analysis" (2003) 1 *Utah Law Review* 137.

[202] *Supra*, at 201.

[203] *Supra*, at 48.

the independent social benefits that restorative justice's emphasis on emotional healing can offer. In this sense, restorative justice must simply be proven effective and credible.

Accordingly, enhancing the roles of victim and offender in criminal justice so as to reflect restorative justice's accent on their emotional restoration does not seek to *reform* criminal justice by injecting it with a restorative focus that claims an inherent superiority to pre-existing practice. Instead, it merely inserts a new *value* into conventional criminal justice. It tweaks its pre-existing value-system so as to diversify traditional methods with a credible and effective, though not necessarily superior, practical addendum (though it may certainly prove itself superior on various fronts). And, as this thesis stresses repeatedly, diversification – as long as it is achieved by effective and credible methods – is the key to better quality criminal justice.[204]

3. Restorative Justice Empowers Communities: Breaking the Cycle of Fear

This section will explore restorative justice's ability to emotionally restore whole communities. It explains how the empowering influence of restorative, community strategies enables them to suppress the fear of crime, which Chapter 4 identified as crime's primary, collectively-suffered emotional symptom.

If restorative justice can assuage the fear of crime that permeates Irish society,[205] it will succeed in performing a task of considerable social benefit: it will target both the *causes and consequences* of community crime, since, as Chapter 4 revealed, fear of crime shares a reciprocal feedback relationship with crime – crime begets fear of crime and fear of crime, by undermining social integration, begets crime and so the vicious cycle continues.

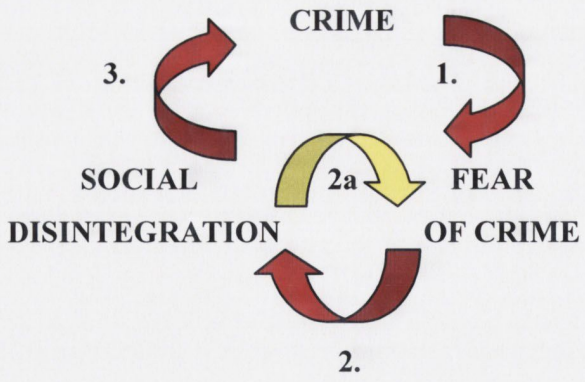
Chapter 4 identified three principal means by which fear of crime in society can be managed. Improving social integration and enhancing collective efficacy both get to fear's root, while educating residents about crime's factual predominance provides a back-up means of maintaining any lingering fear within *proportionate* levels.[206]

This section outlines the means by which court-referred, community-level restorative justice – through its emotionally ameliorative agenda – is capable of performing each of these core fear-management tasks. In the interests of clarity, Chapter 4's diagrammatic expression of the fear cycle is reissued below.

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[204] *Supra*, at 48; *infra*, at 326-327, 353-354, 379.
[205] *Infra*, at 346-347.
[206] *Supra*, at 180-177.

Figure 1



3.1 Restorative Justice and Social Reintegration

Chapter 4 isolated three methods by which social reintegration could diminish the fear of crime that is suffered collectively by the Irish. First, improving the balance of high- and low-intensity social attachments can tackle fear of crime in an indirect fashion.[207] It does so by impeding stage 3 in the fear cycle by reversing or preventing the socially disintegrative conditions that would otherwise incubate sufficient criminality to nurture fear of crime at stage 1.

Secondly, enhancing residential cohesion will prevent the socially disintegrated conditions that fear provokes to support itself reciprocally in accordance with stage 2a.[208] Third and finally, social reintegration can target fear of crime more directly by stemming the brand thereof that is a component of the greater sense of "urban unease" or "fear of the unknown" associated with modern, urban, progressive social conditions such as those currently sculpting Irish society.[209]

Restorative justice achieves social reintegration and its attendant fear-quenching results thanks to four of its most fundamental and legitimating characteristics: (a) its emphasis on rehabilitation, (b) its aspiration towards inter-party reconciliation, (c) its de-prioritisation of imprisonment and (d) its involvement of ordinary residents in the informal exertion of social-control. Each characteristic is considered more fully below.

3.1.1 Restorative Justice and Rehabilitation

The rehabilitation of offenders poses an unenviable hurdle to any criminal justice model, including restorative justice. It is unlikely to be achieved predictably, consistently or fully by either restorative or traditional criminal justice. As Chapter 1 argued, restorative justice should not be opposed on the basis of its failure to *necessarily* do any better than its

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[207] *Supra*, at 172-173.
[208] *Supra*, at 157.
[209] *Supra*, at 171-172.

mainstream counterpart in performing a given function.[210] Rather, any incoming justice innovation can only be attacked legitimately for failing to achieve those benefits it claims specifically to summon. Therefore, restorative justice's rehabilitative (along with its related crime-control) potential should not be used to justify its incorporation into existing criminal justice systems. The paradigm's most persuasive selling point is its emotionally therapeutic potential and the socially remedial fringe benefits that arise incidentally thereto.[211]

On the other hand, as demonstrated above, while rehabilitation may not be performed *reliably* by restorative justice, it is certainly a very real and highly feasible result of restorative justice's emotionally therapeutic jurisdiction.[212] The social significance of the paradigm's potential in this respect is its ability to improve society's integrative balance.

Rehabilitation, whatever its degree, can be said to be generally socially reintegrative. As Chapter 2 revealed, the rehabilitation and restoration of criminals to a constructive, contributing social role have long dominated the philosophies around which human conflict resolution has evolved – consider for instance the *Airey Miklat* of the Hebrew Bible.[213] These values continue to occupy the heart of *modern* restorative philosophy.[214] Returning ex-offenders to the "straight and narrow" of "right-thinking" society reintroduces into that society a subject to and from which social bonds will inevitably extend. The effect of reintegration cannot but enhance social cohesion, by further complicating society's complex web of interlinking social alliances.

Therefore, restorative justice's commitment to the reintegration of offenders invests it with the ability to allay residents' collective fear of crime indirectly by reversing the social detachment from which Chapter 4 proved it to emerge in accordance with stage 2a.[215]

3.1.2 Restorative Justice and Reconciliation

Restorative strategies are further suited to the task of social reintegration because of their emphasis on inter-party reconciliation. Chapter 2 demonstrated that the pursuit of genuine inter-party amends has been a fundamental objective within the largely *restorative* ancient disputing paradigms that have historically governed the world's indigenous and religious communities.

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[210] *Supra*, at 38-41.
[211] *Supra*, at 33.
[212] *Supra*, at 208-214.
[213] *Supra*, at 52-53.
[214] Jensen, "Restorative Justice in Crime Prevention and Rehabilitation" (2000) 73 *Wisconsin Lawyer* 29; Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), at 95-102; Zehr and Mika, *loc. cit.*; Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).
[215] *Supra*, at 157.

Reconciliation was central to these primitive justice systems just as it continues to dominate their contemporary successor – the *modern* conception "restorative justice".[216] Under both ancient and contemporary restorative traditions, crime is considered primarily a "violation of people and relationships"[217] rather than the disruption of some esoteric, symbolic connection between offender and state.

Reconciliation reintegrates society by mending the relationships sundered by crime. When parties reach a mediated consensus, assisted by the apologetic justice[218] to which restorative forums aspire, their crime-fractured social bond can be finally restored.[219] By soldering ruptured social relationships in this way, restorative justice, through its treasured cornerstone of inter-party reconciliation, can improve greater social cohesion.

3.1.3 Restorative Justice and Imprisonment

Restorative justice's emphasis on rehabilitation and reconciliation has further integrative merit. Although this thesis asserts that restorative justice's social value lies predominantly in its proclivity for multi-party emotional healing, there is additional value in its rejection of punishment as all but a last resort.[220] Restorative justice's concentrated focus on the pursuit of rehabilitation and reconciliation when treating offenders leaves little room for considering more punitive options. Only when restorative interventions have failed or are deemed likely to fail will restorative justice's dedication to reform subside sufficiently to accommodate the practical reality of the need to incapacitate society's most dangerous.

Its low tolerance for punitive sentencing means that restorative justice has little time for incarceration in all but the most pressing cases. It is this theme of custodial intolerance in sentencing that grants restorative justice special integrative significance. By endeavouring to avoid (where possible) the inherently disintegrative results of removing certain people from mainstream life, and instead prioritising their rehabilitation and reconciliation through reparative schemes, restorative justice, although not *actively* integrating society, performs a useful duty in *preserving* society's integrative balance. In this sense, its integrative value is a merit of omission.

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[216] Consedine, "Restorative Justice: The Christian Option", at paras 21-24. <http://www.stalbans.org.nz/teachings/guests/consedine.htm> (visited 17 November 2005).
[217] Zehr, *op. cit.*, at 181-184; see also, Zehr and Mika, *loc. cit.*, at 41.
[218] *Supra*, at 190-196.
[219] Retzinger and Scheff, "Strategy for Community Conferences: Emotions and Social Bonds" in Galaway and Hudson eds., *op. cit.* 315.
[220] *Supra*, at 209-210; *infra*, at 257, 334, 380, 387.

3.1.4 Restorative Justice and Residential Involvement in Informal Social-Control

VOM forges community-level residential alliances that adopt a joint, active role in the informal regulation of the community. This is demonstrated not only by the community panels, local representatives, and local volunteer mediators that such strategies typically use but also by their encouragement of the families and/or support structures of victims and offenders to attend mediative proceedings. This degree of *community involvement* is capable of benefiting social cohesion. From their new-found sense of efficacy, influence and involvement in local criminal justice, residents who had theretofore been denied a role in formal justice, amalgamate according to a shared sense of "ownership" over their communities.

People realise their joint power to control the navigation of community-life through informal justice models and are brought together, solidified and jointly mobilised thereby. As McMillan and Chavis explain:

> [p]articipation in voluntary associations or in government programs yields a sharing of power that leads to greater "ownership" of the community by the participants, greater satisfaction, and greater cohesion.[221]

3.2 Restorative Justice and Collective Efficacy

Chapter 4 found that increasing collective efficacy provides a second key means by which fear of crime can be curtailed.[222] Informal, restorative strategies of community-level dispute resolution can perform this fear-shrinking task in two reasonably straightforward and obvious ways.

First, successful social reintegration of the kinds described above is likely to produce collective efficacy – that is, a community's willingness to intervene against prevailing social problems, such as crime, in the interests of the common good.[223] This is because of the linear relationship between social integration and collective efficacy described in Chapter 4.[224] At higher levels, social integration transforms into collective efficacy, a concept that necessarily *includes* a healthy degree of inter-resident trust and cohesion. Therefore, as restorative strategies succeed in socially reintegrating, they are likely to cultivate the more evolved social commodity of collective efficacy.

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[221] McMillan and Chavis, "Sense of Community: A Definition and Theory" (1986) 14 *Journal of Community Psychology* 6, at 7.
[222] *Supra*, at 174-175.
[223] *Supra*, at 152.
[224] *Supra*, at 153-154.

The second method by which informal, restorative initiatives are capable of mustering sufficient altruistic spirit to mobilise collectively against crime, is by producing *positive perceptions* of high collective efficacy among residents.[225] The mere existence of community-level centres of informal, restorative dispute resolution creates the appearance of a community that is seriously committed to informal social-control. This creates the perception of high collective efficacy, whatever its factual level, for the two *can* diverge.

It might happen that a community's quotient of informal, anti-crime collaboration exceeds its actual level of collective efficacy. For instance, a restorative forum might be introduced into a community whose collective efficacy is *low or moderate*. This can occur, as appears likely to happen imminently in an Irish context,[226] when the state initially introduces into an unsuspecting community a court-annexed restorative strategy such as VOM that relies on residential involvement. In such a scenario, the restorative initiative is not born naturally of a proportionate degree of residential collective efficacy; rather, it is the artificially-introduced fruit of state-intervention. Yet, while the establishment of such a programme is undetermined by community mobilisation, it is likely that residents who observe this visual indicator of informal crime-prevention will interpret it erroneously as a symbol of thriving collective efficacy.

Deducing high collective efficacy from prevailing strategies of informal social-control is capable of inspiring similar collective action. Positive perceptions of collective efficacy encourage people to get involved in equivalent strategies. This phenomenon is explained by Hackler and colleagues' thesis on "models of helping".[227] They describe the positive, imitative impact of observing others intervening against crime. It is said that witnessing one's fellow residents intervening for the protection of others enhances a bystander's own altruistic tendencies. So, models of "helping behaviour" increase the probability of future beneficence by individuals who have been privy to charitable acts.

By inspiring greater residential collaboration, the positive *perceptions* of collective efficacy that are prompted simply by the *state's* initial instigation of restorative justice can actually enhance a community's factual reserves of that commodity. People are likely to respond positively to visible signs of informal social-control by uniting to act similarly, either by joining in existing efforts or by establishing their own. This means that limited restorative initiatives that are planted in communities beset by conditions of poor or waning collective efficacy, by stimulating further genuine collective efforts, can actually inspire a factual rise in sincere collective spirit. Accordingly, real collective efficacy can be born of

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[225] *Supra*, at 175.
[226] *Supra*, at 43-44.
[227] Hackler, Kwai-Yiu Ho and Urquhart-Ross, "The Willingness to Intervene: Differing Community Characteristics" (1974) 21 *Social Problems* 328.

mere perceptions of it. The *fiction* of collective efficacy created by isolated initiatives of informal social-control can muster the sense of solidarity and united mettle required to produce *real* collective efficacy.

Therefore, if and when the Irish government integrates restorative justice officially into its criminal justice system – as currently planned – via a court-annexed system of restorative community referrals,[228] it is likely that it will replenish dwindling stocks of collective efficacy – a valuable tool of mass emotional healing.

3.3 Restorative Justice and Education: Involvement in Restorative Programmes Brings Empowerment through Knowledge

Chapter 4 concluded that educating residents about the realities of local crime is an important means of keeping the fear of crime that resists *complete* elimination within proportionate levels. That chapter discovered that one of the dominant sources of residents' over-estimated personal vulnerability to crime and the unwarranted fear that results therefrom is their ignorance about the objective risks that crime poses them.

More particularly, Chapter 4 found that this deficit in accurate knowledge leaves residents vulnerable to the fear-provoking influence of the "indirect victimisation" they undergo when they either misconstrue or are misled by information conveyed to them about local crime.[229] The news media were targeted specifically as prime escalators of the public's excessive fear of crime in Ireland. They have been charged with peddling fear-provoking, distorted crime news to capitalise on the public's ignorance about crime and win readership/ratings points.[230]

Chapter 8 also considers the fear-inducing impact of a *symbiotic collusion* between Irish politicians and news media that may have taken place in the 1990s, whose intentional provocation of "moral panics" about crime could have served both of their personal interests – the preservation of political *status quo* and the maintenance of a strong market position respectively.[231] Residents' education about the objective risks that local crime factually poses them is one means by which the fear-provoking impact of dishonest representations of local crime can be avoided. Armed with accurate information, residents will be less obsessive about the prospect of victimisation, less cautious and retreatist and therefore less susceptible to manipulation and exploitation by corporate and political interests.

Restorative strategies of informal community justice are capable of rectifying the public's ignorance about local disorder. Techniques such as VOM are capable of educating

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[228] *Supra*, at 43-44.
[229] *Supra*, at 139-143.
[230] *Infra*, at 343-344.
[231] *Ibid.*

residents because of the degree of *involvement* they afford them in their disputing processes. The cumulative impact of individual involvement for victims and offenders but also for the local participants who fill the roles of mediator, observer, or community panellist, is community-wide, collective residential empowerment through the *knowledge* that this kind of "at the coalface" involvement brings.

Balanced, truthful information about crime allows residents to make accurate estimations of their vulnerability to future victimisation and thereby keeps excessive fear of crime in check. This is the promise of restorative, community-embedded strategies such as VOM. Inter-disputant dialogue is likely to yield a hoard of valuable knowledge about crime for all of those having experienced it directly or indirectly.

As the above overview of the TRC movement revealed,[232] a variety of truths is likely to emerge from confrontational disputing, from information about the circumstances of a particular offence to the motivations driving individual perpetrators. Participants are likely to gain a better understanding not only of individual crimes but also of their causes and consequences. They learn contextual facts about offenders – their backgrounds, psychological make-up, personal ambitions, motivations and criteria for victim-selection. Much can also be learnt about victims' emotional experiences of victimisation, their losses, fears and their feelings of vulnerability.

Participants thereby benefit from a better understanding of the greater "atmosphere of crime"[233] in their community. They can appreciate more ably and accurately the objective risks inherent in community life, having regard to their own peculiar demographic features. Residents witnessing VOM – whether victim, offender, family member, panellist, onlooker or mediator – can better tailor their individual perceptions of vulnerability to crime and their fear of crime to the objective risks that their enhanced awareness of local crime, local criminals, and local victims, allows them to estimate more accurately.

Armed with accurate information about crime and policies of personal security that are tailored to the objective risks inherent in community life, residents feel better able to control their risk of victimisation. They benefit from an elevated sense of security and safety and as such, are likely to fear crime less.

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[232] *Supra*, at 203-205.
[233] *Supra*, at 130.

3.4 Restorative Justice's Community-Empowerment: Prioritising its Selling Points

As with victims and offenders, the social value of restorative justice's empowering influence over communities must be contextualised. Again, it is restorative justice's emotionally reparative ends on which the paradigm *relies* for its legitimacy, not the means by which its does so nor the incidental benefits thereof. This means that restorative justice can only be attacked legitimately for failing to fulfil its integral emotionally therapeutic potential, and not for failing to summon any ancillary results, regardless of their social merit.

For instance, it might be assumed that restorative justice's de-prioritisation of punitive sentencing in order to quell residents' fear of crime invests the paradigm with a strict anti-punitive agenda. Yet, a retreat from more punitive options in favour of restorative outcomes is merely a *trend that tends* to pursue restorative justice's more concrete mandate of emotional healing. In fact, this thesis is premised on restorative justice's *tolerance* of retributive punishments where they are practically required.[234] It is firmly committed to the prospect of combining restorative and punitive treatment options for certain offenders who would benefit from a two-tiered approach.[235] Hence, an inclination away from incarceration in favour of reparative treatments is simply a tactic that restorative justice uses, *where appropriate*, as a tool of emotional healing through residential empowerment:

> Contrary to the implied suggestion in many restorative justice critiques, the strength of restorative justice responses does not lie in their rejection of punitiveness and retribution, but in the empowerment of communities who are the best placed to address *both* the causes *and* the consequences of the unacceptable behaviour in question.[236]

Similarly, while the crime-control potential that Chapter 4 associates with the social reintegration and improved collective efficacy that restorative justice uses to suppress fear might be considered an integral objective of restorative justice, it is not. As previously insisted, while crime-control would undoubtedly be a positive auxiliary incident of breaking the fear cycle, its potential is empirically unsubstantiated and its social impact probably modest.[237] That is not to deny it any social value; it merely implies that restorative justice should be judged on its other, more realisable, socially transformative goals.

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[234] *Supra*, at 214-215; *infra*, at 329-335, 378-383.
[235] *Ibid.*
[236] Barton, *loc. cit.*, at 55. [author's emphasis]
[237] *Supra*, at 33-36.

4. Conclusion

This chapter has confirmed restorative justice as a credible mechanism by which crime's diverse emotional side-effects can be treated. It corroborates Chapter 1's introductory image of restorative justice as an effective mode of *holistic* emotional healing. This inspires considerable optimism about the paradigm's successful incorporation into Ireland's adult criminal justice system. At this point, however, that optimism is necessarily conditional. Its legitimacy, and indeed its appropriate levels have yet to be properly determined. They will depend on the validity of several important challenges to restorative justice, considered in the following chapter, and how the paradigm is equipped to deflect them.

Chapter 6 adds the first substantial measure of caution into the blend of considerations that will determine restorative justice's future in this country and dilutes the optimism that this chapter has otherwise aroused in that respect. It does not, however, erode that optimism so substantially that it threatens to jeopardise restorative justice's future prospects in Irish criminal justice. To the contrary, Chapter 6 diagnoses a manageable, if not entirely *avoidable* risk of restorative justice's frustration by the various limitations it is commonly perceived to possess.

Chapter 6

Pitting Optimism with Caution: Testing the Limits of Restorative Justice's Emotionally Therapeutic Potential

> The optimistic bias that gives pessimists something better to shoot at can yet be the kind of optimism that we see among the best natural scientists—the medical researcher whose very optimism about a new theory of disease motivates extraordinary rigour in putting in place randomized controlled trials to refute it. But that is not enough. The scientific optimist is also required to develop and test ideas about the side-effects and the contraindications of her new drug.[1]

1. Introduction

The optimism that Chapter 5 arouses about restorative justice's potential to achieve multi-party emotional healing must be tempered by a number of important reservations; but not mortally so. Most doubts about restorative justice's emotionally therapeutic potential can be diluted, circumvented or minimised sufficiently to subdue the degree of caution they would otherwise inspire. More stubborn threats that evade effective suppression or aversion, once monitored with appropriate scrutiny, can be reasonably absorbed.[2]

On the one hand, this chapter demonstrates that the need for alertness to the very *real* risks accompanying a budding system of restorative justice can by no means be dispensed with altogether. At the same time, it concludes that the sense of caution aroused by potential risks can be suppressed *at least sufficiently* to prevent it obstructing restorative justice's passage into mainstream criminal justice.

Caution is essential when considering restorative justice's dramatic infiltration of established sentencing trends. Therefore, optimistic indications of restorative justice's empowering, emotionally-palliative strengths – no matter how compelling – must not be accepted on face value alone. As Chapter 1 warned, impulsive expressions of immoderate enthusiasm for restorative justice ultimately *erode* rather than enhance the paradigm's credibility.[3] This chapter resists such an approach by identifying and considering analytically potential inhibitors of restorative justice's emotionally reparative content.

The arguments that are typically invoked by sceptics to undermine restorative justice's therapeutic capacity can be divided into two distinct categories. First, Part One

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[1] Braithwaite, "Restorative Justice: Optimistic and Pessimistic Accounts" (1999) 25 *Crime and Justice* 1, at 79.
[2] *Infra*, at 250, 258-259.
[3] *Supra*, at 19-20, 46.

below evaluates criticisms that question the very root of restorative justice's asserted legitimacy: its potential to *empower* its participants – the catalyst of multi-party emotional healing.[4] But opposition to restorative justice on this basis adopts more dramatic forms than simple accusations that the paradigm defies its primary emotional purpose by *omitting* to fulfil its promise to empower. Some charge restorative justice with flouting its emotionally therapeutic intent more violently by *actively disempowering* victim and offender.

Secondly, Part Two contemplates reasons for doubting restorative justice's ability to carry out the *component-stages* in its quest for emotional healing. Critics have inferred – with varying degrees of accuracy – a trio of restorative justice's perceived expectations along its route to emotional healing, which they regard as "unrealistic", given the magnitude of various impediments thereto.

Part One: Harmful Consequences for Victims and Offenders

2. Can Restorative Justice Disempower Crime Victims?

> In some respects the VOM movement is consistent with various strands of the victims' rights movement. VOM offers the victim both an opportunity to confront the offender and to receive restitution for the harm done. Aside from monetary compensation, VOM promises healing and reconciliation that many victims may desire. VOM programs give victims an opportunity to see and speak to their offenders, with the hope that such contact will help victims resolve some of their fears of future victimization. This may in turn give victims a greater sense of mobility and freedom to enjoy life instead of taking excessive precautions to avoid harm. In some respects, however, *VOM may betray the interests of the victims it seeks to protect.*[5]

Sceptics and advocates alike are wise to acknowledge the danger of restorative justice doing more harm than good for crime victims.[6] Restorative justice is judged to betray victims in two main respects. First, VOM is considered an emotionally hazardous experience for victims of crime because confronting their offenders can be a potentially distressing

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[4] *Supra*, at 180-224.

[5] Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique" (1994) 43 *Emory Law Journal* 1247, at 1274. [emphasis added]

[6] *Ibid.*, at 1273-1281; Mika, Achilles, Halbert, Stutzman Amstutz and Zehr, "Listening to Victims: a Critique of Restorative Justice Policy and Practice in the United States" (2004) 68(1) *Federal Probation* 32; Strang, "Is Restorative Justice Imposing its Agenda on Victims?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 95; Reeves, "The Victim Support Perspective" in Wright and Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Sage, 1989) 44; Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale Law Journal* 1545; Herman, "Is Restorative Justice Possible without a Parallel System for Victims?" in Zehr and Toews eds., *op. cit.* 74.

event[7] that runs the risk of "revictimising the victim".[8] There is a consequential fear that VOM might reinforce rather than cure the feelings of stigmatisation, domination and fear that disempower many victims in the wake of crime.[9] The result is that "[n]ot all individuals will want to engage in a process that involves meeting the offender."[10]

The statistics that reflect victims' participation in restorative processes have corroborated this possibility, at least to some extent. They can, however, be invoked just as easily to account for victims' *enthusiasm* for restorative alternatives. This dichotomy owes to wide-ranging fluctuations in the available figures. For instance, Dignan cites a participation rate of 85% with respect to Canberra's RISE experiments compared with a figure of 7% in English VOM projects in Coventry and Leeds.[11] Statistics from other schemes can waver anywhere in between.

Of course, a sense of apprehension about subjecting oneself to an emotional ordeal is only one of several reasons why victims might decline to participate in VOM. In addition to variations in different victims' emotional vulnerabilities, statistical variations in participation could arise from corresponding differences in prevailing attitudes to restorative justice from place to place, the implementation, procedures and organisation of conferences across different jurisdictions[12] as well as the quality of the practice that navigates different restorative processes.[13]

Secondly, echoing those who predict harm to offender-participants in restorative programmes,[14] those who foresee damage to victims premise their fear on an erroneous "zero-sum" interpretation of restorative justice.[15] They believe that any improvement in the rights of offenders necessarily involves a proportionate erosion of victims' needs.[16]

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[7] *See* Wemmers, "Restorative Justice for Victims of Crime: A Victim Oriented Approach to Restorative Justice" (2002) 9(1) *International Review of Victimology* 43.
[8] Irish Victim Support, "Policy on Restorative Justice in Criminal Justice", 17 October 2003, at 3. <http://www.restorativejustice.org.uk/Resources/pdf/Vic_Supp_on%20RJ_in_CJOct03.pdf> (visited 17 April 2006).
[9] Reeves, *loc. cit.*, at 52.
[10] Griffin, "Some Offenders Can be Dealt With Outside Prison System" *The Irish Times*, 26 January 2007.
[11] Dignan, "Towards a Systematic Model of Restorative Justice" in von Hirsch, Roberts and Bottoms eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart, 2003) 135, at 137.
[12] *See* Daly, "Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects" in Morris and Maxwell eds., *Justice for Juveniles: Conferencing, Mediation and Circles* (Hart, 2001) 59.
[13] *See* Hoyle, "Restorative Justice and the Non-Participating Victim" in Hoyle and Young eds., *New Visions of Crime Victims* (Hart, 2002) 97.
[14] *Infra*, at 234.
[15] *Supra*, at 27, 102; Strang and Sherman, "Repairing the Harm: Victims and Restorative Justice" (2003) 15 *Utah Law Review* 15, at 35-36.
[16] *Ibid.*

Accordingly, restorative justice is considered an offender-oriented paradigm whose processes treat victims as little more than "agents" [17] or "props"[18] of offender-rehabilitation.

These dual concerns certainly justify a measure of caution and vigilance in designing systems of restorative justice. The risk of harming victims by stimulating or reinforcing feelings of passivity and exploitation in blatant defiance of restorative justice's primary healing objective must be optimally reduced. Yet, this *is* achievable.

VOM is not an easy option for victims.[19] Nor does it claim to be. Encountering or re-encountering the face of one's victimisation is bound to induce some element of apprehension, stress and anxiety.[20] At the same time, the success of the process rests on the positive results to be gained from *confronting* victimisation's difficult emotional repercussions, which might otherwise be easily denied or suppressed, with perilous long-term psychological results.

An emotionally palliative, conciliatory setting such as VOM provides victims with a vital *outlet* for emotional pain, if only by affording them an opportunity to be "listened to" whilst articulating their suffering. As previously discussed, dealing head-on with crime-induced anguish, though potentially arduous, facilitates emotional *closure* for victims;[21] one must get in touch with their pain to ultimately relinquish it.[22] VOM's success is therefore built around a "no pain, no gain" credo.

One cannot discount, however, the possibility of pain *without gain* in VOM. Still, there is reason to believe that it is a risk worth taking. Various factors, considered below, indicate that the risk of restorative justice doing more harm than good is (a) modest by reference to *hopeful* empirical data, (b) no greater than that associated with state-adjudication, (c) not necessarily attributable to anything inherent in restorative justice's value-system, (d) capable of being mitigated successfully by various precautionary measures and (e) more modest than might be expected having regard to bad conduct's disqualification of deficient strategies as expressions of "restorative justice".

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[17] Ashworth, "Victims' Rights, Defendants Rights and Criminal Procedure" in Crawford and Goodey eds., *Integrating a Victim Perspective within Criminal Justice* (Ashgate, 2000) 185, at 199; see also, Mika, Achilles, Halbert, Stutzman Amstutz and Zehr, *loc. cit.*; Herman, *loc. cit.*, at 77; Stutzman Amstutz, "What is the Relationship between Victim Service Organizations and Restorative Justice?" in Zehr and Toews eds., *op. cit.* 86, at 87.

[18] *See* Braithwaite, *loc. cit.*, at 82.

[19] *Infra*, at 228.

[20] *Ibid.*

[21] *Supra*, at 188-189, 191, 203; Strang and Sherman, *loc. cit.*, at 33; Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002), at 110-113.

[22] *See* Delgado, "Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice" (2000) 52 *Saskatchewan Law Review* 751.

2.1 Empirical Data Confirms Emotional Healing

Empirical research has testified to restorative justice's emotionally therapeutic impact on crime victims, confirming high levels of victim-satisfaction with restorative processing.[23] For example, Strang reports that 70% of victims who attended a RISE conference were satisfied with the manner in which their cases were handled.[24] Moreover, McCold and Wachtel studied no less than 13 evaluation reports on various restorative programmes and identified an overall victim-satisfaction rate of 91% with what were deemed "fully restorative" initiatives.[25]

To subdue the optimism such statistics initially inspire, this thesis has already revealed the potential weakness of statistical findings as to restorative justice's effectiveness.[26] The newness of restorative justice's "second wave" has precluded interim follow-up checks sufficient to confirm the *long-term* endurance and validity of its strategies' results.[27] As Julie Stubbs cautions: "[d]ata of victims' experiences tend to focus on the short term, and there is a lack of data on the longer-term effects of conferencing on victims..."[28] As a consequence, the reliability of statistics that indicate *prima facie* successes is somewhat undermined and corresponding levels of optimism suspended in check pending future corroborative research. This factor does not, however, render the last decade's-worth of data devoid of all influence.[29] Positive statistics still inspire a rebuttable hope for the future expansion of restorative regimes.

Moreover, information about *victims'* states of mind following VOM is arguably more immune to the above shortcomings than say, information reflecting offenders' likelihood to go on offending. While only time will tell the true extent of a restorative strategy's rehabilitative influence and as such, premature hard-and-fast judgements are imprudent,[30] the degree of *emotional satisfaction* that victims claim to have gained from restorative processing in its immediate aftermath could be more probative of their long-term well-being. This is because it does not require people to break-out of potentially long-

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[23] *See* Strang, *op. cit.*; Palk, Hayes and Prenzler, "Restorative Justice and Community Conferencing: Summary of Findings from a Pilot Study" (1998) 10(2) *Current Issues in Criminal Justice* 138; Daly, *loc. cit.*; McCold and Wachtel, "Restorative Justice Theory Validation" in Weitekamp and Kerner eds., *Restorative Justice: Theoretical Foundations* (Willan, 2002) 110.
[24] Strang, *op. cit.*, at 133.
[25] McCold and Wachtel, *loc. cit.*
[26] *Supra*, at 19-20; *infra*, at 316-319.
[27] *Infra*, at 318; see Morris and Maxwell, "Restorative Conferencing" in Bazemore and Schiff eds., *Restorative Community Justice: Repairing Harm and Transforming Communities* (Anderson, 2001), at 188.
[28] Stubbs, "Restorative Justice, Domestic Violence and Family Violence" (2004) *Australian Domestic and Family Violence Clearinghouse: Issues Paper 9*, at para. 27.
<http://www.austdvclearinghouse.unsw.edu.au/Word%20Files/Issues-Paper_9.doc>
[29] *Supra*, at 19.
[30] *Supra*, at 33-36.

established, ingrained behaviour patterns such as deviance; it merely encourages the willing relinquishment of *recently acquired* emotional burdens.

This is not to suggest that the latter is some easy feat – just that evidence of emotional healing is more likely to stand the test of time than evidence of rehabilitation because the former is arguably less likely to be reversed or set back once achieved. The comfort of a long-established – in this case a *criminal* – lifestyle is a more appealing, entrenched habit to fall back into than a short-lived period of emotional suffering that one has been trying concertedly to shake off. Once an emotional wound is healed *properly*, it is unlikely to be re-opened without deliberate effort. A criminal routine, in contrast, is easier to relapse effortlessly into.

2.2 Comparison with Conventional Criminal Process

Given its positive empirical track-record and hypothetical propensity for emotional healing illuminated throughout Chapter 5, restorative justice's capacity for *emotional harm* is unlikely to exceed that of curial prosecution, which Chapter 3 isolated as a marginalising and stigmatising influence over many crime victims.[31]

Moreover, while confronting one's offender through VOM certainly holds potential to be an emotionally turbulent experience, so does encountering one's victimiser in court. In fact, testifying against a defendant in an *adversarial setting* that is dedicated to the apportionment of blame, punishment and win/lose outcomes could be *more likely* than VOM, with its emphasis on consensus, healing and mutual understanding to instil in victims a fear of retaliatory harm – in other words, a fear of re-victimisation.[32] In fact, a victim can endure the very same fear even where his testimony takes place *outside the courtroom* in the absence of the offender. As Andrew Ashworth explains, victims' involvement in formal criminal justice can be a frightening prospect even in a context of relative privacy – even making a victim impact statement can inspire a fear of retaliation:

> It is sometimes claimed that making such a statement can have a cathartic effect for victims, but on the other hand it may create or increase the fear of reprisals from the offender's family or associates ... [33]

The very least that could be said is that restorative justice's potential to harm victims emotionally is no less than that of traditional criminal justice. And, to reiterate a dominant principle that permeates this thesis, restorative justice cannot be opposed legitimately on the

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[31] *Supra*, at 94-110.

[32] *See* Wemmers, "Restorative Justice for Victims of Crime: A Victim Oriented Approach to Restorative Justice" (2002) 9(1) *International Review of Victimology* 43, at 53; on the fear of re-victimisation in general, see *supra*, at 133-134.

[33] Ashworth, *Sentencing and Criminal Justice* (Butterworths, 1995), at 310.

basis of its inability to *guarantee* superiority over mainstream methods. It need only prove itself credible and effective with respect to those advantages it claims expressly.

Still, the prospect of victims interpreting *any* form of justice – restorative or retributive – that involves direct or indirect contact with their offenders as a threat to their safety emphasises that a feeling of security is an integral precondition to emotional healing. Victims need a sense of *factual closure* on their victimisation before *emotional closure* can be achieved; if during the adjudicatory process, they still interpret their victimisation as on-going or incomplete, their ability to surrender feelings of fear, anxiety and disempowerment is radically undermined. As Judith Herman warns, "no therapeutic work can possibly succeed if safety has not been adequately secured".[34] Participation in VOM as well as direct or indirect *curial* contact with one's offender could both traumatise crime victims unless, this basic precondition is, as far as possible, primarily met.

2.3 Voluntariness as a Safeguard against Harm

The risk of restorative justice u-turning into emotionally-damaging territory can be mitigated by a mandate of voluntariness in VOM.[35] As Chapter 8 recommends, VOM should be an entirely voluntary process for victims and offenders alike.[36] One factor underlying this principle is the potentially stressful nature of such a process, particularly for crime victims. Attuned to its emotional challenge, victims are unlikely to enter VOM lightly, regardless of their conviction to its potential merits.

Yet, just as victims' untrammelled discretion to *enter* VOM subdues the risk of their emotional disempowerment thereby, so does their freedom to depart the process at any point once *within its ranks*, or reject non-binding recommendations at its conclusion. This acts as a secondary source of protection for those victims who – (a) only realise VOM's emotional challenge or (b) only realise their unwillingness to endure it – once inside the process. Richard C. Reuben illuminates the important procedural safeguard that an uncompromised principle of voluntariness in mediation provides:

> After all ... the most significant structural procedural protection of mediation is any party's ability to terminate the mediation for any reason by simply walking out of the room.[37]

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[34] Herman, *Trauma and Recovery: From Domestic Abuse to Political Terror* (Pandora, 1997), at 159.
[35] *See* Strang and Sherman, *loc. cit.*, at 37; Brown, *loc. cit.*, at 1266.
[36] *Infra*, at 381-383.
[37] Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 *UCLA Law Review* 949, at 1093.

2.4 External Safeguards

Soldering restorative interventions onto mainstream criminal justice boosts the procedural protections available to victim-participants, insulating them further against disempowerment. This thesis envisages a hybrid model of restorative criminal justice whose interventions combine outsourced community resolution with some degree of formal curial attendance, depending on the need for additional punitive sanctions and the success of the restorative proceedings.[38]

One basis for this thesis' preference for court-annexed restorative justice is its ability to keep the back-up safeguards supplied by legal formalism open to victim-participants. Restorative interventions tend to resist the application of strict legal rules in favour of pragmatic, flexible results. Nonetheless, it is imperative that neither victims nor offenders sacrifice access to established curial justice when they assent to their referral there-from. This maintains the important "public realm" of the law, whose abandonment would have far-reaching legal and constitutional consequences.[39]

Access to court is not, however, the only external means of minimising restorative justice's chances of harming victims emotionally. Victims can gain valuable protection and information as to the nature and extent of their rights from victim support organisations, which operate on the ground to bolster the protections offered in restorative and curial forums alike. Andrew Ashworth stresses the importance of adequate support for victims *outside* the criminal justice system:

> It is important that the victims of crime should be able to call upon practical support at a time when they may be traumatized by the offense and subject to associated financial and emotional pressures. The state should therefore regard the provision of support as one of its duties … these services may be seen as the concern of the criminal justice system, but they are in the nature of social service entitlements, being concerned with support, assistance, and respect for those who have become victims of crime and then must cope with the demands of criminal process.[40]

2.5 Bad Practice and the Defence of Exemption

While restorative justice's emphasis on direct victim-offender negotiation is unquestionably a potential source of emotional distress for crime victims, so is the *bad practice* that will inevitably subvert the restorative character of processes such as VOM.

Maxwell and Morris, for instance, found that a surprising number of victims in the strategies they studied felt worse after conferencing. However, they determined that bad

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[38] *Infra*, at 378-383.
[39] *Infra*, at 335-336.
[40] Ashworth, "Some Doubts About Restorative Justice" (1993) 4 *Criminal Law Forum* 277, at 281-282.

practice – and not the inherent intentions of the restorative process – was to blame in this regard.[41] Similarly, Heather Strang found that a RISE conference *sometimes* proved a worse experience than curial processing.[42] However, she pointed the finger of blame towards various shortcomings that were *unrelated* to the conferences' mere "bringing together" of victim and offender, such as deficient investigative work by the police, insufficient preparation of victims prior to conferencing, poor organisation, inadequate training of facilitators, inadequate follow-up evaluations of agreements and excessive emphasis on the offender.[43]

There will clearly be times when crime victims will emerge traumatised from VOM, *not* because (or solely because) of their confrontation with offenders, but because of the inherent deficiency or absence of the procedural safeguards needed to inoculate them as far as possible from undue emotional distress.

Chapter 1's "value-system" definition of restorative justice[44] created another vital principle to be applied when contemplating the validity of challenges to restorative justice: that an attack on a process that neglects a central restorative value needlessly[45] is not an attack on restorative justice. This stems from restorative justice's conceptualisation as a chain of interlinking values, the unwarranted sacrifice of any one of which, sunders the entire chain and divests that strategy of its asserted restorative identity.

Applying this principle, it can be said that a process that harms victims or offenders consistently, particularly one that exploits either party *for the perceived benefit of the other*, flouts restorative justice's indispensable ethic of holistic and balanced stakeholder assistance. Therefore, strategies whose bad practice betrays crime victims in a consistent manner *cannot* be considered restorative justice, since they lack adherence to the full complement of observable[46] restorative values. This principle limits the range of techniques that can be attacked validly for exacerbating victims' emotional distress and exempts genuine expressions of restorative justice there-from.

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[41] *See* Maxwell and Morris, *Families, Victims and Culture: Youth Justice in New Zealand* (New Zealand Institute of Criminology, 1992).
[42] Strang, *op. cit.*, at 153.
[43] *Ibid.*
[44] *Supra*, at 7-8.
[45] *Supra*, at 187.
[46] Victims' interests may not be amenable to observance where there is no identifiable victim of a certain offence. In such a case, a process that focuses instead on an offender's well-being retains its restorative character: *supra*, at 186.

3. Can Restorative Justice Disempower Offenders?

This segment measures restorative justice's potential to emotionally damage offender-participants by reinforcing or exacerbating the disempowerment that Chapter 3 associates with the post-crime period. Again, this possibility is weighed against the optimism that restorative justice's emotionally transformative ability otherwise inspires.

3.1 Net-widening

Restorative justice has been associated with the phenomenon of "net-widening". "Net-widening" refers to a process whereby governments extend police-powers or innovate alternatives to formal justice that surreptitiously lower the threshold of conduct required to involve citizens in the criminal justice system, thereby extending the state's reach over a greater proportion of society. The result is said to be that "minor offenders [are] given more incursive penalties than they would otherwise receive",[47] or worse that "shallow-end" offenders – those who would not ordinarily be processed formally *at all* – become new targets for criminal justice.[48] Stanley Cohen associated an incoming range of "community corrections" in 1970s America with such a process.[49] He asserted at the time that "[i]t is ironical, then, that the major results of the new network of social control have been to increase, rather than decrease, the amount of offenders who get into the system in the first place".[50]

A good example of a modern Irish process that arguably "widens the net" of government control is the Anti-Social Behaviour Order (ASBO), considered in more detail in Chapter 8.[51] Though a civil order, the adult ASBO's introduction on 1 January 2007[52] and its juvenile equivalent's launch on 1 March,[53] have attracted considerable controversy.[54] This is because, by making its breach a criminal offence, the ASBO is said to effectively reduce the standard of behaviour that will involve an offender in criminal justice.[55]

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[47] Morris, "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42(3) *British Journal of Criminology* 596, at 602.
[48] Griffin, "Restorative Justice, Diversion and Social Control: Potential Problems", *loc. cit.*, at 4.
[49] *See generally*, Cohen, "Community Control – A New Utopia" *New Society*, 15 March 1979, at 609; Cohen, "The Punitive City: Notes on the Dispersal of Social Control" (1979) 3 *Contemporary Crises* 339.
[50] Cohen, "Community Control – A New Utopia", *loc. cit.*, at 610.
[51] Reilly, "Asbos Will Take on Yobs Who Prey on Vulnerable" *The Sunday Independent*, 31 December 2006.
[52] Criminal Justice Act, 2006, ss. 113-119.
[53] *Ibid.*, ss. 159-166.
[54] *See* comments of Ursula Kilkelly, senior lecturer in law at University College Cork, in Holland, "Orders for Disorder" *The Irish Times*, 2 April 2005; see position of Brendan Howlin in O'Brien, "High Level of Concern Across the Country" *The Irish Times*, 5 May 2006; "Use of ASBOs" *The Irish Times*, 20 April 2006; Coulter, "Lenihan Says Children's Act Not Undermined" *The Irish Times*, 19 April 2006; Downes and Coulter, "Ministers Back ASBOs in Face of Criticism by Ombudsman" *The Irish Times*, 8 April 2006.
[55] *Infra*, at 321-322.

Restorative justice could be tarred with the same brush and considered yet another criminal justice tactic that creates the illusion of diverting offenders away from formal criminal justice while practically provoking more incursive treatment than ever. The fear is that by referring offenders to restorative forums, the government is effectively involving citizens in the criminal justice system who, were it not for their referral, would not ordinarily encounter it (a) at all or (b) for as prolonged a time. Therefore, it might appear that offenders are being punished more severely in a general sense, because of the arrival of restorative alternatives.

Net-widening is considered to impact the most vulnerable offenders most severely, such as juveniles and the socio-economically weak, when state-endeavours to *reduce* their over-representation in the legal system backfire due to net-widening.[56] Diversion to restorative forums may therefore be considered to *penalise* offenders unfairly for their membership of vulnerable groups, thereby defeating restorative justice's original reparative purpose.

Finally, it could be perceived that the *combination* of incoming restorative and existing traditional sentencing options that this thesis associates with the *customised* treatment of offenders[57] might effectively *over-consequence* certain offenders with more burdensome sanctions than they would previously have faced.

In defence of restorative justice, Morris warns that "the validity of this [net-widening] claim depends on the focus of particular examples of restorative justice and it certainly does not apply to all".[58] This is certainly true. Net-widening may afflict some forms of restorative justice and not others. For instance, *police-led* models of restorative justice, such as the system in place in Ireland's juvenile justice system,[59] are vulnerable to net-widening on the basis that an extra-judicial authority cannot be trusted to exercise sufficient restraint when making referrals to reliably avoid over-consequencing suspected wrongdoers. As Braithwaite remarks:

> Net-widening is most likely to occur with programs the police do not take seriously and which depend on referrals from the police. The police then refer cases they would not normally be bothered doing much about ...[60]

On the other hand, net-widening poses little threat to the *court-annexed* brand of adult restorative justice approved in this thesis. Unlike the ASBO[61] and certain police-led

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[56] Blagg examines this effect with respect to the diversion of aboriginal offenders in Australia; see Blagg, "A Just Measure of Shame?" (1997) 37(4) *British Journal of Criminology* 481.
[57] *Infra*, at 378-379, 387-388.
[58] Morris, *loc. cit.*, at 603.
[59] *Supra*, at 219.
[60] Braithwaite, *loc. cit.*, at 90.

restorative initiatives, court-appended restorative justice does not threaten to lower the normal standard of conduct that involves citizens in the criminal justice system.

The net-widening critique is secondarily weakened because it is a problem that *already affects* various aspects of mainstream criminal justice. In fact, it afflicts non-custodial orders generally. So-called "alternatives" to custody, for instance community service orders,[62] can be used to over-consequence offenders who would not have otherwise attracted custodial sentences. When used in this way, such orders become mere *alternatives to freedom*, not custody – which is where the net-widening influence asserts itself. In light of the universality of the net-widening dilemma throughout criminal justice, restorative justice should not be penalised for failing to out-perform conventional criminal justice or for sharing some of its defects.[63]

Net-widening is just one problem that requires constant monitoring within *any* justice model using non-custodial orders, including *but not limited to* referrals to restorative justice, lest such interventions be used to over-consequence offenders with a degree of state-intervention that – its good intentions aside – is excessive in light of the crime(s) in question. Hence, net-widening can be as much a result of the erroneous, inappropriate *application* of a non-custodial order as anything inherently imbalanced therein. The threat of over-consequencing defendants is certainly not the fault of the methods by which over-consequencing occurs, nor does it justify their abandonment. In reality, it is a problem whose resolution must be entrusted to the exercise of judicial discretion.[64]

Finally, there is a simple scarcity of evidence to suggest that restorative justice performs any net-widening role.[65] In an Irish context, Diarmuid Griffin confirms that "[d]ue to a lack of empirical data, it cannot be asserted that … restorative programmes are used for shallow-end offenders".[66]

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[61] *Infra*, at 321-322.
[62] Walsh and Sexton, *An Empirical Study of Community Service Orders in Ireland* (Stationery Office, 1999), at 28.
[63] *Supra*, at 38.
[64] *Infra*, at 373, 385-386.
[65] For an overview of empirical studies that failed to adduce proof of restorative justice's net-widening ability, see, Braithwaite, *loc. cit.*, at 89-90.
[66] Griffin, "Restorative Justice, Diversion and Social Control: Potential Problems", *loc. cit.*, at 4.

3.2 The Protection of Procedural Rights and the Risk of Prejudice

The rigour of procedural formality and rule application in formal criminal justice is perceived as an important safeguard to fundamental fairness that is missing in informal mechanisms such as restorative justice.[67] Because of its inclination towards informalism, procedural swiftness and de-professionalisation and, in particular, due its emphasis on involving victims, restorative justice has been questioned for its potential to disempower offenders by failing to protect their legal rights adequately and minimise the risk of prejudice.[68] These concerns, though weighty and worthy of serious consideration can be challenged on several grounds.

3.2.1 Empirical Data Confirms Emotional Healing

The statistical evidence indicating restorative justice's capacity to prevent re-offending[69] speaks, on first glance, to the paradigm's rehabilitative potential. Yet, the weakness associated with restorative justice's crime-control data undercuts the inference of rehabilitative competence.[70] Therefore, optimistic impulses must be resolutely restrained. Having said that, positive statistics, though imperfect, provide at least *hopeful* indications of restorative justice's *potential* to heal offenders emotionally. If nothing else, they corroborate tentatively the optimism that Chapter 5's theoretical findings inspire. That tentativeness can only abate as time confirms the endurance of rehabilitative results.

3.2.2 Comparison with Conventional Criminal Process

As Chapter 1 instructed, some initiatives may disqualify themselves as modes of restorative justice by abandoning an indispensable element of restorative justice's value-system.[71] A strategy's creation of prejudicial outcomes for offenders is one trigger of its demotion in this respect. The prospect of such a de-classifying practice might be treated as a reason for avoiding restorative justice altogether. However, it is a threat to which formal criminal justice itself is by no means immune. As Morris asserts astutely, "it is quite farcical

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[67] Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95; Abel, "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice" (1981) 9 *International Journal of the Sociology of Law* 256.

[68] Ashworth, "Is Restorative Justice the Way Forward for Criminal Justice?" in McLaughlin, Fergusson, Hughes and Westmarland eds., *Restorative Justice: Critical Issues* (Sage, 2003) 164; Strang and Sherman, *loc. cit.*, at 35-38; Brown, *loc. cit.*, at 1281-1291; see generally, Braithwaite, *loc. cit.*, at 101-104; Toews and Katounas, "Have Offender Needs and Perspectives Been Adequately Incorporated into Restorative Justice?" in Zehr and Toews eds., *op. cit.* 107

[69] *Supra*, at 213, n. 198.

[70] *Supra*, at 19-20, 33-36.

[71] *Supra*, at 7-9.

for critics of restorative justice to imply that, in contrast, conventional criminal justice systems adequately protect offenders' legal rights".[72]

While it can be argued that the content of victims' dialogue *in mediation* could in some way prejudice the treatment of offenders, victims' participation in *mainstream criminal justice* is equally vulnerable to such an effect. Criminal justice routinely assimilates victims' views and characteristics into its processes; victims' testimony in court, their impact statements,[73] and even their demeanour, lifestyles and personal credentials revealed through lawyers and non-victim testimony will inevitably influence judges and juries alike.[74] While neither VOM nor conventional criminal practice affords the crime victim a *direct say* in binding outcomes, nor should they,[75] neither can resist entirely the influence that victim and offender alike will inevitably exert over the content of the resolution, action plan, judgement or sentence.

Again, restorative justice should not be marginalised or avoided on the basis of its vulnerability to factors *already affecting* mainstream criminal justice.

3.2.3 Voluntariness as a Safeguard against Harm

Like victims, offenders are also protected to some degree from emotional trauma in restorative justice by the voluntariness of their referral. Yet, the potential for defendant's *coercion* into restorative justice militates against its voluntary nature.[76]

Some have argued that *informal justice* is laden with latent coercion[77] because it creates the mere "illusion of informality",[78] which it uses to promote itself disingenuously as an alternative to the expense and delay associated with curial process that is too good to turn down. It thereby conjures the "fiction of choice"[79] for its participants who are duped into choosing a form of "second-class justice"[80] that subsumes much of the formality and coercion of conventional adjudication whilst selling itself as an *alternative* thereto.

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[72] Morris, *loc. cit.*, at 602.
[73] *Supra*, at 104-105.
[74] O'Malley, "Punishment and Moral Luck: The Role of the Victim in Sentencing Decisions" (1993) 3 *Irish Criminal Law Journal* 40.
[75] *Supra*, at 104-105; *infra*, at 324.
[76] *Supra*, at 22-23; *infra*, at 381-382.
[77] *See generally*, Abel, "The Contradictions of Informal Justice" in Abel ed., *The Politics of Informal Justice Volume I* (Academic Press, 1982) 267, at 292; Nader, "Disputing Without Law" (1979) 88 *Yale Law Journal* 999; Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement of Re-form Dispute Ideology" (1993) *Ohio State Journal on Dispute Resolution* 1; *contra* King, "Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader" (1994) 10 *Ohio State Journal on Dispute Resolution* 65.
[78] *See* Genn, "Tribunals and Informal Justice" (1993) 56 *Modern Law Review* 393.
[79] Abel, "The Contradictions of Informal Justice", *loc. cit.*, at 292.
[80] Abel, "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice", *loc. cit.*

Given its long-established tendency towards informality,[81] restorative justice must take care to avoid such deception. It will be argued below that while restorative justice can absorb a possibly surprising element of formalism, it must make concerted efforts to avoid a degree thereof that effectively *equates* it with curial processing, destroying its very *raison d'être.*[82]

In any event, it is unlikely to be its reduced formality and perceived procedural efficiency that will attract *offenders* to restorative justice. These are inducements that cater more to prospective civil litigants, (which could also include crime victims). This fact does not, however, immunise informal criminal processes from the risk of coercion. In the criminal domain, there are other, more compelling forces at play that could entice offenders into restorative forums, covertly overwhelming their free-will and quietly reinforcing the disempowerment that many of them suffer in the aftermath of an offence.[83] In particular, offenders may be prone to instrumental accession and compliance with restorative referrals in order to reap the perceived benefits of their favourable curial treatment on re-referral. However, the incentive for offenders to participate disingenuously in restorative events is not necessarily a sound basis for the paradigm's rejection.

First, the incentive to feign compliance with restorative referrals can be reduced. As Chapter 9 explains in detail, resisting treating successful restorative justice as a *necessary alternative* to curial sentencing will subdue – at least partially – offenders' incentive to fake obedience.[84] This is because satisfactory compliance with restorative justice will not *necessarily* preclude the imposition of subsequent punitive sanctions, where appropriate. As Chapter 9 stresses, satisfactory participation in restorative justice should not *guarantee* leniency, which should instead depend on a host of other criteria, including but not limited to a defendant's compliance with the demands of a restorative forum.[85] This proscription reduces the incentive to submit insincerely to restorative referrals.

Secondly, some degree of coercion is unavoidable under any model of criminal justice that seeks to hold offenders accountable for their actions. In fact, coercion is crucial to ensure offenders' participation in the criminal justice system. In fact, coercion is crucial to ensure offenders' participation in the criminal justice system.[86] Owen Fiss further associates it with the reduction of prejudice in curial adjudication:

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[81] *Supra*, at 22, 181; *infra*, at 241-242.
[82] *Infra*, at 242.
[83] *Supra*, at 111-122.
[84] *Infra*, at 380-382.
[85] *Infra*, at 379.
[86] Van Ness, *loc. cit.*, at 264.

> ... the coercive nature of adjudication reduces prejudice in that it compels the powerful to talk, those who otherwise may not be interested in talking to or listening to the weak or disadvantaged.[87]

There is arguably no such thing as a completely voluntary action in a coercive environment.[88] For instance, the practice of plea-bargaining provides potentially irresistible inducements to offenders consistently within conventional criminal justice. Injecting restorative justice into such an atmosphere has obvious implications for its own coercive effect. Yet, restorative justice cannot be criticised validly for failing to do the impossible, or indeed simply failing to outperform mainstream justice in a given respect. It does not claim to resist *entirely* the coercive character of the state-justice systems in which it operates and its credibility should not suffer on that basis.

Thirdly, it is not the case that *every* offender will succumb to external enticements to forge sincere compliance with restorative referrals. Nor is it certain that offenders will decline referral *in the absence* of inducements. In their study of VOM in Canada,[89] Gustafson and Smidstra found that 87% of defendants chose to meet with their victims despite a prior warning that participation would *not* factor into early release decisions or sentence reductions.[90]

Fourthly, instrumental compliance is not all bad. For instance, as Chapter 9 concludes, defendants' instrumental *accession* to VOM is not without value.[91] Even an offender who *is* induced by the perceived prospect of favourable treatment and consents instrumentally to his restorative transfer could change his mind and decide to co-operate sincerely once inside restorative strategies. Moreover, despite its deceit and its marked divergence from restorative justice's holistic vision of multi-party healing, an offender's instrumental co-operation with restorative justice can still stimulate emotional healing for *victims who misinterpret* artificial reparative gestures as sincerely tendered.[92] Accordingly, VOMs that are partially navigated by offenders' desperation for leniency, though far from ideal, are equally far from futile.

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[87] *See* Fiss, "Out of Eden" (1985) 94 *Yale Law Journal* 1669, at 1672.
[88] Van Ness, *loc. cit.*, at 263.
[89] Gustafson and Smidstra, *Victim Offender Reconciliation in Serious Crime: A Report on the Feasibility Study Undertaken for the Ministry of the Solicitor General* (Solicitor General Canada, 1989).
[90] Gustafson, "Is Restorative Justice Taking Too Few, or Too Many, Risks?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 303, at 305.
[91] *Infra*, at 382.
[92] *Ibid.*

3.2.4 External and Internal Safeguards

Like victims, offenders too can resist the disempowering erosion of their procedural rights in court-annexed restorative justice, thanks first and foremost to the *external* safety-net offered by back-up curial processing. Offenders have constant access to all the protections of law, should they find restorative justice's less formal, less professionalized and less rule-bound *modus operandi* objectionable on referral.

As Braithwaite concedes "[t]here can be little doubt that courts provide superior *formal guarantees* of procedural fairness than conferences".[93] As such, it is important to maintain participants' access to formal legal protections such as codes of judicial conduct, the sequestration of juries, rules of evidence and rules of discovery.[94] The non-binding, voluntary nature of court-annexed restorative justice preserves this.

However, the mere presence of formal procedural protections does not *guarantee* respect for those rights as a practical matter. As mentioned above, it would be naïve to assume that formal criminal justice protects offenders' rights adequately.[95] Data derived from Canberra's RISE project suggests that despite its omission to guarantee strict procedural rights in any formal way, VOM could well respect those rights as well or even better than court-process *in practice*. Offenders who underwent RISE conferencing were more likely than their curially-processed counterparts to believe that their rights were *practically respected*.[96] This sheds light on the possibility that VOM may offer its participants adequate internal procedural protections, albeit in practice rather than theory.

At the same time, there is also potential for the official expansion of formal protections in restorative justice; for, restorative justice has no *de facto* objection to formalism – there is nothing in its value-system to link it *inextricably* to procedural informality. The two tend to coincide, which yields practical advantages in terms of cost and efficiency but, as Braithwaite and Parker argue, there is no reason why restorative forums could not absorb some degree of formalism, should the procedural rights of their participants demand it.[97] For instance, some support a "qualified right to counsel" for participants in

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[93] Braithwaite, *loc. cit.*, at 101. [emphasis added]

[94] Delgado, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) 6 *Wisconsin Law Review* 1359, 1368-1370; see also, Rössner, "Mediation as a Basic Element of Crime-Control: Theoretical and Empirical Comments" (1999) 3 *Buffalo Criminal Law Review* 211, at 218.

[95] *Supra*, at 237-238.

[96] *See* Sherman and Barnes, *Restorative Justice and Offenders' Respect for the Law*, Rise Working Paper No. 3 (Australian National University, 1997); Sherman, Strang, Barnes, Braithwaite, Inkpen and Teh, *Experiments in Restorative Policing: A Progress Report* (Australian National Univeristy, 1998) recounted in Braithwaite, *loc. cit.*, at 103.

[97] Braithwaite and Parker, "Restorative Justice is Republican Justice" in Bazemore and Walgrave eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press, 1999) 103.

mediation.[98] A delicate balance must be struck, however; too much formalism and restorative and mainstream canals could converge into practical mirror images, each appearing incongruously duplicated. Instead, the objective is to achieve what Braithwaite describes as a degree of "legal formalism that enables informalism while checking the excesses of informalism".[99]

3.2.5 The Defence of Exemption

Restorative justice's accent on victim-involvement could be targeted as a potential source of prejudice to offenders. But this assumption rests on an erroneous "zero-sum" or "win/lose" perspective on restorative justice. Such a philosophy also grounded concerns, considered above,[100] that the assistance of offenders in VOM will necessarily disempower crime victims.

This allegation of prejudice rests predominantly on a reading of restorative justice that connects it to the process of victim-sentencing – a prospect that this thesis rejects fiercely, in part because of its potential for inconsistency and interference with judicial discretion but also because of its intolerably prejudicial impact on offenders.[101]

The degree of victim-involvement that this thesis endorses is purely *dialogic*, according to which victims can vent and/or negotiate in a safe environment during the course of extra-curial mediation, not curial sentencing. Restorative justice cannot lend its name to practices that create win/lose results, which include strategies that afford victims some sort of *de facto* sentencing discretion:

> To attempt to create conditions that enable victim healing and empowerment, while creating situations that create new harms for the prisoner, cannot be ethically supported.[102]

Restorative justice, with its emphasis on consensus, healing and fairness cannot encompass practices that create prejudicial outcomes: "there is nothing in the values of restorative justice which would lead to a denial or erosion of offenders' legal rights (through their broad emphasis on human rights)".[103] Restorative justice is about healing the emotional results of crime in a balanced and holistic way for all of those who hold a stake in its aftermath. As John Braithwaite insists:

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[98] Delgado, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution", *loc. cit.*, at 1359; see generally, Reuben, *loc. cit.*, at 1095-1104; Brunet, "Questioning the Quality of Alternative Dispute Resolution" (1987) 62 *Tulane Law Review* 1, 45-46; Braithwaite, *loc. cit.*, at 103.
[99] Braithwaite, *loc. cit.*, at 106.
[100] *Supra*, at 233.
[101] *Supra*, at 104-105; *infra*, at 324.
[102] Gustafson, *loc. cit.*, at 310.
[103] Morris, *loc. cit.*, at 601.

> For informal justice to be restorative justice, it has to be about restoring victim, restoring offenders, and restoring communities as a result of participation of a *plurality of stakeholders.*[104]

3.2.6 Shaming: A Phantom Menace to Restorative Justice

"Shaming" wrongdoers as an attempted path to their rehabilitation provides another method by which restorative justice is alleged to disempower offenders by reinforcing or heightening their social and legal stigmatisation.[105] Yet, as the following discussion reveals, restorative justice must be distanced from the process of "shaming" offenders; the intentional arousal of shame in wrongdoers is strictly at odds with restorative justice's ethic of healing through empowerment.[106] Therefore, shame-based objections to restorative justice are misplaced and the paradigm is protected from another significant source of its opposition.

The process of intentionally shaming offenders should be strictly opposed, even if it is expressly intended to secure the restorative goal of their reintegration into society. The intentional provocation of a sense of shame is flatly incompatible with restorative justice's pursuit of emotional healing through empowerment. This is because, as Chapter 3 explained, shame is a negative, *disempowering* emotion often experienced by victims and offenders alike in the aftermath of crime.[107] In offenders, it can actually exacerbate the tendency towards deviance and secure deeper entrenchment in a criminal subculture.[108]

Even John Braithwaite's landmark theory of "reintegrative shaming" can be rejected on the basis that there is no way of ensuring that the empowering – ultimately reintegrative – intentions of those who set about to arouse shame will bear the reintegrative fruit intended. Offenders' reactions to shaming – positive or negative – cannot be predicted and manipulated reliably by shaming-professionals and as such, cannot be prevented from doing more harm than good.

The most congratulated attempts at so-called "reintegrative shaming" owe their positive empirical results not to the shame said to be stirred therein, but to the system of restorative values that *actually* navigate such processes. For instance, it is arguable that Canberra's Reintegrative Shaming Experiments (RISE) appraised by Heather Strang and

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[104] Braithwaite, *loc. cit.*, at 1. [emphasis added]

[105] Retzinger and Scheff, "Strategy for Community Conferences: Emotions and Social Bonds" in Galaway and Hudson eds., *op. cit.* 315; see also, Braithwaite, *loc. cit.*, at 81-84.

[106] *Supra*, at 16-17.

[107] *See generally*, *supra*, at 88-122.

[108] Garvey, "Can Shaming Punishments Educate?" (1998) 65 *University of Chicago Law Review* 733, at 739; in their study of juvenile shaming, Maxwell and associates found that a feeling of being stigmatically shamed had a highly significant relationship with conviction in adulthood; see Maxwell, Kingi, Robertson and Morris, *Achieving Effective Outcomes in Youth Justice: Draft of the Final Report to the Ministry of Social Development* (Victoria University of Wellington, 2003).

colleagues[109] really have the implementation of a restorative value-system to thank for their positive outcomes and not any shame mustered intentionally or otherwise therein.

Shaming conferences often bear all of the usual hallmarks of restorative justice, involving the face-to-face mediation of consensus between victim and offender with an emotionally therapeutic, rehabilitative end in sight. They might use the rhetoric of shame to account for their successes but their empowering ability is realistically attributable to their implementation of a restorative value-system. Shame's centrality to the positive results attained by many processes is an illusion – an apparition. Where they successfully empower offenders, it is not thanks to their emphasis on shaming, but to the "restorative justice" that they administer totally independently of any "shaming" title or credo. Therefore, "reintegrative shaming" ceremonies can certainly – though not presumptively – be diagnosed as expressions of restorative justice; in fact, that is where their true value lies.

Shame, on the other hand, is *not* among restorative justice's co-operative values and cannot contribute, except through its suppression, to emotionally therapeutic outcomes for participants. It exceeds the boundaries of restorative justice and is unlikely to contribute to the emotional healing it pursues. If anything, shame is a menace to the hunt for emotional closure for offenders. The fiction that shame is responsible for therapeutic outcomes is just that; shame is a phantom phenomenon that is out of place in a limbo-like half-world somewhere between the restorative soil claimed for it and the punitive philosophy it *actually* implements.

For, shaming can be more accurately conceptualised as a *punitive* rather than a restorative endeavour. In fact, the use of what are known as "shame penalties" is growing in certain pockets of the United States,[110] where offenders are judicially compelled to participate in publicly humiliating, degrading, inhumane and ultimately *disempowering* activities that broadcast their crimes publicly. This is done to attract community condemnation, "stir up public indignation"[111] and arouse shame in condemned offenders.[112]

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[109] Strang, *op. cit.*, at 118; Strang and Sherman, *loc. cit.*; Sherman, Strang and Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments* (Research School of Social Sciences, Australian National University, Canberra, 2000). <http://www.aic.gov.au/rjustice/rise/recidivism>; Strang, Barnes, Braithwaite and Sherman, *Experiments in Restorative Policing: A Progress Report on the Canberra Reintegrative Shaming Experiments (RISE)* (Australian Federal Police and Australian National University of Canberra, 1999); Sherman and Strang, "The Right Kind of Shame for Crime Prevention" April 1997, RISE Working Papers No. 1, Australian National University <http://www.aic.gov.au/rjustice/rise/working/risepap1/html>

[110] *See* Karp, "The Judicial and Judicious Use of Shame Penalties" (1998) 44(2) *Crime and Delinquency* 277; Johnstone, "Restorative Justice, Shame and Forgiveness" (1999) 21 *Liverpool Law Review* 197, at 205.

[111] Johnstone, *loc. cit.*, at 208.

[112] *See* Garvey, *loc. cit.*; see also, Messaro, "The Meanings of Shame: Implications for Legal Reform" (1997) 3 *Psychology, Public Policy and Law* 645; Whitman, "What is Wrong with Inflicting Shame Sanctions?" (1998) 107 *Yale Law Journal* 1055.

Examples of shame penalties include offenders being ordered to wear t-shirts or placards in public explaining their crimes, or posting written cautions outside their homes warning those who enter that a dangerous criminal dwells within.[113] There has even been a rare instance of judicially-prescribed shaming here in Ireland. Back in 1999, District Justice William Early ordered four hours of "public shaming" for a man accused of urinating in public on O'Connell Street in Dublin.[114] He was ordered to wear a placard around his neck during daylight hours at the scene of the crime, on which he was to write an apology. Having done so, the case against him was ultimately dismissed. There is nothing restorative, however, about using alternative punishments to avoid a conviction, particularly when those punishments are designed to shame.

Chapter 3 explained that in the post-crime period, some offenders can suffer the self-deprecating, disempowering effects of social and legal stigmatisation.[115] Society is capable of degrading offenders by labelling them as such. Moreover, the legal system has been described as little more than a "degradation ceremony" for offenders passing through its ranks. [116] As Chapter 5 revealed, restorative justice aims to *de-stigmatise* offenders by empowering them.[117] By actively involving them in its processes, it affords them the opportunity to re-capture their senses of dignity and self-worth. Shaming penalties, on the other hand, *by humiliating and eroding dignity*, are likely to further stigmatise offenders and reinforce or exacerbate their disempowerment.

Because of their ability to degrade, humiliate and arguably breach basic human rights standards, shaming penalties evidence the "moral indecency" of the state that sanctions them. A society that accepts the use of shame to punish, fails Margalit's definition of "decency" in which she hypothesises that a "society is decent if it punishes criminals – even the worst of them – without humiliating them".[118] This recalls Winston Churchill's famous proclamation on judging a society by its treatment of offenders. Churchill asserted that "[t]he mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country". They "mark and measure the stored-up strength of a nation, and are the sign and proof of the virtue living within it."[119]

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[113] *See* Johnstone, *loc. cit.*, at 205.
[114] "Stand Up Apology for Urinating Suffices Judge" *The Irish Times*, 15 July 1999.
[115] *Supra*, at 111-117.
[116] Garfinkle, "Conditions of Successful Degradation Ceremonies" (1956) 1 *American Journal of Sociology* 420; *supra*, at 117.
[117] *Supra*, at 208-214.
[118] Margalit, *The Decent Society*, translated by Naomi Goldblum (Harvard, 1996), at 262.
[119] Winston Churchill, speaking in the House of Commons in 1910 while Home Secretary: cited in Aylward, "The Irish Prison Service, Past, Present and Future – A Personal Perspective" in O'Mahony ed., *Criminal Justice in Ireland* (Institute of Public Administration, 2002) 570, at 593.

If moral decency is something to which society should aspire, and arguably it is, then governments should steer clear of shaming sentences that are – *irrespective of how they are marketed* – ultimately punitive and traumatising rather than restorative, healing and reintegrative. And in order to adhere to such a mandate of moral decency, a criminal justice system must tread a fine line when performing its established sentencing duty to encourage public censure.[120] It must hand out punishments under the public gaze so as to preserve public intolerance to various standards of conduct, yet to be morally decent, it should avoid doing so via penalties that demean, demoralise and ultimately *de*-habilitate.[121] As Garvey counsels, "[m]orally respectable forms of punishment maintain a delicate balance between *legitimate* condemnation and *illegitimate* degradation".[122]

None of this is to imply that shame is not aroused in restorative events. In fact, it is a likely incident of offenders progressing through *any form* of formal state apprehension – restorative or otherwise – that involves "victims and their supporters talking about the consequences of the crime".[123] Either way, offenders will be confronted with the harm they caused, may feel shame and may exploit that shame for good or evil subconsciously – to re-join the mainstream as a law-abider or to maintain or escalate deviant behaviour patterns.

The point is that no process can be externally manipulated into a reliable "shaming machine".[124] No outside professional can realistically expect to reliably induce a sense of shame[125] or influence reliably how that shame will be used; there is, in fact, no foolproof means of ensuring that shame is actually stimulated with sufficient consistency to justify the *latter half* of Braithwaite's "reintegrative shaming" nomenclature.

John Braithwaite[126] and Sherman and Strang[127] root their support for shaming in their differentiation between good and bad categories of shame – (a) shame that stigmatises and potentially *creates* crime (disempowering) and (b) shame that reintegrates and potentially *controls* crime (empowering). They oppose the former, favour the latter and convey an overly-ambitious confidence in the ability to invoke the "right kind of shame" under

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[120] On public censure as a sentencing rationale, see generally Ashworth, *op. cit.*, at 64-74; Ashworth, "Sentencing" in Maguire, Morgan and Reiner eds., *The Oxford Handbook of Criminology* (Oxford University Press, 2002) 1076, at 1077-1081; O'Malley, *Sentencing Law and Practice* (Roundhall, 2000), at 3, 61-67; Bean, *Rehabilitation and Deviance* (Routledge and Kegan Paul, 1976); O'Mahony, *Criminal Chaos: Seven Crises in Irish Criminal Justice* (Roundhall Sweet & Maxwell, 1996), at 121-122.

[121] *Supra*, at 38-41.

[122] Garvey, *loc. cit.*, at 740. [emphasis added]

[123] Braithwaite, *loc. cit.*, at 83; Masters also believes that a certain degree of shame is inevitable in restorative justice; see Masters, "The Importance of Shame to Restorative Justice" in Walgrave ed., *Restorative Justice for Juveniles* (Leuven University Press, 1998) 123.

[124] *See* Retzinger and Scheff, *loc. cit.*

[125] In his critique of aboriginal shaming practices in Australia, Harry Blagg doubts that aboriginal people can be made to feel shame for breaching "white" standards that have little relevance for them; see Blagg, *loc. cit.*, at 489.

[126] Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

[127] *See* Sherman and Strang, *loc. cit.*

conferencing conditions or to take sufficient retrospective remedial "follow-up steps" to transform bad shame to good after the fact. Good shame is said to "condemn the crime, not the criminal", but as Maxwell and Morris rightly insist, there is no reliable means of ensuring that the "good" intentions of those who shame will be interpreted by offenders to produce "good" results.[128]

Shame is a ticking bomb. It can either detonate to shower offenders with the disempowering shrapnel of internalised belittlement and humiliation or it can be defused safely to create a reintegrative opportunity. That said, not even the most skilled shamer possesses the tools necessary to manipulate the complex cognitive reactions taking place within the mind of a shamed offender. As Maxwell and Morris state "the intent of the shamer cannot determine the effects on the shamed".[129] Consequently, "reintegrative shaming" will always run the catastrophic risk of defeating its original empowering, emotionally therapeutic purpose and "making matters worse" for offenders in crime's aftermath.

Shamers' hands are tied in this respect because the path a given offender will choose is often the product of a subconscious and instinctive reaction that is sculpted by myriad deep-seated internal and environmental factors that are out of anyone else's control, possibly even the defendant's. As such, the unconscious decision to grasp shame as an avenue to either reform or re-offence resembles the offender's initial decision to offend out of which the restorative process arose: people are often "too crazy, too drunk, too high, too uneducated, too unintelligent and too young to *fully comprehend* what they are doing at the time they broke the law".[130]

Shame must be distinguished from the more productive emotion of guilt. Guilt, unlike shame, is an important stage in the process of *moral education* that creates a moral inducement to rehabilitate.[131] It is a key emotional touchstone that can connect offenders to the immorality of their actions and pave the way for reform. While shame is the result of an attempt to degrade an offender in the eyes of others, guilt is an *intensely personal* experience stirred by a sincere acceptance of wrongdoing, regardless of whether or not it mutates into rehabilitation.[132]

While it too can be an emotionally unpleasant experience and can be accompanied by the pain of a contemporaneous sense of shame, the arousal of guilt (whether intentional or

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[128] Maxwell and Morris, "What is the Place of Shame in Restorative Justice?" in Zehr and Toews eds., *op. cit.* 133, at 136.
[129] *Ibid.*
[130] Soering, *An Expensive Way to Make Bad People Worse: An Essay in Prison Reform from an Insider's Perspective* (Lantern Books, 2004), at 16. [emphasis added]
[131] *Supra*, at 14; *infra*, at 253, 326.
[132] Garvey, *loc. cit.*, at 765-767.

incidental) is arguably better able to promote a sense of moral responsibility in offenders and to do so in *a morally decent way* i.e. without disempowering.

Furthermore, shame can be considered global in the sense that a single offending act is treated as representative of a person's entire character; it attracts a permanent character judgement, which can deliver a substantial blow to one's sense of identity. However, guilt is more localised in that it derives from the wrongful act, rather than its "inherently wrongful" actor. And because guilt divorces the act from the actor to a greater degree than shame – separating one's actions from a self-performed verdict of innate or irreversible deviance – it affords offenders the perspective and distance required to judge their *act* retrospectively and innovate means of preventing repeat performances.

Shame has also been attacked for its ability to obstruct the feelings of *empathy* that are necessary for an offender's moral reform.[133] As Chapter 2 observed,[134] Christina Baldwin describes forgiveness as "the act of admitting that we are like other people".[135] Yet, perhaps its counterpart – repentance premised on a realisation of moral culpability – can be defined similarly. A measure of empathy is integral to the process of genuine rehabilitation.

Empathy provides offenders with an allegorical, hypothetical means by which they can experience *vicariously* the harm they caused their victims. It provides an "RJ-friendly" application of the retributive principle of proportionate harm or *lex talionis* encountered in Chapter 2[136] that allows offenders to "imagine" rather than actually experience a degree of suffering proportionate to that they inflicted on their victims.[137] Offenders can substitute themselves mentally for their victims and estimate the outcome. Interpreted in this way, the law of proportionality becomes "a mode of instruction based on the simple idea of role reversal".[138] This is a crucial step towards acquiring a sense of guilt and responsibility for one's immoral conduct.

The empirical data suggest that it is quite possible that shame *is* capable of diminishing one's capacity for empathy, thereby imposing a barrier to offenders' moral education – a gateway to rehabilitation. Yet, it is unlikely to do so routinely or predictably. In fact, Schneider believes that shame is equally capable of *enhancing* feelings of empathy. By linking individual behaviour to collective judgement-calls, shame is said to "remind us of the

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[133] *See generally*, Lewis, *Shame and Guilt in Neurosis* (International Universities Press, 1971); Tangey, in particular, links shame empirically to a lack of empathy; see Tangey, "Moral Affect: The Good, the Bad and the Ugly" (1991) 61(4) *Journal of Personality and Social Psychology* 598.
[134] *Supra*, at 59.
[135] Baldwin, *Life's Companion: Journal Writing as a Spiritual Question* (Bantam, 1990) cited in Murphy *et. al.*, *Ninth Annual Stein Center Symposium*, "The Role of Forgiveness in the Law" (2000) 27 *Fordham Urban Law Journal* 1349, at 1395.
[136] *Supra*, at 74-75.
[137] Garvey adopts a similar "intelligent" interpretation of the talionic principle; see Garvey, *loc. cit.*, at 780.
[138] *Ibid.*

deep mutual involvement we have with one another".[139] In effect, just as shame threatens empathy, it may protect it just as easily by maintaining a sense of social interconnectedness.

While shame is generally-speaking mentally disempowering and cannot be aroused intentionally under the emotionally palliative auspices of restorative justice, it is nonetheless an inevitable phenomenon in any context in which offenders are brought to bear for their misgivings. Yet, despite its negativity, the shame experienced by an offender can be *alleviated* by restorative post-crime interventions that take remedial action to this end. This, in effect, is what happens under programmes of reintegrative shaming and constitutes the genuine reason why their achievements in healing victims and offenders have been well-received. The intentional arousal of shame is an opaque area with no clear and reliable methods or results. Ironically, those who commend its achievements are *in effect*, whether or not they realise it, likely to be doing little more than endorsing the generally *shame-reducing* impact of post-crime restorative justice – an endorsement dressed up as praise for reintegrative shaming.

It is vital to see the wood from the trees when examining the results of so-called "shaming ceremonies" and to recognise the real forces behind achievements in emotional healing. Restorative justice and shaming should not be confused or commingled and will not be equated in this thesis. There is no place for a subconscious, elusive and potentially emotionally disempowering process in a restorative value-system that prioritises consistent emotional de-traumatisation through empowerment. Restorative justice does not set about to inspire shame, but it can deal positively with the shame that *attends* offenders' progression through criminal justice systems. In sum, shame is an incidental but not an essential response to restorative justice and has no deliberate place in its value-system.

[139] Schneider, *Shame, Exposure and Privacy* (Beacon Press, 1977), at 138.

4. Subduing and Absorbing Risk in Restorative Justice

It is worth emphasising the role of quality-control in restorative justice.[140] Statutory guidelines, local charters[141] and/or rules of good practice for restorative justice provide effective methods of reducing the potentially off-putting risk of alternative strategies losing their restorative identity through bad practice. Quality-control is essential to avoid the disempowering consequences of poorly-implemented strategies that flout participants' rights.

A range of inspiring procedural guidelines are provided in a number of influential handbooks governing restorative justice in Northern Ireland. Braithwaite points to Greater Shankill Alternatives' "Principles of Good Practice" and Community Restorative Justice Ireland's "Standards and Values of Restorative Justice Practice" as commendable reflections of internationally-recognised human rights standards.[142]

Finally, apart from seeking to *mitigate* risks in restorative justice, it is inevitable that, given the ambitious task entrusted to criminal justice and the fact that no one technique is likely to be entirely satisfactory or perceived as such, some degree of risk must be absorbed. Chapter 1 introduced an important principle that under-girds this thesis' ultimate endorsement of restorative criminal justice *despite its potential flaws*: that reasonable risks, cautiously taken, are worthwhile given the significance of the potential benefits to be gained.[143] As Gustafson insists:

> If we ... are deeply committed to safe, responsible ethical, principled practice, if we are clearly aware of the limits of our competencies, then taking reasonable risks – so long as that is done cautiously ... should be encouraged.[144]

Can restorative justice disempower victims and offenders? Yes. Can those risks be managed? Yes. Is the inevitable element of risk that remains worth taking in light of the paradigm's emotional benefits? Arguably, yes.

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[140] Brunet, *loc. cit.*; Braithwaite, "Setting Standards for Restorative Justice" (2002) 42(3) *British Journal of Criminology* 563.
[141] *See* Auld, Gormally, McEvoy and Ritchie, *Designing a System of Restorative Community Justice in Northern Ireland* (NIACRO, 1997).
[142] Braithwaite, "Setting Standards for Restorative Justice", *loc. cit.*, at 572-573.
[143] *Supra*, at 21.
[144] Gustafson, *loc. cit*, at 311.

Part Two: Unrealistic Expectations

5. Unrealistic Expectations in Context

While Part One contemplated factors that could prompt restorative justice to betray its emotionally reparative spirit by *harming* victims and offenders, Part Two considers several obstructions to the *processes* by which restorative justice seeks to bring about emotional healing. So, while Part One dealt with the paradigm's subversion, Part Two considers the simple frustration of its goals.

Several factors may stimulate doubt about restorative justice's practical capacity to (a) achieve primary emotional redress for crime's stakeholders and (b) bring about the credibility-boosting societal benefits that this thesis considers incidental thereto, such as rehabilitation, the replenishment of beneficial social commodities such as social integration and collective efficacy and the control of crime. Four principal doubts about restorative justice's ability in this regard are evaluated below.

5.1 The Expectation that Offenders Will Change

The possibility that offenders will resist restorative justice's attempts to resolve their emotional post-crime injuries might be thought to frustrate the paradigm's goal of holistic emotional redress. Yet, this assumption is flawed. As explained above, full rehabilitation on a consistent basis is an ambitious and elusive goal for *any* justice model[145] and once *some* degree of rehabilitative effect is felt by offenders, restorative justice's emotionally-cathartic promise to them is fulfilled adequately to justify the paradigm's implementation.[146]

Offenders' resistance to their dramatic reinvention as law-abiding citizens is a *realistic* likelihood but one that fails to challenge seriously restorative justice's equally *realistic* therapeutic aspirations. While restorative justice is certainly capable of securing the complete rehabilitation of some offenders[147] – and possibly with greater success than mainstream criminal justice – [148] to have its integration vindicated, it need only achieve *partially* rehabilitative results. Chapter 5 demonstrated restorative justice's ability to achieve *at least* this degree of emotional healing.

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[145] *Supra*, at 210.
[146] *Ibid.*
[147] *Supra*, at 208-214.
[148] *Supra*, at 38-41, 117.

5.2 The Expectation of Deterrence

Restorative justice has modest deterrent potential. One might assume that this frustrates its crime-control potential and weakens its credibility as a result, but this is not so. The following considerations demonstrate that restorative justice's struggle to generally deter does little to de-value the paradigm.

Were it *mandatory*, offenders may well *fear* VOM because of its off-putting emotional consequences and it may, therefore deter them from offending lest they be compelled to confront their victim(s) and face the disapproval of community representatives. There is, however, generally-speaking, little room for prospective offenders' dissuasion from offending on grounds of the emotionally burdensome confrontational requirements of an entirely *voluntary* process. An offender might not relish the possibly daunting experience of VOM once he has submitted thereto, but he cannot *fear* participation in a process that he is free to decline.

Deterrence plays a necessarily marginal role in restorative justice's elusive, yet real crime-control capacity.[149] This marginality can be attributed not only to the paradigm's voluntary character but also to its relative privacy. As Brown explains:

> [t]o have general deterrent effect ... the costs associated with facing the victim would have to be publicized more, so that potential criminals would know the fate that might await them if their contemplated crime is detected. In addition, participation would have to be mandatory because, as long as VOM remains voluntary, offenders who will experience pain when they face their victim might simply refuse to mediate.[150]

Still, it is wrong to assume that restorative justice is *incapable* of deterring crime. Restorative justice is far from a "soft option" and offenders are certainly capable of interpreting it as a "punishment".[151] This is the case *even where* it is the voluntary culmination of a wrongdoer's cost-benefit analysis of his options. It could certainly be considered punitive where an offender feels he has no other option *but* to submit to a restorative referral in light of any favourable treatment he expects in return.[152] When the inducement of favourable treatment intervenes to erode an offender's perception of restorative justice's voluntariness, the latter is more likely to be considered a "punitive" sanction, despite the gains to be ultimately had. After all, as Seán Awlward, recently advised the Oireachtas Joint Committee considering restorative justice's potential place in Ireland:

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[149] Brown, *loc. cit.*, at 1298.
[150] *Ibid.*, at 1299.
[151] Zehr concedes that some elements of restorative justice will be experienced as punishment by offenders: Zehr, *Changing Lenses: A New Focus for Crime and Justice*, *op. cit.*, at 209.
[152] *Supra*, at 239.

> ... RJ is not an easy option for an individual going that route. On the contrary, an offender subject to RJ may be answering fully, for the first time, for behaviour in which he may have been involved for some time.[153]

In light of the challenges posed by restorative justice's expectation that offenders will admit fault, accept blame and take responsibility for their wrongs, a restorative referral can be understood in terms of what Marshall considers "punishment as the pain of taking responsibility".[154] A participating offender must finally face up to the anger, resentment, disdain and condemnation that his actions have attracted around him, not only from his victim(s), but from his fellow residents who play active roles in various restorative processes. Some participating residents might even be known to the offender – a potentially aggravating cause of nervousness and tension.[155]

Nonetheless, restorative justice does not, generally-speaking, control crime by deterrence. It does so instead by controlling (a) *primary deviance* (the target of general deterrence) through the moderation of crime-provoking social currents such as social disintegration and (b) *secondary deviance* (the target of specific deterrence) through the rehabilitation of offenders.

It might, however, be for the best that restorative justice pays little mind to the principle of general deterrence, whose whole philosophy can be interpreted as fundamentally opposed to restorative justice's *moral richness*. Some have condemned general deterrence as a "morally bankrupt", decidedly unrestorative utilitarian principle based on the black-and-white assumption that one person must be made an example for the greater good.[156] To the contrary, however, as Chapter 1 revealed, *restorative justice's* potential to curb secondary deviance derives from the rehabilitative influence of a "moral education"[157] and not from the blanket application of indiscriminate, morally-indifferent rules *across the board*.[158]

Most significant, however, when considering the impact of restorative justice's rejection of deterrence, is the reality that crime-control itself – however it is achieved – is not even a rationale on which restorative justice needs to rely to establish the desirability of its

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[153] Seán Aylward, Secretary General of the Department of Justice, Equality and Law Reform, addressing the Joint Committee on Justice, Equality, Defence and Women's Rights in O'Keeffe, "Report of the Rapporteur to the Joint Committee on Justice, Equality, Defence and Women's Rights on the Potential Benefits of Restorative Justice Methods in Ireland" in Joint Committee on Justice, Equality, Defence and Women's Rights, *Report on Restorative Justice* (Houses of the Oireachtas, 2007) 3, at 15.
[154] Marshall, *Beyond Retribution: A New Testament Vision for Justice, Crime and Punishment* (William B. Eerdmans Publishing Company, 2001), at 36.
[155] Cunneen, *Nenagh Community Reparation Project Evaluation 2004* (Probation and Welfare Service, 2004), at 12, 13, 20.
[156] *See* Zehr, *Mediating the Victim-Offender Conflict* (Mennonite Central Office, 1990), at 54; see also, Garvey, *loc. cit.*, at 783.
[157] *Supra*, at 14.
[158] *Infra*, at 326.

integration; crime-control is merely an incidental bonus of restorative justice's *primary justification* – the pursuit of holistic, multi-party emotional healing.[159]

Any crime-reduction that restorative justice *does achieve* is undoubtedly socially propitious (however modest its overall social impact).[160] It is also credibility-boosting for the paradigm; even a marginal ability to control crime is an impressive feat for a process dedicated predominantly to emotional healing. Hence, that its crime-control potential proves itself marginal or difficult to verify, poses a threat to neither restorative justice's legitimacy nor its credibility, which are, as foregoing research has revealed, established sufficiently by its emotionally restorative potential.

Even if restorative justice *were* to place greater reliance on its crime-control potential through the specific vehicle of general deterrence, conventional criminal justice itself is not faultless in this respect. For, there is reason to question *mainstream* criminal justice's ability to deter crime generally. Its deterrent influence, just like restorative justice's rehabilitative effect, is difficult to both verify and measure in society. This has prompted some to question the very foundations of general deterrence – even the deterrent value of the decidedly fearsome prospect of imprisonment has been rationally challenged.[161] As McGuire remarks:

> That being imprisoned is universally viewed as an undesirable experience does not in itself confirm its impact as a deterrent, given the complex interactions of the factors that influence criminal behaviour.[162]

A recurring principle can then be re-applied in this context – that restorative justice cannot be reasonably attacked for failing to do something that conventional criminal justice performs unpersuasively.

Its disharmony with the principle of deterrence inspires little caution about the prospect of restorative justice's integration into mainstream criminal justice and the optimism that the paradigm's emotionally therapeutic fruits otherwise inspire is undisturbed, at least on this basis.

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[159] *Supra*, at 33-36.
[160] *Ibid.*
[161] Pontell, "Deterrence: Theory versus Practice" (1978) 16 *Criminology* 3; see also, Soering, *op. cit.*, at 16.
[162] McGuire, *What Works: Reducing Reoffending* (Wiley, 1995), at 11.

5.3 The Expectation of Social Benefit

Another perceived limitation of restorative justice that has provoked caution about its implementation is its alleged struggle to exert a positive social impact on the communities in which it is administered.[163] In essence, there is considerable doubt about restorative justice's ability to suppress comprehensively crime's underlying social causes, particularly (a) social disintegration and (b) various socio-demographic dilemmas.

One belief fuelling the first source of scepticism is that socially excluded and marginalised groups such as the poor and ethic minorities cannot be "*re*integrated" into social environments of which they never felt part.[164] However, this weakness' fatality to restorative justice's future prospects is impeded by a proper understanding of what social reintegration actually involves.

The process of "reintegrating" communities must be understood as bringing about a state of mutual tolerance by suppressing instances of conflict between the powerful and powerless. Restorative justice does not claim to invent amicable social co-operation, solidarity and inclusiveness where they never existed in the first place. Quite *distinct* from reversing the impact of social marginalisation, restorative justice can successfully reintegrate if it can restore a sense of order and tolerance between society's "haves" and "have-nots".[165] In this limited sense, restorative justice may be better conceived "in terms of avoiding harm rather than in terms of doing good".[166] Then, even the weak can benefit from restorative justice's "reintegrative" potential.

Restorative justice's perceived inability to exert a positive impact on diverse *socio-economic* dilemmas has also prompted its critique. Yet, it is unlikely that *any* model of criminal justice will tackle successfully the entrenched and diffuse issues of social disadvantage and division, such as unemployment, poverty and homelessness,[167] known to cultivate criminality. Neither restorative, nor mainstream criminal justice offers a magic cure to the complex social disequilibria that provoke deviance:

> A process, no matter how inclusionary, and an outcome, no matter how reparative, is not likely to magically undo the years of social marginalization and exclusion experienced by so many offenders.[168]

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[163] Blagg, *loc. cit.*; Price Lofton, "Does Restorative Justice Challenge Systemic Injustices?" in Zehr and Toews eds., *op. cit.* 381; Braithwaite, "Restorative Justice and Social Justice" in McLaughlin, Fergusson, Hughes and Westmarland eds., *op. cit.* 157, at 157-159; Braithwaite, "Restorative Justice: Optimistic and Pessimistic Accounts", *loc. cit.*, at 91-93.

[164] *See* Blagg, *loc. cit.*

[165] Galanter, *loc. cit.*

[166] Braithwaite, "Restorative Justice and Social Justice", *loc. cit.*, at 160.

[167] On the link between homelessness and criminality, see generally, Seymour and Costello, *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody* (Probation and Welfare Service, 2005).

[168] Morris, *loc. cit.*, at 605.

In any event, it is arguable that criminal justice – whatever its form – is generally *not* the correct vehicle at least for the *comprehensive* rectification of crime's miscellaneous social causes. To do so requires far more than any justice system can achieve on its own in light of the modest percentage of societal crime that will realistically invoke the state's jurisdiction,[169] the strain on its existing resources and importantly the fact that the criminal justice system may be too remote to seriously challenge deep-rooted community issues.

Instead, a *far-reaching* alleviation of crime's social determinants requires the transformative input of "developmental institutions" rooted in community life, such as family, school, work and recreation. These grass-roots groupings are best-positioned and best-motivated to advance the various issues of social justice that are entangled with the crime problem and affect them most.[170] As John Braithwaite cautions:

> Liberal legalism is not the right culprit if we want to tackle unemployment, homelessness, educational disadvantage, sexism, racism and the like ... We need to engage with other forms of social movement politics besides the social movement for restorative justice to tackle seriously the economic institutions that are the deeper villains here.[171]

Problems of social injustice can also be rectified outside of the criminal justice system by establishing a safety-net of external support for victims and offenders.[172] A "blended approach" between formal criminal justice and the community is therefore important. [173] Hence, community-level organisations such as Victim Support and Rape Crisis Centres and Fás[174] not only *empower* victims and offenders through the informative, therapeutic and reintegrative services they provide but they could also advance social justice by lobbying for the changes necessary to improve aspects of the social atmosphere by which their subjects' feel most disadvantaged.

> Good programmes addressing the reasons underlying offending and effective support for victims need to accompany good restorative justice processes and practices, but providing (or at least funding) them is a state responsibility.[175]

The Irish state allocated €1.11m to the Commission for the Support of Victims of Crime for victim support services in 2007.[176]

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[169] *Supra*, at 33-36.
[170] Braithwaite, "Restorative Justice: Optimistic and Pessimistic Accounts", *loc. cit.*, at 93.
[171] *Ibid.*
[172] *See generally*, Ashworth, "Some Doubts about Restorative Justice", *loc. cit.*; Morris, *loc. cit.*
[173] Bazemore and Bell, "What is the Appropriate Relationship between RJ and Treatment?" in Zehr and Toews eds., *op. cit.* 119.
[174] <http://www.fas.ie>
[175] Morris, *loc. cit.*, at 605.

Restorative justice should not be opposed on the basis of its shortcomings in the field of social justice. It cannot be penalised *legitimately* for sharing the logical limitations of mainstream criminal justice – particularly with respect to the performance of a task for which it does not *claim* a superior – or indeed any – ability. Restorative justice does not *promise* to repair the full range of complex social perplexities that trigger deviance, beyond the social reintegration that accompanies its emotionally therapeutic results. Only its ability to achieve those ambitions it sets itself should make or break the paradigm. Therefore, its limits with respect to the most impracticable social tasks *to which it does not aspire directly* do little to undermine its credibility.

None of this is to suggest that restorative justice cannot make valid inroads into moderating crime's underlying causes. As Chapter 5 demonstrated, the paradigm holds considerable potential to reduce fear of crime, social disintegration and low collective efficacy[177] – all of which contribute to the generation of deviance. The point is that it is unrealistic to expect from restorative justice – or any other justice model – an all-out assault on a thorough range of crime's complex social contributors, which are more suitably mediated within the thick of community life.

Furthermore, restorative justice may fare better than formal criminal justice at *preserving* as opposed to improving social justice, since the latter arguably possesses greater potential to make matters of social justice worse. As John Braithwaite remarks:

> We do see retributive justice wrench young people away from loving families, give them criminal records that destroy their employability (Hagan, 1991); restorative justice does not seem very guilty of this. At its best, it heals families, extends their bonds of care, gets young people who have been expelled back into school, or helps them find jobs.[178]

Hence, restorative justice's tolerance of imprisonment only as a last resort in favour more therapeutic, rehabilitative alternatives means that it can reduce not only the rate of imprisonment but also the socially-destructive incidents thereof, such as disease, suicide, drug addiction, physical abuse, unemployment and debt.[179] Moreover, its rehabilitative efforts can advance social justice themselves, for example, by helping offenders return to education[180] or employment.

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[176] Department of Justice, Equality and Law Reform, "1.11 Million Euro to be Provided in 2007 for Groups that Support Victims of Crime", *Press Release*, 11 January 2007. <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6XDPSC-en> (visited 12 March 2007).
[177] *Supra*, at 215-221.
[178] Braithwaite, "Restorative Justice: Optimistic and Pessimistic Accounts", *loc. cit.*, at 92.
[179] *Supra*, at 38-41.
[180] Braithwaite, "Restorative Justice and Social Justice", *loc. cit.*, at 160.

Finally, it can be argued on a straightforward basis that if both victims and offenders get restoration out of a process, it has generally progressive rather than regressive implications for social justice.[181]

6. Conclusion

This chapter balances the potential and pitfalls of restorative justice's emotionally-therapeutic ability. It concludes that the paradigm's potential effectiveness and credibility in this role outweighs the likelihood of its subversion and/or frustration by external threats. A cautiously optimistic approach to restorative justice's incorporation into Irish criminal justice is adopted on this basis.

An essential achievement of this chapter is demonstrating that restorative justice's rehabilitative, crime-control, victim-supportive and anti-punitive tendencies are little more than by-products of restorative justice's main legitimating objective – the pursuit of emotional restoration. These ancillary features may well boost the paradigm's credibility but not so much that their absence could jeopardise its use. The emotionally reparative hub of a particular restorative regime may or may not be sheathed by an outer husk of incidental benefits that offer the paradigm's reputation extra padding. Still, the *mediative reparation of emotional harm* is firmly established as the most indispensable kernel of restorative justice's social utility.

> It appears that the most consistent case for mediation and reparation is based on regarding them as ends in themselves. The traditional ends of criminal justice might occur as desirable side-effects, but in the main would be treated separately.[182]

Another critical principle underscored repeatedly herein is that restorative justice should be neither justified by reference to its superiority over conventional criminal justice, nor condemned for its inferiority. Comparisons between proposed mainstream host and innovative invitee are far from irrelevant, however. Comparing their respective philosophical identities clarifies the potential for their differing objectives to be combined synergistically in the future. Yet, contrasting in a generalised sense their relative strengths and weaknesses in achieving specific goals should not ultimately determine the appropriateness of their union.

This chapter has demonstrated that, far from perfect, restorative justice is undoubtedly mistake-prone. At the same time, the chapter has identified considerable potential for the instigators of Ireland's future restorative system to *learn* from the mistakes of their forbears. Numerous perils can be avoided by heeding the experiences of those who

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[181] *See generally, ibid.*
[182] Wright, cited in Brown, *loc. cit.*, at 1301.

have let bad practice subvert their restorative intentions and/or set their programmes inappropriate or unattainable goals. After all, as Kathleen Daly remarks: "At the end of the day it is better that restorative justice learn from making mistakes than that it make the mistake of refusing to learn.[183]

The risk of restorative justice straying from its original purpose is not so *immense, unavoidable or insurmountable* that it poses a serious challenge to the paradigm's integration into mainstream sentencing. Once this project is painstakingly designed and fastidiously implemented in constant mindfulness of the potential hazards that threaten to obstruct its effectiveness and its credibility, it can be pursued with a considerable measure of cautious confidence.

[183] Braithwaite, "Setting Standards for Restorative Justice", *loc. cit.*, at 575.

Chapter 7

Assessing the Historical Compatibility between Restorative Justice and Irish Legal Culture: Looking Backwards to Move Forward in Irish Criminal Justice

Part One: Foreword to Chapters 7 and 8 – The Case for Contextual Compatibility

1. Ascertaining the Compatibility between Restorative Justice and Irish Legal Culture – Past, Present and Future

Chapter 1 set a challenge for Chapters 2-6 that has now been met: to demonstrate restorative justice's integrity and credibility as a potentially beneficial accompaniment to traditional sentencing customs.[1] This is the first proof required to establish the desirability of restorative justice's proposed injection into Ireland's adult criminal justice system. Chapter 5 verified restorative justice's potential to heal those manifestations of emotional trauma, explored throughout Chapters 3 and 4, that tend to afflict victims, offenders and communities alike during crime's aftermath.[2] It further speculated with cautious confidence about restorative justice's appreciable but elusive capacity for crime-control.[3]

Then, Chapter 6 concluded that, with due vigilance, the risk of restorative justice falling dramatically short on its promise of emotional restoration is amenable to effective moderation.[4] This factor adds a *manageable* measure of caution to the optimism stirred by Chapter 5. This cautiously optimistic approach is one that later chapters will copperfasten.

Thus far, restorative justice has been proven a *credible*, diversifying addendum to an excessively homogeneous, predominantly punitive Irish sentencing regime;[5] its prospective place on the Irish sentencing "continuum" is justified by its logically-determined socially-ameliorative potential. It now falls upon Chapters 7 and 8 to establish restorative justice's *compatibility* with Irish legal culture – the final proof necessary to determine the appropriateness of diversifying Ireland's existing sentencing agenda with an influx of restorative remedies. Chapters 7 and 8 identify various features of Ireland's legal character

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[1] *Supra*, at 44.
[2] *See generally*, *supra*, at 180-224.
[3] *Ibid.*
[4] *Supra*, at 225-259.
[5] *Supra*, at 214-215.

that are likely to influence its potential receptiveness to restorative justice. The success of a hybrid restorative/punitive sentencing model will depend on a number of climactic factors that sculpt the Irish legal landscape.

Despite their common objective, Chapters 7 and 8 diverge along different investigatory routes, detecting past and present harmonies between restorative justice and Irish law respectively. Chapter 7 delves into Ireland's legal past for evidence of an *historical* affinity with restorative justice that may have spilled over into modern conditions. Chapter 8 then combs Ireland's current legal climate for evidence of *contemporary* commitment to restorative justice.

It might be assumed that the appeal of restorative justice's integration into Irish sentencing policy depends solely on the intimacy of the present bond between the two. However, on the understanding that the present *is a product of the past*, Chapters 7 and 8 span Ireland's legal timeline to estimate the degree to which Irish criminal justice is *predisposed* to the integration of restorative justice into its traditional sentencing calculus.

This chapter will later chronicle Ireland's Brehon law ancestry – the high-water-mark of restorative justice in Ireland.[6] It will then scour contemporary Irish society for evidence of residual remnants of Brehon law's lingering restorative ethic, despite its longstanding *official* obsolescence. Hence, this chapter regresses nostalgically into the nation's colourful legal past in order to read the future of restorative justice in Ireland. The goal is to predict how well-received and prosperous the government's anticipated system of nationwide restorative justice[7] is likely to be.

There is however, a preliminary matter of housekeeping that must be addressed prior to delving into the history books. The *need* to match any legal change – restorative or otherwise – to the unique characteristics of its host country must be properly explained. This establishes the underlying rationale for Chapters 7 and 8's joint attempt to reconcile the values of restorative justice on the one hand with Ireland's socio-legal identity on the other.

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[6] *Infra*, at 271-304.
[7] *Supra*, at 43-44.

2. The Case for Matching Restorative Reforms to Legal and Cultural Context

> A fundamental assumption of restorative justice, after all, is that it must be rooted in its context.[8]

This section explains the need to test restorative justice's fit within a uniquely *Irish* legal context – to match each with the other so that they can hypothetically try one another on for size, having regard to their unique individual dimensions. If the fit is good, a complementary merger of the two is prudent. If the fit is poor, it may be that restorative justice and the socio-legal idiosyncrasies of Irish society might be better off apart; for, neither is likely to emerge from an ill-fitting fusion unscathed.

As Chapter 1 warns, an unsuccessful attempt at legislatively incorporating restorative justice into Irish adult sentencing – which will inevitably invite political and public scepticism – is likely to close the door indefinitely on future restorative advances.[9] Furthermore, a failed reform as dramatic as the recalibration of a criminal justice system's long-established *status quo* risks seriously undermining public faith and confidence in it.

Obviously, the need to perform this chapter's compatibility test does not abate on the basis that foreign jurisdictions have already matched restorative justice to their own cultural characteristics with resounding applause. Despite triumphant accounts of restorative justice's use overseas, the paradigm must be deemed compatible with a peculiarly Irish cultural atmosphere in order to predict its success *in this country*. This is particularly true considering the exaggeration and romance to which "evangelistic" accounts of restorative justice are prone.[10]

Just because restorative justice melts snugly around the contours of a foreign socio-legal physique, does not mean it will fit Ireland's inimitable dimensions as effortlessly. Accordingly, the temptation to measure Ireland's compatibility with restorative justice by reference to foreign success stories – such as those recounting advances in VOM in the United States and United Kingdom,[11] family conferencing in New Zealand[12] or a moral culture of apology in Japan[13] – must be resolutely resisted.

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[8] Wonshé, "How Does the 'Who, What, When and How' Affect Restorative Justice?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 253, at 258.
[9] *Infra*, at 337.
[10] *Supra*, at 3.
[11] *Supra*, at 189.
[12] *Supra*, at 81; *infra*, at 265-268.
[13] *Infra*, at 264-265.

2.1 A Lesson in Heeding Foreign Models: For a "Weak Mirror Theory" of Legal Transplants

> While the experiments, practices and customs from many communities and cultures are instructive, none can or should be copied and simply plugged into communities or societies. Rather, they should be viewed as examples of how different communities and societies found their own appropriate ways to express justice as a response to wrongdoing. *These approaches may give us inspiration and a place to begin.*[14]

The recently-launched *National Commission on Restorative Justice* that will soon be entrusted with designing a strategy of restorative justice in Ireland[15] should have *reasonable regard* to foreign endeavours when considering ways to develop the nation's reliance on restorative justice.[16] As the above quote suggests, however, foreign experience should be used only as *inspiration* for change – a guiding light for the befogged framers of incoming restorative regimes; it should not be exploited as a restorative blueprint for wholesale replication.

While foreign strategies provide valuable reference-points for Ireland's adoption of restorative justice, a restorative culture that has developed organically out of peculiarly *foreign* contextual soil cannot be successfully transported slapdash into a uniquely *Irish* cultural clime – not without due consideration and measured precaution.

John O. Haley adopts this perspective when contemplating the degree to which America could draw on Japan's apologetic tradition in order to moderate the excessive retributiveness perceived to blight American legal process.[17] While the peculiarly Japanese *moral culture* of apology[18] cannot be artificially recreated under foreign conditions, it could *inspire* American criminal justice to greater tap apology's potential in the prosecutorial process so as to relinquish *a proportion* of its favouritism for punitive justice. This involves a question of balance – drawing inspiration from the *general character* of foreign practices, while resisting their complete duplication, at least without having first tested their compatibility with prevailing social and legal conditions.

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[14] Zehr, *The Little Book of Restorative Justice* (Good Books, 2002), at 62. [emphasis added]
[15] O'Brien, "Study of Restorative Justice Plan" *The Irish Times*, 10 March 2007; O'Brien, "New Justice System for Lesser Crimes" *The Irish Times*, 12 March 2007; *supra*, at 43-44.
[16] Wonshé warns against cloning restorative justice programs: see Wonshé, *loc. cit.*, at 258.
[17] Haley, "Comment: The Implications of Apology" (1986) 20 *Law and Society Review* 499.
[18] *See generally*, *ibid.*; Yoshida, "Confession, Apology and Settlement Out-of-Court in the Japanese Criminal Justice System – Is Japan a Model of 'Restorative Justice'?" in Weitekamp and Kerner eds., *Restorative Justice in Context: International Practice and Directions* (Willan, 2003) 173; Wagatsuma and Rosett, "The Implications of Apology: Law and Culture in Japan and the United States" (1986) 20 *Law and Society Review* 461; Haley, "Victim-Offender Mediation: Lessons from the Japanese Experience" (1995) 12(3) *Mediation Quarterly* 233; Haley, "Confession, Repentance and Absolution" in Wright and Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Sage, 1989) 195.

> Our observations should not be construed to mean that the Japanese experience offers a potential panacea for the American problem of overcrowded courtrooms or prisons … *Japan does have a distinctive social culture. Each element is integral and interrelated to the whole.* Neither apology nor confession can be borrowed intact and used in the same manner or with the same consequences in another society, nor would this be advisable even if it were possible … *Yet to the extent that apology and repentance elicit similar behavioral responses across cultures, we do have something to learn from Japan.* In Japan the legal system reinforces the social use of the apology. American institutions, on the other hand, encourage the resort to court and criminal justice for revenge and retribution.[19]

It would be naïve and injudicious to merely duplicate a legal custom that strikes an admirable balance between retributive and restorative ideologies in another jurisdiction and expect an automatic duplication of its perceived merits here in Ireland. Legal systems develop according to the social norms that surround them; they absorb and assimilate cultural themes. For instance, the culture of apology in Japan is said to be inextricably enmeshed within a unique culture of police coercion.[20] It would be absurd to attempt to transplant foreign legal norms automatically and blindly into a host society out of whose cultural traditions they did not develop.[21] A legal system will be an appropriate receptacle only for those legal customs that have grown out of (or happen coincidentally to be consistent with) its own prevailing norms and standards. This compatibility test must be performed prior to any effort to emulate foreign strategies.

This view accords with William Ewald's "weak mirror theory of law", according to which it is believed that legal traditions develop predominantly, *though not exclusively* ("strong mirror theory"), according to prevailing contextual conditions.[22] According to Ewald, "[t]he essence of this view seems to be this: Nothing in the law is autonomous; rather, law is a mirror of society and every aspect of the law is moulded by economy and society".[23]

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[19] Haley, "Comment: The Implications of Apology", *loc. cit.*, at 506. [emphasis added]

[20] On the coercive underpinnings of Japanese apologetic custom, see *ibid.*; see also, Upham, "Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits" (1976) 10 *Law and Society Review* 579; Igarashi, "Crime, Confession and Control in Contemporary Japan" (1984) 2 *Law in Context* 1.

[21] Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 *Modern Law Review* 11; Kahn-Freund, "On the Uses and Abuses of Comparative Law" (1974) 37 *Modern Law Review* 1.

[22] *See* Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 *American Journal of Comparative Law* 489.

[23] *Ibid.*, at 492; *contra*, see Watson's "insulation thesis", which opposes mirror perspectives by dictating that the development of law is the direct result of pure legal history and can be explained without reference to social, political, or economic factors; see also Watson's, "Roman law" and "transplants" theses that follow similar theoretical channels: see generally, Watson, *The Making of the Civil Law* (Harvard University Press, 1981); Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974); Watson, *Society and Legal Change* (Scottish Academic Press, 1977); Watson, "Aspects of Reception of Law" (1996) 44 *American Journal of Comparative Law* 335.

A weak mirror theory opposes the *automatic* transplantation of a foreign model as a "short cut" to designing culturally-sensitive legal changes. Yet, it does not oppose some degree of *considered* inspiration by successful foreign reforms that have been measured against the legal and cultural backdrop against which they are intended to fit, such that it could be said that they could hypothetically have been cultivated independently by the conditions prevailing therein. This is obviously reliant on some degree of cultural correspondence between donor and donee societies.

The temptation to rush through "quick-fix", *untested* legal changes is arguably the most powerful when one considers the most celebrated foreign integrations of restorative justice. In fact, the Irish government has had to be especially cautious in learning from New Zealand's acclaimed advances in the field of restorative criminal justice and implementing that wisdom in framing its limited restorative endeavours thus far. The pull to duplicate is strong considering the giant leaps made in New Zealand in recent years.

2.2 Lessons from New Zealand: A World Leader in Court-Annexed Restorative Justice

> New Zealand is an example of how an ambitious alternative criminal justice philosophy can be successfully legislated, resulting in the significant use of restorative encounters while decreasing the use of court and custody.[24]

New Zealand is not the only jurisdiction whose criminal justice legislation has embraced restorative or indigenous practices. In fact, the Children Act, 2001 incorporated restorative-style, mediative practices statutorily into Ireland's juvenile justice system.[25] Add this to the fact that specific restorative practices in the area of adult crime have yet to gain statutory expression in either Ireland *or* New Zealand and it might appear that both jurisdictions are on par in terms of their restorative evolution, but, this is far from true. As the authors of the 1998 National Crime Forum Report highlight, there is an important distinction that sets New Zealand apart from less restoratively evolved jurisdictions such as Ireland and places it on a much higher evolutionary plateau in this respect:

> While may other approaches to justice contain restorative elements, a truly restorative system (as contrasted with a retributive system) is still found only in isolated instances. In fact, New Zealand is the only jurisdiction which has legislated for a model of justice *based fully on restorative principles.*[26]

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[24] Masters, "What Happens When RJ is Encouraged, Enabled And/Or Guided By Legislation?" in Zehr and Toews eds., *op. cit.* 227, at 231.
[25] *Infra*, at 319-320.
[26] *Report of the National Crime Forum 1998* (Institute of Public Administration, 1998), at 144. [emphasis added]

This statement refers to New Zealand's *explicit and exclusive* use of restorative justice in handling youth crime. While Ireland's juvenile legislation contains "restorative elements" in the sense that it has absorbed a restorative theme or flavour and provides for practices that are based implicitly around restorative justice and VOM, neither term is explicitly mentioned.[27]

As the following summary will reveal, New Zealand stands atop the international hierarchy of restoratively-developed common-law jurisdictions. There are four vital ways in which New Zealand's juvenile *and adult* criminal justice models express their commitment to restorative principles.

2.2.1 Family Group Conferencing in New Zealand

As Chapter 2 outlined briefly in its discussion of "indigenised" or "spliced" justice models,[28] New Zealand has successfully disinterred and resuscitated an indigenous Maori method of community justice through its statutory Family Group Conferencing system.[29] The system was established under New Zealand's Children, Young Persons and their Families Act, 1989 and has monopolised juvenile justice ever since. At present, New Zealand's mode of dealing with youth crime can be defined as a fully integrated, statutory system of mandatory restorative justice. The Family Group Conferencing framework, which involves routine judicial referrals to restorative mediation, conveys emphatically that restorative justice is the normal and inevitable route through which all juvenile matters will progress in New Zealand.

2.2.2 Sentencing Act, 2002

New Zealand's Sentencing Act, 2002[30] constituted an important milestone along the country's path of restorative evolution in the field of adult criminal justice. While both Ireland and New Zealand have resisted giving specific adult restorative strategies legislative expression, New Zealand has succeeded in imbuing its entire adult justice system with a statutorily protected *ethos of restoration.*

The Sentencing Act, 2002 afforded the principle – in contrast to the practice – of restorative justice an official legislative platform. It announced that an official reorientation was to take place within the philosophy of adult criminal justice by providing for such things as a restorative basis for sentencing,[31] the adjournment of matters for restorative referrals[32]

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[27] *Infra*, at 319-320.
[28] *Supra*, at 78-85.
[29] *Supra*, at 81.
[30] Available at: <http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes>
[31] Sentencing Act, 2002, s. 7.

and the consideration of their outcomes by sentencing judges.[33] The Act explicitly recognised once and for all, in an official, legislative way, the direction in which New Zealand sentencing policy had been travelling unofficially for some time.[34]

2.2.3 Victims' Rights Act, 2002

New Zealand's Victims' Rights Act, 2002[35] complemented the provisions of the Sentencing Act of that year. While again, it resisted providing statutorily for a system of court-referred restorative conferencing, it encouraged victim-offender meetings under fitting circumstances. Section 9(2) provides that:

> [i]f a suitable person is available to arrange and facilitate a meeting between a victim and an offender to resolve issues relating to the offence, a judicial officer, lawyer for an offender, member of court staff, probation officer, or prosecutor should encourage the holding of a meeting of that kind.[36]

2.2.4 A History of Restorative Pilot Schemes in New Zealand

The unofficial use of restorative practices within the sphere of adult crime has been taking place in New Zealand since 1995. [37] Restorative schemes operated on an *ad hoc* basis until 1998 when they were adopted as government pilot programmes. Four pilot strategies involving restorative, court-referred conferencing for adult defendants – tested between 2001 and 2004 – were deemed particularly successful. And they had much to boast; a recent government evaluation of the schemes found they had achieved their objectives with significant success and recommended only minor adjustments.[38] Their objectives were brave; they aimed to achieve an increased resolution of the effects of crime for victims, increased victim satisfaction with the criminal justice process and a reduction in re-offending rates.[39] Moreover, the projects pursued these benefits with regard to relatively non-minor offenders – those who would otherwise face a maximum custodial sentence of two years or more.

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[32] *Ibid.*, s. 25.
[33] *Ibid.*, ss. 8 and 10.
[34] For an outline of the key restorative provisions of the Sentencing Act, 2002, see, "Appendix 1: Restorative Justice Provisions in the Sentencing Act 2002, Parole Act 2002, and Victims' Rights Act 2002". <http://www.justice.govt.nz/restorative_justice/appendix_1.html> (visited 12 January 2006).
[35] *Ibid.*, at paras 20-22.
[36] *Ibid.*, at para. 20.
[37] *Ibid.*
[38] *New Zealand Court-Referred Restorative Justice Pilot: Evaluation* (New Zealand Ministry of Justice, 2005). <http://www.justice.govt.nz/pubs/reports/2005/nz-court-referred-restorative-justice-pilot-evaluation/index.html>
[39] New Zealand Ministry of Justice, "Restorative Justice Conferences Impact Re-Offending" *Press Release*, *Scoop Independent News*, 10 February 2006. <http://www.scoop.co.nz/stories/PO0602/S00057.htm>

New Zealand's Crime Prevention Unit also funds sixteen community-managed restorative justice programmes around the country that complement a number of local community groups providing restorative services.[40] While local initiatives receive referrals from the courts, they rely mostly on the community for funding.

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While New Zealand's adult court referral system operates informally, outside of the formal criminal justice system, legislation is in place to ensure that the system respects, accommodates and considers restorative conferences. This sets New Zealand apart from Ireland in this regard and provides food for thought as to how a culturally-sensitive network of Irish restorative justice should look.

2.3 Irish Support for Foreign Models of Restorative Justice

The Irish government should continue to resist copying and pasting successful restorative advances blindly from abroad. Circulating accounts of foreign success stories have undoubtedly provided substantial impetus for recent governmental curiosity about restorative justice.[41] Successful restorative initiatives in countries such as New Zealand and Scotland have already been commended, studied and emulated on both a statutory juvenile and informal, adult basis within Irish criminal justice.[42]

New Zealand's restorative achievements have been particularly influential. In fact, they have provided considerable inspiration for each of the principal restorative initiatives, statutory or otherwise, that have been established in Ireland in recent years. Speaking in 1998, prior to the blossom of restorative pilot strategies breaking out around the fringes of Irish criminal justice, former Minister for Justice John O'Donoghue made the following statement. It predicts implicitly the influence that New Zealand alternatives were to exert over forthcoming restorative strategies in Ireland:

> ... I am fully committed to many of the concepts of restorative justice and measures as alternatives to custody in cases where the court decides that a sentence of imprisonment is not appropriate. New Zealand has been for a few decades to the forefront in the development of a restorative philosophy...[43]

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[40] *See* Maxwell, Morris and Anderson, *Community Panel Pre-Trial Diversion: Supplementary Evaluation*, Research Report, Crime Prevention Unit, Department of Prime Minister and Cabinet and Institute of Criminology (Victoria University of Wellington, New Zealand, 1999).
[41] *Infra*, at 309-323.
[42] The Tallaght Victim/Offender Mediation Service drew inspiration from a similar service operating in Edinburgh, Scotland: see "Update on Restorative Justice Developments in Ireland" (2001) 2(2) *Newsletter of the European Forum for Victim-Offender Mediation and Restorative Justice* 6; for an overview of Scottish diversion schemes, see Cooke, "Diversion from Prosecution: A Scottish Experience" in McGuire ed., *What Works: Reducing Reoffending* (Wiley, 1995) 173.
[43] Dáil Éireann, Vol. 497, 26 November 1998, Question 32.

First and foremost, the Nenagh Community Reparation Project was famously inspired by a similar restorative scheme operating in Timaru, New Zealand.[44] The Tallaght Victim-Offender Mediation Service[45] is said to have been similarly inspired by New Zealand's restorative advances.[46] But, possibly the most significant symbol of the Irish government's persuasion by New Zealand's restorative innovations is its adoption of a family group conferencing variant in the Children Act 2001, which came into operation in November 2003.[47]

Of interest when considering the emulation of New Zealand's restorative successes is Allison Morris' argument that such attempts do not need the degree of meticulously-established cultural sensitivity that one might deem necessary having regard to New Zealand's presumptively more evolved legal and social setting.[48] Morris argues that because New Zealand's advances in restorative justice are in fact rooted in surprisingly humble socio-legal soil, there is less of a divide to bridge in seeking to emulate it in a country that has yet to properly embrace restorative justice. In fact, as Masters stresses, New Zealand's restorative achievement "is even more noteworthy considering that these reforms occurred in a country *not famed* for any liberal approach to criminal justice".[49]

Some might assume that restorative justice blossomed so fruitfully in New Zealand because of a prevailing environment of sophistication and superior legal enlightenment. This might prompt its admirers to attempt to alter it *unnecessarily* heavy-handedly to fit the presumptively less accommodating characteristics of their own "inferior" socio-legal landscape. Yet, Morris warns that "New Zealand is not the Island paradise outsiders think it is and that, therefore, experience there may be more generally valid than often supposed".[50]

Even if Morris is correct in identifying the humble beginnings of restorative justice in New Zealand, there is still a need for caution. The revelation that New Zealand may have more in common with apparently "less evolved" jurisdictions does not vitiate the need to scrutinise donor and donee societies for contextual sympathies. It simply means that this scrutiny is made more straightforward by detecting a higher degree of socio-legal correspondence than might have been expected.

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[44] *Infra*, at 311-313; see Curran, "Kiwi Inspired Reparation – Nenagh Style" (2005) 7(2) *Courts Service News* 15.
[45] *Infra*, at 310-311.
[46] *See* O'Doherty, "Victims to Have Say in Punishment for Crimes" *The Irish Examiner*, 17 November 1999.
[47] *Infra*, at 319-321; Shannon, "A Model Conference for the Future" *The Sunday Business Post*, 23 November 2003.
[48] Morris, "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42(3) *British Journal of Criminology* 596, at 597.
[49] Masters, *loc. cit.*, at 231. [emphasis added]
[50] Morris, *loc. cit.*, at 462.

If anything, Morris' insight justifies *more care than ever* in gauging real levels of cultural compatibility, which may be hidden below a superficial crust of cultural superiority coagulated by the publicity that successful restorative reforms tend to invite. The possibility must be considered that a country enjoying successful legal reforms that are admired and coveted from afar did not necessarily cultivate them from a more evolved socio-legal environment, but simply got there first.

While the government has wisely *drawn inspiration* from foreign experience, it has avoided the pitfalls of ill-considered legal clones. However, when designing an official system of nationwide restorative justice in the near future, the government must continue its cautious approach to heeding external reforms. To whatever degree that system adopts the practical badges or philosophical credos of foreign restorative models, its design should be fitted meticulously and uncompromisingly to the inimitable contours of Irish society.

Therefore, a restorative blueprint should be either designed bespoke to fit the distinctive dimensions of Ireland's legal identity or at the very least taken "off the peg" of a range of foreign reforms and painstakingly altered to achieve an equally uncompromising fit. What should *not* be attempted is to force onto Irish criminal justice an ill-fitting restorative innovation from abroad that has been tailored according to the peculiar features of a foreign legal setting.[51] This warning rationalises the *inextricable* connection between the many facets of Irish legal culture and the character of incoming laws; it explains why the former is an essential determinant of the latter and – in that sense – justifies the compatibility-study that follows hereafter.

[51] *National Crime Forum Report 1998*, *op. cit.*, at 166.

Part Two: The Brehon Law

3. Evaluating Ireland's Restorative Heritage: Has the Brehon Law Been Buried Alive?

The Brehon Law provides an essential starting-point for any discussion of alternative justice in Ireland. It describes a sophisticated system of early Irish customary law, which tended to prioritise restorative answers to crime while deferring readily to punitive necessities where appropriate. Therefore, in Ireland's legal *past*, lies a hybrid model of restorative/punitive criminal justice resembling that promoted herein as a means by which to sculpt its *future*. As such, the Brehon legal system could provide valuable inspiration to the *National Commission on Restorative Justice* soon to consider the terms of restorative justice's modern resurrection in Ireland.[52] It could be that looking backwards might provide a fruitful means of moving forward in Irish criminal justice.

Though primitive and even barbaric in parts,[53] the Brehon law belied its age with a host of evolved and progressive rules and methods from which modern common law criminal justice could learn much.[54] Accordingly, integrating restorative justice's value-system into criminal justice in modern Ireland might be considered a *revival or resuscitation* of an indigenous (though dormant) legal tradition, rather than the introduction of a new or alien sentencing philosophy or transient legal fad.

The Brehon law reached maturity around the 8th century and endured officially until Ireland's final conquest by the British. It originated in an unwritten pagan code circulated by word of mouth throughout pre-Christian Ireland. With the arrival of Christianity in the 5th century, the Brehon laws were finally written down in a format that was made to comply with Christian values. The laws were compiled in a written compendium of native Irish legal instruction known as the *Senchus Már* or "Great Tradition", probably towards the beginning of the 8th century.[55]

Although pre-Christian Irish law was infused with various restorative values, the nation's restorative tradition was enhanced vastly by the rich restorative influence of Christianity and the Bible, which was contemplated in Chapter 2.[56] The unique union of

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[52] O'Brien, *loc. cit.*
[53] *Infra*, at 283.
[54] *Infra*, at 301-304.
[55] *See* Breatnach, "Lawyers in Early Ireland" in Hogan and Osborough eds., *Brehons, Serjeants and Attorneys: Studies in the History of the Irish Legal Profession* (Irish Academic Press, 1990) 1, at 2; Kelly, *A Guide to Early Irish Law* (Dundalgan Press, 2003), at 242-246; Thurneysen, "Celtic Law" in Jenkins ed., *Celtic Law Papers* (Brussels 1973) 49, at 54-55; Binchy, "Ancient Irish Law" (1966) 1 *Irish Jurist* 84, at 88; for a compelling and intricate overview of the Senchus Már, see Binchy, *Corpus Iuris Hibernici Ad Fidem Manuscriptorum* (Dublin Institute for Advanced Studies, 1978).
[56] *Supra*, at 68-78.

pagan and Christian influences[57] over the elaborate legal content of the *Senchus Már* is evident from the various sources to which it attributes its wisdom: "[t]he joint memory of the ancients, transmission from ear to ear, the chanting of poets, ... the law of Scripture, ... the law of nature".[58] Donnchadh Ó Corráin praises the multi-faceted roots of Brehon teaching:

> Brehon law is a most remarkable achievement in jurisprudence. Its makers took the inherited law of the pagan past and applied to it the scholarly and jurisprudential thinking of ecclesiastical scholarship – drawing on the Old and New Testaments; the writings of the Fathers of the Church; the legislation of church councils both ecumenical and regional; the letters of the popes; notions of law, personal responsibility for actions and liability, embedded in monastic rules and penitential nooks; and on some scraps of Roman Law transmitted indirectly to them.[59]

Whatever its influences, the Brehon law fits snugly within the ranks of the religious and indigenous justice models considered in Chapter 2, whose prioritisation of restorative responses to crime surrendered only to a prudent recognition of the social necessity of more incursive, incapacitative penalties.[60]

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There are three chief resemblances between Brehon criminal justice and this thesis' cross-bred vision of integrated restorative/punitive sentencing: (1) a focus on community, (2) an emphasis on party-driven criminal justice and (3) a de-prioritisation of punitive sanctions as the first response to crime. Each similarity, in its minutiae, then breaks down into an abundant second generation of restorative principles, such as compensation, social reintegration, restoration, apology, atonement, victim-offender communication and the empowerment of crime victims.

Next, each of these three resemblances and their constituent restorative principles are evaluated in order to determine the desirability and/or feasibility of replicating them inside the hybrid model of restorative criminal justice envisaged herein. Then, the Brehon law's enrichment by these various restorative emblems is identified as the adhesive that bonds it to its international indigenous counterparts.[61]

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[57] For an overview of the Christian and pagan elements of early Irish law, see Ó Corráin, Breatnach and Breen, "The Laws of the Irish" (1984) 3 *Peritia* 382; Breatnach, "Canon Law and Secular Law in Early Ireland" (1984) 3 *Peritia* 439.
[58] Breatnach, "Lawyers in Early Ireland", *loc. cit.*, at 5.
[59] Ó Corráin, "Introductory Lecture", Lecture, *Brehon Law in Modern Times: A 21st Century Perspective on 7th Century Irish Law*, Law Society of Ireland, 9 May 2006, at 19.
[60] *Supra*, at 49-86.
[61] *Infra*, at 285-287.

3.1 Community Focus

The Brehon law's most elemental restorative feature was its community-focus. Its avidly protective concern with community-life evidences an affinity between Brehon justice and a range of other restorative values such as the empowerment of crime victims and communities, the re-integration of crime-fractured community relations and a tendency towards de-professionalised, informal criminal procedure.

Brehon society's pre-occupation with the preservation of community-life is a result of the pre-eminence of local community over nation-state in Brehon times. Ireland was federally rather than feudally subdivided into de-centralised parochial clusters of varying relational intensities. There was no central prosecutorial authority and as such, local issues of crime and disorder were tackled on a local basis within any of the three familial strata known to have assembled Brehon society – the *fine*, the *sept* and the *túath*.[62] The *fine* or kin-group was the smallest entity extending just beyond immediate family while the *túath* (meaning tribe or petty kingdom) constituted the largest territorial but smallest political unit.[63]

One result of this distinctive social stratification was the de-centralised, provincial administration of justice. Criminals were answerable to their victims, peers and local superiors, not some detached or irrelevant-seeming overarching state authority. An altruistic fixation on the preservation of group-life over individual autonomy clearly held a profound significance in early Ireland. Daniel Binchy, a prolific legal scholar in this field,[64] describes Brehon society as "tribal, rural, hierarchical and familiar, i.e. a society in which the family (*fine*) not the individual is the unit".[65]

Brehon society's accent on maintaining social-attachment is also closely linked to its obsession with status, rank, hierarchy, honour and reputation.[66] Abandoning the Roman ethic of equality, Brehon society was strictly partitioned into caste-like[67] layers of differently-valued individuals.[68] Consequently, as Daniel Binchy clarifies below, a principle of stark

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[62] On the Brehon social structure, see generally, Kelly, *op. cit.*, at 1-14; Consedine, "The Celtic Tradition: Repairing the Damage" in Consedine, *Restorative Justice: Healing the Effects of Crime* (Ploughshares, 1999) 132.

[63] Kelly, "Conclusion", Lecture, *Brehon Law in Modern Times: A 21st Century Perspective on 7th Century Irish Law*, Law Society of Ireland, 6 June 2006, at 1.

[64] *See* Braumgarten, "D.A. Binchy: A Bibliography" (1986) 5 *Peritia* 468.

[65] Binchy, "Secular Institutions" in Dillon ed., *Early Irish Society* (Sign of Three Candles, for Cultural Relations Committee, 1959), at 54.

[66] *See generally*, MacNeill, "Ancient Irish Law: The Law of Status or Franchise" (1923) 36C *Proceedings of the Royal Irish Academy* 265; Kelly, *op. cit.*, at 7-10; Charles-Edwards, "*Críth Gablach* and the Law of Status" (1986) 5 *Peritia* 53; Manning, "The Test Críth Gablach and the Old Irish Law of Status", Lecture, *Brehon Law in Modern Times: A 21st Century Perspective on 7th Century Irish Law*, Law Society of Ireland, 16 May 2006.

[67] *See* Ó Corráin, *loc. cit.*, at 2; Binchy, "Irish History and Irish Law: I" (1975) 15 *Studia Hibernica* 7, at 25.

[68] *See generally*, Binchy, "Bretha Crólige and Sick Maintenance in Irish Law" (1938) 12 *Ériu* 1; MacNeill, *loc. cit.*

disparity based on little more than biology or happenstance governed human interaction in Brehon times:

> When I speak of a hierarchical order I mean one in which society was more or less rigidly stratified, and in which the inequality of man – based on differences in birth and calling – had to be erected into a legal principle … Most men were free but they were certainly not equal.[69]

This obsession with social status in Brehon times is evident from the notion of "honour-price" or *lóg n-enech* – the financial measure of a person's status, which had to be paid for any serious offence perpetrated against him.[70] The extent of reputation-based social gradation in Brehon times is further demonstrated by the range of offences against a person's honour[71] and the proportionate correlation between people's socially-prescribed status and the extent of their legal rights. As Fergus Kelly explains:

> Social inequality permeated the whole system in a very explicit manner: one's legal capacity was firmly tied to one's rank, and if one was at the bottom of the heap – whether as a slave or serf – one was virtually without any legal rights at all … Irish women in general suffered serious legal discrimination on the basis of gender.[72]

It seems that the preservation of insular social groupings classified first according to rank and second according to familial intimacy was prioritised in Brehon times to the detriment of wider *inter-group* bridge-building. The damaging social impact of sacrificing global attachments in the interests of more intimate connections was considered in Chapter 4.[73]

A concern with group-prestige aroused the belief that whole collectivities could – like victim and offender – suffer in crime's aftermath; communities were injured *intangibly* as a result of crime's subversion of group-authority, -reputation and -solidarity. Yet, while residents' collective *injury* by crime was recognised in early Ireland, so was their collective *liability* for it. Kins-groups could be treated as vicarious victims on the one hand, worthy of compensation[74] and vicarious offenders on the other, worthy of punishment.

The notion of group-responsibility for individual misconduct is illustrated by the principle of *kincogish* or *cin comoguis* – "the offence of the kinsman" – according to which the *fine* was considered legally responsible for the offences of its members.[75] According to

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[69] Binchy, "Secular Institutions", *loc. cit.*, at 56.
[70] Kelly, *op. cit.*, at 8-9.
[71] For example, satire, taunting or publicising a false story causing shame: see Kelly, *op. cit.*, at 137-138; see also, Kelly, "Offences Lecture", *Brehon Law in Modern Times: A 21st Century Perspective on 7th Century Irish Law*, Law Society of Ireland, 6 June 2006, at 9-10.
[72] Kelly, "Conclusion", *loc. cit.*, at 1.
[73] *Supra*, at 157-158.
[74] *Infra*, at 280.
[75] Kelly, *op. cit.*, at 13; Binchy, *op. cit.*, at 411, paras 22-23.

this principle, the property of a culprit's clan became vulnerable when an offending member's unpaid debts became overdue.

Another testament to the Brehon Law's community-emphasis was the practice of using lay-judges as well as those, known as *brehons* or *brithem* who were professionally educated in Ireland's various law schools.[76] Unprofessional, yet skilled or highly-regarded members of the community were called upon regularly to adjudicate those legal issues that lay within their speciality or trusted discretion.[77]

Echoing restorative justice's tendency towards procedural informality[78] and community-based adjudication,[79] Brehon justice was often administered in the informal surroundings of judges' residences, aloft hilltops[80] or in open-air public assemblies,[81] although king-led assemblies also took place at a national level to discuss the nation's most pressing issues.[82] Finally, reflecting restorative justice's favouritism for pragmatism over strict legal rules and informalism over professionalised justice, judges acted more as arbiters or *mediators* than officials of the court; their decisions reflected inter-party *compromise* rather than the enforcement of a particular legal rule.[83]

These various factors reveal that the Brehon law's restorative focus was a direct result of an obsession with community-authority, -reputation and -preservation in early Ireland – one that spawned a range of restorative principles considered below.

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[76] *See generally*, Simms, "The Brehons of Later Medieval Ireland" in Hogan and Osborough eds., *op. cit.* 51; Breatnach, "Lawyers in Early Ireland", *loc. cit.*; Kelly, *op. cit.*, at 51-56.
[77] Kelly, *op. cit.*, at 55-56.
[78] *Supra*, at 22, 181, 241-242.
[79] *Supra*, at 8-11 and see generally, *supra*, at 49-86.
[80] Kelly, *op. cit.*, at 193; Kelly, "Litigation in Brehon Law (I)", Lecture, *Brehon Law in Modern Times: A 21st Century Perspective on 7th Century Irish Law*, Law Society of Ireland, 30 May 2006, at 3-4.
[81] *See* MacNeill, *Early Irish Laws and Institutions* (Burns, Oates and Washbourne, 1935), at 100-117.
[82] *Ibid.*; Kelly, *op. cit.*, at 4.
[83] Nicholls, "Land, Law and Society in Sixteenth-Century Ireland", O'Donnell Lecture, University College Cork, May 1976 (National Library of Ireland, 1978), at 6 cited in "The Case of Tanistry (*Le Case de Tanistry*)" [2001] *Australian Indigenous Law Reporter* 37, at 38.

3.2 Party-Driven Criminal Justice

The degree of control that the Brehon Law afforded victim and offender over the destiny of a criminal complaint connects it to a central principle of restorative justice: that victim and offender should be actively involved in repairing crime's harms.[84] A classification of victim and offender as the rightful "owners" of the conflict arising between them[85] appears to underlie the Brehon Law's deference to their autonomy in redressing the adverse effects of wrongdoing.

While the *degree* of control delegated to victim and offender in this regard is plainly repugnant to the modern-day state-administration of justice and a contemporary concern with limiting private vengeance, Brehon law and restorative justice share much *in principle* here. The Brehon law's party-centric criminal justice reflects restorative justice's need to empower victims and offenders by maintaining their involvement in and knowledge about post-crime remedial processes.[86] This testifies implicity to the Brehon law's respect for other restorative principles such as atonement, apology, compensation, restoration and direct victim-offender communication. There is, however, more explicit, corroborative evidence of the Brehon law's alignment to this range of principles. This is supplied by four important features of the Brehon law that demonstrate its empowerment of victim and offender in crime's aftermath: victim-instituted criminal justice, remedies for injury and death, compensation for theft and the law of distraint. Each feature is examined below.

3.2.1 *Aidbriud:* Victim-Instituted Criminal Justice

There was no police force in Brehon times. In fact, as Consedine observes: "[t]he people were their own police."[87] There were no prisons and crucially, there was no public administration of justice.[88] As such, it was up to individual victims to initiate formal proceedings against their offenders by publicising an accusation of wrongdoing through a process known as *aidbriud* or "assertion of truth".[89]

While victim-driven private justice is patently unworkable under modern conditions in which the state acts as guardian against the anarchy of blood-feud and private vengeance, the considerable responsibility and authority enjoyed by crime victims in Brehon times reflected *in principle* restorative justice's elemental concern with empowering victims in the

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[84] *Supra*, at 190-214.
[85] *Supra*, at 5-6.
[86] *Supra*, at 190-214.
[87] Consedine, "An Irish Way Forward", Restorative Justice Ireland Conference, *Restorative Justice: Examining the Issues*, April 1999, at para. 17.
<http://www.extern.org/restorative/99_Conf_Consedine.htm> (visited 18 November 2005).
[88] Kelly, "Litigation in Brehon Law (I)", *loc. cit.*, at 1.
[89] *Ibid.*; Kelly, *op. cit.*, at 190.

aftermath of their victimisation – a value on which mainstream criminal justice arguably places considerably less emphasis.[90]

3.2.2 Remedies for Injury and Death: The *Bretha Crólige* and the *Bretha Déin Chécht*

3.2.2.1 Sick Maintenance: *Folog Nothrusa*

The *Bretha Crólige* is an ancient Irish tract forming part of the *Senchas Már*. It was written in the first half of the 8th century and contains a detailed schedule of remedies for illegal injury.[91] The nature of the remedies listed in the *Bretha Crólige* demonstrates the Brehon law's emphasis on the *party-navigated* rectification of crime's harms. The Brehon law's pursuit of party-driven criminal justice relies on other underlying values that occupy the philosophical heart of the modern idiom "restorative justice", namely the principles of compensation, atonement, apology, and victim-restoration. The *Bretha Crólige* provides a veritable treasure-trove of the restorative principles governing Brehon criminal justice.

> To my knowledge, the Old Irish law-text on illegal injury, *Breithe Crólige*, is the most detailed and remarkable expression of the principles of restorative justice in any ancient or medieval legal document.[92]

The *Bretha Crólige* provides mainly for the process of sick-maintenance – the epicentre of the *Senchas Már's* restorative focus.[93] It creates a framework according to which a person who wrongfully injures another becomes *personally* responsible for the physical restoration of their victim. The law of sick-maintenance (*folog nothrusa* or simply *othrus*) originally compelled an offender to attend personally to his victim's recuperation by providing a venue for the latter's convalescence, paying all medical, nursing and refection expenses incurred and providing a substitute to perform the victim's work for the duration of his recovery.[94] These obligations were concurrent with a right to compensation on behalf of the injured party, [95] which arose only from unjustifiable, *unlawful* injury.[96]

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[90] *Supra*, at 108-110.
[91] *See generally,* Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*; Kelly, *op. cit.*, at 130-133.
[92] Kelly, "Introductory Notes", Lecture, *Brehon Law in Modern Times: A 21st Century Perspective on 7th Century Irish Law*, The Law Society of Ireland, 9 June 2006, at 7.
[93] *See generally*, Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*; Kelly, *op. cit.*, at 130-133.
[94] *Ibid.*
[95] Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*, at 90-91.
[96] The Brehon law *did* recognise lawful injury that could be perpetrated with impunity: see Kelly, *op. cit.*, at 133-134.

According to this original manifestation of sick-maintenance, a victim of unlawful injury was assessed by a physician or "leech" for a period of nine or ten days, after which the extent of the injury, the prognosis and importantly, the legal obligations of the offender were all determined.[97] If, according to the physician's verdict (*derosc*), the victim was curable, the offender's *othrus* obligations fell due:

> The person responsible for the injury is obliged to arrange for the removal (*dingbáil*) of his victim from the latter's home to another house, where he is nursed back to health under the direction of a physician.[98]

These far-reaching personal obligations for perpetrators of violent crimes were eventually commuted into a fixed nursing *fine*, known as a "leech-fee", considered below.

3.2.2.2 Compensation for Unlawful Injury: *Wergild, Díre* and the "Leech Fee"

Sick-maintenance provided just one of a culprit's responsibilities towards the personal restoration of his victim. In fact, an offender's *othrus* obligations only accrued when his victim's injuries or losses were sufficiently grave to establish a right to *compensation*.[99] Sick-maintenance and compensation created concurrent restorative obligations for violent wrongdoers in early Ireland.

Throughout the *Bretha Crólige*, the term *wergild* appears to denote a fixed compensatory payment calculated first according to the nature of the victim's injury and secondly, according to his honour or rank. *Wergild* accrues with respect to the victim's original injury regardless of his subsequent recovery or death[100] and whether or not the injury is sufficiently serious to give rise to *othrus* obligations.[101]

Another form of compensation referred to in the *Bretha Crólige* is *díre*. Daniel Binchy laments the difficulty in gleaning its meaning conclusively from the text.[102] At times, it appears to be used as a synonym for honour-price, or a payment for homicide based thereon.[103] Nevertheless, in the *Bretha Crólige*, *díre* at least sometimes appears to denote a compensatory obligation based on one's honour-price that gradually abates in proportion to

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[97] *See generally*, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*; Kelly, *op. cit.*, at 130-131.
[98] Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*, at 96.
[99] *See* McLeod, "*Di Ércib* Fola" (2002) 52 *Ériu* 123.
[100] Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*, at 93.
[101] *Ibid.*, at 99; *Bretha Crólige* §42 states that any injury that does not affect a person's capacity for work, action or movement does not give rise to a right to sick-maintenance: *ibid.*, at 35; see also, Kelly, *op. cit.*, at 131.
[102] Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*, at 56.
[103] *Ibid.*, at 117; *infra*, at 280.

the fulfilment of an offender's sick-maintenance obligations and hence only falls due when *othrus* is withheld.[104]

A tract known as *Bretha Déin Chécht* also establishes a system of compensation for injury.[105] It probably provides the source of the fixed *wergild* payments mentioned throughout the *Bretha Crólige*. According to the *Bretha Déin Chécht*, these payments were intended to compensate for "the fear of death, the gravity of the [accompanying] sickness and the extent of the blemish".[106] The range of compensatory payments for non-fatal injuries set out in the *Bretha Déin Chécht* is surprisingly thorough, physiologically informed and detailed according to honour or rank. As Fergus Kelly remarks:

> *Bretha Déin Chécht's* description of the various types of injury displays considerable anatomical knowledge, and the relation of the injuries to the fines was clearly thought out in some detail. For instance, no less than six classes of tooth-injury are distinguished with the heaviest fines going for injury or loss of a molar or front tooth. The penalty for an injury varies also according to the rank of the victim. For a grain-sized wound in the face, the lowest grade of king (*rí tuaithe*) is paid 6 scruples and 2½ sets. An *inol* (apprentice?) with no master receives only one fleece for the same wound.[107]

Finally, according to Professor Binchy, defendants' onerous liabilities under sick-maintenance weakened over time into a simple compensatory nursing payment known as a "leech fee". The amount was determined by the victim's rank but also by the gravity of the injury.[108] The commutation of full *othrus* duties into a simple fine appears to have resulted from the restrictive range of exceptions to the entitlement to sick-maintenance set out in the *Bretha Crólige* for victims for whom it would prove cumbersome or inconvenient. For instance, the poet, judge and advocate were all denied sick-maintenance on the basis of the difficulty in finding a substitute to do their work.[109]

These three central forms of compensation for injury symbolise the heavy guiding influence that restitutive principles exerted over human interaction in Brehon times – an influence that is further intensified by the compensatory obligations of killers in early Ireland.

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[104] Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*, at 99.
[105] *See* Binchy, "Bretha Déin Chécht" (1966) 20 *Ériu* 1; see also Kelly, *op. cit.*, at 131-132.
[106] *Bretha Déin Chécht* §10: see Binchy, *op. cit.*, at 2307, at paras 24-26; see also Kelly, *op. cit.*, at 131.
[107] Kelly, *op. cit.*, at 132.
[108] Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*, at 134.
[109] Kelly, *op. cit.*, at 133.

3.2.2.3 Compensation for Unlawful Killing: *Éraic, Díre* and *Crólige mBáis*

Two chief compensatory obligations burdened killers in Brehon times. Each fine was generally payable to the victim's family. The more significant obligation was known as *éraic, cró* or *corpdíre* – literally "bodyfine".[110] This was a fixed *wergild* for homicide, irrespective of rank or honour-price, levied in favour of the nearest relatives (i.e. kinsgroup or *derbfine*) of the slain.[111] It amounted to seven *cumals* i.e. 21 milch cows.[112]

The killer was also liable to pay a second sum to the victim's wider kin[113] based on the victim's honour-price, extending even to foster-brothers and foster-sons.[114] This is another form of *díre*, encountered above where it also described a compensatory liability for non-fatal injury against which *othrus* was reckoned.[115] So, the amount of *díre* due depended first on the victim's honour-price and then on the number and rank of the various relatives affected by the death, whether through blood-relationship, marriage or fosterage.[116]

From the offender's perspective, *éraic* might well have been regarded as a "fine" as it is understood today, whose impact was largely punitive. Yet, as this thesis has illustrated, there is certainly *potential* for offenders to feel emotionally restored through the atonement symbolised by restorative gestures.[117] That said, *éraic's* most restorative feature is its intended impact on the victim's kin i.e. to compensate them for their loss. Moreover, the following statement of Edmund Spenser in his 1583 book *View of the Present State of Ireland* demonstrates that the most defining feature of *éraic* payments is their *compensatory* and not their punitive potential. Spenser's words are sprinkled liberally with the rhetoric of annulling or "making good" crime's harms through restorative acts:

> [I]n the case of murder, the Brehoon, that is their judge, will compound between the murderer and the friends [i.e. the relatives] of the party murdered … that the malefactor shall give unto them or to the child or wife of him that is slain, a *recompense* … by which bylaws of theirs *many murders are amongst them made up and smothered.*[118]

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[110] *See generally*, Binchy, *op. cit.*, at 2015, at paras 10-13.
[111] Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*, at 93.
[112] Kelly, "Offences in Brehon Law", *loc. cit.*, at 2.
[113] *Ibid.*
[114] *Ibid.*, at 3.
[115] *Supra*, at 278.
[116] Kelly, "Offences in Brehon Law", *loc. cit.*, at 3.
[117] *Supra*, at 208-214.
[118] Cited by Kelly in "Offences in Brehon Law", *loc. cit.*, at 1. [emphasis added]

There was one other source of liability for homicide under the Brehon Law. It was, in effect, a pre-emptive form of compensation for the anticipated death of a living victim as judged by a physician at the end of the *derosc* period.[119] It was known as *crólige mbáis* or "a mortal blood-lying" and was paid in lieu of sick-maintenance.[120] This fine reflected the victim's rank and fully discharged the offender's obligations to the victim and his kin; once *crólige mbáis* was paid, the offender was freed from liability for *wergild*.[121] *Crólige mbáis* also accrued where a victim was mis-pronounced curable at the end of the *derosc* term yet died soon after. In such an event, any *othrus* expenses paid prior to the victim's death could be off-set against a one-off payment of *crólige mbáis*.[122]

> ... if a patient dies during *othrus*, the guilty party pays to the kin of the deceased the fine for *crólige mbáis*, from which, however, he may deduct the costs of the nursing supplied by him to the date of death.[123]

3.2.3 Compensation for Theft: *Bretha im Gata*

Bretha im Gata, though incomplete in its remnants, is a tract that bears an obvious resemblance to the provisions of *Exodus* 22, considered in Chapter 2.[124] As Fergus Kelly remarks, "[t]hese regulations stem directly from canon law, and are based on Exodus 22:1".[125] Both Brehon and biblical provisions contain a concise miscellany of the compensatory gestures due for the theft of specific items, in particular animals – the main currency in Brehon times.[126] In particular, *Exodus* 22:1 and the *Bretha im Gata* mirror each other closely in their designation of the compensation due for the theft of oxen and sheep.[127] The compensation payable for theft was calculated according to the value of the object stolen, the rank of its owner and the rank of the land- or home-owner where the theft occurred.[128]

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[119] *Supra*, at 278.
[120] Binchy, "Bretha Crólige and Sick Maintenance in Irish Law", *loc. cit.*, at 94, 102.
[121] *Ibid.*
[122] *Ibid.*, at 100.
[123] *Ibid.*
[124] *Supra*, at 54.
[125] Kelly, *op. cit.*, at 147.
[126] *See generally*, *ibid.*, at 178; Kelly, "Offences in Brehon Law", *loc. cit.*, at 6-9.
[127] *Exodus* 22:1; see also, Kelly, *op. cit.*, at 147.
[128] Kelly, *op. cit.*, at 147.

3.2.4 Distraint and Fasting: *Athgabál* and *Troscud*

The Brehon laws of distraint and fasting also symbolise the intimacy with which crime's adverse effects were remedied between victim and offender.[129] Both parties interacted closely in crime's wake in order to negotiate privately a mutually acceptable resolution and to enforce their rights.

Distraint and fasting provided two potential remedies for victims of theft or those seeking to recover a debt owed to them. They created private avenues of restoration along which victims had to actively secure the return of their property through direct contact with the thief or creditor.

Distraint or *athgabál* denotes the private, non-curial seizure of property. It is described in detail in *Di Chetharslicht Athgabála*, the opening text of the *Senchus Már*.[130] The party seeking to recover property must first give formal notice to the defendant that he intends to impound his property. There follows a period of delay of up to five days to allow the defendant to perform his obligations or pay any fine due.[131] If the defendant allows this period to lapse without making good, the plaintiff is permitted to enter the defendant's property and remove items, usually livestock, to the value of the amount due. The plaintiff then impounds the property for a second period of delay to afford the defendant a second chance to come good. If the defendant acquiesces for a second time, his property will be officially and permanently forfeit.[132]

Fasting provided a means by which ordinary citizens could enforce a claim or recover property from a high-ranking defendant.[133] The process seemingly attenuated over the centuries from a more primitive "fast unto death" to a "ritual hunger-strike from sunset to sunrise performed by the claimant before the residence of his more exalted 'debtor'".[134] The defendant was also expected to fast until he was willing to discharge his liability or submit it to arbitration.[135] If he ate during the plaintiff's fast, he became liable for double the debt. Worse, if he continuously ignored a claimant's just fast, he would forfeit his honour-price.[136]

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[129] *See generally*, *ibid.*, at 177–183; Binchy, "Distraint in Irish Law" (1973) 10 *Celtica* 22; Binchy, "A Text on the Forms of Distraint" (1973) 10 *Celtica* 72; Binchy, "Irish History and Irish Law: I", *loc. cit.*, at 23-26; Binchy, *op. cit.*; Kelly, "Offences in Brehon Law", *loc. cit.*, at 11-14.

[130] *See* O'Donovan and O'Curry, *Ancient Laws of Ireland: Volume I, Introduction to Senchus Mor and Athgabal or Distress* (Alexander Thom 1865) although Binchy describes this text as "a disaster": see Binchy, "Ancient Irish Law", *loc. cit.*, at 86.

[131] *See* Binchy, "Distraint in Irish Law", *loc. cit.*, at 38-45; Kelly, *op. cit.*, at 178.

[132] Kelly, *op. cit.*, at 179.

[133] *See ibid.*, at 182-183; Binchy, "Distraint in Irish Law", *loc. cit.*, at 34-35; Binchy, "Irish History and Irish Law: I", *loc. cit.*, at 23-26.

[134] Binchy, "Irish History and Irish Law", *loc. cit.*, at 23.

[135] *Ibid.*

[136] Kelly, "Offences in Brehon Law", *loc. cit.*, at 13-14.

Both the avenue by which Brehon criminal justice was invoked and the remedies it provided for the main forms of wrongdoing testified not only to the hands-on role once enjoyed by victim and offender in Irish criminal justice, but to the predominance of other restorative principles such as compensation, mediation and informal justice in Brehon times.

3.3 The Coexistence of Restorative and Punitive Answers to Crime: Restorative Justice as a First Resort under the Brehon Law

A general prioritisation of restorative responses to crime is evident under the Brehon law, which allowed offenders to escape corporal punishment by paying compensation to their victims. However, corporal sanctions *were* imposed in cases of continuing non-payment. So, what began as a generous opportunity for reform, restitution and dialogue could transform into a distinctly retributive, even blood-thirsty affair. Defaulters faced outlawry[137] as well as a variety of other more gruesome penalties, such as mutilation,[138] flogging,[139] being abandoned to starve in a pit,[140] slaying[141] and being set adrift on the sea.[142]

Corporal punishment certainly existed under the Brehon law and assumed cruel and unusual manifestations. But can such punishments really be divorced from modern modes of dealing with crime? Surely not, in a world that resorts to sensory deprivation, stoning, solitary confinement and torture – flouting international law, which struggles to civilise 21st century responses to rule-breaking that would not be out of place in 8th century Ireland or presumably anywhere within the shadowy realms of global prehistory.

The Brehon law's tolerance of retributive sanctions must not be under-stated. Killing and injury were both considered lawful but seemingly only under exceptional circumstances.[143] For instance, heat-of-the-moment killing was excused – such as the slaying of a man found in bed with one's wife.[144] Liability for *éraic* was also avoided where a person was killed in the midst of perpetrating a crime or, unsurprisingly, slaughtered in battle.[145] Non-malicious injury was also permissible, such as that carried out in self-defence.[146]

However, each of these sources of impunity is founded on one of several *excuses* that *mitigate* one's culpability. There is seemingly no excuse for arbitrary killing or random acts of indiscriminate violence under the Brehon law in the absence of some socially-accepted

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[137] *See* Kelly, *op. cit.*, at 222-224.
[138] *Ibid.*, at 221.
[139] *Ibid.*, at 221-222.
[140] *Ibid.*, at 218-219.
[141] *Ibid.*, at 219.
[142] *Ibid.*, at 219-221.
[143] *Ibid.*, at 128-129, 133-134.
[144] Kelly, "Offences in Brehon Law", *loc. cit.*, at 3.
[145] *Ibid.*
[146] Kelly, *op. cit.*, at 133-134.

justification. Furthermore, a range of similar defences – such as provocation, automatism, self-defence and insanity – operate under modern criminal justice to reduce the penalty for killing. Both of these factors dilute the perceived primitiveness and barbarism of the Brehon law's appreciable retributive dimension.

The Brehon law's punitive edge can be dulled even further. Under the Brehon law, only the victim could ratify the imposition of punitive sanctions on a serious offender. As Kelly observes:

> Where a victim of a serious crime (maiming, theft, satire, etc.) is still alive, the decision as to the fate of the non-paying culprit is apparently his alone. Thus a number of law-texts quote the principle *ní gonae cimbid manip lat* "do not kill a condemned person unless he is yours" i.e. only the person wronged is entitled to kill the culprit.[147]

Victim-led sentencing may be intolerable under modern legal frameworks that value consistent sentencing, fairness and a strict separation of powers.[148] Arguably, it also threatens to encourage violent reprisals as much as it stands to limit them. Nonetheless, this approach was not entirely without restorative merit. A victim's power of veto at least held the *potential* to save a penitent, transformable offender from a grisly fate that he would otherwise certainly face.

There is also evidence to suggest that the Brehon law avoided *undue* punitiveness by dealing more mercifully with first-time offenders.[149] While there is nothing inherently restorative about letting a known offender off the hook,[150] the avoidance of retributive sanctions for minor and first-time offenders in favour of more proportionate, less invasive responses lies at the core of restorative justice's pacifist spirit. Although restorative justice undoubtedly tolerates the need to intervene aggressively against serious offenders,[151] it views such action as a last resort where less intrusive, more therapeutic measures are unsuitable, rejected by the offender, or simply futile given his crime(s) and characteristics.

To summarise, the Brehon law was generally restorative in the first instance, relying on compensatory and restorative sanctions that united wrongdoer and wronged to settle the conflict between them privately. It did, however, accommodate some brutal and violent punishments for rule-breaking and in this sense, the Ireland of today and that of Brehon times are poles apart. Corporal punishment is illegal in the Republic of Ireland, which has an

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[147] *Ibid.*, at 216.
[148] *Infra*, at 324-325.
[149] *See* Kelly, "Offences in Brehon Law", *loc. cit.*, at 6.
[150] *Supra*, at 39, 107; *infra*, at 330, 366.
[151] *Supra*, at 214-215; *infra*, at 329-335, 378-383.

imperfect[152] but relatively unsullied human rights record, at least by international standards.[153]

There is, however, still room for learning from our Brehon law roots in this country; we can, as asserted below,[154] implement the *spirit* rather than the *word* of early Irish law to improve contemporary criminal justice by diversifying its sentencing doctrine. And one important element of the Brehon law's *spirit* or general tenor is a principle that echoes this thesis' dominant refrain: that restorative and traditional retributive sentencing options can and should be combined on a nationwide basis in Ireland.

3.4 Indigenous Criminal Justice Models Share a Restorative "Kinship": The Brehon Law on the International Stage

The Brehon Law's hybrid restorative/punitive agenda connects it to similar forms of indigenous and spiritually-derived criminal justice such as those considered in Chapter 2.[155] Ireland's ancient legal customs reflect those of other nations, religions and ethnicities in their shared adherence to restorative principles while simultaneously recognising the social necessity of more draconian penalties. Jewish, Christian, Islamic and Romani traditions have all bequeathed a spliced legal inheritance to their followers, which marries a restorative value-system with more invasive retributive sanctions. The choice of a particular category of penalty is then guided by an overriding principle of "appropriate sentencing" that sacrifices the blanket application of one indiscriminate rule or method to a superseding principle of legal pragmatism.[156]

Even Brehon society's molecular social composition mirrors that of its international indigenous peers. For instance, the tripartite familial groupings that systemised early Irish society – the *fine*, *sept* and *túath*[157] – bear an arresting resemblance to the *whanau*, *hapu* and *iwi* of New Zealand's Maori people.[158] Furthermore, the Brehon system's obsession with individual social worth earned by honour and rank mirrors the hindu *caste* system.[159]

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[152] O'Toole, "Denying Racism Here From Safe Distance of Durban" *The Irish Times*, 8 September 2001; Carolan, "Survey Says Gardaí Among Those Guilty of Racism" *The Irish Times*, 7 September 2001; Haughey, "Farrell Says Racism is a 'Real Evil' in Irish Society" *The Irish Times*, 6 September 2001; Cullen, "Irish Want Action on Racism but not Refugees Next Door" *The Irish Times*, 11 May 2001; Mc Cormaic, "ESRI Says 21% of Immigrants Seeking Jobs Face Discrimination" *The Irish Times*, 7 November 2006; Holland, "Home is Where the Hurt Is" *The Irish Times*, 4 November 2006; Coulter, "Garda Reform Essential – Manning" *The Irish Times*, 11October 2005; Love, "Garda, Department Must Address Human Rights Issues" *The Irish Times*, 13 April 2005.

[153] Kilkelly, *European Convention on Human Rights Bill 2001: Presentations*, 30 April, 2001 <http://www.irlgov.ie/committees-29/c-justice/20030116-J/Page1.htm> (visited 6 December 2006).

[154] *Infra*, at 301-303.

[155] *Supra*, at 49-86.

[156] *Infra*, at 326-327, 330, 378-380, 387-388.

[157] *Supra*, at 273.

[158] *Supra*, at 81.

[159] *See* Ó Corráin, *loc. cit.*, at 2; Binchy, "Irish History and Irish Law: I", *loc. cit.*, at 25.

However, it is their *common restorative value-system* that binds together most compactly a diverse blend of the world's peoples into a surprisingly intimate, homogeneous legal community.

For example, compensating crime victims is one of the most fundamental restorative principles that has sculpted criminal practice around the globe for millennia. Of particular interest is the striking parallel between Islamic law's system of *diyya* and *errish*[160] and Irish law's *díre* and *éraic*.[161] Though not synonymous – *errish* applies only to bodily injury and not to loss of life like *éraic* – the two systems share an identical dyadic compensatory ethic that aims to cover both injury and death.

The treatment of compensation as a vehicle of *atonement* is another common thread that weaves throughout the world's legal origins. The Brehon law's emphasis on using fines to allow offenders to avoid further liability is premised on the assumption – naïve though it may be – that payment will express genuine atonement,[162] jolt offenders out of rule-breaking patterns, and rehabilitate them, thereby obviating the social need for more onerous sanctions. A similar emphasis can be attributed to Islamic[163] and Hebrew justice.[164]

Another common centre-piece of international ancient legal restorativism is an accent on community-preservation through community-level justice. The Brehon Law's community focus was stressed above.[165] It shares this focal point with Hebrew, Romani, Islamic and Buddhist legal traditions, all of which concentrate on the restoration of the relationships sundered by crime in order to restore a sense of collective harmony, peace and well-being; consider for instance the peaceful states of *shalom*[166] and *solh*[167] sacred to Judaism and Islam respectively.

The standard means of securing social harmony was through the informal arbitration of interpersonal disputes. In general, the first port of call for local disputants was an informal, judicial, tribal or elder-driven system of arbitration that relied on judges and skilled lay-persons alike to mediate fair and mutually acceptable outcomes. However, a second tier of more formal, professionalised justice was available as a last resort option for unsatisfied litigants. The *divano* and *kris* of the Romani gypsies[168] corresponds to the open-air local arbitrations and higher, king-headed assemblies of the native Irish.[169]

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[160] *Supra*, at 66.
[161] *Supra*, at 280.
[162] Kelly, *op. cit.*, at 214.
[163] *Supra*, at 66.
[164] *Supra*, at 54.
[165] *Supra*, at 273-275.
[166] *Supra*, at 51-52.
[167] *Supra*, at 66.
[168] *Supra*, at 79-80.
[169] *Supra*, at 275.

The alleviation of crime's adverse side-effects through direct victim-offender communication is another common emblem of indigenous criminal justice. Consider for example Buddhist law's "getting together payment" levied on disputants' families to encourage dialogue and settlement.[170] The Brehon law implements this principle most effectively through the process of fasting or *troscud* according to which victim and culprit are intended to interact closely to reach a resolution. [171] Yet, as Daniel Binchy clarifies, the Brehon system is not the only legal framework that used fasting as a mode of enforcing one's legal rights against one's social superiors.[172] Fasting, known as *dharna* or *praya* depending on the context, also took place within the equally hierarchical Hindu caste-system.[173]

The Brehon law sits comfortably amongst the ranks of its international indigenous counterparts. Together, they have sculpted a global history of hybrid criminal justice that has oscillated flexibly between restorative and retributive answers to deviance, *as appropriate*, from crime to crime, for millennia.

4. Contemplating the Brehon Law's Modern Relevance

4.1 "Not dead? Not yet quite dead?"[174]

> The invasions in Ireland's history effectively prevented the development of an integrated Gaelic civilization in Celtic Ireland. On the other hand, these invasions have never been absolute ... consequently we have two traditions in Ireland, two civilizations, two languages, two sets of laws. It is the aim of our policy to try to reintegrate and reunify the two traditions of the past.[175]

4.1.1 A Time-Line of Official Decline

The Brehon legal system's gradual suppression at the hands of British colonisers took place relatively gradually, over centuries of political turbulence in Ireland. Its demise was set in motion by the Norman invasion of 1169 and copper-fastened by Henry II's subsequent invasion of 1171. After the 12th century, the Brehon law co-existed with the English common law legal system[176] until it eventually succumbed to the vigour of British suppression. The

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[170] *Supra*, at 60.
[171] *Supra*, at 282.
[172] Binchy, "Irish History and Irish Law: I", *loc. cit.*, at 24.
[173] *Ibid.*, at 24-25.
[174] Shakespeare, *Othello*, Act 5, Scene 2, line 95 in *The Shakespeare Library: Vol. II* (Robert Frederick, 2004), at 295.
[175] Eamon Kennedy, Former Irish Ambassador to Paris, cited in Markale, *Women of the Celts*, translated by Mygrind, Hauch and Henry (Payot, 1972), at 29.
[176] MacNiocaill, "The Interaction of the Laws" in Lydon ed., *The English in Medieval Ireland*, Proceedings of the first joint meeting of the Royal Irish Academy and the British Academy, Dublin, 1982 (Royal Irish Academy, 1984) 105.

following time-line recounts the various stages in the Brehon law's protracted and staggered departure:

1367 The Statute of Kilkenny forbids the use of the Brehon law amongst English settlers.[177]

1583 An Irish lord, Sir John O'Reilly agrees with the Lord Deputy "not to take ericks but to proceed by indictment for murder" through the courts.[178]

1603 The Treaty of Mellifont abolishes the Irish clan system out of which the Brehon law had grown, ending feudal Ireland. This officially finalises the Tudor conquest of Ireland.[179]

1608 The *Case of Tanistry*[180] officially abolishes the Brehon law of Tanistry by which land was devolved "through the male line or agnatic descendents of a common grandfather to the most worthy male member of the extended kin group" and replaced it with the English law of primogeniture.[181] It effectively abolishes the Brehon law by declaring any remaining expressions of native law void *ab initio*.

1635 The English Parliament abolishes *Kincogish*.[182]

1801 The Brehon system's obsolescence is finally reinforced by the Act of Union, which abolishes the Irish Parliament.[183]

The Brehon legal system is now long-dormant and has never been resurrected wholesale – nor could this take place in a modern environment. At the same time, its ways have never been forgotten. Throughout the centuries that followed its official collapse, the

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[177] Unknown, "A Statute Enacted in Kilkenny, A.D. 1367", *Corpus of Electronic Texts Edition* <http://www.ucc.ie/celt/published/T300001-001/index.html> (visited 23 December 2006).
[178] Kelly, "Offences in Brehon Law", *loc. cit.*, at 1.
[179] "The Case of Tanistry (*Le Case de Tanistry*)", *loc. cit.*, at 38.
[180] In *The Case of Tanistry* 80 Eng. Rep. 516, 520 (K.B. 1608), the validity of the native Irish customary law of inheritance was challenged. The court invented a rule of recognition for pre-colonial indigenous law. The rule provided that the native laws of a country can only trump British rule "if they are reasonable, certain, of immemorial usage and compatible with crown sovereignty". The Irish law failed to meet these criteria; see also *Calvin's Case* 77 Eng. Rep. 377, 398, Lord Coke; *Omichund v. Barker* 125 Eng. Rep. 1310, 1312 (Ch. 1744); see further, Dorsett, "Since Time Immemorial: Native Title, Common Law and the Case of Tanistry", *Brehon Law Project Symposium, 2002*, 12 January 2002 published in (2002) 26 *Melbourne University Law Review* 32.
[181] "The Case of Tanistry (*Le Case de Tanistry*)", *loc. cit.*, at 38.
[182] *Supra*, at 274; Kelly, "Conclusion", *loc. cit.*, at 2;
[183] *See generally*, Brown, Geoghegan and Kelly, *The Irish Act of Union, 1800* (Irish Academic Press, 2003).

Brehon law has been re-summoned frequently to influence legal practice, policy and academia. It seems that old habits die hard and while the *word* of the Brehon legal system has been abandoned formally and irrevocably, its teachings and *spirit* are far from extinct.[184] Evidence of the Brehon law's lingering restorative influence is evident throughout Ireland's rapidly changing political history.

4.1.2 A Time-Line of Unofficial Resurgence

For centuries, the Irish voiced their objection to British rule and asserted their perceived political and legal autonomy by reviving native legal norms and substituting them for incoming colonial justice regimes. Alternative, unofficial legal forums were created, allowing the Irish to snub the British courts in symbolic protest to their loss of independence. And in designing these illegal substitutions for British justice, their framers were undoubtedly inspired by the country's indigenous legal heritage.

It seemed that the native Irish ideal of justice had changed little since Brehon times and although the Brehon law was by no means resuscitated intact, *some* aspects of its philosophy and practice were revived to shape a new breed of "Irish law" that occupied an odd kind of purgatory somewhere between native and colonial legal territories. Restorative principles such as the informal administration of accessible, community-level, negotiated justice were re-implemented throughout the Irish legal system centuries after their official interment with the Brehon law.

For instance, the Secret Societies of the 18th and 19th centuries refused to recognise the legitimacy of the British justice system. *Whiteboys* and *Ribbonmen* were late 18th century local, rural groups that campaigned against bad landlord practices.[185] In a similar vein, during the Land League[186] (1898-1910), the Irish established Arbitration Courts to administer justice locally to deal with organised resistance to bailiffs.[187] The Irish were beginning to organise locally to assume responsibility for community affairs through an unrecognised alternative to the British legal system.

The desire to subvert authority from Westminster strengthened from the 19th century onwards. It was embodied first in the establishment of the Supreme Council of the IRB in 1867. The Council announced itself the sole government of the "Irish Republic" and

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[184] *Infra*, at 301-303.
[185] *See* Campbell, *Land and Revolution* (Oxford University Press, 2005), at 126, 228-32, 246-250; Murphy, *Ireland: A Social, Cultural and Literary History* (Four Courts Press, 2003), at 14, 33-35; see also, "Justice Systems in Ireland: The Struggle for Legitimacy", at 2. <http://www.restorativejusticeireland.org/legitimacy.html> (visited 16 November 2005).
[186] Murphy, *op. cit.*, at 128-131; Campbell, *op. cit.*, at 124-165; Boyce, *Nineteenth-Century Ireland: The Search for Stability* (Gill and Macmillan, 1990), at 165-174.
[187] Campbell, *op. cit.*, at 126.

proclaimed that its decrees were to be regarded as law pending the territory's recovery from the British and the establishment of a permanent Irish government.

Despite the trail of alternative, dissident initiatives that pre-existed it, the Sinn Féin Arbitration Court System, established in 1919, held special significance.[188] It was designed as a so-called "native Irish" legal framework that drew heavily on indigenous legal traditions. The Sinn Féin courts heard predominantly agrarian disputes arising after World War I.[189] While Britain was distracted with military matters, the "illegal" Irish government acquired *de facto* status. Although only fully operational in West Clare, the importance of the Arbitration Courts lay in their allegiance to restorative, Brehon-like principles. As in Brehon times, the arbitration of disputes depended on the consent of the parties thereto. Furthermore, disputes were adjudicated informally by lay-personnel who, like *Brehons*, were deemed to possess superior moral authority in the community.

Later, the Dáil Courts (1920-1922) were established to create a more comprehensive justice system.[190] A criminal court system was founded, which again, shared remarkable links with Brehon justice. Its remedies were dominated by fines, the return of stolen property and other forms of making good by way of restitution. For the most serious defaulters, retributive punishments were handed down that were taken directly from the Brehon law, which, remarkably, had been officially obsolete for centuries. So, for that reasonably short period during the 20th century, the gravest offenders were given primitive, pre-colonial punishments such as banishment and marooning:

> In more severe punishments, the guilty person was … banished from Ireland, which caused a protest in the House of Commons on the numbers of undesirable people being deported to England and on the "use of England as a sort of convict settlement for men deported by Sinn Féin". It was felt that the Irish Attorney General did not intervene because it suited him to have such unsavoury persons out of his jurisdiction.[191]

The Dáil courts operated at Parish, District and Supreme Court level, though the most local level held the most restorative significance: parish courts operated almost exclusively under a process of conciliation. This system echoed the community-centrality of the Brehon

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[188] Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24* (Irish Academic Press, 1994), at 17-20; Campbell, *op. cit.*, at 255-257; Kotsonouris, *The Winding Up of the Dáil Courts, 1922-1925: An Obvious Duty* (Four Courts Press, 2004), at 8-9.

[189] *See* Varley, "Agrarian Crime as Social Control: Sinn Féin and the Land Question in the West of Ireland, 1920" in Tomlinson, Varley and McCullagh eds., *Whose Law and Order?: Aspects of Crime and Social Control in Irish Society* (Sociological Association of Ireland, 1988) 54.

[190] *See generally*, Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, *op. cit.*; see also, Kotsonouris, *The Winding Up of the Dáil Courts, 1922-1925: An Obvious Duty*, *op. cit.*, at 6-24; "Justice Systems in Ireland: The Struggle for Legitimacy", *loc. cit.*; Casey, "The Genesis of the Dáil Courts" (1974) *ix Irish Jurist* 326.

[191] Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, *op. cit.*, at 21.

system,[192] as well as its focus on party-driven criminal justice.[193] There was a clear emphasis on using reconciliatory, *mediative*, non-adversarial procedures to preserve local autonomy, solidarity and harmony. The law of precedence was formulated on the basis of the law as it stood in Ireland on 21 January, 1919. A glowing tribute to the system's reverence to the Brehon law was its entitlement to be cited in court, a privilege that was also afforded to French and Roman legal codes.[194]

The Dáil Courts were suppressed initially by the British. While the county of Cork was under Martial Law from December 1920, the courts were precluded from meeting. Surprisingly, however, the final winding up of the Dáil Courts was effected by the Irish themselves.[195] On 20 October 1920, the third Dáil passed a motion to rescind the decree that had originally established the courts.[196] In 1923, an act was passed for the official termination of the Dáil Courts.[197] When the Irish Free State (Saorstát Éireann) was formed – just a shade behind full independence – it was remarkably its own government that ultimately opted to adopt a British justice model.

It is possible that this decision was motivated, at least partially, by a sense of insecurity and indecision among the framers of the incoming Irish legal order:

> While it is clear that the Dáil Court system was a casualty of the Treaty split it is important to remember that the petit bourgeois nature of the Free State was also a factor. When minds were concentrated among the solicitors and barristers in the Bar Libraries of the new state, it is clear that the traditional operation of the law as established by the British system (whose legitimacy had been duly passed – by an Act of Westminster Parliament – to the new government) was far preferable than the more flexible and less august system which had served the country well during the War of Independence.[198]

There appears to have been significant concern for the *reputation* of the fledgling state. It was important that Ireland appeared to stand shoulder to shoulder with other Western nations, which like Britain, cherished a predominantly punitive criminal justice philosophy. Therefore, the final deconstruction of the Brehon law's unique hybrid tradition – which once melded a restorative branch of informal, community-level, mediative dispute resolution with a retributive limb focused on proportionate harm – could have closer approximated a manoeuvre in keeping up appearances than a considered decision to drop restorative justice on its own de-merits. Still, after the Dáil Courts' termination, their decrees were given

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[192] *Supra*, at 273-275.
[193] *Supra*, at 276.
[194] *See Dunphy v. Bryan* (1963) 97 ILTR 4.
[195] On the termination of the Dáil Courts, see generally, Kotsonouris, *The Winding Up of the Dáil Courts, 1922-1925: An Obvious Duty*, *op. cit.*
[196] *Ibid.*, at 22-24.
[197] Dáil Éireann Courts (Winding-Up) Act, 1923.
[198] "Justice Systems in Ireland: The Struggle for Legitimacy", *loc. cit.*

retrospective validity so as to avoid the hardship that would otherwise befall those who wished to enforce them.[199]

In sum, post-independence Irish law resembled an amputee, a shadow of its former self, missing a vital limb that once fuelled an established system of *appropriate sentencing* in this country. It escaped with its recessive limb intact – its retributive agenda, which had previously taken a back-seat to the first-resort contemplative option of restorative justice. The mutilators of Ireland's traditional restorative/retributive legal amalgam were twofold; throughout its history, native Irish law's restorative component succumbed to two divergent interests, themselves long-standing opponents: first, the British who had subdued the Brehon law officially by the 17th century and second, the Irish themselves who eventually plumped for a British legal model, abandoning the legacy of hybrid criminal justice that had lingered on stubbornly well into the 20th century.

4.1.3 Measuring the Brehon Law's Influence Today

The Brehon law leaves in its wake a turbulent and politically chaotic history replete with tales of violent and persistent attempts to destroy once and for all its persisting influence. This might prompt a rational tendency to characterise the Brehon legal system predominantly according to its tumultuous *demise*. To the contrary, however, the most defining feature of the Brehon law, despite its physical death, is the astonishing lasting power of its spirit – its restorative *soul*.[200]

A small hub of the Brehon law's restorative principles and customs that once existed alongside more invasive "tit-for-tat" punishments – particularly those that comply with modern sensibilities – still influence contemporary law-makers and legal scholars alike. And it seems that while the Brehon law is unquestionably lifeless in its corporeal entirety – and has been for centuries – the tenacious endurance of its restorative essence within the Irish legal psyche has foiled successive attempts at its *complete* eradication by both British and Irish hands.

While the Brehon system had no choice but to submit to its *official* downfall, its general mood of restoration still loiters unofficially and informally around the margins of Irish law and policy. The Brehon law's influence has outlived the need to publish Irish independence and today, native Irish legal customs continue to influence lawmakers – albeit from a position of dormancy – just beneath the surface of a legal system that is now secure in its established autonomy. Various fragments of the Brehon law's legal wisdom are resurrected, even today, from its subsurface resting-place to penetrate and enrich the debate

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[199] *See generally*, Dáil Éireann Courts (Winding-Up) Act, 1923 and Dáil Éireann Courts (Winding-Up) Act, 1925; Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24*, *op. cit.*, at 101, 104, 107.
[200] *Infra*, at 301-303.

on contemporary legal policy within four main contemplative zones: parliament, courthouse, academia and media.

4.1.3.1 Parliamentary Debate

The Brehon law continues to exert a nominal but discernable influence within Ireland's legislative arena. Parliamentarians have always drawn on Ireland's legal past to illuminate the wisdom of contemporary approaches to ubiquitous legal issues. For instance, allusions to Brehon traditions have cropped up in debates on bills concerning adoption,[201] care for the disabled,[202] marital entitlements[203] and divorce,[204] to mention but a few.[205]

Parliamentary attempts to contextualise modern legislative proposals by comparing or contrasting them to corresponding Brehon provisions are not without a legitimate, official basis. The "Irish Parliamentary Tradition" – a proclamation published by the government describing the history of the Irish parliament – refers to the Brehon legal system in its very first paragraph:

> Ireland has a tradition of parliamentary government whose roots predate the written history of the country. The legends and annals of ancient times give numerous examples of elective chieftainries and kingships and describe how Irish society was organised along lines that could reasonably be regarded as "democratic" today. The legal system of the time – the Brehon Laws – were clearly grounded on common-sense, practical arrangements that facilitated people living together in a co-operative way.[206]

Standard practice in this regard is for the Brehon answer to a given legal issue to be expounded, considered and then used to justify existing proposals for law reform that echo ancient approaches:

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[201] Glynn, debating the Adoption (No. 2) Bill, 1996. Dáil Éireann Vol. 154, 13 March 1998, at para. 968.
[202] Kett, debating the Disabilities Bill, 2004. Seanad Éireann Vol. 176, 28 April 2004, at para. 514.
[203] Doyle, debating the Matrimonial Home Bill, 1993. Dáil Éireann Vol. 433, 7 July 1993, at para. 1614.
[204] Kelly, debating the Tenth Amendment of the Constitution Bill, 1986. Dáil Éireann Vol. 366, 16 May 1986, at para. 1358; see also Gallagher, debating the Family Law (Divorce) Bill, 1996. Dáil Éireann Vol. 467, 27 June 1996, at para. 1797.
[205] *See also* Dáil Éireann Vol. 593, 30 November 2004, at para. 1213 re Planning and Development (Amendment) (No. 2) Bill, 2004; Dáil Éireann Vol. 557, 14 November 2002, at para. 679 re Interpretation Bill, 2000; Dáil Éireann Vol. 179, 16 February 2005, at para. 708 re Civil Partnership Bill, 2004.
[206] *See* "Irish Parliamentary Tradition". <http://www.irlgov.ie/oireachtas/a-misc/partrad.htm> (visited 9 May 2006).

> We have a historic tradition of adopting children and while modern law only dates back to the Adoption Act, 1952, our tradition of taking responsibility for abandoned or orphaned children, or sharing in the upbringing of children, where the family resources are fully stretched, goes back to the Red Branch Knights and the Fianna ... While these ideas may be radical now, I have no doubt they will soon be seen as the next step in the development of our social structures; *a step forward into our Brehon past.* The Adoption (No. 2) Bill, 1996, is a worthwhile and progressive development of our current statutes. It raises little new thinking but confirms conventional wisdom and, as such, is of significant value.[207]

Crucially, the Brehon perspective on a certain legal issue will not necessarily *have inspired* the proposed reform: it may simply be exploited to legitimise retrospectively an independent change that mirrors a Brehon principle or custom *coincidentally*. It would be tenuous to suggest a clear causal link between parliamentary reflection on the Brehon law and concrete legislative action.

Irrespective of the degree of influence it wields in the legislative arena by actually *provoking* statutory change, the parliamentary contemplation of Ireland's legal past is significant because it indicates that the Brehon law and the unique fused justice model at its core is still on the minds of Ireland's 21st century lawmakers. Its ways, whatever their influence, are far from forgotten.

4.1.3.2 Caselaw

The Brehon law has influenced judicial decision-making both in Ireland and abroad. For instance, the landmark *Case of Tanistry*,[208] whose impact was to extinguish native Irish law,[209] has been considered in important decisions regarding indigenous rights in North America[210] and Australia.[211] Arguably, however, the most momentous manifestation of the Brehon law's contemporary curial consideration is embodied in a trio of Irish fisheries cases.

In the *Moy, Erne, and Foyle and Bann* fisheries cases, [212] two of the country's most expert Brehon scholars, Eoin MacNeill and Daniel Binchy, were summoned to shed light on the existence of private fishing rights in early Ireland. They were accompanied by an impressive selection of scholars such as Robert Dudley Edwards, Osborn Bergin, Myles Dillon and Michael O'Brien whose expert evidence assisted the courts in illuminating the murky terrain of early Irish law. Of particular interest is the *Moy Fisheries* case,[213] in which

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[207] Glynn, *loc. cit.*, at para. 968. [emphasis added]
[208] *The Case of Tanistry* 80 Eng. Rep. 516 (K.B. 1608).
[209] *Supra*, at 288.
[210] *R. v. Van der Peet* [1996] 2 S.C.R. 507 (Supreme Court of Canada), McLauchlin J. dissenting.
[211] *Mabo and others v. Queensland (No. 2)* (1992) 175 Commonwealth Law Reports 1, Brennan J.
[212] *Moore v. Attorney General* [1929] IR 191 (High Court); *Moore v. Attorney General* [1934] IR 44 (Supreme Court); *Little v. Cooper* [1937] IR 1; *Foyle and Bann Fisheries v. Attorney General and Others*, High Court, 13 October 1948.
[213] *Little v. Cooper* [1937] IR 1.

McNeill and Binchy famously differed regarding the nature of Brehon fishing rights and went head-to-head to defend their respective positions. As Mohr remarks, these cases held major significance to the re-appraisal of Brehon law in modern law-making:

> ... it is difficult to deny that there is a certain sense of charm in a long-dead system of law essentially deciding the outcome of cases such as the Erne and Moy Fisheries Cases in the twentieth century. *It was almost as if, after so many centuries in the tomb, the law of the brehons had drawn breath once more.*[214]

It is finally worth noting that references to the Brehon law – such as allusions to the decisions of Brehon Cormac McAirt – were found in judges' handbooks in Ireland right up until the 1960s.[215]

4.1.3.3 Academia

Interest in Ireland's Brehon past is growing within Irish academia. The *Corpus of Electronic Texts* (CELT) project at University College Cork is presently working to digitise and translate the Brehon manuscripts.[216] Further translation efforts are underway at the Dublin Institute for Advanced Studies (DIAS), the seedbed of eminent Brehon scholars such as Daniel Binchy and Liam Breatnach.[217] There may still be a long way to go but there is no doubt that the interpretation and understanding of early Irish law has progressed in leaps and bounds since Judge Gavan Duffy's lament on the intractability of the Brehon manuscripts in the *Foyle and Bann Fisheries* case almost sixty years ago.[218]

Conferences and symposia exploring various aspects of the Brehon system are becoming increasingly fashionable. They have been convened in recent years by organisations that are convinced of the social merits of restorative justice, cognisant of room for diversity in Irish criminal justice and intent on using the past as inspiration for a better future. For example, *Fénechas – The Brehon Law Project* organised a series of annual symposia between 2001 and 2003. The Project also launched *Brehon Aid* – a campaign for the reintegration of Brehon principles into Irish law.[219]

The Brehon Law Project's symposia have succeeded in raising awareness about the Brehon law but also about indigenous law generally. This is largely thanks to the symposia's

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[214] Mohr, "Salmon of Knowledge: Brehon Law Before Twentieth Century Courts", *Brehon Law in Modern Times: A 21st Century Perspective on 7th Century Irish Law*, Law Society of Ireland, at 52. [emphasis added]
[215] Salafia, "Restoration: The Brehon Laws Today", at para. 1 <http://ua_tuathal.tripod.com/legend.htm> (visited 11 November 2005).
[216] *See* "UCC to Translate Latin Histories of Ireland" *The Irish Times*, 10 July 2001; <http://www.ucc.ie/celt/>
[217] <http://www.celt.dias.ie/english>
[218] *Infra*, at 300.
[219] <ua_tuathal.tripod.com/brehonaid.html> (visited 5 July 2004).

high-profile speakers and hosts. Participants such as Ms. Justice Susan Denham, former Chief Justice Ronan Keane, director of the CELT project Donnchadh Ó Corráin and Chief Solicitor of the Navajo Nation Dr. Jim Zion have all imparted their diverse and specialised wisdom on indigenous legal traditions in venues provided by *The Law Society of Ireland*,[220] *The Kings Inns*[221] and *Trinity College Dublin*.[222]

The *Burren Law School* is a weekend-long conference dealing with Brehon legal themes that has been taking place annually since 1994. Its stated objective is to "recreate the tradition of legal learning associated with the Brehon Law Schools, allowing the past to illuminate the present".[223] Each year, the conference analyses one *modern* legal theme and considers it from a peculiarly *Brehon* perspective. The aim is to gain contemporary enlightenment on a range of legal issues by contrasting modern and Brehon approaches. For instance, the 2006 Burren Law School Conference was entitled, "Health, Medicine and the Law: A Contemporary and Brehon Perspective".[224]

The legal ways of the Brehons have also been considered anew within the freshly energised debate on restorative justice generally. The *Restorative Justice Ireland Network* (RJIN)[225] – the brain-child of Extern Northern Ireland[226] – along with the Irish Penal Reform Trust hosted a conference jointly in 1999 entitled *Restorative Justice: Examining the Issues*. Speaking at the conference, eminent restorativist Jim Consedine, a New Zealand prison chaplain, alluded to Ireland's Brehon heritage as a strand of Irish tradition capable of guiding future restorative reforms. He foresaw Ireland's Brehon history as one day shaping a "modern progressive and more productive approach to criminal justice practice".[227] He proceeded to emphasise the potential restorative character of such an approach:

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[220] "Moving Forward into Our Brehon Past", *First Annual Brehon Law Symposium*, 12-14 January 2001, *The Law Society of Ireland.*

[221] *Second Annual Brehon Law Symposium, 2002*, 11-13 January 2002, *Mansion House*, *The Kings Inns* and *Glendalough.*

[222] "Law on the Frontier", *Fénechas III – Third Annual Brehon Law Symposium*, 2003, 24-26 January 2003, Trinity College Dublin.

[223] *See* <http://www.burrenlawschool.org> (visited 2 December 2005).

[224] Other themes have included: "The Inaugural Burren Law School: Women and Family in Irish Law (1994); "Crime and Punishment in Irish Law" (1995); "The Child in Irish Law" (1996); "The Poet and Media in Irish Law" (1997); "Law Making in Ireland – Legislature and Judiciary" (1998); "Alienation from the Law – Ireland and Europe" (1999); "The Language of Law – An Obstacle to Justice" (2000); "Injustice – A Contemporary and Brehon Perspective (2001); "Identity and the Law – Nationalisms in Europe" (2002); "The Outsider and the Law" (2003); "Environment and the Law" (2004); "Education, Empowerment and the Law: A Contemporary and Brehon Perspective" (2005). <http://www.burrenlawschool.org/pastthemes/index.html>

[225] <http://www.extern.org/restorative>

[226] The Extern Organisation is a charity based in Belfast that works with children, adults and communities who are affected by crime and social need. It aims to tackle social exclusion through a variety of projects that seek to challenge homelessness, addiction, abuse, crime, community security, unemployment and poverty. <http://www.extern.org>

[227] Consedine, "An Irish Way Forward", *loc. cit.*, at para. 10.

> Such a system would be focused on where possible repairing the damage done by crime and not just imposing punishment. It would focus on the offender and the acceptance of personal responsibility, on the needs of the victim and on strengthening both family life and community.[228]

Most recently, in November 2006, *Restorative Justice Services*, the organisation responsible for running the two restorative pilot schemes at Tallaght in Dublin[229] hosted its national conference entitled: "Defining the Roles for Restorative Justice in Ireland: An Overview of the Work in Progress and a Summary of International Experiences". The conference was opened by the Tánaiste and Minister for Justice, Equality and Law Reform, Michael McDowell and speakers included noted restorative justice academic Martin Wright, Mr. Justice Michael Donnellan and His Honour Judge David Smyth Q.C. from Belfast. [230]

Renewed fascination with the Brehon law within *legal academia* is also evidenced by the launch of the *Brehon Law Review* at University College Cork in January 2002. It is an online journal intended as a "celebration of current scholarship and legal history, drawing from Ireland's rich manuscript teachings".[231]

The Law Society of Ireland should be commended for their course entitled "Brehon Law in Modern Times: A 21st Century Perspective on 7th Century Irish Law", which ran in May 2006 as an elective optional extra subject in the Professional Practice syllabus.[232] The course attracted esteemed Brehon scholars such as Fergus Kelly and Donnchadh Ó Corráin. Finally, the Department of History at the National University of Ireland, Galway provides a course entitled "Early Irish Law", which "seeks to introduce students to the kinds of law texts produced in Ireland and to the light they can cast on different aspects of Early Irish society".[233]

The recent flurry of academic interest in reconsidering and potentially reviving the Brehon law's restorative schema – regardless of the practicality of so-doing or the quality of the arguments there-for – evidences a growing tendency to look to the past in framing the future of Ireland's legal system. Of particular significance, however, is the credibility-boost that this renewed interest offers both the Brehon law specifically and restorative justice generally.

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[228] *Ibid.*
[229] *Infra*, at 310-311, 313-315.
[230] Wright, "How Restorative is Restorative Justice? Restorative Justice in England and Wales: Progress, Opportunities and Pitfalls", Donnellan, "Integrating Restorative Justice into Probation Practice" and Smyth, "From Waitonga to Belfast", papers presented at *Defining the Roles for Restorative Justice in Ireland: An Overview of the Work in Progress and a Summary of International Experiences*, National Conference of *Restorative Justice Services*, Distillery Building, Dublin, 18 November 2006.
[231] *See* "Brehon Law Review" <http://www.ucc.ie/ucc/depts/law/irishlaw/events/BrehonLawReview.shtml> (visited 14 January 2006).
[232] *See* <http://www.lawsociety.ie/documents/events/brehonlaw06.pdf> (visited 29 October 2006).
[233] National University of Ireland, Galway, Department of History website <www.nuigalway.ie/history/ocroinin/hi327.html> (visited 19 February 2007).

4.1.3.4 Media Coverage

A telling indicator of escalating academic, judicial, legislative and general public awareness of Brehon traditions is the degree of media coverage it has aroused. A body of newspaper interest has accumulated in recent years surveying a diverse assortment of Brehon traditions. It is likely that a good proportion of the media's attention in this regard has been prompted by specific expressions of interest in the Brehon tradition embodied in the three sources mentioned above: parliamentary dialogue,[234] conference speeches[235] and translation initiatives.[236] On the other hand, some media scrutiny seems attributable to a more general aura of heightened sensitivity to Brehon methods.[237]

4.2 Discounting our Past is a Crime of Omission but is Ignorance a Defence? The Lack of a Brehon Law Education as a Barrier to the Reintegration of Restorative Principles into Irish Criminal Law

> Irish law is the oldest, most original, and most extensive of Medieval European legal systems. It is a unique legal inheritance, an independent indigenous system of advanced jurisprudence that was fully evolved by the eight century. It is also far less well known than it deserves.[238]

As Chapter 8 will later argue, an indispensable pre-condition to restorative justice's integration into Irish criminal justice is that it acquires public and governmental acceptance and widespread credibility.[239] Only then might criminal justice's customary leaning towards punitive sanctions recede sufficiently to accommodate the diversity created by restorative options.

Chapter 8 concludes that extensive awareness-raising is pivotal in order to maintain lasting compatibility between restorative justice and prevailing public and governmental consensus on crime and its management.[240] However, the task of elevating Irish people's

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[234] *See* Keane, "Divorce: The Seven Year Itch" *The Irish Examiner*, 9 February 2004.
[235] *See* Ruane, "Advocates of Ancient Law" *The Irish Times*, 30 April 1998 (*The Burren Law School Brehon Law Conference, 1998*); "Brehon, American Indian Laws 'Relevant' Today" *The Irish Times*, 14 January 2002 (*Brehon Law Project Symposium, 2002)*; Cusack, "Conference Told of Growing Support for Restorative Justice" *The Irish Times*, 24 April 1999 (*Restorative Justice: Examining the Issues, 1999*).
[236] *See*, "UCC to Translate Latin Histories of Ireland", *loc. cit.*
[237] Barrett, "Britain's Legacy" *The Irish Times*, 12 January 2001; Ó Riain, "Doneraile 1258" *The Irish Times*, 24 May 1999; "Women's Rights under Brehon Law" *Western People*, 2 January 2003; "Brehon, American Indian Laws 'Relevant' Today", *loc. cit.*; O'Brien, "Court Cases to be Linked Over the Internet" *The Irish Examiner*, 11 November 2002 – "The ultimate aim is to have a paperless court, which would be like a return to the old Brehon law system 1,000 years ago, which relied on an oral tradition."; "Oh For the Days When Men Knew their Place" *The Nationalist*, 13 October 2000; "Of Roots and Resolutions" *The Irish Times*, 27 January 1998.
[238] Donnchadh Ó'Corráin, "Theme Summary", "Moving Forward into Our Brehon Past", *loc. cit.*
[239] *Infra*, at 337.
[240] *Infra*, at 348-350, 355-356, 359.

awareness of restorative justice would benefit from attempts to inform them about the nation's own restorative heritage. Awareness of restorative justice *generally* would rise parallel to a growth in prevailing knowledge about the Brehon law *specifically* as an expression thereof. A Brehon law education could therefore form an effective component of a greater restorative justice awareness-raising campaign.

It appears that there is still a long way to go in terms of Ireland's understanding of its Brehon law roots. And this is the case *despite* (a) growing interest in the Brehon law from the four quarters isolated above – parliament, bench, academia and media and (b) the Irish government's recent undertaking to implement in the near future an official system of nationwide restorative justice.[241]

There is evidence to suggest that the Irish government itself has an imperfect, superficial and carelessly expressed knowledge of early Irish law. Even the most frequently cited parliamentary reflection on the Brehon law is fundamentally flawed. Mary Hanafin T.D., speaking in the Dáil in 1997, asserted authoritatively but *mistakenly* that:

> *Brehon law did not recognise the concept of negligence.* A modern day Fionn McCumhaill running through the woods would be more likely to sue the local authority for twigs sticking in his feet rather than picking them up with his toes. The law of negligence is out of control and needs to be corralled before we are completely fleeced.[242]

In fact, as Fergus Kelly describes in some detail, the Brehon law contained various rules regarding liability for negligent acts.[243]

Vincent Salafia, a vociferous advocate of reintegrating the Brehon law, laments the carelessness with which it is invoked in political dialogue. Yet, as he notes, this is as much a product of what we do not know, as a misinterpretation of what we do: "'Brehon law' has become a catchphrase, batted about like a puc, for those who cannot possibly know what the laws say, since the great body has not even been reliably translated".[244] Until the translation and teaching of the Brehon law become serious governmental objectives, it remains difficult for the state to use it in an accurate, genuine and potentially useful way in informing policy decisions.

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[241] *Supra*, at 43-44.
[242] Ms. Hanafin was speaking during a debate on the National Sports Council of Ireland Bill (1998). Dáil Éireann Debates, Volume 488, 12 March 1998 – Courts Service (No. 2) Bill, 1997. [emphasis added].
[243] Kelly, *op. cit.*, at 152-153.
[244] Salafia, "Restoration: The Brehon Laws Today", *loc. cit.*, at para. 10.

While the CELT project and translation efforts at the DIAS are undoubtedly expanding and perfecting what we know about the Brehon law, there is much still to learn and it seems that the dictum of President Gavan Duffy in the *Foyle and Bann Fisheries* case is still generally applicable today:[245]

> The law still has to be deduced from elliptical, incomplete and often corrupt texts, which appear to be copies of copies of copies of archaic manuscripts, reproduced by much later hereditary scholars, to the accompaniment of unreliable and often unskilled and sometimes unscrupulous interpretation. I apprehend that the study of Irish law, seriously undertaken only in recent times, is still in its infancy ...[246]

The Brehon legal tradition constitutes a central and invaluable part of Ireland's legal and broader cultural landscape whose translation should continue apace, with vital government support. Once the Brehon law is more comprehensively understood, it can finally emerge as a deserving and practically suitable candidate for educational courses in fields as diverse as language, literature, history, art and law. Its translation as well as its increased inclusion on educational syllabi will be crucial catalysts of an enhanced role for the Brehon law in influencing an array of policy issues, including matters of criminal justice.

Without a thorough and honest understanding and portrayal of the content and significance of the Brehon law, its potential to metamorphose into an influential force in Irish law reform is substantially curbed. Unless more is learnt and disseminated about early Irish law, it will be doomed to its present larval state as a political "sound-bite", manipulated at-will to corroborate political decisions retrospectively, whose tangible connection to Brehon principles is unknown, inconclusive, unproven or categorically absent.

To answer the question with which this sub-section commenced, ignorance should be a *partial defence* to the charge of failing to draw generally on Brehon principles in contemporary law-making and policy. It is a *defence* because of the dearth of general knowledge that continues to obscure a complex and elusive tradition spanning centuries. But it is only a *partial* defence because, as demonstrated above and re-considered below, the Brehon law's restorative content is one of the most significant findings to be derived from what *is* known of early Irish law. Consequently, enough is known at this stage to warrant drawing reliably on at least this facet of the Brehon law when shaping contemporary society. Now that it has been reliably detected, the Brehon law's restorative kernel must be dispersed.

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[245] *Supra*, at 295.

[246] *Foyle and Bann Fisheries v. Attorney General and Others*, High Court, 13 October 1948, at 88, Gavan Duffy, P.

4.3 Resuscitating the Brehon Law: Exhuming its Spirit, Interring its Word

Several features of the Brehon law's *practical* operation stand in stark opposition to contemporary law, morals and social structure. Nevertheless, its restorative content is not tied inextricably to its tangible customs, nor does their contemporary impracticality defeat the Brehon law's modern relevance. It is the Brehon law's spirit – not its word, its intentions – *not its rituals* that stand to be incorporated most seamlessly into an existing sentencing framework, without sacrificing any restorative potential.

Some Brehon punishments such as stoning and mutilation were decidedly draconian and while today, it is unlikely that any country is innocent of the macabre, unlawful treatment of offenders behind closed doors, neither domestic nor international law, nor prevailing social mores would deign to tolerate such measures officially in a democratic society. Yet, *the principle* to be derived from the use of antiquated penalties is that the philosophies of restoration and (even severe) retribution can co-habit harmoniously along a "continuum" of options that respond diversely yet appropriately to crime.

There are other Brehon practices reflecting victims' and offenders' personal responsibility under the Brehon law in neutralising crime's aftermath that are all too primitive, out-dated and incompatible with state-centred justice for modern Irish conditions. For instance, fasting[247] is clearly repugnant to contemporary tastes. Daniel Binchy marvels at just how primitive a practice fasting or *troscud* is:

> The Irish jurists recognize and regulate the practice of "fasting against" a person of exalted status in order to enforce a claim against him. Naturally they were unaware that what they were describing was the vestigial remnant of an extremely archaic usage rooted in primitive magic and dating from an era when the sole remedy available to a suitor of humble rank was a threatened fast unto death beside the residence of his more powerful adversary.[248]

Again, however, one can look to the *underlying principle or intent* of Brehon practices to detect their restorative value. From the archaic Brehon custom of fasting, a more general *principle* can be derived that is more acceptable to modern sensibilities, yet no less restorative for its dissociation from its obsolete practical façade: that victim and offender should be actively involved in the resolution of criminal conflict.

Fergus Kelly uses an identical tactic in distilling the modern relevance of the practice of sick-maintenance. He stresses that it is the restorative spirit symbolised by that custom and not the custom itself that could be re-invented in a modern criminal justice arena:

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[247] *Supra*, at 282.
[248] Binchy, "Irish History and Irish Law: I", *loc. cit.*, at 23.

> I think, however, that in certain areas the principles of early Irish law are worth examining in the context of modern law reform. Obviously, there would be no point in reviving the full early Irish system by which a person who illegally injured another had to provide suitable accommodation in which his victim was nursed back to health under medical supervision – it would be totally impractical in modern conditions. *At the same time there is a lot to be said for the underlying principle of restorative justice* whereby the culprit is closely involved in the healing process of the victim, at considerable inconvenience and expense to himself.[249]

Elsewhere, Kelly targets sick-maintenance specifically as a practical conduit for the important restorative principle that offenders should be involved in their victims' restoration in the post-crime period. Again, he dissects an unworkable ancient *technique* and salvages its restorative *intent* for transplantation into an imperfect legal system that has outlived it by centuries:

> The clear intention of this text is that the culprit must maintain a deep involvement in his victim's convalescence, and as far as possible pick up the pieces of the disrupted career and personal life of his victim … In conclusion, it is clear that the intention of this legal practice is to thrust the perpetrator into the whole process of repairing a disrupted life … Inevitably, it will involve a great deal of time, expense, nuisance and worry. The early Irish system would thus meet some of the criticisms often made of the processes relating to illegal injury in modern times. One often hears, for example, that the pain and trauma suffered by the victim are not to any extent balanced by the minor inconvenience and expense imposed on the culprit under contemporary law. [250]

In a similar vein, Ms. Justice Susan Denham – speaking at the Brehon Law Project Symposium in 2002 – identified only two *practical* aspects of the Brehon law that could be reinvented under contemporary conditions: achieving a paperless court system[251] and the replacement of characteristically British judicial robes with Brehon-style substitutes – hardly a momentous contribution to the content or quality of criminal justice.[252]

Finally, the landmark dictum of Mr. Justice Coghlan in the 1963 case of *Dunphy v. Bryan*,[253] corroborates the value of the *spirit over substance* approach to learning from the Brehon law; it is consistent with isolating the philosophical kernel at the heart of the Brehon law while discarding its outmoded practical outer husk.

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[249] Kelly, "Conclusion", *loc. cit.*, at 1-2. [emphasis added]
[250] Kelly, "Introductory Notes", *loc. cit.*, at 7, 8.
[251] O'Brien, *loc. cit.*; see Denham, "Foreword by the Chairperson of the Board", *Courts' Service Annual Report, 2001* 4, at 6.
<http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/118892CAE172C96C80256F2B0035EA60/$FILE/AR2001%20-%20pages%201-11.pdf> (visited 19 February 2007).
[252] *See* "Brehon, American Indian Laws 'Relevant' Today", *loc. cit.*
[253] *Dunphy v. Bryan* (1963) 97 ILTR 4.

> At one stage I thought it might be in point to consider whether any guidance on these matters should be afforded by the Brehon laws, which were operative in this country for so many centuries ... For various reasons those early laws have been so long inoperative ... that it would be wrong to throw them into the scale against the common law even if I were not bound by higher authority to follow the common law. *It is to be hoped, however, that they will be carefully studied when we embark upon law reform.*[254]

The restorative pearl that is exposed when its primitive shell is removed is timeless, portable and unfettered by external restraints. It can be easily encased afresh within a more contemporary practical crust. For instance, Ireland's pilot strategies of court-annexed restorative justice considered in Chapter 8[255] contain the same restorative nucleus at their core as did the archaic *othrus* and *troscud* strategies that were *en vogue* in Brehon times. While each is dressed up differently to accord with the prevailing social and legal trends of their respective eras, they are united by a common restorative motive.

4.4 Conclusion: What does the Future Hold for the Brehon Law's Philosophical Anachronism?

The various *principles* distilled above from the Brehon law's primitive and barbaric *practices* could be revived today in the form of a diversified hybrid criminal justice model. This is something, therefore, to which the *National Commission on Restorative Justice* soon to be entrusted with the design of an incoming restorative system in Ireland[256] should pay close attention.

First, the restorative seed that dominates the heart of Brehon criminal justice could be re-packaged in new practical settings; for instance, it could be inserted into strategies of VOM and ORPs, which this thesis endorses for their joint ability to give life to a comprehensive and balanced blend of restorative principles.[257] As Chapter 8 will later demonstrate, such practices would implement key restorative values present under the Brehon law, such as the active involvement of victim and offender in repairing the conflict between them, the restoration of crime victims, the encouragement of atonement through compensation and the importance of preserving community life.[258]

Secondly, the Brehon law's unique hybrid brand of multi-focused, flexible criminal justice can be resurrected under modern conditions by soldering onto conventional punitive sentencing options an accompanying network of restorative options, from which judges should pick and choose freely. This evokes this thesis' strident accent on quality through

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[254] *Ibid.*, at 7. [emphasis added]
[255] *Infra*, at 310-315.
[256] O'Brien, "Study of Restorative Justice Plan" *The Irish Times*, 10 March 2007.
[257] *Supra*, at 187-189.
[258] *Ibid.*

quantity in criminal justice[259] and its endorsement of extended judicial discretion in this respect.[260]

There is definite potential in Ireland for a renaissance of cross-bred restorative criminal justice. Yet, its Brehon ancestor must be autopsied discerningly to retrieve the ubiquitous legal and social principles that are temporally and regionally independent while discarding the out-dated, context-locked practical residue.

As this chapter has revealed, the Brehon law has rested in a *practically extinct*, yet *theoretically dormant* state within the sub-soil of Irish criminal justice. Its restorative soul has lived on since the official decomposition of its practical carcass centuries before. The Brehon law's lingering restorative legacy, demonstrated throughout this chapter, suggests that Irish people are – at least to some degree – "hardwired" for restorative justice.

> Retribution and vengeance only came with the colonisation of Ireland by the English and the imposition of English law, which eventually saw the *Brehon* Laws disappear from the penal code of Ireland. *One suspects, however, that they have not altogether disappeared from the deepest subconscious of the Irish people.*[261]

Restorative justice, then, can be classified as an ancient, yet timeless legal operating system, which has been long shut-down but which might be restored with careful re-booting. This bodes well for its impending reintroduction according to current governmental plans.

Has the Brehon law been buried alive? To some degree, yes.

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[259] *Infra*, at 353-354, 359, 366-368, 380.
[260] *Infra*, at 326, 365-367, 373-374.
[261] Consedine, *op. cit.*, at 144. [emphasis added]

Chapter 8

Confirming Contemporary Compatibility between Restorative Justice and Irish Legal Culture

1. Introduction: Continuing the Test for Contextual Compatibility

Together, Chapters 7 and 8 predict Irish criminal justice's future receptiveness to restorative justice by measuring the affinity between the two – past and present. Chapter 7 has already established Ireland's historical relationship with restorative justice. Now, Chapter 8 completes the final stage in this two-pronged investigation. It performs two final contextual scrutinies, each of which is necessary to project, as reliably as possible at this point, restorative justice's future reception into adult criminal justice in Ireland.

The first half of this chapter performs a preliminary investigation that yields a *confident inference* that restorative justice and Ireland's socio-legal culture might be united harmoniously in the future.[1] This deduction derives first and foremost from evidence of restorative justice's contemporary use around the fringes of adult criminal justice in Ireland, albeit highly restricted in scope.[2] This creates a tentative presumption of the paradigm's amicable co-existence with the principles of Irish criminal justice on the one hand and contemporary public and governmental consensus on how crime should be managed on the other.

This presumption of compatibility is further corroborated, however, by proof of the Irish legal system's heightened commitment to *individual* restorative principles, such as mediation[3] and the inclusion of crime victims,[4] which operate in isolation from a full restorative value-system. These principles demonstrate growing dedication to an accumulating array of restorative values, which could result in the gradual accretion of full restorative justice. At a minimum, however, they indicate a *general willingness* within Irish law to experiment with new principles and philosophies and to amend the *status quo* accordingly. This bodes well for restorative justice's future prospects in this country.

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[1] *Infra*, at 306-324.
[2] *Infra*, at 309-319.
[3] *Infra*, at 307.
[4] *Infra*, at 307-308.

These dual proofs produce a rebuttable presumption that Ireland's socio-legal soil will be fertile to restorative justice's transplantation. However, before initial indications of compatibility can cement into a *confident* prediction thereof, one final scrutiny must be satisfied: the contemplation of key philosophical divergences between restorative justice and Ireland's socio-legal identity that could potentially rebut the *prima facie* consistency inferred at first glance.

To this end, the latter half of this chapter estimates the room for inconsistencies between restorative justice and the values currently shaping Ireland's social, legal and political climate.[5] First, it tests the degree of harmony between restorative justice and the principles that sculpt Irish criminal justice. It concludes that differences in this respect do not give rise to irreconcilable mutual intolerances but rather, a co-operative sentencing *team* whose members are simply "differently abled" and can be selected in whatever permutation suits the unique dimensions of every prosecution. This reflects one of this thesis' most fundamental principles: that the admittedly ideologically-divergent interests of restorative and mainstream criminal justice models are mutually reconcilable in light of their common goal of alleviating crime's adverse consequences.[6]

Secondly, the extent of the threat posed by potential inconsistencies between restorative principles and those defining Ireland's mainstream consensus on crime-control is evaluated.[7] It is demonstrated that while public, judicial and political attitudinal support for an incoming justice regime are integral to its integration's success, the stars are beginning to align in this country for restorative justice, as gritty commitment to punitive justice abates gradually in favour of exploring inventive alternatives.

2. The Present Influence of Restorative Values in Irish Law

2.1 Individual Values

Chapter 7 surmised that Ireland's long affinity with restorative justice throughout and beyond the reign of the Brehon law may have endowed the Irish legal psyche with a deep-seated restorative credo lurking perennially somewhere beneath its surface.[8] This may or may not be the spark that ignited rising recognition of core restorative principles in this country of late. Either way, it may be that rekindling the principles of restorative justice within contemporary Irish criminal law could re-summon the prosperous bond that existed between the Irish people and the restorative tradition for over two millennia.

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[5] *Infra*, at 323-359.
[6] *Supra*, at 214-215; *infra*, at 329-333, 378-383.
[7] *Infra*, at 337-359.
[8] *Supra*, at 303-304.

2.1.1 Mediation in Civil Justice

As previous Chapters have revealed, restorative justice relies heavily on the process of mediation to achieve its emotionally-reparative goals. With its emphasis on non-adversarial *sharing* and *listening*, mediation provides the perfect forum for restorative justice's dialogic empowerment of victim and offender. While restorative tactics suffer a notable absence from adult criminal justice legislation, mediation has gradually begun to infiltrate various statutes regulating *civil* procedure.[9]

The rise of civil mediation is a natural accompaniment to the search for innovative, more efficient alternatives to conventional curial adjudication and has continued apace around the world since the dawn of the informal justice and ADR movements in the 1960s. A spate of recent Irish legislation providing for the adjournment of civil court proceedings to pursue inter-party negotiated settlement attests to the country's (albeit belated) sensitivity to international trends.[10]

Growing legislative provision for mediation in civil process symbolises a *general swing* in favour of non-curial mediative alternatives. It is reasonable to expect that this growing commitment to a central restorative principle in dealing with civil complaints will eventually infiltrate the sentencing field of Ireland's criminal justice system.

2.1.2 Enhanced Victim-Recognition in Criminal Justice

While efforts to strengthen the crime victim's position in criminal justice cannot be equated presumptively with "restorative justice" – this would require an accompanying framework of other restorative values – they still implement a crucial *individual* component of the restorative value-system.[11] Therefore, heightened awareness and growing formal recognition of victims' rights in Ireland is proof of a legal mindset that is acquiring a growing restorative flavour. It reveals that Irish criminal justice is gradually yet progressively ascending what could be considered a "restorative scale".

As Chapter 3 described, several recent endeavours have sought to better catalogue, publish and protect the rights of victims in Ireland, given their traditional marginalisation by formal criminal justice.[12] These include the introduction of a Victims' Charter,[13] Victim

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[9] For a retrospective on the beginnings of mediation in Ireland, see Broder, "Mediation in Ireland: The Impact of Small Beginnings" (1989) 6(4) *Conflict Resolution Notes* 79.
[10] *See for example*, Family Law (Divorce) Act, 1996; Judicial Separation and Family Law Reform Act, 1989; Children Act, 1997 inserting new Part IV into the Guardianship of Infants Act, 1964; Civil Liability and Courts Act, 2004; Rules of the Superior Courts (Commercial Proceedings), SI No. 2 of 2004, rule 6(1)(xiii).
[11] *Supra*, at 6-8.
[12] *Supra*, at 104-108; McGovern, "The Victim and the Criminal Justice Process" in O'Mahony ed., *Criminal Justice in Ireland* (Institute of Public Administration, 2002) 393.
[13] *Supra*, at 106.

Impact Statements[14] and various provisions for compensating crime victims without the institution of civil proceedings.[15]

Chapter 3 ultimately concluded that, on the whole, these three advances fail to empower crime victims *enough* to make meaningful inroads into their emotional restoration and redress a long-standing asymmetry in criminal justice.[16] Nevertheless, recent developments certainly indicate progress in the field of victims' rights in Ireland; they have undoubtedly *enhanced* the prevailing ambience of respect for the unique challenges of victimhood. But they indicate more: victims' rights developments also signal that mounting commitment to a central pillar of restorative philosophy is beginning to creep into Irish criminal justice. Though only a small shard of restorativist theory, attempts to strengthen victims' rights could provide the catalyst for the eventual implementation of a fuller array of restorative principles, the culmination of which would be the administration of full "restorative justice".

2.1.3 Growing Emphasis on Rehabilitation: Dublin's Drug Treatment Court

As its name suggests, Dublin's Drug Treatment Court is a specialist court aiming to *treat* rather an imprison drug addicts.[17] It was established in 2001 and provides eligible non-violent offenders with long term court-supervised treatment. The court originally operated on a pilot basis in Dublin's North Inner City. However, in February 2006, the Irish Courts Service announced its intention to place the Drug Treatment Court on a permanent footing and extend it around the city of Dublin on a gradual, staggered basis.[18]

Despite the court's necessarily limited jurisdiction, the decision to extend it city-wide still signifies rising dedication within the Irish legal system to yet another isolated restorative principle – in this instance, the rehabilitation of offenders. This comes amidst significant dissatisfaction with the rehabilitative potential of Ireland's prison system.[19]

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[14] *Supra*, at 104-105.
[15] *Supra*, at 106-108.
[16] *Supra*, at 108-109.
[17] *See generally*, *Working Group on a Courts Commission, Fifth Report: Drugs Courts* (Stationery Office, 1998); Butler, "A Tale of Two Sectors: A critical Analysis of the Proposal to Establish Drug Courts in the Republic of Ireland" in O'Mahony ed., *op. cit.* 407; Butler, "Drug Problems and Drug Policies in Ireland: A Quarter of a Century Reviewed" (1991) 39 *Administration* 210; see also, O'Keeffe, C., "Non Violent Offenders Get Alternative to Prison" *The Irish Examiner*, 17 January 2001; Humphreys, "Pilot Drug Court to be Extended for Six Months" *The Irish Times*, 28 July 2003; "Devins Calls for Setting Up of Drug Treatment Courts" *Sligo Weekender*, 21 June 2005; "Learning for a New Life" (2005) 7(2) *Courts Service News* 16.
[18] O'Brien, "Drugs Treatment Court Programme to be Expanded" *The Irish Times*, 5 May 2006.
[19] *Supra*, at 38-41.

2.2 Combined Values: Existing Use of Restorative Justice in Adult Criminal Justice

Ireland's Probation and Welfare Service currently funds a total of three court-annexed restorative pilot schemes – one VOM programme and two ORP initiatives. The strategies represent tentative governmental curiosity about the merits of using restorative justice to deal with adult offenders. Their ascension onto a formal, nationwide footing is arguably overdue, their pilot-status restraining their full potential in light their promising achievements to date.

The pilot initiatives are important here because this thesis considers *court-annexed* community-based forums the premier vehicles of restorative justice's administration. As Chapter 5 demonstrated, VOM implements a diverse balance of restorative justice's key values – with an emphasis on achieving holistic emotional healing through dialogic, party-led exchanges.[20] The back-up option of the ORP complements VOM's remedies by making restorative justice available to offenders where their victims are either unavailable, unascertainable or decline to participate in VOM.[21] Side-by-side on the treatment agenda, VOM and ORPs offer all of the key services at the heart of restorative justice's ethos of holistic healing.

Moreover, while too much emphasis should not be placed on the cogency of empirical data born of necessarily brief evaluation periods,[22] the available statistics on the operation of the pilot projects reveal promising indications that they are achieving their intended objective of emotional healing and possibly even, the fringe benefits associated therewith, such as rehabilitation and crime-control.

Given the hopefulness of their achievements thus far, Ireland's trinity of court-appended restorative structures provides a basic blue-print for restorative justice's forthcoming *official, nationwide* integration into formal criminal justice. They offer a skeletal framework onto which additional procedural embellishments, such as those suggested in Chapter 9, can be added as required.[23]

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[20] *Supra*, at 187-189.
[21] *Supra*, at 186.
[22] *Supra*, at 19-20.
[23] *Infra*, at 361-386.

2.2.1 Tallaght Victim/Offender Mediation Service

The Victim/Offender Mediation Service is Ireland's only formal VOM scheme.[24] It is based in the Dublin suburb of Tallaght and receives referrals from local district courts, including Tallaght, Bray and Naas whose proceedings are adjourned at the pre-sentence stage for the service's mediative intervention. The service was launched officially by the Minister for Justice, Equality and Law Reform in February 2000, a three-year pilot programme having been approved and funded by the Probation and Welfare service in April 1999. It is run by *Restorative Justice Services* – an independent organisation in partnership with Victim Support, the Garda Síochána, and Crosscare – the social care agency of the Archdiocese of Dublin. Participation is entirely voluntary – either victim or offender may withdraw freely at any stage.

After an offender is either found guilty or has pleaded guilty, the judge enjoys unfettered discretion to refer the matter to VOM. There are no formal criteria for case-selection and there is no requirement that the judge consider mediation. Moreover, should the judge contemplate referral to VOM, he or she will request that *Restorative Justice Services* contacts the victim and offender to determine if they are willing to submit to mediation. Judges are therefore heavily reliant on the assessments of both VOM service officials and the probation officers[25] assigned to offenders.

An evaluation will be made in order to determine an offender's compatibility with VOM and the likelihood of recidivist behaviour. To this end, an offender's track record contains important eligibility criteria, given that it highlights certain characteristics, for instance any substance dependency or behavioural problem, that are likely to determine the successfulness of rehabilitative efforts.

Mediation cannot take place, however, without the voluntary participation of the victim. Should a victim refuse to accede to participation in VOM, it will be abandoned as an option, court proceedings will resume and the offender will either be formally sentenced or referred to Tallaght's ORP considered below.[26] The involvement of crime victims was a

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[24] *See generally*, O'Dwyer, "Victim-Offender Mediation with Juveniles in the Republic of Ireland" in *Victim-Offender Mediation: Organization and Practice in the Juvenile Justice Systems*, a study conducted for the European Commission *Grotius II Criminal Programme 2002-2003*, 19-20 September 2002. <http://www.irsig.cnr.it/reports/testi_reports/pdf_reports/report_irelandfinal_01sept03.pdf> (visited 22 January 2006); O'Doherty, "Victims to Have Say in Punishment for Crimes" *The Irish Examiner*, 17 November 1999; "Update on Restorative Justice Developments in Ireland" (2001) 2(2) *Newsletter of the European Forum for Victim-Offender Mediation and Restorative Justice* 6; Hamilton, "Restorative Justice in Ireland: A New Way Forward?" (2004) 20 *Irish Law Times* 315; see also <http://www.extern.org/restorative/Tallaght.htm>; O'Brien, "Young Offender Scheme Offers Alternatives to Criminal Conviction" *The Irish Times*, 12 May 2006.

[25] On the meditative, facilitative role of probation officers that is said to bring probation into restorative territory, see Duff, "Probation, Punishment and Restorative Justice: Should Al Truism Be Engaged in Punishment?" (2003) 42(2) *The Howard Journal* 181.

[26] *Infra*, at 313.

stated goal of the pilot service in the build-up to its operation. Shortly before it became fully operative, senior probation officer Anna Rynn, one of the service's founders said:

> We view this process as giving the victim a place in the whole criminal justice system ... Often they don't want their pound of flesh. They just want to hear the offender acknowledge the hurt and damage they have caused and take responsibility for it. They want the offender to say sorry.[27]

This quote reveals the service's commitment to a principal justificational bastion of restorative justice, celebrated in Chapter 5: its empowerment of crime victims in the navigation of their complaints through the emotionally therapeutic potential of apologetic justice.

The reparative actions typically designated in VOM proceedings evidence this goal – offenders are not only encouraged to compensate their victims materially or financially, but to restore them *emotionally* through the offer of written or verbal apologies. Reparative undertakings of therapeutic benefit to offenders are equally encouraged, such as the agreement to enter addiction treatment or other forms of reformative counselling. Accordingly, Tallaght's VOM Service mirrors restorative justice's ethic of *balanced, holistic* emotional healing for victim and offender alike.

2.2.2 The Nenagh Community Reparation Project

The Nenagh Community Reparation Project is the second restorative initiative that has operated on a pilot-basis in Ireland since its inception in 1999.[28] It is essentially an ORP, inspired by a similar scheme in Timaru, New Zealand. Its establishment was the brainchild of a Government Expert Group on the Probation and Welfare Service as well as the individual endeavours of District Court Judge Michael Reilly, who was inspired by the Timaru project on a trip to New Zealand. [29] The project operates in Nenagh, Co. Tipperary, enjoys charitable status and is financed by the Probation and Welfare Service.

Like the Tallaght VOM Service discussed above, the Nenagh Project operates at the pre-sentence stage. Again, judges have complete discretion as to whether or not to adjourn formal proceedings in order to pursue reparative interventions. Should an offender be referred to the programme, he or she will meet a community panel comprised of the victim if he or she consents, a probation officer, a member of the Garda Síochána and two representatives from the community.

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[27] *See* O'Doherty, *loc. cit.*
[28] *See generally*, O'Dwyer, *loc. cit.*; see also "Pioneering New Offenders' Scheme Extended" *BreakingNews.ie*, 18 October 2004. <http://breaking.tcm.ie/2004/10/17/story171479.html>; Hamilton, *loc. cit.*; Curran, "Kiwi Inspired Reparation – Nenagh Style" (2005) 7(2) *Courts Service News* 15.
[29] Curran, *loc. cit.*

The composition of the panel that confronts an offender evidences the project's devotion to the holistic, community-centric approach of restorative justice. The scheme aims to involve all of crime's key stakeholders – victim, offender and community – whom, as Chapters 3 and 4 explained, each suffer unique emotional injuries as a result of their exposure to crime. The project facilitates the emotional restoration of each of these parties through the empowering influence of its active, mediative *involvement* of victim and offender and the improved *knowledge* it brings.

Moreover, the kinds of treatments typically devised for offenders under the programme offer potent proof of its allegiance to the rehabilitative and reintegrative objectives of the restorative ideology. The community panel convenes with offenders to discuss their wrongdoing and designs "action plans" that contain treatments and obligations that are deemed to fit their needs. This adopts the National Crime Forum's recommendation of the "planned management" of offenders to whose unique needs individual treatment plans, resources allowing, should be tailored.[30] The report recommended the use of customised treatment strategies based upon "total person" assessments of offenders coming before the courts. According to the Forum, treatment plans should contain reparative as well as rehabilitative tasks such as drug treatment, or psychiatric/psychological counselling, all of which are intended to offer offenders a "bridge back to normal life".[31]

Under the Nenagh project, once all parties deem the treatment plan fair and achievable, offenders are invited to sign it so as to commit themselves formally to the fulfilment of its orders. After three months, the probation service writes a report to inform the District Court judge whether or not the "contract" has been performed.

The action plan typically contains directions as to how the offender is to repay the *victim* directly for the harm caused, such as provision for financial reparation or the offer of an apology. Action plans will often contain community service-style orders that are designed to give offenders an opportunity to repay the damage he or she has caused to the community.[32] Moreover, offenders are frequently referred to various forms of rehabilitative treatments such as anger-management or alcohol-awareness classes.

There is however, one crucial difference between the two pilot schemes. Unlike the Tallaght VOM Service, the Nenagh Community Reparation Project does not make victim-participation a pre-condition to its jurisdiction. It is dedicated to addressing victims' needs by involving them where possible but its jurisdiction is not reliant of the feasibility of this function. Where victims are unascertainable or unwilling to participate on any level, the Nenagh ORP concentrates exclusively on offenders. For this reason, it is fair to deduce that it

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[30] *National Crime Forum Report 1998* (Office of Public Administration, 1998), at 152-156.
[31] *Ibid.*, at 155.
[32] *See* "Pioneering New Offenders' Scheme Extended", *loc. cit.*; see also O'Dwyer, *loc. cit.*

is more offender-focused than the Tallaght project as well as being more committed to the policy of reparation than mediation.[33] Of the 21 referrals assessed in the project's 2004 Evaluation Report, for instance, not one involved the participation of a crime victim.[34]

Nonetheless, responses to crime under this pilot strategy adhere tightly to a restorative credo. Treatments typically listed in action plans are tailored not only to the repair of the harm caused to communities, but to the individual needs of offenders, enabling them to overcome their own *personal* issues and challenges. Moreover, despite its lack of *reliance* on victim-participation, the making of reparations, as its name suggests, is the cornerstone of the strategy's operation. Offenders are encouraged to make suitable reparations to willing victims and this is commonly reflected in the content of the action plans. Reparation and rehabilitation, vital mainstays of restorative philosophy, constitute fundamental aspirational centrepieces of the Nenagh Community Reparation Project.

2.2.3 Tallaght Offender Reparation Programme

Acclaim for the restorative interventions offered at Nenagh spawned keen interest in extending such strategies around the country. The first manifestation of this objective is the Tallaght Offender Reparation Programme.[35] It was established in 2004 and operates via a referral-system from Tallaght District Court. Again, it is run by *Restorative Justice Services* and like its counterpart at Nenagh, it aims to divert eligible offenders away from the criminal justice system by referring them to a restorative, community-level forum.

The Tallaght ORP mirrors the Nenagh Community Reparation Project closely in its operation. Despite its accent on compensating the victim by encouraging suitable reparative gestures such as the offer of an apology or financial recompense, the victim's participation is not a necessary pre-condition to its operation. Whether or not victim-participation can be secured, the project aspires to achieve personal transformation for offenders, reducing the likelihood of their descent into a deviant career from the gateway of petty crime.

The programme allows perpetrators of public order and other minor criminal offences to be referred to a "facilitator" who is responsible for the non-binding restorative resolution of diverted matters. The restorative process through which an offender will progress on referral lasts approximately six weeks. During this time, the offender will be assessed by a Restorative Justice Committee, which identifies suitable transformative and compensatory tasks for the offender to perform. The committee will consist of three

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[33] O'Dwyer, *loc. cit.*, at 21.

[34] Cunneen, *Nenagh Community Reparation Project Evaluation 2004* (Probation and Welfare Service, 2004).

[35] *See generally*, Curran, "Tallaght Tackles Public Order Offences" (2005) 7(2) *Courts Service News* 14. <http://www.courts.ie/courts.ie%5Clibrary3.nsf/0/0046874BE72F2E868025703B004CCE1F?opendocument>; Reid, "Reparation Plan Allowed 67 to Avoid Conviction" *The Irish Times*, 12 March 2005.

members representing *Restorative Justice Services*, the Probation and Welfare Service and the Garda Síochána. It is chaired by a representative from the community.

Compensatory actions devised by the committee can include letters of apology to victims or arresting Gardaí, or compensation to owners of property damaged during a criminal incident. In terms of rehabilitative measures aimed at preventing recidivist crime, the committee may direct offenders to addiction counselling or awareness programmes or instruct them to write an essay or journal about the impact of their crime on themselves, their families and communities.

At the expiration of the period for completion of the committee's instructions, the offender will reappear in court where the judge will consider a report outlining the offender's compliance. Should the offender have fulfilled his or her obligations to the satisfaction of both the committee and the judge, the Probation Act will be applied to release the offender from further curial sanctions. [36]

The procedures that construct the Tallaght ORP emit an appreciable restorative flavour. They reflect a profound commitment to restorative ideology and practice by seeking to restore victims (where feasible), involve the community and secure the rehabilitation of offenders. At the programme's launch, Tallaght District Court Judge James Paul McDonnell revealed the extent of its immersion in the spirit of restoration:

> [T]he programme provides an opportunity for *the individuals and the communities who are victims* to have a significant input into the legal and social response to crime and anti-social behaviour. In addition, they know that the perpetrators of the anti-social behaviour are required to take various and specific actions designed to ensure that the risk of their re-offending is greatly reduced.[37]

The programme's dedication to rehabilitation has also been commended. Peter Keeley, Director of *Restorative Justice Services* believes that:

> ... participation in the programme provides an opportunity for the people who come before the courts to take responsibility for their offending behaviour, repair the harm done and make positive choices and changes for the future ... offenders can demonstrate to their families and their community that they have gained an understanding as to the implications and consequences of their offending behaviour and that they have learned to avoid committing offences in the future.[38]

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[36] Probation of Offenders Act, 1907, subss. 1(1)-1(2).
[37] Quoted in Curran, "Tallaght Tackles Public Order Offences", *loc. cit.*, at 14. [emphasis added]
[38] *Ibid.*

2.2.4 Evaluating the Social Impact of Ireland's Restorative Pilot Schemes

Evaluations of the above three pilot projects presently operating within isolated pockets of Ireland's criminal justice system have measured their successes in two principal respects (a) their completion rates for participating offenders (b) their ability to prevent re-offending. The statistics seem impressive on face value. In 2005, 97 out of 100 cases referred to the Tallaght ORP avoided custodial sentences by completing their contracts to the satisfaction of the district court.[39] At the time of a baseline study in 2002, 75% of offenders' contracts were completed at Nenagh, 20% were on-going and only 5% were not completed.[40] Moreover, the Nenagh Community Reparation Project's 2004 Evaluation Report cited a success rate of 84% in deterring recidivist crime.[41]

It must be stressed, however, that regardless of the relative strengths and weaknesses of the pilot projects, it is their *compatibility* with their prevailing social and legal contexts that substantiates the desirability of restorative justice's integration into mainstream criminal justice in this chapter and not the nature of their restorative content. Chapter 5 has already established restorative justice's talent for holistic emotional healing as the primary justification for its use here in Ireland. The desirability of actually implementing restorative justice, as a practical matter, is then subject only to this chapter's confirmation of the paradigm's compatibility with the country's prevailing socio-legal climate.

Furthermore, *nor should* the empirical evidence of the pilot schemes' successes be relied upon to establish their ability to administer emotionally-therapeutic restorative justice. Given the diversity of the restorative values to which they aspire, the three pilot projects certainly *aim* to administer full restorative justice and are certainly capable of doing so if those values are properly and evenly addressed *in practice*. At the same time, this thesis resists using the available statistical data to make a judgment-call in this respect. Two main reasons underlie its restraint.

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[39] McDowell, "Address", Launch of the 2005 Report of the Tallaght Restorative Justice Services, 11 May 2006, at para. 3. <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSq6PQB5E-en> (visited 29 January 2007).

[40] Cunneen, "Baseline Study of Nenagh Community Reparation Project 2002", at 2 <http://www.nenaghreparation.org/baseline_study_printer.htm> (visited 20 January 2007).

[41] Cunneen, *op. cit.*, at 6; see also, O'Duffy, "Justice Minister Impressed" *The Nenagh Guardian*, 2 July 2005; O'Brien, "Alternative to Prison Project a High Success" *The Irish Times*, 26 March 2005; McDowell, "Address", Presentation of the Second Nenagh Community Reparation Evaluation Report, 24 June 2005. <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6DRJVL-en> (12 March 2007); Hayden, "TD Stresses Success of Nenagh Justice Project" *The Irish Times*, 9 May 2005; Curran, "Kiwi Inspired Reparation – Nenagh Style", *loc. cit.*, at 15.

2.2.4.1 Projects Not Designed for Optimal Emotional Healing

For one thing, the procedural content currently shaping the pilot schemes is far from sufficient to *maximise* their emotionally cathartic influence. As Chapter 9 explains, several major limitations on the pilot projects' jurisdiction prevent them from reaching their full healing potential. This is the case whatever the most recent statistics suggest.

First of all, the existing pilot strategies operate on a very small scale. Second, they are generally available only to perpetrators of minor offences. Third, their *successful* operation precludes further punitive sanctions – they operate as a necessary alternative to a curial sentence once an offender has complied satisfactorily there-with.

Chapter 9 will later recommend the elimination of these restrictions if and when the projects are finally elevated to an official, nationwide footing.[42] The scope of court-annexed restorative interventions can be extended unproblematically in these three main respects so that emotionally therapeutic services will be available to a greater number of society's victims and offenders.

2.2.4.2 Statistical Focus on Recidivism

There is another reason why this thesis resists drawing inferences from available statistical data about the pilot projects' *practical ability* to reach their goal of administering full restorative justice: because empirical evaluations tend to concentrate predominantly on the strategies' impact on recidivism relative to that of mainstream criminal justice and this kind of information is largely *unhelpful* in diagnosing the operation of restorative justice.

First, the ability to control crime, even if empirically-established, is not a legitimating ambition of restorative justice on which it must rely to justify its use.[43] At most, it is feasible and certainly, it is important, but it still remains an ancillary incident of restorative justice's closer-held overarching target of holistic emotional healing. Moreover, as Chapter 1 speculated, even if a restorative strategy *does* reliably control crime and its impact in this respect *could* be reliably measured, it is unlikely to exert a substantial social impact.[44] Therefore, comparisons between the crime-control capacities of restorative and retributive criminal justice models are not pertinent to the decision as to whether to implement a hybrid model.

Secondly, even if crime-control *were* a fundamental aspiration of restorative justice, while far from irrelevant, restorative justice's strengths relative to those of mainstream criminal justice neither make nor break the paradigm. An inability to establish restorative

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[42] *Infra*, at 361-386.
[43] *Supra*, at 25.
[44] *Supra*, at 33-36.

justice's superiority to conventional criminal process in the performance of any given role – in this case, crime-control – is no basis on which to attack it. Instead, restorative justice should be judged purely in accordance with its ability to fulfil the ambitious goals it sets itself expressly, and upon whose fulfilment it relies for its credibility, legitimacy and ultimately, proof of the desirability of its insertion into existing sentencing practice.

Third and finally, even if, contrary to the above, it *were* the case that restorative justice (a) placed crime-control at the heart of its objectives and (b) relied on its superiority to mainstream justice in this respect to justify its use, the latter proof would be very hard to establish. This is partially because average rates of recidivism are difficult to measure reliably, without protracted evaluation periods.[45] They are better suited to providing short-term snap-shots than universal truths about how crime can be most effectively managed. Furthermore, it would be near-impossible to isolate that proportion of an overall drop in the crime rate that is attributable to any one legal intervention.

There is no reliable baseline figure for the nation's rate of recidivist crime over anything longer than a four year evaluation period. At *Restorative Justice Services'* national conference in November 2006, Carolle Gleeson, co-ordinator of the Nenagh Community Reparation Project praised the project's impact on recidivist crime, yet she did so in light of a "70%" national rate of recidivism. [46] And she is not alone in her use of this statistic. A figure of 70% is a popular *guess* at the country's long-standing average rate of re-offence, although it source is unclear and it has been prone to immoderate representation as somewhat of a statistical certitude. [47] To pit speculation with speculation, however, it is arguably unlikely that the rate of re-offending in Ireland would remain as high as 70% for any significant period. At the same time, it may not stay for long at a level as low as the 16% "snap-shot" rate recorded achieved at Nenagh.[48]

The nation's first long-overdue[49] baseline recidivism statistics have just been released from a landmark recidivism study conducted by University College Dublin's Institute of Criminology in December 2006. The report found recidivism rates of 27% after year one and 50% after year four amongst the Irish prison population.[50] Professor Ian

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[45] *Supra*, at 19-20.
[46] Carolle Gleeson, Presentation on the Nenagh Community Reparation Project, *Defining the Roles for Restorative Justice in Ireland: An Overview of the Work in Progress and a Summary of International Experiences*, National Conference of *Restorative Justice Services*, Distillery Building, Dublin, 18 November 2006.
[47] *See also*, "Pioneering New Offenders' Scheme Extended", *loc. cit.*, which also cites a 70% "national average" recidivism rate.
[48] *Supra*, at 315.
[49] *See* Comptroller and Auditor General, *Report on Value for Money Examination: The Probation and Welfare Service* (Stationery Office, 2004), at 48.
[50] UCD Institute of Criminology, *Irish Recidivism Study* (University College Dublin, 2006) cited in O'Keeffe, J., "Report of the Rapporteur to the Joint Committee on Justice, Equality, Defence and Women's

O'Donnell, director of the Institute, emphasised the significance of these figures: "For the first time a robust measure of recidivism is available. For many years this crucial piece of information was missing from the criminal justice jigsaw."[51] The report's authors further describe the rates as "strikingly high" and argue that they emphasise the need for non-custodial alternatives for those convicted of minor offences.[52]

Again, however, while this research is long-overdue and to be welcomed wholeheartedly, it must be contextualised as a reasonably limited glimpse into recidivism trends over only four years. It does, however, provide a valuable four-year benchmark figure against which the recidivism statistics of restorative initiatives with similar evaluation periods can be reliably measured. For instance, between June 1999 and the time of the Nenagh ORP's *Evaluation Report* in September 2004, only 16% of participating offenders had re-offended.[53] This comparison paints a tentatively positive image of restorative criminal justice's crime-control impact in light of national statistics. There is however, more to do in gauging the relative crime-control effectiveness of restorative and traditional criminal justice models as restorative strategies inevitably expand and diversify over coming years.

As stressed above, the restorative ambitions of Ireland's three pilot strategies are relevant to this chapter only insofar as their compatibility with the country's prevailing social and legal atmosphere can be determined throughout the sections that follow. But if empirical evidence of the projects' practical ability to heal victims and offenders *is* desired, one should look beyond recidivism statistics. In fact, data confirming a project's ability to *encourage apologies* and/or *secure good completion rates* amongst offenders might be more indicative of restorative justice.

The Nenagh Community Reparation Project has facilitated apologies to victims with considerable success and has encouraged high completion rates amongst offenders.[54] A baseline study examined 20 agreements reached between community panels and offenders between March 2001 and January 2002. Of the 20 participants, the study found that 15 completed their contracts, 4 contracts were on-going and only one offender had re-offended and had the applicable contract withdrawn.[55]

Rights on the Potential Benefits of Restorative Justice Methods in Ireland" in Joint Committee on Justice, Equality, Defence and Women's Rights, *Report on Restorative Justice* (Houses of the Oireachtas, 2007) 3, at 46; Lally, "Quarter of Prisoners Back in Jail within Year of Release" *The Irish Times*, 6 December 2006.

[51] Lally, *loc. cit.*

[52] *Ibid.*

[53] Cunneen, *op. cit.*

[54] *Ibid.*; Cunneen, *loc. cit*

[55] Cunneen, *loc. cit.*, at 2.

2.3 Restorative Juvenile Justice in Ireland?

This thesis restricts its proposals on restorative justice exclusively to the sphere of adult crime. But while it avoids determinations of the paradigm's suitability for young offenders, evidence of restorative justice's invasion of Ireland's juvenile justice system is relevant here because it indicates that an element of restorativism has already crept into the wider landscape of Irish criminal justice. It also provides a backdrop against which restorative justice's imminent full-scale introduction can be contextualised; its productive use in tackling juvenile offending over recent years goes some way towards explaining why Irish criminal justice now finds itself on the brink of *widespread* restorative reform.

The Children Act, 2001 is the only legislative enactment to provide for VOM, though neither that term, nor "restorative justice" is used anywhere in its text. Its provisions apply solely to juvenile offenders. [56] The 2001 Act elevated the pre-existing Garda Juvenile Liaison Scheme, which had been in operation since 1963, to a new legislative footing, re-naming it the Garda Juvenile Diversion Programme (GJDP). It thereby gave formal statutory expression to the programme's customary use of cautioning to divert young offenders from the criminal justice system.[57] More crucially, the Act complemented the diversion scheme by incorporating into its operation a number of "VOM-style" strategies for young offenders, which came into effect on 1 May 2002.

Anticipating the Children Bill's imminent enactment into law, the Garda Síochána, in 1999, instituted their "restorative justice pilot programme" of which the Bill's VOM-style legislative provisions, once passed, would form a central part. Unlike the Tallaght VOM Service and the Nenagh Community Reparation Project, the Garda Restorative Justice Programme enjoys statutorily-prescribed nationwide applicability. There are currently 64 youth diversion projects in operation under the Programme whose restorative events are overseen by the Children Act 2001. The 2005 budget for these strategies was €5.47 million.[58]

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[56] On the restorative provisions of the Children Act, 2001, see generally, Walsh, *Juvenile Justice* (Roundhall, 2005), at 116-311; O'Dwyer, *loc. cit.*; O'Neill, "Bill Aims to Turn Young People Away from Crime" *The Irish Examiner*, 10 January 1999; Nolan, "Vicious Circle of Child Crime" *The Irish Examiner*, 3 August 2004; Breslin, "Time to Act for the Children" *The Irish Examiner*, 28 December 2001; O'Brien, "17,000 Young Referred to Garda Programme" *The Irish Times*, 3 December 2004; Griffin, "The Juvenile Conundrum – Ireland's Responses to Youth Offending" [2003] *Cork Online Law Review XII*; Wallace, "Restoring a Sense of Justice" *The Irish Times*, 14 May 2003; Shannon, "Babes in the Wood" (2003) Nov. *Law Society Gazette* 12; Lockhart, "Restorative Justice" in O'Mahony ed., *op. cit.* 746, at 752-757.

[57] *See* Griffin, "Restorative Justice, Diversion and Social Control: Potential Problems" *National Conference on Young People and Crime: Research, Policy and Practice*, 13 September 2005, Dublin. <http://www.restorativejustice.org/resources/docs/griffindiarmuid/download> (visited 12 September 2006), at 2.

[58] Department of Justice, Equality and Law Reform, *Annual Report 2005* (Department of Justice, Equality and Law Reform, 2005), at 17.

The Children Act, 2001 provides for a number of VOM-style interventions, which can be instigated by Juvenile Liaison Officers (JLOs) who enjoy extended powers under the Act. First, JLOs have been granted the authority to formally caution a juvenile offender with the victim present.[59] The expressed purpose of this procedure is to encourage the offender to apologise directly to the victim and potentially offer some sort of reparation appropriate to the harm done.[60] Secondly, the JLO is given the power to recommend that a conference be held in respect of a juvenile offender,[61] in which the child's situation can be discussed by a range of persons concerned with his or her welfare, such as parents, guardians or other relatives.[62]

The intended outcome of such a conference is the creation of an "action plan" for a child offender that designates the steps that have been deemed necessary to secure his or her reform. Furthermore, provision is made for the attendance of the victim at these conferences.[63] This possibility is intended to benefit both victim and offender alike. For example, the victim's participation in a conference and the mediation between victim and offender overseen by a "facilitator" might be crucial in order to "formulate an action plan for the child".[64] This is beneficial to juvenile offenders because it is intended to prevent them from re-offending but the Act also dictates that another purpose of the conference is to safeguard the interests of victims.[65]

The Act makes additional provision for a "family welfare conference",[66] which is very similar to the section 29 Garda conference outlined above in both its practice and philosophy, except that it is facilitated by the Probation and Welfare Service. Here, it is the Health Board, rather than the Garda Síochána that is responsible for convening the conference.[67]

In sum, the Garda Restorative Justice Programme benefits from mixing new with old. It employs both pre-existing wisdom on diverting juveniles from criminal justice as well as exploiting the more innovative mediative provisions heralded by the Children Act, 2001. Like both the Tallaght VOM Service and the Nenagh Community Reparation Project, Garda management of juvenile-offending exhibits a strong dedication to the goals of restorative justice. It prioritises the fundamental restorative aspirations of the rehabilitation of offenders and the increased involvement of victims in the resolution of criminal conflict.

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[59] Children Act, 2001, s. 26.
[60] *Ibid.*, subs. 26(3).
[61] *Ibid.*, s. 30.
[62] *Ibid.*, s. 29.
[63] *Ibid.*, subs. 29(b).
[64] *Ibid.*, subs. 29(c).
[65] *Ibid.*, subs. 29(d).
[66] *Ibid.*, ss. 7-15.
[67] *Ibid.*, s. 7.

A Garda Research Unit evaluation of the Restorative Justice Pilot Programme's operation between 1999 and 2001, before the family-conferencing provisions of the Children Act took effect, produced some encouraging findings.[68] The report revealed that "most offenders experienced a change in their outlook as part of the process ... the change was spectacular in some cases" and concluded more generally that 79% of restorative events were highly or very highly successful. [69] The report also observed that levels of recorded victim-satisfaction were high, "genuine consensus" having been reached in 84% of cases. The majority of offender-participants reported that they had been made accountable, 82% of whom conceded that they had been made *fully* accountable. In the year following the formal commencement of the Children Act, in May 2002, 46 VOM-inspired or restorative events took place.[70] This figure has risen substantially since then. 118 restorative events took place in 2003 and that number rose to 177 the following year.[71]

However, it is worth noting that a substantial threat to the restorative dimensions of the Children Act, 2001 is posed by its amendment by the Criminal Justice Act, 2006,[72] which introduced a system of juvenile Anti-Social Behaviour Orders (ASBOs), from 1 March 2007. As outlined above, these oft-criticised,[73] hard-hitting civil orders, whose breach constitutes a criminal offence, are said to widen the net of state-control by effectively criminalising *non-offending bad behaviour* and thereby involving unruly yet law-abiding juveniles in the criminal justice system.[74] They are considered particularly caustic in this regard because their application relies on a civil burden of proof. Hence, a violator of an ASBO could potentially incur criminal penalties based upon behaviour established on the balance of probabilities.

The government insists that the ASBO will be used a measure of "last resort" for juvenile offenders[75] but surely the only true "ultimate sanction" for *any* offender, juvenile or otherwise, is prosecution – an avenue that is premised on suspected criminal activity, not the breach of a civil order imposed for suspected bad behaviour.

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[68] O'Dwyer, *Restorative Justice Initiatives in the Garda Síochána: Evaluation of the Pilot Programme* (Garda Research Unit, Research Report No. 4/01, 2001); see also Hamilton, *loc. cit.*, at 317-318.
[69] O'Dwyer, *op. cit.*, at *iv*.
[70] O'Dwyer, *loc. cit.*, at 18.
[71] O'Keeffe, C., "Victims Meeting Offenders Scheme Working" *The Irish Examiner*, 10 August 2005.
[72] Criminal Justice Act, 2006, ss. 159-166; O'Brien, "Asbos Come into Force on Monday" *The Irish Times*, 29 December 2006; Healy, "Minister Backs Strict Use of ASBOs" *The Irish Times*, 11 April 2006.
[73] *See* O'Brien, "Headline-Grabbing or Problem Solving?" *The Irish Times*, 29 December 2006; Holland, "Orders for Disorder" *The Irish Times*, 2 April 2005; see position of Brendan Howlin in O'Brien, "High Level of Concern Across the Country" *The Irish Times*, 5 May 2006; "Use of ASBOs" *The Irish Times*, 20 April 2006; Coulter, "Lenihan Says Children's Act Not Undermined" *The Irish Times*, 19 April 2006; Downes and Coulter, "Ministers Back ASBOs in Face of Criticism by Ombudsman" *The Irish Times*, 8 April 2006.
[74] *Supra*, at 234-234.
[75] O'Brien, "Asbos Come into Force on Monday", *loc. cit.*

The possibility that a juvenile could be imprisoned for the breach of an order compelling him to "behave" is repugnant to restorative justice's vision of incarceration as a *last resort* measure to protect society from its *most dangerous*, chronically criminal members. It is therefore difficult to understand a recent assertion by the Minister responsible for the ASBO, Michael McDowell, that it is "principled on a restorative justice approach".[76]

Any common territory shared between restorative justice and the ASBO is insufficient to equate them. Yes, the ASBO operates in the first instance as a non-custodial response to anti-social behaviour that harasses, alarms, frightens or distresses, or interferes significantly or persistently with people's use or enjoyment of their property.[77] But it cannot be equated with other non-custodial strategies such as restorative justice, community service orders and conditional discharges, which seek to *divert* offenders *out of the courts* for treatment in the community once they have been apprehended on suspicion of specific acts of criminal misconduct. Yet, as Chapter 1 stressed, not even those non-custodial measures that fit this bill and are therefore far closer to the values of restorative justice than the ASBO will necessarily qualify as expressions thereof. A process must do a lot more than attack *bad behaviour non-custodially* to qualify as restorative justice.

It is arguable that juvenile misconduct could be managed more fairly and effectively by maximising the use of the Garda Restorative Justice Programme, which offers both the GJDP and the family-conferencing system set up under the Children Act. For this to occur, however, greater resourcing is required. As at March 2006, only 62 referrals had been made to the court-referred family conferencing programme, only 50 of which resulted in the convening of a conference.[78] O'Dwyer has also noted that the oppressive workload of the Juvenile Liaison Officers involved in the GJDP has kept the number of restorative cases low.[79] More money and more manpower could do much to expand *existing* juvenile justice frameworks in lieu of the so-called "last-resort" ASBO.

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[76] McDowell, "Opening Address", *Defining the Roles for Restorative Justice in Ireland: An Overview of the Work in Progress and a Summary of International Experiences*, National Conference of *Restorative Justice Services*, Distillery Building, Dublin, 18 November 2006.

[77] *See* Criminal Justice Act, 2006, subs. 113(2); Children Act, 2001, s. 157A2 as inserted by Criminal Justice Act, 2006, s. 159.

[78] These figures come from a preliminary evaluation of the conferencing programme under the Children Act, 2001 undertaken by Mary Burke, cited in O'Keeffe, J., *loc. cit.*, at 28.

[79] O'Dwyer, *op. cit.*

3. Evaluating Potential Sources of Incompatibility

Chapter 1 introduced the prospect of restorative justice's incompatibility with Irish criminal justice and/or prevailing Irish attitudes to crime as a potential trigger of caution when contemplating the paradigm's integration into Irish sentencing practice.[80] The following section teases out these issues in finer detail.

3.1 Restorative Justice's Potential Incompatibility with the Principles of Irish Criminal Justice

3.1.1 Threats to the Principle of Consistent Sentencing

3.1.1.1 Restorative Justice's Involvement of Victims

Restorative justice's supposed yet mistakenly-inferred delegation of sentencing authority to crime victims has been targeted as a source of doubt regarding the concept's incorporation into criminal justice.[81] This is because affording victims who possess varying resources, intellects, dispositions, morals and degrees of emotional robustness a voice in the sentencing of offenders is said to flout the principle of *proportionality*, [82] which requires that a sentence bears a reasonable relationship to the seriousness of an offence.[83] It does so by introducing into the sentencing calculus an unprincipled, variable and inherently unpredictable extra-curial influence. This is viewed as a serious affront to the *consistency* that is safeguarded by strict proportionate sentencing i.e. fairness as between defendants.

> If one victim is forgiving and asks little, whereas another is vindictive and makes great demands, offenders might find themselves subject to widely differing expectations for similar offenses.[84]

This perspective is correct; affording victims a direct role in sentencing their offenders is a certain source of an intolerable amount of inconsistency, disparity and unfairness and should be avoided on this basis. It could also offend the principle of separation of powers by delegating the administration of justice to a non-judicial entity.

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[80] *Supra*, at 30-31.
[81] Ashworth, "Some Doubts About Restorative Justice" (1993) 4 *Criminal Law Forum* 277, at 288-289; Ashworth, "Is Restorative Justice the Way Forward for Criminal Justice?" in McLaughlin, Fergusson, Hughes and Westmarland eds., *Restorative Justice: Critical Issues* (Sage, 2003) 164, at 172-173.
[82] Erez, "Who's Afraid of the Big, Bad Victim? Victim Impact Statements as Empowerment and Enhancement of Justice" (1999) *Criminal Law Review* 545.
[83] *See generally*, O'Malley, *Sentencing Law and Practice* (Round Hall Sweet and Maxwell, 2000), at 113-133.
[84] Ashworth, "Some Doubts about Restorative Justice", *loc. cit.*, at 290.

However, there is nothing in restorative justice's party-centric ethic that mandates or even aspires towards victim-sentencing. Restorative justice simply demands *respect and involvement* for crime victims, without specifying expressly how that should be practically manifested. The restorative duties of respect and involvement are adequately fulfilled by affording crime victims *dialogic*, mediative input in restorative proceedings through direct or indirect communications with their offenders. This is the highest permissible threshold of victim-control before the prohibitive influence of inconsistency creeps in.

Restricting victims' involvement in restorative justice to the realms of *negotiation* insulates the paradigm from attempts to besmirch it on the mistaken assumption that it authorises a much wider ambit of victim-control.

3.1.1.2 Restorative Criminal Justice's Extension of Judicial Discretion

Introducing restorative justice as a new sentencing option widens judicial discretion by extending the range of sentencing methods from which judges may choose. However, it is arguable that judges' freedom to select between varying sentencing philosophies could pose a potential threat to consistency.

By further complicating the range of values traditionally used to govern the choice of sentence, restorative justice's introduction might be deemed to create even more room for inconsistency *as between different offenders.* The Irish Law Reform Commission identifies this as the most problematic manifestation of inconsistency:

> The worst type of inconsistency is inconsistency in the way in which sentencers decide on which approach to adopt when making the sentencing decision – as where one sentencer decides that a particular offender should receive a short sentence on the grounds of rehabilitation and another sentencer decides that the same offender should receive a lengthy sentence on the grounds of deterrence - because it leads to unequal treatment of offenders by the criminal justice system.[85]

There are, however, several important factors that subdue the need for caution in this respect and alleviate the destructive impact that this variety of inconsistency is likely to exert upon restorative justice's credibility.

First, as the Irish Law Reform Commission recognises, inconsistency is an inevitable product of an absence of clear-cut sentencing principles or guidelines.[86] This is the case within Irish criminal justice, where judges are generally left to their own devices to implement their intuition, instinct and powers of reason and experience to invoke the most

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[85] Law Reform Commission, *Consultation Paper on Sentencing* (March 1993).
[86] *See also*, O'Malley, *op. cit.*, at 455-462.

appropriate penalty for every offence and offender before them (with some small but growing exceptions with regard to certain serious offences).[87] Because of the dearth of guidance and the resultant high degree of judicial discretion, it is "inevitable that a high level of inconsistency will occur when sentencers make the choice as to the particular approach upon which to base their choice of sentence". [88]

Yet, a familiar principle must be re-emphasised in this context: restorative justice cannot be fairly challenged on the basis that it fails to outdo traditional criminal justice or shares some of its shortcomings. Consistency is an ambitious and elusive *ideal* for *any* form of criminal justice and is likely to *survive* even the most stringent sentencing guidelines.[89] Restorative justice should not be condemned therefore, for failing to do the impossible.

Secondly, any inconsistency as between offenders that relying on a new sentencing principle is likely to stimulate is arguably justifiable with respect to restorative justice. This is because its *customisation or individualisation* of offenders' treatment is so fundamental to its rehabilitative ethos; sentences are designed to maximise the potential for personal transformation, taking into account offenders' varying idiosyncrasies from case to case.

So although restorative justice, like unprincipled mainstream sentencing, has an unavoidable propensity for producing inconsistent results, it is justified by its rehabilitative potential; treating unlikes alike, ignoring their individuality, is unlikely to foster meaningful change and convey to offenders the ethic of respect and individual care that restorative justice values so centrally. Restorative justice therefore sacrifices a measure of consistency in order to maximise its potential to restore offenders.

The importance of individualising traditional curial sentences was identified by the Law Reform Commission as a countervailing interest militating against the discretion-shrinking influence of mandatory sentencing.[90] This is evident from the Commission's approval of the following quote in both its *Consultation Paper* and *Report on Sentencing*:

> It is impossible at the legislative level to foresee and provide in adequate detail either for the multitudinous variety of circumstances under which serious crimes are committed or for the sometimes *considerable differences of personality, background and intelligence between people who commit them*. What is virtually certain is that legislatively imposed fixed penalties for serious crimes will require the frequent intervention of executive clemency.[91]

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[87] *Infra*, at 369-370.
[88] Law Reform Commission, *op. cit.*, at 67.
[89] The Law Reform Commission recommended the introduction of non-statutory sentencing guidelines: see Law Reform Commission, *Report on Sentencing* (LRC 53–1996), at 10-11, para. 2.22.
[90] *Infra*, at 369-370.
[91] From Howard, "An Analysis of Sentencing Authority" in Glazebrook ed., *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens and Sons, 1978), at 406, cited in Law Reform Commission, *Consultation Paper on Sentencing*, *op. cit.*, at 310; Law Reform Commission, *Report on Sentencing*, *op. cit.*, at 40 [emphasis added]

In its *Report on Sentencing*, the Law Reform Commission moved for the abolition of mandatory sentences on the basis that they impede the important aspiration toward the individualisation or "controlled variation" of sentences in Ireland – a country where "sentencing remains an instinctive synthesis of the particular characteristics of the offender and the particular characteristics of the offence".[92] This superior interest of individualised sentencing is treated as superseding any losses in consistency that abandoning mandatory sentences and thereby restoring judicial discretion might bring.

Untrammelled judicial discretion, albeit a source of potential inconsistency, is therefore considered a paramount defender of offender- and offence-sensitive sentencing. Garvey links such sentences with a higher probability of rehabilitating offenders than the application of indiscriminate, utilitarian rules.[93] He believes that an offender is more likely to achieve the "moral education" lying at the heart of "moral reform theory", reviewed in Chapter 1,[94] if his sentence is customised to his needs.[95] A rehabilitative "moral lesson" is considered the educative fruit an "intelligent application" of the rule of *lex talionis*, considered in Chapter 6, [96] whereby a wrongdoer substitutes himself mentally for his victim(s) so as to experience victimisation vicariously through a feat of imagined participation.[97]

> ... moral reform theory works best when sentencing is individualized. It calls upon the creativity and imagination of the sentencing judge to figure out just what punishment would "fit" a particular offender and his particular offense, and to identify what kind of imposition would best serve the educative mission *lex talionis* sets for itself. Talionic punishments thus require considerable toleration of judicial discretion and diversity in punishment. This toleration ... swims against the current trend toward uniformity and rule-based sentencing guidelines ... [98]

Hence, the deficits in consistency occurring in any justice model – restorative or otherwise – are regrettable but necessary sacrifices in the interests of *customised*, or what might be better conceived as *appropriate* sentencing, which sets its sights ambitiously on the rehabilitation of offenders through the ambitious task of "moral transformation".

The justification of inconsistency in restorative justice on the basis of its individualised, rehabilitative treatment ethic also insulates the paradigm effectively from allegations of the related concept of "disparity". The Law Reform Commission defines

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[92] Law Reform Commission, *Consultation Paper on Sentencing*, *op. cit.*, at 69.
[93] Garvey, "Can Shaming Punishments Educate?", *loc. cit.*, at 783.
[94] *Supra*, at 14.
[95] Garvey, *loc. cit.*, at 783.
[96] *Supra*, at 248-249.
[97] Garvey, *loc. cit.*, at 783.
[98] *Ibid.*

disparity simply as "a difference in sentencing which cannot be justified."[99] Restorative justice, because of its individual focus, admittedly carries the risk of producing "different sentences" but those differences or inconsistencies are justified by their irrevocable fundamentality to the restorative value-system; their elimination actually divests restorative justice of an indispensable limb of its raison d'être – the emotional restoration of offenders. Restorative justice's willing forfeit of consistency in favour of the superior reward of rehabilitation clearly passes muster with Forst's description of disparity:

> Anyone who wants to show disparity in sentencing must demonstrate that the *different* sentences meted out to persons committing the same offence under similar circumstances cannot be justified by reference to some legally relevant variables, that is, to *factors that have some rational relationship to the aims of the criminal law.* This is a tall order to fulfil, since the aims of the criminal law are rarely clearly articulated.[100]

Rehabilitation is one such "factor" that bears a "rational relationship to the aims of the criminal law", which could, according to Forsts's definition, prevent inconsistencies in restorative justice from creating genuine disparity.

Thirdly, even if stringent sentencing guidelines were put in place within mainstream sentencing (such as the non-statutory variety recommended by the Law Reform Commission)[101] so as to curtail judicial discretion in the interests of greater consistency, restorative justice may still be immune to attacks that criticise its inability to mirror mainstream advances in safeguarding consistency. This is the case regarding the *court-annexed* variety of restorative justice endorsed in this thesis whose semi-curial character operates as a safeguard to consistency.

For one thing, court-annexed strategies are *voluntary* and can be abandoned by either participant at any time in favour of curial process. Additionally, the case will be re-referred to court for final approval on the cessation of the restorative intervention, when an offender's *unsatisfactory* performance of restorative tasks could expose him to traditional punitive sanctions. However, space is also created for the application of traditional punishments by heeding Chapter 9's recommendation to resist treating *even satisfactory compliance with restorative interventions* as a necessary alternative to punitive sentencing.[102] The principle of proportionate sentencing can be invoked during any of these escape-routes from restorative justice as one of the criteria determining the need for or nature of further penalties.

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[99] Law Reform Commission, *Consultation Paper on Sentencing*, *op. cit.*, at 65.
[100] Forst ed., *Sentencing Reform: Experiments in Reducing Disparity* (Sage, 1982), at 30. [emphasis added]
[101] *See* Law Reform Commission, *Report on Sentencing*, *op. cit.*, at 10-15.
[102] *Infra*, at 378-383.

It is also arguable that what restorative justice lacks in consistency of outcome, it could make up for in the more important and realistic target of *consistency of approach.* Restorative justice can achieve this goal by involving victims and offenders in its processes in a uniform and committed manner:

> [U]niformity or consistency of approach (as opposed to uniformity or consistency of outcomes) is what is required and this is achieved by always taking into account the needs and wishes of those most directly affected by the offence: victims, offenders and their communities of care.[103]

Restorative justice might also defend itself pre-emptively from inconsistency-based critiques by ensuring the consistent *implementation* of its strategies. In fact, the principle of uniform implementation under-girds Chapter 9's call for a *nationwide* strategy of court-annexed restorative justice in Ireland.[104] Admittedly, the external consistency of restorative justice's implementation has no causative bearing on the internal consistency of its outcomes:

> It is certainly possible for restorative justice programmes to be set up on an ad hoc and selective basis. But this is not the result of endorsing restorative justice principles or values and so this criticism cannot be made with respect to restorative justice generally.[105]

Nonetheless, given the popularity of inconsistency-based critiques and the ubiquity of some degree of inconsistency in restorative sentencing due to its expansion of judicial discretion and its individualised treatment agenda, strategies of restorative justice should defend themselves vigilantly against claims of inconsistency on every other reasonably foreseeable ground. This is because despite the various legitimate and illegitimate obstructions to achieving it, consistency is still an important aspiration for sentencers. Andrew Ashworth emphasises the importance of maintaining consistency as an aspiration or ideal in sentencing *despite* the various barriers to achieving it.

> I am not so naïve as to imagine that any actual sentencing system operationalizes this ideal; but one surely would not discard an ideal of justice on the ground that, because the world is imperfect, there are always difficulties in achieving it.[106]

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[103] Morris, "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42(3) *British Journal of Criminology* 596, at 610.
[104] *Infra*, at 375.
[105] Morris, *loc. cit.*, at 607.
[106] Ashworth, "Is Restorative Justice the Way Forward for Criminal Justice?", *loc. cit.*, at 172.

The principle of consistency operates as an important safeguard against the insidious threat of *unjustifiably* disproportionate, disparate and unfair sentences. Therefore, while the need for consistency can be diluted legitimately in the interests of customised treatment, its outright neglect would invest the criminal justice system with a chaotic image of arbitrariness, disparity and prejudice. This would be intolerable *whatever the rationale there-for.* As Murphy and colleagues assert:

> A legal system that does not abandon commitment to impartiality, neutrality, and treating likes alike is itself a remarkable accomplishment and not something to be bypassed in the hopes of human transformation.[107]

3.1.2 Forgiveness and Punishment: Clashing Cornerstones of Competing Ideologies or Willing Bedfellows?

While some of the most fundamental values of restorative and traditional criminal justice may be assumed to collide with fatal results for their future co-existence, this is not necessarily the case. The following discussion plucks the concepts of *forgiveness* and *punishment* straight from the philosophical hearts of restorative and traditional criminal justice models respectively and pits them against one another. While forgiveness reflects restorative justice's objective to restore and heal, punishment represents mainstream criminal justice's retributive centre-piece.

Yet, as the following discussion will reveal, forgiveness and punishment – and therefore the seemingly incompatible paradigm's they represent – are capable of co-existing harmoniously not only *despite* their differences but *because of them*. They represent the ideological hubs of "differently abled" criminal justice paradigms, which can be implemented individually but also *combined* to offer a synergistic, customised blend of approaches when dealing with individual offences and offenders.

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> The moral ambitions of law and forgiveness, in short, offer worthy challenges one to the other in our desires for impartiality and compassion, autonomy and connection. Let us just not confuse one for the other.[108]

Several scholars have studied the impact of forgiveness within the procedural strictures of formal criminal justice.[109] Perhaps the most significant misapprehension about

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[107] Murphy *et. al.*, *Ninth Annual Stein Center Symposium*, "The Role of Forgiveness in the Law" (2000) 27 *Fordham Urban Law Journal* 1349, at 1405.
[108] *Ibid.*, at 1394.

the impact of forgiveness in a legal setting is that it necessarily involves mercy and nullifies the need to punish.[110] The assumption that forgiveness is a necessary *substitute* for punishment – that if one forgives, he automatically waives not only his desire for revenge but also his right to see his offender punished – has been subject to deserved critique.[111]

As Cohen stresses, forgiveness symbolises merely a decision to cease resentment, not an undertaking to absolve wrongdoers from all liability for their actions.[112] It is wrong to equate forgiveness (or restorative justice)[113] with "letting the offender off the hook".[114] Forgiveness and punishment can co-exist: they are not mutually exclusive.[115] While they follow separate *theoretical* channels, they can quite viably occupy the same *operational* sphere, performing what each does best to produce an overall pattern of synergistic, flexible sentencing and better quality justice as a result.

Forgiveness offers much to criminal justice,[116] tweaking its conventional value-system by injecting it with a complementary goal that it does not generally prioritise:[117] the restoration of the non-material, non-legal, *emotional* dynamics that cause and result from crime in society. As emphasised from the outset, however, restorative values such as forgiveness need not *outdo* or *remedy* existing justice models in order to justify their insertion there-into.[118] The social merits of forgiveness are sufficient in and of themselves to warrant their prioritisation within criminal justice, regardless of the prior sentencing patterns of their host regime. There need not be anything outstandingly deficient about a criminal justice system in order to justify its diversification by additional, independently beneficial values or techniques. Still, that is not to suggest that criminal justice cannot *gain* from enhancing its prioritisation of a particular objective:

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[109] *See generally*, Ammar, "Forgiveness and the Law: A Redemptive Opportunity" (2000) 27 *Fordham Urban Law Journal* 1583; Denckla, "Forgiveness as a Problem-Solving Tool in the Courts: A Brief Response to the Panel on Forgiveness in Criminal Law" (2000) 27 *Fordham Urban Law Journal* 1613; Enright and Kittle, "Forgiveness in Psychology and Law: The Meeting of Moral Development and Restorative Justice" (2000) 27 *Fordham Urban Law Journal* 1621.

[110] *See generally*, Murphy and Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1988).

[111] *See* Lerman, "Forgiveness in the Criminal Justice System: If it Belongs, Then Why is it So Hard to Find?" (2000) 17(5) *Fordham Urban Law Journal* 1663, at 1665; Cohen, "Advising Clients to Apologize" (1999) 72 *Southern California Law Review* 1009, at 1015; Levi, "The Role of Apology in Mediation" (1997) 72 *New York University Law Review* 1165, at 1209.

[112] Cohen, *loc. cit.*

[113] *Supra*, at 39, 107; *infra*, at 366.

[114] Lerman, *loc. cit.*

[115] Walgrave, "Has Restorative Justice Appropriately Responded to Retribution Theory and Impulses?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 47, at 57; Garvey, "Restorative Justice, Punishment, and Atonement" (2003) 1 *Utah Law Review* 303; Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press, 1998).

[116] Ammar, *loc. cit.*; Murphy, *et. al.*, *loc. cit.*; Minow, *op. cit.*; Denckla, *loc. cit.*; Enright and Kittle, *loc. cit.*; *contra*, Bader, "'Forgive Me Victim For I Have Sinned': Why Repentance and the Criminal Justice System Do Not Mix – A Lesson from Jewish Law" (2003) 31 *Fordham Urban Law Journal* 69.

[117] Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press, 2002), at 118.

[118] *Supra*, at 48-41, 109-110.

> Forgiveness is instrumental for courts attempting to have more effective and lasting results by addressing the non-legal causes and consequences of crime, rather than merely sentencing based on the crime itself.[119]

Punishment is equally essential to quality criminal justice. And it may be the case that restorative justice actually *benefits* from the punitive addendum of mainstream criminal justice in certain cases. The need for punishment is an inescapable, perennial social reality: "[s]o long as offenders commit wrongs that we wish to right, punishment will continue to be a practical necessity."[120] In an ideal world, all offenders would be suitable for informal, restorative interventions such VOM, all victims would be enthused to participate, all mediations would result in genuine apologetic exchanges and forgiveness would be ample to secure an offender's reform and social re-inclusion. Unfortunately, however, reality throws a spanner in the works.

Consider the example of a victim of an attempted murder, victimised by a serial killer in the midst of a killing-spree. The offender is chronically deviant, remorseless and unremitting, vowing to continue his delinquent career, should he ever face release from prison. An extreme example perhaps, yet it is at least *viable* that under these circumstances the victim may forgive even the most wanton acts of violence (difficult though it may be). In this situation, the victim relinquishes her right to revenge but maintains the belief that the offender should be punished and removed from society in the interests of public safety.

There is a need for forgiveness within formal criminal justice. And, fortunately it seems that there is room.[121] Though modern criminal justice appears little moved by the process of forgiveness, historically, the two have shared common terrain.[122] Their connection is evident from the historical development of common law criminal justice, though it has degraded over the years:[123]

> ... within formal legal rules, judges and lawyers always have invented room for forgiving individual wrongs and wrongdoers. The British King crafted a system of equity, partly as a struggle for gaining political power but also to supplement and override the common law courts of the local lords. Initially, equity permitted flexibility and justice tailored to the circumstances, until it too became rule-bound. Executive power and pardons reflect to this day the conception that stemmed from royal forgiveness overriding the necessary rigidities of law.[124]

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[119] Denckla, *loc. cit.*, at 1619.
[120] Garvey, "Restorative Justice, Punishment, and Atonement", *loc. cit.*, at 317.
[121] Denckla, *loc. cit.*; Minow, *op. cit.*; Ammar, *loc. cit.*
[122] Murphy, *et. al.*, *loc. cit.*
[123] Lerman, *loc. cit.*
[124] Murphy, *et. al.*, *loc. cit.*, at 1406.

The compatibility between the interests of forgiveness and punishment is significant here because it symbolises a more fundamental corresponding compatibility that this thesis identifies between their pilot philosophies of restorative and retributive criminal justice. Forgiveness and punishment can co-exist harmoniously in shaping sentencing options, as can their parent ideologies of which they are central ingredients.

Restoration and retribution can and should coexist in the administration of Irish criminal justice.[125] There is no *de facto* incompatibility between the interests of punishment and restorative justice. As Segal stresses: "... there is nothing in the model of Restorative Justice that would contradict the need for the fair and impartial imposing of punishments on wrongdoers".[126] Therefore, the restorative ideology does not and should not deny, on principle, the need for punishment under fitting circumstances.[127]

> ... any stance that entirely rejects judicial punishment seems seriously flawed with respect to its understanding both of prevailing legal ideologies, and of the role of punishment in a Restorative Justice paradigm.[128]

Moreover, in light of restorative justice's *tolerance* of punitive necessities, its philosophy should not be mistakenly perceived as immiscible with that of punishing offenders. Nor should it be attacked on that basis. Garvey falls into this trap, mis-attributing to restorative justice a blanket resistance to punishment and then condemning it on that basis:

> Restorative justice is an inspiring vision of how we should deal with the consequences of crime. But alas, *its hope to eliminate altogether the need to punish* an offender for the wrong he has done asks more than human nature will allow ... So long as offenders commit wrongs that we wish to right, punishment will continue to be a practical necessity. The most for which we can realistically hope is not the elimination of punishment, but its transformation: punishment turned into penance.[129]

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[125] *See* Zedner, "Reparation and Retribution: Are They Reconcilable?" (1994) 57 *Modern Law Review* 228, at 250; Minow, *op. cit.*; Duff, "Restoration and Retribution" in von Hirsch, Bottoms, Roach and Schiff eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart, 2003) 42; Barton, "Empowerment and Retribution in Criminal Justice" in Strang and Braithwaite eds., *Restorative Justice: Philosophy to Practice* (Ashgate, 2000) 55; Daly, K., "Revisiting the Relationship Between Restorative and Retributive Justice" in Strang and Braithwaite eds., *op. cit.* 33; Garvey, "Restorative Justice, Punishment, and Atonement", *loc. cit.*, at 317; Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice" (1993) 4 *Criminal Law Forum* 251, at 264-266; Segal, "Jewish Perspectives on Restorative Justice" in Hadley ed., *The Spiritual Roots of Restorative Justice* (State University of New York Press, 2001) 181, at 189-190; Van Ness, "A Reply to Andrew Ashworth" (1993) 4 *Criminal Law Forum* 301; Walgrave, *loc. cit.*, at 57; *contra*, Ashworth, "Some Doubts About Restorative Justice", *loc. cit.*, at 287-293; Sarnoff, "Restorative Justice to the Community: A Realistic Goal?" (2001) 65 *Federal Probation* 33.

[126] Segal, *loc. cit.*, at 189-190.

[127] Greenwood, "Restorative Justice and the Jewish Question" (2003) 1 *Utah Law Review* 533, at 560.

[128] Segal, *loc. cit.*, at 189.

[129] *See* Garvey, "Restorative Justice, Punishment, and Atonement", *loc. cit.*, at 317. [emphasis added]

Closer to home, the authors of the National Crime Forum Report have acknowledged the potential for an amicable relationship between restorative justice and punishment. They stressed that the "more imaginative use" of restorative principles in sentencing does not mean being "soft on crime".[130] Barton agrees: "The notion that punitiveness and retribution are incompatible with restoration is a myth, and is shown to be so by both history and current practice."[131]

Beyond vouching for their compatibility, Barton perceives a *need* for the co-existence of both philosophies; in the greater interests of justice, the emotionally palliative aspirations of restorative justice *must* accommodate some degree of traditional punitive intent:

> Far from having to reject punishment and retribution from the available range of responses, what needs to happen in restorative justice interventions is that any punitive response to wrongdoing is *complemented* with genuine caring, acceptance and reintegration of the person, as opposed to stigmatising, rejecting or crushing them – provided, that is, that they appreciate the moral gravity of their behaviour and are intent on making amends. This way, far from defeating restorative justice, *a well pitched punitive measure will form part of, and will enhance restoration for everybody involved.*[132]

Howard Zehr, though generally a purist when it comes to restorative justice, concedes the potential workability of a crossbred model of "restorative punishment" whereby the guiding justification for punishment is healing and the restoration of harm.[133]

> If there is room for punishment in a restorative approach, its place would not be central. It would need to be applied under conditions which controlled and reduced the level of pain and in a context where restoration and healing are the goals. Perhaps there are possibilities for "restorative punishment".[134]

Strang[135] and Duff[136] also appear to envisage a restorative purpose for traditionally retributive "punishments". According to Strang, an offender's performance of a burdensome undertaking such as a custodial sentence may be conceived as an important element of the restorative process.

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[130] *National Crime Forum Report 1998*, *op. cit.*, at 139.
[131] Barton, *loc. cit.*, at 62.
[132] *Ibid.* [emphasis added]
[133] Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 1990), at 210.
[134] *Ibid.*
[135] Strang, "Is Restorative Justice Imposing its Agenda on Victims?" in Zehr and Toews eds., *op. cit.* 94.
[136] Duff, "Restorative Punishment and Punitive Restoration" in Walgrave ed., *Restorative Justice and the Law* (Willan, 2002) 82.

> Restorative justice provides the time and space for victims and offenders to talk about more than the price to be exacted for the wrongdoing, and much of it is more salient and important to all players than the question of punishment. But the need for censure and reparation through the voluntary undertaking of a burdensome action, should be seen for what they usually are: the signal of an offender's remorse and an acknowledgement of the legitimacy of the victim's suffering.[137]

Zehr and Strang's contemplation of restorative punishment subsumes the crucial restorativist concession that punishment occupies a worthy space in criminal justice,[138] albeit a *last resort*.[139] This notion of confining retributive sentencing to "last resort" scenarios where restorative interventions have either already failed or are presumptively unsuitable has long pervaded religious and indigenous approaches to conflict resolution.[140] It also has relevance closer to home: Ireland's native Brehon legal system, as Chapter 7 explained, administered an evolved *hybrid* species of restorative/punitive criminal justice in Ireland for millennia.[141] The Brehon law prioritised restorative answers to crime, yet understood crime's ubiquity and the need for back-up and alternative punitive sanctions.

Though the state may perform less than perfectly in its distribution of uniform and even-handed punishments, it best approximates an impartial, observable, publicly-accountable source of social regulation. Formal criminal justice, like its informal, community-based equivalent,[142] is an indispensable vehicle of social-control. It is capable of meeting valuable social needs such as incapacitation and public censure and preserves the public realm of the law.[143] Consequently, erroneously-labelled "restorativist" arguments for the abolition of the criminal law,[144] its absorption by the civil law of torts[145] or the usurpation of its sentencing duty by overly-empowered crime victims[146] are all firmly rejected.

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[137] Strang, *loc. cit.*, at 103-104.
[138] *See generally*, Zedner, *loc. cit.*; Murphy *et. al.*, *loc. cit.*; Minow, *op. cit.*; Duff, "Restoration and Retribution", *loc. cit.*; Walgrave, *loc. cit.*; Garvey, "Restorative Justice, Punishment, and Atonement", *loc. cit.*; Daly, K., *loc. cit.*
[139] *Supra*, at 209-210, 218, 257; *infra*, at 380; *National Crime Forum Report 1998*, *op. cit.*, at 139; see also, Whitaker, *Report of the Committee of Inquiry into the Penal System* (Stationery Office, 1985).
[140] *See generally*, *supra*, at 49-86.
[141] *Supra*, at 271-304.
[142] Jacobs, *The Death and Life of Great American Cities* (Vintage Books, 1961), at 32; Conklin, *The Impact of Crime* (Macmillan, 1975), at 9.
[143] *Infra*, at 335-336.
[144] *See generally*, Bianchi and Van Swaaningen eds., *Abolitionism: Towards a Non-Repressive Approach to Crime* (Free University Press, 1986); Blad, van Mastrigt and Uildriks eds., *The Criminal Justice System as a Social Problem: An Abolitionist Perspective* (Erasmus University, 1987); see also, Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice", *loc. cit.*; Ashworth, "Some Doubts About Restorative Justice", *loc. cit.*; Van Ness, "A Reply to Andrew Ashworth", *loc. cit.*
[145] Wright, *Making Good* (Burnett Books, 1982), at 249-250; Christie, *Limits to Pain* (M. Robertson, 1982), at 92-94.
[146] *See* Erez, "Victim Participation in Sentencing: Rhetoric and Reality" (1990) 18 *Journal of Criminal Justice* 19, at 28-29.

Still, even though formal criminal justice is essential to perform important retributive tasks, it should be treated as neither immutable, nor impenetrable by alternative, contrasting ideologies and techniques that have proven themselves equipped to resolve conflict, emotionally restore, enhance social harmony and even cut crime. Restorative justice is such an ideology.

3.1.3 The Threat to the Principle of Justice in Public

At first glance, expressions of informal justice might appear incompatible with the important constitutional ethic that justice should be administered in public. As previously asserted, while informality is not necessarily *integral* to restorative justice's identity, the paradigm has a long-established tendency to offer less formal alternatives to the procedurally more rigorous, rule-bound justice doled out at state-level.[147] For the most part, restorative justice *tends* to be administered on an informal, community-basis, though its omission to do so would not be fatal to its restorative identity.

David Luban,[148] amongst others,[149] might consider that non-curial attempts at redressing crime's harms for victim and offender constitute an impermissible "erosion of the public realm" preserved for criminal justice. Others still, assert that there can be no "justice without law" and reject attempts to resolve conflict in abstraction from the authority of formal institutions.[150]

This is an argument not without merit. It is worthy of serious contemplation with respect to many varieties of restorative and community justice. Yet, it holds less significance here because the state's supervisory authority over the voluntary, *court-annexed* sort of restorative justice promoted herein insulates it from attempts to condemn it as form of "private justice" that breaches Article 34.1's decree of justice in public.[151]

Cases flow from court to informal institutions and restorative resolutions flow back to court for consideration and ultimate judicial approval, variance or rejection. The mere negotiation of an outcome is not made final until it is judicially scrutinised within the public realm of the courts. Therefore, cases that are referred to restorative interventions and then re-referred to court are *not* divested of their "public" identity simply because of their

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[147] *Supra*, at 22, 181, 241-242.
[148] Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 *Georgetown Law Journal* 2619.
[149] Brenowitz, "Deadly Secrecy: The Erosion of Public Information under Private Justice" (2004) 19 *Ohio State Journal on Dispute Resolution* 679; Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique" (1994) 43 *Emory Law Journal* 1247.
[150] Fiss, "Against Settlement" (1984) 93 *Yale Law Journal* 1073; Fiss, "Out of Eden" (1985) 94 *Yale Law Journal* 1669.
[151] Constitution of Ireland, 1937, Article 34.1; for a discussion of Article 34.1, see Hogan and White, eds., *Kelly: The Irish Constitution* (3rd ed., Butterworths, 1994) at 330-359.

intermediate non-curial processing. But even if they *are*, legal precedent suggests that their interim, non-binding and non-final resolutions are not "the administration of justice".

In *Lynham v. Butler*,[152] Chief Justice Kennedy stated that determinations or "adjudications" performed by persons other than judges for purposes ancillary to the state administration of justice are not part of the exercise of judicial power to which Article 34.1's mandate of public justice applies. Applying this logic, it is likely that the resolutions of restorative forums, like administrative decisions, would fall into the category of non-judicial *ancillary* adjudications falling outside the scope of Article 34.1.

Finally, ignoring momentarily the constitutional implications of non-curial justice, it is arguable that the importance of public access to justice can be subordinated to the greater public interest of its actual administration. This approach was adopted by the Lord Chancellor of England and Wales, Lord Falconer whilst considering the desirability of televising court proceedings in England and Wales:

> Justice being done and being seen to be done is not a two-part notion of equal weight, but a priority list, and no reforms to the justice system to make it more open and accessible can interfere with that.[153]

The sum of these various considerations is that objections based on the perceived "privacy" of restorative justice do not pose a substantial threat to its implementation in a *court-annexed* format. An obstructive degree of caution – at least on this ground – is kept at bay, the optimism that the paradigm's emotionally palliative potential has otherwise earned it remaining largely unscathed.

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[152] *See Lynham v. Butler (No. 2)* [1933] IR 74; (1933) ILTR 75; see also, *Halpin v. Attorney General* [1936] *IR* 266; *The State (McKay) v. Cork Circuit Judge* [1937] IR 650; *The State (Shanahan) v. Attorney General* [1964] IR 239.

[153] Falconer, "Justice Should be Seen to be Done – but be Careful of TV" *The Guardian*, 30 August 2004, <http://www.guardian.co.uk/comment/story/0,,1293540,00.html>

3.2 Restorative Justice's Potential Incompatibility with Mainstream Consensus on Criminal Justice

> In the absence of more thoughtful and progressive public and political attitudes ... there is a real possibility that present advances will have minimal constructive impact. One thing is sure, there has never been a better opportunity for radically reshaping the penal system.[154]

While the very establishment of restorative forums may be sufficient to arouse "after-the-fact" public, judicial and political approval thereof, *prior concurrent* expressions of public and governmental support for restorative justice provide the most fertile conditions for its prosperity. *Both* sources of approval must merge to form an attitudinal platform that is sufficiently durable to sustain lasting restorative change.

A high level of pre-existing compatibility between restorative justice and public, judicial and political opinion on crime and its resolution would provide ideal conditions for restorative justice's successful integration into tried and tested sentencing patterns. For, attempts at restorative justice's integration that are factually incompatible with the prevailing consensus on how criminal justice should operate and are as such, stimulated by motivations other than sincere and comprehensive commitment thereto, pose a serious threat to its chances of survival.

An hospitable attitudinal environment is pivotal to the acceptance or rejection of elements of restorativism that have been transplanted inside criminal justice's conventional framework. Caution is essential here. The risk of criminal justice disingenuously *and fatally* "hijacking" the concept of restorative justice by grounding its integration on premature, ill-informed, symbolic, ulterior or superficial acceptance must be minimised.[155]

Restorative justice's perception as a failure, which is likely to occur on its collapse at the hands of attitudinal opposition, poses a potentially lethal threat to the paradigm's lifespan. Moreover, it could provoke a permanent *regression* in criminal justice back towards the comfort-zone of routine, predominantly punitive default sentencing methods. Then, the potential benefits of restorative justice may remain indefinitely and unfortunately untapped.

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[154] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice* (Cork University Press, 2000), at 116.

[155] Robert and Peters, "How Restorative Justice is Able to Transcend the Prison Walls: A Discussion of the 'Restorative Detention' Project" in Weitekamp and Kerner eds., *Restorative Justice in Context: International Practice and Directions* (Willan, 2003) 95.

> [T]he most likely consequence of a poorly implemented, misunderstood justice reform initiative will be a dramatic swing back to punitive and retributive responses to crime which will never afford society the opportunity to address the actual root causes of criminal behaviour ... [156]

At the same time, it is possible to overcome evidence of resistance to restorative change. This sub-section identifies lobbying, training and general awareness-raising efforts for citizen, judge, politician and legal professional alike as valuable tools by which prevailing attitudes on managing crime's adverse consequences can be readied for the arrival of a new system of restorative criminal justice. Ideally, this should be undertaken prior to the establishment of a restorative system, but could also work effectively subsequent thereto to inspire the "after-the-fact" acceptance mentioned above.[157] The threat of attitudinal resistance weakening or overthrowing restorative justice is certainly a risk to the success of its integration, but one that can be absorbed once efforts to minimise it are vigilantly undertaken.

The following discussion predicts the likelihood of public, judicial and political opposition to restorative criminal justice, considers the ameliorative potential of awareness-raising in each sector and ultimately adopts a *cautiously optimistic* attitude to restorative justice's harmonious co-existence alongside the attitudes that currently shape Irish law and society.

3.2.1 Public Attitudes

A preliminary point to be stressed here is that public punitiveness is not *necessarily* at odds with a *hybrid* model of restorative criminal justice that straddles both restorative *and* retributive solutions to crime as the need for each (or indeed both) arises. Such a cross-bred model would not only tolerate a quantity of public punitiveness that is roughly proportionate to the predominance of retributivism therein – it would *require* it. Equally, it would necessitate sufficient public support for restorativism to bolster that section of its binary focus.

That is not to deny, however, that a fiercely punitive public mindset could obstruct restorative justice's advance into Irish criminal justice; this could easily occur, should the public's commitment to just deserts prove so strong that *any* alternative thereto is treated with suspicion or scepticism or perceived as an intolerably soft option.

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[156] Montgomery, "Restorative Justice and the Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate" <http://www.cfcj-fcjc.org/full-text/montgomery.htm> (visited 4 November 2004).
[157] *Supra*, at 337.

The need for public support for restorative justice is only strengthened by this thesis' submission that restorative responses should not only stand shoulder to shoulder with their punitive counterparts, but should ideally be prioritised at least initially as a *first resort consideration* for every offender. Relegating imprisonment from its current predominance in sentencing is compatible with the position of the National Crime Forum, which, back in 1998, called for a major shift in how criminal justice operates, de-emphasising punishment in favour of the "promising avenue" of restorative justice:[158]

> [a] fundamental change of focus to make the prison the option of last resort, to be used sparingly and only when all other options have been tried or considered and ruled out for *cogent reasons*.[159]

It also mirrors the recommendations of the Comptroller and Auditor General in its 2004 *Value for Money Examination Report on the Probation and Welfare Service*, which concluded that: "community sanctions are to be preferred to custody, which should be the penalty of last resort."[160]

Of course, restorative options can be discarded swiftly should an offender prove sufficiently obstinate, chronic or dangerous to necessitate the most incursive, incapacitative penalties. Traditional punishments can be exploited, just as they can be avoided or supplemented *for cogent reasons.*

That restorative intervention is at least the first *contemplative* line of attack against criminality only concretises the need for public approval thereof and escalates its potential incompatibility with evidence of staunch public retributivism. Thus, it is important to gauge the Irish public's current degree of hospitality or hostility to restorative principles before its greater legal and cultural compatibility can be reliably established.

3.2.1.1 Populist Punitiveness in the 1990s

Back in 1998, the National Crime Forum diagnosed a retributive mindset amongst the Irish public *so strong* that it expressed serious concern about the hurdle such an attitude might pose restorative justice's prospects in this country:

> [T]he restorative justice approach is so different from the current retributive justice system that, however effective it might be, it might be difficult to gain acceptance of it in the short term … a move to greater use of non-custodial sanctions would involve not just changes in the law or in sentencing practice, but a profound change in public attitudes.[161]

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[158] *National Crime Forum Report 1998*, *op. cit.*, at 144.
[159] *Ibid.*, at 142. [emphasis added]
[160] Comptroller and Auditor General, *op. cit.*, at 46.
[161] *National Crime Forum Report 1998*, *op. cit.*, at 94, 144, 147.

Admittedly, the forum had good reason to doubt the ease with which a generally non-incursive, emotive, rehabilitative justice model might be slid inconspicuously into Irish society. Earlier, in 1993, an *Irish Independent* survey concluded that "public opinion ... has swung firmly in favour of a tough crack-down on our criminals".[162] Unsurprisingly, law and order became a burning issue throughout the mid-to-late 1990s.

This "populist punitiveness"[163] is no better evidenced than by the Irish public's ratification by referendum in November 1996 of a constitutional amendment to bring the preventative detention provisions of the Bail Bill into law.[164] The Bill empowered the courts to *refuse bail* to those accused of a "serious offence" where it was deemed necessary to prevent the commission of another serious offence.[165] The Bail Bill was condemned at the time for its draconian impact; it was accused of achieving little more than the "criminalising of mere intention", [166] providing a mechanism by which innocent people could be required to spend time in prison in contravention of the presumption of innocence. As the Irish Council for Civil Liberties remarked back in 1997:

> It is almost impossible to explain the reasoning involved in the Bill without suggesting that the person concerned is guilty of committing the first offence. That is why we argue that it infringes on the principle that everyone should be regarded as innocent unless/until proven guilty ... In practice, it looks as if the court will be expected to infer from that fact that the accused is currently with an offence and has previous convictions or faces other charges that s/he has a propensity to "re"-offend. What has happened to the presumption of innocence?[167]

It is not, however, difficult to pinpoint a potential catalyst for this wave of public punitiveness. Shortly after the referendum, in January 1997, an *Irish Times*/TNS MRBI poll reported a pronounced *fear of crime* amongst its sample cluster.[168] It found that 86% of people believed that crime was increasing and that, on the whole, they were unhappy with the government's efforts to tackle it. Crucially, however, this public-preoccupation with law and order seemed to *exceed* the seriousness of Ireland's crime problem at the time – almost two

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[162] "Time to Reclaim the Streets" *The Irish Independent*, 9 October 1993.
[163] O'Donnell, "Challenging the Punitive Obsession" (1998) 8 *Irish Criminal Law Journal* 51.
[164] *See* O'Mahony, *Criminal Chaos: Seven Crises in Irish Criminal Justice* (Roundhall Sweet & Maxwell, 1996), at 17-23; "Decision to Hold Referendum on Bail Welcomed" *The Irish Times*, 16 October 1996; Kennedy, "Bail Referendum Should Not Be End of Debate on Crime" *The Irish Times*, 5 December 1996.
[165] Bail Act, 1997, s. 2.
[166] *DPP v. Ryan* [1989] IR 399, 407, Walsh J.
[167] Irish Council for Civil Liberties, "Commentary on the Bail Bill (1997)", at 1, 3. <http://www.iccl.ie/DB_Data/publications/CommentaryontheBailBill1997.pdf> (visited 27 February 2007).
[168] Maher, "Most People Fear Crime is Getting Worse and are Unhappy about What's Being Done" *The Irish Times*, 3 February 1997.

thirds of respondents in the January poll said that neither they nor their close friends or relatives had been victims of crime in 1996.[169]

In fact, this wave of public "high alert" to crime developed relatively suddenly during a period of *falling crime* in the mid-to-late 1990s,[170] opinion polls having shown, in dramatic contrast, that public-concern about crime was low in the 1980s when the crime rate was swelling;[171] between 1980 and 1994, only 2-7% of people put crime at the top of their list of concerns.[172] Traditionally a country of relatively low crime,[173] Ireland's crime rate has fallen dramatically since 1996.[174] Kilcommins *et. al.* stress that:

> Examination of the Garda statistics would suggest an unprecedented fall in crime between 1996 and 2000. Over this period recorded crime in Ireland dropped faster and further than in any other EU country ... This was from a baseline that was already low in an international context.[175]

In an article in *The Irish Times* in early 1996, Dr. Ian O'Donnell described the atmosphere of *unwarranted* panic about crime that was gripping Irish society at the time:

> Recent weeks have seen an unprecedented level of concern about crime ... However, it is by no means clear that the Republic is currently experiencing a crime wave ... Most indictable crime is against property and a large proportion of this is minor in nature ... offences against the person ... constitute less than two per cent of all recorded crime and this number has been declining ... *In terms of violent crime against the person Ireland must rank as one of the safest countries in the developed world. It is paradoxical that despite our comparatively favourable position with regard to the level of recorded crime, there is increasing public concern about crime.*[176]

While it is relatively easy to identify a surge in unjustified fear of crime as a possible vector of public-orientation towards harsher penalties, *understanding* it is a more complex feat. There are three potential explanations for Irish people's disproportionate fear of crime, which has, in recent years, enamoured them to the more incursive end of the punitive spectrum.

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[169] *Ibid.*
[170] O'Donnell and O'Sullivan, "The Politics of Intolerance–Irish Style" (2003) 43 *British Journal of Criminology* 41, at 41, 48; McCullagh, *Crime in Ireland: A Sociological Introduction* (Cork University Press, 1996), at 10-11.
[171] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration, 2004), at 133.
[172] Coulter, "Crime Policy Debate Seldom Rational – Expert" *The Irish Times*, 24 December 2004.
[173] Brewer, *Crime in Ireland 1945–95: Here Be Dragons* (Clarendon Press, 1997); McCullagh, *op. cit.*
[174] O'Donnell and O'Sullivan, *loc. cit.*, at 41; O'Donnell, "Criminal Justice Review" (1999) 47(2) *Administration* 175; O'Sullivan and O'Donnell, "Why is Crime Decreasing?" (2001) 11(1) *Irish Criminal Law Journal* 2.
[175] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 92.
[176] O'Donnell, "Prison Spaces Allay Public Fears More than Reduce Crime" *The Irish Times*, 8 February 1996. [emphasis added]

The first possibility is that Irish politicians exaggerated the gravity of Irish crime *deliberately* in order to manufacture the perfect scenario in which they might be seen to intervene heroically with far-reaching anti-crime tactics likely to curry favour with voters by assuaging their rising fears.[177] In mid-1996, Gay Mitchell, then Minister of State for Foreign Affairs, added fuel to the fire of public concern about crime in a newspaper article, brimming with dramatic rhetoric, which lambasted the government for its allegedly light-handed approach to crime and called for a harsher assault on criminality:

> I will repeat what I said when I was on the Opposition benches, that it is not an exaggeration to say the drugs and crime problem is the greatest epidemic since the outbreak of TB ... In church grounds and school yards young and old alike can prick themselves with ... needles and must then worry about whether they have contracted HIV ... Unless we treat the crime problem with such seriousness, we will not solve it, irrespective of what laws we pass.[178]

Later that year, only weeks after the Bail Referendum, doubts began to circulate about the motivations underlying the government's recent resolve to "crack-down" on criminals. Some entertained the possibility that the government conjured an *illusion* of society's rapid descent into lawlessness to gain electoral incentives and maintain political *status quo*.

> Was this indeed, as some have claimed, just a vote-catching exercise wherein our elected representatives with an eye on re election, pandered to a frustrated and embattled electorate suffering the social costs and effects of crime? Or was it a genuine and serious attempt to confront the criminal and eliminate crime? I suppose only time will tell ... [179]

Even to this day, people are questioning the "dark heart of opportunism"[180] lurking behind government crime policy.[181] In February 2007, the Irish government published its most recent plans for toughening-up its approach to gangland crime with a new hard-hitting Criminal Justice Bill that includes – somewhat disconcertingly – provisions that will place certain restrictions on an accused's right to silence.[182] Ivana Bacik recently expressed her struggle to understand the rationale behind such a provision, branding it a mere populist

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[177] *See* Daly, Y., "The Changing Irish Approach to Questions of Criminal Justice: Media Portrayal, Moral Panic and Myopic Politics" [2003] *Cork Online Law Review* X; O'Mahony, *Criminal Chaos: Seven Crises in Irish Criminal Justice*, *op. cit.*, at 15; O'Kelly, "Buying Votes by Building More Prisons" *Sunday Business Post*, 20 June 2004; Donaghy, "McDowell's 'Manufactured' Prison Crisis" *Saoirse32*, 4 April 2005. <http://saoirse32.blogsome.com/2005/04/25/mcdowells-manufactured-prison-crisis>

[178] Mitchell, "Laws 'Help to Fill Vacuum but Will Not Work unless We Also Tackle the Order Problem'" *The Irish Times*, 27 July 1996.

[179] Kennedy, *loc. cit.*

[180] O'Connell, D., "Dark Heart of Opportunism Lies Behind McDowell's Proposals" *The Irish Times*, 15 February 2007.

[181] *Infra*, at 353-354.

[182] Gartland, "Laws May Give Garda Too Much Power, Forum Told" *The Irish Times*, 18 February 2007; "Responding to Gangland Crime" *The Irish Times*, 15 February 2007.

stroke before a general election.[183] Elsewhere, the government has been accused of rushing the legislation in time for the next election without having afforded its Criminal Law Review Group sufficient time to properly evaluate the issues it raises and the remedies it provides:

> There is no good reason, other than the impending election, why reform of the law could not have awaited the outcome of its final deliberations ... Given the short period that remains in the life of this Dáil, the Minister's Bill should be shelved until after the election to allow for a proper debate on an appropriate response to the complex issue of gang-related crime.[184]

As Bauman suggests, governments' answers to crime are not always "just, explicitly, about the personal safety of their subjects, but by implication about their security and certainty as well."[185] In fact, it is likely that governments are "constantly aware of the Damocles' sword of public opinion hanging over their heads".[186] By capitalising on public anxieties, whether or not they have contributed to them, Irish politicians are capable of helping themselves by creating the illusion of their noble intervention to help others.

The Irish government could be perceived to have magnified what little serious crime there was during the period in question in order to paint a picture of Irish crime that was far bleaker than reality. It thereby stimulated a "moral panic"[187] amongst the Irish public that could only be placated with the promise of more aggressive anti-crime tactics, such as zero-tolerance and massive prison expansion.[188]

The second potential source of this *rising* fear of factually *receding* crime in Ireland during the 1990s is the media.[189] The media has been charged with conveying a distorted image of crime that has caused the Irish public to over-estimate the seriousness of the nation's crime problem, triggering an objectively unwarranted fear of crime.[190] This, in turn, cultivates a consequential rise in punitiveness. The public's vulnerability to manipulation by

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[183] *Ibid.*
[184] "Responding to Gangland Crime", *loc. cit.*
[185] Bauman, "Social Issues of Law and Order" (2000) 40(2) *British Journal of Criminology* 205, at 217.
[186] O'Flaherty, "Punishment and the Popular Mind: How Much is Enough?" in O'Mahony ed., *op. cit.* 371, at 372.
[187] Daly, Y., *loc. cit.*; for a general overview of the concept of the moral panic, see generally, Goode and Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Blackwell, 1994); Lines, "Living in the Past: The Americanization of the Irish Prison System", Irish Penal Reform Trust *Annual Summer Law Academy Dinner*, 9 June 2005. <http://www.iprt.ie/iprt/1375> (visited 19 January 2006); Hardy, "Victimisation, Moral Panics, and the Distortion of Criminal Justice Policy" (1994) 6 *Current Issues in Criminal Justice* 27.
[188] *Infra*, at 376-377.
[189] *Supra*, at 141-143.
[190] O'Connell, M., "Is Irish Public Opinion towards Crime Distorted by Media Bias?" (1999) 14(2) *European Journal of Communication* 191; *National Crime Forum Report 1998*, *op. cit.*, at 27-28; Kerrigan and Shaw, "Crime Hysteria" *Magill*, 18 April 1985; O'Connell, M., "The Portrayal of Crime in the Media" in O'Mahony ed., *op. cit.* 245; on public perceptions of crime seriousness in general, see O'Connell, M., "Taking Wrongs Seriously: Public Perceptions of Crime Seriousness" (1996) 36(2) *British Journal of Criminology* 299.

the media in this manner could owe to the fact that, as David Garland explains, people tend to rely upon "collective representations" of a "culturally given experience of crime" when shaping their opinions on criminal justice rather than accurate, up-to-date information. [191]

The potential for symbiotic collusion between government and media in this respect cannot be ignored; they both stand to feed off the fear they jointly create, each fattening its individual interests – the media wining readership, ratings points and market share and the government through hard-line, superficially *necessary* crime campaigns, winning votes. It seems that the media can influence political reactions to crime in two different ways.

First, its depictions of crime can influence the political audience directly, whose reactions thereto will then shape public opinion. David Garland has highlighted the influence that *television* can exert over the political rhetoric responsible for honing public attitudes on crime:

> TV has changed the rules of political speech. The TV encounter—with its soundbite rapidity, its emotional intensity, and its mass audience—has tended to push politicians to be more populist, more emotive, more evidently in tune with public feeling.[192]

However, the media can also affect political responses to crime in a second, less direct way. As Chapter 4 explained, the media's dramatised portrayals of rising crime attune its audience to the crime problem in their own region and prompts over-estimations of its severity.[193] This in turn, stimulates a disproportionate fear of crime to which politicians proceed to design their harshest crime-control strategies:

> Media portrayals of crime instil fear and profound concern in the public; the public express their concern to politicians, who in turn vie with each other to articulate, in the most sensational language, a tough philosophy of curtailment and containment of crime. *This self-affirming synergy generates a reactionary public and political discourse of fear and crisis which forms a fertile seed bed for repressive policy.*[194]

It seems likely that both of these processes took place throughout the 1990s with the result that the Irish population was, as Patrick Riordan speculated in his 1993 study of punishment in Ireland, "at the mercy of events and subject to the immediacy of responses to crises highlighted by the media".[195] This becomes clear as one looks back throughout the literature documenting the dramatic changes that Irish society underwent throughout the 1990s. As Mairéad Seymour observes:

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[191] Garland, *The Culture of Control* (Oxford University Press, 2001), at 158.
[192] *Ibid.*, at 157.
[193] *Supra*, at 141-143.
[194] O'Mahony, *Criminal Chaos: Seven Crises in Irish Criminal Justice*, *op. cit.*, at 15. [emphasis added]
[195] Riordan, "Punishment in Ireland: Can We Talk About It?" in O'Mahony ed., *op. cit.* 558, at 568.

> Analysis of the literature on the expansion of punitive intervention suggests that the politicisation of the crime issue since the mid-nineties (Cotter, 1999; O'Donnell, 2004) fuelled by extensive media coverage of high profile crime cases and the ensuing moral panic were key factors in the development.[196]

Thirdly, Chapter 4 describes how modern conditions of "progress" and modernisation are capable of generating a widespread fear of the unknown *that includes* a fear of crime.[197] This category of fear is ripe for exploitation by the government,[198] which could set about being "seen" to reverse it using "sloganeering"[199] and high-intensity crime policies such as "zero tolerance" and large-scale penal expansion.[200] As McCullagh observes:

> Global anxieties and uncertainties become "condensed into the anxiety about safety" … This is a demand that politicians can respond to and the expansion of the prison population is the inevitable and highly popular outcome.[201]

3.2.1.2 Has the Dust of Populist Punitiveness Settled in the "Noughties"?

Several particularly gruesome murders have taken place in the state over recent years, some of which have attracted substantial public attention. The killings in 1996 of Detective Garda Jerry McCabe and journalist Veronica Guerin sparked mass public condemnation at the time,[202] creating a "textbook moral panic".[203] It is arguable that isolated, high profile crimes such as these have only inflated the public's growing but often objectively unmerited concerns about law and order.[204]

It is unlikely that a genuine crime crisis of sufficient magnitude to justify large-scale public outcry and panic has occurred at all in Ireland over the last two decades. And there are

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[196] Seymour, *Alternatives to Custody* (Business in the Community Ireland in Association with the Irish Penal Reform Trust, 2006), at 6. <http://www.iprt.ie/files/iprt/alts_to_custody_report.pdf> (visited 19 February 2007).
[197] *Supra*, at 173-174.
[198] Seymour, *op. cit*, at 10.
[199] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice*, *op. cit.*, at 115.
[200] McCullagh, "The Social Analysis of the Irish Prison System" in O'Mahony ed., *op. cit.* 595, at 609-612.
[201] *Ibid.*, at 611.
[202] *See* Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 92, 267; O'Donnell, "Seam of Policies Opening Up in 1996 has been Exhausted" *The Irish Times*, 19 June 2006.
[203] O'Donnell, "Crime and Justice in the Republic of Ireland" (2005) 2(1) *European Journal of Criminology* 99, at 106.
[204] *See* O'Donnell and O'Sullivan, *loc. cit.*; O'Donnell and O'Sullivan, *Crime-Control in Ireland: The Politics of Intolerance* (Cork University Press, 2001), at 30-45; O'Donnell, "Crime and Justice in the Republic of Ireland", *loc. cit.*, at 105-107.

certainly those who have sought to highlight this.[205] Vincent Browne recently advised the Irish to "Get Real, There is No Crime Crisis".[206] He stressed that:

> ... there has been no escalation in the scale of violent crime, the headline crime figures have remained in the 80,000 to 105,000 range for over 20 years ... Yes, some of the recent murders have been absolutely horrific ... But let's get a grip on this .. The murder rate hardly suggests a 'threat to democracy' ... And the message of all of this is: get real.[207]

Nevertheless, *over-estimations* of crime-seriousness are still rife amongst the Irish public. As Chapter 4 remarked, Minister for Justice, Equality and Law Reform, Michael McDowell has more or less confirmed that current crime policy in this country is designed to reflect the public's misconceptions first, and the crime rate second.[208] That such miscalculations have continued to survive a recent decline in the crime rate aligns the nation to a general trend identified by David Garland in *The Culture of Control* as having gripped public opinion in the UK and US over the last 30 or so years:

> Until recently ... recorded crime statistics showed an annual increase ... This secular pattern established a set of *cultural assumptions and collective representations that are now hard to dislodge*. Public opinion polls ... show that the majority of people believe that the crime problem is bad an getting worse and that crime rates will continue to rise in the future: a belief that persists even in periods where both recorded and actual rates are stable or declining.[209]

This process could be transported into a modern Irish context to explain lingering over-estimations of crime-seriousness that eclipse the country's relatively modest crime rate.

Irish people's continuing tendency to imagine a crime problem that is grimmer than in reality confirms that fear of crime still sweeps throughout their ranks. However, there is evidence to suggest that the *degree* of fear that accompanied public misperceptions in the 1990s did not survive the journey into the 21st century. Public opinion polls suggest that while people still over-estimate the crime rate, they no longer *fear* crime to a corresponding degree.

Issues of crime and disorder have rated lower in more recent public opinion polls. In a TNS MRBI poll of October 2006, it was discovered that the improvement of public services such as health, transport and education (56%) as well as the economy (13%), all surpass crime within the range the issues about which the Irish electorate are most

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[205] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 90-141; O'Donnell, "Challenging the Punitive Obsession", *loc. cit.*; O'Donnell and O'Sullivan, *loc. cit.*; O'Donnell and O'Sullivan, *op. cit.*, at 30-45.
[206] Browne, "Get Real, There is No Crime Crisis" *The Irish Times*, 20 December 2006.
[207] *Ibid.*
[208] *Supra*, at 176.
[209] Garland, *op. cit.*, at 107. [emphasis added]

concerned.[210] Crime (12%), along with the waste of public expenditure (9%) and the need to keep taxes low (6%) all registered relatively low on the radar of public concern.[211] Nowadays, it appears that crime is more likely to *fluctuate amongst*, rather than *dominate* the list of public-priorities. This contrasts considerably to the atmosphere of high-alert hypersensitivity that consumed public opinion on law and order in the 1990s.[212]

The situation today appears to be that while people still over-estimate the severity of the crime problem, their tendency to inflate the issue is no longer reflected in their relative fear of it. It seems that the causal nexus between over-estimations of crime and the proportionate fear of being victimised has been dramatically ruptured. A Garda Research Unit Public Attitudes Survey in 2006, found that while 86% of respondents thought that crime was generally increasing, [213] 71% reported feeling safe out walking in their neighbourhood after dark,[214] 86% felt safe alone in their homes at night,[215] less than half (40%) worried about becoming a victim of crime themselves[216] and the majority of respondents indicated that their fear of crime did not affect their quality of life significantly – 25% claiming to be moderately affected and 29% reporting no affect at all.[217]

The natural product of this levelling-off in public concern about crime is the erosion of the "punitive obsession" of the 1990s. 79% of respondents in the 2006 Garda Report felt that prison does not prevent re-offending and, boding well for restorative justice, 62% believed that "[a]lternatives to prison, such as a community service, fines, and probation, should be used for all but the most serious crimes and offenders".[218]

On the other hand, despite some degree of public disillusionment with imprisonment and in the absence of optimum judicial usage of alternative sanctions, public support for hard-hitting anti-crime measures still holds firm. While the intensity of prevailing "populist punitiveness" has diminished along with the public "panic" about crime, the seemingly ubiquitous pull to over-estimate the crime situation is still too strong to allow the Irish public to withdraw their support for the toughest crime-control tactics. A recent public survey on crime and law-enforcement concluded that:

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[210] *See* Collins, "Coalition Five Points Ahead of FG-Labour Alternative" *The Irish Times*, 14 October 2006.
[211] *Ibid.*
[212] *Supra*, at 339-340.
[213] Kennedy and Browne, *Garda Public Attitudes Survey 2006* (Garda Research Unit, 2006), at 48.
[214] *Ibid.*, at 41.
[215] *Ibid.*, at 42.
[216] *Ibid.*, at 45.
[217] *Ibid.*, at 48.
[218] Kennedy and Browne, *op. cit.*, at 52.

> ... the public strongly supports current policy to increase the number of Gardaí on our streets, the establishment of a Garda Reserve and the employment of civilians in Garda stations.[219]

As Chapter 5 revealed, it appears that the most aversive crime-control tactics currently sculpting government crime policy are specifically designed to meet a residual degree of unwarranted public anxiety about crime – a possible, albeit diluted hangover from the 1990s crime "panic". While the statistics no longer corroborate a public "obsession" with crime, they still support a fear that exceeds objective risks, which can only be subdued with the promise of hard-hitting crime policies.

A survey, undertaken by TNS MRBI in March 2006, found that 73% of the 1,009-strong sample-group "strongly" supported the creation of a Garda Reserve.[220] Over 75% of respondents felt that there were too few police officers patrolling the streets. This is despite the fact that, as Michael McDowell asserts "the number of crimes per head of population is significantly lower now than it was 10 years ago".[221]

Bearing all of this in mind, it is likely that there is a greater balance between retributive and restorative public opinion today than there was ten years ago and now may be as good a time as any for restorative justice's successful integration. Alternative philosophies of sentencing, such as restorative justice, are arguably *less vulnerable* today to being suffocated by frenzied, public retributivism than they would have been at various points over the last ten to fifteen years.

Crucially, however, the end of the "punitive obsession" far from obviates the need for concerted governmental efforts to earn and maintain public confidence in a prospective system of restorative justice. Because of the fluctuating nature of public opinion – as evidenced from its recent track record – and given its arguable vulnerability to manipulation, the government will have to endeavour diligently to maintain public confidence in any new justice innovation, particularly throughout its infancy. Thus, maintaining compatibility between the principles of restorative justice on the one hand and prevailing public consensus on crime on the other is a balancing act that must be taken very seriously by the framers of an incoming restorative regime.

Awareness-raising about restorative justice and the implications of its absorption into traditional criminal justice is crucial, lest the paradigm be widely received by public, judiciary and politicians alike as an insufferably "soft option" against crime. One means of

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[219] McDowell in Department of Justice, Equality and Law Reform, "Minister Publishes Preliminary Results of Public Survey on Crime and Law Enforcement", *Press Release*, 22 March 2006. <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6N6PCZ-en> (visited 17 February 2007).
[220] *Ibid.*
[221] *Ibid.*, at para. 4.

raising public-awareness of restorative justice is to encourage *collaboration* between restorative justice service providers and support agencies for victims throughout the community, such as Victim Support, Rape Crisis Centres and Women's Aid.

It is encouraging that some degree of collaborative lobbying and awareness-raising has already taken place in past years. There have been concerted efforts between the Irish Penal Reform Trust and other organisations such as Extern Northern Ireland to coalesce to form an all-Ireland restorative justice lobbying "super-group".[222] Moreover, a range of organisations sympathetic to the values and ambitions of restorative justice, including Pax Christie, St. Vincent de Paul, Amnesty International and the Irish Commission for Prisoners Overseas, has united to support and co-ordinate *Restorative Justice/Prisoners' Week*, which takes place on a yearly basis.[223]

Awareness-raising endeavours should continue unabated, regardless of the government's landmark announcement in January 2007 that it is to finally "take the plunge" and set about implementing an Irish system of restorative criminal justice.[224] Awareness-raising should also survive the eventual *establishment* of such a system; support for an up-and-coming system of restorative justice will be crucial to its implantation, use and prosperity. Awareness-raising and lobbying constitute two effective vehicles by which to cultivate a credible image of restorative justice in this country that inspires not only public but also judicial and political confidence in a diversified sentencing menu and a widespread sense of comfort and familiarity with the values of restoration that will penetrate Ireland's sentencing calculus.

Equally important in earning public confidence in restorative justice will be its dramatic *promotion* from its current position of experimental marginality to an official legislative,[225] nationwide programme[226] that is funded and resourced accordingly.[227] Finally, the *quality* of a prospective system's design and implementation will be key. As the Oireachtas Joint Committee contemplating restorative justice's future in Ireland recognised:

> ... public perceptions of RJ effectiveness are closely related to the quality of its implementation, staff training and funding ... an RJ programme will only be a soft option if it is not properly implemented.[228]

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[222] *See* O'Keeffe, C., "Restorative Justice a Positive Response to the Problem of Crime" *The Irish Examiner*, 20 November 2001.
[223] *See* O'Donoghue, Dáil Éireann, Vol. 496, 10 November 1998, at para. 367.
[224] *Supra*, at 43-44.
[225] *Infra*, at 362-365.
[226] *Infra*, at 375.
[227] *Infra*, at 375-378.
[228] O'Keeffe, J., *loc. cit.*, at 14.

Finally, people's awareness of restorative justice, as well as their contentment and security therewith will also benefit from enhanced *judicial* reliance on restorative justice, whose encouragement is contemplated below.[229]

3.2.2 Political Attitudes to Restorative Justice: A Game of Two Halves

The Irish government's crime policy over the last ten years can be characterised by an appreciable degree of dichotomy. On the one hand, it has regularly endorsed restorative justice and other less punitive alternatives to incarceration. On the other, it has promised tough crack-downs on criminality through the introduction of incursive penalties such as ASBOs[230] and aggressive aversionary tactics such as zero-tolerance. But, just as a *hybrid* model of restorative criminal justice can survive a happy balance of public retributiveness and restorativism, so it can tolerate a balanced blend of punitive and restorative government policy.

The need for balance, however, must be stressed in this regard. Should governmental punitiveness begin to spiral out of all proportion to its commitment to restorative justice, it is self-evident that the latter component of its crime policy will suffer. This thesis' proposed *prioritisation* of restorative justice as the primary response to criminality (when and where appropriate) must be bolstered by a degree of genuine restorativism that is unobstructed by the government's *disproportionate* expansion of retributive answers to crime.

From paying polite tribute to its foreign achievements, to expressing curious interest about its potential in Ireland, to anticipating its imminent implementation, Irish politicians have come a long way in recent years in their dedication to restorative justice. Back in 1998, Michael McDowell stated that he was:

> ... fully committed to many of the concepts of restorative justice and measures as alternatives to custody in cases where the court decides that a sentence of imprisonment is not appropriate. New Zealand has been for a few decades to the forefront in the development of a restorative philosophy...[231]

This curiosity eventually prompted the Irish government to provide financial backing for two experimental programmes of *ad hoc* restorative justice, which have operated in Ireland since 1999.[232] The pilot schemes at Nenagh and Tallaght have received considerable political praise since their inception, as governmental persuasion by the merits of restorative justice has gradually solidified:

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[229] *Infra*, at 355-359.
[230] *Supra*, at 234-235, 321-322.
[231] Former Minister for Justice John O'Donoghue, Dáil Éireann, Vol. 497, 26 November 1998, Question 32.
[232] *Supra*, at 310-319.

> My department has a strong commitment to the principles of restorative justice and is very clear about the advantages it offers to communities and victims of crime ... Expansion of the dedicated restorative justice projects is desirable and I intend to develop further such projects through the probation and welfare service as and when resources allow.[233]

Of *Restorative Justice Services'* reparation project at Tallaght, Minister McDowell observed in mid-2006 that:

> Much media attention and indeed public debate centres on imprisonment versus community based or non-custodial sanctions. Much less focus is given to making greater use of community based options, like this one, which, I believe, seriously challenge offenders to not only reflect on and take responsibility for his/her offence but to commit to restorative actions.[234]

Additionally, as indicated above, the government's growing persuasion by restorative justice is further evidenced by its injection of several core restorative principles into Ireland's juvenile justice system.[235]

It now appears that curiosity has turned to conviction with Minister Michael McDowell's recent announcement that he is to heed the recommendation of the Oireachtas Joint Committee's recent *Report on Restorative Justice* and establish a *National Commission on Restorative Justice* to draw up plans for a nationwide system of adult restorative justice.[236] At the national conference of *Restorative Justice Services* in November 2006, Minister McDowell asserted that there is now "no option but to go down the restorative justice road", stressing that incarceration must be a last resort.[237] It seems that the Irish government has finally been won over by the promise of restorative criminal justice. There is, however, another side to the story.

Ireland's criminal justice policy over the last fifteen years has contained a decidedly *un*restorative array of hard-hitting strategies such as zero-tolerance,[238] mandatory minimum sentencing[239] and Anti-Social Behaviour Orders (ASBOs).[240] Moreover, future proposals

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[233] McDowell, Dáil Éireann, Vol. 571, 30 September 2003, Question 1123.
[234] McDowell, "Address", Launch of the 2005 Report of the Tallaght Restorative Justice Services, *loc. cit.*, at para. 5.
[235] *Supra*, at 319-322.
[236] *Supra*, at 43-44.
[237] McDowell, "Opening Address", *loc. cit.*
[238] *See National Crime Forum Report 1998*, *op. cit.*, 161-167; O'Donnell and O'Sullivan, *op. cit.*, at 30-45; on zero tolerance generally, see Innes, "An Iron Fist in an Iron Glove? The Zero Tolerance Policing Debate" (1999) 38(4) *The Howard Journal* 397.
[239] *Infra*, at 368-370; see McDowell, "Address", *Sentencing in Ireland*, First Edward O'Donnell McDevitt Annual Symposium, 28 February 2004. <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ5XUD5V-en> (visited 14 April 2006); Ennis, "Mandatory Minimum Sentences in s. 15 Drug Cases" (2003) 8(1) *Bar Review* 30.

include mandatory drug testing in prisons,[241] massive prison expansion,[242] prison privatisation[243] as well as the controversial provisions of the new Criminal Justice Bill.[244] Furthermore, Minister McDowell's statement whilst speaking at *Restorative Justice Services'* National Conference in late 2006,[245] that imprisonment is "expensive, ineffectual and does not advance the social interest or common good" is also difficult to reconcile with his vocal dedication to increasing prison places.[246]

The Irish government has received sizeable criticism for its allegedly "more of the same" attitude to developing its criminal justice policy.[247] Rick Lines – in impassioned spirit – accuses Ireland's crime policy of lagging embarrassingly behind its international peers, relying continuously on the tried, tested and ultimately *unsuccessful* draconian crime-control customs of the past in the hope that they might arbitrarily begin to work in the present:[248]

> Today, Ireland's justice policy is little more than a car boot sale where we're being asked to purchase the *second-hand policies now being discarded by other countries* … Anyone who bothers to look at the international evidence and experience knows that these policies will inevitably fail, often with significant human, social, and financial costs …[249]

Even in recent weeks, the government has been accused of deceitfully "re-bottling" the same blend of usual punitive suspects and passing them off as fresh reforms in a bid to "do-up" existing crime policy in time for election season.[250] It seems that the same doubts circulating

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[240] O'Brien, "Rabbitte Swears by New Party Policy and Merits Minor ASBO" *The Irish Times*, 5 May 2006; Healy, *loc. cit.*; Downes and Coulter, *loc. cit.*; O'Brien, "Juvenile Justice System Reforms to Go Ahead" *The Irish Times*, 12 December 2005.

[241] "Sweeping Prison Reforms to Include Drug Testing" *BreakingNews.ie*, 22 June 2005. <http://archives.tcm.ie/breakingnews/2005/06/22/story208300.asp>; "Parole Board: Murdered Must Serve Lengthy Sentences" *BreakingNews.ie*, 24 August 2005. <http://archives.tcm.ie/breakingnews/2005/08/24/story217652.asp>

[242] *Infra*, at 376-377.

[243] "McDowell to Forge Ahead with Prison Plan" *BreakingNews.ie*, 30 June 2005. <http://archives.tcm.ie/breakingnews/2005/06/30/story209396.asp>; see also, Irish Penal Reform Trust, *Inspecting Private Prisons: An Evidence-Based Critique of the Prison Inspector's Call to Introduce Private Prisons in Ireland* (Irish Penal Reform Trust, 2006) <http://www.iprt.ie/iprt/1466> (visited 20 January 2006); see also Lines' critique of the Government's "behind closed doors" initiative to privatise the prison service, in Lines, "McDowell Must Clear the Air on Future of Prisons" *The Irish Times*, 2 September 2005; Lally, "Minister Outlines Plans for New Prison at Spike Island" *The Irish Times*, 6 May 2006.

[244] *Supra*, at 342-343.

[245] McDowell, "Opening Address", *Defining the Roles for Restorative Justice in Ireland: An Overview of the Work in Progress and a Summary of International Experiences*, National Conference of *Restorative Justice Services*, Distillery Building, Dublin, 18 November 2006.

[246] Lally, "Plan for Additional 1,000 Prison Places by 2011" *The Irish Times*, 20 November 2006.

[247] Lines, "Living in the Past: The Americanization of the Irish Prison System", *loc. cit.*; O'Connell, D., *loc. cit.*; see also, O'Donnell, "Seam of Policies Opening Up in 1996 has been Exhausted", *loc. cit.*

[248] Lines, "Living in the Past: The Americanization of the Irish Prison System", *loc. cit.*

[249] *Ibid.*, at paras 22, 29. [emphasis added]

[250] O'Connell, D., *loc. cit.*

in the 1990s about the possibility of ulterior, media-fed governmental motives lingering sinisterly behind the toughest anti-crime measures prevail to this day.

Donncha O'Connell, Dean of Law at the National University of Ireland, Galway believes that it is not only he who is attuned to the reality of government sloganeering. Of Minister McDowell's recent undertaking to legislate for the extension of detention periods, the restriction of the right to silence, the creation of new drugs offences and the provision of a DNA database,[251] O'Connell remarks that:

> Michael McDowell has delivered the curse of the answered prayer to an Opposition clamouring for "*more of the same but sooner*" and excited his own battalions in the run-up to the PD pre-election conference. It is a sad reflection on both Government and Opposition that no-one seems focused on either the efficacy or novelty of his proposals, concentrating instead on the battle of the soundbites. Timing, it would appear, is everything. But the victims of crime deserve better than this, as do an increasingly sceptical public bored by shallow responses to crime and that sees no real difference between the Government and any viable alternative. While the chorus of party political agreement will be passed off as a reflection of common sense, it is, in reality, an unthinking, media-driven consensus that is doomed to fail.[252]

Price opposes this stagnant approach to criminal justice reform. He laments that "[h]uman beings are the only species on earth that recognizes what is not working and then does more of the same."[253] The reasons for this inclination might lie in vote-grabbing political agendas or simply in a sincere commitment to established punitive traditions. Either way, a "more of the same" approach to criminal law reform is highly unlikely to create the synergistic results that *diversification* brings and is objectionable on this basis. And there *is* potential for reform through variation.

As Chapter 1 stressed, restorative justice is not endorsed herein because it is inherently superior to current sentencing patterns (though it may prove more effective at certain tasks).[254] Rather, it is its *attachment onto* the list of existing sentencing options, in a credible and effective form, which stands to improve the quality of criminal justice in this country. It is the *diversification* of normal sentencing practice by credible and effective alternatives that enhances the quality of justice administered thereby and not the relative superiority of one over the other. The result is legal synergy – *quality through a quantity of quality*:

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[251] *Infra*, at 342-343; Gartland, "Laws May Give Garda Too Much Power, Forum Told" *The Irish Times*, 18 February 2007; "Responding to Gangland Crime", *loc. cit.*
[252] O'Connell, D., *loc. cit.* [emphasis added]
[253] Price, "Can Mediation Produce Justice? A Restorative Justice Discussion for Mediators" (1997) 1(13) *ADR Report, News and Strategies for Alternative Dispute Resolution Practitioners* (Pike & Fischer Inc.) 2.
[254] *Supra*, at 38-41, 109-110.

> If a new drug does better than existing drugs at curing a disease, it is approved for marketing. But it may also be approved if the new drug does no worse than existing drugs. Then patients and doctors may choose among a wider range of drugs to find one most suited to the individual patient's needs.[255]

The Irish criminal justice system's looming system of restorative justice, if and when it comes to fruition, could – through the diversity it brings – immunise the Irish government to some extent from these "more of the same" claims. Nonetheless, it is arguable that the prospective retributive branch of its hybrid crime policy will still need to abate, at least partially, from its current intensity in order to allow restorative justice a point of access and to avoid cutting short its shelf-life.

The government's introduction of the adult ASBO testifies with particular cogence to the intensity of its retributive agenda. Any *hybrid* model of restorative criminal justice would, as its name suggests, obviously tolerate both punitive and restorative approaches to criminality; as explained above, there is nothing necessarily unworkable about a superficially "mismatched" blend of restorative and retributive techniques.[256] Nonetheless, because ASBOs threaten to punish conduct falling *below* the official threshold of criminality in an effective act of net-widening,[257] there is a risk that their future implementation *in tandem* with a budding network of nationwide restorative justice, could cause the public to question the sincerity of concurrent government-dedication to *both*. The retributive element of an incoming hybrid system could require dilution lest it fatally suffocate its restorative counterpart due to insufficient genuine political support for it and the public scepticism that will inevitably invite.

The above considerations arouse a cautious measure of optimism about restorative justice's potential compatibility with prevailing Irish political consensus on crime and its management. The government is expressing more commitment than ever to restorative justice and that is to be commended. It certainly looks feasible that restorative answers to crime may be able to sit comfortably alongside their traditional retributive counterparts in the future. Still, the end in sight is *harmonious co-existence* and considerable care must therefore be taken to prevent a hybrid system's punitive branch, given its current dominance under Irish criminal law, from overpowering and ultimately smothering its restorative neighbour.

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[255] Strang and Sherman, "Repairing the Harm: Victims and Restorative Justice" (2003) 15 *Utah Law Review* 15, at 42.
[256] *Supra*, at 214-215, 329-335.
[257] *Supra*, at 234, 321.

3.2.3 Judicial Attitudes

> ... unless there is judicial commitment to promoting restorative justice, it is plausible that it will be consigned to the margins of the justice system, undermining its effectiveness and transformative abilities.[258]

Judicial indifference, scepticism or outright opposition to restorative justice could fatally obstruct the paradigm's implantation into Irish criminal justice. Restorative justice can exert little influence in this country without sufficient judicial belief to sponsor regular referrals. This is a reality that was recognised by Anna Rynn, one of the founders of the Tallaght Victim-Offender Mediation Service at the time of its inception: "Any alternative to custody has to be credible and has to be seen to work so we will have to sell it to the judges."[259]

More recently, the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights, while recommending greater recourse to restorative justice in Ireland, recognised the potential for judicial obstruction thereto. It claimed that " ... a major impediment to RJ programmes in Ireland has been a lack of awareness and interest amongst members of the judiciary ..."[260] As a result, the Committee recommended awareness-raising strategies to boost judicial knowledge about and confidence in restorative programmes.[261]

Unfortunately, the impact of judicial opposition is hard to avoid. As Chapter 9 later argues, judicial resistance to restorative justice is safeguarded by the high degree of discretion enjoyed by sentencing judges, which could provide the perfect outlet for judges' implicit, yet unequivocal expressions of distaste for alternative sentencing techniques.[262] As Chapter 9 explains, judges' ability to express their opposition to restorative justice practically by creatively avoiding restorative referrals could prove fatal to restorative justice's early development. [263] Moreover, judicial discretion has proven tricky to constrain statutorily; attempts to rein Irish judges within certain prescribed sentencing patterns have been problematic in the past.[264] Doing so in the interests of protecting restorative referrals is unlikely to be any easier in the future.

That restorative referrals in Ireland currently rely on the intercession of so few members of the judiciary is a product of the extremely small-scale three-strong restorative system currently that is presently operative. Only the handful of district courts occupying the

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[258] Goodyer, "Rethinking Justice in New Zealand – A Critical Assessment of Restorative Justice" (2003) 9 *Canterbury Law Review* 179, at 196; see also, Sarnoff, *loc. cit.*, at 34.
[259] O'Doherty, *loc. cit.*; see also, O'Dwyer, *loc. cit.*, at 16.
[260] O'Keeffe, J., *loc. cit.*, at 43.
[261] *Ibid.*, at 43-44.
[262] *Infra*, at 369-370.
[263] *Ibid.*
[264] *Ibid.*

catchment zones of the restorative pilot schemes at Tallaght and Nenagh routinely refer offenders to restorative justice.[265] It is therefore unsurprising that judges *outside* those catchment areas have been reluctant to innovate their own restorative treatment plans for victims and offenders. In fact, there is only one account on record of a judge having detoured in this manner.

In December 2006, Mr. Justice Carney, in the Central Criminal Court, offered restorative justice to the family of a murder victim *outside* of the traditional avenue that usually ferries *minor offenders* between local district courts and restorative pilot programmes.[266] While this is a promising indicator of an increasingly hospitable mainstream environment to restorative interventions and a welcome endorsement of using restorative justice in cases of serious crime,[267] it was an opportunity that lapsed. The family in question declined to take part. Moreover, it is a scenario that is arguably unlikely to recur until the government dispatches restorative justice formally into mainstream officialdom.

Additionally, the lingering experimental identity of the existing pilot projects coupled with their limited jurisdictions and relatively meagre referral figures does few favours for restorative justice's credibility in this country. All this could change, however, with the dawn of an incoming *nationwide*,[268] *legislative*[269] system of restorative justice. Accordingly, it is dangerous to rush to judgement and assume that the problem of struggling referral rates will also afflict a properly resourced and statutorily implemented future system of restorative justice in this country.

Furthermore, even at present, despite its reluctance to innovate restorative answers in districts in which they are not formally on offer, the Irish judiciary is generally receptive to a range of non-custodial alternatives such as probation and suspended sentences; it is also content to innovate others itself such as its development of the poor box system[270] and its use of "supervision during deferment of penalty".[271] While such alternatives cannot be classed as expressions of full restorative justice,[272] many of them *are* imbued with isolated restorative aspirations such as rehabilitation and compensation.

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[265] *Supra*, at 310.
[266] "Family of Killed Man in Mountjoy Refuse 'Restorative Justice'" *The Irish Times*, 19 December 2006.
[267] *Infra*, at 383-386.
[268] *Infra*, at 375.
[269] *Infra*, at 362-365.
[270] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 261; Coulter, "New Fund Set to Replace Court Poor Box" *The Irish Times*, 20 September 2005; Coulter, "Poor Box in Courts Could be Thing of the Past" *The Irish Times*, 30 March 2004; see The Law Reform Commission, *Consultation Paper on the Court Poor Box* (LRC CP31-2004).
[271] O'Donnell, "Crime and Justice in the Republic of Ireland", *loc. cit.*, at 120.
[272] *Supra*, at 15-16.

In addition, Irish judges' arguable over-use of imprisonment with respect to relatively minor offences, considered in Chapter 1,[273] may prove less of a threat to restorative justice than might be initially assumed. So too might evidence of a rising prison population, which is prone to exceeding periodic reductions in the rate of imprisonment; this disparity between "stock and flow" has been attributed to the increased use of remand,[274] a decline in the use of temporary release,[275] the jailing of non-nationals and detention of deportees.[276] In any event, as Kilcommins and associates further speculate, neither excessive imprisonment *nor* a rising prison population can be equated conclusively with a proportionate rise in judicial punitiveness.[277] And this is of considerable relevance to restorative justice's future prospects in this country.

While a hybrid justice model can, as its name suggests, absorb a *balanced degree* of dichotomy in judicial attitudes to retributive and restorative sentencing, a *glut* of judicial punitiveness could effectively suffocate a cross-bred justice model's restorative content. As Chapter 1 stressed, judges' perceived favouritism for incarceration could be more probative of a perceived shortage of *appropriate alternatives* than a blinkered dedication to punitive sanctions themselves.[278] As Kilcommins and colleagues explain:

> ... in an international context, Ireland appears relatively punitive when the prison population is expressed per 1,000 crimes. The proportionate use of custody was three times as high as England and Wales and the Netherlands, and five times as high as Finland. ... The great unknown in such analyses is whether Irish judges use prison in minor cases because they feel they have no other options. *If a full menu of community penalties and measures were available, this apparent punitiveness might be shown as a consequence of limited options rather than the desire for tough sentencing.*[279]

Restorative justice's *diversification* of existing sentencing options will provide one means by which the latter situation can be clarified. The degree of judicial punitiveness in Ireland can only really be revealed unambiguously when judges are afforded a greater number of alternatives to incarceration, particularly those that provide *more effective, appropriate* responses than the non-custodial specimens currently on offer.

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[273] *Supra*, at 38-39.
[274] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 242-249; see also, O'Donnell, "Imprisonment and Penal Policy in Ireland" (2004) 43(3) *Howard Journal* 253, at 259.
[275] O'Donnell, "Imprisonment and Penal Policy in Ireland", *loc. cit.*, at 260-261.
[276] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 256-259; O'Donnell, "The Cost of an Infatuation with Locking Up People" *The Irish Times*, 22 December 2004; O'Donnell, "The Enthusiasm to Incarcerate is Difficult to Justify or Understand" *The Irish Times*, 4 November 2005; 2185 non-nationals were committed to prison in 2005, 40% of whom were committed for short periods of detention under immigration laws. 25% in total of those imprisoned in 2005 were non-nationals: Irish Prison Service, *Annual Report* 2005 (Department of Justice, Equality and Law Reform, 2005), at 3, 10.
[277] O'Donnell, "Imprisonment and Penal Policy in Ireland", *loc. cit.*, at 260-261.
[278] *Supra*, at 39.
[279] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *op. cit.*, at 251.

The Irish judiciary's future receptiveness to restorative referrals is difficult to divine from present circumstances. The potential for reluctance, uncertainty or outright judicial rejection of restorative justice, given how difficult it is to avoid completely and given its potentially mortal consequences for the paradigm, must be accepted and used to fuel a *realistic* measure of caution about its future integration.

There are, at the same time, grounds for optimism. Preventative measures designed to deflect the risk of judicial frustration of restorative objectives will be important to any incoming system of restorative criminal justice. Awareness-raising could prove highly effective in this respect. The Joint Committee specifically recommends a judicial training programme in restorative justice.[280] These gentler attempts to encourage organic judicial persuasion by restorative justice may prove more effective at cultivating genuine judicial confidence in the paradigm than more aggressive attempts to *manufacture it artificially*, for instance, via a legal *compulsion* to consider restorative referrals, considered in Chapter 9.[281]

However, in order to *optimally* insulate a vulnerable system of embryonic restorative justice from the risk of expulsion by an inhospitable, unsupportive legal environment in this country, the training of its judiciary alone will not suffice. The innovation of extensive and diverse awareness-raising initiatives must also be directed at a broad array of legal professionals such as solicitors, barristers, court-officials, probation officers and Gardaí on whose backing the referral of matters to restorative initiatives will also depend. This is already the case with respect to the decision to refer offenders to the pilot schemes currently in place in Ireland. As O'Dwyer observes, the impetus to pursue VOM at Tallaght frequently does not even originate in the judge. He reveals that:

> [i]n practice, what often happens is that the Probation officer, the police or the defendant's legal representative suggests that the case is suitable for referral. If the judge concurs, then the case is adjourned to allow assessment.[282]

Whatever the eventual format of Ireland's impending system of restorative justice and whatever the systems put in place to initiate restorative referrals, it will inevitably rely on a sturdy foundation of professional support. It might be recalled from Chapter 7 that New Zealand's integration of restorative justice into its criminal justice system acknowledged the potential input of a *range* of legal professionals in instigating restorative interventions.[283] Section 9(2) of its Victims' Rights Act, 2002 provides that:

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[280] O'Keeffe, J., *loc. cit.*, at 44.
[281] *Infra*, at 368-371.
[282] O'Dwyer, *loc. cit.*, at 6.
[283] *Supra*, at 267.

> [i]f a suitable person is available to arrange and facilitate a meeting between a victim and an offender to resolve issues relating to the offence, *a judicial officer, lawyer for an offender, member of court staff, probation officer, or prosecutor* should encourage the holding of a meeting of that kind.[284]

4. Conclusion

This chapter has illuminated a substantial degree of harmony between restorative justice and Ireland's contemporary socio-legal climate, including its civil and criminal justice systems and prevailing popular consensus on how crime should be managed. It concludes that there is no specific evidence *at present* to indicate that restorative justice is likely to offend the sensibilities of Ireland's legal and cultural norms to such an extent in the near future that it can no longer be sustained. Moreover, it identifies effective modes of minimising the likelihood that emerging disharmonies could stub out restorative justice's budding embers. These methods include (a) intelligent system-design, implementation and quality-control and (b) a serious commitment to awareness-raising techniques for lay-people and legal professionals alike.

At the same time, this chapter's call for vigilance, care and precaution when rooting restorative justice in established attitudinal and practical contexts, has failed to expand the former half of this thesis' cautiously optimistic tone such that it threatens to overpower the latter and destroy the appeal of restorative justice's introduction in this country. Accordingly, the optimism kindled by Chapter 5's confirmation of the paradigm's emotionally therapeutic, holistic potential has survived this chapter's contextual scrutiny intact.

With realism, foresight, care and composure, restorative justice's ongoing compatibility with Ireland's socio-legal tastes can be safeguarded sufficiently to preserve the shelf-life of a hybrid restorative/punitive criminal justice model.

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[284] "Appendix 1: Restorative Justice Provisions in the Sentencing Act 2002, Parole Act 2002, and Victims' Rights Act 2002", at para. 20. <http://www.justice.govt.nz/restorative_justice/appendix_1.html> (visited 12 January 2006). [emphasis added]

Chapter 9

Proposals for Restorative Justice's Practical Integration into Adult Criminal Justice in Ireland

1. Introduction

The foregoing chapters have yielded a trio of core conclusions that have built a sturdy case for constructing a hybrid model of restorative/retributive criminal justice in Ireland. Together, they arouse a sense of *cautious optimism* about the potential benefits of restorative justice's official integration into Irish sentencing practice:

(1) Chapters 2-5 established that restorative justice is an effective and credible tool of balanced, holistic emotional healing.

(2) Chapters 7 and 8 determined that restorative justice is likely to be compatible both with Ireland's traditional criminal justice norms and its prevailing attitudes to crime-control.

(3) Chapters 6, 7 and 8 proved that the element of risk accompanying restorative justice's integration can be managed with (a) the exercise of reasonable caution, (b) intelligent system-design, implementation and quality-control and (c) a serious commitment to awareness-raising techniques directed at all those involved in criminal justice – judges, politicians, professionals and public alike.

This chapter performs two final tasks. First, it contemplates the *practical realities* of restorative justice's integration into Irish sentencing practice. To this end, it diagnoses the ideal features of a restorative criminal justice system, which are individually chosen for their abilities to maximise its emotionally therapeutic ambit by safeguarding its effectiveness, credibility and ultimately, its lifespan. Secondly and finally, the chapter tenders some concluding remarks to draw this thesis to a close.

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Restorative justice is a *philosophy* moulded by a set of values or principles. It is not a practice. Its ideological content has influenced *but has not dictated expressly* how its practical manifestations have evolved over time. For instance, inter-party mediative dialogue is merely the *practical expression* of restorative justice's *philosophical teaching* that conflict belongs to the parties thereto. As John Braithwaite stresses, "there is no blueprint for how an ideal restorative justice system should work. *There are restorative values* ... [that] inform a vision for reform".[1]

One critical advantage of the research embodied in the preceding chapters is that it enables an *informed choice* of the practical wrapping in which to best present an incoming restorative regime. It discourages impulsive or absent-minded decisions to adopt the traditional practical expressions of restorative philosophy, based simply upon their popularity, endurance or emotive rhetoric. Instead, the foregoing analysis promotes the informed and measured selection of specific restorative techniques for their ability to implement comprehensively restorative justice's diverse value-system. This research *enriches the motives* that fuel restorative reform, discouraging simplistic, valueless clones[2] of restorative justice's "usual practical suspects", such as VOM, in favour of decisions that are considered, rational and judicious.

So, a profound and extensive understanding of restorative justice, such as that provided herein, can *purify* the motivations for reform. And it has done so with respect to the motives underlying this thesis' strategic preferences. VOM has prevailed in this thesis as the ideal practical vessel for restorative philosophy.[3] It was not, however, chosen simply for its domination of global restorative justice over the last 30 years; nor was it selected purely on foot its success stories, nor for the alluring appeal of its romantic rhetoric of peace-making, healing and restoration. Rather, the foregoing research has enabled an informed and measured evaluation of VOM's ability to implement restorative justice's value-system in a satisfactory way.

Yet, a restorative system's design is not complete with the choice of a suitable practical setting. The internal procedural content thereof must be further tweaked in order to implement as *effectively as possible* a comprehensive complement of restorative principles. For instance, this chapter, for the most part, endorses the shared procedural characteristics of

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[1] Braithwaite, "Principles of Restorative Justice" in von Hirsch, Bottoms, Roach and Schiff eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart, 2003) 1, at 4. [emphasis added]
[2] *Supra*, at 262-265.
[3] *Supra*, at 187-189.

Ireland's three restorative pilot schemes.[4] At the same time, however, it identifies room for improvement in their abilities to maximise their restorative effects.

The following discussion proposes that Ireland's looming system of nationwide restorative justice should mirror the main procedural emblems of the existing restorative pilot projects, such as referral, adjournment, restorative actions plans, report-preparation and re-referral. But it additionally recommends five crucial *adjustments* to the schemes' present design, which are chosen for their potential to *optimise* a future restorative system's emotionally therapeutic impact, effectiveness and ultimately, its credibility.

These five procedural features are recommended below for adoption by the forthcoming system of restorative criminal justice that has recently entered the horizon of adult criminal justice in Ireland.[5] They represent adjustments to a quintet of corresponding procedural features that currently *limit* the emotionally reparative scope of Ireland's three restorative pilot programmes, the remaining procedural aspects of which are considered sufficiently effective to be maintained and replicated under any incoming restorative regime. Two of these amendments also deviate from and to some extent *modify* the procedural dimensions of the restorative system proposed recently by the Oireachtas Joint Committee researching restorative justice in Ireland.

2. Five Desirable Features of a Court-Annexed Restorative Network for Adult Offenders in Ireland

2.1 Legislation

Affording an incoming framework of restorative justice a legislative foundation will reinforce two important crutches of the structure's overall integrity and staying-power. First, it stands to boost the paradigm's *credibility* throughout public, judicial and political domains. Secondly, it provides an important vehicle through which *judicial support* for restorative justice can be maintained.

2.1.1 Legislation Promotes Awareness and Perceptions of Credibility

A substantial hindrance to the credibility of Ireland's three restorative pilot projects is their lack of a legislative footing. Their continuing experimental-status, small number of referrals and modest government funding[6] invests the schemes with an air of transience and uncertainty; they appear "worth a try", yet undeserving of official recognition. A programme that suffers *protracted* pilot-status does not inspire much confidence in the techniques that

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[4] *Supra*, at 310-319.
[5] *Supra*, at 43-44.
[6] *Infra*, at 375.

operate there-under, no matter what form they take, the success with which they achieve their goals or how popular they have become within legal and political commentary.

In essence, as Chapter 8 revealed, maintaining a budding restorative system is all about maintaining referral numbers.[7] And in order to do so, restorative justice must be able to capture the imaginations of all those on whose authority the decision to refer will depend. This category includes not only the judges and legal professionals who will raise restorative justice as a sentencing option from case to case, but also the prospective participants in restorative mediation – victims and offenders – whose voluntary accession is necessary[8] to make a proposed referral a reality.

A nationwide referral system that is fully embedded within an official legislative seedbed is more likely to appeal to each of the aforementioned parties than one that operates around the fringes of officialdom and has only the elusive whim of judicial spontaneity to cling to.[9] The former will benefit from a higher public, legal and governmental profile than the latter that will therefore attract closer public scrutiny – a factor that is likely to heighten *general awareness* of restorative options. Kieran O'Dwyer supports the legislative integration of restorative justice on this basis:

> My view is that it would help because statutory requirements cannot be ignored. The Children Act 2001 gave a big impetus to the diversion programme … It would have to be framed carefully but *it would probably give a strong fillip to the movement.*[10]

Ensuring that restorative justice puts down legislative roots early-on provides a vital means by which public-awareness, -familiarity, -approval and -respect can all be consecutively earned, insulating an immature restorative system from the peril of an early demise due to lack of support.

This recommendation is in keeping with the position of the Oireachtas Joint Committee that recently presented a selection of proposals to guide the government's future development of restorative justice in Ireland.[11] The achievements of the restorative pilot projects appeared to provide considerable impetus for the Committee's promotion of restorative legislation:

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[7] *Supra*, at 355.
[8] *Supra*, at 238-241.
[9] *Supra*, at 356.
[10] O'Dwyer, cited in O'Keeffe, J., "Report of the Rapporteur to the Joint Committee on Justice, Equality, Defence and Women's Rights on the Potential Benefits of Restorative Justice Methods in Ireland" in Joint Committee on Justice, Equality, Defence and Women's Rights, *Report on Restorative Justice* (Houses of the Oireachtas, 2007) 3, at 39-41. [emphasis added]
[11] O'Keeffe, J., *loc. cit.*, at 38-41.

> ... the Nenagh and Tallaght pilot projects have been highly successful in implementing RJ services within their respective communities. In light of this encouraging work, and convincing international evidence, the Joint Committee recommends that RJ services should be extended to adults on a statutory basis.[12]

2.1.2 Legislation Promotes Judicial Acceptance: Estimating Restorative Justice's Potential Impact on Judicial Discretion

The second reason that legislation stands to insure restorative justice's shelf-life is because its *content* can be styled to promote judicial referrals and avoid the catastrophic results of widespread judicial opposition, doubt or indifference. Various provisions can be inserted into restorative justice's statutory source to set the terms of the paradigm's authority and application. The legislation's finer procedural minutiae is open to debate and exceeds the scope of this thesis. Issues such as the protection of participants' procedural rights e.g. their right to legal representation,[13] the avoidance of prejudice, [14] mediative confidentiality, [15] mediator qualifications[16] and neutrality[17] as well as quality control[18] and accountability[19] in restorative justice will all provide food for thought when drawing up the relevant legislation. However, the following discussion is concerned exclusively with legislative provisions that impact more directly on the judicial decision to make a restorative referral.

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[12] *Ibid.*, at 39.

[13] *See* Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice" (2000) 47 *UCLA Law Review* 949 at 1095-1104; Brunet, "Questioning the Quality of Alternative Dispute Resolution" (1987) 62 *Tulane Law Review* 1, 45-46; Delgado, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) 6 *Wisconsin Law Review* 1359.

[14] Delgado, *loc. cit.*; Rosenberg, "In Defense of Mediation" (1991) 33 *Arizona Law Review* 467.

[15] There is currently no legal protection in Ireland for the confidentiality of matters disclosed in restorative justice: see Irish Victim Support, "Policy on Restorative Justice in Criminal Justice", 17 October 2003, at 2, 4. <http://www.restorativejustice.org.uk/Resources/pdf/Vic_Supp_on%20RJ_in_CJOct03.pdf> (visited 17 April 2006); although there are obligations under European law: see Council of Europe Recommendation (1999) 19 Concerning Mediation in Penal Matters; for a potential approach to *adult* restorative mediation, see the confidentiality provisions of the Children Act, 2001: ss. 14, 48, 50 and subss. 32(7)-(9); for a discussion of confidentiality in mediation generally, see Green, "A Heretical View of the Mediation Privilege" (1986) 2 *Ohio State Journal on Dispute Resolution* 1; Rosenberg, "Keeping the Lid on Confidentiality: Mediation, Privilege and Conflict of Laws" (1994) 10 *Ohio State Journal on Dispute Resolution* 157.

[16] Irish Victim Support, *loc. cit.*, at 2; Hill, "Qualification Requirements of Mediators" (1998) 1 *Journal of Dispute Resolution* 37; Devine, "Mediator Qualifications: Are Ethical Standards Enough to Protect the Client?" (1993) 12 *St. Louis University Public Law Review* 187.

[17] Abel refers to "the myth of the neutral advocate" implying that mediator-neutrality is unlikely to be achieved in practice: see Abel, "The Contradictions of Informal Justice" in Abel ed., *The Politics of Informal Justice Volume 1* (Academic Press, 1982) 282; Reuben, *loc. cit.*, at 1094; see also, Engle and Merry, "Myth and Practice in the Mediation Process" in Wright and Galaway eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Sage, 1989) 239, at 244-245.

[18] Brunet, *loc. cit.*; Braithwaite, "Setting Standards for Restorative Justice" (2002) 42(3) *British Journal of Criminology* 563.

[19] Roche, *Accountability in Restorative Justice* (Oxford University Press, 2003).

The only provision that should feature conclusively in incoming legislation is an initialising clause that announces restorative justice officially as a new sentencing option and *authorises* judges to make restorative referrals. Like New Zealand's Sentencing Act, 2002, considered in Chapter 7,[20] this fundamental life-giving provision should establish a restorative basis for sentencing, the adjournment of matters for restorative referrals and the judicial consideration of their outcomes. This fundamental provision is likely to act as a primary source of a new system's credibility amongst public and judiciary. On its own, it can fulfil a key rationale for legislating *at all* for restorative justice.

Yet, in order to *further secure* restorative justice's new position in sentencing practice by maintaining healthy referral-rates, it might be tempting to statutorily "push" judges in the right direction by inserting certain supplemental provisions. Three approaches can be adopted in this regard: (a) *curtailing* judicial discretion through a statutory compulsion to consider restorative referrals,[21] (b) *guiding* judicial discretion through statutory criteria for making referrals[22] or (c) *resisting interfering* with judicial discretion whatsoever and trust that the culmination of awareness-raising, restorative justice's new legislative profile as well as judicial pragmatism and training, will be a referral-rate of sufficient health to safeguard a restorative system's survival.

On the one hand, all three options will ultimately *expand* judges' sentencing discretion in a common respect. This is because simply adding restorative justice to the existing range of sentencing options will necessarily enhance judicial choice; discretion will grow proportionate to a rise in diversity. The following discussion opens with a consideration of the desirability of this primary impact of restorative justice's integration.[23]

On the other hand, only the first two provisions threaten to *limit* judicial discretion at the same time as they broaden it. The analysis then turns to contemplate the nature and consequences of all three options. There is a delicate balance to be struck in this respect, between the constitutional principle of judicial autonomy on the one hand and the preservation of a vulnerable, yet potentially valuable emergent sentencing practice on the other.

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[20] *Supra*, at 266.
[21] *Infra*, at 368-371.
[22] *Infra*, at 371-373.
[23] *Infra*, at 373-375.

2.1.2.1 Potential Pitfalls of Increasing Judicial Discretion through Restorative Justice's Diversification of Existing Sentencing Options

It might be considered that the expansion of judicial discretion that is necessarily created by restorative justice's diversification of judicial choice is unnecessary in and of itself – that judicial freedom is widened to capacity by the spectrum of non-custodial orders already available to judges.[24]

However, as this thesis demonstrates, the potential benefits to be gained from restorative criminal justice are sufficiently valuable to *justify* its expansion of judicial discretion. This is because a restorative system will introduce a new range of values into Irish sentencing that is largely unrepresented amongst existing sentencing options, despite their diversity and frequent non-custodial character. For, as Chapter 1 stressed, the less incursive, less punitive and even rehabilitative intentions of certain non-custodial orders are not sufficient to equate them with restorative justice, which is a far more multi-faceted ideology.[25] For instance, despite its distaste for incarceration[26] and generally non-incursive ways, restorative justice sees no *restorative* merit in letting offenders "off the hook", as it were, through suspended sentences, despite their justifiable use on other grounds e.g. to avoid over-consequencing offenders.

Expanding judges' sentencing choice is also vulnerable to the allegation that it creates greater room for judicial leniency. Yet, as the range of non-custodial orders currently on offer to Irish judges demonstrates,[27] Ireland's sentencing options are *already* sufficiently diverse to attract the risk of leniency – with or without their extension by one additional option. Moreover, a *Public Attitudes Survey* undertaken by the Garda Research Unit in 2006 revealed that 82% of respondents already believe that the criminal justice system is too lenient in its treatment of offenders.[28] Furthermore, the right of appeal on grounds of undue leniency offered by the Criminal Justice Act, 1993[29] will act as a back-up safeguard against leniency regardless of the fluctuating contraction or expansion of sentencing options over time.

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[24] *Supra*, at 12-13.
[25] *Supra*, at 12-15.
[26] *Supra*, at 218.
[27] *Supra*, at 12-13.
[28] Kennedy and Browne, *Garda Public Attitudes Survey 2006* (Garda Research Unit, 2006), at 51.
[29] Criminal Justice Act, 1993, s. 2.

At any rate, leniency is not always the undesirable result of a judicial "slip-up" or erroneous omission to apply appropriate standards. To the contrary, Ireland's Law Reform Commission has recognised the principle that leniency should be tolerated where it is considered necessary to frame individualised treatments that promote offenders' rehabilitation by reflecting their unique characteristics from case to case.[30] It is only excessive leniency – leniency that *lacks a legitimate basis* such as rehabilitation – that can reasonably be considered an affront to justice. As Chief Justice King stated in *R. v. Osenkowski*:

> It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.[31]

Increased judicial choice is also vulnerable to being branded a source of sentencing *inconsistency*, particularly given the leniency that may result from customised, individualised, or as Chapter 8 prefers to term it – "appropriate" sentencing.[32] Again, however, given the *existing* diversity of sentencing options, the margin for inconsistency in the choice of sentence is already wide. The Law Reform Commission regret that:

> Justice and equality of treatment require sentencers to adopt a uniform system for choosing the approach to be adopted, but such uniformity is sadly lacking in Irish sentencing practice.[33]

Given that the criminal justice system is already beset by inconsistency of approach in light of the array of options available to judges, it is difficult to see how restorative justice's addition as an extra sentencing option will impact judicial inconsistency in a significant way; consistency is lacking in Irish criminal justice, whether or not restorative justice is added. Furthermore, transporting the above principle of tolerable *leniency* that it is pursued in the interests of rehabilitation, it might also be best-practice to forego a measure of *consistency* where the interests of customised, rehabilitative treatment dictate it. As the Law Reform Commission advises:

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[30] Law Reform Commission, *Consultation Paper on Sentencing* (March 1993), at 17, para. 1.46
[31] *R. v. Osenkowski* (1982) 30 SASR 212, King CJ.
[32] *Supra*, at 326-327.
[33] Law Reform Commission, *op. cit.*, at 22, para. 1.61 [emphasis added]

> Thus the sentencing judge must decide whether to impose a sentence of sufficient severity to punish the offender, or of such severity so as to deter the offender and others from committing similar offences in the future, or, alternatively, *to choose an "individualised" measure*, i.e. a sentence based not on the severity of the offending behaviour but on the individual needs of the offender; i.e. a sentence likely to reform the offender.[34]

This approach follows Garvey's train of thought, analysed earlier in Chapter 8, according to which judicial discretion and sentencing diversity's contribution to an offender's rehabilitative "moral education" are thought to override any losses in consistency.[35]

In sum, the inflation of judicial discretion that necessarily accompanies additional sentencing options is, in the context of Ireland's current legal climate, unlikely to be a problematic phenomenon.

2.1.2.2 A Statutory Compulsion to Consider Restorative Referrals?

> The discretion the officers have in case selection might be seen as both a strength and a weakness of the system. It constitutes a strength insofar as there is no imperative to follow the approach blindly in all cases ... The extent of discretion represents a weakness if it results in low take-up due to discomfort or reluctance about restorative justice. [36]

One option when seeking to encourage restorative referrals statutorily is to place judges under an express legal compulsion *to consider* restorative options. This is premised on a concern that *unfettered* judicial discretion could accommodate and sustain judges' opposition to restorative justice and their consequent reluctance to make restorative referrals.[37] Narrowing judicial discretion in this way is problematic, however, for several reasons.

First, mandating judges to consider restorative referrals is actually *unlikely* to overcome the potential problem of principled judicial hostility to restorative justice. This is because there is no reliable means of ensuring *genuine* judicial contemplation of restorative options, despite the *appearance* of compliance with a statutory direction do to so.

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[34] *Ibid.* [emphasis added]
[35] *Supra*, at 326-327.
[36] O'Dwyer, "Victim-Offender Mediation with Juveniles in the Republic of Ireland" in *Victim-Offender Mediation: Organization and Practice in the Juvenile Justice Systems*, a study conducted for the European Commission *Grotius II Criminal Programme 2002-2003*, 19-20 September 2002, at 16. <http://www.irsig.cnr.it/reports/testi_reports/pdf_reports/report_irelandfinal_01sept03.pdf> (visited 22 January 2006).
[37] *Supra*, at 355.

Secondly, attempts to restrict judicial discretion statutorily could prove futile because of their vulnerability to being trumped by judicial creativity. For instance, impressions of the ill-fated discretion-trimming provisions of section 5 of the Criminal Justice Act, 1999 are that they were largely ignored by judges.[38] Under the Act, judges are compelled to impose a mandatory ten-year minimum sentence for the possession, with intent to supply, of drugs with a street value of at least €12,700.[39]

Remarkably, judges have successfully side-stepped this duty by stipulating imaginative conditions and caveats to its exercise. For example, in 2004, Mr. Justice Kennedy sitting in Portlaoise Circuit Court, [40] ruled that the onus is on the prosecution to prove beyond reasonable doubt that the accused *knew* that the drugs were worth at least €12,700.[41] The judge also afforded the defendant credit for his guilty pleas to two of the three charges brought against him.[42] Judges have therefore been resourceful and inventive in *using their discretion* to pare down the scope of a provision that was ironically intended to pare down their discretion. Judicial discretion might therefore be used as a shield against unpopular attempts to limit it, allowing the judiciary to voice a silent protest against governmental interference with their sentencing authority.

The government is, however, attuned to this practice and intent on suppressing it.[43] Minister for Justice, Equality and Law Reform, Michael McDowell has bemoaned the judiciary's evasive approach to section 5:

> ... the law requires that departure from the mandatory sentence should not merely be case-specific but also be exceptional. Unfortunately that extra element seems to be lost in present practice where departure from the mandatory sentence seems to be the norm rather than the exception.[44]

To defeat the judicial evasion of mandatory minimum sentencing, the government extended the DPP's power of appeal in the Criminal Justice Act, 2004. The Act allows the DPP to appeal to the Supreme Court on a point of law of exceptional public importance on the grounds that a judge's ruling sets a legal precedent, even where the accused is found not

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[38] Brady, "Ruling on Jail Sentence May Set Precedent" *The Irish Independent*, 14 July 2004; Brady, "Lawmen to Study Ruling on Jail Sentences" *The Irish Independent*, 14 July 2004; Brady, "DPP May Appeal Drugs Sentence" *The Irish Independent*, 15 July 2004.
[39] *See* s. 5 Criminal Justice Act, 1999 inserting subs. 27(3) Misuse of Drugs Act, 1977.
[40] *DPP v. Charles*, Unreported, 14 July 2004, Kennedy J.
[41] Brady, "DPP May Appeal Drugs Sentence", *loc. cit.*; Felle, "Man Acquitted of Trafficking Ecstasy Tablets in Landmark Case" *The Irish Independent*, 14 July 2004; Brady, "Lawmen to Study Ruling on Jail Sentences" *The Irish Independent*, 14 July 2004.
[42] *Ibid.*
[43] Brady, *loc. cit.*
[44] McDowell, "Address", *Sentencing in Ireland*, First Edward O'Donnell McDevitt Annual Symposium, 28 February 2004, at para. 37. <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ5XUD5V-en> (visited 14 April 2006).

guilty. Unfortunately, it is difficult to evaluate this provision, which appeared in section 21(2) of the corresponding Bill, because the text of the Act, which came into effect on 1 August 2006, has yet to be made available – an omission that has provoked the new Act's condemnation as "phantom law".[45]

The said provision is intended to complement the DPP's existing right to appeal a decision on the grounds of undue leniency.[46] Minister McDowell has also proposed further drugs-related offences carrying mandatory minimum sentences to further strengthen the provisions of the Criminal Justice Act, 1999 and send a cogent message to the judiciary about the muscle of legislative authority:[47]

> [This law] was enacted by legislators who have to deal with the day to day consequences of the crimes to which it applies ... If the considered view of the legislature is that a 10 year sentence is appropriate in all but exceptional cases as a deterrent, I would hope that such sentences would be imposed as the norm until the legislature otherwise decides.[48]

Another reason for caution when pruning judicial discretion through legislation is that care must be taken to avoid constitutionally impermissible legislative invasions of the judicial domain in violation of the separation of powers.[49] There is a fundamental distinction between unconstitutional legislative discretion-thinning provisions that usurp the judicial function impermissibly and those that simply inject "a different value into the law" acceptably.[50] Thomas O'Malley considers that the mandatory sentencing provisions mentioned above may fall into the former category, deeming them "of dubious constitutionality".[51] If the Irish government eventually decides to go this route and whittle away a portion of judges' sentencing discretion statutorily to ease the passage of restorative justice through Irish criminal justice, it must take care to adopt the latter, least restrictive approach.

Despite the above factors that countervail against statutory assaults on judicial discretion, it should be recognised that trimming it in order to allow *restorative justice* a point of entry into criminal justice might be less problematic than doing so to facilitate

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[45] Fine Gael, "McDowell Makes Mockery of Justice with 'Phantom Law' – O'Keeffe", *Press Release*, 6 October 2006. <http://www.finegael.ie/Representatives/NewsDetails.cfm?NewsID=29383&action=detail&year=2006&month=10> (visited 13 November 2006).

[46] Criminal Justice Act, 1993, s. 2.

[47] McDowell, Dáil Éireann, 28 March 2006, *Motion on Criminal Justice Bill Amendments 2004*, at para. 21. <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6NBN6D-en> (visited 13 November 2006).

[48] McDowell, "Address", *loc. cit.*, at paras 38-39.

[49] *See* Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Roundhall Sweet and Maxwell, 1997), at 10, 11, 136-138, 200-219, 288.

[50] *Ibid.*, at 151.

[51] O'Malley, *Sentencing Law and Practice* (Round Hall Sweet and Maxwell, 2000), at 455.

alternative strategies. While forcing judges into certain statutorily prescribed sentencing patterns could jeopardise the important keystone of individualised, sensitive, or "appropriate" sentencing favoured above,[52] the compulsion to consider *restorative* options for offenders is less likely to do so given its special *affinity* with customised treatment and the potential for its *combination* with existing sentencing options where the balanced needs of offender and society warrant it.[53]

Nevertheless, given the problems of enforcement and judicial circumvention and in light of the constitutional minefield over which it treads, a statutory compulsion to consider restorative justice is, on the whole, the least appealing option of the three considered herein, the remaining two approaches offering less vexed alternatives. In this respect, this thesis departs from the apparent position of the Oireachtas Joint Committee, which seems to *endorse* the coercive approach critiqued herein:

> In particular, legislation that *requires judges to consider RJ approaches* for adult offenders would increase awareness and facilitate a national expansion of adult-focused programmes.[54]

2.1.2.3 Statutory Referral Criteria?

There is a potentially helpful, less violent alternative to a statutory compulsion when seeking to encourage restorative referrals and overcome any judicial resistance thereto: the introduction of a statutory (or indeed non-statutory)[55] list of *referral criteria* for judges. An easy-to-apply framework of eligibility criteria that can be applied routinely to prospective restorative referees holds substantial potential to subdue that element of judicial aversion to making restorative referrals that stems from the off-putting time and resource commitments involved in making unprincipled decisions "in the dark". Such a list stands to transform judges' perception of the referral process from something vague, complex and burdensome into something more comprehensible, straightforward and manageable. It could thereby heighten judicial willingness to refer.

The introduction of statutory eligibility criteria merely tweaks the "value system" that guides judges' exercise of sentencing discretion and arguably does not even approach the *permissible* degree of legislative interference with judicial freedom embodied in a new rebuttable presumption. The Slovene VOM system offers a good example of various statutory eligibility criteria.

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[52] *Supra*, at 326-327.
[53] *Infra*, at 378-383.
[54] O'Keeffe, J., *loc. cit.*, at 40. [emphasis added]
[55] Law Reform Commission, *Report on Sentencing* (LRC 53–1996), at 11-12, para. 2.22.

Slovenia has a nationalised, statutory diversion system for the referral of adult offenders from the courts into restorative conferencing forums.[56] Article 161a of the Slovene Code of Criminal Procedure (CCP) lists the following criteria that must determine a defendant's suitability for referral.[57]

- the nature and seriousness of the offence
- the circumstances of the offence
- the personality/background of the perpetrator
- the defendant's criminal record
- the defendant's degree of criminal responsibility

In designing Irish eligibility criteria, it would be wise to include the first five Slovene considerations. However, further criteria should be added that address the crime victim, such as the number of victims, the harm caused to them, and their willingness to participate in restorative events.

Like other VOM models, such as New Zealand's conferencing system, Slovene law also restricts participation in restorative forums to offenders of a certain gravity of offence. Article 161 CCP confines participation to offenders of minor to moderately serious crimes – those punishable by a fine or a prison term of up to three years. This thesis opposes placing statutory limitations on the types of offenders eligible for referral. While it accepts that certain grievous offenders will often be unsuited to restorative treatment, this is a matter that should be determined *on the bench* from case to case, not once and for all in parliament. Just as the decision to *refer* should be a product of unfettered judicial discretion, so too should the decision *not to refer*. Both decisions should be the products of a skilled judicial balancing act between the needs of offender, victim and society – not the results of applying absolute legal rules.

Later on, this chapter rejects the conclusive presumption that certain categories of non-minor offenders are inherently unsuitable for restorative justice.[58] However, this position is also premised on the feasibility, also established later herein, of *combining* restorative and retributive options to provide a given offender with the most "appropriate" treatment plan in light of his needs, his victims' needs as well as those of society.[59]

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[56] *See* Miers, *An International Review of Restorative Justice*, Crime Reduction Research Series Paper 10. (Home Office, 2001).
[57] *See* Bosnjak, "Short Overview of the Position of Victim in the Slovene Criminal Justice System" <http://www.victimology.nl/onlpub/national/si-sket2.doc> (visited 16 January 2006).
[58] *Infra*, at 383-386.
[59] *Infra*, at 378-383.

Furthermore, criteria such as those listed above are clearly designed to estimate the likelihood of a given offender's successful progression through the referral procedure. It is assumed that the more serious the offender, the less likely he or she is to comply willingly and sincerely with the referral process by performing reparative acts. Still, the standard should not be set too high when using the predicted success of a referral as a criterion of eligibility. A consideration of these criteria should point to a *reasonable likelihood* of either personal transformation of the part of the offender or of reparative acts that will assist the *victim's* healing. Even partial success – partial reparation or partial attitudinal change – can be beneficial to victims and offenders. As argued later, retributive treatments should still be available to deal with the parallel issue of containing dangerous citizens and pursuing general deterrence and public censure.[60]

2.1.2.4 Preserving Judicial Discretion

A less judicially intrusive, *laissez faire* approach is probably the wisest mode of ensuring restorative referrals. Simply introducing restorative justice into Irish sentencing in the absence of any statutory or non-statutory compulsion to consider referrals *or* a delineation of the appropriate grounds there-for, will affect judicial discretion only in so far as it widens it slightly by its basic diversification of sentencing options.[61]

This approach *trusts* the judiciary to afford restorative justice due respect. Its margin for judicial opposition to restorative referrals is arguably no wider than that which is only outwardly restricted by a statutory compulsion and it may be the case that there is no *practical* means of forcing judges to consider referring offenders, regardless of what is said or not said in legislation. Moreover, perhaps this is how it should be. The Law Reform Commission has stressed and re-stressed the importance of investing *trust* in the judiciary. This important principle motivated the Commission's aversion to the crippling influence that mandatory sentences and mandatory victim impact statements threaten to exert over what should be judges' *presumptive* ability to weigh competing interests, distil relevant from irrelevant facts and circumstances, match punishments to crimes and criminals and resist the undue leniency created by giving in to "hairy-heeled populism":

> Those who advocate the mandatory statement do not trust judges properly to exercise their discretion in seeking such evidence.[62]
>
> The Commission believes that an experienced judge can be relied upon to use this widened discretion wisely to improve the quality of justice...[63]

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[60] *Ibid.*
[61] *Supra*, at 366.
[62] Law Reform Commission, *Report on Sentencing*, *op. cit.*, at 48.

Hence, perhaps the negatives of narrowing judicial discretion outweigh its *questionable* benefits.

By avoiding the obstruction of judicial freedom, this approach also avoids incurring the judicial resentment or irritation doing otherwise could invite. Furthermore, as noted in Chapter 8, there is no clear basis on which to predict that judges will oppose restorative referrals.[64] There is already a wide array of non-custodial orders which – though possibly not *optimally* exploited due to the popularity of imprisonment – are still used freely by judges.[65] Furthermore, as mentioned above, some evidence exists of judicial inventiveness in the development and expansion of alternatives to custody.[66] It is possible that the option to refer offenders to restorative interventions will be received with similar enthusiasm. Thus, the imposition of restraints on judicial freedom in this regard is, if not improper, potentially *unnecessary.*

Finally, this thesis has already pointed to various *non-statutory* approaches to safeguarding judicial referrals that could prove highly effective at inspiring judicial confidence in restorative justice in an organic, non-coercive and educative way. First, a future rise in restorative justice's public profile could garner judicial support thanks to (a) its prospective legislative basis, (b) general awareness-raising techniques, including collaborative efforts by those sympathetic to restorative justice's cause[67] and (c) heightened academic interest in restorative justice and Ireland's Brehon past.[68] Moreover, educative strategies aimed directly at the judiciary could prove effective, such as the judicial training in restorative justice recommended by the Oireachtas Joint Committee.[69]

Once judges take care to resist over-consequencing offenders with non-custodial interventions, *including restorative referrals*, and avoid the net-widening impact of applying such interventions to offenders who would otherwise have had their cases thrown out, there is no need to restrict their discretion. The most suitable course of action may be the simple discretion-growing diversification of sentencing options to include restorative justice. Then, it is up to the judiciary.

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[63] Law Reform Commission, *Consultation Paper on Penalties for Minor Offences* (LRC CP18-2002), at 60.
[64] *Supra*, at 355-359.
[65] *See generally*, Seymour, *Alternatives to Custody* (Business in the Community Ireland in Association with the Irish Penal Reform Trust, 2006). <http://www.iprt.ie/files/iprt/alts_to_custody_report.pdf> (visited 19 February 2007).
[66] *Supra*, at 356.
[67] *Supra*, at 348-349.
[68] *Supra*, at 295-298.
[69] O'Keeffe, J., *loc. cit.*, at 44.

2.2 Nationwide Basis

The second alteration to Ireland's existing restorative pilot system is more obvious. In order to maximise its emotionally therapeutic scope and enhance its credibility, a restorative referral system should operate on a nationwide basis. As Chapter 8 revealed, restorative services are currently available in only two communities in Ireland – Nenagh in Co. Tipperary and Tallaght in Dublin.[70] The projects receive referrals from a small number of district courts.[71]

Despite their limited scope, however, the projects' completion rates, their facilitation of apologies and their impressive ability to prevent re-offending in light of recently-released national recidivism statistics,[72] as well as the "invaluable contributions of the people of Nenagh and Tallaght"[73] that they elicit, all indicate the potential for such initiatives' *successful integration* into rural and urban communities around the country.

2.3 Increased Funding

A new nationwide footing will necessitate a dramatic boost in funding for Ireland's restorative initiatives. While €360,000 may suffice *at present* to cover the operating costs of the two isolated projects presently in place,[74] the government will have to make a far greater financial commitment to the running of a *nationwide network* of restorative projects.[75]

While restorative justice is far from a "bargain basement" approach,[76] the funding it requires is dramatically exceeded by the colossal cost of imprisonment.[77] Whilst considering the potential merits of restorative justice in Ireland, Diarmuid Griffin surmises that:

> The use of the restorative justice may also be more cost efficient. Sending an offender into a restorative programme is an attractive alternative when compared with a pricey term of imprisonment.[78]

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[70] *Supra*, at 310-319.
[71] *Supra*, at 310.
[72] *Supra*, at 315-318.
[73] O'Keeffe, J., *loc. cit.*, at 38.
[74] In 2005, the Nenagh Community Reparation Project received €40,000 from the Probation and Welfare Service: Gleeson, Presentation on the Nenagh Community Reparation Project, *Defining the Roles for Restorative Justice in Ireland: An Overview of the Work in Progress and a Summary of International Experiences*, National Conference of *Restorative Justice Services*, Distillery Building, Dublin, 18 November 2006; O'Keeffe, J., *loc. cit.*, at 33; The 2005 budget for Restorative Justice Services at Tallaght was €320,000: McDowell, "Address", Launch of the 2005 Report of the Tallaght Restorative Justice Services, 11 May 2006 <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6PQB5E-en> (visited 28 February 2007); O'Keeffe, J., *loc. cit.*, at 46.
[75] *See* O'Keeffe, J., *loc. cit.*, at 45-46.
[76] McDowell, "Opening Address", *Defining the Roles for Restorative Justice in Ireland: An Overview of the Work in Progress and a Summary of International Experiences*, *op. cit.*
[77] Coulter, "Can We Afford the Cost of the Irish Prison System?" *The Irish Times*, 31 January 2004; O'Donnell, "The Cost of an Infatuation with Locking Up People" *The Irish Times*, 22 December 2004.
[78] Griffin, "Some Offenders Can be Dealt with Outside Prison System" *The Irish Times*, 26 January 2007.

Restorative justice, like various other forms of non-custodial, community-based sanctions unquestionably provides a more cost effective alternative to imprisonment. According to the Comptroller and Auditor General's 2004 *Value for Money Report Examination into the Probation and Welfare Service*, "community based sanctions are significantly less costly to implement than custodial sentences."[79] The Report estimated, based on spending in 2001, that implementing community service orders costs about one-third of the cost of imposing custodial sentences.

While the Probation and Welfare Service's total running costs in 2003 were around €40.7 million,[80] this figure pales in comparison to the Irish Prison Service's annual budgets of €305 million in 2004[81] and €344 million in 2005.[82] It is also far surpassed by the cost of the government's prison expansion scheme.[83] The purchase in 2005 of a new prison site at Thornton in North County Dublin, to eventually replace the Mountjoy Prison complex in 2010, contributed substantially to the €334,931,000 spent on prisons that year, [84] with claims that it was purchased far above the going-rate.[85]

It appears that the Prison Service omitted to adopt to budget or affordability limit to guide its choice of site, [86] ultimately chose a site 50% larger than the estimated size-requirement,[87] for which it paid €29.9 million[88] - a price that exceeded by €19.9 million the amount estimated for the purchase of a suitable site in the 2003 Report of the Capital Sub-

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[79] Comptroller and Auditor General, *Report on Value for Money Examination: The Probation and Welfare Service* (Stationery Office, 2004), at 9.
[80] *Ibid.*, at 8.
[81] Website of the Irish Prison Service <http://www.irishprisons.ie/stats.asp> (visited 25 February 2007).
[82] Irish Prison Service, *Annual Report* 2005 (Department of Justice, Equality and Law Reform, 2005), at 67.
[83] Lines, "Living in the Past: The Americanization of the Irish Prison System", Irish Penal Reform Trust *Annual Summer Law Academy Dinner*, 9 June 2005. <http://www.iprt.ie/iprt/1375> (visited 19 January 2006); at para. 36; Lally, "Plan for Additional 1,000 Prison Spaces by 2011" *The Irish Times*, 20 November 2006; see also, "Warning Over 'Misguided' Approach to Prison System" *BreakingNews.ie*, 29 August 2005 <http://archives.tcm.ie/breakingnews/2005/08/29/story218340.asp>; O'Donnell, "The Enthusiasm to Incarcerate is Difficult to Justify or Understand" *The Irish Times*, 4 November 2005; Irish Penal Reform Trust, "'Ireland's imprisonment rate increased from about 25 to 81 prisoners per hundred thousand between 1970 and 2002 in part as a result of a "successful" prison construction policy'", 5 January 2005. <http://iprt.ie/ireland/print/1128> (visited 31 January 2006); O'Kelly, "Buying Votes by Building More Prisons" *Sunday Business Post*, 20 June 2004.
[84] Irish Prison Service, *op. cit.*, at 67.
[85] Cullen, "Price Paid for Thornton Hall 'Eight Times' the Going Rate" *The Irish Times*, 27 October 2006; Cullen, "Prison Service Paid Twice Going Rate for Site" *The Irish Times*, 28 September 2006.
[86] Comptroller and Auditor General, *Annual Report 2005* (Stationery Office, 2005), at 60.
[87] *Ibid.*, at 59.
[88] *Ibid.*, at 56, 57; "Cost of New Prison Site Rises by €8.5m" *BreakingNews.ie*, 27 July 2005. <http://archives.tcm.ie/breakingnews/2005/07/27/story213674.asp>

Committee of the Prison Service Interim Board.[89] €38.8 million has been set-aside for the prison building programme in 2007.[90]

It currently costs about €90,900 to imprison one person for one year.[91] Moreover, the Irish Prison Service incurs massive staffing costs compared to its international counterparts. It currently supports a total staff of approximately 3,200[92] while the average daily prisoner population in 2005 was 3,151.[93] This gives an average prisoner to prison officer ratio of 1:1, which is high by international standards – three times that of the UK and France.[94] In light of this, as well as the controversially high rate of overtime customarily paid in this country,[95] wages and overtime accounted for approximately 67% of all spending by the Irish Prison Service in 2005.[96] These are just some of the costs that will escalate with the creation of more prison places.[97] Dr. Ian O'Donnell argues that the government's commitment to a costly programme of prison expansion evidences a "healthy disregard for public finances".[98] This certainly appears to be the case in light of the potential suitability of a substantial proportion of the prisoner population to restorative justice.

As Chapter 1 stressed, a high proportion of the Irish prison population is made up of minor offenders, such as fine-defaulters and perpetrators of motoring offences.[99] 39% of all committals in 2005 were for 3 months or less.[100] Therefore, the spiralling costs of various kinds considered above that are incurred by the process of imprisonment could be subdued dramatically in the future by processing many minor offenders through restorative forums. While this chapter will later identify definite potential for restorative justice to benefit *non-minor* offenders,[101] it is fair to suggest that *generally speaking*, minor offenders will be *most amenable* to the rehabilitative efforts of restorative interventions.

There is, as always, a need for balance when designing an initial budget for a budding network of court-annexed restorative justice. If it is under-funded, it will face the risk of premature collapse, with potentially permanent effect.[102] At the same time, however,

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[89] Comptroller and Auditor General, *Annual Report 2005*, *op. cit.*, at 60.
[90] Department of Justice, Equality and Law Reform, "Estimates Process – Allocation for Justice and Equality Sector (Current and Capital) Rises by 9%" <http://www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6VLKX4-en> (visited 12 March 2007).
[91] Irish Prison Service, *op. cit.*, at 68.
[92] *Ibid.*, at 60.
[93] *Ibid.*, at 3.
[94] Coulter, "Can We Afford the Cost of the Prison System?", *loc. cit.*
[95] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration, 2004), at 169.
[96] Irish Prison Service, *op. cit.*, at 67.
[97] Lally, *loc. cit.*
[98] O'Donnell, "The Cost of an Infatuation with Locking Up People", *loc. cit.*
[99] *Supra*, at 38-39.
[100] Irish Prison Service, *op. cit.*
[101] *Infra*, at 383-386.
[102] *Supra*, at 337-338.

ploughing excessive resources into restorative initiatives could endanger the efficiency and informality that differentiates them from mainstream criminal justice; over-resourcing could thereby divest restorative programmes of a major justification for their existence.[103] They should be funded sufficiently that they remain effective and their nationwide scope is maximised, yet not so much that they begin to resemble that which they are intended to replace and/or supplement as the case may be.

2.4 Complementary to Punitive Justice

> "[R]estorativists" should come to grips with the necessity of using coercive power where deliberative processes appear to be impossible. The phobia of many of them against considering it *not only obscures commonalities with retributivists*, but also makes it difficult to explore the essential difference: the assumption that intentional pain infliction is indispensable to censuring wrongful behavior. This is, in my view, a principle that restorative justice cannot encompass.[104]

Restorative and retributive treatments are compatible.[105] As such, they should coexist in the sentencing of adult offenders in Ireland, just as they did when united instinctively under a host of the world's religious and indigenous legal traditions, including the Brehon law.[106] They serve competing but important interests that should be afforded equal weight under any legal system that aspires towards quality criminal justice.

As Chapter 1 emphasised, it defies good sense to commit *exclusively* to the practices of either one philosophy.[107] An ideal criminal justice system should be sufficiently flexible to meet important social needs such as rehabilitation, public censure and the preservation of public safety *contemporaneously* as they arise from case to case. Moreover, no one need should be allowed to assume a position of indiscriminate priority above its peers unless such a promotion is *earned* by the unique circumstances of a particular case. Key social needs such as deterrence, rehabilitation, public censure, restitution and incapacitation should be

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[103] *Supra*, at 242.

[104] Walgrave, "Has Restorative Justice Appropriately Responded to Retribution Theory And Impulses?" in Zehr and Toews eds., *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004) 47, at 57. [emphasis added]

[105] *See generally*, Barton, "Empowerment and Retribution in Criminal Justice" in Strang and Braithwate eds., *Restorative Justice: Philosophy to Practice* (Ashgate, 2000) 55, at 61-64; Duff, "Restoration and Retribution" in von Hirsch, Bottoms, Roach and Schiff eds., *op. cit.* 42; Daly, "Revisiting the Relationship Between Restorative and Retributive Justice" in Strang and Braithwaite eds., *op. cit.* 33; Zedner, "Reparation and Retribution: Are They Reconcilable?" (1994) 57 *Modern Law Review* 228; Garvey, "Restorative Justice, Punishment, and Atonement" (2003) 1 *Utah Law Review* 303, at 317; Van Ness, "New Wine and Old Wineskins: Four Challenges of Restorative Justice" (1993) 4 *Criminal Law Forun* 251, at 264-266; Van Ness, "A Reply to Andrew Ashworth" (1993) 4 *Criminal Law Forum* 301; Walgrave, *loc. cit.*, at 57.

[106] *See generally*, *supra*, at 283-285.

[107] *Supra*, at 48.

valued equally until a case presents in which it is judicially determined that one or more need transcends the others *on the facts*.

The loyalty that Irish criminal justice continues to exhibit to a predominantly retributive sentencing regime lacks the attitudinal flexibility that would enable it to administer *customised* criminal justice of an *optimum* quality. The open-minded union of restoration and retribution to meet elastically any or all of the social needs listed above, creates a synergistic harmony that may seem odd given the *prima facie* divergences between the two ideologies. Still, as Chapter 8 confirms, this "odd-couple" of sentencing philosophy make willing bedfellows *despite* their apparently competing emphases on forgiveness and punishment.[108]

Currently in Ireland, *satisfactory compliance* with the demands of a restorative forum operates as a *necessary alternative* to retributive punishments such as incarceration.[109] Once a judge is satisfied with an offender's performance under the terms of the referral agreement, a custodial sentence and a criminal record are avoided. However, the successful completion of the terms of a restorative referral should have no definite, predictable outcome; it should *mandate* neither a release from criminal liability nor further curial penalties. To demand either, statutorily or otherwise, would impose an ill-advised restraint on judicial discretion that impedes dramatically a sentencing judge's freedom to impose *customised treatments* that are sufficiently *diverse* to meet the range of social needs that are invoked from crime to crime.

An offender's satisfactory compliance with a restorative action plan should not be treated as vitiating the appropriateness of a punitive sentence, which is an option that should remain viable both during and after the referral process; it should not suffer necessary debarment because of an offender's satisfactory restorative actions. Instead, an offender's degree of compliance with his or her restorative action plan should be just one of an assortment of factors to be judicially considered when proceedings are re-commenced at the report-stage. At that point, the sentencing judge should decide on the appropriateness of further punitive sanctions, having regard to factors including, *but not limited to* restorative gestures, the gravity of the offence, the degree of harm and the offender's track record. Judicial discretion must be exercised vigilantly here in light of the careful balance to be struck between over-consequencing offenders[110] and providing them with effective penalties and treatments.

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[108] *Supra*, at 329-335.
[109] O'Brien, "Young Offender Scheme Offers Alternatives to Criminal Conviction" *The Irish Times*, 12 May 2006.
[110] *Supra*, at 235.

There are several problems with continuing to treat successful referrals as *necessary* substitutes for further criminal liability. First, it reduces vastly the range of offenders that might qualify for restorative intervention. If a successful VOM or offender reparation proceeding is to operate only as an alternative to more punitive measures, then the opportunity to participate will be confined to those offenders who are considered most amenable to reform and most likely to be re-released safely into society.

Because the referral process is currently intended to *eliminate* the need to impose curial sentences that involve criminal records, perpetrators of serious crimes will not be eligible candidates for restorative intervention. Ideally, retributive punishments should be treated as a last resort and wholly replaced by restorative treatments *where appropriate*.[111] Nonetheless, it must be accepted that punishment is a regrettable, yet practical and inevitable necessity in society and restorative interventions alone will not suffice to deal with most serious, dangerous, pathological and unrepentant criminals. This is because first, the gravity of their crimes will, in all likelihood, warrant their periodic removal from society – their incapacitation in the interests of public safety – and second because, depending on their characteristics, restorative strategies may not be able to exert as much public censure or deterrence[112] as the seriousness and social significance of the offence require.[113]

In contrast, because of the non-violent nature of relatively minor crime, the need to make an example of its perpetrators – to discourage similar conduct in order to secure public safety – is less pronounced. This means that it will be predominantly minor offenders who will benefit from restorative referrals. Still, reserving the opportunity to participate in restorative strategies to the least serious offenders leaves substantial restorative potential wastefully and regrettably untapped.

Aside from enhancing accessibility, resisting treating a successful restorative process as an alternative to curial sentencing has further merits. Under the restorative pilot schemes presently in place in Ireland, offenders know that their submission to restorative forums and full compliance with reparative and rehabilitative orders will *necessarily* mean an escape from a custodial sentence. This is problematic because it encourages offenders' insincere, instrumental, or "means to an ends" participation considered in Chapter 6.[114]

The situation could arise in which a perpetrator of a serious crime complies satisfactorily, yet insincerely, with the demands of a restorative forum, which is built around the load-bearing keystone of emotional healing. Coerced by the motive of escaping a punitive sentence, offenders are likely to feign the required reparative gestures, thereby

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[111] *Supra*, at 214-215, 329-336.
[112] *Supra*, at 252-254.
[113] Walgrave, *loc. cit.*
[114] *Supra*, at 239-240.

contributing disingenuously to an only *superficially* holistic outcome.[115] Their attitude has been described as one of "Tell me what I am supposed to do and I will do it."[116] Under such circumstances, genuine inter-party reconciliation – a fundamental objective of restorative justice – is impossible and offenders are released unrepentant, untransformed into the community.

Instrumental compliance is undesirable for two reasons. First, as Chapter 6 explains, it undermines implicitly the *voluntariness* of the offender's participation in the referral process,[117] an ideal around which the Ireland's restorative pilot schemes are currently built.[118] Voluntary participation is an essential centrepiece of what should be an entirely consensual process for victims and offenders.[119]

Mandatory mediation in civil matters is morally and constitutionally tolerable[120] on the basis that the mediated obligation is non-binding – nobody is compelled to agree anything.[121] On the other hand, even though *compulsory* referral to VOM is also constitutionally compliant in that it too resists compelling the parties to reach consensus, it cannot be *morally* justified on the same grounds as civil mediation, since it implicitly mandates the participation of a victim; an offender cannot be forced to take part without the victim being similarly coerced, yet this is a patently inhumane idea, given the potentially traumatic experience of confronting one's victimiser.[122]

While mandatory referrals are strongly opposed, an offender who is desperate to avoid the hardship of state penalties, in particular imprisonment, may still feel – to all intents and purposes – *mandated* to accede to a restorative transfer.[123] The decision to comply with referral cannot, under those circumstances, be said to be an independent, uncoerced act of one's free agency. Yet, if satisfactory compliance with restorative forums was demoted from its status as a reliable tool of liability-avoidance to one of a *number* of factors to be considered by a sentencing court in deciding an offender's fate, the incentive to comply

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[115] *See* Coates and Gehm, "An Empirical Assessment" in Wright and Galaway eds., *op. cit.* 251.
[116] Chupp, "Reconciliation Procedures and Rationale" in Wright and Galaway eds., *op. cit.* 56, at 59.
[117] *Supra*, at 238-240.
[118] *See generally*, *supra*, at 310-315.
[119] Irish Victim Support, *loc. cit.*, at 2, 3; Bowen, Boyack and Marshall, "How Does Restorative Justice Ensure Good Practice?" in Zehr and Toews eds., *op. cit.* 265, at 272-273; Chupp, *loc. cit.*; Veevers, "Pre-Court Diversion for Juvenile Offenders" in Wright and Galaway eds., *op. cit.* 69.
[120] The requirement to merely *attempt* to settle does not interfere with one's constitutional right of access to the courts considered to be implied in Articles 34 and 40.3 because it does not require that a person *must* find a resolution; see *McCauley v. Minister for Posts and Telegraphs* [1966] IR 345, Kenny J.; *Byrne v. Ireland* [1972] IR 241, Budd J.; *O'Brien v. Keogh* [1972] IR 144, Ó'Dálaigh C.J.; *O'Brien v. Manufacturing Engineering Company* [1973] IR 334; (1974) 108 ILTR 105; *Brady v. Donegal County Council* [1989] ILRM 282, Costello J.
[121] *See for example*, Civil Liability and Courts Act, 2004, s. 14; Aylmer, "New Resolution" (2003) May *Law Society Gazette* 16; on mandatory mediation in England, see Nwagboso, "Mediate or Else?" (2003) 153 *New Law Journal* 88.
[122] *Supra*, at 288, 230-231.
[123] *Supra*, at 238-240.

instrumentally will be at least partially diluted. The accompanying deficit in voluntariness is thereby obviated.

While some scholars have attempted to identify, somewhat tenuously, sources of latent coercion embedded in society that quietly undermine the voluntariness of the decision to *succumb* to mediation, [124] the overall voluntariness of the process is preserved by the parties' ultimate freedom to reach, *or not to reach*, a satisfactory consensus:

> After all, the decision on how to resolve the dispute ultimately is in the hands of the parties, and the most significant structural procedural protection of mediation is any party's ability to terminate the mediation for any reason by simply walking out of the room.[125]

The second reason that instrumental participation may be considered undesirable relates to its aforementioned ability to inspire insincere apologies and other disingenuous reparative acts whose utility in achieving emotional restoration has been called into question:

> The potential for meaningful healing through apologetic discourse is lost when the moral component of the syllogistic process in which apology is situated is erased for strategic reasons.[126]

However, the presumption that false gestures are incapable of promoting emotional redress is flawed.

While some argue that apologies that lack *moral* motivations are empty and futile,[127] insincere apologies are in fact, not entirely without merit.[128] Once they are either correctly or even erroneously interpreted as sincere by victims, victim-healing is unobstructed by any latent pretence.[129] Victims can still enjoy the cathartic results of an offer of apology, once they *interpret* it as sincere. Furthermore, they may benefit further from the cleansing impact of offering forgiveness in response.

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[124] Abel, *loc. cit.*, at 292; Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology" (1993) *Ohio State Journal on Dispute Resolution* 1; *contra*, King, "Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader" (1994) 10 *Ohio State Journal on Dispute Resolution* 65.

[125] Reuben, *loc. cit.*, at 1093.

[126] Taft, "Apology Subverted: The Commodification of Apology" (2000) 109 *Yale Law Journal* 1150, at 1157.

[127] *Ibid.*, at 1150; Murphy and Hampton, *Forgiveness and Mercy* (Cambridge University Press, 1988), at 17-18; see generally, Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, 1991).

[128] *See* Latif, "Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions" (2001) 81 *Boston University Law Review* 289, at 305-308, 311-316; Cohen, "Advising Clients to Apologize" (1999) 72 *California Law Review* 1009, at 1030, 1065-1068.

[129] *Supra*, at 240.

The chief disadvantage of instrumental reparations and artificial apologies is that they necessarily preclude *an offender's* emotional restoration. If offenders enter restorative forums with an automatic, sub-surface ambivalence to its objectives, there is little chance that they will experience the "moral education" that is pivotal to their rehabilitation.[130] Still, in terms of the parties that ultimately experience healing in VOM, while two is better than one, one is better than none and therefore, should victims feel healed by gestures that conceal insincerity beneath an honest façade, all is not lost therapeutically-speaking.

So, some degree of incentive is not necessarily damning to the entire VOM process. After all, it is inevitable *even if* compliance with the orders of a restorative forum ceases to act as a necessary alternative to sentencing. This is because compliance will still constitute one of several factors that determine the need for punitive sanctions on re-referral. At the same time, the incentive *is* dramatically reduced: the *possibility of lenience* provides less impetus for feigned involvement and compliance than the *guaranteed release* that superficially sincere and complete restorative obedience ensures under Ireland's present pilot system.

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In sum, it can be said that both the restorativists and retributivists are correct about the important functions performed by their paradigm of choice. However, there is nothing to obstruct the merger of both stances to create a *compatible* pair of *complementary* treatment/sentencing models. The union of these otherwise competing philosophies is likely to yield a synergistic, hybrid sentencing construct that is more than the sum of its parts:

> ... restorative theorists are right to insist that our responses to crime should seek "restoration", whilst retributive theorists are right to argue that we should seek to bring offenders to suffer the punishments they deserve; but ... both sides to the controversy are wrong to suppose that these aims are incompatible. Restoration is not only compatible with retribution: it *requires* retribution, in that the kind of restoration that crime makes necessary can (given certain deep features of our social lives) be brought about only through retributive punishment.[131]

2.5 Access for Non-Minor Offenders

Under its present guise, it is fair to say that restorative justice in Ireland is the privilege of the petty thug. Wrongdoers passing through the country's three pilot schemes are, for the most part, first time offenders of low-level crime, such as public order offences,

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[130] *Supra*, at 14, 117, 247, 253, 326.
[131] Duff, *loc. cit.*, at 42. [author's emphasis]

minor assaults, drug possession, criminal damage and the possession of a weapon.[132] While there are no formal referral guidelines in place to *expressly preclude* the referral of serious offenders, the protocols of the pilot projects themselves have stymied the emergence of such a practice and they have reliably shied away from the hornet's nest of serious crime. As O'Dwyer observes, "[c]ertain offences are unlikely to be accepted by the VOM service, e.g. child abuse cases, serious sex assault or domestic violence."[133]

There is, however, no good reason why victims and perpetrators of non-minor crime should be conclusively denied the opportunity to participate in restorative justice. This is particularly true under a referral system, such as the species endorsed herein, that refuses to treat offenders' satisfactory compliance with restorative interventions as a necessary alternative to punitive sentencing.[134] The odds of rehabilitative success may well favour the minor offender more than his more subculturally-entrenched counterpart. That is not to deny, however, that restorative interventions hold the potential to set offenders, whatever their crimes, upon the first tentative step along the path to *some degree* of reform. And as Chapter 6 insists, even partial rehabilitative results are worth the effort of restorative processing.[135]

Moreover, even if serious offenders fulfil their prophecy of accomplishing little within a restorative forum by withholding compliance with the rehabilitative and reparative tasks demanded of them, their *victims* can benefit psychologically from their offenders' *mere participation*. As Chapter 6 explained, some victims will admittedly find simply confronting their offender an emotionally challenging, even harmful experience, *regardless* of their offenders' attitudes to the process.[136] Equally, however, crime victims could also *benefit* emotionally from confrontation alone, feeling cleansed, relieved or empowered by the opportunity to face their offenders and gain some degree of closure on their victimisation.[137]

Even if it is the victim who gains more from restorative justice than an offender who is defiant, unyielding or simply "too far gone" to benefit substantially from the experience, a criminal justice system that is genuinely devoted to assisting crime victims should continue

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[132] *See* Cunneen, *Nenagh Community Reparation Project Evaluation 2004* (Probation and Welfare Service, 2004), at 11, 20; Cunneen, "Baseline Study of Nenagh Community Reparation Project 2002", at 2. <http://www.nenaghreparation.org/baseline_study_printer.htm> (visited 20 January 2007); O'Keeffe, C., "Non Violent Offenders Get Alternative to Prison" *The Irish Examiner*, 17 January 2001; O'Dwyer, *loc. cit.*, at 15; Curran, "Tallaght Tackles Public Order Offences" (2005) 7(2) *Courts Service News* 14. <http://www.courts.ie/courts.ie%5Clibrary3.nsf/0/0046874BE72F2E868025703B004CCE1F?opendocument>

[133] O'Dwyer, *loc. cit.*, at 15.

[134] *Supra*, at 378-383; for an overview of a programme that combines restorative interventions for serious offenders with the possibility of an accompanying punitive option, see Rugge and Cormier's evaluation of Ottawa's "Collaborative Justice Project" (CJP): Rugge and Cormier, "Restorative Justice in Cases of Serious Crime: An Evaluation" in Elliot and Gordon eds., *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Willan, 2005) 267.

[135] *Supra*, at 210, 251.

[136] *Supra*, at 228.

[137] *Ibid.*

to consider referrals. The decision to refer in such instances will be made less problematic and as such, more judicially appealing when, as under the hybrid model promoted herein, doing so will not preclude the application of additional punitive sanctions.[138]

The extension of restorative justice's emotionally remedial potential to a diverse array of non-minor offences has been considered extensively elsewhere. For instance, various mediative, dialogue-based techniques have been promoted to assist in the remedial aftermath of offences involving severe violence, [139] sexual offences,[140] drugs offences,[141] domestic violence,[142] hate crimes, [143] even homicide.[144] In fact, in December 2006, as Chapter 8 recounted, a judge of Ireland's Central Criminal Court, in an unprecedented move, offered restorative justice to the family of a murder victim. [145] Furthermore, the TRC movement, considered in Chapter 5 provides a good example of using restorative principles to gain mass emotional closure on *whole eras* of wrongful killing.[146]

Opening-up restorative justice on an official basis to non-minor crime requires that considerable trust is placed in the judiciary, which must juggle complex tasks, such as (a) doling out suitable punishments where there is a genuine social need for them, (b) providing eligible offenders with appropriate, customised rehabilitative treatments, (c) meeting the

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[138] *Supra*, at 378-383.

[139] Umbreit, *Victim Offender Mediation with Violent Offenses* (PACT Institute of Justice, 1986); Umbreit, Bradshaw and Coates, "Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue" (1999) 6 *International Review of Victimology* 321; Rugge and Cormier, *loc. cit.*; see Gustafson, "Exploring Treatment and Trauma Recovery Implications of Facilitating Victim-Offender Encounters in Crimes of Severe Violence: Lessons from the Canadian Experience" in Elliot and Gordon eds., *op. cit.* 193; *R. v. Clotworthy* (1998) 15 CRNZ 651.

[140] Daly, "Sexual Assault and Restorative Justice" in Strang and Braithwaite eds., *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 62; Hodak, "Court-Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution" (2004) 19 *Ohio State Journal on Dispute Resolution* 1089; Hudson, "Restorative Justice: The Challenge of Sexual and Racial Violence" (1998) 25(2) *Journal of Law and Society* 237.

[141] Lamparello, "Reaching Across Legal Boundaries: How Mediation Can Help Criminal Law in Adjudicating 'Crimes of Addiction'" (2001) 16 *Ohio State Journal on Dispute Resolution* 335.

[142] Pelikan, "Victim-Offender Mediation in Domestic Violence Cases-A Comparison of the Effects of Criminal Law Intervention: the Penal Process and Mediation" (2002) 3(1) *Forum Qualitative Social Research.* <http://www.qualitative-research.net/fqs/fqs-eng.html>; Edwards and Haslett, "Restorative Justice and Domestic Violence: Advancing the Dialogue". <http://voma.org/docs/DVandRJPaper2003.pdf> (visited 18 November 2005); see also, Edwards and Sharpe, "Restorative Justice in the Context of Domestic Violence: A Literature Review". <http://www.mrjc.ca/forms/CMDocuments/RJ-DVLitReviewPDF.pdf> (visited 18 November 2005); Stubbs, "Restorative Justice, Domestic Violence and Family Violence" (2004) *Australian Domestic and Family Violence Clearinghouse: Issues Paper 9* <http://www.austdvclearinghouse.unsw.edu.au/Word%20Files/Issues-Paper_9.doc>

[143] Volpe and Strobl, "Restorative Justice Responses to Post-September 11 Hate Crimes: Potential and Challenges" (2005) 22(4) *Conflict Resolution Quarterly* 527; Volpe and Strobl, "Dispute Resolvers in a Post-September 11th World" (2003) 3(1) *Practical Dispute Resolution* 1; Umbreit, Lewis and Burns, "A Community Response to a 9/11 Hate Crime: Restorative Justice Through Dialogue" (2003) 6(4) *Contemporary Justice Review* 383.

[144] Umbreit and Vos, "Homicide Survivors Meet the Offender Prior to Execution: Restorative Justice Through Dialogue" (2000) 4 *Homicide Studies* 68.

[145] *Supra*, at 356; "Family of Killed Man in Mountjoy Refuse 'Restorative Justice'" *The Irish Times*, 19 December 2006.

[146] *Supra*, at 202-205.

needs of crime victims and (d) avoiding over-consequencing offenders with excessive state demands. Despite the complexity of such a philosophical "balancing act", this is a task that falls squarely under the judicial job-description. Judges are uniquely chosen for their expertise in this regard. They should, therefore, be entrusted with sufficient discretionary latitude to maximise their ability to carry out the difficult cost-benefit analysis that every crime demands of them.

Restorative justice is far from universally appropriate for all offenders, all victims or all crimes. Still, the decision as to when and where it *can* offer a potentially effective, holistic and balanced response to crime's various harms should be delegated unreservedly to judicial wisdom. It should *not* be dictated by blanket eligibility restrictions, whether their source is legislative or an extra-judicial rule of thumb.

The argument for broadening restorative justice's horizons in this country and opening it up to the more serious end of the criminal spectrum represents a departure from the Oireachtas Joint Committee's recent proposals on restorative justice in Ireland. The Committee appear to recommend the legislative expansion of the existing pilot system, more or less *as is*, leaving its established focus on minor crime untouched.[147] However, as Diarmuid Griffin posits astutely whilst contemplating the nature of an incoming restorative system in this country, "it would … be a shame to waste such an opportunity by limiting the use of such a programme to petty offences".[148]

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[147] O'Keeffe, J., *loc. cit.*, at 39; O'Brien, "New Justice System for Lesser Crimes" *The Irish Times*, 12 March 2007.
[148] Griffin, *loc. cit.*

3. Towards a Hybrid Model of Restorative Criminal Justice in Ireland: Concluding Remarks

> We should avoid being bogged down in a polarised debate that privileges restorative justice over conventional criminal justice or the converse. The way forward ... may be in a hybrid approach that integrates those elements that offer a safe and effective outcome.[149]

Criminal justice should be responsive and not inert.[150] This thesis envisages a flexible, organic and holistic criminal justice system – one that can contract and expand, life-like, to re-prioritise, adjust, absorb and expel the various ideologies that govern it as public tastes and tolerances inevitably wax and wane. This principle's application yields a *composite* criminal justice system that resists stark, valueless prioritisations of any one sentencing philosophy over another.

While this thesis promotes restorative justice as the "first resort" *contemplative option* when considering the most effective means of resolving an offence's negative side-effects, this is not to attribute to the paradigm an inherent superiority to its mainstream counterpart. In fact, the foregoing research has expressly rejected justifications for restorative justice's integration that are rooted in its alleged ability to "outperform" traditional sentencing methods.[151]

This thesis does not intend to place restorative justice on a pedestal as a more sophisticated alternative to traditional sentencing conventions. While restorative justice's use *as an alternative* to punitive outcomes is certainly endorsed herein in cases where it provides a more customised and potentially effective answer to a given offence, it is not intended to act as such in every situation; in fact, the *commingling* of retributive and restorative obligations on an offender's treatment plan is firmly promoted.

Bearing this in mind, when pushing for restorative justice's official incorporation in this country, one would be largely missing the point to infer that this thesis simply pursues "alternative dispute resolution". In fact, what it promotes could be more precisely termed "*appropriate* dispute resolution", whereby the *most suitable* response to a given crime, its perpetrator(s) and surrounding circumstances can be selected and applied irrespective of the various philosophies and practices that application invokes. And the best way to maximise the likelihood of there *being* an available remedy is by expanding the diversity of credible and effective treatment options on the nation's sentencing menu.

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[149] Stubbs, *loc. cit.*, at para. 94.
[150] *Supra*, at 1.
[151] *Supra*, at 38-41, 109-110.

By seeking to introduce restorative principles officially and comprehensively into Ireland's adult criminal justice system, this thesis moves to *diversify* the range of potential remedies to crime's equally diverse social fall-out. This will augment the likelihood that an *appropriate, customised* solution can be tailored bespoke to fit the unique dimensions of every offence and offender, whilst also addressing the needs of society and victim where possible.

It would be unrealistic to expect a criminal justice system to meet the needs of every offender passing through it by simply dusting off and altering, time and again, the same few "usual suspects" of standardised sentencing regalia. A sentencing judge's overriding priority should be the framing of *appropriate treatments* for particular expressions of criminality and the unwanted results thereof – *not* the blanket application of a presumptively superior sentencing method that could easily prove ill-fitting, ineffective and ultimately damaging.

Yes, restorative justice is attributed special merit in this thesis and yes, its *appropriateness* is promoted as the primary determination when contemplating the best way to treat a given offender. But none of this seeks to escape the reality that punitive options must also be applied where *they too* are appropriate.

3.1 A Recital of Central Themes

> A total overhaul is not what is needed: *our current adversarial and retributive system is necessary* for many criminal cases where there is a real question of culpability, and where there is *a need to separate a predatory individual from society.* Yet, *restorative justice principles will help reweave the social fabric* which continues to be torn asunder from within by many things, including *fear of crime*. As people become more involved in the process, their fear will decrease, and our communities will *re-assert the internal social-control* necessary to successfully prevent crime.[152]

The above quote hammers sequentially at several of the key notes that together, play out this thesis' thematic refrain. In chorus, they call for change, yet root it within an indispensable, long-standing regime of largely punitive criminal justice, for which the ubiquity of serious crime will eternally call.[153]

This thesis has described a *credible* and effective response to crime that is likely to prove both *compatible* with Ireland's socio-legal identity and *co-operative* with the retributive principles that currently dominate the nation's criminal justice system. Drawing on empirical and theoretical data and placing special emphasis on the conjoint capability of VOM and ORPs to breathe life into a comprehensive range of restorative values, the thesis

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[152] Lerman, "Restorative Justice and Jewish Law" (1998) 9(1) *Victim Offender Mediation Association* 1, at 2. [emphasis added]
[153] *Supra*, at 15, 56.

has demonstrated restorative justice's holistic, emotionally therapeutic potential for victim, offender and community.

The socially beneficial by-products of restorative justice's emotionally ameliorative influence have also been identified and explored, such as improved social integration and collective efficacy.[154] Special attention was paid in Chapters 4 and 5 to the reflexive relationships shared between these vital social balancers and a collective fear of crime in society. While the foregoing research also demonstrated the crime-control potential of restorative justice's influence over acts of primary and secondary deviance, it stressed the limited social impact thereof. It commended restorative justice for such a talent, whilst discouraging undue focus thereon.[155]

Although restorative justice may carry ancillary social benefits in tow and could potentially fill various "gaps" that are perceived to weaken its mainstream host,[156] restorative justice's integration into conventional criminal justice is justified sufficiently on other grounds: its therapeutic ability to challenge the emotional symptoms of stigmatisation, domination, disempowerment and fear suffered by victim, offender and community in the aftermath of crime.

3.2 Treading Cautiously into a Better Future ...

The tone of cautious optimism that was introduced in Chapter 1 has endured unabated throughout the chapters that followed. It now characterises this thesis' departing outlook for restorative justice's future in Ireland. It is surmised, however, that as evaluative evidence amasses and with the benefit of time, the cautious limb of this composite attitude will begin to decompose, its optimistic counterpart gradually strengthening.

Optimism about restorative justice's socially beneficial ability has intensified even since the writing of this thesis. While it is restorative justice's *emotionally therapeutic* potential on which this thesis has chosen to rely in painting a viable image of restorative criminal justice in Ireland, the nebulous terrain of Irish crime has been clarified in previous months by long-overdue national recidivism statistics, against which restorative justice's crime-control potential can be finally measured.[157]

The Irish government should be commended for its concretised commitment to making restorative justice "a more regular feature" of criminal justice in Ireland.[158] A forthcoming system of restorative criminal justice, once implemented, will constitute a

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[154] *Supra*, at 146-176.
[155] *Supra*, at 33-36.
[156] *Supra*, at 38-41, 109-110.
[157] *Supra*, at 317-318.
[158] O'Keeffe, J., *loc. cit.*, at 36.

positive and memorable landmark confirming that Ireland has slowly but surely "woken up to the fact that the criminal law is not an immutable monolith but can be actively shaped and remodelled as the legislature deems appropriate".[159]

As Chapter 8 stressed, however, it may be that we have only one chance to "get it right" in terms of restorative justice's final integration.[160] It is imperative, therefore, that this task is undertaken with concerted care and scrupulous vigilance. A *half-baked* integrative effort must not be permitted to tarnish, with potentially fatal results, restorative justice's credibility in this country. The Irish government should therefore take meticulous care in designing and implementing a nationwide model of restorative justice that will not only maximise the paradigm's therapeutic effect, but respect the unique dimensions of the country's socio-legal identity and the attitudes that shape the nation's cumulative consensus on crime. In doing so, the government should pay particular regard to those proposals set out herein *that depart* to various degrees from both the existing restorative pilot system and the recommendations contained in the Oireachtas Joint Committee's recent *Report on Restorative Justice*.

This thesis has established a distinct need for caution, precision and vigilance in the incorporation of restorative justice into existing criminal justice frameworks. Indeed, diligent care must be taken to clear the potential perils thrust by various facets of Irish law and society in the way of restorative justice's ascent up the echelons of Ireland's criminal justice system. At the same time, however, the country's unique suitability to restorative justice must not be forgotten. As Jim Consedine counsels us:

> You have ancient Celtic traditions of restorative justice to draw upon, you have a 1500 year tradition of biblical justice, properly understood, to draw upon, and you have a relatively small and homogeneous population within your borders. *No country in the world has a better chance of developing a better and more creative criminal justice system.*[161]

With reasonable caution, pragmatism and common sense, the optimism otherwise aroused by restorative justice's unique abilities in the context of Ireland's distinctive restorative past, can be effectively preserved and permitted to usher in a brighter future for adult criminal justice in Ireland.

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[159] O'Mahony, *Prison Policy in Ireland: Criminal Justice Versus Social Justice* (Cork University Press, 2000), at 33.
[160] *Supra*, at 337-338.
[161] Consedine, "An Irish Way Forward", Restorative Justice Ireland Conference, *Restorative Justice: Examining the Issues*, April 1999, at para. 11.
<http://www.extern.org/restorative/99_Conf_Consedine.htm> (visited 18 November 2005). [emphasis added]

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