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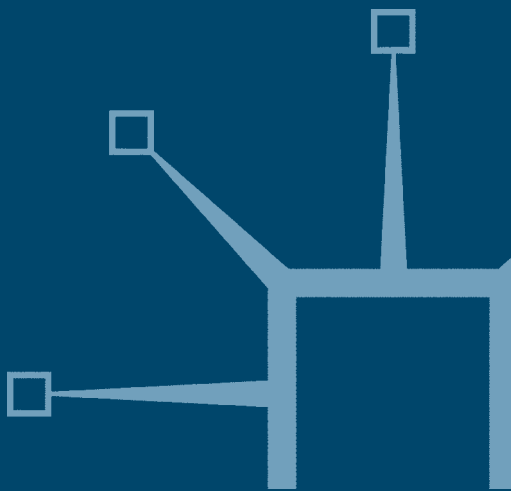
The Victim in Criminal Law and Justice

Tyrone Kirchengast



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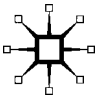

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The Victim as Concept

Governmentality identifies that regulation is constituted by micro instances of rule rather than by a centralised power or agent. Governmentality challenges the assumption that regulation is effected by centralised government over a constituency, arguing instead that regulatory practices exist everywhere, in the particular, such that macro regimes of rule can be deconstructed into their constitutive rationales and programs (Foucault, 1982, 1991; Dean, 1999). When viewed in light of this perspective, the history of the crime victim as a common law subject maps a different narrative than that traditionally offered by legal theorists, victimologists and criminologists alike. These theorists identify the victim in terms of empowerment, or disempowerment, arguing that the victim is deprived of their right of participation in criminal justice by the dominance of the state in controlling criminal prosecutions and punishment. Rather than view the history of the victim as the struggle for rights against an all dominant state, as articulated through post-modern perspectives arguing for the plurality of the victim subject, governmentality provides a means for divining the genealogy of the victim from the history of criminal law and justice. Foucault (1984: 89) puts this process in terms of an 'effective history'.

Foucault's (1984: 79) notion of effective history understands that '[w]hat is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things'. History becomes 'effective' when it introduces discontinuity into our assessment of the past, depriving it of a sense of stability. Effective history does not identify an end or goal to which history moves, leaving the past open to various discursive interpretations. Foucault (1984: 88) argues that 'the forces operating in history are not controlled by destiny

or regulative mechanisms, but respond to haphazard conflicts'. Genealogy, for Foucault (1984), is thus an account of the past that seeks to explain or rationalise successive events, drawing on broad discursive changes, not restricted to their temporal origin. Foucault (1984: 91) is thus critical of conventional historical perspectives as '[a] characteristic of history is to be without choice: it encourages thorough understanding and excludes qualitative judgements – a sensitivity to all things without distinction, a comprehensive view excluding differences.'.

Following the Foucauldian approach, genealogy presents the victim as integral to many of the discursive developments in criminal law and the justice system. Victim genealogy therefore sheds new light on the assumption that *a priori* criminal law and justice is consolidated around monarchical or stately interests. Instead, the gradual removal of victim power for the development of royal and social justice suggests that criminal law developed through a fragmented, decentred and discursive process, inclusive of the victim (see Hay, 1983: 174–80). Thus, victim genealogy suggests that the victim played a formative role in the discursive changes that led to the establishment of criminal law and justice as a jurisdiction consolidated around the social. Traced over time, these discourses show how victim genealogy explains the genesis of criminal law and procedure, including its conceptualisation, in a way hitherto not recognised in current legal theory. In particular, conventional explanations of modern victim agency and the development of institutions of justice are called into question.

The genealogy of the victim makes a new contribution to our understanding of criminal law and justice by demonstrating that the victim has indeed been more central to the development of criminal legal institutions than first realised. This text shows that the historical interaction of the victim with various institutions led to the development of the common law and justice system, as we know them today. The assumption that the centralised state accounts for the genesis and administration of criminal law is consequently challenged by the genealogy of the victim.[1]

Various theorists assume that the centralisation of the state, as a sovereign institution unto itself, both regulates and controls the course of justice. For example, the sociology of Norbert Elias (1982a, 1982b), influential in both criminology and the broader social sciences, stresses the significance of state violence in the civilising process. Others, including Claus Offe (1984, 1985, 1996: 61–102), argue for the relative autonomy of the state as an apparatus of politics, and as a dominant form of societal organisation of modernity. This emphasis on the state,

as the central praxis comprising social relations, is more than evident when one considers the monopoly of the modern state in the apprehension, prosecution and punishment of crime. Since the first movement from the absolute power of the victim, the King, state and common law have been increasingly established as institutions controlling or 'owning' criminal justice (Greenberg, 1984; *cf.* Christie, 1977). Rather than view the development of criminal law and justice from this centralised perspective, this text argues that the victim has engaged in various epochs or periods of rule, contributing to the formation of discourses of power rationalising the development of modern criminal legal institutions away from the victim self.[2]

Given the early history of the victim it is not only the state that need be analysed as the locus of criminal justice but also the discursive history of the victim as pertinent to the shaping of criminal institutions. Governmentality reminds us that regulation is everywhere. It is not restricted to a central power. As in the case of administrative law, studies suggest that the principles of procedural fairness are often applied within an environment of power relationships and governmentality rather than in relation to the nebulous concept of the state (Bateup, 1999). Indeed, governmentality acknowledges that even the most disempowered subjects may contribute to the regulatory frameworks that constitute their government (Cruikshank, 1993). This genealogy does not argue that criminal law and procedure, including institutions of the Crown, developed via the removal of the victim for the centralisation of power around a sovereign figure alone. Instead, it tells of the gradual formation of criminal law and justice by the participation of the victim in a discourse of juridical change, involving various micro instances of rule.

The victim plays a significant role in various epochs of criminal justice, which when taken collectively over some 900 years, shows how important the genealogy of the victim is to our understanding of the shaping of criminal law and justice. This genealogy challenges the assumption that criminal justice is the exclusive manifestation of the state, limited to the key players of the police, the Office of the Director of Public Prosecutions (ODPP), and the criminal. The victim has always played a fundamental role in the formation of criminal law and justice on both a procedural and substantive level. The interaction of the victim with various institutions of the early counties, the community, the King, and the institutions of modern government, show how the victim is indeed a powerful discursive agent in the formation of criminal law and justice. This calls into question the conceptualisation of

criminal law in the current literature. This literature predicates a discussion of the victim in the context of politics, as a subjectivity of inherent diversity, deserving of better public policy in order to compensate the victim for the state's failure to apprehend crime. Far from this perspective, the genealogy of the victim identifies the victim subject as an agent of inherent legal power – as an agent significant to, and intuitive of, the shaping of criminal law and its institutions.

Key victimologists including Mendelsohn (1963), Shapland (1984, 1986a, 1986b), Elias (1984, 1986a, 1993) and Walklate (1989) argue that victims need to be invited back into criminal justice. Informing this line of argument is the realisation that the victim now participates in the limited role of witness for the prosecution, if required. Historically, however, this has not always been the case. The eleventh century victim occupied a central position in the common law being responsible for the apprehension, charge and prosecution of offenders. Known as a private prosecution and later the appeal,[3] this method saw the victim control each aspect of the judicial process, including punishment and the determination of associated remedies.[4] The law at this time was feudal in character, with little or no distinction between the civil and criminal jurisdictions.

Indeed, the common law after Norman Conquest sought mainly to secure the property interests of the landed gentry in the county or hundred courts, evidenced by the frequency of actions for trespass to property. In the twelfth century, the feudal law was marked by the rise of the criminal appeal, in which the victim would inform the hundred court of an offence to be later heard by the eyre justices, in a court of assize. This period also saw the rise of the presenting jury, which could indict an offender without the consent of the victim. Thus, from the thirteenth century, the absolute power of the victim to initiate a prosecution began to be degraded for the rise of monarchical structures based on victim power. Here, the county began to assert its right to protect its provincial interests consistent with their obligation to keep the King's peace. The end of the thirteenth century was therefore marked by increased administrative structures of the Crown that took at least partial control of criminal justice, as evidenced in the rise of the constable, royal prisons and the expansion of policing methods as based on the quintessential mode of individual power, the hue and cry. From an early period the role of the victim was weakened for the rise of 'an ensemble of institutions, procedures, tactics, calculations, knowledges and technologies'; the rudiment of what is now defined as the 'state' (Bateup, 1999: 95).

However, the role of the victim in explaining the genesis of these developments is fundamental.

The history of criminal law until the advent of victim compensation in the 1970s is clearly expansive. Various trends involving the victim have impacted on the early development of the state and common law. The control and regulation of crime as a threat to the personal property of the landed gentry established initial guiding factors constituting the criminal law of England. From here, county policing in the hundred and the rise of the constable marked the change from the enforcement of individual property rights to communal modes of law enforcement. Systems of prosecution adapted to these changes, with the introduction of the presenting jury providing local and itinerant justices the power to indict an offender, in addition to the victim. The King's peace and the development of offences against the security of the realm in terms of treason, and then later, public order offences, marked other changes to which the early government of the victim was integral.

Evidenced by the rise of the civil writ of trespass,[5] the gradual emergence of tort law out of feudal law also marked changes to which the victim was party (see Hay, 1983: 167–74). Here, the victim began to be displaced as the primary focus of feudal law for alternative institutions such as the county, the kingdom and the King's interests. Into the latter part of the thirteenth century, as captured in the *Pleas of the Crown* of Hale (1685), Hawkins (1716), East (1803) and Maitland (1888), this marked the rise of a definable criminal jurisdiction accountable to the Crown in the court of *curia regis*, or King's Bench. The security of the King's peace and realm was thus of paramount importance. The gradual introduction of communal and then social concerns into the common law displaced the victim from their orthodox position as private prosecutor, opening up the new jurisdiction of civil law for the enforcement of distinctly personal rights.[6]

Personal interests being bound to the civil law, criminal law developed characteristics associated with social threats such as public risks and order. The development of early policing forces, public prosecution systems and the decline of private settlement for state controlled punishments belies the separating of public and private interests into the criminal and civil jurisdictions respectively. The distinction between felony and misdemeanour, different types of punishments, the rise of statutory courts of criminal jurisdiction (circa 1361), the Court of Star Chamber (1487–1641), and the rise of discrete offences against the King's peace, suggest key developments rising out of the

discursive relocation of victim power to institutional forms. The introduction of criminological perspectives and the human sciences into the latter part of the eighteenth century also suggests the movement of criminal justice away from the victim to the security of society, consistent with earlier discursive changes. The genealogy of the victim is therefore the gradual divestment of the ownership of rights and powers constitutive of the criminal conflict at law.

The identification of the criminal as the site of deviance as identified through imperfect biology, and then later, improper socialisation, evidences the way criminal justice came to focus on the criminal exclusively, leading to the demise of the significance of the victim. From here, criminal law and justice began to represent the criminal, the state and the common law as removed from the victim (Hay, 1975: 38–42; Thompson, 1975: 270–7). Representing the private interests of the landed classes, criminal law began to represent the values of the King, the protection and rehabilitation of the criminal, social control, and state sovereignty, in controlling criminal justice.

Literature critiquing the role of the victim in the modern justice system generally views the victim as lacking certain powers and rights at law. A key argument supported by victimologists generally is that the modern victim is silenced by the dominant role the state plays in regulating the course of criminal justice pursuant to its social and public prerogatives. Critiquing court procedure, justice administration, and victim support services in the provision of assistance to victims to ameliorate the effects of crime, victimology has identified several failings of criminal justice depriving the victim of their orthodox rights and powers. The rise of victim assistance services such as criminal injuries compensation is generally identified as linked to the rise of victim rights as a political issue in the 1970s. Victim assistance has, therefore, been established to reintroduce victims into the justice system following their disempowerment and exclusion. In terms of victim impact statements, for example, the victim now has a welcome albeit limited role to play in the determination of the criminal sentence.

However, commensurate with the institution of criminal injuries compensation in New Zealand in the 1960s, victim assistance was criticised as a statutory remedy for the lack of victim agency in the criminal trial. Further, such programs have been identified as compensating the victim for the state's failure to safeguard the welfare of its citizenry. These criticisms show that victim assistance can be defined as a form of welfare support administered by the state, much

to the dissatisfaction of victims. Victim assistance can thus be conceptualised as an alternate jurisdiction for the reparation of victim needs, at arms length of the criminal jurisdiction. Significantly, this demonstrates that victims now vie for powers long subsumed by the state in its monopolisation of the criminal law, attesting to the institutionalisation of victim power in the state in the first instance. Here, victim assistance demonstrates that criminal justice emerged out of the dynamic history and genealogy of the victim as their prosecutorial power was subsumed by the state.

The dynamic empowerment of the victim since the 1970s was made possible due to the genealogy of the victim as a participant in discursive change. Demonstrated in Holdsworth's (1903–38) *A History of English Law*, institutions of criminal justice established around the victim and then later, the sovereign. Just as the orthodox victim was deprived of their common law power by provincial, sovereign, and then social interests, the modern victim is capable of being empowered by re-invoking those discourses that place the victim within close proximity to the criminal justice process. The development of modern assistance, as a program attempting to 'empower' the victim in the context of social government, demonstrates how modern institutions of justice have developed in accordance with the history and genealogy of the victim. Victim assistance indicates how modern institutions of criminal justice have emerged in terms of the discursive changes to which the victim was part.

This discourse, the gradual degradation of victim agency for their bourgeoning dependence on society as the arena of justice administration, suggests that the genealogy of the victim sheds new light on the genesis of criminal justice programs. This genealogy, the assemblage of various periods of rule that saw the centralisation of victim power under the state, demonstrates how the victim has participated in discourses that influenced the development of justice over the 900 years traced in this text. Fundamentally, this establishes how the genealogy of the victim is a vital aspect of the genesis of modern criminal law and procedure in common law systems.

The genealogy of the victim maps a history of micro regulation and development demonstrating the significance of the victim to our understanding of criminal law and justice, including its constitutive practices and procedures. Criminological theory discussing the modern victim generally tends to provide little detail of the genealogy of the victim as an agent of power. Instead, the state and its institutions are identified as constituting criminal justice, to the

disempowerment of victims generally. By establishing a genealogy of the victim in the emergence of key developments in criminal justice since Norman Conquest, this text provides that the origins of criminal law and justice lie not in the innate sovereignty of the King, or the state, but in the genealogy of the victim subject as an ongoing participant in discourses of power. This suggests that the victim has played a fundamental role in the development of key modes of legal regulation, including the substantive and procedural rules of criminal law and justice.

As the counties grew into metropolitan centres, the administration of criminal law shifted to the Crown and state. This resulted in the limitation of the expression of victim interests as the management of criminal justice became subsumed by various institutional forms securing the social interest. By questioning the assumption that the state acts as a centralised 'body' from which the development of criminal law and justice flows, this text establishes that the victim is indeed central to our conceptualisation of the development of the criminal jurisdiction. By tracing the discursive power of the victim, in terms of a genealogy of the victim, the state as the consolidated arena of criminal justice administration is challenged, and the basis of the victim as a powerful agent of government, is established.

The victim, criminology and the state

A key assumption in criminological and legal theory is that the state exists independent of other institutions and subjectivities. Evidenced in various branches of criminological theorising, the state is viewed as the centralised agent through which power relations are governed. In the work of Garland (1981), for example, the state is qualified as the site of relevant social action. In particular, the state is defined as the seat of social government. The term 'welfare state' is thus used by Garland (1981) as the locale through which arrays of normalising agencies intersect to conduct the modern policing of individuals, families, and other groups.

In his later work, Garland (1996, 2001) acknowledges that limitations of the sovereign state saw the emergence of new and innovative crime control policies towards the end of the twentieth century. These new policies tended not to characterise the state as the sole site of crime control, but rather began to utilise the individual to help reduce crime by encouraging the individual to calculate criminal risks and threats. However, other literatures discussing the sovereignty of the

state continue to acknowledge the state as the primary seat of control. Identified as the dominant source of control regulating the operations of classical and modern society, the state assumed the role of constituting and managing anything social – including crime and criminal justice.

This notion has been continuously affirmed in the criminal law, recently by Gleeson C.J. and Hayne J. of the High Court of Australia in *The Queen v Carroll* (2002) 213 CLR 635 at 643, where it was said:

> A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept 'that it is better that ten guilty persons escape, than that one innocent suffer' may find its roots in these considerations.

The development of this notion, however, resides in the growth of ideas attesting to the legitimacy of the state as the source of power and control.

The rise of the state follows the movement away from feudal property relations towards communal and then social relations. Evidenced in the changed nature of legal dispute resolution from the provincial to the national level, and the concomitant modes of criminological thought locating the initial source of deviance in the individual and then the social, the state became the site of order and control. This shift validated the state as the site of centralised sovereign power claiming a 'monopoly of independent territorial power and means of violence' (Dean, 1999: 9). The state thus came to be identified as the organised and formal political apparatus through which social relations were determined. State power stands apart from its constitutive elements, the rulers and ruled. Concerns such as the legitimate source and exercise of state power, and the proper agents of that power, soon came to dominate, establishing the autonomy and sovereignty of the state as the principal regulatory authority. For the victim, this resulted in the states unquestioned monopolisation of criminal prosecution and punishment. This has led to the state being identified as the inherent source of criminal law and justice over the victim.

The shift from feudal property relations to the state

The changing legal practices of secular and church authorities in the twelfth and thirteenth centuries transformed the legal system from one designed to resolve community conflicts, to one acting largely in response to those conflicts (van Krieken, 1990: 359). From the fourteenth century, the central authorities of the Crown and state took a more active role managing and regulating civil society, such that these authorities began to solely define what constituted crime (Smart, 1983; Pike, 1968; Damaška, 1986: 8–15). The disciplining of the population, for example, evidences the rise of a centralised authority empowered to conduct the behaviour of the society. This is suggested by the increasing significance of organised modes of poor relief and the bourgeoning law of public order into the seventeenth century (Beloff, 1938). Argued by Elias (1982a, 1987), the community underwent a civilising process that can be regarded as 'a conscious proselytizing crusade waged by men of knowledge and aimed at extirpating the vestiges of wild cultures – local, tradition – bound ways of life and patterns of cohabitation' (Bauman, 1987: 93).

Medieval and early modern disciplinary power can thus be distinguished through the transition from power relations rooted in communal village relations, exercised pursuant to custom or local law, to the rise of the early state, in which discipline was consciously planned, designed, implemented and imposed on a population (Airies, 1989: 1–10). This civilising process denotes then, 'above all else a novel, active stance towards social processes previously left to their own resources, and a presence of concentrated social powers sufficient to translate such a stance into effective social measures' (Bauman, 1987: 93). The change from feudal property relations evidenced through the parcelisation of sovereignty to the expansion of the institutions of the Crown regulating criminal justice as a communal and then social issue substantiates the transition to a sovereign administrative power concerned with the conditioning of society over the protection of the hereditable entitlements of the landed classes. The growth of the state out of feudal relations is thus central to the discursive relocation of the victim from criminal law and justice.

Initially, however, the feudal mode of production and the organisation of society as a set of property relations established early legal institutions in favour of the private interests of the landowner (Bloch, 1964: 109–16; Anderson, 1988; Airies, 1989; Chartier, 1989; Friedman, 1979, 1984). This is because the process of subinfeudation created a chain of tenures from the King down to the peasants occupying the

land. The source of the early law of England, therefore, resides in the parcelised sovereignties flowing from the King. Feudal relations were thus characterised by individual duties, owed to others in the feudal hierarchy, and exercised through that hierarchy.

The development of a centralised political authority assisted the growth of the common law by establishing causes for the protection of private property, evidenced in the growth of trespass and trespass on the case as a civil offence actionable by writ in the sixteenth century. Distinct social relations were created outside the feudal mode of subinfeudation, necessitating the regulation of civil interests as separate from private propertied ones. This required the policing of civil society by a social authority that could regulate public order through domination and coercion. This led to the development of new kinds of offences, including those against the Crown, the state and public order.

Under feudalism, power was diffuse, parcelised, and privatised because feudal lords constituted the source of legal order. As these feudal networks began to breakdown, a civil society was established that required supervision, control and direction (Anderson, 1988). The source of the legitimacy of this control, in terms of constitutional theory, resided in the sovereignty of the King in parliament, transferred in part from the King to the House of Lords under the Statute of Westminster 1275.

In the fourteenth century, the House of Commons began to assert its right to be consulted. By the 1500s, it was generally established that the King could only make laws with the consent of parliament. From the 1700s, parliament was generally accepted as the sovereign law-making body, with the King taking a less influential role. From here, the state slowly divested the ruling classes of direct political power, leaving them with private exploitative powers removed of any public or social function. Instead, the state, as a fragmented body of politicians, officials, and institutions under the authority of parliament, assumed the role of governing the laws of civil or public society (Poggi, 1978). The sixteenth century thus evidences the increased use of statutory codes for the regulation of social interests (Sayles, 1988). In particular, offences to the integrity of the person, once private, began to be exclusively defined in the social interest (Sharpe, 1983).

The transition to a centralised power independent of orthodox property and familial relations was accompanied by the rise of state institutions, and significantly, disciplinary social practices. Airies (1989: 2–3) argues that 'the state and its system of justice increasingly intervened,

at least in name, and in the eighteenth century also in fact, in the social space that had previously been left to communities'.

Medieval social history can be perceived in terms of a particular transformation of social order from one based on communal or provincial rule, to one located in the formation of the sovereign state. The move from feudal social relations to those of commerce contributed to the breaking down of old, communal forms of social order. This was responded to by state institutions establishing new forms of social rule around the tenets of centralised power. A particular socialisation process emerged as based on the state and citizen, rather than the feudal hierarchy. Out of this movement from the parcelisation of sovereignty to centralised power, the state came to be concerned with social order and regulation (Bourdieu, 1987).

It is this process which saw the legitimate removal of the customary punitive and prosecutorial powers of the victim, to the Crown and state. This was affirmed by the emergence of a disciplinary order complementing the social and the state as the most appropriate praxis of crime control. For instance, Elias (1982a, 1987) argues that social history can be read in terms of a transformation towards the 'constraint towards self-constraint', in which the regulation of the body including its impulses, passions and desires, underwent a 'civilizing process'. For Elias (1982b, 1984, 1987), this order is achieved by the monopolisation of violence by the state. The effect of this consolidation of state power thus included the intensified dependence of social groups on the state as the guardian of social life. With the rise of the state regulation of crime, for example, increasing dependency between the welfare of the victim and the Crown as the locus of prosecuting power came into being.[7] The movement from feudal property relations to the social under a sovereign state saw the concomitant rise of practices constituting the state as the sole regulator of the social (Bloch, 1964: 359–74; Ewald, 1991a; Mitzman, 1987).

The undisciplined society, the state and the victim

The rise of the state as an intrinsic, natural and sovereign institution was complemented by the development of theoretical assumptions consolidating state sovereignty as the guardian of social rule. Classical strands of criminology as represented in the work of Beccaria, Ferri and Lombroso suggest the movement away from the private concerns of the victim to the pathologies of the individual criminal. These criminals were seen as manifesting within the urban slums, consequent with the expansion of metropolitan society. Certain social conditions

were identified as being likely to encourage deviant, unruly behaviour (Gatrell, 1990: 243–6; Cohen, 1979). Strain theory as an explanation for criminal deviance soon emerged, presenting the social as the basis on which criminality was both conceived and defined.[8] This model expressly qualified the state as the institution combating crime. The state was defined as the appropriate intervening power, given that the criminal threat was seen to have past anything that the victim could combat.

Theoretical criminology also seeks to critique the plight of the modern crime victim by examining ways in which the state limits their ability to participate in criminal justice. In terms of the discipline of victimology developed by Mendelsohn (1963), modern studies in victim regulation suggest the state is identified as the source of centralised power dominating the interests of the victim. Thus, in various works including those of victimologists and criminal theorists (Goodey, 2005; Zehr, 2005; Doerner and Lab, 2005; Kaptein and Malsch, 2004; Davies *et al*., 2003; Shapland, 1984, 1986a, 1986b; Shapland and Bell, 1998; Elias, 1984, 1986a, 1993; Wright, 1991; Weisstub, 1986; Davis *et al*., 1990; Sumner, 1987), the state is identified as the power restricting victim's access to the courts, and ultimately, the criminal trial.

Court sponsored victim services responded to this need seeking to console and support the victim throughout the criminal prosecution process. Notwithstanding the introduction of an expression of victim rights by the executive, these programs attempt to offer the victim support to compensate their lack of franchise within the prosecution process. Accordingly, victimology plays a role in affirming the notion that the state is qualified as the centralised power from which criminal justice flows. Dominated by the Crown, criminal prosecutions 'glorify' the state as the central heritage upon which criminal law is advanced, leading to the assumption that the justice system acts autonomously in the interest of the state, devoid of the concerns of the victim.

The autonomous state and the victim

The rise of the state as a centralised power has resulted in significant changes for the victim. This text focuses on the assumption that victims were gradually displaced from their position as private prosecutors and punishers for the rise of Crown interests, followed by the formal institutions and structures of the state. Today, the state, in the form of an 'independent' ODPP, assumes the role of prosecutor along with other regulatory authorities. In this process, however, the state is confirmed as a power unto itself. Here, the ODPP is situated as the

principal power from which criminal law prosecutions flow. The ODPP acts as the centralised source of criminal prosecution to the marginalisation of the agency of the victim. The impact of the centralisation of social and legal power under the state has thus resulted in the legitimate displacement of the victim from the common law. This is evidenced in terms of ODPP policy regarding the decision to prosecute in the first instance. Such policy asserts that the public interest is paramount, over the needs of the victim.

However, by tracing the genealogy of the victim, the assumption of the imminent power of the state can be challenged. This, in turn, challenges the assumption that criminal law is consolidated around the interests of the state, to the exclusion of the power of the victim. Rather, the victim has been integral to the shaping of the law as evidenced by the active role they have played in the organisation of criminal law and justice since 1066. With the transfer of victim power, the Crown and state came to subsume the centrality of the victim as the constitutive element of criminal law and justice.

Governmentality

The governmentality literature examines ways in which regulation is conducted. Rather than focusing on ideological and political explanations for the constitution of life, governmentality seeks to expose the regulatory practices, frameworks and rationales that govern each of us.[9] This literature provides the opportunity to move beyond debates as to the legitimacy of any one ideal to focus on how behaviour is subject to control over time. It is the changing nature of this control, or rather the constitution of different rationales that subject individuals to regulation, that is of concern here. The assumption that the state and criminal law have intrinsic origins is established in much of the criminological and legal literature critiquing the role of the state as monopolising the criminal justice process. In criminal justice, such assumptions are used to explain or understand the limited role of the victim. The governmentality literature challenges this notion by providing a mode of analysis that establishes the significance of micro control.

The notion that we are controlled by an all-powerful centralised government is challenged by the way regulatory programs exist everywhere, to legitimate certain modes of subjective regulation in the present. Governmentality explains how various forms of conduct are subject to regulation. Conduct as diverse as self-esteem and will

(Cruickshank, 1993; Valverde, 1998), pregnancy (Weir, 1996), personal security (O'Malley, 1992, 1996), insurance and risk (Ewald, 1991b), policing (Stenson, 1993), dangerousness (Pratt, 1997, 1999), social welfare (Garland, 1985b), statistics and moral order (Hacking, 1991), the economy (Miller and Rose, 1990), and unemployment (Dean, 1998), have been identified as subject to different mentalities of rule. These include liberalism, sovereignty, reason of state, pastoral power, bio-politics, social rule, and neo-liberalism. These mentalities provide a framework accounting for changes to government on a subjective level.

Accordingly, in the context of Foucault's (1984) notion of 'effective history', governmentality establishes a framework through which the history of the victim can be traced. This literature also facilitates the argument that the state and criminal law are not of intrinsic origins but themselves shaped through micro instances of rule, as a response to changing rationales of government. By considering the regulation of the victim as an agent of change since Norman Conquest, the centrality of the victim to the development of criminal justice can be established.

The main tenets of governmentality involve the identification of mentalities of rule that legitimate the 'conduct of conduct'. Identified in various works, these include classical liberal, sovereign, liberal, communal, social, paternal, and neo-liberal rule. While almost all the mentalities of rule identified in the governmentality literature apply to the explanation of the expansive history of the victim, and the associated rise of criminal law and justice, those concerning the state and social are particularly relevant. The history of victims demonstrates how their plenary power at common law was gradually displaced by the rise of sovereign interests and institutions. First evidenced in the King's peace and the establishment of parcelised sovereignties, provincial interests came to displace the dominance of private landed ones from the law. For this reason, the development of sovereignty, reason of state, pastoral power, bio-politics, social, and contemporary paternal modes of rule help explicate the power of the victim.[10] They help explore the idea that the conduct of criminal law and justice lies not in the centralised power of the state, but in the power of the victim as it was transferred to institutional forms.

While this text is not concerned with the development of each mentality of rule in particular, an understanding of them suggests how individual agents such as the victim are pertinent to the broader development of state institutions, including the justice system. This text is

not concerned with the genesis of mentalities of rule out of the problematisation of past regimes, but the application of the general principles and rationales of governmentality in order to identify the genealogy of the victim as a constitutive power of criminal law and justice. These mentalities help explain how victim power was removed from the victim to be instituted in the state.

The milieu of the victim in history and discourse

The history of law, including the documented development of the common and statutory law, and secondary works accounting the history of criminal justice, feature as the empirical source of this text. This text will move through victim history from around 1066 up until the relocation of the victim in common law and statute post 1970s. While the emphasis is not on tracing, chronologically, the events leading to the disempowerment and contemporary re-empowerment of the victim, the development of law will be traced from the advent of private prosecution and settlement in the eleventh century. It must be borne in mind, however, that this text is styled by a genealogical analysis, such that the focus is on the development and institutionalisation of discourses of victim power, than the ordering of events.

This text begins with the social and legal traditions leading to the establishment of private prosecution as a mode of conflict resolution in the period 1066–1300. The role of the early victim is examined through the antecedents of private prosecution and settlement, the eyre justices on assize, and the role of the courts. The abolition of the private settlement and the concomitant rise of the civil writ of trespass are examined in terms of the emergence of a criminal jurisdiction into the latter half of the thirteenth century. The rise of the King's peace and interests, Crown institutions and officials, and statutory courts for the expedient management of offences is examined in terms of dominant customary, social, and religious factors; the origins of the transfer of the power of the victim to the Crown. This demonstrates how the shift to Crown control first conformed with victim plenary power, slowly eroded as the King gained the institutional prerogative to undertake prosecutions for the sake of his peace.

The rise of public prosecuting authorities under the authority of the Crown is then considered to determine those factors that led to the institutionalisation of victim prosecutorial power under the Crown. Specifically, Chapter 3 examines the social and political conditions that necessitated the institution of a public official in the form of the

Attorney-General, and later the ODPP, in the late twentieth century. This chapter thus follows the rise of the presenting jury and the emerging power of royal justices to continue an indictment after withdrawal of the charge by the victim. Here, the rise of the Attorney-General, prosecution associations for the apprehension of felons, and the police, are examined as antecedent to the ODPP, and its continued monopolisation of criminal prosecutions today. The continued prominence of police prosecutions, the use of *nolle prosequi* for the staying of private prosecutions, and the bourgeoning law of evidence limiting the discretion of the ODPP for the provision of defendant rights, is considered against the background of the development of the social and the consolidation of the ownership of criminal law under the Crown and sovereign state.

Evidenced initially in the hue and cry and then office of shire reeve (soire-reeve) and sheriff in the eleventh and twelfth centuries, police forces were provincial in nature and characterised the victim as a significant player in the early justice system. Later, the office of constable arose in accordance with the sovereign duty to keep the King's peace. Policing methods during this early period were closely associated with the administration of the courts only. The victim thus formed the basis of feudal policing and crime control. Following an offence, or upon witnessing a crime, it was the common law duty of a victim to raise the hue and cry and to apprehend the offender. Into the fourteenth and fifteenth centuries, the justice of the peace and constable soon replaced early modes of victim orientated policing, followed in 1829 by the creation of the first state police force under the *Metropolitan Police Act 1829* UK. The rise of police prosecutors, and their use of the power of private prosecution in a public capacity, demonstrates continuity with the early powers of the victim, leading to the modern context of policing. This tradition then explains modern forms of policing, including market based private policing, community policing, and the role of the victim in the policing of community order.

The early victim was a fundamental adjunct accounting for the rise of prisons, penalty and punishment. Chapter 5 traces the antiquity of the power of punishment, including the role of the church and clergy, in the development of victim punitive power. The early history of the English prison is traced in terms of the emergence of the sovereignty of the Crown over the criminal prosecution process, and in particular, the punishment and reform of criminals. The decline of private settlement for the rise of manorial and communal prisons is discussed in the

context of the rise of houses of correction under the supervision of the state. Here, the impact of the move to social government is considered as the impetus limiting the punitive power of the victim.

Chapter 5 also discusses the rise of the modern prison and rehabilitative punishment. The movement towards social explanations of deviance and the punishment of crime as a social problem within the various strains of criminology, including liberal perspectives such as those of Hall and Beccaria is examined, together with the impact of scientific positivism and the birth of the criminal individual. The rise of the human sciences and emergence of neo-liberal perspectives demonstrates the rationalisation of crime away from the private interests of the victim to society, the state and criminal self. An examination of modern penalty and modes of reform shows the significance of the integration of the social as the rationale for criminal punishment. The movement from retribution to restorative justice in terms of shaming, reintegration and conferencing will additionally highlight the movement from the private interests of the victim to the state as the power seeking to control crime and deviance.

Characteristic of the genealogy of the victim is the general consolidation of victim power under the state. Spanning a massive period and development, Chapter 6 shows how the social began to displace the private interests of the victim from the common law with the rapid increase of public offences from around 1600. This chapter covers the rise of parliamentary supremacy and the statutory amendment of the common law; the expansion of treacherous offences; the impact of the Star Chamber and growth of misdemeanour offences; the development of court procedure; the expansion of public order offences; the rise of proof and intent distinguishing the criminal jurisdiction; changes to the substantive laws of homicide and assault; larceny and theft; inchoate offences; the rise of summary offences and the decline of the jury; and the continued use of criminal informations and private prosecution. The rise of sovereign and social interests will be seen as displacing victim power to the state. Thus, this chapter will focus on the institutionalisation of criminal law under the apparatus of the state.

Following this lengthy period of removal and disempowerment for state institutions and powers characterised in terms of the public good, Chapter 7 examines the emergence of the victim rights movement in the 1970s. Resonating through criticisms for better treatment and access to justice, this movement is identified as flowing from the 'crisis' of the victim in the justice system concerning their lack of

prosecutorial and punitive power. This movement reflects various issues impacting the status of the victim from feudal times. The factors influencing the rise of victim rights including criminal injuries compensation; the theoretical movement of victimology; women's rights and advocacy; the lack of victim agency in the common law; the growth of victim agency at the local level; and an emerging general critique of state domination, are identified as supporting the development of victim rights. This is represented in the policies and activities of four movements, specifically the American movement Mothers Against Drunk Driving, the Australian movement Victims of Crime Assistance League, the US movement Parents for Megan's Law, and the UK movement Victim Support. This chapter argues that the victim's movement was largely spawned by the relocation of victim power to the state. The victim's movement will be seen as representing the reaction of victims to the gradual erosion of their power at common law for the consolidation of that power under the state.

The relocation of the victim at common law and the rise of executive assistance programs followed the victim's movement and characterises the present epoch of the victim. Following the removal of the crime victim from 1600 and developments in victim rights, Chapter 8 considers the different ways in which the victim has been included in the common law from 1970. This will involve a discussion of the modern context of private prosecution; victim impact statements; due process; victim experience as mitigating criminality; the use of apprehended violence orders, and developments regarding the modification of the law of double jeopardy. Responsive to the changes in the political scene of victim rights, the modern regulation of the victim in the common law has, for the first time in centuries, developed to include the victim, though not to the demise of the powers of the state in controlling policing, prosecutions and punishment.

The second part of Chapter 8 considers the rise of criminal injuries compensation, or victim assistance programs. The genealogy of the victim demonstrates the close association of the victim to the development of criminal law and justice. The contemporary move to emancipate the victim, empowering them with statutory powers and rights, suggests at first glance a dramatic change in the history of the victim indicating a change, in part, to inclusive modes of government. Such programs are rationalised on the basis that the victim needs to be re-established within the justice system as a primary agent of criminal actions. These programs seek to empower the

victim through the provision of compensation for pain and suffering, restitution, property damage and referral for counselling.

Combined with developments in the common law, the rise of victim compensation and assistance suggests that the victim is being brought back into the criminal justice system. However, this relocation has been poorly received by victim groups. Changes to the common law and the rise of victim assistance are identified by victim groups as competing with the sovereignty of the state, because the victim is being compensated for the failure of the state to secure public order. The re-inclusion of the victim is thus neither complete nor plenary. The competing interests of contemporary criminal justice stop the victim from gaining increased control over the punishment and prosecution process because their power has been transferred, over hundreds of years, to institutions of the state.

The latter part of Chapter 8 argues that where applicable, the victim is being empowered through a range of neo-liberal technologies that focus on victim self-government outside the common law, due to, *inter alia*, the conflicting interests of victims and the state in the prosecution and punishment of crime. In those areas where self-government is not appropriate, such as the relaxing of the rule against double jeopardy, heated debate arises concerning the powers of the victim against those of the state. The fact that victims now compete for the reinstatement of their powers, seeking to have them transferred back from the state, suggests how their agency has shaped criminal law and justice. The spawning of new and innovative programs, such as the rise of victim impact statements, apprehended violence orders and the availability of victim counselling, evidences how new technologies of rule respond to the genealogy of victims as agents of institutional development. This affirms the fact that victims exercise a discursive power that has influenced the development of criminal law and justice. It establishes how victim power has been pertinent to the shaping of the criminal law. The contemporary relocation of the victim through the proliferation of new regulatory techniques and critiques of state power thus affirm the victim as a participant of common law change.

While ranging historically in their control of the prosecution process, victim power and agency has been fundamental to the shaping of criminal law and justice from the first instance. Drawing on the preceding chapters, Chapter 8 concludes that the re-inclusion of the victim is limited and regulated in accordance with the victim's prior transfer of power to the state. This chapter suggests that the victim can be empowered by invoking discourses that place the victim within

close proximity to the criminal justice process, by drawing on their orthodox powers and rights. The incomplete inclusion of the victim is thus consistent with the genealogy of the victim as both proximal and removed. This suggests the discursive formation of criminal law and justice around the victim as a subject of micro regulatory change.

Chapter 8 therefore affirms that criminal law and justice has developed by the participation of victims in instances of micro regulation and development, leading to the institutionalisation of orthodox victim power within a range of state institutions. The conceptualisation of the victim as 'silent' thus ignores the significant discursive power of the victim, and the institutionalisation of that power in the formation of criminal justice over 900 years of common law history.

The final chapter considers the future of the victim and concludes that criminal law is a manifestation of victim power. This necessarily leads to the reconsideration of the notion that criminal law and justice is constituted by state power advocating the social interest alone. Here, criminal law and justice will be viewed as developing governmentally, in accordance with victim genealogy. Consistent with the lengthy history of the victim as both central and removed, the victim can be relocated within the criminal justice system as their common law powers were always pertinent to the shaping of criminal legal institutions in the first instance. This is evidenced in terms of the slow and gradual removal of the victim over some 900 years, through the move from private prosecution and settlement to public modes of prosecution, punishment and crime control. The gradual relocation of victims by way of victim impact statements, apprehended violence orders, injuries compensation, and other developments contesting the common law power of the state further establishes the centrality of victim power to the shaping of law and justice.

The genealogy of the victim from Norman Conquest evidences various periods of micro rule leading to the institutionalisation of victim power within the modern apparatus of the state. This suggests how the genealogy of the victim underpins the formation of criminal law and justice. Here, criminal law and justice is established as a discursive process operating beyond the confines of the state as a consolidated entity. In particular, this calls into question the assumption that criminal law and justice is constituted by the power of the state as an autonomous institution of centralised government.

Victims, once central to the administration of criminal justice as a private means of dispute resolution, became gradually removed from

their position as prosecutor by a number of political, legal and social developments. However, the victim subject remains an important agent of common law change, despite their paucity of modern prosecutorial powers, due to their participation in discourses of legal change. This text moves from the position that the history of the victim is fundamental to understanding the modern function of the criminal law and justice system. This is argued by viewing the victim subject, state and criminal law as being established around relationships of power and micro instances of change. As such, the history of the victim and the genesis of criminal law and justice can be better understood through genealogy, governmentality and the Foucauldian notion of subjective power over the traditional narrative that the authority of criminal law is established by the assertion of legal power by a centralised sovereign state alone. The genealogy of the victim established herein therefore disputes the assumption that the basis of criminal legal power resides in the state and its institutions.

As it is the interaction and influence of the victim on various institutional structures over time, in the particular, that is the empirical focus of this text, state power will be explicated to the demise of other subjectivities, institutions, and powers. What is produced out of this analysis, the subject matter of which are the historical developments to which the victim is part, is a genealogy of the history of the victim and a critique of the dominance of the state (see Donzelot, 1991; Deleuze, 1979; Ewald, 1991a, 1991b). This genealogy demonstrates how the victim fundamentally explains the development of criminal law and justice from private prosecution through to victim assistance programs and the nuances of executive assistance programs. The relocation of the victim from the 1970s explains how the victim is regulated in accordance with their genealogy as proximate and removed to the criminal conflict.

The history of the victim is given new status by this text. An understanding of victim history is vital if we are to fully comprehend modes of common law regulation and criminal justice administration. The genealogy of the victim provides a new mode of cognition, conceptualising certain types of legal participation, including the formation of legal institutions and the control of criminals and victims generally. The discursive power of the victim thus allows for the reconsideration of the constitutive principles of criminal law and justice as they are currently considered.

2
Private Prosecution

The power of a person to apprehend and prosecute felons on their own motion was an essential mode of crime control in early medieval England. Pre-dating the establishment of community or metropolitan police forces, the private person owed a duty to the King to maintain the peace and security of the realm. Before the emergence of this duty, however, private prosecution was the means of securing private property rights in terms of land, chattels and the person. Before any distinction between public and private, tort or criminal law, feudal law was characterised by the expression of private landed interests. The private nature of these interests saw prosecutorial power accord with the feudal chain of command, leaving the indigent poor with little recourse to justice. Consequently, the early common law of England supported various procedures that secured the interests of the landed gentry, specifically their right to the sanctity of their person and property.

Securing property and the person involved the use of private settlement where money or blood was exchanged for the infringement of a right. At this time, the courts essentially registered private settlements, in addition to the general supervision of the administration of justice in each county. From the thirteenth century, however, the courts took a more interventionist role seeking to guide the course of justice away from private propertied interests to those of communal peace and security. The historical focus on private interests, however, directed the course of English justice so that today, the common law power to initiate proceedings in the name of an individual remains as a central feature of our criminal justice system (Samuels, 1986). Indeed, though rarely used today, the right of a private person to institute a prosecution for a breach of the law has been said to be a 'valuable constitutional safeguard against inertia or partiality on the part of authority'.[11]

This chapter begins with an examination of the early law of England. Eleventh century feudal law was primarily concerned with private propertied interests. The duty to keep an expanding King's peace, however, led to fundamental changes into the fourteenth century evidenced by the emergence of new legal structures securing sovereign rule. This chapter traces the various foundations for such change, explaining how the prosecutorial and settlement powers of the victim were gradually eroded for the King's sovereign interests. The mentalities and rules of government used to rationalise these changes to the law, from private to semi-public and sovereign, will be analysed to indicate how the common law power of the victim fundamentally underpins the development of the first tenets of criminal law and justice as it emerges in the twelfth and thirteenth centuries.

Social conditions and the government of private disputes from 1066 to the thirteenth century

The development of the medieval English legal system evolved around the needs and interests of the victim. From the eleventh century, the landed classes instituted customs for the resolution of disputes borrowed from the Anglo-Saxon Kings and continental Europe. The formal contexts of the early law of England, however, were couched in the social, religious and political issues of the time. Seen to represent the interests of landowners over those of the poor or vagrant, the law from 1066 captured the political and cultural values on Conquest. The source of the authority of law at this time flowed from the feudal hierarchy established by the King. The subinfeudation of the authority of the King to regulate his realm resulted in the parcelisation of sovereignties across England. Through this delegation of power, each province was ordered by the feudal lord's prerogative to resolve local disputes.

However, the types of disputes before the King's royal justices were not defined by civil or criminal code, but by the social dynamics of feudalism.[12] As a distinct criminal jurisdiction was yet to form, law flowed from social and religious custom. The divide between those interests secured by law and those that went unrepresented, were defined by the property one held and owned. As such, law came to represent and empower those with property against those who infringed it. It was not until the Magna Carta that law was held as independent of the King, though by this time the common law well reflected his sovereign interests. The rights of the propertied elite came, therefore,

to be embodied in the types of offences recognised at law, including punishments, and the procedure by which guilt could be declared. It was this social context which lends an understanding to why the powers of the victim were paramount, to be gradually eroded into the thirteenth century for the establishment of a criminal procedure under the Crown.

Changing social and political conditions 1066–1200

The remedy of private settlement, made distinct by its use as a form of dispute settlement between propertied families, suggests how the common law emerged as a basis from which the landed classes ordered their interests in accordance with their lineage and heritage. An assault might, under the doctrine of private settlement, be discharged by blood feud or the giving of land or money by the family of the offender. The arrest of the suspect, charge, plea and terms of settlement were resolved between each family in the hundred courts. In the early twelfth century, due to the close association between the judiciary, feudal hierarchy, and lineage, this was recognised as the most appropriate mode of prosecution. The reporting of offences would generally occur within the hierarchical chain, or lord-vassal relationship, rather than by independent judiciary or police.

Early modes of settlement empowered the victim. Here, the victim or their nominee challenged the offender to resolve their conflict in accordance with the laws of natural justice. An example of this challenge is the common law duel, in which the offender, if successful, would be absolved of his crime. Other modes of blood settlement included branding, maim or torture. However, the landed elite could always pay their way out of trouble, while the poor were subject to punitive terms the landed classes deemed just. This centred the victim at the heart of English justice. The victim was expressly empowered because the law lacked formal jurisdictional bounds and protocols that empowered the defendant with substantive rights against the victim or King. The feudal hierarchy provided that when a feudal superior was the subject of a crime, they had the right to the body of the offender pursuant to their noble tenure. Thus, the early law was private, and based on the infliction of harm to the body of the offender by the victim.

Private settlement took various forms in the early twelfth century. Before the intervention of the presenting jury, this agreement was supported by the bench as the most appropriate mode of case dispensation. Private settlement empowered the victim to enact a course of

retribution against their offender. For certain crimes, such as larceny, assault and battery, burglary and housebreaking, and homicide, the private settlement sanctioned the conduct of the offender and provided the victim a personal cause of retribution. Over time, with changing social and political values, and the intervention of the clergy, the nature of private settlement changed. The shift from blood feud, to pecuniary remedies or the transfer of title to land, to private imprisonment, was nonetheless informed by the power of the victim and their centrality in the administration of early twelfth century justice.

King Henry II was responsible for the development of many of the legal institutions that transformed medieval English society. Of particular significance was the centralisation of the state and the growth of law, nationwide in scope and common to the whole of England. This common law, and the institutions that administered it, affected victims in various ways. When William I conquered England, although maim was a common mode of settlement, compensatory justice empowered victims to receive monetary penalties for various offences. Called bot payment, this remedy offered offenders redemption where money could be offered as compensation to avoid the mayhem of the blood feud.[13]

However, increasingly in the twelfth century, the offender was also amerced for wite, payable to the King. Into the twelfth century, certain serious offences such as killing by stealth, treason, housebreaking, and arson were also unamendable by private settlement by bot. In such cases, the offender was compelled to suffer the punishment of maim or death if brought before the courts. Only in cases where offences were settled away from the courts, could a serious offender pay their way out of trouble. For minor offences, however, bot became a common mode of settlement. The influence of Christianity on the early law also advocated the use of bot, through the proliferation of the notion that monetary payment was as honourable as blood feud, or the traditional resort to vengeance.

The private settlement was an informal measure of feudal government. However, the King possessed ultimate control over the constitution of the justice system. It was the desire to restore peace to the realm that, under the reign of King Henry II, saw the expansion of the centralised control of crime and justice. The growth in the royal jurisdiction of the courts made wrongdoers answerable to the King and punishable upon conviction by forfeiture of land and chattels to their lord. In turn, offenders were subject to more organised forms of punishment, such as imprisonment or death by hanging. Changes to

feudal government, therefore, including the proximity of church and state, placed limitations on the victim's discretion to settle.

In the early twelfth century, the victim had broad discretion to define the terms of settlement. However, the rapid expansion of disorder in the mid-twelfth century provided the impetus for the limitation of victim discretion and power. Thus, when the King gained an interest in the security of his kingdom and the welfare of his subjects, private settlement became regulated. This is seen in the curtailment of the common law duel, the history of which is traced by Lord Templeman in *R v Brown* [1993] 2 ALL ER 75 at 77–81. Duelling became outlawed when it was clear that the King would be deprived of an able bodied citizen for the defence of the realm in war. Thus, as the victim's discretion to settle by mayhem was restricted, victims opted for bot payment. The punishment of maim or death was reserved for the courts, pursuant to the King's right to the body of each Crown subject. Other than the limitation of private settlement, changes to victim power can be accounted through the influence of the early church and hundred courts.

The influence of the church

Religion was a fundamental aspect of feudalism as it supplied the philosophical basis for determining social status. In a feudal system the King is the beneficial owner of all land in the name of God, and so on down the hierarchy, with the peasants at the bottom. Due to his need to rationalise his sovereignty, later enacted under the Act of Supremacy 1534 UK, the King acknowledged the legitimacy of the laws and institutions of the church in his own laws of the kingdom. Just as a peasant was subject to common law over the ruling of a particular knight, a cleric was subject to ecclesiastical law rather than the judgement of the King. The King, however, did have power over clergy. Since a knight could substantiate a cause of action in relation to another knight's vassal, the King could enforce his rights against a cleric of the church. However, the King's power over clergy fell short of those causes generally reserved for a feudal lord. These causes have been identified as the 'benefit of clergy', which as part of rationale of feudalism, gave churches sovereign power over their own clerics.

The justification for benefit of clergy flows from the principle that clerics descend directly from God, and are thus independent of the King. Therefore, clergy were obliged to follow canon law over that of the common law. As society expanded into the twelfth century, however, with the infusion of canon and common law, the church

impacted on the types of settlements available to the victim. Apart from the growth of clergyable offences, this resulted in the decline of unbridled mayhem for bot compensation.

The hundred courts and county courts

Divided into counties and subdivided into hundreds, the early law of England was constituted by communities with their own customs and practices for managing disputes. The arena for the settlement of these disputes was the hundred or county court. The hundred courts heard all cases, unless for some reason a matter was withdrawn to be heard elsewhere. Hundred courts were omnicompetent, authorised to hear all cases. However, in certain situations, such as the inactivity of the constable, the King's courts might intervene (Baker, 1990: 7–8). Nevertheless, county jurisdiction remained omnicompetent to deal with local disputes. County or hundred courts were local to the source of the conflict and thus exercised original jurisdiction over the dispute. As hundred courts were primarily guided by local custom encouraging private settlement, there was a need to standardise crime and punishment and to control the bourgeoning problem of victim-centred justice as the counties grew into boroughs. The emergence of the King's courts of assize responded to the need to centralise justice across England. Into the twelfth century, increasing restrictions were placed on the hundred courts, and written authorisations to handle cases in the King's courts became common.

However, the removal of a case to another venue would, under local law, require explanation (Holdsworth, 1903–38, 1: 70, 71). The King's courts exercised the royal prerogative which, by virtue of that prerogative, assumed jurisdiction by express royal order or writ. The writ was thus fundamental to the expansion of the common law.[14] As the hundred courts exercised original jurisdiction, the King's courts used the writ to authorise the exercise of royal jurisdiction.[15] Once obtained, however, the hundred courts became obsolete as trial courts instead taking on the role of a court of first mention, or in today's terms, a magistrates court. The victim was thus subject to the standardised application of law throughout the kingdom.

Private prosecution and settlement 1066–1500

For social historians, understanding private prosecution is important because private prosecution put awesome power in the hands of ordinary individuals: the power to accuse others of crime and

> thus set in motion the coercive powers of the criminal law, including the possibility of pre-trial imprisonment, outlawry, fines and hanging (Klerman, 2001: 2).

Used widely throughout feudal Europe as a means of justice or vengeance legitimated by the law of vengeance *lex talionis*, the private settlement was an exercise of victim discretion. The remedy epitomised the way disputes were valued as private affairs, in accordance with the feudal mode of production and hierarchy. Although the law around 1066 governed disputes between persons, and between persons and the King, the choice to prosecute and the mode of punishment rested with the victim. Late eleventh century prosecution was thus exclusively private. As the office of sheriff or justice of the peace was limited to certain Crown interests, the victim was empowered to apprehend and punish the criminal free from the interference of the sovereign. If the sovereign were to litigate, it would be in his personal capacity. Thus, the King could sue where taxes were owed, or where a subject harmed his body in the case of treason.

The feudal lord usually prosecuted petty treason in the hundred courts or after 1166, a court of assize. For other treasons, a case may be brought before the King's Bench. Although the King or his feudal lords were empowered to use the system of private prosecution to prosecute in the name of the sovereign, almost all prosecutions were brought by private landowners securing their entitlements. From the late twelfth century, these courts advocated private settlement, as the making of a complaint was generally voluntary, with modes of settlement at the hands of the victim. However, the following demonstrates how, despite being subject to private prosecution at the hand of the victim's kin, the King often exercised his right to be consulted:

> Pleas at Shresbury in the fifth year of the reign of King John (1203). Hundred of Overs. Robert of Herthale, arrested for having in self-defense slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the king must be consulted about this matter. The chattels of him who killed the five men were worth two shillings, for which Richard [the sheriff must account] (Maitland, 1888: 31).

The Normans added the appeal of felony to the Anglo-Saxon system of compensation. Being a private accusation made by the victim or the victim's family against a suspected offender, the appeal borrowed its

form from feudal modes of family settlement and dispute resolution. The main characteristic of the appeal was that it placed on the victim or their kin the responsibility for bringing the offender to justice and proving before a court of assize, the accusation of guilt. The eleventh and early twelfth century victim was thus legally privileged. As the notion of the King's peace was yet to become custom in all of England, the victim had plenary power over the prosecution process.[16] As the emphasis was on the victim's apprehension of the offender, their charge and trial, the victim was under a burden of proving the prosecution on their own efforts. However, in the twelfth century, the notion of the King's peace began to emerge evidenced by the rise of policing methods such as the hue and cry. The hue and cry sought to alert the surrounding counties of the offence, aiding in the capture of the felon. Thus, from the late twelfth century, the victim's burden of apprehending felons was shared amongst the county, although the appeal was the sole responsibility of the victim.

Into the later twelfth century, the responsibility to maintain the peace was shared between all Crown subjects. However, as the King could not interfere in a private appeal brought by a victim, an alternate initiation process was instituted in accordance with the royal prerogative to regulate the realm. The problem with the appeal was that it was voluntary, and conducive of private settlements. This was against the interests of popular control. Referring to the problem of the appeal, Blackstone (1783, 4: 311) indicates that 'on an indictment, which is at the suit of the King, the King may pardon and remit the execution; on an appeal, which is at the suit of a private subject... the King can no more pardon it than he can remit the damages recovered in an action of battery'. There was thus a need to expand the control of criminal justice beyond the victim and their discretionary power of appeal. As all Crown subjects were obliged to maintain the King's peace, the King instituted a mode of prosecution by way of presentment of indictment. The reforms of Henry II, outlined below, saw the centralisation of the power of the courts and the relocation of prosecutorial power to the county as a response to the increasing need to control crime.

Out of the expansion of the provinces into boroughs and an awareness of the growth of the threat of offensive conduct to the King's peace in the later twelfth century, King Henry II devised a method of restoring law and order to England. His major enactments, the Assize of Clarendon of 1166[17] and Assize of Northampton of 1176,[18] provided for the ordering of itinerant royal justices to travel from London to the

counties to inquire into the commission of certain violent offences. Here, the itinerant justices summoned a jury of men from the county who could accuse or present persons suspected of criminal behaviour. These Assizes indicate the start of a criminal procedure under suit of the Crown. The form of presentment and trial borrowed much from the appeal. The victim remained central, but the King's justices or presenting jury had the power to continue a prosecution where the information was withdrawn by the victim. Continuing a prosecution by presentment, however, was not easy. The Crown generally lacked the formal institutions of the police, prisons, and prosecuting counsel to effect a complete shift to sovereign control.

Even though power was provided to limit the discretion of the victim, the courts were still dependent on them. It is for this reason that all offences were generally prosecuted by appeal up until the late thirteenth century, to be generally limited to homicide and theft by the fourteenth century (Klerman, 2001: 7). It was not until institutions of the Crown developed to complement the continuation or presentment of prosecution away from the victim that the Crown could effectively deprive victims of their power of appeal. The victim was thus absolutely central to the administration of justice even after the 1166 Assize which sought *inter alia* to transfer the power of the victim to the Crown.

Types of appealable offences and modes of proof

The appeal was used to prosecute a wide range of crimes, from common assaults to rape and homicide. The appeal was most commonly used for assaults, including beatings, wounding, and mayhem. Next most common was homicide, then theft of various kinds, including larceny, robbery, and burglary (Holdsworth, 1903–38, 2: 192, 195, 198, 250, 256, 257; 3, 322–3; Klerman, 2001: 8–10; Baker, 1990: 434, 575, 602, 603, 632). In the twelfth century, the rate at which appeals were brought to prosecute property crimes was high. Appeals were often actioned against multiple offences. For example, a third of assault appeals also informed of the wrongful taking of property, as did a few appeals of rape (Klerman, 2001: 8–10). Added to the thefts of larceny, burglary and housebreaking, property crimes constituted approximately a quarter of all appeals. The next most common crime prosecuted by appeal was rape (Klerman, 2001: 8–10). Finally, a small number of appeals were brought for an array of other offences, including abduction, arson, attempted burglary, false imprisonment, malicious prosecution, and receiving outlaws (Holdsworth, 1903–38, 5:

413). These were all offences affronting the victim self, thus being amenable by appeal at the discretion of the victim.

If not settled, appeals were initially tried by ordeal. Ordeal was a ritual through which God would reveal the guilt or innocence of an offender. Ordeals included the use of hot irons and cold water, to test the worth of the offender. The following exemplifies the ordeal:

> Pleas at Launceston in the third year of the reign of King John (1201). Hundred of Eastwivelshire. William Burnell and Luke of the Well are suspected of the burglary at the house of Richard Palmer by the jurors of the hundred, and by the four neighbouring townships, which are sworn. Let them purge themselves by water under the Assize (Maitland, 1888: 3).

Another popular method, carried into modern law in a modified form, included the compurgation of the suspect (Holdsworth, 1903–38, 1: 60, 305–8; 2: 102, 108–10). Here, parties would present 'oath swearers' who would testify to the credibility of the offender. The following is typical:

> Pleas at Bedfordshire in the fourth year of the reign of King John (1202). Borough of Bedford. Lambert Miller complains that Clarice, wife of Lawrence, Walter's son, sold him beer by a false gallon, and thereof produces suit, which testifies that it was present when she sold by that gallon, to wit, three gallons for a penny. And Clarice comes and defends that she sold by a false gallon, nor did she sell by the gallon which he says is hers, as being a gallon, but as being a half-gallon. let her defend herself twelve-handed [i.e., with eleven compurgators] on the [next] coming of the justices. She has waged her law. Pledge for her law: William, Ascelin's son. Lambert's pledges to prosecute: William Sanguinel, Richard, Geoffrey's son, Denis, Lambert's son, Walter Miller (Maitland, 1888: 27).

Trial by battle or judicial combat in which the parties fought under guidance of the court, were also popular early twelfth century procedures. Over the twelfth century, however, justice became increasingly centralised supplanted by the secularisation of tests of proof from local and religious custom. By the late twelfth century these methods of proof fell into disfavour replaced by the self-informing petty jury by the early thirteenth century (Holdsworth, 1903–38, 1: 308).

The outer limits of offences that could be prosecuted by appeal were largely determined by social, customary and religious rules as to accept-

able conduct. Further, towards the end of the twelfth century, appeal method came to adopt certain characteristics of presentment, such as the need to impute an allegation of a breach of the King's peace. Later, with trespass actions, such a breach could be made without an associated offence (Klerman, 2001: 10). In cases approaching the early thirteenth century, therefore, the crime appealed could be specified merely as a breach of the King's peace, attesting to the way in which it became a cause of action unto itself (Holdsworth, 1903–38, 2: 361–4; 3: 329). However, being an inherently private action, the victim maintained full control of the prosecution process and could withdraw or settle at any time.

The social context of private prosecution

Many cases of private prosecution conformed to a common pattern. Earlier cases focused on actions flowing from propertied rights, while the latter cases included property actions, actions flowing from offences to the person and breaches of the King's peace. Generally, the offender violated what the victim thought to be a legal right. The victim then used self-help to enforce that right. The victim was generally powerful, consistent with their propertied status and rank. The offender, if unable to settle, was made to appear before the shire reeve or justice of the peace, and then royal justices on assize. The appeal of robbery and breach of the King's peace, below, is thus typical:

> Pleas at Launceston in the third year of the reign of King John (1201). Hundred of Powdershire. William de Ros appeals Ailward Bere, Roger Bald, Robert Merchant, and Nicholas Parmenter, for that they came to his house and wickedly in the King's peace took away from him a certain villein of his whom he kept in chains because he wished to run away, and led him off, and in robbery carried away his wife's coffer with one mark of silver and other chattels; and this he offers to prove by his son, Robert de Ros, who saw it. And Ailward and the others have come and defended the felony, robbery, and breach of the King's peace, and say that (as the custom is in Cornwall) Roger of Prideaux, by the sheriff's orders, caused twelve men to come together and make oath about the said villein, whether he was the King's villein or William's and it was found that he was the King's villein, so the said Roger the serjeant demanded that [William] should surrender him, and he refused, so [Roger] sent to the sheriff, who then sent to deliver [the villein], who, however, had escaped and was not to be found, and William makes this

> appeal because he wishes to keep the chattels of Thomas [the villein], to wit, two oxen, one cow, one mare, two pigs, nine sheep, eleven goats. And that this is so the jurors testify. Judgment: William and Robert in mercy for the false claim. William's amercement, a half-mark. Robert's amercement, a half-mark. Pledge for the mark, Warin, Robert's son. Let the King have his chattels from William. Pledge for the chattels, Richard, Hervey's son (Maitland, 1888: 2).

In this matter, William appeals several men for robbery and breach of the King's peace. Upon entering the victim's house, the offenders led away another held in the victim's custody, and robbed the victim of money and chattels. Judgement lay against the victim, amerced by the King for a false claim. His chattels where then forfeited to the King. Other cases described by Maitland (1888: 3–45) reveal a different pattern. These include appeals against a lord who used violence to enter into land after the death of a tenant, against a landowner who imprisoned and tortured a suspected thief, and against a lord who ransacked a tenant's house in retaliation for the tenant's suit in royal court over customs and services (Klerman, 2001: 19). In these cases, the victim was suing a person of higher status. Here, the offender would have been a modest property holder, possessing land upon which another could trespass. This modesty would have provided the means of private settlement. Feudal property relations thus influenced the shaping of the initial structures of the justice system according to the victim plenary prosecutorial power. These structures were also shaped by the fact that from Conquest, a rule of law began to emerge empowering all persons with substantive legal rights exercisable against another in a private capacity.

Consistent with the Assize of 1166, the types of presentable offences expanded to complement the Crown prerogative to establish a criminal procedure for the good of the peace. From 1166, offences normally subject to appeal could be presented before itinerant justices. These included assault and battery, and wounding (Holdsworth, 1903–38, 2: 257, 258, 360–1). However, due to the centrality of the victim these were rarely presented before the late thirteenth century. This broader social context reveals that feudalism, with its focus on private property and power, constituted victims as possessing a fundamental right to justice. This established the praxis upon which the twelfth century victim was empowered.

Appeal procedure and the rise of presentment

The procedure for private prosecution in the eleventh century, before the rise of presentment in 1166, was relatively informal. The charge and prosecution of the offender before a justice of the peace was only seen as necessary where private settlement could not be reached. Immediately following the Assize of 1166, where the justice of the peace was informed of an offence to be heard by royal justices on assize, the victim could plead the proposed terms of settlement. This would generally only occur for the more serious offences of homicide or where the King's interests were threatened. Other offences were settled out of court. For offences against the King, the prisoner would be turned over to the feudal lord who in turn would organise for his death.

After the Assize of 1166, prosecuting an appeal became a long and complicated process that often took several years. Immediately after an offence, the victim was required to raise the hue and cry. The hue and cry increased awareness of a crime, leading to the pursuit of the offender. The victim was then required to make suit by publicising the alleged crime in the surrounding villages, notifying the coroner. The victim initiated the appeal at the next hundred court attended by the justice of the peace. Prosecutors could be either sex, and had to be in person. Counsel was not permitted except where the victim was incapacitated (Klerman, 2001: 10; Baker, 1990: 582, 583). The offender would then be summoned to appear at the next hundred court. If the offender did not appear, the matter would be stood down and the offender given three more chances to appear. If the offender still failed to attend, they would be outlawed. An outlaw was compelled to forfeit all property to the King. It was a crime to feed, shelter, or communicate with an outlaw. If an outlaw resisted arrest, they could be killed without further process (Holdsworth, 1903–38, 3: 604–7, 4: 534; Baker, 1990: 28, 77).

At subsequent hearings, the victim was expected to appear and affirm their initial information. If they wished to withdraw their information or had settled, the victim would have to retract their accusation. If the victim continued their information, the offender would be 'attached'. Attachment involved the finding of sureties to compel appearance at trial. If the offender could not secure appearance, the offender could be gaoled pending trial. The coroner recorded all procedural steps (Hunnisett, 1986).

The justice of the peace, exercising local law, constituted the hundred courts. Custom and Magna Carta prohibited such officers

trying an appeal because such actions alleged a breach of the King's peace (Holdsworth, 1903–38, 1: 288, 290, 292–3; Baker, 1990: 29–30). Trial was postponed until the royal justices arrived from London. Delegations of royal justices took many forms. For appeals, it took the form of the eyre. At the eyre, the presenting jury reported all appeals to the itinerant justices. Their presentments were compared with the coroner's records to ensure that the jury was not concealing any potential offences (Hunnisett, 1986). If the victim were present, they would repeat their information.

In the early twelfth century, a female victim would offer to prove the appeal 'as the court adjudges'. A male victim, unless aged or maimed, had to prove his case 'by his body', that is, by battle (Klerman, 2001: 11; Holdsworth, 1903–38, 2: 41). The offender then entered their plea. The offender's options were to deny commission of the crime or to put forward a technical defence, such as failure to raise the hue and cry, failure to sue at the first hundred court sitting, or a divergence between the information in the hundred court and its repetition in the eyre (Holdsworth, 1903–38, 2: 170). If the defence was accepted, the appeal was dismissed. If the defence was rejected, or if no defence was offered, the offender was subject to proof by battle or, after jury trial became routine around 1220, was made to put himself 'on the country' (Klerman, 2001: 11). If given a choice, offenders generally chose jury trial (Holdsworth, 1903–38, 1: 310–11).

In the early twelfth century, juries did not hear evidence at trial. Instead, the jury was expected to have investigated the matter before trial. This is consistent with the objects of the Assize of 1166, and the organisation of the early law through the feudal hierarchy. Before the abolition of the ordeal in 1215 (Klerman, 2001: 43), offenders accused by women and maimed males were put through the ordeals of cold water or hot iron to establish their innocence (Holdsworth, 1903–38, 2: 221, 283). Offenders however rarely underwent ordeals, except where the presenting jury had rendered a 'medial verdict' that the information had *prima facie* merit. The following demonstrates such process:

> Pleas at Staffordshire in the fifth year of the reign of King John (1203). Hundred of Offlow. Godith, formerly wife of Walter Palmer, appeals Richard of Stonall, for that he in the King's peace wickedly and by night with his force came to her house and bound her and her husband, and afterwards slew the said Walter her husband; and this she offers to prove against him as wife of the slain as the court shall consider. And he defends all of it. And the jurors and the

> whole neighbourhood suspect him of that death. And so it is considered that he purge himself by ordeal of iron for he has elected to bear the iron (Maitland, 1888: 30).

Offenders convicted of homicide were hanged, while those convicted of lesser offences were taken into custody until their crime was amerced in accordance with their wealth and culpability. Convicted offenders could also be castrated or blinded, but such punishments were uncommon (Klerman, 2001: 11–12).

Due to the popularity of settlement, however, it was rare for appeals to proceed through to battle or the ordeal. In most cases, the victim withdrew their information before the case reached the eyre (Klerman, 2001: 12; Baker, 1990: 574–6). One of the key issues, therefore, was the treatment of non-prosecuted appeals. As the Assize of 1166 sought to standardise justice across England, limiting the discretion of the individual victim, non-prosecuted appeals were of serious concern. Klerman (2001) argues that the treatment of such cases changed several times during the thirteenth century. He suggests that the eyre judges had two options. They could either discharge the offender, or require the offender to submit to trial despite the fact that the victim had withdrawn their information. In the late twelfth and early thirteenth centuries, offenders were usually discharged when the information was withdrawn. By the 1250s, however, royal justices increasingly put offenders to trial when the victim withdrew their case (Klerman, 2001: 13). When an offender was put to trial after the information was withdrawn, they were tried 'at the King's suit'. The case below is typical of those where withdrawal of the information by the victim led to a discharge:

> Pleas at Launceston in the third year of the reign of King John (1201). Hundred of Pydershire. Eadmer of Penwithen appeals Martin, Robert and Thomas of Penwithen, for that Robert wounded him in the head so that twenty-eight pieces of bone were extracted, and meanwhile Martin and Thomas held him; and this he offers to deraign against the said Robert as a man thereby maimed, under the court's award. And Robert comes and defends all of it word by word. It is considered that he purge himself by ordeal of iron. Let the others be in custody until it be known how Robert shall fare. Afterwards Eadmer came and withdrew himself, and submitted to an amercement of one mark. Pledges, Reinfrid, Gill's son, and Philip his brother. Let the other appellees go quit (Maitland, 1888: 4).

The court discharged the defendants, amercing the victim for troubling the court. However, the following case demonstrates how an offender was indicted despite withdrawal of the information by the victim or pledge:

> Pleas at London in the twenty-eighth year of the reign of King Henry III (1244). They say that on the feast of St. Ethelburga [11 Oct. 1226] Emma, daughter of Walter of Coggeshall appealed Gregory, son of master Gregory the Physician, of violently raping and deflowering her, and Richard, son of Thomas the Imagemaker of aiding and abetting him. Gregory and Richard come, but Emma does not, and she found pledges to prosecute her appeal, viz. Richard the Baker and John of Kennington, baker. Therefore they are in mercy and Emma is to be taken into custody. Afterwards the mayor and citizens were asked whether they were of opinion that peace had been made between the parties, and they said upon their oath and in the faith in which they are bound to the king that they had agreed together. Asked further if they believe that Gregory is guilty of the deed, they say that he is not guilty. They say also that he who was appealed for aiding and abetting has not made peace and is not guilty. Therefore he is quit. And Gregory is to be taken into custody. He made fine in half a mark, because he is poor, with Simon fitz Mary and John de Coudres as his sureties (Chew and Weinbaum, 1970: 9–10).

In this case, Emma appeals rape against Gregory, aided and abetted by Richard. After first mention, Emma did not show before the eyre justices, and in her stead, Richard and John, Emma's pledges, seek to prosecute. The jury, however, informs the court that Emma and Gregory had settled. However, the matter is still put to the jury who finds Gregory not guilty. Richard, with whom a settlement was not made, was also acquitted. Both Emma and Gregory are taken into custody, however, to amerce the King for want of settlement. Here, the withdrawal of the information did not lead to a discharge. The jurors, at the prompting of the royal justices, reported the circumstances of the offence. The case demonstrates how withdrawal of the information could still lead to the offenders being tried despite settlement.

Withdrawal of the information following settlement was a significant process, of value to the victim. Should the victim be denied their right to withdraw an appeal, however, the offender would be unwilling to settle, as they would stand trial on the motion of the

court. Victims were thus put into a difficult position as they attempted to preserve their plenary power of prosecution. However, flowing from the Assize of 1166, the power of the presenting jury was such that the victim's power was effectively eroded. Such was the consequence of the expansion of the King's peace into the twelfth and thirteenth centuries. The plenary power of the victim to direct the course of justice was therefore augmented as the royal justices became aware of the need to secure the order of the realm pursuant to the prerogative of the 1166 Assize. Not discounting the canon law influence or the rise of the civil writ, appeal procedure moved from the general discretion of the victim, to the bourgeoning administrative structures of the jury and courts. The struggle over prosecutorial power between victim and county attests to the way in which the original power of prosecution was transferred from victim self to the Crown in the twelfth century.

The development of prosecution under the Crown

Into the latter part of the twelfth century, prosecution changed from exclusively private, to being partially controlled by the King (Baker, 1990: 9–11). From the seventh to the tenth centuries prosecutions were *entirely* private. Prosecution was motivated by the possibility of monetary compensation or vengeance. Until the late tenth century, those convicted of crime were not ordinarily hanged or incarcerated, but instead owed the victim bot or in cases of homicide, the deceased's 'wergild' – a monetary payment that varied with the deceased's social status (Greenberg, 1984: 80). Starting in the late tenth century, Anglo-Saxon Kings began to change the nature of prosecution from an exercise of purely private power. Aethelred's third code, promulgated circa 1000, required the 12 leading nobles of a district to accuse and arrest those suspected of crime in their locality (Baker, 1990: 10). This procedure foreshadowed presentment, which did not become a routine part of judicial administration until the Assize of 1166.

The Assize of 1166 required leading men to be chosen from each locality to present on oath crimes committed in their county. These men were known as the presenting jury, ancestor of the grand jury. Like the petty jury, the presenting jury were self-informing. Little or no evidence was adduced in court. The jurors gathered information and presented their conclusions to the royal justices. The nature of criminal penalties also changed during this period. Bot or wite became payable to the church, King, or county rather than the victim's family. Accompanied by forfeiture of land and chattels, the death penalty was

also increasingly imposed. By the late twelfth century the curtailment of the blood feud meant that the King controlled the enactment of violence, with the victim being left the private settlement of money and land only.

Although presentment was used towards the end of the twelfth century, appeal remained the key means of prosecution. As the Crown depended entirely on the victim, lacking the institutional capacity to prosecute of its own motion, victims were free to induce a private settlement at any stage of the proceedings. Thus, even with the introduction of county based law enforcement and the rise of presentment procedures for the enforcement of the King's peace, private settlement remained a key remedy. Unless the King's peace or interests were directly threatened, the victim generally continued to administer the terms of settlement well into the thirteenth century even if the matter was to proceed before a petty jury before the royal justices. Thus, from 1200, justice was still administered as a private affair. By the middle of the thirteenth century, however, the appeal was becoming much less common, and presentment became an effective mode of prosecution (Klerman, 2001: 15–21, 36–7, 42–7, 57). The erosion of the victim's power of appeal was concomitant with the rise of Crown institutions for the management and regulation of crime. This included the rise of prisons, and the strengthening of offices such as that of coroner, justice of the peace and constable.[19]

The thirteenth century also marked the limitation of jury power (Green, 1985). Petty juries began to rely on evidence presented in court, and the presenting jury did not make as many accusations based on its own knowledge. Instead, the presenting jury primarily screened accusations made by victims, declaring a 'true bill' of accusations it approved. This formed the basis of the Crown indictment. Although these prosecutions were brought formally in the name of the Crown, they continued to be informed by the victim (Klerman, 2001: 7; Hay, 1983: 166). However, royal officials did provide investigative assistance. From the late twelfth century, the coroner gathered evidence in homicide cases (Hunnisett, 1986). The justice of the peace performed a similar function from the fourteenth century.

The thirteenth century was thus a significant period of change for the victim. The expansion of the centralised administration of justice meant that new judicial structures were assembled under the administration of the Crown. These structures were responsive to the expanding role of the King's peace that came to focus on the safety of the person and county. A shift was thus effected towards the utilisa-

tion of presentment as the Crown assembled institutions transferring prosecutorial control from the victim to the King.

These early developments provided for the establishment of public prosecution. From the late fourteenth century, partly in response to the growing problem of communal unrest, pressure began to mount for the control of prosecution under the Crown (Greenberg, 1984). Increasingly, victims failed to prosecute due to the increasing demands of court process, rendering an appeal onerous. As a result, by the mid-fifteenth century, Crown officials such as the constable increasingly brought prosecutions. Accordingly, the twelfth and thirteenth centuries were a period of significant change for the victim. Presentment replaced the plenary power of the victim to initiate a private prosecution and control the course of criminal justice (Klerman, 2001: 8). Herewith, victim power began to be transferred to the Crown as crime came to be seen as a threat to the very fabric of English society.

Appeals in gaol delivery and the *curia regis*

Other than the eyre, gaol delivery sessions constituted the principal court for the hearing of appeals. Commissions of gaol delivery empowered the royal justices to try persons in particular gaols, or offenders released on surety, or bail. By the fourteenth century, gaol delivery became a significant procedure for the securing of the peace (Baker, 1990: 581–2). This was commensurate with the expansion of institutions of correction under the Crown. This was because the most serious of felons were remanded in custody before presentment. The fact that the more serious felons were tried at gaol delivery suggests that into the thirteenth century the Crown began to intervene to isolate the control of serious offenders from the victim (Klerman, 2001: 38). As an expanding civil jurisdiction began to absorb private actions once commonly appealed, the growth of institutions of the Crown ensured that where information was presented attesting to a particularly serious offence, the offender would be subject to indictment and imprisonment as the King had an institutional basis upon which to administer criminal justice.

Into the early fourteenth century, the King's Bench was charged to review decisions from the lower courts of eyre, gaol delivery and common pleas, in addition to hearing appeals of those causes directly affecting the King.[20] The King's Bench differed from the eyre because prosecutions could be brought in the name of the King, albeit for a limited number of offences, specifically homicide, rape, larceny, robbery, arson and breach of prison under arrest for felony

(Holdsworth, 1903–38, 1: 221–8; Klerman, 2001). Prosecution was still initiated by appeal, although the offender would be remanded in custody, namely the Marshalsea, to ensure their appearance (Holdsworth, 1903–38, 1: 91, 208; 2: 491). Until the early fourteenth century, the King's Bench had only a subsidiary role to play in the organisation of justice and the pursuit of felony. Along with the local authorities, the royal justices of eyre and gaol delivery were the primary agents of the administration of criminal justice. In 1323 however, the King's Bench assumed responsibility for all pleas of the Crown in the shire where it sat and undertook to deliver the gaols of all prisoners pending trial (Holdsworth, 1903–38, 1: 551; Klerman, 2001: 31–3). The dominance of the Crown was therefore stamped over that of the victim.

Prosecution by the King's approver's

The duty of the King to maintain peace and order throughout the kingdom meant that a duty was likewise placed on the victim to inform the court to control the threat of crime. However, the popularity of private settlement and the informal and discretionary administration of criminal justice in the twelfth and thirteenth centuries meant that alternate modes of prosecution were sought. The lack of a public prosecuting authority meant that apart from victims, and preceding the expansion of the office of constable, the Crown began to accept pro-active modes of prosecution into the twelfth century (Musson, 1999: 467–9). Here, offenders were encouraged to make a confession and bring a private prosecution against other felons in the form of an appeal. Known as an approver's appeal, or the process of 'turning King's evidence', this mode of private prosecution sought to regulate the increasing threat of disorder by utilising the criminal self as a means of control.[21] Victim power was thus transferred to an agent convenient to the Crown, for the maintenance of the conviction of felons and the reduction of crime accordingly.

The rise of the approver's appeal attests the changing focus to Crown policing methods and crime control. The expansion of the King's peace thus led to the rise of new and innovative modes of prosecution based on the orthodox power of private prosecution, and the King's need to regulate an increasingly evasive criminal order. However, the basis for the initiation of such actions flowed from the power of the victim. Even though a clearer prerogative began to emerge into the twelfth and thirteenth centuries to ensure the similar administration of justice across England, victim power remained central.

The erosion of the common law power of the victim

The plenary power of the victim was severely limited by the Assize of 1166. Victim power began to be transferred to the presenting jury and institutions of the Crown as crime increasingly undermined the stability of the kingdom, over the private needs of the propertied elite. The victim, however, remained central to the rise of criminal prosecutions under suit of the Crown. The abolition of private settlement, the influence of the church, and the growth of a civil jurisdiction based on the actioning of a writ of trespass, sought to limit and displace victim interests away from the early criminal law for Crown prosecution.

Towards the end of the thirteenth century, the option to settle was restricted with the growth of the control of the presenting jury. From the fourteenth century, the presenting jury were free to exercise their prerogative of indictment as the institutional capacity of the Crown took shape. By this time, the King's peace became a major concern in the boroughs and counties of England. While duels and fights were tolerated until the nineteenth century (Andrew, 1980), their use as a mode of private settlement declined when the blood feud was outlawed (Holdsworth, 1903–38, 3: 311; *R v Coney* (1882) 8 QBD 534). The courts ceased to endorse private settlement as a mode of punishment in the fourteenth century, when the King's interests displaced the need for landowners to enact their vengeance upon their accused privately and freely. The King, responding to the need to secure his kingdom, displaced private settlement from its position as a primary legal remedy.

The rise of the criminal jurisdiction saw a shift to the King's interests, including interests pertinent to the keeping of the King's peace and the protection of all subjects for the defence of the realm. The development of trespass to the person from a cause of appeal to a civil writ suggests the separating out of public and private law. Notably, the rise of the criminal jurisdiction distinct from civil law saw the technical end of the reign of private settlement. Here, the role of private settlement as an expedient mode of self-help conflicted with the public administration of justice, including that of the church. This mode of punishment thus gave way to broader social considerations, affected by the shift to legal institutions and relations that identified the King and kingdom as the relevant source of regulation and power. This resulted in the similar administration of law throughout England under Crown institutions that prosecuted and punished for the good of all Crown subjects.

The abolition of private settlement

The appeal provided victims an enormous discretionary power to settle. The victim generally withdrew their information if the offender offered to settle by battle, bot or transfer of title to land. For example, the following appeal was settled following a compromise between offender and victim:

> Pleas at Shresbury in the fifth year of the reign of King John (1203). Hundred of Munslow. Sibil, Engelard's daughter, appeals Ralph of Sandford, for that he in the king's peace and wickedly and in breach of the peace given to her in the county [court] by the sheriff, came to the house of her lord [or husband] and broke her chests and carried off the chattels, and so treated her that he slew the child that was living in her womb.
>
> Afterwards she came and said that they had made a compromise and she withdrew herself, for they have agreed that Ralph shall satisfy her for the loss of the chattels upon the view and by the appraisement of lawful men; and Ralph has assented to this (Maitland, 1888: 30).

In the twelfth century, settlement was the typical response to an offence continuing the earlier medieval custom in which reparation flowed from the offender (Klerman, 2001: 15; Baker, 1990: 575–6). In the late twelfth and early thirteenth centuries, parties could motion the court to issue a 'license to concord', an order through which terms of settlement were given judicial approval, which the royal justices would usually grant in exchange for an amercement to the King (Klerman, 2001: 18). The following typifies the writ:

> Pleas at Shresbury in the fifth year of the Reign of King John (1203). Borough of Shrewsbury. Jordan, son of Warin, appealed Reiner Read, for that he in the king's peace and wickedly assaulted him and cutt off his fingers, so that he is maimed; and this he offers to prove against him as a maimed man. And Reiner comes and defends the assault and the felony and the mayhem, and says that on a former occasion this appeal came before Sir Geoffrey FitzPeter, Earl of Essex, and by his leave a concord was made between them, so that [Jordan] remitted him from that appeal for ten marks which [Reiner] paid him; and he offers the king two marks for an inquest by the county and lawful men of the town of Shrewsbury (to wit, the jurors), to

> find whether a concord was thus made between them by licence of Sir Geoffrey FitzPeter in consideration of the ten marks paid by [Reiner] to [Jordan] (Maitland, 1888: 35).

This practice became less common into the thirteenth century as the royal justices became less tolerant of settlement. Often, however, jurors reported that the parties had settled without approval. Klerman (2001: 16) suggests that such settlements resulted in a small fine, occasionally leading to the trial of the victim. The victim's threat to prosecute would be established once the victim informed the court. If settled, this resulted in the victim being fined. Victim discretion to settle was thus fettered by the coercive power of the Crown, which effectively led the victim to continue an appeal unless a satisfactory settlement was reached displacing the threat of fine (Klerman, 2001: 16).

The victim's promise to withdraw the information upon settlement became, however, problematic. Settlement did not protect offenders from further prosecution when a victim sought to persist with an information. The credibility of the promise not to prosecute thus came down to victim discretion. Klerman (2001: 18) argues that other than the registration of settlements, there was little evidence of their judicial enforcement. There thus existed a tension between the desire of the victim to continue private settlement as a matter of private negotiation, and the prerogative of the Crown to enforce the King's interests over his subjects and domain. The compromise being at the turn of the thirteenth century the tolerance of settlement in light of the lack of public institutions for the punishment and housing of offenders.

However, Klerman (2001: 42) argues that in the early thirteenth century, the royal justices attempted to quash private settlement. As the eyre heard the most serious of offences, out of court settlement was unacceptable. However, the royal justices lacked the institutional capacity to prosecute and punish offenders if the victim refused to prosecute. Additionally, if an offender was to be put to trial, they would face the ordeal. Trial by ordeal became, however, increasingly criticised as a mode of proof. The church doubted whether the Bible and patristic sources justified its use (Klerman, 2001: 42–3; Baker, 1990: 5–6, 578–9). Faced with this choice, the royal justices favoured settlement. However, the royal justices increasingly began to question the presenting jury if it suspected the offender, and where the jury responded favourably, the royal justices put the offender to the ordeal (Holdsworth, 1903–38, 1: 270). The emerging seriousness of crime thus necessitated the restriction of settlement for the rise of the public

control of prosecution. Consequently, royal justices began to apply an 'anti-settlement policy' advocating the continuation of an action in order to secure the peace (Klerman, 2001: 42).

The ordeal fell into disuse when in 1215 the Fourth Lateran Council forbade the participation of clerics (Klerman, 2001: 43). Trial by jury became routine, and the royal justices did not face the choice of condoning settlement. Royal justices could ascertain guilt in the absence of the victim by referring the question to the jury 'at the King's suit' (Holdsworth, 1903–38, 1: 327–30). They did so in a majority of cases in the 1218–22 eyres, the first eyres after the abolition of the ordeal (Klerman, 2001: 43). The disrespect for settlements by the bench, however, caused victims to bring fewer appeals.

The disrespect for settlement had removed one of the victim's motives for informing courts of an offence. By punishing offenders following withdrawal of the information, the royal justices discouraged victims from prosecuting, because offenders were unlikely to settle. The royal justices thus adopted their former practice of accepting settlements. Klerman (2001: 43) indicates that in the 1226–9 eyres, offenders went free without trial in 67 per cent of appeals in which the information was withdrawn. By the 1234–8 eyres, the royal justices discharged offenders in 93 per cent of cases where the appeal was withdrawn (Klerman, 2001: 43).

Klerman (2001: 43) suggests this reversal saw the number of appeals increased by more than 50 per cent. Private settlements in the early to mid-thirteenth century were permitted as a response to the duty to maintain the King's peace. Settlements were only allowed, however, so that levels of private prosecution before the eyre were maintained (Klerman, 2001: 44). This changed with the introduction of modes of punishment controlled by the Crown, and the organisation of county policing forces. As the rise of the administration of criminal prosecutions under the Crown saw the capture and arraignment of more offenders, royal justices no longer relied on the victim as the sole initiating agent. General crime control had thus shifted to the Crown. The rise of civil trespass also underpinned the abolition of private settlement. The constable increasingly brought charges, indicting felons at the King's suit. The victim's power of settlement was thus effectively abolished from the common law, the power being transferred to the Crown instead.

The writ of trespass

Trespass arose out of the writ of *ostensurus quare*, requiring the sheriff to instruct the defendant to appear before the royal justices to show

why he had committed an alleged wrong. Of this, the writ of trespass and the writ of trespass on the case arose to cover a wide range of civil injuries in the thirteenth century (Baker, 1990: 71–5; Holdsworth, 1903–38, 1: 331, 2: 257, 265, 278, 360–1). Such injuries included many formerly appealable under the general feudal law.[22] Trespass thus included a variety of torts committed to land, chattels or the person. Up until 1694, trespass could be actioned as a common law offence in the criminal jurisdiction; the offender fined for a breach of the King's peace. The writ of trespass, however, empowered the victim to action a matter without the burden of general appeal procedure. Unless provided by statute, pursuant to the eighteenth century Game Acts for example, trespass became a civil action removed from the criminal courts. When, however, trespass was carried sufficiently far it became criminal, it would be prosecuted as assault if to the person, or nuisance if to land. The difference between trespass and case was sometimes narrow, the general rule being that where the injury was directly caused by the act of the offender the remedy was trespass, and where indirectly, on the case. The difference is illustrated by the action for false imprisonment. If the offender imprisoned the plaintiff it was actionable as trespass, and if a third person did so on the information of the defendant, it was on the case (Baker, 1990: 71). Both, however, gave the victim viable options as to the remedy of a common law liability.

The result of the rise of the civil writ was a separating out of victim interests into two jurisdictions. In the criminal jurisdiction, the Crown came to establish procedures for the protection of the King's interests and those of the community beyond that of the private individual. As the number of actions grew for which writs could be issued, concomitant with the rise and growth of common pleas, the victim was able to pursue their interests elsewhere other than in a court of criminal assize. This made room for the public monopolisation of the criminal jurisdiction under the Crown.

The rise of statutory courts of criminal jurisdiction

Due to the decline of the communal courts of the hundred, the discouragement of appeals by the church, a bourgeoning civil jurisdiction and the rise of provincial ideas as to the regulation of law and justice, the popularity and use of the assize of eyre into the latter half of the thirteenth century declined. The result of the Assizes of 1166 and 1177 was that criminal justice became a matter for the royal justices and the

jury rather than the victim. The civil work of the assizes during this period also declined due to the removal of cases to common pleas in Westminster, as provided by *nisi prius*. The assize judges, therefore, had an increasing workload under the name and authority of the Crown. Towards the end of the thirteenth century, new structures for the administration of criminal justice emerged.

The rise of statutory provisions constituting the office of justice of the peace, sitting in the court of quarter sessions, established juridical structures that resemble the district or county courts of Australian and the UK, as they sit today. Creatures of statute, these courts enabled the curtailment of the criminal jurisdiction from the inherent powers of the royal justices exercising the prerogative of the King, to meet the needs of an emerging civil sphere. With the rise of courts of statutory origin, the courts of limited jurisdiction came into being. Lesser offences would be disposed of in the lower courts, with the more serious felonies being reserved for the superior courts of inherent jurisdiction granted by royal charter. These lower statutory courts enabled the expedited hearing of criminal matters as distinct from the drawn out process of the eyre, which *inter alia* depended on the exercise of victim discretion.

For this reason, the rise of statutory courts of criminal jurisdiction suggests the regulation of crime as a persistent threat to stable government. As the itinerant justices could no longer manage the growing problem of crime into the fourteenth century, a hierarchy of courts was created to best regulate this threat, which was, by now, communal in nature. In addition to those charges brought by the constable, victims remained central in the administration of justice for want of a centralised police force. Victims thus continued to initiate almost all matters that by grand jury indictment would lead to the conviction of felons. Victims, accordingly, substantially underpinned the transfer of criminal justice from the victim self, to the Crown, as the King asserted his prerogative to bring peace to the realm.

The decline of the general eyre

The eyre declined for several reasons. These include the opening up of an alternative jurisdiction in which damages for property offences could be sought and the movement of feudal or criminal justice away from the private interests of the victim to the King's peace under the administration of the royal justices. Specifically, eyre justice flowed from the need to regulate private settlement and affect the shift to presentment. Thus, once presentment became common, the eyre ceased

to be a useful way of regulating the expanding problems of crime in the counties and boroughs. From the late thirteenth century the Crown increasingly managed the regulation of justice, and the victim ceased to undermine the prerogative of itinerant justice. New statutory courts replaced the eyre complete with the codification of new crimes in the form of misdemeanours, or offences threatening the peace.

The genesis of misdemeanour offences gave the Crown access to the regulation of crime away from the private interests of the victim. Misdemeanour operated at the level of the King's peace, necessitating the intervention of the King over any particular victim. New offices for the control of crime and a central criminal court in London, the Old Bailey, or the court of quarter sessions in the counties, provided for the efficient administration of criminal justice being commissioned to hear both misdemeanour and felony offences (Holdsworth, 1903–38, 1: 292–3). Accordingly, the decline in the general eyre was precipitated by several interlocking factors in the movement towards the state. The differentiation of felony and misdemeanour, the Crown's need to regulate the former, and the associated institutions of criminal justice that arose to administer the process, led to the decline of the substantial administration of criminal justice by the victim.

Felony, misdemeanour and communal order

The word felony became appropriate to describe offences that were particularly grave, and deserving of severe punishment. Originally, only homicide and treason were felonious, to which other offences were added. These included grand larceny, arson, highway robbery, and rape (Holdsworth, 1903–38, 2: 358). During the thirteenth century, felony was distinguished from other offences. Such offences needed to be distinguished because felony could only be prosecuted by appeal and battle, resulting in the forfeiture of the offender's land and chattels. Felony was punishable, save the matter being settled privately, by death and forfeiture, in which a flight from justice meant outlawry. The more serious offences harming the victim and breaching the King's peace were separated out from the lesser crimes. These lesser crimes or misdemeanours were punishable by amercements, fines or imprisonment. Imprisonment was generally not used as a mode of early punishment due to the lack of an organised prison service. The nature and number of misdemeanours were greatly expanded by statute. Others were adapted from the common law, such as contempt of court or public nuisance. The court of Star Chamber also added to the array of misdemeanour offences into the sixteenth century.

As demonstrated, however, the discretion of the victim to prosecute the more serious offences of homicide or rape was gradually restricted during the thirteenth century with the establishment of grand jury indictments. Offences once prosecuted by the victim alone came to be subsumed into the jurisdiction of the King's royal courts. Controlled in this way, the courts were free to establish procedures for the prosecution of felony to best meet the needs of the King in the security of his subjects. This included the mandatory punishment of felonies regardless of settlement. Further, the classification of certain crimes as felonious meant that the King was provided sufficient mandate to establish new administrative structures for the regulation of criminal justice consistent with the heightened threat these offences presented to the stability of the kingdom.

Establishing the court of quarter sessions for this purpose, the King could ensure the local administration of justice would fall within the commission of the one court on oyer and terminator. The assize of eyre was then wound back for the centralisation of criminal justice around the sovereignty of the King, his pleas of the Crown, and a court that was established by statute drawing from the orthodox prosecutorial power of the victim on which the administration of the eyre was dependent (Holdsworth, 1903–38, 1: 192–3). With the creation of statutory courts, the power of the victim as the constitutive administrative force of criminal law, as evidenced in the eyre courts, was thus effectively subsumed by the Crown.

The rise of the justice of the peace and the court of quarter sessions

Proclaimed in 1195, custodians for the keeping of the peace were assigned to each county by royal appointment. Their role concerned the broad administration of justice. However, it was not until the Statute of Winchester of 1285 that the jurisdiction of justices of the peace was extended. Their duties included the hearing of informations of breaches of the peace, to be made by victims or, increasingly, the constable. The justice of the peace would then put the matter to the grand jury. Justices of the peace thus assumed a role in the early administration of law in England, though the victim and eyre did the majority of the work.

During the reign of King Edward III, various statutes defined the functions of the keepers of the peace in the administration of English justice. The Statute of 1327 (1 Edw 3 st 2 c 16; 2 Edw 3 c 6) provided for the selection of the most learned justices of the peace to be com-

missioned oyer and terminator to preside over misdemeanour and felony offences. The Statute of 1361 provided that commissions were to be assigned to the counties of England, effectively establishing the jurisdiction of the quarter sessions.[23] The power of certain justices of the peace was thus extended to constitute quarter sessions to facilitate the punishment of offenders in accordance with the expanding common law of misdemeanour. While all major felonies were heard at the general assize by the King's royal justices, quarter sessions heard most of the minor offences. Thus, in the winding up of the eyre, quarter sessions were empowered to hear, determine and punish offenders to complement the move to the sovereign control of the peace despite the fact that victims were still required to initiate matters where the constable could not. This new court system thus sought the transfer of the plenary power of the victim by administering criminal justice as a prerogative of the Crown over the retributive needs of victims.

In addition to the establishment of quarter sessions, further statutory amendment of the common law in 1495 created the first magistrates courts, or as they came to be known towards the mid-nineteenth century, courts of petty sessions. A number of statutes conferred upon justices of the peace the power to deal summarily with offences out of quarter sessions. Magistrate's courts were therefore identified as exercising restricted powers, conferred mainly by statute. Further, their establishment meant that justices of the peace began to take on different roles according to their commission. Certain justices of the peace were assigned to the magistrates' courts, others to quarter sessions. Others were assigned to apprehend criminals under warrant of arrest, thus becoming a pivotal adjunct of early modes of county policing.

The King's peace and the emergence of criminal law

The stripping away of the victim's power of voluntary prosecution to enact a private settlement was significantly eroded into the thirteenth century with the introduction of offences against the King, in particular, the King's peace. During this period, victim power became formalised around certain Crown structures. While the court of common pleas heard disputes between private subjects, the court of King's Bench heard matters directly relating to, or affecting, the King. These tended to involve issues common to England, including disputes as to taxation, property, and other civil matters. The statutory enactment of the crime of treason, however, suggests that the interests of the King

began to dominate in the early fourteenth century leading to the proclamation of the Statute of Treasons of 1352. The introduction of this Act indicates that the King's interests became a significant rationalising force leading to the relocation of victim power in medieval England. With the development of a code for treachery, the King's interests were extended over all subjects as common legal concern. The enforcement of the propertied interests of landowners no longer constituted legal order *a priori*. Although the fundamental basis of the law of treason is evidenced in the popular trials of Coke and Moore, the extension of the King's interests over the kingdom can be seen with the passing of civil codes and other enactments, including the *Act Against Treacherous Words 1555* UK. In addition to the formalisation of the high crime of treason, trial procedure before the King's Bench severely limited the rights of the accused in favour of the Crown. Here the defendant was denied counsel or a copy of the indictment. This was consistent with the sovereign power of the King, and the formation of an early judicial system in which the primacy of the King's peace and security provided for the relocation of victim power to the Crown.

In the fifteenth century, the independence of the court of King's Bench was established from the political will of the King. The court of Star Chamber was also constituted at this time, with the passing of the *Star Chamber Act 1487* UK. This court, in which a chair was reserved for the King, heard a number of matters of which 'great riots and unlawful assemblies' were high on the agenda (Holdsworth, 1903–38, 2: 289). The chamber also punished juries that gave 'perverse' verdicts, thought to be in contradiction to the King's personal, sovereign and political interests (Holdsworth, 1903–38, 2: 231; 3: 210, 211). Again, this suggests the extent to which the sovereign interests of the King affected judicial business during the period. A number of cases were heard in the Star Chamber in the fifteenth century prohibiting riot, affray and assault, suggesting how the focus of the common law changed to the regulation of offences in which there was no identifiable victim. The focus then moved from criminal trespass to the person as a private subject, to the person as a Crown subject, and then to the security of kingdom itself. The cases of *Dobell v Soley and Ors* (1533) Moo F 25 and *Cappis v Cappis* (1548) Moo F 85 suggest these changes accordingly. These cases evidence the relocation of judicial attention from the victim to the King's peace and the order of the realm. *Dobell v Soley and Ors* (1533) Moo F 25 represents how the Star Chamber was integral in extending the jurisdiction of the common law with the introduction of

new crimes devoid of an individual victim. Instead, the peace was of key concern, evidenced by the way the Star Chamber prosecuted Dobell for riot instead of assault in which a victim could be identified.

With the expansion of the King's peace into the high middle ages, the substantive principles of criminal law began to take shape. Though diminished for the sovereign interests of the King, the history of feudal law as essentially private continued to affect legal practice into the 1300s. However, as settlement was not possible, victims would have to action a civil writ to gain a private remedy. By the fourteenth century, Crown interests were advocated over those of the victim due to the prerogative of the King's peace in an expanding civil society. The principle that every person's body is inviolate, for example, emerged through the notion that criminal assault disturbed the peace. Therefore, it was not until criminal law came to represent the broader interests of an emerging society that the victim was directed to common pleas. The decline in trespass appeals for the rise of the writ defined the principle that recourse to criminal law secured conduct perverse to the kingdom.

The transformation of the appeal of trespass for the rise of the criminal assault is found in the *Offences Against the Person Act 1861* UK ss42-45. This has been demonstrated in *McLlkenny v Chief Constable of the West Midlands* [1980] 2 WLR 689. This case held that where conduct is actioned in a criminal court as an assault, the victim may be estopped from actioning a civil writ for trespass. Evidenced also in the rise of maim and murder for persons settling conflicts by duel, the victim's ability to claim absolute discretion over the prosecution process has now been diminished for the security of the kingdom: *R v Brown* [1993] 2 ALL ER 75 per Lord Templeman at 78. With the outlawing of the prize fight, Lord Coleridge C.J. said 'the combatants in a duel cannot give consent to one another to take away life, so neither can the combatants in a prize-fight consent to one another to commit that which the law has repeatedly held to be a breach of the peace': *R v Coney* (1882) 8 QBD 534 at 567. The security of the King's men for war could be assured, therefore, by the expansion of his peace to the integrity of the body: *R v Wigg* (1785) 1 Leach 378.

Before the introduction of the distinction of civil and criminal harm to the person, the offence of trespass enabled the victim to bring an action against another for the unlawful touching of their property. As trespass concerned the protection of one's property, it was classified as an appropriate action for either private prosecution or civil wrong, each moving from the victim. This was characteristic of the values of

the early period 1066–1300. As the interests of the King formalised around distinct judicial structures and processes, the power of the victim to bring a private suit was transferred to the King, for the good of the kingdom. Herein, law not only separated into public and private jurisdictions, but the former became the exclusive domain of the Crown as victim power became a matter of sovereign control. Despite the formal limitation of victim prosecutorial power, courts of first mention would still hear from the victim on offences punishable by common law and statute, attesting to the fact that victim power remained a central constituent of criminal procedure despite its bourgeoning administration under the Crown. To a lesser extent, therefore, the victim continued to inform the prosecution process.

The transfer of victim power to the Crown

In the thirteenth century, the writ of trespass provided for the development of substantive changes relocating victim interests to a civil jurisdiction. This new action could be brought for most of the same offences as appeals, but did not give the defendant the option of trial by battle nor required formalities such as initiation in the hundred courts. By the mid-thirteenth century, the victim could bring something other than an appeal under the general feudal law of the Assize of 1166. Once this alternative was available, a 'criminal law' was distinguished from the general feudal law, providing for its separate development in accordance with the King's sovereign, communal and social interests. The anti-settlement policy of the royal justices highlights this change. Starting in 1239, royal justices let fewer offenders go free without trial where the information was withdrawn by the victim (Klerman, 2001). By 1250, this policy began to have an effect on the number of appeals brought. The appeal was diminished for the civil writ, and appeals were brought at only a third of their highest rate at the turn of the fourteenth century (Klerman, 2001: 43). The policy of disrespect for settlements did not, however, eliminate appeals. Appeals continued to be brought in order to punish or outlaw an offender. However, the comparative ease through which a writ could be obtained and the abolition of victim controlled prosecution provided the basis through which the institutions of the Crown took control of criminal justice.

The rise of the writ along with the move to the presenting jury and power of royal justices to indict a non-prosecuted offender distinguished feudal law into two particular branches, or jurisdictions. On

the public side, the criminal law was distinguished through sovereign and public interests, communal in nature. The rise of Crown prosecution procedure, in light of the rise of the King's peace, also denotes a shift to public law. Private offences, such as those of personal property, were actioned by writ. This provided an opportunity for victims to use something other than the appeal to remedy their property loss or damage. Thus, with the rise of the King's peace and writs actionable in a court of common pleas, a civil jurisdiction arose distinguishing public law from the general feudal law. In the criminal jurisdiction, however, the early tenets of private prosecution as victim orientated continued to define the fundamental praxis from which the criminal justice system developed. This is not only the case with the continued relevance of the criminal information as victim based, but with the fact that the Assize of 1166 had to be applied within a justice system owned by the victim self. Thus, all developments formally eroding the victim's power of appeal first developed to support the victim. Here, the Assize of 1166 and eyre justice initially sought to complement the use of private settlement. As demonstrated in the anti-settlement policy of the royal justices, however, this changed as the Crown began to insist upon the conviction of felons.

The King's interests provided for the rise of a criminal jurisdiction in medieval England. The rise of this jurisdiction cannot be easily dated as it arose out of a private power in the hands of the victim, to be gradually eroded for the Crown in the thirteenth century. However, such a rise was marked by the diminished capacity for the victim to exercise certain common law powers under the general feudal law, with the concomitant rise of the writ in common pleas. Thus, common law process began to be shaped less around the needs of the victim as the interests of the public. This suggests how the agency of the victim played an integral role in defining the criminal jurisdiction; by the way private propertied interests were evacuated from the general law for a separate civil jurisdiction leaving behind the orthodox initiating process still used today. Victim prosecutorial power was thus central to the shaping of the criminal law, if not the common law through the rise of the writ. This prompts the notion that while the victim was displaced to common pleas by sovereign, political and religious conditions instituted around the rise of the King's interests, the common law power of the victim remained in the criminal jurisdiction consolidated under the Crown. The victim subject was discursively located into an alternate jurisdiction, leaving the administration of the criminal law for the King. However, the genesis of the development of the criminal

jurisdiction was dependent on the victim and the powers available to them. Although the institutional environment of criminal justice increasingly embodied Crown interests from the thirteenth century, the power providing for a prosecution in the first instance continued to flow from the victim even where exercised by such Crown officials as the constable. The victim, in terms of their constitutive common law power, thus underpins the development of criminal law as it emerged out of feudal tradition and custom.

3
Public Prosecution

In 1998, the Law Commission of England and Wales published its report *Consents to Prosecution* (CTP, 1998). In this report, the Law Commission of England and Wales reviewed consent provisions in a number of UK Acts. Consent provisions provide that for specified cases the permission of the Attorney-General, Solicitor-General or ODPP be given as condition prerequisite before a prosecution can commence. Debate as to consent provisions arose out of the Royal Commission on Criminal Procedure ('the Philips Commission') questioning the necessity of consent procedures in a number of UK Acts.[24]

The Phillips Commission questioned whether consent procedures fettered the constitutional liberty of the individual to bring a private prosecution by subduing the will of the individual to prosecute for the authority of the state. This involved a consideration of the role of the Attorney-General in the administration of justice. In particular, this touched on the legitimacy and power of the state to prosecute in the name of the Crown, for the good of society. Represented in the report of the Commission, the tension resides between the need to ensure that individual liberty is preserved under the rule of law, against the need for independent public representation and the control of criminal justice by a public body for the good of all society (Conner, 1994: 448–91).

Formal institutions of the Crown were established throughout the later middle ages to manage prosecutions away from the victim. Starting from the thirteenth century, these included the rise of the presenting jury under the Assize of 1166; the rise of prosecution associations for the apprehension of felons; the office of parish constable and the enactment of justices of the peace; and officers of the Crown specifically engaged to manage the business of the King in court. This

includes the rise of the office of Attorney-General. This is the office through which prosecutions were brought before the establishment of the ODPP, and the power through which private prosecutions came to be stayed.[25] The origin of the office of Attorney-General can be traced back to the thirteenth century when, as King's attorney or serjeant, the office holder was responsible for maintaining the sovereign interests of the King in the *coram rege* or royal courts (Edwards, 1964: 3). The office of Solicitor-General originated in 1461. However:

> [U]ntil well into the nineteenth century the generally accepted interpretation of a Law Officer's responsibilities was primarily that of leading counsel, whose professional services could be called upon at any time by the government to look after litigation affecting the Crown. (Edwards, 1964: 4)

Due to the increased workload of the Attorney-General's department, resulting from the increased volume and complexity of legislation, a Law Officer's Department was established in 1893. The development of offices of the Crown for the regulation of the King's legal business in accordance with his peace and social interests concomitantly limited the common law power of the victim. The consequences for the victim did not include the abolition of private prosecution, but resulted in its curtailment in terms of the need to prosecute crime as a threat to the security of the social over the victim's propertied or vengeful interests (Hay, 1983: 166–7).

Changing social conditions and the public regulation of criminal justice

The sixteenth century population increase and growth in metropolitan centres presented a particular threat to the stability of English society. Due to this increase, the number of vagrants grew extensively, becoming a threat to the propertied elite (Hay, 1975: 50–8). During this time petty offences became the vast proportion of crimes committed. However, law enforcement was restricted to the constable, who, for the reasons canvassed in Chapter 4, was largely ineffective (Critchley, 1967: 21–4).

The orthodox system of prosecutions continued to be requisite to the adequate control of crime. Victims often brought the accused before a justice of the peace, and then jury, acting as prosecutor. This defined the English judicial system as one of private prosecution and

individual power. The King could not force victims to prosecute, but would seek to inform the courts through his constabulary if the criminal incident was serious. During the 1500s, victims would often refuse to bring offences before a justice of the peace and quarter sessions, especially if they could obtain a settlement. Since prosecution was the only means to punishment, certain enticements were instituted, such as prosecutorial bonuses, in the effort to make prosecution more appealing. In the 1700s, neighbours seeking to protect common property interests joined prosecution associations. Members of these associations were bound to initiate a prosecution should cause arise. Since members of these associations were publicised, offenders knew they would be prosecuted if their victim fell within the associations ranks (Hay, 1989: 344–52).

The majority of offences in England during the seventeenth and eighteenth centuries were minor, and included vagrancy and petty larceny (Holdsworth, 1903–38, 4: 155–7). Where a minor offence was committed, offenders were generally subjected to public humiliation, such as the pillory or whipping (Emsley, 1987: 201). For the more serious offences, offenders were usually sentenced to death. The prison was not seen as a significant form of penance, used mainly to remand serious offenders awaiting trial. The reformer, John Howard, acknowledges this in his 1777 book, *The State of the Prisons in England and Wales*. The non-punitive rationalisation of the prison, coupled with frustration with the unsatisfactory punishment of offenders at the discretion of the victim or county, led the government to take exclusive control of the prison system around the 1830s. In 1822, Sir Robert Peel became the Home Secretary, encouraging this development. Peel introduced the *Gaol Act 1823* UK that transformed the way prisons would operate by providing minimum standards of living and inspection criteria that operated both locally and centrally. Prisons thus became a viable option for punishment, enabling the government to take full control of criminal justice away from individual victim, provincial or associated interests.

By the late eighteenth century, the criminal jurisdiction had been clearly distinguished from tort. This had begun some 500 years earlier with the rise of the writ of trespass and the curtailment of the appeal. This was further highlighted by the passing of criminal codes, of which the 1722 Black Act of Geo I c 22 outlined by Thompson (1975: 21, 270–7) featured prominently. During this period, focus moved from the victim self to the social risk of crime to the community. While this change was gradual, marked by various stages, the increasing focus on

modes of criminality and the rise of a criminal class identified by eighteenth century scientific positivism necessitated the need for purely public prosecutorial representation. This was coupled with the reluctance of some victims to press for a private prosecution, wishing instead to settle the matter privately away from the state, or to not prosecute at all. The rise of a criminal class independent of the victim self, or rather the rise of a fear of one, was however, the significant development advocating public prosecution. Other factors included the need to eradicate corruption and partisanship, particularly after the common problem of corruption in the office of constable before the introduction of the new police in 1829.

Before the end of the nineteenth century, England shifted away from private prosecution and decentralised policing. The prison system became a more comprehensive and available mode of punishment, and the formation of a state based police force under the *Metropolitan Police Act 1829* UK emphasised the government's responsibility for the safety of its citizens. However, the prosecution of suspected criminals on both misdemeanour and felony was primarily, up to the mid-eighteenth century, a matter for the victim. The victim possessed all necessary powers to apprehend on hue and cry, bring the accused before a justice of the peace, and in cases of misdemeanour, to request an amercement or wite payment. Private prosecution was seen as primary, with the King's interests represented by the judge, grand jury and various Crown officials. However, the growth of society beyond its provincial limits meant that this mode of control could not quell the increasing burden of petty crime, in addition to the continued threat of felony. These changes instituted the need for the formal administration of prosecution, away from the victim or localised interests of the county.

In the nineteenth century, changing social and legal conditions necessitated the rise of a public office for prosecutions under the Crown. This office would seek to control the then identified 'criminal classes', which were seen as a significant threat to the stability of English life. The 1850s saw rise of debate in the House of Commons for the enactment of an office of public prosecutor, resulting from the insufficient prosecution of offenders during the former century (Hay, 1983: 167). With the rise of a state based police force, the political focus changed to the stable regulation of society through the management of issues threatening the security of the social. This continued the earlier movement towards the control of prosecution under the Crown, though by this time, emphasis moved from the King's interests and personal property to the social as paramount and sovereign.

The rise of an English public prosecutor, and the preceding parliamentary debates, therefore suggests a shift in the locus of prosecutorial power from individual power to society. Society was now the more appropriate milieu for criminal control and regulation. However, tensions caused by the shift to a public system were exacerbated by the relative successes of private prosecution. Despite its lack of enforcement, the private prosecution continued to be the most convenient mode of crime control throughout the greater medieval period.

Prosecution associations for the apprehension of felons

Associations for the apprehension and prosecution of felons were spawned into the late eighteenth century for several varied reasons. Foremost, Hay and Snyder (1989) cite the propertied needs of the landed classes as the basis for their formation. Such associations secured common property interests and provided for the sharing of the expense and burden of prosecution. These associations, which usually sought to prosecute petty property offences, aided the needs of producers and capitalists at a time when the state control of crime was fragmented and disorganised. Although the Crown increasingly took control of prosecutions from the thirteenth century, the victim was still required for the apprehension and control of crime into the eighteenth century. Although constables prosecuted for peace offences on the local parish level, offences against private property were usually prosecuted by information brought by the victim self. Although the victim was free to act alone and often did so, prosecution associations helped protect all landowners from the threat of crime by increasing the chance that assailants were brought before the courts. Much like the early communal hundreds acting under duty of hue and cry, prosecution associations were formed by bonds of loyalty, linage and property interests (Philips, 1989: 116–26).

The significance of these bonds meant that many landowners thought it fit to participate in prosecution associations for the common good and security of personal property. However, the rise of prosecution associations was primarily responsive to the growing epidemic of crime in expanding metropolitan and rural centres. No longer could the victim alone regulate the criminal threat. Instead, an organised approach was required to meet the burden of prosecuting felons provided by the increased rights of the accused, trial method and procedure, the rise of proof and intent or *mens rea*, the cost of presenting evidence, and the loss of revenue for the victim controlling the means of production.[26]

Friedman (1979) defines prosecution associations as a group of potential victims, usually residents of the same town, who would each contribute a few pounds to a common fund to be used to pay the cost of prosecuting a felony committed against any of them. The names of the members of the association would be published in the local newspaper consistent with the earlier practice of hue and cry. Thousands of such associations existed in England in the eighteenth and early nineteenth centuries (Friedman, 1979). It was only after the formation of a centralised police force, and then the rise of the ODPP, that the prosecutorial power of such groups became restricted (Hay, 1983: 175).

However, it was the growth of metropolitan society and the rise in crime that rationalised the functions of the prosecution association, the metropolitan police and the ODPP. The distinction between them, however, was that the latter two were aligned with the prerogatives of the state, while prosecution associations were informal, the power of which flowed from the victim's ability to inform any court of an offence. The decline of the prosecution association thus evidences the tension over the rise of an organised police force and ODPP. The relative success of the prosecution association suggests that the power of the victim was indeed fundamental to the organisation and development of criminal justice. Its success suggests that despite the rise of state authorities for the regulation of the criminal prosecution, the victim continued to perform a fundamental role supporting the state when its control of criminal justice was incomplete. Thus, it was not until the state gained the institutional ability to regulate all prosecutions away from the victim that the victim ceased to be a vital adjunct to the administration of criminal justice. Against the prerogative of the Crown, the victim stood little chance of preserving the administrative control of criminal prosecution, though the common law power of the victim to inform a court of an offence survives today.

House of Commons debates as to the Office of a Director of Public Prosecutions

Through the period 1850–70, Bills were introduced into the House of Commons for the introduction of the ODPP. Although finally taking office in 1879, the ODPP remained in an advisory capacity until the early twentieth century. Here it began to take charge of prosecution from the police in certain matters (Emsley, 1987: 190). In the Australian states and territories, this remains the case today. The unfavourable response to public prosecution in the UK, limiting the rise of the ODPP's authority,

or the powers available to it, were varied and wide. Hansard debate indicates that at the time of the reading of each Bill, there was growing resistance from a body of professional solicitors regarding the cost of public prosecution. Moreover, it was feared that a public prosecutor would encroach on the personal and political liberties of the English. The gentry feared that they would lose their ability to manage their business without state interference, in accordance with their royal prerogative. The cost to the public and the fear that such an office would distract from the work available to the legal profession only built upon this.

The development of the ODPP in the Australian states and territories borrowed much from its English heritage. In Australia, an ODPP has been established in all nine federal, state and territory jurisdictions.[27] Taking over from the discretionary power of the Attorney-General, in the UK the ODPP was instituted to ensure public justice was served free from corruption or undue influence (Edwards, 1984: 5–29; Emsley, 1987). The idea that prosecutions should be brought without influence is based on the premise that offences presented by the Attorney-General favoured the landed classes, in addition to the possibility of corruption. The rise of an English working class thus led to the acceptance of the ODPP from the direct control of the government. This was particularly significant in a society of increasing industrial strength and disorder. Today, the ODPP represents the broad interests of all, and includes as its stakeholders all individuals in the criminal justice system including the courts and victims. It is, however, the impartiality of the ODPP that founds its mandate to represent the interests of society over any particular subject – government, police or victim. Thus, the limitation of victim power in the prosecution process was influenced by a multitude of factors. Of these, the need to enforce criminal legislation against all of society, free from the influence of politics and corruption, prevailed (Hay, 1983: 166–7). Accordingly, the ODPP arose amidst the fear of English landowners that, concomitant with the rise of a prosecuting police force from 1829, their substantive legal rights and control of offenders would be diminished (Emsley, 1987: 186–9).

Before 1879 offences against the Crown such as sedition or petty treason were brought by local authorities, but only to the extent that such conduct offended the King's interests (Edwards, 1984: 6). All other interests, particularly propertied ones, were usually brought by the police or victim. Private prosecution thus remained the principal mode of initiation up until the late nineteenth century. As indicated in Chapter 2, all prosecutions were initiated by information, the grand

jury indicting an offender where a 'true bill' was found. The prosecution process was thus mainly initiated by the victim. The police and Crown officers representing community interests also informed the courts, though to a lesser extent. Crown officers relied on victim initiated prosecution for lack of an organised investigative force. Here, private prosecution remained a key ingredient where a Crown officer wished to undertake a prosecution. Today, the police and various government departments initiate criminal proceedings by way of charge, summons or court attendance notice in the local court (Hay, 1983: 180–6). Consequently, the common law power of private prosecution performs a fundamental function in the initiation of criminal proceedings under the Crown. This is demonstrated by the way all public prosecutions are initiated by information in the first instance. Chapter 2 identified that this power was first constituted at common law as the means by which a victim could enforce their propertied rights, in the form of the criminal appeal. Into the twentieth century, however, the power of the victim to inform a court increasingly conflicted with the centralisation of power under the ODPP as a social authority, as private prosecution had always been associated with the private interests of the individual or group of individuals in association.

The *Prosecution of Offences Act 1879* UK created the ODPP. Originally, it was intended to supplement the existing system by which important government prosecutions were instituted and conducted by the Attorney-General and other Crown officers. The *Prosecution of Offences Act 1884* UK sought to increase the power of the ODPP by expanding the prosecutorial responsibilities of the office by merging it with other Crown offices such as that of the Treasury Solicitor. Statutory amendment of the 1879 Act sought to expand the power of the ODPP to prosecute in the name of the Crown where an offence had occurred. From 1908 the ODPP thus came to assume all functions previously performed by the Attorney-General and other Crown officers in respect of criminal proceedings.

Based on the process of initiation constituted by the victim, the ODPP subsumed victim power through its statutory prerogative to take over any proceeding (Edwards, 1984: 423–9). This prerogative was plenary in nature. Although victims could continue to inform any court, the 1879 Act set in motion the process that removed victims from the courts. This occurred amidst significant concerns as to the independence of the ODPP, the traditional role of the victim, and the movement of justice away from victim interests to communal concerns (Hay, 1983: 167–74).

Power of intervention: private prosecution, the Attorney-General and *nolle prosequi*

In *Raymond v Attorney-General* [1982] 2 ALL ER 487 the question arose as to the limits of the discretion of the ODPP to undertake the conduct of a prosecution commenced privately pursuant to s4 of the *Prosecution of Offences Act 1979* UK. It was held that the ODPP was always empowered to do so, even where no evidence was entered. In this case, where the accused laid informations against a person giving evidence against him at committal, the ODPP stepped in and took over the conduct of proceedings. The ODPP offered no evidence. The case was subsequently dismissed, and the original trial followed. Edwards (1984: 58–104) discusses the rise of the ODPP in England, including the ways in which the objects of the ODPP are mandated over those of the aggrieved party.

Edwards (1984: 142) argues that no matter how significant the threat of criminal conduct is to the public at large, private prosecution remains significant due to its shaping of the prosecution process. Edwards (1984) suggests that the ODPP plays a leading role in the prosecution of crime over that of the victim. However, he suggests that this does not remove the victim's fundamental right to present their cause before a court. However, the ODPP has a statutory prerogative over the victim such that the ODPP has ultimate discretion in the control of prosecutions. This means that by authority of parliament, the ODPP is able to refuse to provide consent to prosecution or stay proceedings in order to regulate the offences that ultimately go before the courts (Edwards, 1984: 89). Although this prerogative expressly limits private prosecution by individual victims, the common law power of initiation as an artefact of victim orientated justice remains central. This is despite the fact that today, the orthodox victim power of initiation is utilised by the police.

Raymond followed *Turner v DPP* (1978) 68 Cr App R 70, where it was held the ODPP, having the same common law powers of those of the Attorney-General, could decide to take over a case and not enter any evidence. The court held that when the ODPP takes over a case, it may do so with the objective of carrying it on to prosecute the accused, or alternatively, to abort the proceedings. With the rise of the ODPP, conflicts arose as to the interventional power of such an office to either prosecute citizens or stay private prosecutions between citizens. This is outlined in the House of Commons debates as to the rise of the office in the 1870s. The following cases demonstrate how the diminished

capacity of the individual to initiate a prosecution continues to be contested at law, despite attempts by the legislature to regulate the power of private prosecution away from an exercise of individual discretion in favour of the broad discretion available to the ODPP in securing the public interest.

Commencement of proceedings

A prosecution may be initiated after an offender has been charged by the police or by the laying of an information before a magistrate. Where a court is informed of an offence, a summons or court attendance notice may be issued requiring the offender to attend court to answer the information, or a warrant issued for the arrest of that person, requiring them to be brought before their court: *Magistrates' Courts Act 1980* UK s1(1); *Criminal Procedure Act 1986* NSW s172. An information may be laid by any person, known as the informant, but is usually brought by a police officer, ODPP lawyer, or some other authorised person: *Magistrates' Courts Rules 1981* r4; *Criminal Procedure Act 1986* NSW ss49,174. It cannot be laid on behalf of an unincorporated association such as the police force: *Rubin v DPP* [1990] 2 QB 80. This is because an information must be laid by a named, actual person and must disclose the identity of that person (Blackstone, 1783, 4: 301).

It is necessary that informations leading to the charge and trial of an offender are made by another person, rather than an association, for two key reasons. First, because criminal offences, at least historically, are seen as being against a particular person or their property to which the accused must answer. And second, because orthodox criminal process identifies the process of initiation as moving from a particular victim pressing their legal rights against an accused. It is thus vital that the offender be able to identify the person laying an information against him or her to appropriately answer the charge.

If proceedings commence by way of a charge, the police officer signing the charge sheet will initiate proceedings. Although proceedings can be initiated by a private individual exercising their right, most prosecutions are brought by a police officer for which the individual laying the information acts. Lord Diplock in *Lund v Thompson* [1959] 1 QB 283 at 285 indicates that '[a]lthough, in all but an infinitesimal number of cases, no doubt [the] information is laid and the prosecution is conducted by a particular police officer;... he is exercising the right of any member of the public to lay an information and to prosecute an offence'. Once instituted, the prosecution is

taken over by the Crown Prosecution Service (CPS) in the UK or police and ODPP in Australia.

The ODPP administers all prosecutions in Australia in its executive capacity. In NSW, representative of the system established in each Australian jurisdiction, the ODPP may institute indictable prosecutions and Crown appeals in all jurisdictions: *Director of Public Prosecutions Act 1986* NSW ss7,8. Indictments and presentments may be signed by the Director, or on behalf of the Director, by a Crown Prosecutor or other authorised person: *Criminal Procedure Act 1986* NSW s126. The Director has the same functions as the Attorney-General in relation to indictments, no bills and *ex officio* indictments: *Director of Public Prosecutions Act 1986* NSW s7(2). The ODPP may take over any prosecution commenced by the police, but when doing so it must conduct the prosecution as the ODPP: *Director of Public Prosecutions Act 1986* NSW s9; *Price v Ferris* (1994) 34 NSWLR 704. The powers of the Director may be delegated to two Deputy Directors: *Director of Public Prosecutions Act 1986* NSW s22. The Solicitor for Public Prosecutions instructs the Director and Crown Prosecutors: *Director of Public Prosecutions Act 1986* NSW s23. In practice, the bulk of the prosecution work is undertaken by Crown Prosecutors. The Director and Deputy Directors undertake some appeal cases. The ODPP of the various jurisdictions publish detailed guidelines setting out the administrative procedures by which the decision to prosecute is determined.

The Commonwealth ODPP was established in 1983 by the *Director of Public Prosecutions Act 1983* Cth. The Director may institute prosecutions for indictable and summary offences, and Crown appeals. The Director may institute *ex officio* proceedings, with the consent of the accused: *Director of Public Prosecutions Act 1983* Cth s6(2A). The Director may also terminate prosecutions (*Director of Public Prosecutions Act 1983* Cth s9(4),(5)) and publish guidelines: *Director of Public Prosecutions Act 1983* Cth s11. In practice, prosecutions are conducted by the Director, in-house counsel, ODPP solicitors, Crown Prosecutors or private counsel briefed by the office.

The Crown Prosecution Service and the ODPP

Before constitution of the CPS, police prosecution was exercised locally, under the supervision of the local chief constable. The Philips Commission recommended in 1981 that a national prosecution service be established. In 1985, the *Prosecution of Offences Act 1985* UK put the recommendation into effect. In Australia, police prosecutions continue to be brought locally.

Section 3(2) of the *Prosecution of Offences Act 1985* UK outlines the duties of the UK ODPP. Similar provisions are enacted under Australian law, in particular in NSW, under the *Director of Public Prosecutions Act 1986* NSW ss7,8. Pursuant to s3(2), the UK legislation empowers the ODPP to:

(a) to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force (whether by a member of that force or by any other person);
(b) to institute and have the conduct of criminal proceedings in any case where it appears to him that –
    (i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or
    (ii) it is otherwise appropriate for proceedings to be instituted by him;
(c) to take over the conduct of all binding over proceedings instituted on behalf of a police force (whether by a member of that force or by any other person);
(d) to take over the conduct of all proceedings begun by summons issued under section 3 of the *Obscene Publications Act 1959* (forfeiture of obscene articles).

The role of the CPS under the direction of the ODPP and Attorney-General is to prosecute offences following charge by the police or individual. As it has no investigative power, the CPS, much like the ODPP in Australia, is reliant upon the exercise of the private prosecution and policing functions of either a police officer or an individual. However, the UK Attorney-General has argued for the reorganisation of the CPS, localising investigative power under the supervision of the CPS. It is proposed that the CPS be reorganised into 42 areas, each with its own Chief Crown Prosecutor, to correspond to an existing unit of the police force. This reform seeks to 'create a service much more locally based and therefore much better structured to co-operate with the police in ensuring an effective prosecution system' (CTP, 1998: 10).

Tensions exist as to the control of criminal prosecutions between the state and the police due to their development from systems of private control. The CPS and ODPP were instituted to administer prosecutions at suit of the Crown, with the victim and police instituting all other aspects. This fragmented development, and calls for its decentralisation after significant centralisation under the CPS, results from the fact that public prosecution developed by way of the gradual transfer of power

to the Crown from the victim. The attempt to centralise prosecutions under the state to the exclusion of the provincial basis of prosecutorial power thus conflicts with the origins of prosecutorial power – that of the individual aggrieved at law.

The decision to prosecute and the Crown Prosecution Service

Section 3(2)(a) of the *Prosecution of Offences Act 1985* UK prescribes that the ODPP acts under a duty to undertake all proceedings instituted by the police. Once undertaken by the CPS, the case is reviewed. The decision to continue the original charge, or bring a different charge, or to stay the process, is administered in accordance with principles set out under the 'Code for Crown Prosecutors' ('the CCP'), issued under s10 of the *Prosecution of Offences Act 1985* UK. Similar principles define the process in Australia.

The CCP provides a two-part test to be applied to all matters under review. The test comprises the evidential test and the public interest test. The evidential test requires that 'there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge' (CCP, 2004: par 5.2). Realistic prospect of conviction is assessed on the basis of whether 'a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged' (CCP, 2004: par 5.3). The public interest test is considered subsequent to the passing of the evidential test. It involves the prosecutor assessing the social benefits of prosecution. It is assumed that '[t]he more serious the offence, the more likely it is that a prosecution will be needed in the public interest', thus providing that '[i]n cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour' (CCP, 1994: par 6.2). Thus, the presumption is that the CPS under the direction of the ODPP will take over any criminal proceeding initiated by the police or by private prosecution so long as the prosecution is beneficial to the public interest. Here, the CPS will assess the merits of the case as removed from the will of the individual victim. If satisfied that a prosecution is not in the public interest, a *nolle prosequi* will be entered to stay the prosecution.

Judicial review of the ODPP's decision to stay criminal proceedings

Although being 'sparingly exercised', the ODPP's decision to not prosecute an offence may be subject to judicial review: *R v DPP, Ex parte C* [1995] 1 Cr App R 136. In this matter, Kennedy L.J. identified three

circumstances in which an application for judicial review of a stayed prosecution would be effective: *cf. R v CPS, Ex parte Waterworth* [1996] JPIL 261. If the decision was contrary to law, if it was made on the basis of jurisdictional error or not in accordance with the CCP, or if the decision perverted the course of justice, the stay could be quashed certiorari on the basis of the jurisdictional error or for want of procedural fairness.

It appears that a decision to prosecute where the circumstances of the offence lead to a more serious charge is also open to judicial review. In *R v General Council of the Bar, Ex parte Percival* [1991] 1 QB 212, for example, the decision to lay a lesser charge made by the Professional Conduct Committee of the General Council of the Bar UK was held to be reviewable. The High Court of Australia has determined otherwise, holding that judicial review of the decision to prosecute should be rarely granted: *Maxwell v The Queen* (1996) 184 CLR 501. Gauldron, Gummow and Hayne J.J. suggest in *DPP (SA) v B* (1998) 194 CLR 566 at 579 that '[t]he line between, on the one hand, the decisions whether to institute or continue criminal proceedings (which are decisions in the province of the executive) and on the other, decisions directed to ensuring a fair trial of an accused and the prevention of abuse of the court's processes (which are the province of the courts) is of fundamental importance'.

The types of prosecutorial decisions, being executive in character, that cannot be subject to judicial review were outlined in *Maxwell v The Queen* (1996) 184 CLR 501. These include decisions whether or not to prosecute (*Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1277; *R v Humphrys* [1977] AC 1 at 46; *Barton v The Queen* (1980) 147 CLR 75 at 94-95, 110); whether to enter a *nolle prosequi (R v Allen* (1862) 121 ER 929; *Barton v The Queen* (1980) 147 CLR 75 at 90-91); to proceed *ex officio* (*Barton v The Queen* (1980) 147 CLR 75 at 92-93, 104, 107, 109); whether or not to present evidence (*R v Apostilides* (1984) 154 CLR 563 at 575); and decisions as to the particular charge to be laid or prosecuted (*R v McCready* (1985) 20 A Crim R 32 at 39; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 604-605). Consequently, Australian law holds that the ODPP has exclusive discretion as to the decision to prosecute to the full exclusion of judicial review by, for example, victims and other interested parties: *cf. DPP (SA) v B* (1998) 194 CLR 566 at 607-608. In terms of Australian law, this aids the consolidation of prosecutorial power under the state. As the victim is excluded from judicial review so too is their ability to represent their individual perspective alongside that of the state.

Private prosecution

Private prosecution is a right expressly preserved in Australian and UK law: *Prosecution of Offences Act 1985* UK s6(1); *Criminal Procedure Act 1986* NSW ss49,174; *Special Prosecutors Act 1982* Cth s6(5); *Director of Public Prosecutions Act 1983* Cth s10(2). Section 6(1) of the *Prosecution of Offences Act 1985* UK provides that 'nothing... shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply'.

In *R v Bow Street Stipendiary Magistrate, Ex parte South Coast Shipping Co Ltd* (1993) 96 Cr App R 405, the court ruled that private prosecution is precluded where, pursuant to s6(1) of the *Prosecution of Offences Act 1985* UK, the ODPP is under a duty to take over proceedings (as specified in ss3(2)(a),(c),(d)(26)). Thus, proceedings instituted by police or summons under s3 of the *Obscene Publications Act 1959* UK were, for example, unable to be undertaken privately and were to be conducted, unless otherwise agreed, by the ODPP. Similar provisions exist in Australian law with regard to prosecutions for incest and attempted incest: *Crimes Act 1900* NSW s78F. Express statutory prescription thus empowers the ODPP to take exclusive control of certain limited matters from the outset.

However, unlike the power of the victim, the power of the ODPP is limited to that prescribed by statute. The ODPP is thus restricted to those powers instituted in it by parliament. Unlike the police and victims, the ODPP does not have an inherent common law power of prosecution. The provisions of the Acts providing for public prosecution in each of the jurisdictions in the UK and Australia are, however, wide. Thus, though not inherent to the common law, statutes enabling public prosecution set out various constraints upon which private prosecution can be initiated and conducted.

Procedural constraints on private prosecution

The common law power of private prosecution can be exercised by any individual but is limited by statute. These limitations include the following.

(1) a magistrate may refuse to issue a summons;
(2) the Attorney-General may terminate proceedings by entering a *nolle prosequi*;
(3) the Attorney-General may prevent criminal proceedings being instituted by vexatious litigants by applying to the High Court for an order declaring such a person to be a vexatious litigant;

(4) the DPP may take over private prosecutions and terminate them, whether by discontinuance, withdrawal or offering no evidence, and
(5) the Law Officers, the DPP or some other designated officer or body may, with regard to those offences where consent is a condition precedent to the institution of criminal proceedings, refuse that consent. (CTP, 1998: 12)

Deciding whether to issue a summons or court attendance notice, a magistrates or registrar of the local court will ascertain whether the offence is recognised at law and whether the elements of the offence are *prima facie* present, including 'whether time constraints have been complied with, whether the court has jurisdiction, and whether any consent to prosecute, if required, has been obtained': *R v West London Metropolitan Stipendiary Magistrate, Ex parte Klahn* [1979] 1 WLR 933 per Lord Widgery CJ at 935. The court must also consider if the information is vexatious, requiring the examination of 'the whole of the relevant circumstances' of the case (CTP, 1998: 13).

A *nolle prosequi* can be entered on any indictable matter, usually after the case is committed to the District, County or Supreme Court for trial. However, a *nolle prosequi* can be entered at any time after the indictment is signed and before judgement: *Dunn* (1843) 174 ER 1009. This will stay the proceedings but does not operate to bar future proceedings by the ODPP. However, it effectively stays the individual's power to continue the case privately. The *nolle prosequi* is thus procedural in nature and does not amount to a discharge, or acquittal: *Goddard v Smith* (1704) 91 ER 803; *R v Swingler* [1996] 1 VR 257.

In the UK, s42 of the *Supreme Court Act 1981* prescribes that on application of the Attorney-General, criminal proceedings may be initiated in the High Court against a private prosecutor if they 'persistently and without reasonable ground[s]... instituted vexatious prosecutions': *Supreme Court Act 1981* UK s42(1)(c). Such an order declares the prosecutor to be a vexatious litigant, preventing the prosecutor bringing further proceedings without leave of the High Court. If satisfied that the prosecutor is a vexatious litigant in both civil and criminal proceedings, the court may make an 'all proceedings order' estopping private actions in both criminal and civil courts.

The ODPP and the interests of the victim: *R v AEM Snr; R v KEM; R v MM* [2002] NSWCCA 58

The ODPP in each Australian jurisdiction is constituted by the respective Act codifying the orthodox powers of the Attorney-General first identified in the common law in the thirteenth century. The ODPP's main function is to protect the security of the community rather than represent particular victim or police interests. This was demonstrated before the NSW District Court and NSWCCA in *R v AEM Snr; R v KEM; R v MM* [2002] NSWCCA 58.[28] The defendants were charged with aggravated sexual assault under s61J of the *Crimes Act 1900* NSW, for which sentences of imprisonment with minor non-parole periods were imposed. Following conviction, the Crown successfully appealed the sentences imposed by the District Court on the grounds of leniency. A key problem for the Crown, however, was the fact that the lenient sentences were imposed as a result of charge bargaining, or plea deals (see Seifman and Freiberg, 2001: 70). These were arranged without consent of the victims. Indeed, the victims were not consulted during the course of prosecution. Instead, the ODPP assumed its statutory prerogative to 'do justice between the community and the accused according to law and the dictates of fairness' (NSW ODPP Prosecution Policy, Pt 1). Here, the needs of the community surpass those of the victim. Indeed, a consideration of the needs of the victim may be said to detract from the impartiality of the ODPP.

Following sentencing in the District Court, media interest was sparked claiming that the heinous nature of the offence warranted greater penalty. The NSW legislature responded with the insertion of s61JA into the *Crimes Act 1900* NSW, prohibiting sexual assault in the company of others. The *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* NSW provides a life sentence for any person inflicting an aggravated sexual assault on another in the company of another person or persons. The second reading speech of the introduction of the amending legislation into the NSW parliament qualified the new sentencing arrangements as necessary for the protection of the welfare of the victim and community. The Bill was rationalised from the perspective of the victim, but not to the demise of the prosecutorial power of the ODPP.[29] This rationalisation demonstrates how the victim may inform legal change by the consolidation of their interests and power in accordance with the need for public prosecution.

Media reports criticised the ODPP's ability to inform itself of the severity of the crime. Plea bargaining was seen as a particular threat to the liberties of the victim. Following *R v AEM Snr; R v KEM; R v MM,* the Hon Gordon Samuels was commissioned to review the NSW ODPP guideline on charge bargaining. Samuels determined:

> It must be emphasised that victims are often greatly shaken and emotionally disturbed by their experience. It is not to be expected that those in the depths of sorrow at bereavement, or of anger and humiliation, can easily consider their situation with the detachment that the administration of justice demands. They seek revenge, but as the Federal Court has said: 'Vengeance is not to be equated with justice'. Nor can anguish be measured and compensated by terms of imprisonment. Victims may feel that objectivity denotes indifference or want of compassion. Hence explanation of how the system works, and discussion of possible outcomes, must be handled with delicacy. The Witness Assistance Service, to which such victims should be referred, can be of considerable assistance in these cases. (Samuels, 2002: 50)

Consistent with the Attorney-General's response to *R v AEM Snr; R v KEM; R v MM*, Samuels defines the process of charge bargaining within the domain of the state. Instead, the victim is encouraged to utilise alternative services that remove them from the prosecutorial process (see Shapland and Bell, 1998; Shapland, 1986a). The public outrage towards the decision of *R v AEM Snr; R v KEM; R v MM* thus resulted in the confirmation of ODPP power prosecuting crime as a threat to the public good.[30] This suggests the strength of the prerogative of the ODPP, over that of the victim. It further suggests how the role of the ODPP is recognised as distinct from that of the victim, even though the two share common procedural antecedents leading to the development of the modern prosecutorial process.

The emergence of civil remedies for want of prosecution

The power of the victim to bring a private prosecution was limited by the rise of a stable metropolitan police force and, particularly, the ODPP. In this tradition, modes of compensation available to the victim became limited to those available in the civil jurisdiction, mainly in tort (Hunter and Cronin, 1995). The rise of exemplary and punitive damages, for example, made available to victims a mode of private

redress that compensated their loss of private settlement (Andrew, 1980). The discretionary ability for the victim to wreak revenge or vengeance on their offender was limited with the rise of the outlawing of the common law duel, and with the rise of the offences of maim, wound and murder.

The power to hold or detain an offender was lost with the rise of trespass to the person and false imprisonment, unless the victim was purporting to exercise their common law power of arrest. The power to prosecute being transferred to the Crown under a CPS or ODPP, the victim was left with little by way of private action for their personal settlement. Remedies in tort played an increasingly important role compensating this loss, first instituted with the migration of victims to the common law writ in the early thirteenth century. Consequently, victims are increasingly dependent on the civil jurisdiction for private redress. This power is now being eroded with the bar placed on the awarding of exemplary damages where the cause of civil action also raises a criminal charge: *Gray v Motor Accidents Commission* (1998) 196 CLR 1.

Civil remedies available to the victim depend on the nature of the offence. For offences prosecutable under the crimes legislation, these may include statutory damages for compensation or restitution. For property offences, remedies may include coercive relief for the recovery of goods, injunction, and detinue or conversion. The extent to which these remedies compensate for the loss of the prosecutorial powers of the victim depends, arguably, on the nature of the offensive conduct. Chapter 2 traced the rise of the writ of trespass providing a civil remedy for wrongs to private property and the person. In the context of the rise of police and public prosecution in which the victim has a limited and regulated role, civil remedies have been utilised by victims to achieve a sense of personal justice (Burns, 1980).

This suggests that the rise of civil remedies such as exemplary damages, including statutory compensation schemes, complement the relocation of the private interests of the victim out of the general feudal law and criminal jurisdiction. This point is brought into focus in Chapter 8, which considers the rise of statutory modes of victim compensation.

The rise of defendant rights and limitations on the discretion of the prosecutor in the law of evidence

The rise of defendant rights was responsive to various common law changes. The rule of law that each person shall be judged equally

before it underpins the law of evidence, which seeks to protect defendants against partiality or inertia from the state. Defendant rights also ensure that the trial process is transparent, and that modes of proof are objective such that guilt is established fairly and impartially. Rules as to the admission of evidence thus emerged in the eighteenth century to ensure that state power could not be applied maliciously against any person, though this was often the case. With the concomitant rise of positivism that led to the scientific assessment of evidence, the criminal trial came to be seen as a method of divining 'truth' (Hunter and Cronin, 1995: 5–25). Trial methods came to reflect the rise of a structured prosecution process incorporating committal, arraignment, trial and sentencing (and appeal, from 1907; see Spencer, 1982: 263).

While the rise of these methods do not in themselves diminish the power of the victim to prosecute or the conflict over the move to a public prosecutor, the rise of public representation did see an increase in defendant rights that limited the way prosecutions could be brought. This was particularly highlighted after passage of the *Prisoner's Counsel Bill 1836* UK into law, which provided each defendant a statutory right to counsel.[31] At the time of proclamation, debate arose as to the need to provide this right. It was assumed that professional thieves, for example, would retain counsel by aid of their takings. However, this fear was exacerbated by the enactment of the ODPP. The rise of defendant rights derived from the fear that an organised prosecution service under the supervision of the state would be capable of infringing the rights and liberties of Englishmen over those of a lone individual or association. The strengthening of defendant rights and trial method was thus responsive *inter alia* to the fears expressed in the House of Commons from first mention of an organised ODPP in the 1850s (Hay, 1983: 178).

The law of evidence, trial method and the presumption of innocence on the part of the accused were important nineteenth century common law developments. From this period, the accused increasingly came to be seen as innocent until proven guilty. Accordingly, an accused is entitled to the benefit of every reasonable doubt that is raised in a case: *R v Phillips* (1868) 8 SCR (NSW) 54; *R v Hawkins* (1808) 10 East 211; *R v Burdett* (1820) 4 BA 95; *Woolmington v DPP* [1935] AC 462; *Mancini v DPP* [1942] AC 1. Early nineteenth century law emphasised that the clarity of an offender's guilt should increase with the seriousness of the charge: *R v Hobson* (1823) 1 Lewin's CC 261. Today, the trial judge is not under an obligation to remind the jury as to the principle that an accused is innocent until proven guilty with the use of an expression such as 'presumption of innocence' where the jury is given a clear direction on the onus of proof:

R v Palmer (1992) 64 A Crim R 1. It is now the case that the presumption of innocence is a basic consideration in the decision of every application before evidence is given, and determinations as to guilt or innocence made: *R v G* (1984) 12 A Crim R 189.

However, since the development and introduction of summary offences in which the burden of proof may lie with the accused, rules as to the presumption of innocence have weakened. Where by statute or common law some matter is presumed against an accused person unless the contrary is proved, the burden of proof required to be discharged by the accused is on the balance of probabilities: *R v Carr-Briant* [1943] KB 607; *Sodeman v The Queen* (1936) 55 CLR 192 at 233. Other rules developed to protect certain types of defendants. For alleged offenders between ten and 14 years, for example, the presumption of *doli incapax* applies.[32] To rebut this presumption it must be proved that such a person knew that their act was wrong 'as distinct from an act of mere naughtiness or childish mischief': *C (A Minor) v DPP* [1995] 2 WLR 383 at 401-402.

Since the development of the substantive law of defendant rights, public prosecutions began to conform to stricter procedures ensuring that individual liberty was not deprived unfairly, without accordance of full procedural fairness. The threat of state controlled prosecution on individual freedom was thus ameliorated by the rise of rules as to fair treatment, embodied in trial procedure, defendant rights, and the law of evidence. Here, the *Poor Prisoner's Defence Act 1903* UK further secured the defendant's right to counsel, affirming the notion that such rights were largely responsive to the fact that by the early twentieth century, prosecutorial power had shifted to the state.

The concomitant rise of trial methods and rights also limited the victim's ability to utilise law for their private intentions, and highlights the move away from plenary victim discretion. Limitations on the victim prosecutor, which landowners feared with the rise of police prosecution, was heightened by a bourgeoning law of evidence that provided all individuals with substantive common law rights. This altered the way trials were conducted, and shifted the power balance from the propertied elite who traditionally brought private prosecutions securing their entitlements. Social changes amounting to the rise of an organised public prosecution service for the control of all criminal offences thus necessitated the rise of laws protecting ordinary persons from the awesome power of centralised justice. This not only had consequences for defendants, but limited victim discretion in their ability to try a criminal accusation. Consequently, the victim was

restrained in their ability to bring an action against an offender where a *prima facie* case could not be made out, or where the action was informed wholly or partly through a desire for vengeance or revenge.

Prosecutions and the social

Various governmentality theorists have contributed to our understanding of the rise of society or the social as a sphere of government (Rose, 1999; Donzelot, 1991; Deleuze, 1979; Ewald, 1991a). Distinguished from other rationales of rule, social government is constituted through the concern of the welfare of the individual, for the good of the society. Shifting ideals as to the most appropriate arena of government legitimated the movement of prosecutions from the victim to the police, and then to an independent ODPP under the Crown. The growth of social government thus impacted the way prosecutions secured community and social values. This means that public prosecutions cannot be solely justified by the need for an independent office for prosecutions. The broader requirements of social government traced by Donzelot (1991), Deleuze (1979) and Ewald (1991a) must be cited as causative factors. The growing strength of reason of state, also explains how prosecutions came to be associated with the prerogative of the state to regulate the social.

These causative factors include welfare practices that sought to rehabilitate the criminal back into society. In this matrix, the victim declined as a site of plenary prosecutorial power for the security of the public peace. As an individual, the victim is still empowered to invoke the law in their favour. However, this is now severely limited compared to the power of the private prosecutor in the early period 1066–1300. This chapter has considered that the rise of social mentalities of rule legitimated public representation under the Attorney-General and ODPP, driven by the expanding threat of crime and social life from 1300–1900. The broader explanation of the movement of prosecutions away from individual interests, to those of the community, is located in the expanding tenets of society as an arena of government. However, the continuation of the significance of private prosecution in the common law, notwithstanding consents to prosecution and the ODPP's ability to enter a *nolle prosequi*, attests to the fundamental relationship between the victim of crime and the genesis of the prosecution process. Indeed, this suggests that the victim fundamentally underpins the rise of public prosecutions and explains why the powers of the ODPP as legislated were designed to function within the orthodoxy of criminal prosecutions as shaped by the victim self.

4
Police

The origin of the English police lies in the customary duty for securing order through the power of a private person to apprehend felons. In effect, victims were the police. The Saxons brought this system to England, improving and developing the organisation over time. Initially, policing was a personal prerogative, evidenced in the customary duty of hue and cry, to be later shared amongst the townspeople. This entailed the division of the people into groups of ten, called tythings, with a tything-man as representative of each; and into larger groups, each of ten tythings, under a hundred-man who was responsible to the justice of the peace of the county (Critchley, 1967: 2).

The tything system, after Norman feudalism, changed considerably albeit certain elements of the system remain today. In time, the tything-man became the constable and the shire-reeve, the justice of the peace, to whom the constable was accountable. The office of constable became widely established in the early middle ages, comprising, generally, one unarmed able-bodied citizen in each parish. The constable worked in cooperation with victims, local justices and the hundred, securing observance of laws and maintaining order. Responsibility for the maintenance of order had thus been transferred from the exclusive control of the victim. However, the power of the victim to apprehend, arrest and charge an offender had been preserved. Though being diffused throughout the hundred, the power of the victim fundamentally underpinned feudal policing.

However, towards the eighteenth century this system failed to adapt to social and economic changes, and the consequent movement of the population to towns. The constable and watch systems failed to secure order. The failure of law enforcement became a serious threat to the control of crime. Conditions became such that

in the early nineteenth century enactments were considered for the formation of an organised police force, pursuant to the *Metropolitan Police Bill 1829* UK. Sir Robert Peel was responsible for the creation of the metropolitan police force, bureaucratic in form, throughout England (Critchley, 1967: 47–50; Taylor, 1998: 71–87). The metropolitan police force's jurisdiction was limited to the London metropolitan area; their duties largely preventative. Documented by Colquhoun (1806: 501–35), the metropolitan police had fixed powers limited originally by common law. These powers were largely based upon the prerogative to apprehend felons enacted under the hue and cry. Today, police power is generally codified by statute, though not to the exclusion of the traditional common law powers of the constable.[33]

Much like public prosecution, there was resistance to the idea of an organised police force. It was feared that the police would infringe English social and family life, despite their potential to reduce high crime rates. Accordingly, the *Metropolitan Police Act 1829* UK encouraged the training of passive and impersonal police. Their means of crime prevention came almost solely from visible patrol; their power to detect crime developing later. The metropolitan police force was, however, successful, especially in their handling of street riots and other order related problems. In 1856, after the enactment of the *County Police and District Constabulary Act 1839* and *1840* UK, this mode of policing was expanded to cover all of England.

Out of the origins of the hue and cry and communal policing in the hundred, modern police forces developed to combat the expanding problems of social order into the nineteenth century. The tension, however, evidenced with the rise of the first metropolitan police, suggests the expansion of communal and social interests over those of the individual liberties of the victim. The rise of the constable and metropolitan police suggests how the ordering of communal security was of greater concern from around 1250. However, the interests of the victim and their orthodox duty of hue and cry was a fundamental aspect of the rise of successive generations of policing. The transfer of victim power to the Crown and state can thus be demonstrated in the statutory and common law developments of the police from the middle ages onwards, and in particular, the way such developments have retained fundamental policing powers first constituted by the victim around 1066 (Critchley, 1967: 101–33).

Early modes of policing and the King's peace 900–1830

Sheriffs and constables were all active keepers of the King's peace in the early period to the thirteenth century. These roles were particularly significant in smaller communities and villages where the source of control flowed from a lord seeking command of his vassals. These officers secured the interests of the propertied elite by reclaiming stolen property listed in the hue and cry, and by bringing the accused before a justice of the peace or magistrate under the direction of a victim. As the rise of the King's peace increased the number of common law offences, the duties of the constable were also extended (Critchley, 1967: 14). Originally, their role included the apprehension of persons infringing sovereign interests, as for sedition or other cases of petty treason. Later, constables were made to secure order offences, such as drunkenness, vagrancy and riot. The constable thus became integral to the policing of the county as victim power was subsumed by the Crown. The emergence of the early peacekeeping forces, including parish constables, and the reasons for their decline in light of the threat of a growing criminal class, provides the basis for the formation of modern policing under the *Metropolitan Police Act 1829* UK.

The rise of the constable thus reflects the way early modes of policing evolved in accordance with the needs of the victim to be replaced by the needs of the King and society towards the nineteenth century (Choongh, 1977: 209–16; Emsley, 1983). This development suggests how the plenary control of the victim to apprehend crime was distributed to various administrative structures under the guise of the King's interests. However, up until the rise of a modern police force, the victim played a powerful and discretionary role in the function of this administrative process as they continued to be responsible for the detection and apprehension of the suspect.

Victim power and the hue and cry

The hue and cry centred the victim at the heart of feudal policing. Indeed, the stability of provincial English life relied so heavily on the hue and cry that its rudiments have been preserved in the policing of the modern metropolis. The hue and cry was significant because it placed a duty on individuals to pursue a felon, leading to their capture. Specifically, the hue and cry was not so much a duty as a feudal right to apprehend someone infringing a personal or property right. The hue and cry could only be raised where a felony was occasioned, and was thus closely associated with the power of the victim to bring their

offender to justice. Today, with the exception of Victoria, the power of an individual to pursue an offender has not been substantially abolished from the common law. The hue and cry thus accounts for the generation of successive modes of policing in the UK and Australia.

Hue and cry was a phrase used to signify the common law procedure of pursuing an offender with 'horn and voice'. It was the duty of an aggrieved person, or of anyone discovering a felony, to raise the hue and cry. Where the hue and cry was raised, all persons engaging in the pursuit had reasonable cause to arrest the suspect, even where it turned out that the accused was wrongly accused. The process of hue and cry involved a summary method of procedure, as proof was not required of the accused guilt, but only that he had been caught 'red-handed'. Blackstone (1783, 4: 290–1) indicates that the victim possessed a private right to raise the hue and cry, even after the enactment of successive modes of county based policing, thus:

> There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an hue and cry raised upon a felony committed. An hue (from buer, to shout) and cry, hutefium et clamor, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another. It is also mentioned by statute Westm. 1. 3 Edw. I. c. 9. and 4 Edw. I. de officio coronatoris. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I. c. 1 & 4., which directs, that from thenceforth every county shall be so well kept, that, immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff.

The various Acts relating to hue and cry were repealed in 1827. The *Sheriffs Act 1887* UK, re-enacting 3 Edw I c 9, established that every person in a county must be prepared and apparelled at the command of the sheriff and at the cry of the county to arrest a felon, and in default, shall on conviction, be liable to a fine. The hue and cry thus substantively cultured the development of English policing such that the individual right to apprehend crime underpins institutions of policing to this day. Although the rise of various offices gradually transferred the victim power of apprehension to the Crown, the per-

sonal prerogative to pursue a felon in guard of one's personal and property rights signals a significant element of the genealogy of the victim underpinning the development of the modern police.

Frankpledge and the keeping of community peace

According to the laws of Athelstan (925–39), a thief absconding from the scene of the crime could be pursued to his death by all men willing to carry out the King's wishes. Effectively, whoever met the offender, had a duty to kill him. Under the laws of Athelstan, a person who spared or harboured an offender forfeited their life, property and chattels as if they were the offender themself, unless it was established that they were unaware of the offence (Critchley, 1967: 2–4). On Norman Conquest, England inherited the requirement that the local community pursue and deliver offenders to the hundred for punishment. Early mobs for the apprehension of felons were associated with the manorial courts. By the time local villages grew into counties, they were not used for any formal mode of peacekeeping. However, this tradition followed the notion that crime control was the responsibility of each person. The roots of policing are thus found in the duty of village peacekeeping, as flowing from the duty of each person to apprehend crime.

From 900, the onus of policing was placed on each individual in the form of frankpledge. Before the infiltration of the King's peace, each community was responsible for its own conduct. The origin of the hundred lies in the expectation that each male person would be enrolled in a group of approximately ten families. If any member of that group committed a crime, the group would be responsible for the production of the offender (Critchley, 1967: 2–4). Such groups were known as tythings. Formed into groups of hundred, tythings were led by the shire reeve who commissioned a sheriff to keep the peace. The sheriff would appear before the hundred courts and would be responsible for the general maintenance of the peace in the community. Where an offence had occurred, the defendant would appear before a jury of men taken from the hundred (Critchley, 1967: 4).

The Statute of Winchester 1285 required that all felonies were to be publicised and the felons actively pursued.[34] The watch system formalised this process out of the customary system preceding it, employing watchmen to protect property against fire and robbery. The watchmen were supervised by the constable. The rationalisation of hundreds, and later the hundred courts, grand and petty juries, and watch, arose out of an individual's obligation to the county. This

suggests how the power of private policing and prosecution was essential to the early organisation of provincial life, in particular, the organisation of private policing and prosecution to meet the needs of the community as a whole. These early modes of policing, evidenced in the laws of Athelstan, also demonstrate how the focus of hundred policing was on personal property relations and victim control. The need for early communal police was thus informed by the individual's need to secure their personal property.

The office of justice of the peace as keeper of the peace

Following the decline of the shire reeve, the office of justice of the peace was established to complement the move to county crime control by command of the King. Following the extension of the office under the Statute of Winchester 1285, the *Justice of the Peace Act 1361* UK entrusted certain members of each county to keep the King's peace as an officer of the Crown. Trusted with communal security from 1195, justices of the peace were elected through the feudal hierarchy (Critchley, 1967: 7–9). Often lords of manors, justices of the peace would preside over the hundred courts through which the constable was appointed. Certain justices of the peace were commissioned to detect crime, although this function was generally left to the constable. King Henry V's accession to the throne in 1413 was accompanied by general disorder throughout the kingdom and the parliament of 1414 introduced various measures to improve civil order, including an expansion of the role of the justice of the peace to accommodate both policing and judicial functions (Langbein, 2002: 40–7).

The justice of the peace thus became the executive Crown officer and principal judicial agent of his manor or parish. The hue and cry survived throughout this period, used as late as the nineteenth century, which permitted the constable to arrest suspects without warrant and to pursue offenders across jurisdictional boundaries. The hue and cry was successful because it placed a duty on each person to assist the constable. Into the latter half of the nineteenth century, the common law enabled a justice of the peace, based on information on oath or affirmation of a suspected larceny, to issue a search warrant for execution during the day time to search for and seize stolen goods and arrest any person found in possession of them: *Jones v German* [1897] 1 QB 374. The justice of the peace was thus a necessary adjunct for the efficient administration of centralised justice.

The rise of the constable

By the end of the twelfth century, the office of constable was established for the representation of the tything before the hundred courts for the particular responsibility of keeping the King's peace. Unpaid, local constable was an onerous position that replaced the sheriff, who became associated with the maintenance of the courts. The constable had specific and fixed duties, each of which served the interests of the Crown and, although relying on its tenets, superseded frankpledge. This office was founded on the administrative structures guiding the development of criminal justice into the next two centuries. This is because policing was an important determinant in local government, being the first instance of the conferring of statutory power to members selected from each county. However, the common law power of the victim to apprehend and punish offenders remained the chief source of crime control (Critchley, 1967: 1–24).

The Statute of Winchester 1285 preserved and codified certain features of frankpledge and reinforced the localised responsibility for the policing of a district. However, the statute of 1285 introduced changes to the policing of feudal England that extended the traditional duties of the sheriff. For example, the statute codified the hue and cry out of the common law, as a mode of apprehension. Those resisting arrest by watchmen would be listed in the hue and cry for apprehension, which was undertaken by the community at large. For this purpose, the statute of 1285 also required an assize of arms to be kept by each male between 15 and 60. This assize, which comprised all armaments and procedures necessary for the apprehension of a suspect, could be called upon should a cry be made by the constable. This established a mode of policing that was not completely replaced until the *Metropolitan Police Act 1829* UK. The Statute of Winchester 1285 thus comprised measures that ensured that the King's peace could be maintained and enforced through the codification of the traditional power of the victim.

The rise of the parish constable

As the role of constable was unpaid, wealthier merchants and tradesman elected to the office often paid a parish constable to perform policing duties in their place. The lack of popularity of the office of constable can be found in the lack of financial incentive, and the increased duties and responsibilities of crime control commensurate with industrialism. As many new offences against the King's peace were introduced into the common law, the constable became increasingly burdened with peacekeeping duties (Critchley, 1967: 11–13).

The parish constable thus brought all types of criminal offences to the local courts for prosecution, in addition to private prosecution by individual victims. As the responsibilities of constables increased, with the introduction of fines for the non-production or reporting of public offences or nuisances, the office fell into disrepute. Many men did not wish to undertake the office for it impacted negatively on their acquisition of wealth, status, and lifestyle as provided by their commercial interests. The number of parish constables thus increased significantly. The paid duties of the parish constable came to be outlawed, however, as the constable himself was ultimately responsible as a common law agent of the Crown (Critchley, 1967: 12).

Problems with the office of constable and the collapse of the old system of policing

The constable had legitimate authority derived from his landholding and Crown grant. However, the office became generally unattractive when the urban landscape changed from that of small isolated townships to large industrial centres. This made the role of constable difficult for their duty was to ensure the peace of their community, under the sovereign and hierarchical charge of their Crown grant. Thus, policing was always personal and communal. The constable was a representative of the township through which he ruled, and as this mode of control was weakened by the introduction of more administrative structures for the keeping of peace, this office became isolated and outdated (Critchley, 1967: 21–4).

The office of constable failed the needs of metropolitan London towards the beginning of the nineteenth century. County based policing failed to curtail the threat of an expanding criminal class, and could not support the associated burden of policing new crimes resulting from the expansion of common and statutory law. One reason for this was that the criminal law, towards the nineteenth century, regulated social crimes that did not identify a particular victim. Thus, the old system of policing, dependent on the hue and cry and the duty of the victim to investigate the offence, failed to competently manage the increasing risk to the social (Emsley, 1987: 236–8).

Constables were neither a preventative nor detective force and they had other duties for the administration of local justice. Apart from pursuing offenders, the office required the constable to accompany an accused to court. To meet this requirement, constables occasionally housed offenders in their home (Critchley, 1967: 18). Due to an expanding citizenry aware of their constitutional rights, the office also

conflicted with the right of the victim to exercise their common law powers. Consequently, there was a great deal of hostility towards constables as they were seen as exercising informal and discretionary powers, lacking in accountability.

Constables were also criticised as largely ineffective. Constables had an obligation to pursue any reported felony. Detection of crime was assumed by victims themselves (Critchley, 1967: 58–100). If unwilling or unable to perform this task, the offence went unpursued. Compensating this lack, many victims engaged a thief-taker. Theft-takers were private individuals, who were rewarded by victims and the courts for bringing offenders to justice. Like constables, thief-takers were not always reliable. The notorious Jonathan Wild, for example, was hanged at Newgate Prison for being in league with the very criminals he was supposed to be catching (Critchley, 1967: 18–19). Various problems arising through the period 1600–1800 thus led to the decline of the office of constable, which saw the introduction of a formalised police force in 1829.

The old system of policing consequently fell into disrepute for three interconnected reasons. First, landowners held the office in contempt due to its onerous judicial responsibilities, leading most to perform the office in their stead. Towards the end of the eighteenth century, many parish constables were said to be 'illiterate fools', taken from the criminal classes that they were sworn to defeat (Critchley, 1967: 18–19; Rawlings, 1999: 14). Second, the office of justice of the peace fell into disrepute with the introduction of a scheme for the self-administration of criminal justice. During the seventeenth century, justices of the peace were paid for each conviction recorded. This was for the expedient administration of criminal justice. However, this led many justices of the peace to abuse the system for profit. An example of this included the making of deals between some justices of the peace and career criminals, such as theft-takers, who were overlooked by the magistracy for a fee (Critchley, 1967: 21–4). The third, which contextualises the second, was the gradual movement of towards industrialisation. This movement saw the increase in urban and metropolitan centres. The resulting problem was the rise of a criminal class beyond the control of the office of constable. The rise of public offences, which had now taken over from the sovereign concept of the King's peace, did not sway the threat of riot, protest, vagrancy, prostitution and other problems (Emsley, 1987: 231–5). In early nineteenth century London, this constituted a threat to the continued security of the peace and prosperity of all English persons – particularly the propertied elite.

As the office of constable was now some 500 years old, new ways of dealing with crime and corruption needed to be considered. Although taking some 80 years to enact, these problems saw a move to the policing of the metropolis rather than the boroughs of England as isolated and manageable units.

The development of a modern police force under the *Metropolitan Police Act 1829* UK

The state of crime in London prior to the formation of the metropolitan police was captured in the leaflets *Confessions of a Condemned Prisoner* and *An Authentic Narrative*. Published in 1687 and 1765 respectively, each depicted the bourgeoning criminal malaise as a threat to the liberty of the individual. As a result, Londoners often carried batons and other tools of self defence, legitimated by the individual's duty to keep the peace. The system of watchmen, described in Thomas Robinson's book, *The Complete Parish Officer*, promulgated methods by which the peace could be secured (Critchley, 1967: 45).

However, steps to improve the system were initiated by Colonel de Veil, who moved to Bow Street as a magistrate to set up office in 1729 (Rawlings, 1999: 67–82). From 1748, Sir Henry Fielding, the principal Westminster magistrate, expanded the initiatives of de Veil responsive to the need for an active policing force associated with local order and court administration. Antecedent to the 1829 reforms, the Bow Street Runners were assembled as an early detective force, operating from the courts to enforce the decisions of magistrates. In 1763, Fielding introduced the Bow Street horse patrol to secure the highways around London (Rawlings, 1999: 59). In 1796, Colquhoun published his treatise on the *Police of the River Thames*, which led directly to the establishment of the marine police, and a dramatic fall in crime and corruption then rampant throughout the London docks.

The *Middlesex Justices Act 1792* UK provided for the keeping of court records detailing the number of police attached to each court (Rawlings, 1999: 67–82). Each court had three magistrates and six police officers. This spawned the need for an organised police force for the courts and, more specifically, for civil order. Peel eventually led the House of Commons debate for a united police force for London, resulting in the assent of the *Metropolitan Police Act* UK in 1829.

The history of policing and the *Metropolitan Police Bill 1829* UK

Responding to the increase in crime in the early nineteenth century, Fielding initially encouraged victims to come forward with descriptions of criminals and their deeds, developing a system of record keeping shared amongst magistrates. Information about serious crime was also collected and circulated throughout England in the form of a newspaper, titled *The Hue and Cry* (Rawlings, 1999: 63). Despite these initiatives, the serious threat of crime required institutional force. The first metropolitan police force, the Bow Street Runners, comprised a small force of eight Westminster constables. This was the first police organisation to patrol the streets for the sake of civil order and safety. Commensurate with their duty to enforce the orders of the magistrates courts, the Bow Street Runners gained the trust of the public and became widely respected. Consequently, due to the effectiveness of this mode of policing removing the onus from the victim and constable, now overwhelmed by new forms of criminality, calls were made for a permanent police force. The first organised police force thus came to be seen as a metropolitan force for the control of the social, responding to the need to police the expansive urban sprawl of London (Taylor, 1998: 71–87; Colquhoun, 1806: 501–35).

In 1822, Peel set up a select committee to consider the state of existing police offices, watchmen, constables and the Bow Street Runners (Rawlings, 1999: 85; Critchley, 1967: 101–39). Peel advocated the centralisation of the police and by 1826, he outlined a plan for six police districts to cover most of London. A year later, Peel drafted the *Metropolitan Police Bill 1829* UK, seeking to legislate for a police force for the maintenance of civil order. Despite considerable public animosity against the idea of armed patrols, the Bill was given royal assent. The initial force was comprised of over one thousand officers. Peel stressed that the principal duty of the police was crime prevention, rather than detection; detection remaining a key function of the victim. While preventative policing reduced crime rates, metropolitan police originally lacked the investigative power to detect offenders. In 1842, the metropolitan police was expanded to include a criminal investigative division that was largely made up of old stipendiary police officers experienced in solving crimes (Critchley, 1967: 51).

Changes instituted by the *Metropolitan Police Act 1829* UK and the continued relevance of the victim

Originating at common law and codified in the *Special Constables Act 1831* UK, any two magistrates had the power to appoint any number of

special constables deemed necessary to control a crowd and prevent a riot. In London, special constables were appointed during the Chartist Demonstration of 1848, when the Chartists demanded universal suffrage and the opportunity for working men to be represented in parliament without fear of victimisation (Critchley, 1967: 118–23). Concerned with the gravity of this movement, 150,000 special constables were appointed, which successfully made the Chartists postpone their meeting and present a petition to parliament instead (Choongh, 1977: 47). Special constables were again used in 1867, during the Fenian terrorist campaign, and again in 1911, when special constables were called upon to assist with law and order during a rail strike (Choongh, 1977: 49). In all cases, special constables were enrolled for a particular purpose and were disbanded after the threat to the social had subsided.

During the Second World War, the police force was left severely understaffed. This encouraged the establishment of the metropolitan special constabulary, to supplement the metropolitan police (Rawlings, 1999: 67–77). This led to the establishment of the police war reserve for the duration of the war, where special constables volunteered for police service to maintain social order (Rawlings, 1999: 67–82). Metropolitan London, pursuant to the Act of 1829, thus became dependent on the police for the ordering of the social. However, the common law power of the constable remained such that individuals could be called upon to assist the metropolitan police should the need arise. The power of the victim thus underpinned the continued success of metropolitan policing by providing an alternative means by which the peace could be secured.

Into the twentieth century, the metropolitan police became a pervasive institution of social government such that the police could respond to new and demanding social changes in the event of a threat to the stability of the social. However, special constables continue to be appointed to assist the police response to particular public threats. In NSW, the power to appoint a special constable in the face of serious social unrest remains. Under s101(1) of the *Police (Special Provisions) Act 1901* NSW, a special constable may be appointed by a magistrate or two justices for 'the preservation of the peace, and for the protection of the inhabitants and the security of their property, or for the apprehension of offenders'. For example, special constables are now widely used to keep watch over various landmarks deemed susceptible to acts of terrorism. The functionality of the office, and its continued relevance today, suggests how victim power continues to inform modern polic-

ing by providing a flexible means by which individuals can be enlisted as officers of the peace, in times of need.

Although the rise of the metropolitan police sought to centralise control under the state, this was not to the exclusion of the victim self. As the increasing significance of special constables demonstrates, victim power continues to inform the growth of modern policing. The centralisation of policing under the one administration and the move to national or state control, though suggesting the movement of power away from the victim, does not distract from the basis of policing as a residual duty of the individual to keep the peace.

The rise of metropolitan policing and the victim

The *Municipal Corporations Act 1835* UK created the borough police and required each borough council to form a watch committee and employ sufficient constables to preserve the peace. The *County Police and District Constabulary Act 1839* and *1840* UK provided for the voluntary installation of county police and abolished all alternative police forces, including the Bow Street Runners.[35] These Acts provided that executive control over the police rested with a chief constable, who would be responsible for appointing, promoting, dismissing and disciplining the constables in the force. The formation of county forces mirrored the metropolitan police; to be subject to the same administrative structures and answerable to the one authority – the state. The 1829 Act thus set in motion the movement towards a national police force by replicating similar police forces across the counties of England (Taylor, 1998: 88–94).

The *Metropolitan Police Act 1829* UK marked a significant change in the mode of policing, crime control and the administration of criminal justice. Although the criticisms of the old system had been addressed, they were not to the decline of the substantive rights of the victim. The marked change brought by the 1829 Act, therefore, was the notion that police represented the interests of society over those of the individual victim. Under the 1829 Act police power was based upon the common law duty of the constable, derived from the power of the individual to apprehend felons. Thus, although police power derives from the victim, the 1829 Act set in motion a discursive shift that identified members of the police force as the appropriate regulatory power.

The discursive regulation of the victim away from their discretionary common law position resulted from the increasing concern over several threats to the security of public order. These included the

rise of poverty, riot, and disorder; the rise of a distinct criminal class; industrialism; population expansion; working class unrest; and the corruption of local constables. Here, the 1829 Act aided the centralisation of power under the state. This reduced the likelihood that the personal interests of the victim would be pursued, as the role of the victim as a significant determinant in local law and order had been largely subsumed.

The administrative structures established by the 1829 Act supported police powers of community crime control. In themselves, these did not interfere with the administration of victim prosecutorial power until after 1850, when the police took charge of most prosecutions (Edwards, 1984: 85). Specifically, the shift to public order marked a significant change for the victim. This is exemplified where offences to the person and property were prosecuted by the police regardless of the will of the victim (Critchley, 1967: 140–71; Taylor, 1998: 106–23). Gaining institutional capacity, the police began to assert their sovereign control over the crime victim. This was completely inconsistent with the earlier history of the victim, upon which entire systems of policing were based. Apprehension existed as to the extent to which the liberty of the common person would be curtailed by the keeping of the peace under a centralised force.[36] Under the old system of policing, offences were prosecuted privately, with order offences being brought by the local constable and occasionally prosecution associations. The victim had thus been substantially displaced from their orthodoxy, though their orthodoxy survived in terms of the common law powers of the constable constituted by the victim before 1100.

As the power of arrest demonstrates, the power of the victim under hue and cry remained central to the function of the office of the police at common law. Though increasingly codified by statute, police power derives from the customary practice to keep to the peace constitutive of the common law victim in pursuit of a felon.

The modern police and common law powers of arrest

The police have various general functions flowing from the power of the feudal victim, contained in the common law, now substantively codified by statute. These include the detection and prevention of crime; the protection of people from injury and death; the prevention of damage to property; and the provision of essential services in emergency situations. Generally, a police officer has the power of a common law constable and such other duties, obligations, powers and privileges as conferred by statute: *Police Act 1990* NSW s14; *Law*

Enforcement (Powers and Responsibilities) Act 2002 NSW Pt 8; *Police Regulation Act 1958* Vic s11; *Crimes Act 1914* Cth s3W. A police officer has a continuing duty to prevent disturbances to the public or breaches of the peace, whether or not he or she is in uniform, and regardless of whether the relevant incident occurs within the officer's ordinary working hours: *Horne v Coleman* (1929) 46 WN (NSW) 30.

An information may be laid by a police officer in any matter where the public is concerned. At common law, a police officer may arrest without warrant any person that is suspected on reasonable grounds of having committed a felony. This power carries over from the orthodox office of constable instituted under the Statute of Winchester 1285. In the case of a misdemeanour or summary offence, the power of arrest flows from statute such that no lawful arrest can be made without warrant, unless the arrest is made during or immediately after the said offence. Generally, an arrest may be made without warrant where there is a breach of the peace, such as a common assault committed in the presence of a police officer: *R v Smith* (1876) 14 SCR (NSW) 419. The distinction is such that there cannot be an arrest without warrant on the mere suspicion that a misdemeanour has been committed: *Nolan v Clifford* (1904) 1 CLR 429. Being derived from the victim, the power to arrest a suspected felon was absolute – residing in any subject at common law. The power of arrest on misdemeanour was an extension of orthodox victim power, requiring statutory approval.

Arrest without warrant is a derogation from the policy of the common law and Magna Carta, and is only permitted where it is recognised as necessary by the circumstances of the occasion: *Brown v Lizars* (1905) 2 CLR 837. With the exception of an express statutory power, the boundaries limiting the victim also largely limit the modern police. Hence, powers of arrest are now substantially contained in legislation that is of general application even when the legislation deals with specific subject matter. For example, the power of arrest without warrant under s352(1) of the *Crimes Act 1900* NSW is of general application to all offences irrespective of the statute empowering the police officer to make the arrest in the first place: *Maybury v Plowman* (1913) 16 CLR 468; *Ex parte Finney Re Miller* (1936) 53 WN (NSW) 190; *Hazell v Parramatta City Council* [1968] 1 NSWLR 165.

Statutory and common law powers of police prosecution

Although public prosecution under an ODPP was poorly received in the late nineteenth century, police prosecutions increased dramatically.

With the rise of a criminal class, the police were seen as taking an active role in the apprehension and prosecution of crime over that of the victim, especially in metropolitan London. The prominence of police prosecutions increased significantly when legislation was passed in the latter half of the nineteenth century for the control of public order and the protection of the person: *Offences Against the Person Act 1861* UK; *Summary Jurisdiction Act 1848* UK. Vagrancy and petty street offences, or other offences disturbing the peace, were largely prosecuted by constables and local law officers, and then the police, after 1829 (Emsley, 1987: 191). As there was no clearly identifiable victim in many of these instances, the option to prosecute was left to those protecting the public good. This is consistent with the shift from the property of the victim to the good of the kingdom under the King's interests, marking the beginning of a new phase of social governance.

Despite the orthodoxy of the power and centrality of the victim, the prosecutorial discretion of the police over public offences indicates divergence from the primacy of the victim at common law. Here, the police exercise discretion over the prosecution of offenders pursuant to their prerogative to keep the peace. Accordingly, the discretion of the victim was ameliorated by the rise of the police as protectors of the public good. Police, however, were only able to prosecute because of the orthodox procedure of private prosecution. Although private individuals could continue to prosecute, the *Metropolitan Police Act 1836* UK provided an expansive and united personnel for the prosecution of 'social' crimes that would otherwise go unpunished. However, the police did not purport to have plenary power over prosecution. This role was assumed by the ODPP, who gained a statutory prerogative for the protection of Crown and community interests in the power to take over any prosecution (see Tobias, 1979: 117–38).

The work of police prosecutors increased into the early twentieth century when the police force became a larger and more professional body, taking responsibility for the prosecution of most offences including those against the person and property. This is explained by the increased demand placed on police to control the growing urban centres of England, including the metropolitan centre of London. The rise of the criminal classes, spawned biologically and through practices of improper socialisation, were identified at this time as a major threat to the stability of the social. As a result, the police utilised the oldest of common law powers, the power to inform a court of an offence, to maintain social order. The victim could thus continue to assist with the maintenance of order, as their orthodox common law duty,

though largely transferred to the police, remained unfettered. The common law procedure of private prosecution and the new police force under the 1829 Act thus provided for the more comprehensive prosecution of offenders within an arena previously monopolised by the victim. This made way for the rise of the ODPP in 1879, as the victim has been initially displaced by the police as protectors of the public good.

Today, police prosecutors appear in the local court with the leave of the magistrate. The magistrate has an inherent power to grant leave to any person to appear as an advocate. Police prosecutors must be members of the police force. The offences prosecuted by police officers generally expands with the jurisdiction of the local court. Corns (2000: 290) suggests that in most Australian states and territories, the police exercise complete prosecutorial control over summary prosecutions.[37] For indictable charges not disposed summarily, Corns (2000) indicates that matters are generally taken over by the ODPP. This is particularly true as proceedings move from first mention to the committal (Corns, 1999: 9–21). Crown Prosecutors appear at trial when a matter proceeds on indictment in the District, County and Supreme Courts. In the UK, the CPS now takes control of all police prosecutions, appearing in place of the police or victim in the courts of first mention.

Police as prosecutors: issues and tensions

Tension arose as to the use of police as prosecutors in nineteenth century England. During this century, prosecution was not specifically associated with an independent Crown office as it is today. All proceedings were brought privately, and as such, mirrored civil litigation where two private parties were present. Whether it was a constable, police officer, law officer, or government clerk, each prosecuted in place of the victim. At law, each could be likened to a private party to litigation and so stood in the shoes of the victim (see Tobias, 1979: 117–38).

The idea that the new police would take over, or add to the role of the victim, by appearing as prosecutor, outraged many who supported the *Metropolitan Police Act 1829* UK. As the person informing the court utilised private power, any formalisation of the role around the interests of the state drew criticism from landowners who feared that their prosecutorial discretion would be limited. Replaced instead by social interests and concerns, landowners and Whig parliamentarians contested the idea by confirming the legitimacy of the private

prosecution. Collective agreement regarding prosecution, it was feared, could jeopardise the reasons for bringing the assailant to trial – just resolution on the part of the individual property owner (Emsley, 1987: 189). Criticisms focused on the honesty and integrity of the police, and their ability to be bribed in the same way as the constable advocating eighteenth century theft-taking. It was said that the low salaries of the police increased the possibility of malicious prosecution where an officer wished to supplement their salary if partial to bribery. This, it was feared, would distract from the freedom of the individual guaranteed under the English constitution.

However, out of these criticisms, the police came to be viewed as assuming the power of the victim. This was particularly so in Victorian England for the number of crimes either going unreported or unprosecuted due to the increasingly onerous nature of prosecution. The welfare of the victim also resulted in more police standing in their place. By the mid-twentieth century, police sought to inform the court in most instances. In Australia and New Zealand, this remains the case today (Corns, 1999). However, out of fear of malicious prosecution and the quashing of individual liberty, suggestions arose for the introduction of a neutral or independent class of professional prosecutors. The move to police prosecution thus necessitated the rise of an independent ODPP, even though this led to the further removal of victim power and discretion (Taylor, 1998: 106–23).

Police, private prosecution and the ODPP

The victim of crime remains empowered to charge and prosecute an offender in court. However, this right is severely limited. A police officer's ability to charge an offender is only independent of the victim, however, due to advances made by statute. Police stop, search and entry powers are principally derived from statute as they are generally inconsistent with the common law power of the constable, derived from hue and cry. The extension of police power to search and enter in aid of victims of domestic violence is indicative of the extension of the office of constable: *Crimes Act 1900* NSW ss357F-357I. The victim's discretion to bring charges and prosecute an offender generally remains for lesser offences, by asking the police not to lay charges. However, the final decision to prosecute lies with the police or ODPP (see Taylor, 1998: 121–3).

For the police, regardless of the will of the victim, the power to prosecute lies with their prerogative to protect the public good. It is in the

discretion of a police officer to ascertain the threat of criminal conduct to the public, prosecuting if necessary. The ODPP has the express power to prosecute over that of the victim, contained in the respective statutes of each state and territory for the establishment of the ODPP. The system of police and public prosecution has been instituted to the extent that today, most victims come to depend on it (see Greenberg, 1984). Victims have come to rely on the police apprehension, charge and prosecution of crime in the local court. Indeed, victims now expect that if a crime occurs, it will be taken over by the ODPP and prosecuted by the Crown.[38] Given the current formality of criminal justice and the risks of policing offenders personally, many crimes would go unprosecuted if left to the victim.

The decision to bring a prosecution after the charge of the offender flows from the common law power of private prosecution. Certain jurisdictions have chosen to codify this power: *Magistrates Courts Act 1989* Vic Pt 4 Div 2.[39] In NSW, however, but for the power of private prosecution, a police officer could not inform a court in the first instance. Technically, the ODPP has the ability to initiate matters. However, since the ODPP has no policing or investigative authority, this power is rarely exercised. Private prosecution, developing centuries earlier as a mode of private dispute settlement moving from the victim, thus remains the central method by which prosecutions are brought in most jurisdictions in Australia. So fundamental is this power that the states and territories never chose to comprehensively legislate for a separate police power of initiation. Instead, the police rely on the common law power established by the victim around 1066 and consolidated by the appeal after the Assize of 1166.

The following case demonstrates, however, that the police power to charge a suspect has been distinguished from the victim's power to inform a court of a criminal offence. Here, police power is distinguished through the enactment of consent provisions providing for a separate procedure for police and private prosecution. This case distinguishes modern UK policing from Australian law, holding that in the UK, the police now exercise a prosecutorial prerogative independent of the will of the victim.

Private prosecution after charge by the police: *R v Ealing Magistrates' Court Ex parte Dixon* (1989) 2 ALL ER 1050

The *Police and Criminal Evidence Act 1984* UK and *Prosecution of Offences Act 1985* UK prohibits private prosecution following charge by the police except where the permission of the ODPP is sought. *R v Ealing*

Magistrates' Court Ex parte Dixon (1989) 2 ALL ER 1050 holds that the Director is the only person allowed to prosecute a matter, except where he permits another to act in his place. Where charges are brought by the police but no prosecution follows, a private individual is thus unable to undertake the case. *Dixon* establishes, therefore, that the ODPP has plenary power of prosecution where a matter is initiated by the police. If an individual is to intervene, the consent of the Crown must be sought.

Dixon establishes that in England, once a person is charged by the police, the matter is subsumed into the jurisdiction of the state. Statute has therefore distinguished victim initiated actions, from Crown actions. The victim is still free to initiate a prosecution, but has no power to take over proceedings where the police choose not to pursue a matter. This decision reinforces the notion that the state seeks to subsume the power of the victim. Though preserved at law, a private prosecution must be initiated without the assistance of the police, unless express permission is granted by the Crown. *Dixon* thus advocates that although the police and victim exercise similar powers of initiation, statutory restrictions have been placed on the victim limiting their plenary power for the plenary discretion of the police.

The victim and modern policing

Despite recent attempts to distinguish police and victim power, the fundamental tenets of policing continue to be informed by the history of the private individual as an integral agent of the peace. Hence, the power to make a citizen's arrest has been preserved from the time of frankpledge: *Crimes Act 1900* NSW s352(1)(a)-(b); *Crimes Act 1914* Cth s3Z.[40] Further, the individual duty to keep the peace is established by the common law offence of failing to assist a police officer securing the peace. An individual would be guilty of a common law misdemeanour if he or she refused to assist an officer in the execution of his or her duty to prevent a breach of the peace. Such assistance is warranted where there is a reasonable necessity for calling upon a person, and he or she is not prevented from assisting by any physical impossibility or lawful excuse: *R v Brown* (1841); *R v Sherlock* (1866) LR 1 CCR 20. It matters not that the assistance if rendered would have been useless: *R v Brown* (1841) 174 ER 522. Various aspects of victim power have thus been preserved, even though the identity of the modern police remains distinct from the private individual.

However, the rise of new methods of policing has altered the role of the victim in the policing process. Stenson (1993) emphasises the shift to liberal modes of community policing, along with other governmentality theorists, recognising a general shift to use of the liberty of the individual in securing common threats to the safety of the community. Today, the role of the citizen in community policing has become estranged from the office of police constable, but continues under the guise of self-government. Regardless, the duty of the citizen to keep the peace remains.

O'Malley (1992, 1996) has identified this duty in terms of the liberty of the subject. Neighbourhood Watch programs are raised as the example. Although these programs do not seek to replace the police force, emphasis has shifted from the apprehension of criminals as following a criminal incident, to the threat of crime to the security of the individual. To secure property, therefore, individuals are to minimise the risks presented to them. O'Malley (1992, 1996) argues that the market rather than the state begins to play a role here by emphasising the individual's responsibility to minimise the criminal threat. Insurance and market based security thus replaces mainstream policing and criminal correction. Victim status is assumed in advance of the crime. Traditional modes of policing that control the outcome of crime are adjusted to meet the new onus on the individual. This relocation is performed discursively, in accordance with the state's need to govern the social. Thus, for want of the double exercise of policing power, the victim is not empowered at law. Instead, the victim is empowered as a liberal self to complement the objectives of the state in securing the peace.

Policing: a victim power

The history of policing and crime control evidences the shift from the individual's duty to keep the King's peace to the communal responsibility to maintain order and control of the King's realm. The evidence for this resides in the transition from the hue and cry, to tythings and frankpledge and the constable and justice of the peace, to modern police forces under the *Metropolitan Police Act 1829* UK. The consolidation of the keeping of the peace under a centralised police force further suggests the move away from the individual interests of the victim to those of the social. The objects of a metropolitan police force included the detection and prevention of crime not to the individual specifically, but for the protection of the stability and security of society

(Cohen, 1979, 1985). This is established by the rise of statutory codes and common law offences concerning riot and civil unrest in the seventeenth and eighteenth centuries. The focus on a metropolitan police force further stresses the move from feudal property relations to those of a centralised state government. The movement towards this mode of government, and the historical changes which led to it, suggest that the victim fundamentally underpins the rise of the police. The move towards the social government and control (Donzelot, 1991; Deleuze, 1979; Ewald, 1991a) thus involved the relocation of victim power to the state. The history of the victim at common law and statute thus explains the rise of policing under the control of the state executive.

The gradual assemblage of policing methods first spawned by the right of the individual to protect their propertied interests and pursue an offender following an office came to be diffused throughout the early village by the customary duty to keep the peace. Upon Norman Conquest, this custom became a duty to the King, such that old peace-keeping measures became common law processes. This effectively transferred the individual power of policing to that of the county, such that crime was no longer seen as manifestly, a personal problem. Instead, the control of crime became a threat to everyone, such that a common law duty was imposed on the whole community. However, in the history of policing at common law and statute, the orthodox common law power of the victim remains fundamental to the modern operation of the state police. As such, the discursive expansion of policing under the governance of the modern state has depended on the application of victim power to the county initially, then metropolitan society, and now the nation state. Significantly, this demonstrates that the genealogy of the crime victim as a subject of power helps explain the development of institutions of policing to this day.

5
Prisons, Penalty and Punishment

Rationales for punishing deviant conduct in early medieval England legitimated the rise of various institutions of blood feud, fines, penal servitude and imprisonment, rehabilitative and corrective punishments, and restorative frameworks. Initially this chapter views the infliction of punishment as the actioning of a natural right in response to the offender's guilt. In accordance with this orthodoxy, punishment is conceived as an essential form of retribution. Early modes of judicial punishment were thus regarded as essential to the maintenance of personal rights and liberties. The practice of vengeance in the form of the blood feud was deemed necessary for the regulation of early disputes, not simply for the well being or good order of the county, but because of the personal satisfaction it afforded the individual victim in righting a wrong. Early punishment was justified then as essential to the maintenance of respect for the liberty and rights of individual members of society. Respect for these rights demanded that should an offence occur, a punishment must follow. On this view, the victim of crime gained access to the body of the offender, and their immediate fate. Alternative perspectives redress offending in markedly different ways. The justification offered by rehabilitative modes of punishment, for example, examine the conditions of punishment and its likely reformative effect on the offender's conduct. This punishment is rationalised as benefiting the offender, by the way it seeks to re-establish the criminal as a useful and productive member of society.

Punishment, therefore, is justifiable, or not justifiable, in terms of its effectiveness, lack of effectiveness, and the consequences of its effects (Garland, 1985a, 1990). These views amount to the claim, in the one case, that respect for the victim's rights and liberties is essential to the individual, and in the other, that punishment is justified as a method

of control important to the well being of society. What changes with each perspective, however, is the subject of victimisation and control. Emergent throughout the later medieval period, this subject changes from the individual owner of rights and liberties under feudal tenure, to the King's order and later still, the order of the community and social.

The history of punishment and the victim

Formal institutions for the punishment and correction of deviant persons, and rationales for them, have existed since early Roman times. Many of these impacted on the development of rationales of punishment in the feudal era. Possibly the most important characteristic of ancient punishment was the utility of the victim in the enactment of the terms of punishment (Morris and Rothman, 1998; McIntosh, 1998). This characteristic has seen somewhat of a revival today in terms of the correction of the offender in the limited context of victim-offender mediation. However, the punitive power of the victim was transferred to the state with the advent of the King's sovereignty and the rise of a social independent of the Crown. Nevertheless, alongside those of the state, victim interests continue to inform the punitive process even though the modern victim has all but lost their power to enact the punitive term themselves. This section traces the orthodoxy of punitive legal remedies, and their association with practices of victim restitution. The role of the victim is traced from antiquity to the advent of private prosecution, which generally resulted in the victim remedying a wrong through the enactment of a private settlement.

Private settlement and victim discretion in antiquity

Roman law required the victim to prosecute the offender privately before a justice and an assembly of the people. Based on the prescriptions of the early laws of Rome, first enshrined in the written laws of Rome in the Twelve Tablets of 451 BC, crimes were established for the unlawful interference of person or property (Peters, 1998). Emphasis was placed on the will of the victim to seek restitution and revenge. For the crimes established by the code, death by burning, clubbing, hanging, and decapitation were prominent. These punishments were not usually carried out by the victim, being instead delegated to a family member or official of the Empire. However, the victim possessed discretionary control over the terms of the punishment. Thus, if the victim was so satisfied, punishment could be commuted into some

other form. Out of sympathy or for want of settlement with the prisoner, this discretion led to the first forms of private confinement. The giving of money or transfer of land, or torture, were also popular alternatives. Other modes of punishment, used by the Roman Empire, included ostracism and exile, and gladiatorial combat (Spierenburg, 1984, 1998).

During this time, prisons were used for the confinement of individuals. However, much like that of early English law, confinement was not seen as a general punitive option after sentence had been imposed. Rather, individuals were remanded into custody to be tortured to obtain the evidence required for conviction. After sentencing, punishment would be at the discretion of the victim, unless under edict of the Roman Empire, the state gained control. However, most offenders were sentenced to death to be carried out by local authority on behalf of the victim. The victim was thus firmly established as the source of punitive power, possessing plenary control over the body of the offender.

Punishment, church and state

Although no individual victim could be identified in cases of heterodoxy, the active dissent from ecclesiastical doctrine, prisons were established to confine such individuals. However, emphasis was not on remedying the damage to the victim but restoring such individuals under God's order. Execution was increasingly used as the state and church began to fuse their authority under the authority of the Crown (DuCane, 1885). Ecclesiastical law thus influenced the development of criminal law under the King and state, distinct from the restitution of victims for offences to the person or property. As suggested in Chapter 2, offences against victims and the punishments available to them were modified over time to include various Christian ideals. As shown, emphasis turned from private prosecution and settlement to the punishment of offenders under the King. The power of the victim to carry out any form of punishment was thus diminished as early as 1100 for the security and good of the kingdom, supported by religious or secular ideals as to the sanctity of the person.[41]

Benefit of clergy exempted clerics from prosecution in the secular courts. The privilege was established around the twelfth century, and only extended to felonies. Except in rare cases, the ecclesiastical courts did not sentence offenders to death, in which case those adjudged guilty were diverted to secular authorities for enforcement of the sentence. Under canon law, the harsher sentences involved degradation and the imposition of penances. Thus, many offenders posed as clerics

to obtain benefit of clergy. This privilege was soon extended to all literate persons. The ecclesiastical courts lost jurisdiction over criminal acts in 1576, and thereafter clerics tried by the secular courts were either discharged or sentenced to imprisonment for one year.

In the early eighteenth century the reading test was abolished and all offenders could claim benefit of clergy for their first conviction of felony. Later, the privilege was extended to all peers and women. As the death penalty was imposed for various offences now deemed petty, benefit of clergy mitigated the harshness of English criminal justice. In 1827, benefit of clergy was abolished as unnecessary (McGowen, 1998). The distinction between canon and feudal law also diminished over time. However, the beliefs of the church helped shape the types of crimes recognised in the common law courts and the punitive terms available upon sentencing. Canon law influenced the movement of punitive power away from the victim and unbridled vengeance to the state so that offenders could be punished in accordance with the prerogatives of the King and state.

Punishment and the King's peace

Under feudal law, every subject owed allegiance to the King. A criminal was someone who by doing wrong, disturbed the King's peace. Lords were responsible for punishing minor crimes in their manorial or hundred courts, but serious crimes were dealt with by the royal justices. The constable had the job of rounding up criminals and keeping them in gaol before they were brought to trial. While in gaol, prisoners would rely on friends and family to bring them food and money. The state did not assume responsibility for the welfare of prisoners. Apart from manorial prisons on the county level, the King erected prisons with the establishment of the criminal jurisdiction of the King's Bench for the more serious felonies (Innes, 1980). Following trial, most offenders were sentenced to death by hanging (Cockburn, 1994; Linebaugh, 1992). However, in the thirteenth century, imprisonment was increasingly used as an alternative to the death sentence. As indicated by Blackstone (1783, 4: 14), the thirteenth century marked the decline of the law of unbridled vengeance for imprisonment:

> when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment or such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III. c.18. that such as preferred any suggestions to the king's great council should put in sureties of retaliation; that is,

> to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of retaliation was rejected, and imprisonment adopted in its stead.

The statute of 38 Edw III c9 succeeded the law of vengeance with terms of imprisonment. Other than to absolve a person of their crime, and as a general deterrent, prisons were used to remand the accused whilst various harsh practices were undertaken to induce a confession (van den Haag, 1975). However, concomitant with the growth in misdemeanour offences, other modes of punishment also grew in popularity. These included torture and public humiliation (Spierenburg, 1998: 44–52). Often watched by large crowds, punishments included the bilboes, ducking stool, stocks, pillory, whipping, public penance, and branding and maiming. The rise of the sovereignty and control of the Crown thus sought the use of methods of punishment to complement the increased emphasis on the public sphere of the King's peace. Imprisonment, and later, public humiliation, stabilised the peace by diminishing the violence of mayhem whilst utilising social judgement as a means of deterrence. The tenets of ecclesiastical law and benefit of clergy also impacted on the decline of the death sentence for alternate modes of lesser punishment. Effectively, this legitimated the removal of punitive control from the victim to the Crown and early state.

History of the English prison 1150–2000

Various epochs characterise the development of the English prison. As the development of punishment moved from the vengeance of the victim to the needs of the King in remanding and reforming criminals, the prison came to stand as the apex of the transfer of punitive power to the King and state where the will of society could be imposed on each inmate.

In the late eighteenth century, the locus of criminality shifted to the imperfect biology of the offender and, later still, their improper socialisation. The rise of the social significantly influenced this process (Garland, 1981, 1985b, 1997). Following this, rehabilitative punishment was considered the preferred mode of correction. This followed the shift away from the victim subject and their emotional and property loss, to the state as the offended subject (Garland, 1985a). After positive explanations of criminality were discredited into the late nineteenth century, the social became the focus of research explaining how the locus of

criminality resided in urban conditions conducive of deviant conduct. While the theoretical tenets of this movement are traced in the next section, the focus here is on the institutional developments that accommodated the shift away from the victim to the normative tenets of society as the appropriate offended subject and place of resocialisation, or correction. However, as will be shown, it was the rise of the criminal sciences that significantly limited victim power for the state. The development of non-victim centred rationales for the punishment of offenders thus highlights the transfer of punitive power from the victim, to the prison, and state, over time.

The introduction of new punishments and the decline of private settlement: 1150–1700

The prison as a centralised institution of punishment and correction was first recognised in England through the rise of royal prisons in the twelfth century. Prisoners restrained in this fashion were originally offenders of the King's peace and security (Langbein, 1976a: 35–42). Initially, those accused of treason or similar offences were housed in royal prisons. Preceding this, in the case of property offences or offences to the person that fell beyond high crimes to the King, the offender was dealt with by way of local authority (Post, 1987). Constables or victims would apprehend and house prisoners for the purpose of local security. The King did not formally administer these prisons, which were left to the nobility of the village, borough or community, exercising their prerogative to keep the peace. Such prisoners were brought before a local justice of the peace and then, eyre justice on assize. The victim would then administer the punishment, where permitted.

In the twelfth century, prisons were thus seen as administrative and intermediate. Even in the case of royal prisons, from which the prisoner was acquitted, sentenced to death, or commuted to some lesser punishment, imprisonment was not seen as punishment unto itself (Spierenburg, 1998). Prison institutions were yet to adopt modern characteristics. These modern characteristics included the use of the prison as a house of correction, where the prisoner would be sentenced to undertake the punishment of penal servitude involving hard labour. This use of the prison, however, gradually developed into the thirteenth century.

The first royal prison was the Tower of London (Innes, 1980). Soon after a number of other royal prisons appeared, used for the housing of treacherous offenders or those remanded into custody by local justices.

However, only the most serious offenders were remanded in such fashion. The Assize of 1166 ordered that every county build gaols to hold persons indicted on felony until they could be tried before a royal justice on assize (Pollock and Maitland, 1968). During this period, the most common form of punishment was the private settlement. Guided by custom, maim or mayhem would generally remedy an offence where a pecuniary remedy was not sought. The victim would bring the offender to justice in order to provide cause for settlement.

As the criminal jurisdiction became a specialised arena for the punishment of conduct offensive to the Crown, prisons became widely used and eventually developed into a mode of punishment themselves (Langbein, 1976a: 42). In the thirteenth century, penal servitude was seen as a remedy for individuals offending an expanding criminal code. Additions to the criminal law during the twelfth and thirteenth centuries included indebtedness to the Crown, perjury, fraud, and misinforming the courts other than that of perjury (Baker, 1990: 489–90). In such cases, all of which took the form of an offence to the King, penal servitude was seen as a relevant and just punishment (Sharpe, 1980, 1990). From 1270, the number of offences expanded to include such acts as vagrancy, breaking the peace, infamy, the illegal bearing of arms, and moral offences. Restricted bail, frankpledge and private settlement thus led to the increased use of prisons for the remedying of such offences into the fourteenth century (Musson and Ormond, 1999). Correspondingly, several offences for which no bail could be sought were also introduced into the common law. These included arson and jail breaking (Baker, 1990: 489).

However, during the thirteenth century, the rise of public justice and the establishment of a criminal law under the Crown were less than plenary. Pursuant to their noble right, lords were permitted to construct small houses to keep prisoners awaiting trial. Consequent on the emphasis on property and landed relations, the nobility housed offenders infringing their propertied rights. However, the move to establish prisons for the confinement of offenders awaiting trial and following sentence on servitude was never comprehensive. Private settlement always remained a possibility (Klerman, 2001: 43). However, this was diminished to a limited number of offences involving the private property and feudal entitlements of the nobility. Into the fourteenth century, this privilege diminished with the strengthening of the administrative structures of the Crown (Kiralfry, 1958: 64).

From as early as the thirteenth century, prisons were established that grouped offenders according to their crime. This was said to aid

prisoner rehabilitation and punishment, seen with the rise of the Tun, a prison built for the housing of moral delinquents (Kerr, 1995). The grouping of prisoners for the purpose of corrective treatment and deterrence was a significant factor signifying the removal of victim discretion from the punishment process. As demonstrated in the next section regarding the rise of the criminal sciences, this movement encouraged the late eighteenth century development of a medical or positive knowledge of the criminal for their identification and correction. However, up until the advent of scientific positivism, the punitive process remained a semi-formal process inclusive of victim and Crown interests.

Until the eighteenth century, therefore, the will of the victim remained an important determinant in the punishment process. Except where a prisoner was taken into the exclusive custody of the Crown, in which the power of the victim was transferred to the local lord, the victim would be able to impact on the punitive process by pleading to the court the possibility of private confinement. From the eighteenth century however, scientific positivism impacted on the power of the victim to participate in the punitive process. This impact removed the victim's need to partake in the punishment of prisoners as it obviated the idea that criminality was in some way solely associated with the deprivation of an individual's liberty to life or property. Apart from the emergence of the King, state and social, science was increasingly used to detect offenders and legitimate the housing and correction of deviant persons. The rise of a criminal science thus presents a sharp cleavage in the history of punitive justice removing the remaining vestiges of victim power to the state. The discretionary power of private settlement and confinement from the victim subject was therefore diminished for the rise of alternative institutions and explanations of control that removed any reference to the victim as the relevant site of punitive power.

The emergence of houses of correction, prisoner reform and the state: 1700–1850

The rise of criminal offences and the expanding administration of the kingdom and state in the eighteenth century saw an increase in the number of prisons housing various types of criminals. However, felons were not the only individuals housed in such fashion during this period. Prisons were also used to confine civil offenders (Morris and Rothman, 1998). Persons convicted of indebtedness, unable to pay their creditors in full, were often housed in prisons. Though subject to

different treatment and lower levels of security, debtors were housed in prisons for the good of the market (Innes, 1980). This signifies a significant shift away from victim discretion to the stability of the public, or economy, as an expanding domain of rule.

During this latter period, the kingdom began to decline for the rise of the state. This evidences a shifting governmental rationality from highly secular communal rule to a mode of regulation that held social ideals as paramount. Although debtors were housed under civil law, their confinement suggests an increasing focus on the good of the social over that of the interests of the victim, and victim orientated settlement. This shift, evidently, had various implications for the regulation of offenders as objects of sovereign and public rule. Even in the case of such civil offences as indebtedness, the victim was unable to influence the outcome of the matter by pressing their private rights and interests consistent with their early common law power. Private settlement was outlawed, as any agreement contrary to public policy would be deemed void.[42] Although victim discretion may have induced a settlement before a claim was brought, once an action was set in motion the state imposed its administrative framework on the tortfeasor.

This necessarily changed the nature of victim-offender-state relations. For felonies, the increased organisation of the state and the rise of a centralised policing force after 1829 saw the increased reduction in victim discretion and power. For felony, death by hanging and penal servitude were increasingly imposed by the state (Linebaugh, 1992). For misdemeanours, whipping, fines and the pillory were utilised. Gone was the orthodox power of the victim to impose on their offender a punishment of private arrangement. New governmentalities identifying the sovereignty of the Crown, reason of state and the social became paramount for the proper organisation of society. The prison system, in terms of its national rather than provincial administration, reflected changes to the power of victims as they were transferred to the state.

The prisons of this period were marked by their articulation of an ordered approach to punishment (McGowen, 1998). Again, this was influenced by the rise of scientific criminology and the need for a centralised approach to crime control and correction. However, gaolers tended to administer prisons through a variety of informal channels. Prisoners sentenced for petty offences or as remedy indebtedness generally organised their own daily routines. Family or other interested persons were allowed access to these convicts who often worked in the prisons for profit (McGowen, 1998). Gaolers were thus able to attract

higher profits from an informal administration as convicts would often attract outside business, equipping some prisons with a marketplace of their own. Felons were treated with heightened security being placed in leg irons and shackled, though still able to engage with others (McGowen, 1987). Other than those housed for insanity, most felons were free to move about the prison. This resulted from the incomplete administration of the state in punishing the guilty. Though regulated by the state, prisons were thus a private affair.

The advent of new ways of imprisoning convicts saw the creation of houses of correction in the eighteenth century. The most famous, Bridewell, was built in the seventeenth century and used increasingly throughout the eighteenth. The distinct purpose of houses of correction was for their punishment and reform of the criminal self (see Foucault, 1967). These prisons were originally responsive to growing vagrancy and petty crime. These prisons intended to employ their inhabitants so that they could learn industrious trades. Although houses of correction did not produce the intended reforms, magistrates continued to sentence petty criminals to them for the benefits of a shorter period of confinement away from the felonious criminal class (Langbein, 1976a). However, a 1706 Act permitted magistrates to sentence felons to these gaols for a maximum of two years (Jenkins, 1986). However separated from the rest of the prison population, felons could learn a trade though still confined to a sentence of hard labour.

Transportation to the New World and later, Australia also suggests the implementation of new and innovative punitive techniques, which further evidence the movement of punitive power from victim to state. Rationales for transportation were similar to those of houses of correction. Transportation to the colonies was seen as an opportunity to punish the offender with hard labour and conditions whilst also providing an opportunity to invigorate the idle. This mode of punishment displaced the primacy of the punishment of the body, seen with whipping or death by hanging. Rather, focus was placed on the reform of the subject according to social and stately principles. Here, transportation was an inventive solution to the increasing criminal population in the overfilled prisons and hulks that suited the social conditions and needs of the time. This complemented the rapidly increasing population of England by forcing the removal of 'undesirable' persons. Transportation also represented the way offenders, once identified as criminals at law, were regulated as a separate class of persons distinct from morally abiding citizens. As criminality was seen as an inherent condition in the late eighteenth century shift to the positive know-

ledge of the criminal form, the normative response of government was to remove such tainted individuals from the population.

These changes, evidenced by the expanded use of prisons in the period 1780–1850, suggest ways in which victim punitive power became subsumed by the state. When read against the increasing mobilisation of the market (capitalism, and the social); the expansion of the kingdom into a state; the rise of an organised metropolitan policing force; the respective expansion of the common law; and the separation of the criminal and civil jurisdictions, changes to the prison demonstrate how the victim was gradually removed from the punitive process. Further, this demonstrates that the rise of the state was decentralised, informed in part by the transfer of orthodox victim power to informal institutions of the Crown initially, and then to centralised houses of correction. Victim power was thus gradually transferred to state institutions for the sake of social control, influenced significantly by the sharp impact of scientific positivism.

The genesis of the modern prison: 1850–today

Modern modes of punishment are significantly different from those of earlier times. In Australia, prisons are administered by the state, albeit increasingly by private corporations. Offenders in maximum-security prisons have little power over their treatment. Characteristic of the development of prisons in accordance with Crown interests for the isolation and rehabilitation of offenders according to their 'class' of criminality, modern prisons tend to be classed according to the culpability and dangerousness of the offender. Upon sentencing, an offender may be sentenced to penal servitude or imprisonment, in a variety of ways. This includes full time incarceration, suspended, periodic and home detention. However, changes to the criminal justice system explaining these developments also suggest how the orthodox powers of the victim were assumed by the state, and how they have since been modified.

Foucault (1967, 1976, 1977, 1978) argues for the transformation from the body to the soul, evidenced by the movement of punishment from the torture of the body to the reform of the mind. During the eighteenth century, emphasis shifted from the public humiliation and torture of the body of the offender to the training of the soul of the individual. This was achieved through the adaptation of a variety of reforms from 1850. Reformers questioned the plight of prisoners, including the physical conditions of their confinement. Rather than punish the prisoner by exposing them to hard labour in conditions of

filth, the prisoner's conscience was invoked to enact suffering and nurture rehabilitation. Depending on the seriousness of the crime, therefore, a prisoner's soul was to be exposed to remedial techniques to aid their rehabilitation and correction.

This period saw the rebuilding of many gaols whose very architecture suggested the emergence of new mentalities of confinement. Separate cells, religious instruction, uniforms and isolation were strategically used to correct the conduct of the offender (Foucault, 1977). The greater the offence, the more corrective technologies were imposed. Enacted in the *Penitentiary Act 1779* UK, this period saw the integration of social causes to modify the punishment of the offender away from retribution under the guise of the victim, community or state, to reform in accordance with public ideals. The role of the victim once considered paramount to the punitive process was thus seconded for the needs of a bourgeoning society. The power to apprehend and confine, akin to the early power of the victim, on being transferred to the state, was further modified to meet the needs of an expanding society under an ever increasing criminal code.

The bench also reflected these shifting mentalities. Originally, royal justices were concerned with the restitution of the rights of the victim, primarily. Over time, this was supplemented by the King's peace, and then needs of the state. However, during this period, the interests of the victim became further displaced by the introduction of the welfare of the offender. This was first evidenced when royal justices took charge of local prison administration. In the thirteenth century, royal justices were charged with a duty to report on prison conditions and to order the making of repairs where necessary (Langbein, 1976a). The concern for the victim was thus set aside by the need to assure the correct confinement of the offender. This continued for many centuries as the use of imprisonment increased. Later, influenced by scientific theory advocating the corrective basis of punishment, judges acted to assure the rehabilitation of the offender through their proper care and maintenance (Garland, 1985a). The decision to rebuild prisons to meet the new schematics of subjective reform was originally invoked by the justices hearing cases at quarter sessions. When hearing cases on circuit, justices of the peace would review the local prison conditions deciding to either repair or rebuild based on the way prisoners were housed. Over time, and with the introduction of the *Gaol Act 1823* UK, a program of national standardisation was put into force. This authority excluded justices of the peace from prison administration, to be replaced by the state executive and in some jurisdictions, a corporation.

Expanding government debate as to the proper and expedient punishment of prisoners also saw the implementation of a range of new punitive ideas. The utilitarian reforms of Bentham, though criticised, came to be adopted in part (see Holdsworth, 1903–38, 13: 317). Emphasising the isolation and inspection of each prisoner, these ideas represent the move to the correction of the offender for the good of society. In this tradition, therefore, the victim became isolated from the sentencing and punishment process. This is further emphasised by the move to other rationales for punishment, such as just deserts and deterrence. Here, prison was the punishment rather than an institution for it (Garland, 1990, 1997). Prison thus served as a deterrent unto itself. Emphasising reform, the common law power of the victim was set aside. Victim rights were marginalised within a justice system orientated towards social modes of crime detection and reform. The lengths of sentences were increasingly designed to complement the interests of society rather than the victim (Lacey, 1988; Packer, 1968).

The onset of the twentieth century saw the reduction in prison sentences, particularly for petty offences. Only felons were subject to penal servitude for life. The rise of sentencing legislation characterises this epoch, limiting and guiding judicial discretion towards standardised modes of punishment in accordance with victim interests including the demand for consistency in sentencing. Brown (2002) discusses the rise of various legislative instruments for the correction of offenders devoid of the victim or the harm caused to them.[43] The common law power of the victim had thus been transferred, and the victim subject displaced, as the state subsumed all punitive power for the ordering of the social.

Criminology

Criminological theorists have traced various rationales of punishment constitutive of the criminal form. Such theories have focused on the changing relationship between criminal and state, reflected in the development of the common law. Criminology thus tends to focus on macro developments that explain changes to criminality and correction. These provide a background explaining how the victim possessed plenary punitive power, and how that power was then gradually removed to the Crown and state. Under classical liberal control, for example, criminality was seen as a threat to the freedom of the individual. This declined with the rise of the state and social. Here, the identification and correction of deviant conduct became estranged from the harm of the victim.

The rise of a positive knowledge of the criminal evidences the shift to social control. This movement suggested that criminality could be identified in advance of the criminal act by the development of a scientific knowledge of the antecedents of the deviant. Once such a change had occurred, the liberty of the victim was less important than the state's ability to identify criminals in advance of their offensive or devious act. These changes identify the shifting primacy of the victim in the criminal justice process. Further, these perspectives indicate how the centralised state came to possess control of criminal punishment, isolating the victim. The analysis of the development of criminological theory indicates that the centralisation of criminal justice came by way of the transfer of victim power. The main strains of thought that consider this transfer of power are discussed.

Liberal perspectives

Liberal rule is identified by a number of characteristics. Marked as a critique of government, various theorists offer different perspectives on the way liberalism has shaped modern society. Accordingly, liberalism is seen to have taken many forms. These include classical, radical, conservative and social democratic perspectives, as well as providing the basis for the agency of the utilitarian individual advocated by classical criminologists such as Beccaria and Bentham (see Garland, 1985a). However, in these diverse approaches, liberalism presents common trends that suggest a fundamental relationship between the individual, the state and society.

In *Variants of Liberalism*, Hall (1986) suggests that liberalism argues against arbitrary feudal rule for a free bourgeois market society. Hall (1986) notes that liberalism was not generally recognised as affecting social relations until the breakdown of feudalism, and the rise of the *laissez faire* market economy. However, the tenets of liberalism reach back further into the history of the victim than one would first realise (see Stenson, 1998; Burchell, 1996). In terms of private prosecution and settlement before 1200, the freedom to initiate a prosecution and enact a private settlement without interference from the judiciary or King can be explained as a 'liberal' process.[44] Liberalism thus informs the basis of the initiating process of feudal law, despite feudal rule being imposed on all Crown subjects. Today, liberalism continues to shape common law process. Hall (1986) argues that liberalism constitutes the basis of the rule of law, and equality. Thus, each individual must be free to invoke the law and to press their rights in a court of law without undue interference from the state. This is evidenced in terms of the orthodox

discretionary role of the victim as police, prosecutor and punisher. Although informed by the feudal mode of production that connoted anything but freedom, the influence of liberalism on the development of victim power is established through an examination of the freedoms inherent in early modes of prosecution.

Liberalism, in terms of individual conduct free from government, explains how certain aspects of victim power was constituted and rationalised in the early period. From 1066–1200 the victim was identified as an individual free to approach the courts to seek resolution convenient to their individual propertied needs. Hall (1986) indicates that the state was essentially a set of external constraints on individual freedom, necessary for an ordered social existence. These constraints are viewed as artificially imposed on the individual. Subject to such constraint, legal power could be invoked at the will of the individual. The tensions evident in the winding back of these powers, such as the removal of the victim's right to private settlement for the rise of the King's justice, can be explained by the way sovereign government and reason of state began to replace individual freedom, as provided according to feudal tenure, chief rationale of government in the twelfth century. The common law, as a means of government, was therefore used into the twelfth century to modify the discretionary powers of the victim. Victim discretion came to be subsumed by the King's justices, and later by Crown officials such as the constable. Hence, what were once private issues to be disputed between individual persons became common law crimes as the King realised the necessity of, for example, an able body of men for war. To this day, certain traits continue from this early period. Tensions, for instance, resident in our justice system can be explained in terms of the struggle for freedom. The power of the victim to plea bargain, for example, has now been completely eroded by the state to the distress of many victims. This erosion, however, is legitimated by the state's need to take charge of prosecutions. This erosion of victim power can be further explained by examining a number of specific theories on crime and punishment as based on the tenets of liberalism.

The orthodox common law power of the victim can be explained by the classical liberal emphasis on the individual's right to freedom. Although the punitive power of the victim has long been removed to the state, the various conceptualisations of the use of freedom suggest a fundamental relationship between punitive power, the victim and state. For example, Beccaria (1765) argues that the liberty of the individual constitutes the sovereignty of the nation. Beccaria (1765)

conceived the utilitarian individual in explaining the proportionality between crime and punishment. This proportionality assumes that the state should only invoke powers that need to be invoked to curb a social threat. Beccaria (1765) argues that people should remain free to the extent that it is necessary to achieve sound government. Referring specifically to the division between individual crimes and the distribution of punishment by the state, Beccaria (1765) argues that state intervention is necessary for the control of crime. His work therefore demonstrates how liberalism explains how law adapted to new social needs and changes, impacting the victim. Writing in the eighteenth century, Beccaria (1765) theorised a relationship between the individual and sovereign based on the freedom of the individual to enter into compact. For the victim, his work demonstrates how liberalism constitutes relations of power. Liberalism thus views the constitution of criminal justice in terms of the victim's ability to invoke their common law power freely, bereft of government.

Bentham's work, focusing on practical regulatory relationships, demonstrates how the freedom of the individual can be used to enter into agreement. Liberalism explains the tensions involved in the expansion of the common law to allow for the monopolisation of the orthodox freedoms of the victim, by their transfer to an institutional setting. In terms of the shift from liberal rule to social modes of control, the victim was slowly removed from the common law for the imposition of the state pursuant to the social contract forged by individuals.[45]

Liberal rule continues to inform the fundamental basis of the common law. This was the case during the eighteenth and nineteenth centuries, where the individual's freedom to invoke the law to secure their own ends became severely restricted. For example, the fear of crime in nineteenth century metropolitan society modified the individual's right to influence each aspect of the criminal prosecution process. The victim, whose powers are linked to the freedom to engage the law, were further wound back for the rise of an organised approach to criminal justice. Instead of the individual, focus shifted to the conditions of urban and industrial life. Here, the degradation of the victim power was informed by two separate criminological movements. The first was the rise of scientific positivism, and the second, an emphasis on the social, as means of controlling crime and criminality. In each of these phases, the freedom of the victim to invoke the law was largely removed due to the shifting focus of the law to the definition and cure of crime, deviance and criminality. Although their basis as free indi-

viduals under the common law remained, victims now lacked plenary power to invoke the law as they saw fit.

However, the fundamental right of the victim to prosecute did not leave the victim. Constituted by the power of the individual to contract their freedom, the value of the social compact legitimated the degradation of orthodox victim power. Though the state subsumed various punitive powers, other powers, such as private prosecution, remained. This indicates the centrality of the liberty of the individual in the genesis of the criminal law.

Scientific positivism and the birth of the criminal individual

Around the nineteenth century, focus shifted from crime as the infringement of individual liberty to an inherent condition of being. The tendency to deviate from social norms and commit crime was viewed as a condition that could be isolated in certain individuals. Although this movement did not restrict the common law power of the victim, it did as Garland (1985a) points out, make space for a discussion of the 'criminal' that was removed from the victim. This space then took on its own discursive and institutional form, to the extent that we now see the criminal being classed and treated as a form unto itself (Foucault, 1979, 1988). Lombroso (1895) and Ferri (1906) each identified several biological conditions in their attempt to map criminal deviance. These theories provided a positive knowledge of the criminal self, such that criminality could be identified without a crime having occurred. Positivism gave rise to an institutionalised criminality that modified the course of criminal justice in England. The result of this was the creation of prisons and hospitals that exclusively treated the criminal, with little or no concern for the victim.

Science and the 'scientism' of the criminal thus presented new ways of regulating crime. Commensurate with the nineteenth century concern over moral habits and decency, this saw the shift in the punishment of crime to the asylum (Garland, 1985a). The asylum, the hybrid of the prison and the hospital, sought to treat pathological forms of deviance, including madness and insanity (Foucault, 1967). The creation of institutions solely concerned with psychiatric causes furthered the isolation of the victim, not only from the punishment process, but also as an offended subject in the first instance (Johnstone, 1988). With biological causes of criminality the victim was therefore not so much silenced as an agent of criminal justice, but effectively removed as a potential actor altogether. Instead, the criminal was seen as the subject in need of study, support and assistance. If a victim was

to be identified, this would take the identity of the social, which became a bourgeoning force greater than that of any individual.

From their traditional foothold as a private individual possessed of various common law powers, the victim came to be seen as nothing more than a mere witness of the crime in a court of criminal law. Indeed, the influence of the victim on the ODPP or state in its pursuit of the most appropriate punishment has come to be seen as an affront to the independence of the state in prosecuting offenders.

Social theory and the human sciences

The rise of an urban classed society increased opportunities for petty crimes and deviance. In this threat to the security of the social, criminologists began to overlook the liberties of the victim to find an explanation in the urban environments that seemed to be housing such crime. Suggested by the increased prosecution of persons for common law vagrancy and the introduction of the poor laws, theorists began to conceptualise crime as arising from disorganised social conditions over some inherent condition or disease (Pfohl, 1981).

The move to social causes and explanations thus belies the rise of the human sciences. Linked to the rise of scientific positivism and the criminal individual, the human sciences were used to map and control the demographic, economic and social conditions of urban life to ameliorate criminal threats. This shift is evidenced by the rise of public health campaigns, a medical knowledge of victimisation, and systematic forms of social inquiry such as human statistics. Hacking (1991) argues for such a perspective, indicating that statistics have been used to map urban crime and ways of managing the social to minimise the threat to both individuals and the community.

Under liberalism, the freedom of the individual was privileged alongside the minimalist conception of the state. The state acted as an 'overseer', to protect the legal rights of individual citizens. This means that law was repressive, diminishing certain forms of behaviour identified as criminal (Jones, 1982). However, this repressive task was controlled by the individual and community and was influenced by the need to address communal concerns across the county. As the social became more prominent, law became concerned with moral habits and ways of life over infringements to personal space and property. The rise of vagrancy and laws prohibiting public drunkenness evidence this shift. Instead of articulating the array of remedies available to the individual, the law came to sanction conduct that threatened the routines of an industrialised, civil society. Concomitant with the rise of new institu-

tional forms and government enquiries into the status and health of urban living, the common law came to protect the interests of the social. This was to the express exclusion of the victim. The rise of police prosecutions, the ODPP, and state correction, and various disciplinary arenas for the management of urban life, suggests that the state assumed the traditional powers of the victim to utilise the criminal law to protect social interests.

Neo-liberal perspectives

The freedom of the individual to regulate their interests away from the interference of the state is a key feature of liberalism. Aside the feudal mode of production, this was the praxis upon which the common law power of the victim was legitimated and rationalised. However, with the development of modern society and the rise of the accountability of government agencies for the distribution of resources to its constituents, the self became an increasingly important agent of control. Identified by the governmentality literature as utilising the freedom of the individual in a technical capacity, self-regulation places the onus of responsibility not on the state or social but on the individual (Rose, 1999). This self-responsibility is, however, markedly changed from that rationalised by liberalism (Rose and Miller, 1992). Instead of governing interests that fall beyond the reach of the state, neo-liberalism argues for the self-regulation of the life of the individual. Consequently, various aspects come to be governable that were once unavailable. Rose (1989, 1992, 1998) argues this in terms of the soul and private self. Others have examined this rationale in terms of unemployment, self-empowerment and policing (Dean, 1998; Cruickshank, 1993; Stenson, 1993).

In the case of the victim, O'Malley (1996) indicates how risk induces the victim to prepare for any potential criminal threat. This has the effect of removing the onus from the state to the self to encourage participation in the private security market. The victim must now avoid risks rather than seek remedy upon infringement. Rather than turn to the common law and their orthodox power for relief, the victim must turn to the market and community for security. This is evidenced by the way community policing is articulated as a risk minimising measure, and explains the popularity of private security and personal insurance in modern society (Stenson, 1993; Ewald, 1991a). Although the social and state may exist alongside the self-regulating individual (Burchell, 1996), seen with the continued role of the ODPP and welfare agencies seeking to support the victim post offence, the victim is

further removed from the criminal justice process by their reliance on self-insurance practices. Here, the victim must not turn to the state for help, but their own earnings to protect their personal good.

Neo-liberal perspectives thus explain how the victim has been removed from common law processes and the criminal justice system as a larger disciplinary arena. The state is then free to pursue the criminal disassociated from the victim, who looks to him or herself as the source of criminal risk minimisation. Subject to Pratt's (1997) thesis below, neo-liberal rule thus complements the notion that crime is a problem for the state, by enabling the state to focus squarely on the criminal and the justice process as removed from the specific needs of the victim. Effectively, various victim interests can be met through self-regulatory practices leaving the criminal threat for the state as the guardian of the public sphere.

The removal of the victim thus made room for the complete control of the criminal form by the Crown and state. In this context, Pratt (1997: 11–18) argues for the change to self-government by analysing the shift from dangerous classes of criminals, to dangerous criminal selves. Traced earlier, scientific positivism sought to map the criminal form identifying certain pathological tendencies into which criminals could be grouped. However, during the nineteenth century, the issue of recidivism amongst criminals, along with the shift to social theory and the human sciences, called for the amendment of traditional approaches to the management of the criminal form. This concern was responded to by the enactment of legislation identifying repeat offenders as a serious threat to the social: *Habitual Criminals Act 1869* UK; *Habitual Criminals Act 1905* NSW. Significant modifications to sentencing law and the discretion of the courts followed. In this context, Pratt (1997: 35–69) argues that the relocation of criminal dangerousness to the criminal self was responsive to the movement towards minimising the threat of dangerousness to the social, devoid of victim interests. The decline of the welfare state for the rise of neo-liberal practices of self care saw a further shift to the prescription of minimum mandatory sentences for repeat offenders. Here, the criminal self was held as accountable for their recidivism, allowing for the indeterminate incarceration of the offender: see *Crimes (Serious and Repeat Offenders) Sentencing Act 1992* WA. Repeat offenders were thus identified as exercising a free choice to re-offend. The risk of indeterminate incarceration thus fell on the criminal, albeit supported by the prerogative of the state to regulate the criminal threat as a matter of public control (Pratt, 1997: 157). The removal of

the victim from punitive processes provided the state increased control over the criminal threat. As the victim declined as a site of punitive power the state arose to regulate criminality, which today, responds to the neo-liberal shift to self care.

The relocation of the victim from the arena of the common law and changes to the management of serious offenders jointly suggests the movement of the administration of punitive justice to the state. The shifting locus of control from the feudal compact, to individual freedoms and liberties, and then the rise of the social and self, explain how the state came to be rationalised as the principal authority controlling the punishment and correction of offenders. Herein, the rise of industrial society, and the concomitant shift to urban conditions generative of deviant or criminal conduct, attracted the focus of criminologists and policy makers alike. In the least, the last two centuries represent the transformation to broader social forces displacing the victim. For the most part, no direct attempt was made to formally remove victim common law powers. Instead, victim power was gradually eroded by social developments captured in the boarder movements of criminology and criminological theorising. Liberalism, positivism, social control and neo-liberalism thus demonstrate how the victim has been discursively located outside the common law for other interests more pertinent to the sound government of society, including modes of punishment, which now increasingly resides in the criminal's ability to exercise choice. However, while the victim subject was relocated outside the common law their constitutive powers remained to be subsumed into the rubric of state control. The victim's right to the body of the offender thus subsided for an array of governmentalities localising the power of punishment in the state.

Modern penology and modes of reform

The modern criminal justice system is based on the administration of a variety of punishments that have influenced the participation of the victim in the common law. Originally, the victim administered the private settlement. Over time, this power was formally diminished by the King for the good of the King's peace and men. The introduction of houses of correction emphasised rehabilitation, which continues in the prison environment today. Retribution under the law of vengeance was displaced by more humane techniques of correction. Other techniques and rationales for punishment suggest that the victim has been removed from the punishment process at common law only to be remitted in a

highly controlled and modified way, as with the rise of mediation and victim impact statements.

From vengeance to the rehabilitation of the offender

The justification for punishment under the law of vengeance *lex talionis* involved the identification of an evil. This evil was to the person or property of the victim, providing the victim an express right of retribution (Jacoby, 1993). As criminal law became organised around a set of provincial ideals, originally protecting personal propertied interests and later those of the King, vengeance fell into disfavour. This was due to the rise of unbridled mayhem. By the fourteenth century, vengeful punishments were regulated to exclude punitive terms that threatened the bodily integrity of the King's men for the purpose of the defence of the realm. At this time, the increasing control of justice under the Crown meant that the victim's ability to invoke punishment privately with the aim of settlement was diminished. The outlawing of the common law duel provides an example of this: *R v Coney* (1882) 8 QBD 534. Once this provincial ideology was established, punishment began to be justified on various other grounds. These included retribution and deterrence with the aim of providing an organised, calculable and fair response to crime (Jenkins, 1986; *cf*. Beccaria, 1765).

The rise of institutionalised correction and social causes of criminal conduct led to a third justification for punishment – rehabilitation. Although rehabilitation was seen as a rationale for punishment before the rise of social causes, it was not until the social was established that rehabilitation became a significant consideration as to sentencing proportionality. The moral regeneration of a corrupted individual thus became a justification for punishment itself. For the felon, punishment would involve all three justifications. Incapacitation may also serve as a rationale. For the person convicted on misdemeanour, such as vagrancy, rehabilitation legitimated their confinement, in order to subject them to new industrial trades in the attempt to overcome their idleness and restore their productivity as a member of society.

The victim was removed from the common law *inter alia* with the decline of unbridled vengeance. Once it was established that the personal vengeance of the victim did not serve the interests of the King or society, the victim's capacity to rule the sentencing process became limited. Further, this led to divided opinions as to how to best manage the criminal – as a threat to the liberty of the individual or to society.[46] As corrective ideology shifted to the rehabilitation of the offender, the needs and interests of society dominated those of the victim to the

extent that society, as the offended subject, became the primary arena for the rationalisation of punitive technologies and justice. With the increased focus on the rehabilitation of the offender, the harm of the victim was effectively marginalised as rationalising the punitive term.

Just deserts and retributivism

Retribution is justified in terms of the culpability of the offender for the loss of the victim. This rationale allows the state to punish in place of the victim as the right to punish is based on violation of criminal code. Punishment is then a prescriptive exercise that is legitimated by the same force that provides for the sovereignty of criminal law (Brown, 2002). Under this model, the victim is largely removed from the punitive process, though may still bear some relevance to the justification of a punitive term. New 'truth in sentencing' legislation demonstrates its application. In NSW, a mandatory life sentence may be imposed for the most serious repeat offenders: *Crimes (Sentencing Procedure) Act 1999* NSW s61; *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* NSW; see Brown (2002).

This rationale of punishment is also validated by the failure of rehabilitation, and as a response to misguided judicial discretion. This justification therefore seeks to restore the legitimacy of punishment in the provision of determinate sentences. It disregards the discretion needed to justify a rehabilitative sentence. Natural justice, rather than the ability for the judge to understand mitigating circumstances, protects the rights of the offender. Retribution therefore draws from a liberal rationale. Retribution also draws from the movement of the human sciences and positivism to scientific, calculable punishments. The calculation of this type of sentence does take into account *inter alia* the harm done to the victim. However, a victim's personal discretion is limited to that which could constitute the objective seriousness of the offence, which is manifestly concerned with community interests. Compared to rehabilitation, however, retribution does acknowledge the nature of the crime to the victim. As retributivism focuses on the blameworthiness of the offender and the seriousness of the crime, the harm done to the victim will generally bear some relevance to the determination of the culpability of the offender.

Shaming and reintegration

Reintegration attempts to bring the offender back into the community by invoking the offender's personal sense of shame as to their offensive conduct. Shaming is thus rationalised on the basis that the offender is

being reintroduced to those social standards that have been offended. Once realised, the offender is reintegrated into the social by their realisation of collective standards and moral codes. Braithwaite's (1989) *Crime, Shame and Reintegration* explains the basis of this justification in the utilisation of public participatory shaming with the aim of re-socialising the individual back into the collectivity. Based firmly on the notion of the collective, reintegrative shaming works through the articulation of social standards and norms. In this model, the emphasis on the will of the individual victim is minor. In fact, the crime to the individual is seen in terms of the breaking of a number of social standards that would normally inhibit the individual from consciously offending. The offender is made to realise the necessity of the criminal law infringed, which aids in the reintegration of the offender back into the community by their realisation of the abhorrence of their conduct. Although the standards of the victim and his or her community may be relevant to the shaming process, the principal place of correction is the broader 'social'. This modality of punishment therefore questions the need for incarceration, volatile and retributive punishment (Pratt, 2000: 430–3).

Victim-offender mediation

The mediation process introduced significant changes for the punishment of offenders against the history of the removal of the victim for the state. Victim mediation, otherwise known as conferencing, allows the victim to interact with their offender on a personal level. Though supervised, the victim is able to confront the offender with their emotional pain, seeking an explanation that may help resolve or reconcile their loss (Umbreit, 1985, 1994). The justification of this punishment includes its potential restorative effect on the victim and offender. The history of this punishment is based on the lack of agency accorded to victims in the criminal justice system. The origins of restorative justice are thus found in the victim rights movements of the 1970s, and later institutional developments which sought to bring the victim back into the justice system. Rather than the state being viewed as the victim, placing the primary victim and offender in passive roles, restorative justice recognises that crime is directed against individuals. Umbreit (1985) argues that mediation attempts to heal the emotional pain of crime. This has a therapeutic effect on the offender as it demonstrates the consequences of their actions, even if the offender does not acknowledge ultimate responsibility for them. The integrity of the victim is therefore brought into focus. Conferencing also seeks to rein-

tegrate the offender back into the community in much the same way as reintegrative shaming, highlighting this technique as a mode of therapeutic jurisprudence.

For the victim, this rationale suggests that victim agency remains a significant justification of punishment. Although flowing from the punitive prerogative of the state, mediation has redistributed part of the power of punishment back to the victim. On the surface, this is a right last possessed in the age of the private settlement. However, this mode of punishment is generally informal, seeking to ameliorate the effects of crime on the victim and to encourage the offender's awareness of the effects of crime on their victims. Although recommended in the sentencing phase in certain jurisdictions, the victim is unable to demand mediation as of right. Instead, the victim participates as a subject of the state for the good of the social. Here, the victim is allowed to participate in mediation by permission of the court or prison. Victims do not hold, therefore, any formal power over the criminal. Instead, mediation shows that victim punitive power has been transferred to the sentencing court or executive in its control of criminals generally. Restorative justice is thus a key indicator as to how the victim has been simultaneously removed from the justice system while impacting on its administration and direction.

Governmentality, punishment and the victim

Changing rationales for the punishment of offenders, and the common law justification of different modes of punishment over time, reflect the changed position of the victim in the judicial process. This position, to which the ability to exercise punitive power over the offender is attached, became peripheral to the victim since the law of *lex talionis*. However, interesting developments in offender rehabilitation, which emphasise the loss of the victim alongside the social, colour the contemporary context of punitive justice. These include a focus on the reintegrative shaming of the offender, and the ability for the victim and their family to participate in mediation. Contemporarily, a myriad of punitive terms are utilised for the correction and control of deviance. However, whilst the victim is taking a more active role today, their role is fettered by the focus on the correction of crime on a social and communal level. Although this provides for the dynamic rationalisation of punishment and penalty, little is left for the victim compared to that of their orthodoxy. This orthodoxy has long been subsumed by the Crown and state as punishment came to be

associated less with vengeance than correction, deterrence and normalisation. Clearly, the key shift providing for the substantive movement of power from the victim to the state flowed from the impacts of scientific positivism. This provided the basis for the regulation of punishment devoid of a victim self. As demonstrated, this led to the development of a variety of rationales of punishment, most of which complement the isolation of the victim.

The governmentality literature highlights the movement of victim power to the Crown and state. For Pratt (1997; see Freiberg, 2000), the locus of punitive control resides in the dangerousness of the criminal. As the criminal threat to the security of the social increases, the power of the victim decreases. This power is subsequently subsumed by the state. This literature thus suggests that the power of the victim is eroded for communal and stately interests to the extent that the victim was no longer identified as a relevant subject of criminal justice. Thus, the genesis of the criminal and criminality as sites of dangerousness explain the removal of the victim from the punitive process. As the criminal became an increasing threat to social stability, the power of the victim was subsumed by the state as the relevant arena of risk minimisation and control. The only exception to this, Pratt (1997) explains, is where the state encourages the victim and criminal to engage the risks of dangerousness themselves. However, for the most part, the state's prerogative to manage the social rationalises the transfer of power away from the victim to combat criminal threats. It is this process which explains the movement of victim power to the Crown and state, to be diffused between different modalities of punishment from just deserts to rehabilitation.

6
The Erosion of the Victim and the Rise of State Power from 1600

The history of the victim demonstrates the gradual removal of the victim from common law processes, in particular, their empowered position as private prosecutor. This is evidenced by the steady rise of precedents that focus on the power of the King, state, public prosecutors and defendants, over that of the victim. In many cases, it is not the victim that was expressly excluded, but simply replaced as the subject bringing charges on indictment. This provided the basis upon which, from around 1600, the victim increasingly lacked prosecutorial agency, to be seen around the mid-twentieth century as little more than a witness, or basis for the charge of the defendant's offensive conduct against society. The impact of various institutions, namely the rise of parliamentary sovereignty independent of the political will of the King, the decline in feudalism, and the expansion of the social as the key arena of government, each explain why victim power was transferred to the state.

The history of the victim, in terms of common law precedent, emerges through a governmental process that identifies the victim as possessing various powers exercisable in court. Towards the middle of the seventeenth century, however, the victim held only a paucity of these. Instead, the bulk of victim policing, prosecutorial and punitive powers had been transferred to the state. Holdsworth (1903–38, 4: 93–6) indicates that during this period, criminal law had been distinguished by a parliament independent of the political will of the King, and specifically the creation of the Court of Star Chamber. It was the Star Chamber acting as a 'court of criminal equity' that saw the introduction of many forms of misdemeanour into the common law, including the law of attempts, fraud, larceny and forms of riot, each of which remained after the Star Chamber's abolition in 1641 (Holdsworth,

1903–38, 2: 289; 3: 210; 4: 60–1). The development of the common law in this period was influenced by the earlier developments sanctioning disorderly conduct, and breaches of the King's peace (Hudson, 1996). These earlier developments evidenced the first movement of victim power to a centralised source, namely the King.

However, the increasing complexity and diversity of criminal law, evidenced by problems associated with the distinction between felony and misdemeanour; the hierarchy of courts including the assize of eyre, quarter sessions and King's Bench; the amendment of the common law by statute; and the at times unclear distinction between tort and criminal law, each suggest the shift of victim power to the state as a consolidated arena of government. The political turbulence of the period 1600–1900, and the dramatic changes to which the victim was part, demonstrates how the state came to subsume the powers of the victim incrementally, removing the victim from the common law governmentally. Thus, from 1600, criminal law and procedure was increasingly established as a site of common law doctrine, based upon the orthodox power of the victim in the early hundred courts and court of assize. This transfer of power, removing any direct influence the victim had on the courts and criminal precedent, establishes the history that spawned the relocation of the victim in the latter part of the twentieth century.

The victim and the development of criminal law from 1600

The development of criminal law from 1600 involved the attachment of various common law powers to institutions of the state, once held exclusively by the victim. The earlier chapters demonstrate how the victim was integral to the shaping of the early common law (1066–1600) in terms of the distinction between crime and tort, the rise of misdemeanour and felony, the King's peace, the rise of criminal courts of statutory creation, the rise of metropolitan and later county policing forces, prisons, penalty and criminological modes of reasoning, and importantly, public prosecution systems (Langbein, 1973: 317–20). Further, these developments suggested how the early powers of the King and later the rudiments of the state were assembled via the transfer of the common law powers of the victim to various institutional forms.

The victim was significant to several developments central to the ordering of the common law from 1600. These include the expansion of treacherous offences to the King; the expansion of the King's peace

into public order offences such as vagrancy and consorting as introduced under the *Vagrancy Act 1824* UK and *Vagrancy Act 1835* NSW; the expansion and development of rules of evidence differentiating the civil and criminal jurisdictions; the substantive distinctions in the law of assault and battery and the decline of the maim for aggravated forms of assault; the abandonment of malice aforethought for the development of murder, and separation of manslaughter; the development of larceny and other modes of dishonest acquisition; the inchoate offence of conspiracy; and the introduction of summary offences, and the decline of the jury. Commensurate with these changes, the very fabric of the common law became public in character. Changes to the early government of the victim accounts for this massive expansion, establishing the victim as a significant governmental agent of change. As traced in Chapter 2, this expansion arises out of the initial movement of prosecutorial power from the victim to the Crown. The growth of the common law around the interests of the state is further demonstrated in this chapter through the movement of prosecutorial control to public authorities, such as the Attorney-General or later ODPP. As a result of this shift in power, the protection of the freedom of the individual against the potential abuse of power by the state crystallised in the common law as a paramount legal value, or rule of law.

The expansion of treacherous offences

The codification of new forms of treason including high treason marked the seventeenth century. Some of these provisions survive today, albeit in modified form. These laws sought to consolidate the power of the King in terms of his person and institutions. Expanding treacherous offences to the institutions of the Crown resulted in greater control of public conduct by the threat of harsh punishment. During the seventeenth century the domain of criminal law controlling public conduct was yet to offer the government assurance against riot or other threats to public stability (Sharpe, 1988: 28–32). The expansion of the common law of treason by statute thus enabled greater control of the public by introducing new crimes against the Crown, which by this time had expanded beyond the immediacy of the King to include various offices of the Crown. This expansion was highly significant. The expansion of treason from the body of the King, to the institutions and officers of the Crown, provided the foothold for the expansion of crimes legislation to wider society. As the King came to be identified less as an individual ruler than head of state, Crown

power was diffused over all England by various offices and institutions exercising the royal prerogative. This was akin to the growth of parliamentary sovereignty in which the King became less influential personally, than a figure of sovereignty, in the seventeenth century and thereafter. As the King declined as the constituent of government, so did private law. Instead, the parliament sought control, and did so through criminal law. Thus, the expansion of treacherous offences to include the public office of the Crown is of paramount importance.

The doctrine of constructive treason was extended by a number of statutory amendments to the statutes of King Edward III. These amendments, namely the 1661 statute of 13 Charles II St I c I § I, the *Treason Act 1795* UK and *Treason Act 1848* UK, each contributed to the identification of the types of conspiracies that may lead to the harming of the King or his body (Holdsworth, 1903–38, 8: 321–2). Early conspiracies included the levying of war, and remaining outside the realm when ordered to return by proclamation. However, as the eighteenth century encroached, other order type offences became treacherous, or felonious. These included refusing to take the oath of allegiance to the Crown, and publishing any seditious libel stating that the King was not rightfully sovereign. Restraining the King, including imprisonment, was also treated as high treason. The Act of 1848, moreover, provided for the greatest expansion of treacherous offences. Holdsworth (1903–38, 8: 322) states that many criminal actions could simultaneously occupy the two jurisdictions of treason and ordinary criminal wrongdoing. Examples include riot, which offended the general criminal law but also could be seen as an attempt to threaten the stability of the kingdom and peace, and indirectly the safety of the King (Shoemaker, 1987: 26–8). Such crimes could therefore be punished with the harsh penalties associated with felonious conduct, and sought to control bourgeoning social unrest at a time of vast social change. These changes suggest the growth of law beyond the orthodox constraints of the personal interests of the King.[47] By the nineteenth century, the divide between nominal criminal offences and those treacherous crimes seeking to secure threats to the interests of the King became blurred. The dominance of the social as the arena of state government was beginning to assert itself to the demise of the recognition of the specific interests of the sovereign.

Statutory amendment of the common law

The rise of parliamentary sovereignty features as significant social determinant from 1600. The introduction of new statutory offences

and the increasing independence of parliament from the political will of the King provided the praxis upon which social interests could inform the basis of lawmaking (Holdsworth, 1903–38: 13, 387–407). Blackstone (1783, 1: 156) remarks:

> The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds… It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal.

The power of parliament to make or modify law is evidenced through the range of offences created by statute relocating the offended subject from the victim to society. Changes instituted with the rise of a parliament answerable to the social set the precedent for the complete exclusion of the victim from the law; even their position as 'offended'. This development, however, is couched with the tradition of the statutory regulation of crime, evidenced through the introduction of such statutes as the 1722 Black Act of Geo I c 22 s I. This Act made several forms of conduct felonious, including the occupation of the King's highways and the hunting of game. This Act sought to protect the landed interests of the gentry but also expanded the number of offences to the peace and public order (Thompson, 1975: 270–7; Holdsworth, 1903–38, 11: 536). Thus, the Act lacked any identifiable victim. Throughout the period, other amendments legislated against sharp practices, fraud, unlawful commercial and corporate practices, and assault and homicide. This concluded in the twentieth century with the passing of crimes' legislation in England, and each state of Australia. These statutes sought to order or codify the common law, abolishing old distinctions between felony and misdemeanour, and placed ultimate prosecutorial power upon the state. Many of these enactments removed any reference to a victim subject. Instead, criminal conduct became an offence against society. This process was complemented in most Australian states by the passing of legislation

establishing the ODPP in the 1980s. Towards the latter half of the twentieth century virtually all prosecutions were brought in the name of the Crown, excluding the victim from private prosecution in a procedural sense.

The seventeenth century saw the expansion of the numbers of felonious offences hitherto unrecognised in the criminal law. The protection of the market and the propertied interests of the elite featured prominently. For example, the Statute of Frauds of 29 Charles II c 3 attempted to control private dealings by making it necessary to present certain agreements in writing (Holdsworth, 1903–38, 6: 379, 382). The 1694 statute of 6,7 W & M c 17 made felonious the forging of bills or notes of the Bank of England (Holdsworth, 1903–38, 6: 400). A number of statutes were also enacted relating to theft and cognate offences. Placing property owners in fear, receiving stolen goods and the buying of stolen goods was also made unlawful under this Act. Thus, the seventeenth century evidenced the rapid expansion of the prerogative to secure the peace through the enactment of various codes for the ordering of society. Expanding on the various common law offences that identified the liberty of the victim as central, these statutes sought to identify offences to the peace and state as the emerging agent of control.

Following this trend, the expansion of felony and misdemeanour offences characterised the eighteenth century. Examples include burglary in 1706 under the statute of 6 Ann c 9, and fire prevention in 1774 under the statute of 14 Geo 3 c 37, but also included offences to the person and assault (Kiralfry, 1958: 363, 389). A major statute was introduced setting procedure for felony cases in 1772, being 12 Geo 3 c 20 (Holdsworth, 1903–38, 6: 417). This statute sought to consolidate changes in the common law regarding the genesis of defendant rights and procedure for the trial and sentencing of felons.

The nineteenth century saw the increased codification of the common law with the introduction of crimes legislation in England in the form of the *Criminal Law Act 1827* UK (Holdsworth, 1903–38, 13: 392). This Act sought to modify the common law and to extend the integrated framework of readily recognisable offences. These Acts were, however, supported by specific statutes extending the ambit of criminal law. The *Offences Against the Person Act 1861* UK suggests such expansion beyond any code. The use of statutes to organise the common law and justice system particularly marked this century. The introduction of several statutes sought to reorganise criminal procedure concerning trial, sentencing and appeal, and the order and types of courts that were to hear such cases.[48]

The twentieth century was marked by the diversification of crimes legislation to include new and innovative offences and processes. Examples include drug misuse and trafficking, traffic offences, child welfare law, family law, and the introduction of new forms of forensic evidence including fingerprint evidence at the beginning of the twentieth century, and DNA evidence at the end. The curtailment of certain forms of punishment also marked twentieth century legislation. This includes the winding back of the death penalty in England and in Australia, and the assertion of new modes of punishments such as suspended and home sentencing, and programs for welfare reform, such as the NSW Drug Court program. Legislation for the administration of criminal justice and criminal procedure also mark recent twentieth century developments, exemplified in NSW in the *Criminal Procedure Act 1986* NSW.

Originally protecting the interests of the King, statute law came to expand the reach and control of government by identifying new forms of illegitimate conduct that threatened the peace of society, or significantly into the nineteenth century, social welfare. The growth of the jurisdiction of family law during this time suggests how the regulation of private affairs came to be sanctioned by parliament as the focus of government turned from individual interests to social ideologies including the protection of children and women in a domestic milieu. The basis for this expansion, however, resides in the control of offensive conduct to the King initially and then the King in parliament, such that the control and order of the criminal law was transferred away from the victim subject to early institutions of the Crown. As the Crown moved away from the personal interests of the King, institutions were established forming the fundamental rudiments of the state.

The court of Star Chamber and the growth of misdemeanour offences

The Star Chamber was one of the conciliar courts designed to interfere with legal proceedings to administer the course of justice. Questions of high policy or injustice came before the court, constituted under the *Star Chamber Act 1487* UK (Kiralfry, 1958: 143). Generally, the court came to exercise jurisdiction as a court of final appeal in those matters that did not reach the other concilar courts of Chancery, Admiralty and Requests (Kiralfry, 1958: 135). Accordingly, the Star Chamber exercised both civil and criminal jurisdiction. As far as the criminal law was concerned, the court's main objective was to maintain order in the King's realms. This included the suppression of subjects who threatened the peace, by the

creation of new laws. The court was not limited by the adversarial procedures of the common law courts, and thus had the ability to expand the criminal law in new directions (Baker, 1990: 136, 138, 538, 539). The Star Chamber enriched the common law by introducing the new crimes of criminal liable, conspiracy, maintenance, forgery, and fraud. A creature of politics, the Star Chamber gained the mandate to directly modify the law, regardless of precedent and procedure.

This, however, was a serious criticism of the court leading to its abolition in 1641. The court was increasingly seen in the Tudor period as an engine of politics. Whilst the mix of law and politics enabled the criminal law to be clarified, where the interests of the King could be directly inserted into the common law as with the rise of riot as a criminal offence, the same forces led to its decline. The common law should seek to protect private citizens against the executive, as Dicey notes, such that the Star Chamber invaded the personal liberties of all Englishmen. However, the Star Chamber helped modernise the criminal law, leading to the ordering of the public sphere through the proliferation of misdemeanour offences. The impact of the Star Chamber thus underpins the way certain sovereign, and later, public interests, came to be seen as paramount from 1600 (see Holdsworth, 1903–38, 3: 210, 211, 390; 6: 112; 9: 115, 343).

Breaches to the King's peace, first known as transgressions or trespass, came to be known as misdemeanour offences. Misdemeanour offences were generally punished by amercements or fines, imprisonment, or like modes of sanction, though some of the more inventive punishments were undoubtedly reflective of the harshness of English justice. The crime of common scold, for example, attracted the punishment of the 'scolds bridle', a metal cage placed over the head of the offender for the purpose of public humiliation and to silence the offender.[49] Though cruel, this type of punishment characterised the development of misdemeanour offences, with its focus on public wrongdoing, breaking the peace and controlling unruly behaviour. This punishment likewise emphasised social correction rather than the remedying of some private wrong.

In the twentieth century, new summary and indictable offences replaced misdemeanour and felony offences. This was due to the association of felony with antiquated modes of punishment, including changes to the way such crimes were to be prosecuted. Additionally, felony punishment was generally seen as flowing from the right of the victim to the body of the offender. Misdemeanour offences were seen as flowing from the sovereign's need to order an increasing civil

society. Thus, the removal of the categories of felony and misdemeanour for minor or serious indictable offences, and summary offences, removed the distinction between offences to the victim and those of society. All offences have now come to be seen as a threat to the stability and security of all individuals in the context of society.

The growth of criminal procedure

Criminal procedure was substantially strengthened from 1600. This was particularly evident in the criminal trial, specifically by the right to receive a fair and impartial hearing before a judge and jury (Holdsworth, 1903–38, 9: 223–6). However, in the sixteenth and seventeenth centuries, procedure, which remained informal, was in favour of the Crown. This was evidenced through the stringency of bail procedure for defendants; the use of torture in the interrogation process; the denial of help of counsel, or a copy of the indictment, for felons; and the fact that the defendant could not call witnesses to their defence (Post, 1984: 23–5). However, as Holdsworth (1903–38, 9: 224) notes, trials during this period maintained various standards assuring some level of fairness. He notes the way the Crown was made to prove its case to the jury, and the way many judges possessed the belief that it was better to let a guilty person go free than to convict someone innocent (*cf.* Blackstone, 1783, 4: 352). Regardless, juries who returned a verdict contrary to the opinion of the court were punished, usually by proceedings being entered upon them by attaint if they acquitted. The jury in *Throckmorton's Case*, in which the jury endorsed the exceptional defence of the accused, was punished in this manner (Holdsworth, 1903–38, 9: 226).

Commenting on the trial process from 1600, Holdsworth (1903–38, 9: 225) notes how criminal trials involved an altercation between Crown counsel, the bench and the prisoner. Evidence was generally taken by deposition, with the cryer informing the town that Crown witnesses should draw near on the day of the trial. Interestingly, if no witnesses presented themselves then the judge would ask who it was that brought the charge. The usual answer being the justice of the peace first hearing the charge in the county. However, with the defendant being refused a copy of the indictment, representation by counsel, and with no ability to cross-examine Crown witnesses, the defendant was expressly disadvantaged (Post, 1984: 24).

The rights of defendants, commensurate with an expansion of the law of evidence, did not evolve until the late seventeenth century. Traced in the earlier sections, developments included the strengthening

of the common law to embody a higher standard of fairness and justice. This was also commensurate with the Act of Settlement of 1701, which provided for the life tenure of judges on good behaviour, or their removal for misbehaviour, lending towards their growing independence. Holdsworth (1903–38) traces this from 1640, when parliament began to assert its supremacy over the political will of the King.

However, the Long Parliament sitting at the time showed concern over archaic practices that seemed inhumane and harsh, and not lending to a criminal trial based on a fair and just process. Sir John Hawles, Solicitor-General in 1695, criticised the harshness of the criminal trials in the reign of King Charles II (Holdsworth, 1903–38, 9: 230). He complained about the practice of the Crown obtaining evidence to indict an offender, likening it to a method of inquisition. With this, parliament came to amend the common law, seen with the decline of torture (Langbein, 1976b). As the harsh penalties of continental Europe gradually emerged in the common law from 1066, so did the more humane ideals of fairness and justice from 1600. *Bushell's Case* demonstrates these gradual changes, as when the jury gave a verdict contrary to the opinion of the bench, no punishment was enacted on them (Holdsworth, 1903–38, 9: 231).

The growing independence of the bench to the ideals of natural justice were also seen as paramount, especially when popular opinion turned against a particular defendant, to have a legitimate and fair hearing. Significantly, in 1695, parliament intervened and enacted several rules that impacted on the trial of those charged with high treason. Such defendants were able to see the indictment five days before the trial, and in 1708, it was decided that a list of Crown witnesses should be provided ten days prior to trial. The 1702 statute of I Anne St c 9 s 3 prescribed that in cases of felony and treason, the defendant could call witnesses who could present sworn evidence (Holdsworth, 1903–38, 1: 336). Gradually, around the same period, counsel represented defendants. Such representation was not able to address the jury, albeit Crown witnesses could be cross-examined. The *Trials for Felony Act 1836* UK formalised the right to present defence counsel, although the 1695 Act formed the basis for this change (Holdsworth, 1903–38, 9: 235; Kiralfry, 1958: 365).

The growth of criminal procedure was responsive to various social changes. The growing power of the state, and the consolidation of criminal law around its tenets of social government, meant that the harshness of English justice had to be met with a compromise. This compromise came by way of certain safeguards for the protection of

defendant rights. As most criminal trials favoured the offended victim, which in turn carried over to the state as it subsumed its orthodoxy, defendants were significantly disadvantaged. The genesis of court procedure and defendant rights attests, therefore, to the shift from the will of the victim in the trial process to the threat of the power of the state in prosecuting and punishing crime (see Hunter and Cronin, 1995: 5–25). As this threat was seen as particularly grave against the will of a lone victim, safeguards crystallised to ensure that defendants received some level of fairness against the might of the state.

Growth of the substantive law of homicide

The early common law of England grouped murder cases into three categories of excusable, justifiable and felonious homicide (Holdsworth, 1903–38, 3: 310–11, 315, 600, 604; 8: 304, 330–1). The rise of state power necessitated the differentiation of classes of homicide as the prosecution became less associated with the exercise of a private right on the part of the victim, than offence against the peace and social (Hale, 1685, 1: 433; East, 1803, 1: 227). The bourgeoning prosecutorial power of the state also called for an increased sensitivity to defendant rights. Excusable homicide included those situations where the killer had taken life out of self-defence at the time of the killing. Justifiable homicides were permitted under law, such as where an outlaw was slain or where an official of the King or state administered death as punishment (Perkins, 1934; Dixon, 1935).

In such instances, if brought to trial the defendant would be entitled to an acquittal. All other killings were felonious. If convicted, the felon would be put to death, his possessions forfeited to the Crown. Throughout the greater part of the middle ages those convicted of felonious homicide were put to death without benefit of clergy. Over time, benefit of clergy was allowed, as were commutable punishments where the offender might be branded and imprisoned instead of being sentenced to death (Ashworth, 1995). Originally, benefit of clergy was only extended to clerks, monks and nuns and then to persons who could read, although in a statute of 1779 branding was allowed for all persons in substitution for death (Baker, 1990: 588).

Perkins (1934: 539) notes, however, that the substantive law of homicide was formed much earlier in the common law. In a series of statutes passed from 1496 to 1547, clergy were excluded from homicides committed with malice aforethought, codifying their right to benefit of clergy. The result was that felonious homicide became divided into two classes. The first was where the homicide was

committed with malice aforethought, being the corruption of the mind towards the sanctity of life, as ordained by the church. This class of homicide was called murder, strictly punishable by death and forfeiture. The second was without malice aforethought, punishable by branding and imprisonment. Homicides lacking malice aforethought, though still identified as felonious, were initially punished by death and forfeiture regardless of the intent of the felon, though execution could, and at times was, pardoned at the King's mercy. As benefit of clergy expanded beyond its canonical roots, the increased mercy of the Crown towards human mistake, accident or frailty led to the categorisation of these lesser forms of homicide as manslaughter.[50] The significance of homicide involving clear malice aforethought, which attracted the severest of punishments, was the way it was seen to transcend the victim's right to venge life, supported by religious ideals regarding the sanctity of life.[51] The administrative needs of the King, and his desire for a well ordered kingdom, also legitimated the standard, although this is cited as a secondary influence before 1600 (Hale, 1685, 1: 451; East, 1803, 1: 222, 223). The increased influence of the church and Crown, however, removed homicide from the province of the victim to that of the Kingdom.

However, continuing the development of the law of homicide, Stephen (1877: art 233) defines malice aforethought in terms of intent or *mens rea*, as follows:

> ...Murder is unlawful homicide with malice aforethought. Malice aforethought means ... (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused...

The test for *mens rea* for murder being sufficient malice aforethought on the part of the accused has subsided for an alternative rationale. Intent to kill or cause really serious harm or grievous bodily harm has replaced the antiquated notion of malice aforethought in the common law. This is supported by English and Australian authority: *R v Woolin* [1998] 4 All ER 103; *Parker v R* (1963) 111 CLR 610. An intent to kill or inflict really serious bodily harm or injury will, together with the *actus*

reus of death, provide for a conviction: *Director of Public Prosecutions v Smith* [1961] AC 290.

However, *mens rea* for murder has been extended to include situations where the offender shows a reckless indifference to life, or in some jurisdictions, really serious bodily harm. Where such a state of mind is exhibited, the accused must have known that their conduct would probably cause death or grievous bodily harm: *The Queen v Crabbe* (1985) 156 CLR 464. It is not the offender's indifference to the consequences of his act but knowledge that those consequences will probably occur that is the relevant element constituting *mens rea* for murder: *The Queen v Crabbe* (1985) 156 CLR 464 at 469. In *Pemble v The Queen* (1971) 124 CLR 107, Barwick C.J. thought it sufficient that death or grievous bodily harm should be foreseen as possible, but McTiernan and Menzies J.J. favoured the current standard, that it is necessary that the accused had foreseen or known that death or grievous bodily harm would be a probable or likely consequence of the act causing death.

The other development on that of malice aforethought includes constructive murder, otherwise known as the felony murder rule. This rule developed prior to the eighteenth century to include those instances where a person in the course of some unlawful act unintentionally kills another. This rule came to be mitigated into the eighteenth century to be limited to those who kill during the commission of a felony, such as robbery, burglary or housebreaking. There was, and still is, an overlap between felony murder and murder with clear intent. However, as Windeyer J. makes clear in *Ryan v R* (1967) 121 CLR 205, the doctrine was gradually limited to those situations in which death was occasioned in the course of some felony dangerous to life or likely in itself to cause death. Today, constructive murder is limited by statute to those who kill in the course of some offence punishable by imprisonment for life or 25 years.

Changes to the nature of criminal intent for homicide suggest a gradual movement away from notions of wrong originating in the victim self, to religious doctrine, to a model of proof influenced by scientific positivism, or model evidence. This model is based upon the rational assemblage of proof as based on the empirical assessment of evidence, or fact. The decline of malice aforethought for reckless indifference or constructive murder supported by an *actus reus* of death suggests a movement away from imprecise standards of the 'evilness' of a defendant's state of mind to one based on objective criteria including the quantifiable harm caused. The introduction of manslaughter as a category of homicide also suggests movement away from the victim's

desire to avenge all harms to their kin, to an assessment of the seriousness of the offence against broader communal standards. Given this shift, focus moved from the *actus reus* of the death occasioned to the actual state of mind of the offender. Under the modern doctrine, it is assumed that all persons in a community possess the same standards of reasonableness of the sanctity of life, regardless of subjective belief to the contrary.

The abandonment of malice aforethought suggests the movement of the law of homicide towards objectives standards of communal responsibility across the social, not isolated notions of wrong defined provincially and located within the orthodoxy of the victim, or in religious text or doctrine. This is underpinned by the law of evidence advocating a fair and impartial hearing, and the need to establish knowledge of the probability of death or really serious bodily harm, beyond reasonable doubt. As the law moved away from the protection of victim rights, in particular the victim's right to vengeance, conduct that was felonious came to be differentiated from that deserving lesser punishment. Accordingly, the criminal courts turned towards objective standards of reasonableness to establish felonious homicide to protect potential defendants from the subjective, private needs of victims. This was a response to the consolidation of power under the state, which led to the development of standards of proof and intent for those charged with felonious homicide, or later, murder.

Growth of the substantive law of assault

The law of battery was initially distinguished as a precursor to homicide. The intent to maim, disfigure or inflict really serious bodily harm evidencing malice aforethought in the law of homicide, battery was seen as a similarly significant threat to the body of the person. The settlement of maim being outlawed by the King to preserve the bodily integrity of his men for war, battery was treated as a significant threat to the person, the more serious forms punishable as a felony. Assault, or the threat of violence, was originally added to false imprisonment, trespass and kidnap as a misdemeanour punishable by fine and imprisonment, or whipping and the pillory (Hawkins, 1716, 1: c 62 s 5). Touching without hostile intent has long been recognised as constituting no offence: *Cole v Tanner* (1704) 6 Mod Rep 149.

Apprehended violence is now treated as common assault. Battery is now identified as an aggravated assault, with graduated penalties for assaults occasioning actual bodily harm, grievous bodily harm or

wounding. In the eighteenth century, however, the law primarily focused on the unlawful contact to the victim. Thus, in *R v Woodburne & Coke* (1722) 16 ST 53, the prisoner plead that his intent to only disfigure the victim mitigated the death caused to manslaughter, *mens rea* being establish for battery only (Holdsworth, 1903–38, 6: 403). By the nineteenth century, an assault was occasioned where sufficient fear was raised in the mind of the victim that some violence was imminent: *R v St George* (1840) 9 C & P 483; *R v March* (1844) 1 Car & Kir 496. Adding to the decline of battery for assault was the general notion that this area of law sought to secure breaches of the peace. As with the outlawing of the prize fight, consent to assault was dismissed as a defence where the action involved a breach of the King's peace: see *R v Coney* (1882) 8 QBD 534. This was such that all persons taking part in or aiding and abetting a prize fight could also be charged with assault: *R v Perkins* (1831) 4 C & P 537. The decline of battery and growth of assault thus represents the movement away from specific injuries to the victim self, to the King's peace.

The development of the substantive law of battery initially dealt with wrongs to the person that did not result in death. Battery generally grew out of the law of trespass to the person and false imprisonment, both of which were recognised as civil offences under the general law of tort (Holdsworth, 1903–38, 8: 422–4). Blackstone (1783, 4: 216–17) indicates that the law of assault and battery was closely associated with disturbances to the King's peace, his government and the public:

> The inferior offences, or misdemeanours, that fall under this head, are assaults, batteries, wounding, false imprisonment, and kidnapping.... we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fine and imprisonment; or with other ignominious corpora penalties, where they are committed with any very atrocious designs. As in case of an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual, than for the absolute perpetration of the facts themselves, on account of the difficulty of proof: and herein, besides heavy fine and imprisonment, it is usual to award judgment of the pillory.

The eighteenth and nineteenth centuries also evidenced the massive expansion of the number of statutes seeking to protect the body of the subject in particular ways. The 1722 Black Act of Geo I c 22 s I made it an offence to wilfully and maliciously shoot any person in any dwelling house or other place (Holdsworth, 1903–38, 11: 536). In 1734, an assault with intent to rob was made punishable with transportation for seven years under the statute of 7 Geo II c 21 (Holdsworth, 1903–38, 3: 304). The 1738 statute of II Geo c 22 s I and the 1769 statute of 36 Geo III c 9 s I prescribed it an offence to assault others in order to hinder the purchase or carriage of commodities (Holdsworth, 1903–38, 5: 199–200; 8: 421–3). The same statutes made it a felony without benefit of clergy to beat or wound with intent to kill.

However, it was not until 1803 that specific provisions were enacted to protect the body of the person from assault or battery. These provisions were prescribed in Lord Ellenborough's Act of 43 Geo III c 58. This Act made it a felony punishable by death to shoot, stab, or cut a person with intent to kill, rob, maim or prevent arrest (Holdsworth, 1903–38, 13: 390). This led to the proliferation of offences other than those traditionally identified by the infliction of maim or some physical wound. Holdsworth (1903–38, 15: 150) indicates that in 1860 the statute of 23,24 Vic c 8 made it a felony to administer poison with intent to inflict grievous bodily harm. In 1875, legislation was passed prohibiting the abuse of girls under the age of 12 and 13 in the form of 38,39 Vic c 94. In 1861, the law of assault was consolidated under the *Offences Against the Person Act* UK, which continues to be in force.

With the exception of the injury constituting the offence, the modern law of assault excludes general reference to the victim. Although the fear experienced by the victim may be relevant, the modern test is objective, and no victim need to be actually injured or put in fear for a charge of assault to proceed. Assault is thus a threat to the safety of the community. An assault is thus any act done with intention to cause the victim to apprehend immediate or unlawful violence, regardless of whether such apprehension is caused: *R v McNamara* [1954] VLR 137 at 138; *R v Venna* [1976] QB 421; 3 All ER 788; *R v Savage* [1992] 4 All ER 698 at 711. In *Rosza v Samuels* [1969] SASR 205 at 207, Hogarth J. said '[t]he gist of the offence is the creation of a fear in the mind of the person assailed that unlawful force is about to be used against him'. However, King C.J. in *Yardley v Betts* (1979) 1 A Crim R 329 at 334 conceptualises the disruption of the

peace as the basis of the charge, marginalising the relevance of the victim:

> Assaults vary very greatly in seriousness. Some result in injury to the victim and some do not. Some are committed under provocation in the heat of the moment and others are wanton and premeditated attempts to impose the offender's will on the victim by force. Some are mere man to man altercations and others are terrifying and cowardly examples of mass violence. Many other variations could be mentioned. The offenders vary from the normally law abiding person who is caught up in a situation of stress which erupts into violence, to the habitual bully and thug.

The law of assault and battery grew out of the need to protect the victim and their property. However, this area of law has since been informed by bourgeoning social forces emphasising the care of the person in the context of the social. The move to welfare practises into the twentieth century articulated a rhetoric of personal well-being through the imposition of collective standards across the social, impacting on the criminal law in the development of laws for the punishment of assault. This suggests the displacement of the private concerns of the victim, for the need to secure threats to the stability of the state. Not discounting aggravated forms of assault, the right to secure the body of the victim has thus shifted to the state such that the harm caused is now identified in terms of the disruption to communal standards and order.

Larceny and theft

The law of larceny was clearly expansive up until the seventeenth century. Fletcher (1976) provides an exposition of the ways in which the law of larceny, originally constituted as a means of securing private property relations, is significantly developed beyond the seventeenth century to allow for the development of an expanding market economy in which new commercial relationships spawned the need for the extension of the common law of larceny, larceny simpliciter, to accommodate the new and innovative ways in which property could be stolen. However, before the rapid expansion of the law of larceny into new offences as based on the feudal law of theft, larceny sought to secure victim interests over those of the county. Larceny simpliciter can thus be originally identified in terms of the victim's right to exercise absolute ownership of their property. This includes situations

where the owner of property transfers possession to another, such that that possession infers a right to hold the property to the exclusion of any action alleging ill intent.

Fletcher (1976: 472) puts this in terms of possessorial immunity. The early law of larceny, being a law as to private property, only sought to protect victims from situations in which the accused sought to remove property or chattels with a fraudulent or dishonest intent. It was assumed that the victim exercised control over their possessions and took responsibility for the maintenance of them, such that should the victim be swindled out of their possessorial control, no remedy would be available at law. Thus, where a victim complained that they were tricked out of their possessorial control, based on a false promise or misstatement of fact, the law offered little protection. It was only where the victim could demonstrate fraud on the part of the accused that the law of larceny offered remedy. Fletcher (1976: 473) describes this as constituting the second structural principle of the old law of larceny. He argues that to create a *prima facie* case of larceny one must, in the collective sense of the word, act like a thief. Blackstone (1783, 4: 232) suggests of felonious intent that the 'taking, and carrying away, must also be felonious; that is, done [with] *animo furandi*'. Fraudulent intent has been subject to various definitions at common law, but the need for judicial restraint has reinforced the point that fraud is to be construed according to its ordinary meaning, that of the ordinary decent person: *R v Feely* [1973] 1 QB 530; *Peters v The Queen* (1998) 192 CLR 493.

The law of larceny secured private property relations and the will of the victim to dispose of their property. Apart from a clear fraudulent intent converting possession, no action lay against an accused. This necessitated the expansion and development of the law of larceny with the rise of market commence. As the society grew, so did new ways of acquiring and possessing property. The law of larceny by a trick, referred to above, was thus a extension of the common law of larceny securing private relations, now codified in false promise: see *Pear* (1779) 168 ER 208. Larceny by a bailee, occurring where the owner passes possession to another wilfully, who then under the conditions of the bailment fails to use the goods according to the terms of the bailment, was first legislated in 1857 under 20,21 Vic c 54. Since then, various offences have been identified or codified by statute, including, embezzlement, fraudulent appropriation, fraudulent misappropriation and obtaining under false pretences: *Pear* (1779) 168 ER 208; *Beazley* (1799) 168 ER 517; *Young* (1789) 100 ER 475; *Riley* (1853) 169 ER 674.

These offences, each of which has elements distinct from larceny simpliciter, respond to the dynamic ways in which money or goods may be taken or miscarried into the twenty first century.

Inchoate offences

In 1972 the House of Lords dismissed an appeal against the publishers of *International Times* magazine on the basis that their initial conviction for conspiracy to corrupt public morals and to outrage public decency represented good application of law. The offence of conspiracy requires that two or more people from an agreement to commit an offence, and like the law of attempts, conspiracy requires that the court extend the temporal dimension of the offence backwards in time from the planned offence. However, in the decision of the House of Lords in *Knuller (Publishing, Printing and Promotions) Ltd and Ors v DPP* [1972] 2 All ER 898, Lord Diplock gave a dissenting opinion in which his Lordship traces the history of conspiracy from three sources particular to the common law. Of the three sources, the first identifies how the law of conspiracy grew out of the regulation of the victim of crime at a time when the victim had plenary control of the appeal process.

As indicated by Lord Diplock in *Knuller*, the victim was closely aligned with the constitution of the first form of the offence of conspiracy known to the law. Proclaimed the Third Ordinance of Conspirators of 1304, this pronouncement sought to limit false or malicious prosecutions against an innocent party. The narrow terms of this offence set into motion the law of conspiracy by enabling the prosecution of those presenting a false indictment before the eyre justices on assize. By 1351, there was argument that this limited offence be expanded to include all conspiracies to imprison and oppress persons generally. However, this argument was rejected on the basis that the offence of conspiracy sought only to remedy vexatious prosecutions. It was not until the Tudor court of Star Chamber that the law of conspiracy was extended to include all agreements to commit a crime, as is the case today.

The development of criminal proof and intent

The creation of the *actus reus* and *mens rea* as standards for proven criminal liability defines the nature of the criminal jurisdiction into the twentieth century. However, from the fourteenth century, the genesis of the notion that a wrong will be felonious if it is the intention of the person to do something essentially wrong, began to take shape (Sharpe, 1981: 24; Perkins, 1934). The growth in *mens rea* in the

fifteenth century, Holdsworth (1903–38, 8: 433) argues, led to the increased distinction between crime and tort (see Seipp, 1996). The introduction of proof beyond reasonable doubt further separated the criminal jurisdiction from civil law, although this was not firmly established until the early twentieth century. Because of the stringency of the criminal standard of proof, one could be guilty of a civil offence based on the balance of probabilities but not the criminal standard of proof beyond reasonable doubt. Historically, however, the defendant suffered the burden to prove their innocence once the Crown case had been established (Dixon, 1935; Langbein, 1976b). The burden to disprove a criminal offence once alleged suggests how criminal justice was initially associated with the restoration of victim rights and interests. The rise of state power, however, necessitated new laws in the form of intent and standards of proof to protect persons against the significant power of the state. Where once victim against defendant provided a remedial process, arguably, on equal footing, the power of that same defendant pales in comparison to the might of the state.

Holdsworth (1903–38) outlines the history of the development of criminal liability from the sixteenth century. *Hales v Petit* (1563) Plowden 259 held that a criminal intent involved the intention of the mind to do wrong (Holdsworth, 1903–38, 8: 433). Over time, *mens rea* for murder, manslaughter and assault each came to emphasise different standards for a justifiable finding of guilt. This required the consideration of new rules accounting for various kinds of liability. *Mansell and Herbert's Case* in 1536, for example, held that where a person was killed accidentally by a group of persons engaged in some illegal activity, the group could be complicitly liable for murder (Holdsworth, 1903–38, 8: 435). Murder should thus involve some form of predisposed malice to the victim, or malice aforethought. Manslaughter, alternatively, involves the act of killing but without the element of malice aforethought. In this early period, therefore, murder was seen to be voluntary although in some instances incidental to the desired action, whilst manslaughter was seen to be involuntary (Perkins, 1934). The intent required for manslaughter is therefore inclusive of various states of mind concerning the unlawful and dangerous act commissioned, from the verge of those excusing one from homicide to reasons just falling short of murder: *R v Hughes* (1857) Dears & B 248; *R v Horsey* (1862) 3 F & F 287. Manslaughter may be voluntary, although the intent to kill must be susceptible to some recognised defence, mitigating liability.

The rise of defences to murder and manslaughter helped refine the mental element required for a finding of guilt. The complete defences

are insanity, infancy, necessity, duress, and self-defence. The partial defences include provocation, intoxication, infanticide, and diminished responsibility. Each contributed to an understanding of predispensed malice. Provocation, for example, has developed from recognising human frailty as a reaction to insult, to cover a wide variety of situations, including battered woman's syndrome and other forms of systematic violence. Henceforth, the increased focus on the defendant through the rise of rights of due process demonstrates that during the seventeenth century, focus shifted from the right of the victim to the body of the offender to an increased concern over the conduct of offenders, and the detection of their level of culpability.

The burden of proof differentiating criminal and civil law was, however, a later development. For general offences requiring full *mens rea*, proof beyond reasonable doubt is required for conviction. For summary offences, in which the doctrine of strict liability may be invoked, the onus may be reversed such that the defendant must demonstrate that their conduct falls short of requisite standard out of honest and reasonable mistake of fact. Alternatively, absolute liability may be invoked for which there is no available defence. Where the accused bears the evidential burden, actions must be established on the balance of probabilities. For indictable offences, the history of proof beyond reasonable doubt lies with the orthodoxy of the criminal trial. Foster, in *Discourse of Homicide* published in 1762, argues that the burden of proof lay with the defendant who was made to plead his innocence once a case had been established by the Crown (Dixon, 1935: 67). The House of Lords, however, rejected this perspective in *Woolmington v DPP* [1935] AC 462. Their Lords held that the prisoner is entitled to stand mute, putting the Crown case to proof. Here, the Crown must establish intent and prove it beyond the reasonable doubt of the jury:

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of

> the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. *Woolmington v DPP* [1935] AC 462 at 481, 482.

The defendant, under this authority, does not have any duty to disprove anything or plead his innocence, unless desired, for offences requiring the prosecution to discharge the persuasive burden of proof beyond reasonable doubt.

The Crown bears the onus of establishing each ingredient of an offence. This evidences the way the criminal trial has evolved pursuant to the interests and sovereignty of the state. This means that once a *prima facie* case is established by the Crown, a conviction may follow. Hence, where the prosecution provides *prima facie* evidence from which the guilt of the accused might be presumed, which therefore calls for an explanation by the accused and an unsatisfactory explanation is given, a presumption is raised upon which the jury may be justified in finding him guilty: *R v Stoddart* (1909) 2 Cr App R 217; *R v Garth* [1949] 1 All ER 773; *R v Cohen* [1951] 1 KB 505; *R v Guiren* (1962) 79 WN (NSW) 811; *R v Bradburn* [1969] 2 QB 471. However, the role of the jury as a safeguard against the power of the state ensures that save the discretion of the individual victim in allowing a private settlement, the defendant will not be convicted unless the jury is so satisfied. Thus, even where a *prima facie* case has been made out, it simply means the accused may be convicted. Whether the defendant ought to be convicted depends upon the jury being satisfied beyond reasonable doubt on the whole of the evidence before it that the accused is guilty. This question must be decided on the evidence tendered by the prosecution and defence, and upon the assumption that the prosecution carries the onus of proving guilt beyond reasonable doubt throughout, including the duty to negative defences where required.

In this context, it may be legitimate to have regard to the fact that the defendant has not given evidence, as a consideration making the inference of guilt: *May v O'Sullivan* (1954) 92 CLR 654. A jury may be able to accept Crown propositions more easily if the defendant remains silent: *Weissensteiner v The Queen* (1993) 178 CLR 217. This, however, is counterbalanced by the fact that the jury cannot be informed of the pre-trial silence of the accused: *Petty and Maiden v The Queen* (1991) 173 CLR 95. Against such state power, the accused bears an evidentiary onus to point to or produce evidence from which an inference could be drawn that there is at least reasonable possibility of innocence, because of the availability of a defence such as self-defence: *R v Youssef*

(1990) 50 A Crim R 1; *R v Abusafiah* (1991) 24 NSWLR 531; *R v Asquith* (1994) 72 A Crim R 250. However, where such a defence is raised, the prosecution bears the onus to disprove it: *Viro v The Queen* (1978) 141 CLR 88; *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

The gradual development of standards of proof and intent represent the growth of the sensitivity of law to the sanctity of personal freedom against the consolidated power of the state. The rapid and massive expansion of crimes legislation and common law offences into the nineteenth century meant that many persons were increasingly at risk of being prosecuted for conduct once categorised as legal. The concern over the freedom of individuals and the security of the social was thus met with a compromise – the genesis of common law rules of intent and proof. The law at this point moved far beyond the private interests of the victim. As the state came to dominate social relations emphasising welfare governance, the victim was removed. Instead, the accused was highlighted as a potentially vulnerable subject against the immense power of the state in making the arrest, laying a charge, and in prosecuting and punishing the offender. In turn, the development of civil law meant that many victims once exercising property rights at assize were now made to turn to it for relief. As the victim was being removed from the criminal law, nullifying the possibility of a privately negotiated settlement, new laws stipulating the form of standards of proof were required to protect persons against the significant power of the state.

The expansion of public order offences into the twentieth century

Public order offences generally grew out of the manifest feudal concern of the King's peace (Beloff, 1938). As has been demonstrated with the gradual genesis of treacherous offences and an expanding crimes legislation, the ordering of the public was prioritised into the nineteenth century (Innes and Styles, 1986: 386). The threat to the security of government presented by the mass poor was addressed with the introduction of various laws prohibiting idleness and laziness, vagrancy and loitering. The *Poor Relief Act 1601* UK and the *Poor Law Act 1834* UK sought to relieve indigent poor (Holdsworth, 1903–38, 4: 155–7, 160–1, 392, 513). The threat of the poor to stable government was seen as significant. The creation of a public sphere in which crime could manifest was the consequence of the gradual expansion of provincial areas into counties and, over time, urban centres. By the nineteenth century, the limited notion of the King's peace failed to ensure the security of this social. Thus, from 1600, there was increased need to rid the social

of various threats – the idleness of poverty being just one. With this shift, the criminal law came to be accepted as ordering the social over the needs of victims. Garkawe (1995: 425–8; see Greenberg, 1984) indicates that this is even true of victims themselves.

The relevant legislation used to order public spaces has changed dramatically over recent years. Many statutes were developed by the English parliament to extend the ambit of criminal law into public places. Many of these were transposed into the NSW colony for the better regulation of peace within an expanding civil society (Finnane, 1990: 219–20). An example includes The Tippling Act of 24 Geo II c 40, prohibiting public drunkenness. The enactment of the *Vagrancy Act 1835* NSW also followed that of English law, prohibiting loitering, occupying private property without permission, failing to maintain one's family, begging, consorting and other like offences. This Act categorised offenders according to whether they were 'idle and disorderly persons', 'rogues and vagabonds' or 'incorrigible rogues' – with the latter defining serious or repeat offenders. Blasphemy was also prohibited in the early English common law, to be mirrored in legislation in the eighteenth century. Seen as conduct intended to outrage the general Christian public, blasphemy was treated as a public order offence. In *R v Gott* (1922) 16 Crim App R 87, the trial judge put to the jury that the words complained of must be phrased in such a manner that they are calculated to outrage the feelings of the general body of the community, so leading to a possible breach of the peace. Although blasphemy was thought to have ceased to exist at common law, in 1977 a private prosecution was brought against a gay magazine for blasphemy by morals campaigner Mary Whitehouse, for publishing a poem that graphically depicted Jesus as having homoerotic fantasies: *Whitehouse v Lemon and Gay News Ltd* [1979] AC 617. Lord Scarman said at 662 that the words 'a breach of the peace' 'remind us that we are in the field where the law seeks to safeguard public order and tranquillity'. However, *Ramsay & Foote* (1883) 15 CCC 231 held that the religious doctrine may be criticised without want of blasphemy, if done in a decent and ordered way. The crime of blasphemy continues to exist in NSW common law and statute, although no person has been prosecuted since the late nineteenth century.

Public order into the twentieth century was marked by a number of statutes that regulated different aspects of the peace. These included the *Offences in Public Act 1979* NSW, *Prostitution Act 1979* NSW, *Intoxicated Persons Act 1979* NSW, and the *Public Assemblies Act 1979* NSW, most of which are now repealed. Rather than different statutes

for each area of public safety and unrest, the *Summary Offences Act 1988* NSW was proclaimed to unify most order type offences under the one legislative instrument.

The development of public order offences has been identified as analogous to that of orthodox criminal offences to private property and the person. The nature of these offences were distinguished in *Sherras v De Rutzen* [1895] 1 QB 918, where Wright J. suggests that public order offences are not criminal in any real sense, but within a class of conduct that is prohibited under a penalty for the ordering of the public good. 'Not really criminal' offences have come to dominate the local courts of Australia and England due, in part, to the rise of the summary jurisdiction. The bulk of peace related offences are dealt with summarily. The level of criminality associated with peace related offences is generally lesser than that associated with an offence against the person or personal property. This is because no individual victim is identifiable. As society is seen as the offended subject, the punitive response is not informed by the vengeance of the victim, but the need to deter others in aid of a 'peaceful' public sphere. Further, it is possible for parliament to create a variety of offences that attract a penalty without the rigours of criminal indictment and process. This also detracts from the criminality of offensive conduct, as offenders are not subject to the same trial process as if charged on indictment. In terms of the expansion of the criminal law to encompass public order offences, this is a highly significant change. Evidenced by the police power to issue infringements with ease, the summary jurisdiction and its expedited process allows for the efficient and effective control of public space through the threat of minor punishments, encouraging the defendant to pay the fine or enter a guilty plea, should the defendant be required to appear before a magistrate.

The impact of the rise of summary offences and the jurisdiction of the local court to hear and determine these matters has done much to order public space. This is particularly so, given the concomitant power it gives police to charge offenders, and their likely chance of successful prosecution. Unlike certain summary offences, the burden of proof rests with the prosecution for all matters disposed of by indictment. For certain summary offences the onus is on the accused to prove on balance that there are no reasonable grounds for the charge. The onus of proof is reversed, the benefit being reduced penalties for offences. For example, s527C of the *Crimes Act 1900* NSW creates the summary offence of being in custody of stolen goods that may be reasonably suspected of being stolen or otherwise unlawfully obtained. The onus is

on the accused to satisfy the court, if found in possession of such goods, that no such reasonable grounds exist.

The ease of prosecution of summary offences means that police are able to arrest and charge offenders disturbing the peace without problems of investigating the crime and obtaining evidence that would normally occur if the charge would be disposed of by indictment. The rise of summary offences has thus extended the ambit of the ordinary criminal law into the public domain. The creation of these offences by parliament, and the use of the reverse-onus for defendants, means that criminal law can be extended into the public domain in a way that ensures that most order offences are identified and punished. The widespread use of summary jurisdiction for the organisation of public space attests to the way the victim is no longer relevant to the operation of much of the criminal justice system. For the most part, summary offences obviate any reference to a victim subject.

The decline of the jury

Various changes in the criminal law saw a decreased emphasis on the jury. Originally, the grand jury was implemented to bring presentments based on criminal activities within their local community. The grand jury was to bring to the notice of itinerant justices criminal causes that were heard before the sheriff, or justice of the peace (Cockburn, 1969: 17). Persons called for jury service in this way were encouraged to present information as to the nature of the criminal offence, which formed the basis of the indictment, if a true bill was found (Roberts, 1984). The *Administration of Justice (Miscellaneous Provisions) Act 1933* UK abolished the grand jury on the basis that no person was to be put to trial on assize or at quarter sessions unless the trial judge had already conducted a preliminary hearing to determine whether a *prima facie* case had been made by the Crown. If no such case had been established, the case would be dismissed (Ashworth, 1995). Today, this is determined at the committal hearing, where the defendant will be committed for trial once a case is established.[52]

The petty jury survives today. However, its power and use in criminal trials has been severely curtailed due to a number of reasons. These include that since the 1351 statute of 25 Edw III s 5 c 3, no person sitting on a grand jury was to sit on a petty jury in cases of felony and misdemeanour trespass (Holdsworth, 1903–38, 1: 325). Further, since the decline of the Star Chamber and the practice of punishing delinquent juries as demonstrated in *Bushell's Case* in 1670, judges began to dismiss juries where their impartiality was compro-

mised. Today, this practice is supported by the Court of Appeal that can order a new trial based on the fact that the verdict was against the weight of the evidence, was informed by error of law, or for other similar reasons constituting a serious miscarriage of justice.

However, trial by jury significantly declined with the introduction of the summary jurisdiction and expedited modes of hearing. Summary offences are pleaded directly before a magistrate with no involvement of a jury. As traced in the previous section, summary jurisdiction is wide and inclusive. Summary charges thus take up the greater part of the business of the criminal courts. The *Criminal Procedure Act 1986* NSW complements this move by providing a schedule of offences that are to be heard summarily unless an election is made to have the matter proceed on indictment. The impact of this change is evidenced by the fact that juries are now only called for the more serious offences heard in the District and County Courts, and Supreme Court.

Other developments have encouraged the decline of the jury trial. Section 132 of the *Criminal Procedure Act 1986* NSW provides that an accused person in the Supreme or District Court may be tried by judge alone if the person so elects, and the judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor. Other jurisdictions have enacted similar provisions. A judge trying a case alone must direct himself as if he were a jury: *Fleming v The Queen* (1998) 197 CLR 250.

Criminal informations and private prosecution

The prominence of the information, which takes the form of a plea initiating a criminal proceeding, is today, most commonly seen in the form of a criminal charge.[53] Through most of the medieval period till the early twentieth century, trial by information was a popular means by which actions were brought, originating in the hundred courts where the shire reeve would take informations from victims directly. Holdsworth (1903–38, 8: 238) notes that in the early Tudor period informations were the key means by which misdemeanour offences were initiated. Misdemeanour offences were generally initiated in relation to offences against the King's property or peace, brought by a common informer, or any individual in an *ex officio* capacity in the name of the Attorney-General (Edwards, 1984). During this period, indictments remained at the control of the grand jury or royal justices. Though not to the complete exclusion of the victim, the power to indict an offender had been generally relocated to the early state.[54]

Informations, however, maintained many of the powers lost through grand jury presentment. An information could be brought on the basis that any statutory offence has been satisfied (Holdsworth, 1903–38, 8: 238). In the fifteenth and sixteenth centuries, a growing number of statutes gave any person the power to inform on behalf of himself, in the name of the King (Holdsworth, 1903–38, 8: 237, 241). Specifically, the information remained a vital mode of initiation for the maintenance of the peace where the Crown lacked the policing capability to secure social interests. The use of the information came to be criticised, however, as any victim or common informer could petition a court without informing the other party and without any legal assistance in the drafting of the terms of the offence. The information thus provided the ability to undermine the basis of public justice by informing courts of misdemeanours based on personal rather than public surmises.

From the seventeenth century therefore, the courts and parliament acted to restrict victim based informations to specific statutory offences, public in nature. The pursuit of personal interests through a criminal information in the name of the King undermined the nature of criminal law as public justice. Although the justice of the peace hearing the information at first instance would sanction any information that was personal in character, changes were made to curtail the likelihood of a private prosecutor proceeding on a personal basis. Firstly, the statute of 4,5 W & M c 18 provided that those proceeding on information were liable to pay costs if unsuccessful (Holdsworth, 1903–38, 9: 243, 244). Where a matter initiated by information was abandoned, or where a *nolle prosequi* entered, the prosecutor would be liable for costs. Secondly, towards the beginning of the nineteenth century, the use of the information was generally limited to the suppression of 'gross and notorious misdemeanours, riots, battles, libels and other immoralities' (Holdsworth, 1903–38, 8: 245). This quote, originating from Blackstone (1783), was cited in *The Queen v Labouchere* (1884) 12 QBD 330 and represented the law up until the mid-twentieth century. Informations were thus restricted to misdemeanours offensive to the stability of the kingdom, or early state, to avoid the use of criminal law in a private capacity.

The generality of the information was thus curtailed to limit the power of the victim bringing a discretionary prosecution advocating purely private interests. Their prominence in the criminal justice system, following the limitation of the victim in felony appeals around the thirteenth century by the institution of grand jury presentment, suggests a significant transfer of power from the victim self to prosecut-

ing authorities. Used to maintain the King's peace, informations were limited in the nineteenth century to serve the public interest over the private desires of the victim. Much like the decline of the appeal, the victim was directed to a growing civil jurisdiction, which by this time was distinguished from criminal law by a number of social and institutional developments. These included the establishment of various public authorities such as the police and ODPP. The statutory amendment and separation of criminal law, the rise of a criminal procedure, and modes of criminal proof and intent, also helped distinguish the criminal law as public justice (Kurland and Waters, 1959: 493–6). However, the restricted use of the information demonstrates that as late as the turn of the twentieth century, the common law power of victims continued to shape the criminal jurisdiction as the state subsumed their orthodox prosecutorial capacity by limiting the victim's ability to present a personal information leading to the trial of an offender.

However, the information continues as the general procedure of initiation today. This method is used by both private citizens and the police where charges are brought in the local court. However, in the case of private citizens the information must, following the seventeenth century reforms, identify an offence recognised at common law or, more generally, statute. Thus, informations are usually only used by agents of the state as all informations must identify a public offence akin to the sound regulation of the social.

However, up until the rise of the ODPP in each jurisdiction of Australia and England, victim actioned private prosecution remained the sole basis upon which prosecutions were brought. In England, this was the late nineteenth century. In Australia, private prosecution fell into disfavour as a mode of private initiation in the early twentieth century (Neal, 1991). The cause of this change, as discussed earlier, was the rise of policing forces and other government departments empowered to bring charges in the local court. Although victims rarely initiate private prosecutions today, mainly due to the powers and tradition of the ODPP and police in monopolising the prosecution process, the procedure continues to exist at common law. In fact, the very basis of prosecution remains private although public authorities bring most charges. Thus, if the procedure of private prosecution were to be abolished from the common law, unless authorised by statute, public authorities such as the police and ODPP would be unable to bring charges in the local court. This is because the procedure of initiation remains unchanged at common law; any individual possessing the

power to inform a court of an offence (Kurland and Waters, 1959: 503; Samuels, 1986). Statute has amended who has the ultimate power to take over an indictment, and an information must identify an offence recognised at law, but the common law power of victims remains unchanged.

In the local court therefore, the police charge a suspect pursuant to their common law duty. Alternatively, if the informant is an individual, and where the police determine that their intervention is not appropriate, an individual victim may sign the charge book, such that the victim becomes the informant.[55] Common law process provides, however, that the permission of the victim need not be sought once an arrest has been made, or a summons or court attendance notice issued. The ODPP may lay a charge or take over any charge on indictment at any stage of the prosecution. If a charge is brought by a private citizen as either the victim or a concerned individual, that charge remains legitimate at common law. The fact that the ODPP cannot reverse an indictment, instead entering in a *nolle prosequi* to enter no evidence in the matter, attests to the fact that the private prosecution process succeeds the states monopolisation of criminal law (Samuels, 1986; Hodge, 1998: 146).

Much like the initiation of indictable offences, all summary charges are brought by way of private prosecution. The informant is usually either the police or government department prosecuting. Summary proceedings are styled *The Informant v The Accused*, consistent with the orthodoxy of private prosecution in which the informant was a private person. The decline of private prosecution, therefore, merely represents a shift in the proximity of the victim to the prosecution process. Public authorities have subsumed the power to prosecute leading all prosecutions to be brought in the name of the police, state or Crown. Hence, the basis of the victim as the 'owner' of criminal justice never left the common law. Instead, victims were displaced by the dominance of the social and state, by means of parliamentary sovereignty and common law process.

The exclusion of the victim and the consolidation of criminal law

The course of criminal justice has been affected by the removal of the victim from the common law. Although the victim and criminal are involved in an intrinsic legal relationship not completely dissolvable at common law, the state has intervened in this relationship supported

by hundreds of years of public justice, starting with the rise of the King's peace. Although the changes raised demonstrate that victims have been displaced from their orthodox position, certain traditional powers remain. This attests to the fact that while victims have been removed from the common law, their orthodox power has survived. Agencies of the state have instead adapted this orthodoxy to meet the ends of social government: the regulation of the public sphere. However, this process has not been arbitrary nor is it representative of a course of legal development concerning the increasing secularisation of society. Instead, the removal of the victim suggests how criminal law developed around the tenets of the private power of the victim, to then be identified with the regulation of threats to the peace and social government as the state took agency of those powers. The relationship between the victim, the King, the state and the social, over time, has thus been vital to the shaping of what we now understand to be the modern criminal law and justice system. This suggests the significant role played by the victim in the development, not only of our common law, but the workings of the institutional environment that administers the law. This includes the ODPP, corrections and the courts. The historic position of victim as private prosecutor and the slow degradation of this historic role for the establishment of the King, the King's justice and the state, is therefore a relevant factor in the explanation of the genesis and development of criminal law and criminal justice generally. The state of criminal justice administration and indeed common law procedure has much to do with the history and genealogy of the crime victim.

Criminal justice theory explains the development of the criminal justice system in terms of the dominance of the state and common law, around the interests of the criminal, the state and security of the social. Rather than examining these as natural developments *per se*, the developments examined to this point demonstrate that the history of the victim not only leads to an understanding of how the state came to be dominant, but how the victim self is responsible for the shaping of this institution in the first instance. The modern function of the criminal justice system operates on the assumption that the common law victim has only a paucity of exercisable rights. The transfer of the orthodox power of the victim to the state suggests that victims cannot exercise many of their traditional powers, even when left unaltered at common law, due to the power of the state in subsuming the regulation and control of criminal law and justice. This is highly significant, explaining the current tensions and failings of criminal justice projects

in the twentieth century, and why the crime victim still invokes a sense of dissatisfaction in their exclusion from the common law prosecution process. Even though victim power led to the establishment of many state institutions, and the criminal laws that support them, the criminal jurisdiction generally remains inaccessible for want of public prosecution and control.

This suggests various misgivings as to the development of the state and common law and the role of the victim in relation to them. This chapter suggests the primacy of the victim in explaining the modern apparatus of the criminal justice system. Our understanding of the victim is therefore central to our understanding of the state and criminal law, and the rise of administrative structures that support these. This will be examined in the next two chapters, which will show how the victim is vital to the understanding operations of criminal justice. Chapter 7 examines the rise of victim rights as a reaction to the evacuation of victim power from the common law. The movements that sought to advance these rights demonstrate how the victim continues to claim ownership of the criminal law despite the prior transfer of power to the state. Chapter 8 considers the tensions surrounding the administration of victim compensation and relocation of the victim back into the common law. This chapter shows how the victim is being relocated in criminal law and justice only to be contested out of the need to prevent the double exercise of prosecutorial and punitive power.

7
Emergence of the Victim Rights Movement

The history of the victim traced to this chapter has proven vast and expansive. This history clearly suggests how agencies of the state and common law slowly emerged to displace the victim from their once empowered position, constitutive of the prosecution and punishment process. The weakening of the role of the victim in relation to the correction of the offender has occurred by way of the relocation of the retributive power of the victim to the state. This has resulted in certain changes for victims at common law, primarily, their inability to invoke personal discretion over the prosecution and punishment process. In addition to the ongoing emotional and financial needs of victims, this frustration saw the first victim groups' form, mobilising around a set of ideals advocating the primacy of victim rights and agency. This mobilisation has, today, influenced the way victims are regulated in the criminal justice system. Further, this movement has led to the creation of new programs for the inclusion of victims back into the corrective and judicial process. The impetus, however, for the launch of a rights campaign can be traced back to the early 1970s. Bourgeoning social movements generally critical of the dominance of the state, combined with the exclusion of victims historically, saw victims mobilise to react to the crisis of their lack of agency in criminal justice, both institutionally, and at common law.

Grassroots perspectives usually hone in on issues confronting discrete groups of victims. Other than the few organisations that seek to support all victim types, victim rights groups tend to represent micro-collective interests. This means that almost all organisations focus on certain types of victimisation. This makes for many and various types of organisations that appeal to a broad cross-section of interests. From groups helping victims of spousal abuse to groups claiming unfair

treatment under child maintenance law, victim rights groups present a diversity that cannot be competently analysed on a macro level. Even if one was to isolate those groups purporting to suffer an injustice through their lack of representation in the criminal justice system, diversity remains. However, common features also present. These include the way most organisations seek to influence the state in its control of crime, the offender and victim, and promote the cause of the organisation to all society. Further, most organisations seek to educate victims to the extent that warnings are made for 'at risk' groups and communities. Accordingly, organisations generally work on many levels – personal and supportive; educative; compensative; and legal. The legal level tends to focus on each arm of government empowered to make decisions concerning the regulation of victims. Thus, organisations provide commentary on the courts, on legislation impacting victims and criminals, and at executive attempts to manage and distribute victim services. Victim groups are therefore complicated and involved, and act in many ways to reform and advocate the interests of victimised persons. It is on this level that victim groups also purport to critique the failings of the criminal justice system. This includes the removal of the victim from the criminal justice system by agencies of the state, and common law process.

The rise of the state and institutions of corrective justice led to the consolidation of the criminal law for the protection of the social. This led to the removal of the victim. This can be reduced to a number of key developments. These include the rise of the ODPP and police, the human sciences and positivism, the identification of crime as a social pathology rather than the infringement of individual property rights, and the removal of the punishment process to reflect rehabilitative ideals. The treatment of victims both institutionally, in terms of executive schemes for corrective justice, and at common law, in terms of prosecution and punishment, has seen the removal of the crime victim from their orthodox position. This is well documented by both legal and criminological theorists (Sebba 1992: 197, 2000; Weisstub, 1986: 203; Rock, 1990: 210; Wright, 1991: 10–21; Fattah and Sacco, 1989: 22; Mosteller, 1997: 1695; Walklate, 1989; Hudson and Galaway, 1975; Cuomo, 1992: 1–5; Elias, 1993; Morgan and Zedner, 1992; Schafer, 1965: 163), and others working within the criminal justice system (Viney, 1999: 7; Herrington, 1987: 139–42). Other theorists (Shapland *et al.*, 1985: 1–14) have documented the antecedents of the rise of victim rights and the regulation of the victim in the modern justice process.

Focusing on their foremost concern, the rise of victim rights, Shapland *et al*. (1985) argue that the edifice of the victim movement is not concerned with the felt experiences of crime victims, but with the critique of support structures constituted by the state. This is consistent with Young's (2001) perspective on the rise of victim rights. Young (2001), Executive Director of the National Organization for Victim Assistance (USA), argues that several factors need to be counted as influencing the rise of the victims' movement. Of these, state based compensation is said to have raised the consciousness of victims to their removal from the justice system. Compensation programs were said to frustrate many victims in the system rather than appease their needs. Shapland *et al*. (1985: 3) argue that such frustration, combined with unpleasant feelings towards their treatment as 'third parties' to crime, led many victims to avoid the law and supporting government agencies in an attempt to regain control over their victim experience. Conversely, compensation schemes designed to emancipate the needs of the victim gave rise to a wider consciousness of victim rights that led to the formation of grassroots movements outside the traditional bounds of the state. Although these organisations sought to utilise compensation schemes where appropriate, they undertook the boarder role of liberating the victim as a primary agent of criminal justice. Thus, grassroots movements took a critical position towards the state though seeking to utilise services where available.

Apart from compensatory programs, this chapter discusses various factors critiquing the exclusion of the victim from the common law. This chapter is concerned with the collective reaction of victims to the transfer and monopolisation of their power under the state. This chapter traces factors influencing victim rights, concluding with an analysis of four key victim groups. This analysis suggests that the victims' movement is responsive to the history of the victim. It demonstrates that the organised reaction against the control of prosecution and punishment results from the displacement of the victim from the criminal prosecutorial process historically.

Factors influencing the rise of victim rights

Various factors are cited as foundation for the victim rights movements of the 1970s. Both academic and grassroots perspectives link these factors to the broader changes to the power of the victim historically. While most perspectives do not canvass victim orthodoxy as discussed, the history of the disempowerment of the victim for the rise of the

state as the central arena for the administration of criminal law provides the background for these perspectives. Consistent with this genealogical inquiry, the issues raised by the victims' movement will be revisited in the next chapter which deals with modern common law, legislative and executive responses to victim rights. The focus of this section, however, surrounds the antecedents of how and why the victims' movement arose to challenge the removal of the victim subject from the common law and criminal justice system. Here, the victims' movement will be considered as challenging the way victims were replaced by agencies of the state and common law in the prosecution, punishment and control of crime.

The introduction of state controlled victim compensation programs

English penal reformer and magistrate Margery Fry first developed the justification for the rise of victim compensation in the 1950s. This justification focused on the victim's need to be reimbursed to compensate for their loss as a result of the state's failure to properly insure against the criminal threat. A scheme to compensate victims in this way was first introduced in New Zealand in 1963 and shortly thereafter in England (Elias, 1986a). These early compensation programs assisted victims in a time of need. In the United States, California was the first state to implement such a program in 1965, followed shortly by New York. From here, victim compensation programs spread to most common law countries under the assumption that victims of crime were deserving of assistance whether or not they were in actual need of financial assistance.[56] Hence, such programs grew to include other non-pecuniary services, such as counselling, the provision of emergency accommodation, legal assistance and workplace support. However, these programs also required that victims become involved in the criminal justice system by making it mandatory for victims to report crimes to police and to cooperate with prosecuting authorities. Although victim compensation did much to advocate the interests of victims as separate from the criminal incident or self, victims only received support if they were willing to participate as a subject of the state. Any sense of freedom to enact on their offender a desired prosecution or punishment was eschewed for the receipt of moneys or services that were strictly controlled by the state. Not surprisingly, victims became frustrated with compensation programs that sought to confound their subordination to those same stately and social ideals

that saw their express removal from the justice process in the first instance.

The polemic of victim compensation and the bourgeoning rise of the victim movement is demonstrated in the work of the British Home Office. The Home Office produced a number of significant studies during the 1970s that emphasised the position of the victim apart from the criminal prosecution and sentencing process; as distressed, angered and emotive subjects deserving of state funded assistance (Rock, 1990). Although compensation and assistance schemes did not promote a rights movement outright, seeking instead to curb such pressures, changes to victim's services during this period provided many grass-roots movements with resources through which their interests could be advocated. As suggested however, the role of compensation was not exclusively advantageous. Rock (1990: 409), in his analysis of the Home Office and the rise of victim support, argues that victim services pre-1980s sought to diffuse victim anger and 'punitiveness'. The role of compensation, then, both liberated and inhibited victims. It liberated victims by providing a source of support and compensation long removed from the common law. But it disadvantaged victims by substituting state authority in the place of the offender. As a result, victims were reminded how the state had long subsumed their right to retribution. Compensation thus motivated victim rights for a number of non-complementary reasons, by raising their consciousness to the legitimacy of their plight as sufferers of a personal wrong, and by entrapping that consciousness in a bureaucracy controlled by the state that kept their regulation at arms length from the common law.

Under the Australian Constitution, the responsibility of the control and regulation of crime is generally left to the states. Thus, no national compensation scheme exists catering for the needs of all Australians. In NSW and Victoria, compensation schemes have been enacted to achieve various ends. The *Victims Support and Rehabilitation Act 1996* NSW ss45-58B empowers a court to restitute a victim from the funds of an offender. In Victoria, similar provisions are enacted pursuant to s85A of the *Sentencing Act 1991* Vic. Victims may be able to be compensated by either the state or the offender, depending on whether the offender has been apprehended, or the probability of payment. Other services are also provided for, including the creation of a tribunal assessing the merit of applications for compensation and the provision of alternative services such as counselling.

The benefits provided by victim's compensation legislation are provided in discrete and specific ways. Generally, compensatory legislation

limits the common law power of the victim once a claim has been entertained. For example, s51 of the *Victims of Crime Assistance Act 1996* Vic provides:

> The person to whom, or for whose benefit, an award of assistance is made under this Act may, on or before the making of the award, assign to the State their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates.

In NSW, similar provisions are enacted under the *Victim Support and Rehabilitation Act 1996* NSW ss43,57. Although provisions for the limitation of further civil proceedings as based on the same conduct giving rise to compensation or assistance is not barred under either Acts, judgement for damages payable by a civil court must not be entered unless the amount is greater than that awarded by the tribunal or judge. In this way, the state acts as the assignee, where the money recovered is paid into a consolidated fund administered by the state. If the money paid into the account exceeds that compensated by the tribunal, then the victim is entitled to its recovery. Otherwise an award of civil damages becomes estopped. Thus, for victims of crime, the ability to receive compensation is inhibited but for the discretion of the state. Once a victim approaches the tribunal or court for compensation, their ability to invoke the civil law in their favour is restricted. As suggested by grassroots perspectives, the victim is subordinate to the needs of the state in administering criminal justice for the social. In terms of the criticism of compensation leading to the rise of victim consciousness, the legislative responses to victim's compensation potentially aggravates the plight of the victim in the justice system. Although attempts are made to redress this plight, improving the system for the needs of victims, compensation schemes may indeed provide for the mobilisation of victims and other concerned persons away from the strict supervision and control of the state.

The rise of victimology

The discipline of victimology emerged out of the broader discipline of criminology in order to focus on and highlight the participation of victims in the criminal process. In England, Australia, America and Canada, victimology was seen as an opportunity to discuss the status of the victim away from the normative tenets of criminology – criminal deviance and control. In itself, the discipline of victimology sug-

gests the victim of crime had been ignored as a relevant actor in criminal justice. Originally, this analysis did not favour the victim with claims that it might be the victim self which caused crime, or its seriousness. However, this field has developed contemporarily with many and varied studies. Some of these suggest the victim of crime is a 'silent' actor in the criminal justice system, for the reason that the victim has been excluded by the state and criminal justice system (Shapland, 1986a, 1986b).

The study of victimology arose after the Second World War to primarily conceptualise the criminal-victim relationship. Mendelsohn (1963) applied the term 'victimology' to argue for a separate discipline from criminology, tracing the development of the term in his 1937 study. This discipline focused on the role of the victim, especially the role of the victim in explaining criminal behaviour. Mendelsohn's analysis focused on a classification of victims in order to understand the extent to which different types of victims contributed to the criminal incident. von Hentig (1948) similarly argued for a reciprocal relationship between offender and victim. His thesis stated that the role of the victim in the criminal incident and justice process called for increased rights for victims of crime. Ellenberger (1954) also posited for a relationship in which the victim was connected to the offender. Concomitant with this notion was the idea that victims should also share a greater responsibility in regulating crime including their own welfare and safety against the risk of crime.

Young (2001: 2–3) argues that the rise of the discipline victimology not only spawned academic debate as to the role of the victim in relation to crime but also gave rise to increased government concern over victims in the criminal justice system. Starting in the America with the Commission on Law Enforcement and the Administration of Justice in 1966, victimology increased awareness of the heightened cost of victimisation to society including the way victims were reluctant to report crime due to a loss of faith in the policing and prosecution process. This movement thus spawned victimisation surveys reporting the attitudes of victims to government agencies concerned with the management of crime, specifically unreported crime. In turn, this captured the attention of researchers who questioned why victims were disillusioned with the criminal justice system.

Studies during the 1970s, mainly in England and America, demonstrated the crisis of the victim. These studies focused on the lack of reporting of rape and sexual assault, the impact of crime on the elderly, and the rise of battered woman's syndrome. These studies increased

the awareness of the impact of crime on the victim as a person removed from the justice system. The study of victimology thus provided for the realisation that victims had an intrinsic relationship with the criminal (Christie, 1977). This resulted in changed prosecution practices including the better notification of victims as to the status of the prosecution of their offender, and increased support and aid to victims acting as witnesses (see Shapland and Bell, 1998).

Similar to the way criminology impacted on the development of the prison and punitive terms for the rehabilitation of the offender, victimology had an impact on the state. Informed by government studies seeking to understand the plight of the victim, victimology encouraged the raising of victim consciousness informing victims as to their centrality in criminal justice, including their orthodox rights and powers (see Weisstub, 1986: 193). Hence, victimology raised the concerns of victims as legitimate and worthy of specific attention.

The rise in women's consciousness and feminism

The development of the victims' movement was strongly underpinned by mounting feminist concern (Feeley, 1994). Along with homicide and assault victims, rape and domestic violence victims formed the first organised victim groups of the 1970s. Rape crisis groups were motivated by the need to organise a support structure around the feminist ideals of the emancipation of women from the oppression of male hegemony (Gartner and Macmillan, 1995: 394). Catering for the emotional and security needs of abused women, such organisations introduced firmly into the victims' movement the feminist agenda of the protection of women at risk. Accordingly, feminism not only contributed to the increased independence of victims of male abuse. It also raised the consciousness of the state to the potential benefit of private organisations catering for the legitimate needs of abused women. Examples include the establishment of rape crisis centres outside the direct control of state administration. Feminism thus contributed to the victims' movement by signalling the significance of victim support outside the bounds of the state. For the genesis of victim movements away from the direct supervision of the criminal justice system, feminism made a significant contribution to the legitimacy of victim rights as private, personal interests against the social ones of the state.

The rise of victim groups securing the needs of women demonstrates the way feminism contributed to the rise of the victim rights movement. Following the rise of such concerns, women's victimisation has come to be studied by the state. The Home Office (2001) publication

Domestic Violence: Break the Chain makes recommendations for the better treatment of domestic violence victims in the criminal justice system. Part of the problem for victim groups supporting women of domestic violence is that such women are not accorded primacy in the prosecution or punishment of offenders. In this way, women experiencing domestic violence have leaned towards alternative support mechanisms that cater for their particular independent interests. The Home Office (2001) argues that the interests of the state are at times disparate from those of the victim. In terms of the need to prosecute offenders of domestic violence whilst taking care of the needs of the victim, the Home Office (2001) suggests:

> When the victim withdraws the complaint there will often follow a complex decision about whether a prosecution is still required. The Crown Prosecutor will need to decide whether it is necessary to call the victim as a witness in order to prove the case. If not, the case may continue if a prosecution is needed in the public interest. The Crown Prosecutor should always think very carefully about the interests of the victim when deciding where the public interest lies. However, they must also think about the wider interests of the public and not just the interests of an individual. Clearly the interests of the victim are important; they cannot, however, be the final word on the subject of prosecution Home Office (2001: 10).

This suggests how the rights and interests of domestic violence victims are second to the needs of the state and social. However, the Home Office (2001) also realises how the needs of female violence victims can be accommodated by alternative rights agencies, as below:

> Domestic violence survivors also frequently turn to non-statutory agencies such as Women's Aid and other refuge services, Victim Support, and other voluntary sector service providers. In taking forward their strategies, partnerships will need to work closely and sensitively with non-statutory groups specialising in this area and to liaise with representative organisations whose knowledge can be a valuable resource Home Office (2001: 8).

This report affirms the role of feminist interests as constituting the victims' movement. Rather than isolate such groups, however, the state seeks to utilise agency agreements to better regulate victims to overcome the apparent non-compatibility of victim's needs and state

prosecution (Ryan, 1994). Victim groups supporting domestic violence victims have been utilised by the state, albeit not to the demise of the prosecutorial capacity of the state. The state overcomes this criticism by asserting that but for these intra-organisational agreements, many domestic violence assaults would go unreported. Such agreements provide prosecuting authorities with the ability to detect more victims of violence and their offenders than would otherwise be the case (Stanko, 1997). From a feminist viewpoint, however, this necessitates the role of victim groups as supporters of women's interests for the clear lack of primacy accorded to victims once a criminal incident is reported to the police. This has led to various criticisms of the Home Office in its regulation of female victims of crime. Further, it demonstrates how feminism spawned alternative solutions to victim care and support that cannot be provided by the criminal justice system. This is confirmed by the main objectives of the Home Office (2001) study on domestic violence – to strengthen partnerships at the local level between criminal justice agencies of the state and non-government organisations.

Feminists continue to argue that the primacy given to the state and social inhibit the inviting of women into the judicial process. Although reform is evident in terms of the evolving law of provocation and self-defence with regard to battered woman's syndrome, there is a continued need for non-government support agencies. This is a result of the state's manifest concern with paternal interests, over the needs of women. The development of the law of provocation suggests the way victim rights have influenced common law doctrine leading to the introduction of various feminist perspectives such that the provocative conduct of abusive spouses, for instance, need no longer be imminent to the retaliation of the woman: *Chhay v R* (1992) 72 A Crim R 1; *Osland v The Queen* (1998) 197 CLR 316. Although influencing the development of common law in this instance, the victim rights movement remains hampered by the lack of control victims have over the trial and prosecution process. As to the law of provocation, despite the amelioration of the culpability of the accused by the introduction of a victim perspective, the victim subject is still restricted by rules governing trial participation and prosecution. In such instances, the victim's experience of the accused is introduced as mitigating evidence pursuant to rules that some feminists identify as hegemonic (Smart, 1989: 10–29). The victim of provocative conduct gains no real control over proceedings, despite certain changed procedures recognising the emotional context of criminal proceedings for rape victims. The need for

alternative agencies outside the ambit of the state, rationalised around the interests of feminist discourse, therefore remains.

The rise in crime, new crimes, fear of crime, and the media

Increasing crime in nineteenth century metropolitan London gave rise to new and innovative management structures to control the threat of criminality. Though victim common law power was subsumed by the state, these innovations were not responsive to the direct needs of victims but the safety of the social. In this way, new policing forces came to guard against victimless crimes as well as traditional threats to personal property and liberty. With the increasing industrialisation of most Western societies, the fear of crime increased, to be managed by institutions protecting the security of the state, society and victims. However, the twentieth century evidenced a shift from the sovereign protection of victims as citizens of the state to a welfare campaign that sought to detect and reform criminals unattached from the plight of victimisation.

The removal of the victim in the modern justice system can be witnessed in terms of neo-liberal policing methods such as community policing and market based, private security (Stenson, 1993; O'Malley, 1992, 1996). As a response to these shifts however, victims felt increasingly vulnerable in a society that was seemingly concerned with the criminal self. Emphasising the criminal risk to the individual and their responsibility for minimising such risks, a fear of crime arose in most community and victim groups. Examples include women and the elderly, who were made to regulate their own space to ensure a lower level of risk (Clarke and Lewis, 1982: 56). This was confounded by the rise of new crimes and the abandonment of old modes of policing, such as beat patrols. Out of these changes came a need to mobilise around the lack of victim protection, in which the safety of victims, potential or otherwise, was targeted. The role of most victim groups being the care and welfare of the victim outside the traditional bounds of the justice system, victim groups responded to the need to educate and protect citizens from criminal risk in the first instance. The role of the media in perpetuating victimisation fear also needs to be recognised as antecedent to this change.

The victim rights movement, not being restrained by policies seeking to protect the social and detect criminality in advance of the crime, is generally unrestricted in its ability to meet new victim needs. Fear of crime increasingly became one such concern, to augment the development and role of victim groups generally. The realisation that victims

were faced with increasing levels of fear was supported by official victimisation surveys, conducted by the Home Office during the 1980s (Rock, 1990; Maxfield, 1984). Although attempts were made by the state to reduce this fear pursuant to its social prerogative, the victims' movement was quick to adapt to the notion of a criminal threat. This placed most groups in the position of having to pressure the state for increased security for its citizens, particularly street safety. Skogan (1987) argues that victimisation fear has been traditionally managed according to the needs of certain groups. Although his study suggests fear is consistent between groups, government policy has tended to target those groups at risk of crime. It is argued that fear is generally dependent on one's locus of control, the resources available to them to help minimise criminal risks, support structures, and the recency of crime to the person. Skogan's (1987: 152) study suggests that while fear of crime may be a reasonable reaction for many people, it is primarily perpetuated by subjective experiences and other's reactions to crime.

The state has utilised this perspective by identifying fear of crime as a personal experience, not necessarily amenable by the state. Consequently, the state has been reluctant to implement programs to ameliorate fear of crime for its basis in the subjective world of the citizen. This platform is confirmed by the terms 'official risk' and 'perceived risk' in government policy (Ferraro, 1995: 51). American studies show that the official risk to victims as measured through victimisation studies is inconsistent with the perceived risk of potential victimisation (Krahn and Kennedy, 1985: 703). Here, studies demonstrate that persons feel that crime is rising nationally, although their own neighbourhood remains safe. The dichotomy between official and perceived risk has encouraged the incidental regulation of crime by the state. Further, with the onset of self-regulative technologies such as community policing, victims have been left with the greater burden of managing crime, personally. This has increased the chance of fear forming amongst citizens, confounded by the fact that the state has taken the view that such fear is largely subjective and contrary to official research. Victim groups, however, have reacted sharply to this position.

Victim groups are sensitive to the needs of victims and their potential victimisation. The reasonableness of fear of crime being based on the subjective experience of the individual is therefore a firm basis from which to advocate higher levels of public security. This is the position of Victim Support Services (VSS), a South Australian victim rights group founded in 1979 assisting the needs of secondary victims of homicide. Their main objective is to 'achieve a crime free society'.

VSS seek to achieve this by community and police involvement. However, their position on fear of crime is that when presented in the context of an aetiology of a criminal attack, abuse or neighbourhood incivility, the risk of attack is very real. Even if disputed by official research, it is the reality of this fear that drives the VSS to educate their members to avoid criminal attack. This organisation has fostered strong links with the police and criminal justice programs, such as witness support programs, to help reduce fear of crime from the subjective world of the victim.

The role of the media perpetuating the perception of the reality of crime as a threat to the safety of the individual is also a significant factor leading to the rise of a victims' movement. Williams and Dickinson (1993: 42–8) argue for a positive correlation between newspaper reports on crime and the fear of crime in a community. Particularly from tabloid newspapers reporting the sensational aspects of crime, fear increased independent of demographic factors such as age, race and gender. This study found that while it is not clear whether the media solely influences 'fear of crime', the media is likely to influence other factors, such as the personal impression of crime rates and the potential risks of criminal behaviours and environments.

Victim power and agency at common law

Theorists and grassroots movements argue that the lack of support of the personal needs of the victim led to the rise of movements away from the administration of the state. The lack of victim power and agency at common law has been cited as the cause for the rise of victim rights and services (Freckelton, 2001: 89–91). Many organisations now focus on alternative ways of remedying criminal wrongs (Shapland, 1994; Herrington, 1987: 139–40). However, the lack of power possessed by victims at common law, in particular the prosecution process, compared to their once exclusive position as private prosecutors, accounts for the rise of rights movements (Elias, 1986a). Further, this lack directs the way most movements lobby the state for increased support mechanisms, if not the ability to enter the criminal justice system in a prosecutorial capacity. The Victims of Crime Assistance League, for example, has argued for the repeal of public prosecuting authorities for the return of private prosecution at the discretion of the victim. The history of the victim traced suggests how the removal of the power of the victim by the intervention of state institutions may well provoke an organised response from victims, generally.

The genesis of the role of the victim in the common law is, essentially, exclusive. By the time the first organised movements of the 1970s were formed, the victim had lost almost all the rights and powers once possessed. Although the victim retains their power of private prosecution, which is exercised by some victims from time to time, the power of the ODPP to take over a prosecution entering a *nolle prosequi* staying an action is absolute. This means that victims are veritably disempowered at law, although their natural rights remain central to the shaping of justice (Henderson, 1993: 100–3).

Victims' groups tend, however, not to be appeased by the existence of natural rights long subsumed by parliament. Nor are they appeased by the administration of criminal justice in terms of social ideals alone. This is coupled with the fact that though private prosecution survives today, victims generally do not possess the skills to prosecute in a justice system marked by its complicated procedural, technical, abstract and obscure categories of meaning. Alternatively, few victims would be able to afford representation. Today, victim powers have re-emerged in the form of victim impact statements, although these are regulated by the state, and available only upon sentencing. But for this modern development, the victim has been all but removed from the criminal trial. Their only agency lies as witness for the prosecution. Again, however, their discretion to present as witness is regulated by the requirements of the ODPP in securing a prosecution. This means that if a prosecution is securable without their appearance, they may not appear at all. Within this system, the victim not only lacks power, but credibility as an influential source of discretion as to the discernable law under which the offender is to be charged and prosecuted. Additionally, victim interests are now only one of many considerations in sentencing. The plight of the victim tends to be used only as evidence of the harm of the crime to society, stripping the victim of any real sense of personal contribution.

The history of the removal of the victim from the common law is, in most common law jurisdictions, consequential on the rise of public prosecution (Hay, 1983). Although policing bodies adapted the role of prosecutor before this, the rise of the ODPP in the UK and Australia finally estopped the victim from exercising their orthodoxy. This was combined with the enactment of criminal procedure legislation limiting the nature and scope of prosecution by making available new options for the expedient prosecution of offenders. In the NSW legisla-

tion, various indictable offences are scheduled to be dealt with summarily, which will only proceed before a jury if an election is made to the contrary. In addition to limiting jury trial, this change raises the possibility of discharging a case with minimal input from the victim; if a victim is to be identified at all. Most charges are thus disposed of in the local court constituted by a magistrate sitting alone. Combined with expedient measures to remove the traditional and historic structures that once included the victim in the prosecution process, s8(1) of the *Criminal Procedure Act 1986* NSW construes the appearance of prosecutor by charges disposed of on indictment to the Crown or ODPP as follows:

> All offences shall be punishable by information (to be called an indictment) in the Supreme Court or the District Court, on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions.

The erosion of victim rights and powers was therefore commensurate with the rise of legislative changes for the modification of the common law. The formal displacement of the victim increased as a result of the introduction of new regimes for the expedient administration of justice. Based on the transfer of power from victims to the state, changes to the use of informations and indictments for the prosecution of offenders saw increased need for support agencies advocating and supporting the victim experience. This is evidenced by increased adjudicatory in the 1970s and 1980s focusing on the role of the victim in the criminal trial.

Growth of victim agency and advocacy at the local and state level

The development of the victim rights movement was assisted by increasing local and state advocacy. The rise in consumer rights, also during the 1970s, assisted the mobilisation of victim interests around common goals and ideals. This was achieved by the increased power of the consumer in the market, as well as the rise of the individual as a consumer of state services (see Rose, 1989, 1992, 1998). In this way, victims were able to define themselves as stakeholders in the criminal justice process (Elias, 1986a). Linked to the following section on the rise of a general criticism of state regulation, the growth of consumerism led to the identification of the victim as a stakeholder of the state, accounting for the growth of compensation schemes and support services offered by the state.

The rise of a general critique of state domination

The governmentality literature identifies various modes of rule that critique the domination of the state in the life of the private self (Cruikshank, 1993; Larner, 1997; O'Malley, 1992, 1996; Rose, 1993, 1996, 1999; Valverde, 1998). This is particularly evident in areas of criminal justice, following criticisms of the rise of the welfare sanction (Packer, 1968). The failings of the welfare state were evidenced in terms of its overly bureaucratic form, lack of accountability, and the critique of the 'intrinsic' relationship between the state and society. The linking of the social to an administrative regime caused the dynamism of civil society to become subsumed by the goals of social and economic well-being. This meant that the interests and innovations of individuals, groups and organisations remained unidentified and unacknowledged for the significance of the social as administered by the state. The function and objectives of government were represented, instead, in terms of standardised subjectivities to be regulated across society. This standardisation provided the basis upon which all individuals could be measured against stately ideals. Thus, welfare government saw as its goal a certain type of judicial, economic, and social subject, with its own needs and responsibilities. Deleuze (1979) sees this as an unstable assemblage of elements, such that to speak of a society is to speak of something 'artificial'. Key weaknesses of the welfare state are explicable through a neo-liberal critique of state control. The victims' movement thus arose to combat the dominance of the state for the utility of the freedom of the individual to govern oneself. Out of the domination of the individual in the context of the social, victim movements challenged the control of criminal justice for the stake of the personal interests of the victim. Further, this critique also mapped new relationships for victim organisations and the state. These include agency agreements and contemporary pluralism, each of which assembles victims, victim organisations and the state in the form of a 'new contractualism' (Yeatman, 1998).

Welfare rule is defined by its conception of the social. Needs and responsibilities are distributed and regulated through the social, over the individual. Thus, in the case of crime, the state does not focus on the rights of the victim and their need for retribution, but the amelioration of crime itself as a threat to society. This is identified in the shift to corrective technologies and rehabilitation, and in the attempt to locate and identify crime before it occurs. In this mentality, the health of society takes precedence over the securing of individual rights. The welfare state thus sought to enforce solidarity and prevent disillusion-

ment by the securing of the needs for the population. Here, the rights and liberties of socially responsible citizens are met, while the threat of social instability is minimised. However, welfare rule for the control of the social, as suggested by Deleuze (1979), excludes micro perspectives and ways of individual or self-government. It is the exclusion of these micro perspectives which best explains the tension between victims, victim movements, and the state in the 1970s.

The welfare state governs through ideals distributed over the social against trends of difference (Donzelot, 1991; Deleuze, 1979; Ewald, 1991b). Here, the victim is exposed to normalising experiences of criminal justice focusing on the criminal form. The welfare sanction represents a paternalistic structure that advocates the interests of the offender and state in the control of crime. Criminal threats are thus a problem for society. The victim is subordinate to this interest. Individual victim experiences are eschewed for the delivery of welfare assistance identifying the commonality of victim experience – the criminal harm. This has led some to assume that victims are entrapped, away from the courts but within an offering of systematic relief not curtailed to the needs of any one victim (Burns, 1980). As victims were always more concerned with the exercise of freedoms, their rights, and self-responsibility, movements arose to fundamentally critique the agency of the state. Dean (1999: 153) details the development of this general critique of the welfare state in the emergence of left movements in the 1960s, associated with social and cultural emancipation. Emerging victim rights movements fit this framework. Dean (1999: 170) argues that these movements saw the welfare state as paternal, utilising oppressive and coercive power against the individual. The notion that the victim is silenced against the power of the state operates as an example of this oppression.

Several problems were identified with welfare control. These included unaccountable professionals, unaccountable systems of exclusion, and the deskilling of the community of its local knowledge (Dean, 1999: 173). What was required was the dominant reassertion of individual rights and autonomy over oneself. Dean (1999: 154) argues that a politics of 'voice and representation' came to displace welfare policy, held as overly paternalistic. Out of this critique came the rise of consumer rights. Further, the rise of autonomy and subjective self-regulation led to the rethinking of ways in which it was possible to act as a member of a collective or group. For victim organisations, such groups began to work as a consciousness raising apparatus. The empowerment of the victim, their self-actualisation, and self-esteem,

became important outcomes. The critique of state domination leading to the rise of victim rights went on to invent new relationships between victim subjects, victim organisations and the state.

The critique of state domination opened new possibilities for the victim. This included their ability to traverse state institutions for victim organisations linked to the state in agency agreement. In terms of their contemporary regulation, the victim is able to participate in various arenas as an individual empowered with rights. A by-product of the new prudentialism and the focus on risk containment and minimisation (*cf.* O'Malley, 1992), the victim has been invited back into the justice system. This invitation takes the form of the contracting out of services by the state to victim groups. For the victim, this denotes a marked shift from welfare politics. Dean (1999: 168) argues that agency agreements enable the inclusion of the 'voice and representation' of the subject such that interested individuals can enter into a negotiation over their needs. Here, the victim is engaged as an active citizen, as an involved consumer of criminal justice, and as a self-managed community. Contemporary pluralism also explains that victims are invited to participate in partnerships with professionals, bureaucrats and service providers. In place of a united welfare state, agency agreements advocating contemporary pluralism came to dominate. These agencies are fragmented, taking the form of quasi-autonomous non-profit organisations now identified as the 'third sector'. The VSS in Adelaide and arrangements considered by the Home Office (2001) provides example of this in their attempts to foster links between police and prosecuting authorities. Here, both victim and state enter into an open discourse regarding the treatment of victims in the criminal justice process regarding their access to services and their use as potential witnesses for the prosecution. This dialogue engages victims in 'third way' discourses that utilise the freedom of the individual to participate in self-regulatory programs. Victim groups enter into new relationships with the state, forged through their critique of welfare domination.

The victims' movement is a political movement critiquing the silence of the victim in the justice system. Neo-liberal perspectives suggest the redeployment of the free subject. In this way, the ideology of the victims' movement is diminished for a perception of a victim instituted with rights and powers. Victims' groups in the 1970s were quick to adapt as part of their reformative vocabulary ways in which the victim could be reinstituted in the criminal justice system. This has seen the victim become more than a subject of social movement

protest, but of liberal institutional reform. The redeployment of the victim as a subject of welfare rule to an advanced liberal agent of change explains the contemporary link between victim groups and the state. Consequently, the victim can be identified as a relevant agent in the justice process by the fact that the victim is now linked to the state as a constitutive element of the criminal process.

Critiquing the welfare state, victims are able to advocate their agency as consumers of the justice system to which the ODPP and other agencies are now partly accountable. Changes have since been instituted to make the ODPP accountable to victims in the charge bargaining process. Victim interests must now be consulted during the prosecution process, increasing their proximity to the criminal: *Director of Public Prosecutions Act 1986* NSW s13. Although only fractional compared to their orthodoxy, the rise of agency agreements with the state has led to the increased negotiation of victim rights at common law. Within this movement, the victim is now a more powerful agent or stakeholder in the criminal justice process though not to the demise of the state.

Victim rights groups: four examples

This section examines four victim rights groups advocating the interests of different types of victimisation. While each organisation still serves the needs of victims, each was founded at different times from 1970. Each group is thus responsive to different types of victim harm, and seeks to use victim power in different ways. Outlined above, several factors account for the rise of the victims' movement. In the following case studies, each group drew from these aetiological factors in substantiating their movement away from the state, although other individual factors also came to bear.

The first group, Mothers Against Drunk Driving (MADD), California, USA, formed out of the need to represent the interests of the victims of drunk driving accidents not acknowledged in the justice system in the late 1970s. The second group, Victims of Crime Assistance League (VOCAL), NSW, Australia, seeks to critique the ODPP and state undermining it with its own mode of support and advocacy. The third, Parents for Megan's Law (PFML), New York, USA, advocates for the rights of sexual abuse victims, and seeks to secure the safety of children from sex offenders sentenced by the state. The fourth, Victim Support, is a macro representative group seeking to support the harmful consequences of crime throughout the UK. These groups have critiqued the way victim

power has been subsumed by the state, representing interests not acknowledged in the criminal justice system since the monopolisation of criminal law by the state.

Mothers Against Drunk Driving, California, USA

MADD emerged as a grassroots movement in California and Maryland. Then named Mothers Against Drunk Drivers, it lobbied against the serious threat posed by drunk driving and to raise the status of drunk driving victims as worthy of compensation. The initial focus was on the individual offender and modes of reparation for victims. However, from early in its history, MADD sought legislative change in the regulation of drunk driving offences. From 1984, MADD focused on victim risk, in advance of the offence. By this time, the organisation had more than 350 chapters across America and Canada. Although presenting itself as a large organisation, MADD maintained its focus as a grassroots movement by placing chapters in each state.

By 1986, MADD had been invited to participate in the National Drunk Driving Taskforce, resulting in the passing into law of the first awareness week for their cause. MADD also established victim assistance institutes to train volunteers to support victims of drunk driving, acting as their advocate in the criminal justice system. Australian chapters were added in 1986. By 1988, the *Omnibus Anti-Drug Abuse Act* US was ratified. This Act provided for the same compensative rights to victims of drunk driving as were currently offered to victims of other crimes. Another amendment, the *Drunk Driving Prevention Act 1988* US, increased incentives for state drunk driving law enactments. The *Alcohol Beverage Labelling Act 1988* US was also enacted, requiring warnings on alcohol containers. In 1990, MADD filed an amicus brief with the US Supreme Court over the constitutionality of sobriety checkpoints in *Michigan Department of State Police v Sitz* (1990) 496 US 444. The court ruled in favour of checkpoints, holding that highway sobriety checkpoints were consistent with the Fourth Amendment to the American Constitution. However, in the midst of legislative and regulatory change, MADD continued to focus on victim services away from the bounds of the state. In 1992, MADD developed clergy/funeral director seminars, to help educate clergy, funeral directors and allied professionals on the special needs of family members following a death. In 1995, congress permitted the tying of federal highway funds to the passage of state level zero tolerance laws. By 1998, this project had been completed, with all 50 states mirroring the federal legislation. In 1999, the MADD national board of directors unanimously voted to

change the organisation's mission statement to include the prevention of underage drinking. This marked another key change in the organisation's history, responsive to the needs of prudentialism and crime prevention.

In 2000, MADD petitioned for the passing of a national 0.08 prescribed content of alcohol measure pursuant to the *Federal Transportation Appropriations Act 2000* US. Responsive to the needs of preventative education for victims, in 2001 MADD developed *Protecting You/Protecting Me*, a school curriculum program designed to educate children as to the risks of drunk driving. Today, MADD continues their dual role of victim support and education away from the traditional bounds of the state. They lobby federal and state government for legislative change to minimise the rate of drunk driving, and to encourage state support for victims already affected. Belying this history is the focus of grassroots change that has since impacted the legislature and judiciary reaffirming the notional power of the victim in criminal justice.

The history and development of MADD has been responsive to the needs of victims and justice. This is evidenced in their interventionalist role, in particular, the way MADD seeks to restore the victim by lobbying governments for harsher penalties for offenders. Although attempts are made to adopt new rationales such as prudentialism to safeguard victims in advance of the act, their organisational focus centres on the critique of the state. The attempts to re-establish the victim in criminal justice comes by way of *amici curiae* to the state, which maintains its administrative control over the development of law and justice. This organisation demonstrates that victims continue to claim ownership of criminal justice issues, utilising their association with judicial processes as a key influential factor lobbying for new laws for the protection of victim rights.

Victims of Crime Assistance League, NSW, Australia

VOCAL is an Australian victim rights organisation that serves the emotional needs of victims while influencing the administration of criminal justice. It is critical of the failings of the criminal justice system in representing the needs of victims, arguing that the justice system favours the accused and society generally. Replacing the voice of the victim into the justice process is therefore a high priority for VOCAL, leading to recent criticisms of the NSW ODPP and the charge bargaining process. Here, VOCAL suggested that it would be in the interests of victims to have the ODPP abolished, returning instead to a system of

private prosecution.[57] Critical of the intervention of the state in administering criminal trials, VOCAL aims to decrease the proximity of the victim from the prosecution process. VOCAL seeks to achieve this by reference to the traditional role of the victim in the common law – as a prosecuting authority. Although the needs of the social are recognised as legitimate, VOCAL argues that this need not be to the demise of the rights of the victim. They argue that the victim should play a significant role in administering criminal justice due to the way in which victims are intrinsically related to the criminal conflict (*cf.* Christie, 1977).

The history of VOCAL surrounds the efforts of Dawn Gilbert, the mother of Tracey Gilbert, who was murdered by her former boyfriend. After Tracey's murder, her family sought guidance from the justice system, to resolve their grievances. Initially sentenced to life imprisonment, the offender appealed and had his sentence reduced to a minimum six-year term, arguing that he had been depressed at the time of the murder. As the Gilberts felt that the criminal justice system let Tracey, her family and friends down, they formed a small support group attempting to help crime victims and 'fix' the system. Supported by intense community outrage, Dawn and many in the Hunter community, with bipartisan political support, formed the organisation VOCAL, determined to invoke a higher sense of justice for victims of crime, including rehabilitative support. VOCAL is now a community based, grassroots organisation, and a registered charity, operating according to a constitution and managed by an annually elected committee.

VOCAL speaks out about injustices on behalf of victims, from the victim's perspective. VOCAL's position is that crime affects everyone. VOCAL publicises the impact and costs of crime, and campaigns for resources to be more effectively allocated so that victims receive the support, assistance, and rehabilitation they need. The organisation seeks to empower all victims to get fair and relevant responses based on their needs, regardless of the role played by criminal justice experts such as the ODPP.

VOCAL claims that victims rely on the ODPP or state in order to bring an offender to justice. VOCAL argues that victims often assume that the ODPP will respond appropriately and compassionately, in light of the circumstances of an offence. Thus, VOCAL indicates that victims of crime often assume that the service providers in the criminal justice system are naturally advocating their interests. Victims usually trust the professionals to record and recollect what they say and do

accurately, and in a way that will support them in any future investigation, legal process or compensation matter. However, VOCAL is critical of this assumption. VOCAL attempts to empower victims by assisting them to understand their role in criminal proceedings, including the ways in which the position of the ODPP may differ from that of the individual. The victim, from the viewpoint of VOCAL, must thus be enlightened as to the role of experts in the criminal justice system so as not to give the impression that the ODPP advocates the interests of the victim.

VOCAL attempts to explain the power of the ODPP in the justice system. This is particularly important where the injuries suffered are not reflected in the charges laid, or where the ODPP engages in charge bargaining. By understanding how charge bargaining works against the interests of the victim, victims are often able to facilitate better outcomes thus reducing further trauma. VOCAL argues that victims should not enter the justice system with unrealistic expectations as to the position of the criminal and their threat to society. Thus, for VOCAL, the ODPP's monopolisation of the judicial process leads to a denial of natural justice where the victim expects to actively participate. VOCAL critiques the ODPP on the basis that it removes the valuable experience of retribution from the victim (see Murphy, 2000: 135–7), leading to the further aggravation of victim harm. Thus, VOCAL identifies the state as the main beneficiary of public prosecution.

VOCAL, as a rights group, responds to specific victim needs in light of the dominance of the ODPP in prosecuting offenders. On its formation, VOCAL attempted to reinvoke victim power, questioning the legitimacy of the ODPP in administering prosecutions exclusively. This was the impetus for their development, and has augmented their history since. The removal of the victim from the common law thus remains the key polemic for VOCAL. Resistant and critical of the welfare mentality which displaced the victim self for the good of the social, VOCAL has deliberately drawn from the history of the victim as private prosecutor to demonstrate the imbalance between the state and individual.

Parents for Megan's Law, New York, USA

PFML is an American community and victim rights organisation dedicated to the prevention of childhood sexual abuse through the provision of educational, advocacy, policy and legislative support services. This organisation is responsive to recent legislative enactments, known as Megan's Law, allowing the identity of convicted child sex offenders

in the United States to be publicised to members of the community in which they reside. Megan's Law provides for the keeping of a registry of released sex offenders for the purpose of community security and safety. This followed the murder of Megan Kanka by her neighbour, a twice convicted sex offender (Filler, 2001: 315). The significance of this movement is its influence on the legislature, and the divide it has caused between the common law right of the accused to participate in society as a free individual on completion of their sentence.[58] Offenders can be registered under the statute, and community members informed. So influential was this movement that other jurisdictions, including some in Australia, have adopted similar legislation guarding against the potential threat to child safety. In NSW, this is contained in the *Child Protection (Offenders Registration) Act 2000* s19. PFML provides various services empowered by Megan's Law, including a database of registered offenders and the associated ability to check the criminal history of suspected individuals. The organisation also offers associated services, such as educational campaigns for parents and children, and a support network for those living near a high risk sex offender. In terms of their association with the state, PFML is responsive to the neo-liberal emphasis on prudentialism and the risk assuming individual (Levi, 2000). From the perspective of the state, this agency agreement is perhaps an attempt to regain control of victim rights, bringing disenfranchised victims back into the justice system, whilst keeping victims from their historic common law positions.

PFML provides various services assisting victims to help prevent a criminal attack. Minimising the risk of an attack, PFML invokes various techniques to help secure the welfare of potential victims. For example, PFML provides advocacy through collaboration with local and federal law enforcement agencies, executive, legislative and judicial agencies. PFML provides educational forums on Megan's Law, childhood sexual abuse prevention education for adults, and sexual abuse prevention workshops for children. Further, PFML publishes brochures to educate the public on their rights and responsibilities under Megan's Law. PFML also maintains a website which explains Megan's Law, childhood sexual abuse prevention, and links to other resources for advocacy and prevention information. PFML seeks to serve as the focal point in providing assistance to parents, schools and childcare centres, community organisations and residents about ways to manage Megan's Law high risk sex offender notifications. Its task is to raise awareness about the public's rights for information under Megan's Law, and ways to prevent childhood sexual abuse. For example, PFML's distributes the

New York State Model School Board Dissemination Policy & Regulations, which are implemented by schools that serve various communities across the state of New York.

Megan's Law authorises law enforcement agencies to release information into communities about known sex offenders who may pose a risk to child safety. When implementing a notification for a sex offender the police may notify a limited number of neighbours and organisations such as schools or childcare centres. PFML's position is that once released to the school or childcare centre, it is imperative parents are informed that the police have implemented a notification. Under New York State's version of Megan's Law, Article 6-C of the *Correction Law*, 'any entity receiving information on a sex offender may disclose or further disseminate such information at their discretion'. The broad aim of PFML is to therefore ensure such information traverses all sections of the community, minimising the risk to potential victims. Their role is supportive and influential, and in many ways acts as an extension of the state in its attempt to minimise the criminal threat to a community by taking various administrative steps to ensure child safety is maintained.

Victim Support, UK

Victim Support is a charitable organisation spanning England and Wales, Scotland, Northern Ireland and the Republic of Ireland. This organisation provides assistance to victims of crime through various court based support services and community outreach programs as well as lobbying government for increased agency for victims of crime through the provision of victim rights in the criminal justice system. Victim Support originated as a grassroots movement responding to the lack of statutory support for victims, in particular, the lack of government policy catering the various needs of victims. The National Association for the Care and Resettlement of Offenders first established the Victim Support project in Bristol in 1974. They set out to find that victims faced significant emotional, practical and financial problems that were unable to be addressed by the UK justice system that had come to exclude victims from the criminal justice process. From its inception as a support project, Victim Support has today grown to include member schemes across the UK. This organisation now operates within an agency agreement with the state, encouraging the funding of court based witness support programs and other like services. Apart from services for victims within the justice system, Victim Support also assists those affected by the broader impacts of crime,

including situations where an offence is not reported to the police, or where no suspect is either apprehended or charged.

The Victim Support publication *Criminal Neglect*, released in 2002, identifies the basic rights and facilities that should be available to all victims. Of these, the need for society to take responsibility for the effects of crime; the increased awareness of the role of health care professionals to the needs of victims, and the health care services available; housing; and insurance and social security provisions, featured as prominent. The report indicates that the policy directive of the organisation is focused upon the need for increased welfare provisions for the proper care and assistance of victims. However, the premise from which this policy moves is that of the responsibility of the state for the care of the social. Victim Support firmly locates victims and victim rights within this agenda, that the state bears the onus of responsibility in regard to the systemic problems of victimisation. This is achieved through the identification of victim needs as a persistent social problem. The report identifies:

> We believe government policy should deal with crime, not just with criminals. It must address the suffering that has been caused by crime and take action to alleviate it. To date, this strand of action has been largely overlooked, especially where it relates to reducing the effects on victims of crime in the community… As well as acknowledging the wide-ranging needs of crime victims, the government must accept its responsibilities in meeting these needs. Responsibility for tackling the effects of crime should not be left to individual agencies and voluntary organisations (Victim Support, 2002: 18).

The organisation cites the fact that for the last 50 years, victims have had their role in the criminal justice system limited to that of witness for the prosecution, a theme well recognised in the preceding chapter. As a result of this limitation, principally by the authority of the state in its control of policing and prosecution, Victim Services fairly locates the responsibility to deal with the shortcomings of criminal justice on the state, as benefactor of the social. As the above demonstrates, however, Victim Support seeks the assistance of the state in the amelioration of the effect of crime such that it, subject to any agency agreement aligning the policies of the organisation with those of the state, does not lose its status as social movement. This means that Victim Support can continue to advocate the needs of victims beside any

agreement with the state to fund services, such as Crown Court Witness Service program funded by the Home Office in 1991.

Victim rights, genealogy and the state

This chapter demonstrates that the victim rights movement developed from several related factors seeking to critique state domination. As the latter study of movements demonstrates, the timing of their formation, in particular, the policies of the criminal justice system, situate their goals and directions. This suggests that the victim rights movement responds to trends that compromise the power of the victim. The organisations analysed argue, in different ways, that the victim has been removed from the criminal justice process. VOCAL is a clear example with regard to prosecution. Although numerous factors underpin the development of each group, all cite the dominance of the state in controlling criminal justice to the express exclusion of the victim as a factor constituting their cause.

The victim rights movement is therefore a movement responsive to the history of the crime victim. Although most organisations do not recall the days of private prosecution, the movement is sensitive to the fact that the victim has been displaced if not from a historical position, then from a position of significant power in terms of their 'ownership' of the criminal process (*cf.* Christie, 1977). Thus, all organisations argue that victims should have direct access to their offenders as the victim has an intrinsic relationship with the criminal, pursuant to their natural right to justice. This means that the rise of victim rights is dependent on their critical response to the dominance of the state in managing the social. The introduction of self-governing strategies to compensate for the failings of the state suggests how victim groups attempt to relocate the victim back into criminal justice, if not the common law. The movements identified impact on the development of criminal law by their insistence that victims are in an intrinsic relationship with the criminal self, not dissolvable by the state. This is demonstrated by PFML, who have a statutory agenda in addition to their goal of continued victim support. Accordingly, the petitioning of victim groups for legislative change has been generally successful. They have impacted on the development of the common law, through legislative amendment, exercising significant discursive power against the dominance of the state by drawing on their orthodox right to the body of the offender, thereby reversing, in part, the transfer of victim power to the state.

8
Relocating the Victim in Common Law and Statute

The exclusion of the victim from the common law has resulted in the development of new programs to redress victim harm. These new structures, evidenced at common law and statute, seek to include the victim following the consolidation of criminal law under the state (Rock, 1993: 169–72; Mawby and Gill, 1987: 35–66). At common law, this is evidenced by private prosecution, victim impact statements, due process rights, victim experience mitigating criminality, the rise of apprehended violence orders and the proposed modification of the principles of double jeopardy. Statutory change has sought to inform and empower the victim as deserving *inter alia* compensation and support following a crime. Utilising tribunals and the lower courts, the victim is offered welfare support and assistance to help ameliorate the results of crime. Here, the inclusion of the victim seeks to relink the victim to the courts, criminal process, and in terms of mediation, the criminal self, within new policy frameworks.

The relocation of the victim, in this context, reconstitutes certain orthodox relationships to which the victim was formerly part. Traced from Chapter 2, the centralised state, social government and welfare regimes have largely developed to the exclusion of the victim. Thus, the inclusion of the victim at common law and statute denotes a change from their removal for programs advocating stately prerogatives and interests. Here, certain modes of reform have come to address the redistribution of power back to the victim. Theorists argue, however, that this empowerment is primarily limited to welfare support (Rock, 1990; Fenwick, 1995). The downfall of the discursive relocation of the victim, theorists argue, is that it fails to meet the private needs of the victim seeking reparation and retribution for the crime they have experienced (Murphy, 2000: 133–5; Pratt, 2000: 420–1). Emergent in these changes

is the notion that the victim now vies for power monopolised by the state.

The relocation of the victim in common law and statute has been met with considerable resistance from state authorities. Where the victim has been actively included, as with the rise of criminal injuries compensation and assistance programs, theorists have critiqued the inclusion as token. Thus, with the relocation of the victim in the prosecutorial process, theorists have commented that victims are not provided with any substantive power in any practical sense, but have been included to support the interests of social control (Burns, 1980: 10–15). The tensions evident in these debates show that the exercise of victim power is generally inconsistent or non-compatible with the exercise of the same powers by the state. The inclusion of the victim can thus be evidenced primarily through programs not conflicting with the state's power to prosecute and punish. Consequently, the proliferation of criminal injuries compensation, apprehended violence orders and victim impact statements does not interfere with the ODPP's power to prosecute and punish offenders.

The notion of the 'ownership of crime' developed by Christie (1977) supports the fact that victims possess a range of powers linking them to the criminal prosecutorial process. Christie (1977) argues that criminal injuries compensation removes the victim from the source of conflict providing their identity. For Christie (1977), victim compensation involves the removal of the victim from their conflict for an award of statutory damages moving from the state.[59] Christie (1977) argues that victims 'own' criminal conflict, suggesting that such conflict is indeed a necessary and productive exercise, benefiting the private interests of the individual. Linking the lack of victim involvement in criminal trials to the intervention of state based regimes, Christie (1977) suggests that victims are a constitutive element of criminal conflict. Christie's (1977) thesis thus imputes a connection between victim orthodoxy and crime. He suggests that the emergence of the state, and its monopolisation of criminal law, has led to the rise of alternative schemes for the remedying of criminal wrongs. This perspective establishes that despite the removal of the victim from the common law, victims continue to constitute a fundamental relationship with the criminal self. This shows that victims, in terms of their orthodox common law power, continue to impact on the development of criminal law by virtue of their ownership of criminal conflict. Despite the rise of executive tribunals, victims have a sound basis upon which to negotiate for their re-empowerment at law. Indeed, Christie

(1977; see Flatman and Bagaric, 2001) makes plain the fact that victims have a right to engage in the criminal process and not be excluded by the state, due to their orthodox ownership of the criminal process.[60]

This chapter examines the inclusion of the victim through the discursive relocation of the victim as relevant to the criminal prosecution process. However, the fact that this inclusion, or relocation, is fraught with political tensions suggests a certain discord between victim power, and those subsumed by the state. This suggests that the discursive relocation of the victim within the criminal jurisdiction conflicts with the role of the state as constituting and controlling criminal law. The history of the victim from Norman Conquest evidences the transfer of power to the apparatus of the state. For want of the double exercise of victim power, the state must now take complete control of criminal prosecutions, to the marginalisation of the victim. This establishes how criminal law and justice formed in accordance with the discursive relocation of victim power. The modern polemic as to the transfer of that power back to the victim, evidenced through contemporary issues discussed herein, results from the fact that this power is substantially instituted in the state. The fact that the victim now seeks to utilise or negotiate their power back from the state establishes that criminal law and justice was formed by the relocation of micro-instances of power, inclusive of the victim.

Common law change and the relocation of the victim from 1970

This section examines various developments seeking to include the victim in the common law. Developments limiting the victim will also be considered to highlight the fact that the relocation of victim power is in conflict with the state. These developments include the rise of the rule of law, to safeguard the rights of defendants where the state impedes individual freedom and liberty. The reaction of victims against their lack of power, traced in the preceding chapter, suggest that state processes, including due process rights, should be weakened in favour of victim empowerment. This section therefore links victim rights to the contest of common law power between victim and state. Starting with private prosecution, the competing interests of victim and state will be discussed to establish how victim power accounts for the development of criminal law and procedure.

The introduction of the reform of criminal justice followed the victim rights movement and the introduction of victim power on to

the political agenda in the 1970s. This is evidenced outside the common law with the rise of state based compensation, victim counselling, and other programs. However, contemporarily, the common law position of the crime victim has gained the attention of the courts. This is particularly evident where the powers and rights of the victim conflict with the agency of the state, or natural rights of the defendant. Dependent on this history, modern victim participation can take many varied forms. As demonstrated, the state has long been established as the site of criminal law and procedure for the good of society. The relocation of the victim in the common law is thus dependent on the extent to which victim power is compatible with the state and the social interest.

This section argues that the victim plays an integral role in shaping modern criminal law by pressing their private interests at law. This challenges the concept that criminal law is an exclusive product of state control. This is evident where the victim attempts to bring a private prosecution without the support of the state. Similar conflicts arise where the victim seeks to influence the course of sentencing proceedings with the introduction of victim impact evidence. Reflected in both Australian and American practice, courts have reacted sharply against the introduction of the experiences of the victim where those experiences conflict with the defendant's right to natural justice, as guaranteed by the state. The bourgeoning law of evidence in the eighteenth century has, today, been formalised in the common law and codified by both commonwealth and state legislation. Here, prejudicial evidence that outweighs its probative effect is expressly excludable. Thus, much of the emotional experience of the victim may be excluded as it jeopardises the defendant's right to due process, or a fair, impartial hearing (see Freiberg, 2001).

However, alternative developments for victim expression at common law have grown out of the history of defendant rights. This includes the introduction of victim experience as mitigating culpability. As with provocation, victim experience can be adduced to mitigate the liability of the defendant. Similarly in drug law, victim experience can be considered on sentencing. In the Drug Court of NSW, this is demonstrated through the consideration of court supervised rehabilitation where the defendant exhibits non-drug related criminal antecedents in addition to a drug addiction. This nuance demonstrates the relocation of the subjectivity of the victim at law. Distinct from the prosecuting victim, the increased use of mitigating evidence suggests the relevance of the victim's perspective in the

criminal process. Apart from relevant evidence tenable by the defence, victim experience is not seen as a significant concern for the courts due to the priority placed on securing social order. As the ODPP or police increasingly took control of proceedings from 1600, victimisation was generally eschewed from the criminal law as an essentially private viewpoint. However, the rise of victim power against the power of the state suggests that the victim is now competing for agency long subsumed by the state. In the context of provocation and drug law, the rise of victim perspectives mitigating criminal culpability suggests that victim discourses are indeed justiciable, though are unlikely to be included where such discourses conflict with the power of the state and ODPP in the administration of criminal prosecutions.

The prosecuting victim, however, has regained certain powers over offenders exercisable in court. Demonstrated through the widespread use of apprehended violence orders, victims are now able to petition courts to restrain offensive conduct, or persons likely to offend. The apprehended violence order, introduced in NSW by statutory amendment of the *Crimes Act 1900* NSW, empowers victims to make an application directly to the magistrate. However, these pleadings do not interfere with the power of the ODPP and do not replace the criminal trial. If such an order is disobeyed, raising a cause of action in criminal law, the matter may be taken over by the ODPP and prosecuted publicly.

It is, however, the modification of the principles of double jeopardy in the UK, Tasmania and Western Australia that demonstrate how the restatement of the significance of the victim has led to the modification of the rule prohibiting the retrial of an acquitted person. The relative success of victim groups in the politicisation of the reform of double jeopardy law indicates that victims can indeed make creditable claims over common law powers of prosecution. Currently, in all but the above mentioned jurisdictions, the principles of double jeopardy evidence how the common law is interpreted in terms of social interests, devoid of the victim. However, the modification of double jeopardy law in accordance with victim interests supports the claim that victims are competing for criminal legal powers long subsumed by the state. It remains to be seen if victims will indeed be able to affect a universal shift in the common law.

Private prosecution

The Crown generally brings all prosecutions. The victim's right to private prosecution, however, continues at common law. Indeed the

police rely on the orthodox power of private prosecution to initiate a charge where not provided by statute. Where a charge concerns a matter witnessed by the victim only, such as shoplifting, it is possible for the victim to sign the charge book and prosecute the charge. The ODPP may take over the prosecution if the charge is to be dealt with by indictment. However, in the New Zealand case of *Wallace v Abbott* (unreported), a private prosecution on indictment for murder was brought for the fatal shooting of Steven Wallace by Constable Keith Abbott. Abbott maintained that Wallace was killed in the line of duty after he smashed the windscreen of a police car. An investigation carried out by the NZ Police Complaints Authority exonerated Abbott of any responsibility for the death. Thus, no charge was laid by the police. Exercising his right of private prosecution, Wallace's father initiated a deposition hearing in January 2002 before two justices of the peace. The justices ruled that there was not enough evidence to proceed, that Abbott acted in self-defence, and that the shooting was a matter of police policy.

On appeal, Elias C.J. of the NZ High Court ruled that the holding of the justices was in error, finding a *prima facie* case had been established: *Wallace v Abbott* [2002] NZAR 95; [2003] NZAR 42. Elias C.J. ruled that the justices exceeded their jurisdiction by ruling on self-defence and police policy, holding that Abbott should be indicted for murder. At trial, the prosecution failed to establish its case, and Abbott was acquitted. However, the case sparked widespread debate as to the use of private prosecution, leading the NZ Police Commissioner to call for law reform to exempt the police from private prosecutions. This case clearly establishes how private prosecution remains a fundamental power of the victim, leading to the shaping of modern criminal law and justice.[61] Distinct from Australia and England, the New Zealand system of public prosecution acknowledges the significance of the power of the victim by preserving the right of the victim to initiate a prosecution without undue fear of it being taken over by the Crown.[62] *Wallace v Abbott* [2002] NZAR 95; [2003] NZAR 42 highlights the way victim power continues to inform the development of criminal law, and that the power to prosecute and punish is derived similarly for both state and victim.

Although the victim reserves the right to prosecute, most charges are brought by police. The ODPP generally take over all matters at committal. However, the victim remains central. In terms of the evidence required to make out a *prima facie* case, the victim continues to exercise significant power over the conduct of proceedings. All charges need to

be supported by some form of proof or fact before an accused can be committed for trial. If no evidence is presented at committal, the matter will be dismissed. Thus, it is necessary to present to the court facts as to the harm of the criminal incident *a priori*. This will generally take the form of a written statement by the victim or arresting police officer as to the nature of the incident. If no information is presented on the particular harm caused to the victim self, the charge will not be made out. Even where no individual victim is identified in the charge, as with public order offences, failure to adduce information as to the conduct constituting the cause of the criminal action will result in the matter being discontinued. The initial phase of prosecution thus requires the participation of the victim, either personally, or in terms of another standing in their place.

Consistent with the New Zealand experience, private prosecution provides for the expression of victim interests at law. Despite significant statutory limitations on the exercise of private prosecution, it flows from the liberty of the individual to advocate their personal interests. This means that private prosecution has the potential to place the victim subject within close proximity to the courts. The fact that all prosecutions are substantively initiated by way of private prosecution attests to the fact that the process that puts into action the coercive power of the criminal law is inclusive of the power of the victim.

Victim impact statements

Victim impact statements are a creature of statute. In NSW, pt 6A was inserted into the *Criminal Procedure Act 1986* after amendment by the *Victim Rights Act 1996*. These provisions can now be found in the *Crimes (Sentencing Procedure) Act 1999* NSW Pt 3 Div 2. This amendment allows the victim to produce a victim impact statement to the court after conviction but before sentencing. Similar procedures exist across the Australian states, in the UK and in America. In the NT, s106B of the *Sentencing Act 1995* provides for the presentation of a victim impact statement to the court. Although a victim impact statement is not admissible to assess the harm to the victim pursuant to s5(2)(b), such a statement may be taken into consideration to assess the broader effects of the crime on the victim. As the NT Supreme Court of Criminal Appeal (NTSCCA) notes, the purpose of a victim impact statement is to give the victim or their relatives an opportunity to place before the court an account of the impact of the crime on their lives (see Erez, 1999: 550–4). Victim impact statements, therefore,

cannot constitute the sole information upon which an offender is sentenced, instead assisting the judge as to the culpability of the offender (Ashworth, 1993: 498–502).

In *The Queen v Raimondi* [1999] VSCA 101, the Victorian Supreme Court of Appeal (VSCA) held that the misuse of victim impact statement evidence caused the sentencing judge to err when determining the appropriate sentence to be imposed. Here, the sentencing judge allowed information as to the suspicion of the victim regarding the remorse of the offender post-offence to be considered as relevant to sentence. The victim impact statement described how the offender had a general lack of regret, informed by the victim's perception of the offender. The court ruled that a sentencing judge should not consider material in a victim impact statement advocating mere opinion. The VSCA therefore affirmed the holding of *Staats v R* (1997) 101 A Crim R 461, that victim impact statements should not be used to source information as to the culpability of the accused.

The function of victim impact evidence is to therefore present to the sentencing judge the victim's perspective of the offence. This is not to the detriment of the rules of evidence, nor the objective assessment as to the seriousness expected of each sentencing court. The victim is provided an opportunity to include their perspective albeit not to the demise of the rule of evidence or the due process rights of the accused.

However, American authority holds otherwise. The use of victim impact statements in the United States is deeply rooted in their civil rights code under the constitution, and in the broader ideals of personal liberty enshrined in the United States judicial process (Allen, 1992: 629–33; Murphy, 1988: 1303–6). In *Booth v Maryland* (1987) 96 L Ed 2d 440, the United States Supreme Court was asked to determine whether the Eighth Amendment to the United States Constitution prohibits a sentencing jury in a capital trial from considering victim impact evidence regarding the characteristics of the victim, and the emotional response of family. In this matter, the court ruled against the use of victim impact evidence on the basis that it inhibited the defendant's right to due process and justice. *South Carolina v Gathers* (1989) 104 L Ed 2d 876 extended this bar to statements made by the prosecutor regarding the personal qualities of the victim. In *Payne v Tennessee* (1991) 115 L Ed 2d 720, the court overruled these decisions. In their place, the court held that the Eighth Amendment does not bar a jury from considering the characteristics of the victim in capital trials or from a prosecutor arguing similar evidence in the sentencing phase (Levy, 1993: 1027–30). *Payne v Tennessee* (1991) 115 L Ed 2d 720 held

that the assessment of harm caused by the defendant as a result of the crime has long been a concern of the criminal law. Accordingly, victim impact statements are another method through which a court may be informed as to the relevant harm caused to the victim. The court ruled that victim impact statements generally present information long considered by a court when sentencing. The difficulty of keeping from the jury information as to the emotional impact of crime was an additional practical matter supporting this argument.

The use of victim impact statements suggests how the perspective of the victim may be taken into account upon sentencing. In certain ways, this is a positive change for victim rights at common law. However, the use of victim impact statements in Australia does not take away from the power of the Crown, or the rights of the defendant, in putting the prosecution to proof. As noted in *Staats v R* (1997) 101 A Crim R 461, victim impact statements provide an opportunity for victims to place a personal and emotional record before the courts. However, these records introduce little more than the details of the impact of crime on the victim, other than providing victims the satisfaction of making a personal statement to the court. The factors relevant upon sentencing are still relevant regardless of whether a victim impact statement is presented (Bugg, 1996: 158). Accordingly, victim impact statements have a certain gratuity from the perspective of the sentencing authority, as the harm done to the victim is neither constituted nor necessarily informed by such a statement. Additionally, following the NSW decision of *R v Previtera* (1997) 94 A Crim R 76, the court will not take into account a victim impact statement where the victim was killed as a result of the crime. This suggests the limited effect of victim impact evidence in Australia, leading to the conclusion that the empowering legislation only provides for limited victim participation in the prosecution process. Reform is evidenced, however, with amendments to the *Crimes (Sentencing Procedure) Act 1999* NSW s30A, affording NSW victims the opportunity to read their impact statement to the sentencing court, aligning Australian practice with that of America.

The victim and due process

The struggle over due process rights explicates the competing powers of the victim and state. *Siganto v The Queen* (1997) 97 A Crim R 60 examined whether the defendant's decision to enter a plea of not guilty and proceed to trial could be said to aggravate the harm caused to the victim. The NTSCCA supported the plea, which was reversed

by the High Court on further appeal. The defendant's choice to plead not guilty was held by the NTSCCA as frivolous given the weight of evidence against him. At trial, the victim was made to testify against the defendant. This process was said to impact negatively on the victim, such that the ODPP submitted the following in the first appeal in support of the sentence imposed by the sentencing judge (at 64):

> [S]ince harm occasioned by a victim is a relevant sentencing factor, and aggravation of that harm must also be relevant and may lead to an increased penalty.

Martin C.J., Kierny and Priestly J.J. held, dismissing the appeal, that the trial judge may have looked at the distress of the victim in giving evidence at the committal and at trial, although it was not apparent he increased the sentence as a result of this observation. Instead, the NTSCCA held that the sentence was instead informed by the defendant's general lack of remorse. This lack was considered an aggravating factor relevant to sentence. For the NTSCCA, it was not the plea of not guilty that aggravated the harm to the victim, but the distress occasioned in giving evidence. This was said to be one of the consequences of the crime on the victim.

In *Siganto v The Queen* (1998) 194 CLR 656, the High Court of Australia thought otherwise. Gleeson C.J., Gummow, Hayne and Callinan J.J. held that the examination of the defendant's lack of remorse was not the only factor aggravating sentence. Instead, the court ruled that the decision of the trial judge, that the manner in which the crime was defended aggravated the harm done to the victim, must have influenced sentencing discretion. Citing *R v Gray* [1977] VR 225, the High Court held that a sentencing court cannot increase a sentence in order to mark the court's disapproval of the accused having put the prosecution to proof. This rule applies even where the accused presents a time-wasting or scurrilous defence. The High Court ruled in favour of the appeal, remitting the case back to the NTSCCA. Their Honours, in *Siganto v The Queen* (1998) 194 CLR 656 at 663, said:

> A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed.

The due process rights of the defendant therefore place a bar on the consideration of any increased harm to the victim upon sentencing, if the increase in that harm is related to the exercise of the defendant's right to natural justice. So fundamental is this principle that the aggravated distress of the victim cannot be considered even in light of the most ridiculous defence. This suggests the competing interests of victims and the state, in protecting the rights of the defendant. That the due process rights of the accused bar aggravated victim experience deriving from a traumatic trial experience suggests how the common law has come to embody stately principles, constitutive of Australian criminal law, removing the victim from the judicial process. Although relevant victim experience is admissible in order to establish the harm caused to make out a *prima facie* case, when pressed against the exercise of the 'rule of law', such harm is effectively estopped as a factor relevant to sentence: see *Melville v The Queen* [1999] NTSC 55 and 56. Thus, as victim power came to be consolidated under the prerogative of the state, express guarantees have developed to protect the accused from any potential abuse of process. The fact that the victim now contests this guarantee, albeit with limited success, indicates how their agency is being given increased judicial consideration as relevant to the common law process.

Victim experience in provocation and drug law

The introduction of victim experience as mitigating liability or sentence on the part of the defendant is an increasingly significant issue for the courts. With the continuing development of the partial defence of provocation and the creation of such sentencing courts as the Drug Court of NSW, victim discourses are becoming increasingly relevant when determining culpability. With provocation, the introduction of a victim's perspective may see the accused acquitted of murder and found guilty of manslaughter: *R v Ahluwalia* [1992] 4 ALL ER 889; *R v Thornton* [1992] 1 ALL ER 306; *R v Thornton (No. 2)* [1996] 2 ALL ER 1023. In drug law, the defendant, or victim of addiction, may receive a suspended sentence, or program of rehabilitation supervised by the court, rather than full time custodial term: *R v Chandler* [1999] NSWDRGC 6. The admissibility of these types of discourses in the criminal law attests to the intrinsic relationship between the victim and criminal, first identified by victimologists a century ago. Further, the increased relevance of victim experience suggests how various institutions have intervened to substitute social interests in place of the private desires of the prosecuting victim. These institutions, namely

those of the state, have succeeded the prosecuting victim from the common law by introducing the notion that criminal law is essentially a public concern. This demonstrates that victims are at once excluded by the social dynamic of criminal law, which in turn avails to defendants potential discourses of victimisation mitigating their culpability. The introduction of victim discourses by defendants against the demise of the victim's private interests highlights the way social discourses are used to relocate the victim at law.

The defendant's ability to introduce victim experience to mitigate culpability flows from the due process rights of the accused. Although the experience of the prosecuting victim is highly regulated in order to not interfere with the rights of the accused, victim experience from the side of the accused is permitted because of this right. For the prosecuting victim, this suggests the primacy of the public interest in regulating victim common law power. Confirmed in *Siganto v The Queen* (1998) 194 CLR 656, the victim's ability to influence sentence is held as inconsistent with the due process rights of the accused, and the social interest as it has emerged over some 500 years. The way social interest limits prosecuting victims for the rise of defendant victimisation suggests the shift of victim power to the state and common law. The state permits the use of victim experience by defendants, as it accords with the government of the social and does not distract from the primacy of public prosecution. Manifesting contemporarily in the broad admission of victim perspectives for the defence, victim power can be introduced or relocated where the substantive content of the power does not interfere with the power of the state or ODPP. Although victim groups may well praise the admission of mitigating evidence into the criminal trial in the case of victims of domestic violence, this has not been to the relocation of the significant power of the state.

Apprehended violence orders

Apprehended personal and domestic violence orders, otherwise known as restraining or protection orders, are orders that a court makes to protect victims of crime, either following the commissioning of an offence or to prevent its likely occurrence: *Crimes Act 1900* NSW s562AI. Thus, the increased availability of such orders for victims of crime attests to the relocation of victim interests at law. Apprehended violence orders protect victims by ordering defendants not to do specific things, and so mirror an injunction. In addition to the presumption against stalking or intimidation, the order may prohibit or restrict the defendant from approaching the victim: *Crimes*

Act 1900 NSW ss562AB,562BC,562D. Victims may apply for an order even where they are in a domestic relationship with the recipient of the order: *Crimes Act 1900* NSW s562BD. Apprehended violence orders aid the relocation of the victim by making available a common law process allowing for increased control and discretion on the part of the victim.

If a defendant disobeys an apprehended violence order, they may be arrested and charged. Various sentences are available where an order has been broken, including fines and imprisonment. However, apprehended violence orders do not give defendants a criminal record. As such, they mirror a criminal action and are likened to a victim centred prosecution, although they do not form part of the criminal prosecution system as outlined in Chapter 3. Indeed, where an order is broken, proceedings will generally be initiated by the police rather than individual victim.

Changes to the law of double jeopardy

The retrial of an offender for a particular offence, once acquitted of that offence, is prohibited at common law under the principle of double jeopardy. This principle has been recently affirmed by the High Court of Australia in *The Queen v Carroll* (2002) 213 CLR 643. Several reasons are presented for the maintenance of the prohibition against the retrial of acquitted persons. These include, the protection of the civil liberties of the offender against an abuse of state power; the chance of wrongful conviction particularly given the prosecution's awareness of the defence case; the limitation of the emotional suffering of the defendant; that the defendant is entitled to have the matter concluded; and that the rule against retrial encourages efficient investigations in the first instance (Corns, 2003: 87–8). However, Corns (2003) argues that if limited to certain situations, a case can be made for the relaxing of the double jeopardy rule. Through statutory modification of the common law, Corns (2003) suggests that where fresh evidence is obtained, where a Crown appeal lay against erroneous judicial rulings, or where the acquittal is tainted by misleading or fabricated evidence, grounds may be made for the relaxing of the bar against retrials. However, Corns (2003: 83) suggests that such modification is permissible on the basis of the social interest of maintaining the integrity of criminal proceedings, rather than the sectarian interests of *inter alia*, crime victims. The prevention of the abuse of state power, however, has been raised as a significant concern limiting the availability of a retrial. In *The Queen*

v Carroll (2002) 213 CLR 635 at 643, Gleeson C.J. and Hayne J. said in joint judgement:

> Without safeguards, the power to prosecute could readily be used by the executive as an instrument of oppression. Further, finality is an important aspect of any system of justice. As the New Zealand Law Commission said in a recent report dealing with the possibility of statutory relaxation of the rule against double jeopardy in the case of acquittals procured by perjury or perversion of the course of justice, the need to secure a conclusion of disputes concerning status is widely recognised, and the status conferred by acquittal is important.

Against the potential of oppression, a consequence of the consolidation of criminal law under the state, exist a number of causes justifying retrials. Victims have responded to the notion that an overly empowered ODPP is an obvious risk to the liberty of defendants. Such arguments are bound up in the notion that criminal justice seeks to protect the social. Even where a retrial is feasible as a result of fabricated evidence, for instance, the victim perspective is often lost in the general assumption that criminal law is a matter of state policy *a priori* (Dennis, 2000: 945). This has led to the general omission of the victim from debates as to the modification of double jeopardy law by lawyers and members of the judiciary. However, victim interests have been widely cited on a political level as substantiating the re-investigation of the relaxing of the doctrine of double jeopardy. Indeed, the interests of victims may form part of the wider social interest, given the relocation of the victim in common law and statute, as a constituent of the 'public interest'. Here, the victim is politicised as the apex of failings of double jeopardy law. This is evidenced in NSW, where the reform of double jeopardy is proposed, with the Carr Governments' reference to the case of *Carroll* and the need to reform the principles of double jeopardy on the basis of the needs of victims. The *Sydney Morning Herald* reported on 10 February 2003 that:

> He [Premier Carr] said the recent High Court case involving Raymond John Carroll had provided a reminder of the need for change. Carroll's conviction for murdering 17-month-old Deidre Kennedy in Queensland 30 years ago was overturned on appeal, despite new evidence emerging. Double jeopardy meant he could not be tried again. Mr Carr said this case encapsulated the need to

> be able to re-try someone, even if they had been acquitted. The changes would be retrospective and would apply to crimes such as murder, manslaughter, gang rape and large-scale drug dealing.

Premier Carr's plan to amend the common law can be read as a political response to community outrage against the injustice of *Carroll* to the immediate victim and her family. Important too is the fact that this reform was proposed in the context of a pre-election campaign. However, the proposal for reform was made in the context of the injustice done to the victim thus emphasising the potential power of the victim towards the reform and development of the common law.

Developed to protect defendants against the power of the state, the rule against double jeopardy precedes Premier Carr's promised reforms. Hunter (1984) argues that the first traces of a law against double jeopardy can be evidenced in early Roman law. The principle was firmly established by the mid-thirteenth century, an appellor pleading 'attachment of jeopardy' to estop the possibility of a double indictment (Hunter, 1984: 10). Here, the rule emerged in accordance with victim interests. Criminal justice being provincial, jeopardy could not be attached unless the first trial had also been within the court's jurisdiction. Thus in 1313 Stephen was indicted in Essex and acquitted, later to be indicted in Middlesex where the previous acquittal failed to bar retrial on the basis that the deceased's body was found in the latter county. Essex was not competent to hear the plea. Hunter (1984) also suggests that the principle was susceptible to legislative modification. In 1487 (3 Henry VII c 1) and again in 1534 (26 Henry VIII c 6) the rule was weakened with no 'public or judicial controversy over lost liberties' (Hunter, 1984: 5). Thus, the reform of the rule against double jeopardy was modified in accordance with the interests of the victim. Later, as the justice system assembled around the interests of the King and state, the rule was strengthened to secure the interests of all individuals.

The challenges faced by the weakening of the rule against double jeopardy attest to the significant problems faced by the victim in a legal system constituted by the fundamental powers of the victim as they have been subsumed by the state from the eleventh and twelfth centuries. The proposed reforms of double jeopardy in the interests of victims, therefore, have a history more particular than the general social interest. The reform of double jeopardy does seek to empower victims, albeit through the ODPP, suggesting that the victim is discursively placed within criminal justice to the extent that the subjective

power of the victim is a key explanatory factor in the development of criminal law generally.

A statutory space for victims: the rise of criminal injuries compensation and victim assistance programs

Victim Assistance has been widely criticised by victimologists for failing to meet the personal needs of victims (Burns, 1980: 10–21; Elias, 1993; Cook *et al.*, 1999; Rock, 1990). Needs have been identified as flowing from the victim's fear of crime, the requirement of greater personal security, counselling, workplace assistance, and pecuniary compensation for pain and suffering. However, other needs have been identified including a desire for increased participation in the criminal trial, sentencing and punishment of offenders, and for the purpose of emotional reparation and vengeance (Wright, 2002: 658–60; Murphy, 2000; Pratt, 2000). While victim assistance makes headway for victims in terms of financial needs, little is provided to appease their reparatory desires.

This lack has been the focus of victimological work regarding assistance programs and compensation (Lamborn, 1972: 462; Miers, 1997: 7). Although conferencing and mediation have established a medium through which victims are now able to interact with their offender accounting for emotional needs, few policies provide for the interaction of victim and offender in a criminal court. It is on this basis that assistance programs fail victims. Further, these problems suggest how assistance programs are rationalised as outside the common law, thereby not affecting the significant power of the ODPP in administering criminal prosecutions.[63] This suggests that victims are being relocated, but not to the decline of the power of the state. This indicates how, over time, victim power has been instituted in the state.

Victim assistance programs emerged out of the state's consolidation of criminal law. These programs support the victim through the provision of statutory compensation that aims to restore the victim to their pre-crime position, via an administrative structure limiting and removing the victim from the common law (Shapland, 1986a: 224). This section focuses on the criticisms of victim assistance to show how such programs consolidate the power of the state against the victim. Victim assistance is examined as compensating the victim *inter alia* for the state's failure to keep the peace and provide the victim access to the courts (Burns, 1980; Elias, 1993; Mawby and Gill, 1987: 51–63). Through an analysis of these programs, this section demonstrates how

victim interests are accommodated away from the traditional arenas of criminal justice and the common law, for a regulatory program subject to the will and sovereignty of the state. The attempt then to provide victims with compensable statutory rights at common law conflicts with the prior transfer of victim power to the apparatus of the state.

Perspectives on victim assistance include the offering of victim compensation as a technology of the welfare state. These analyses critique how programs protect victims in a paternal capacity, remove the victim from orthodox common law processes limiting victim-offender interaction, restrict retribution, and limit civil claims to amounts in excess of statutory compensation. Albeit a source of compensatory empowerment, damages for pain and suffering, property recovery and funds for assistance services restrict the victim's participation in the common law. Additionally, theorists critique the way victim assistance inhibits the victim's need for retribution and compensates for the state's failure to insure against criminal risks (Rock, 1990: 74–5).

Others critique the way victim assistance establishes services that are beyond the conventional ambit of litigation, representative instead of an administrative structure that regulates criminal victimisation as a welfare issue (Wright, 2002: 663). Elias (1993: 89–92), Burns (1980: 1–18), Viney (1999) and Shapland (1986a: 222–6) suggest how the victim is consoled in order to rehabilitate them back into the community, restoring their faith in the state's management of crime. Victim assistance has also been criticised as detaching the victim self from the apportionment of criminality in the prosecution processes, in favour of state-funded services (Gegan and Rodriguez, 1992: 242–4). The rise of social government, the causative factor displacing the victim throughout history, underpins victim assistance by legitimating the offering of pecuniary awards for the state's failure to keep the peace.

Victimologists have been critical of the way victim services restrict traditional private remedies, replacing this orthodoxy with rehabilitative services concerning the security of the social *a fortiori*. Victim assistance can accordingly be analysed as a social program of rule advocating the welfare protection of the victim. This indicates that victim assistance is rationalised by similar communal and social tenets as associated with the displacement of the victim historically. This suggests how criminal injuries compensation seeks to complement the removal of the victim for the consolidation of stately interests. The failings of assistance programs indicate how the social has continued to take precedence over victims amid earlier practices in which the victim was compensated directly, by their offender (Shapland, 1986a: 222–6). By

adapting the perspectives of critical theorists, therefore, victim assistance establishes how the victim is offered an alternate administrative locale for the venting of criminal harm.

The first sections examine criticisms of victim assistance. These sections apply victimological research to identify areas in which assistance programs advocate the welfare and social government of victims as connected with victim history and genealogy. The final section examines victim assistance as a social program of rule, focusing on the way assistance is offered as a paternal mode of state protection. Collectively, these sections examine how victim assistance is constituted by social and communal objectives, in which the harm experienced by the victim is ameliorated away from the common law. These readings of victim assistance elicit the argument that the state has come to administer criminal law through the prior occupation of orthodox victim power.

Victim assistance as a source of limited judicial participation

Criminal injuries compensation advocates a welfare mentality, securing the interests of victims for failings of the state. The position advocated by such programs suggests that intervention is required in the normal course of criminal justice to reinvite victims back into the system (Cook *et al*., 1999: 64). Having been relegated to a position of silence, schemes were established to guide the victim into supportive structures that aim to regulate fear, property loss and other results of crime (Moriarty, 1999: 37). From the perspective of the state, therefore, victim's ability to claim compensation is consistent with the orthodoxy of victim power to request a personal award and should thus aid in victim satisfaction. However, this does not occur in the criminal jurisdiction. Instead, victim assistance and compensation falls under the ambit of administrative law (Shapland, 1986a: 219–29). State power is thus consolidated by the fact that the victim is directed away from the trial and prosecutorial process. Rather, the victim is empowered with limited rights of compensation that cater for the victim's welfare needs, and the state's failure to exercise their prerogative to secure the realm, removing victims from their conflict (Mawby and Gill, 1987: 36).

The need for personal retribution

Debate has surrounded the extent to which victims should be able to pursue a course of personal retribution against their offender. Abolished from the common law centuries earlier, vengeance

motivated punishments were seen as brutal and inhumane. However, the victim's desire to enact against their offender a course of punishment remains (Murphy, 2000; Pratt, 2000). Identified in terms of the desire to participate in the trial and sentencing process, retribution is defined as the need for recompense, where the victim is able to influence the culpability and punishment of their offender (Shapland, 1986b: 210–14). Personal retribution has shaped criminal justice processes as offences were traditionally identified as private disputes, felonies, to be settled between individuals in the feudal chain of command. Though increased county policing and presentment led to the removal of the victim's right to prosecute exclusively, the victim continued to privately prosecute up until the late nineteenth century. This provided a basis from which the victim could at least initiate the first stages of the retributive process, though after the rise of metropolitan policing in 1829 and the ODPP in the 1870s in England, victims lacked general control and discretion of the prosecution process (Mawby and Gill, 1987: 115–34).

Victim assistance does not allow for personal victim participation in the criminal trial. While the ODPP is under a duty to consider the rights of the victim in their exercise of executive power in prosecuting the offender, the needs of the community prevail. Thus, victim assistance programs do not offer any avenue for personal justice other than an award of statutory damages outside the criminal jurisdiction (Shapland *et al.*, 1985: 117–49, 150–73).

The dominance of the state in administering compensation

Victim assistance programs are administered by statute. They fall within the prerogative of the state in administering crime and justice. As such, victims are subject to the will of the state and the dominance of social government. This means that victims are supported back into society following the commissioning of a crime by various services endorsed by the state. This may include counselling and associated services. The focus is not on the offender, but on the amelioration of harm. The victim is instead encouraged to re-establish their faith in community safety and crime control (Burns, 1980: 1–18; Shapland *et al.*, 1985: 174–94; Elias, 1993). Various programs seek to apportion compensation in order to sustain a victim's desire for counselling to facilitate their return to work, or to normal community and family life. Directing the victim away from the conflict of the offence, victim assistance has been criticised as focusing on the social objects of the state over the private or personal needs of the victim.

The state monopolisation of crime control has led to the offering of compensation where a criminal threat is not secured. This is evidenced where the state takes charge of the regulation of crime, leaving the victim with little significant power either in the policing of crime or its prosecution. The state acts under the burden of taking care of the victim, which then translates into the primary rationale for assistance schemes (Shapland *et al.*, 1985: 118). However, in effect, this quashes the victim's ability to seek personal retribution at any stage of the criminal prosecution process and further limits the victim's ability to participate in the justice system by curtailing their right to seek civil damages. Effectively, the victim is removed from the criminal trial while the state consolidates its power of prosecution and punishment (Elias, 1986b: 291).

Risk minimisation and victim protection

Victim assistance programs encourage the assessment and minimisation of victim risk in a localised way. Though the state will take responsibility for offences as suggested by the fact that compensation is ultimately payable by it, victims are encouraged to act as informed consumers. Victim assistance thus seeks to educate victims to protect against the risk of crime. O'Malley (1992, 1996) argues that market based security is now advocated as a means of personal insurance against crime. Rather than rely solely on the state or community, personal security needs to be purchased to ensure the safety of the individual. Victim assistance programs encourage victims to take charge of their own sense of personal safety by utilising services made available by the executive. Rehabilitative structures such as counselling are utilised to encourage the victim to regain their personal security by adopting measures against future possibilities of crime (see Mawby and Gill, 1987: 51–66).

The genesis of neo-liberal rule has been traced from classical liberal rule and the problematisation of social government in the 1980s (Rose, 1992, 1996). Neo-liberal regimes complement the removal of the victim, by relocating the victim outside the criminal law. The state, however, belies this neo-liberal regime as the consolidated source of crime control. While victims are encouraged to take an active stance against crime, the services and programs that victims are encouraged to opt into complement the state and social as the main arenas of criminal. Though it is the victim's choice to engage in self-restorative programs such as counselling, it is offered to help assist the victim back into the community (Mawby and Gill, 1987: 37–41). Victims are

encouraged to govern themselves in order to shift the burden of welfare control from the state. The state is thus free to control the criminal threat without the need to comprehensively support victims in the process. Consequently, victim assistance services advocate the state administration of criminal law by encouraging victims to focus on modes of self-government, leaving criminal law for the administration of the state. For Pratt (1997), this is evidenced through the manifest concern over criminal dangerousness compared to that of any other form. The arena of the self is therefore utilised to at once empower the victim, and maintain the locus of control of criminal law under the state for want of the double exercise of prosecutorial power (Elias, 1986b: 293).

Removal of the victim from the common law

Victim assistance removes victims from the common law, substituting a statutory scheme in which cause for compensation can be determined and contained. The impact is that victims are offered limited state based services without the benefits of traditional common law remedies. The victim is consequently removed from the trial for an award of compensation that goes towards their rehabilitation. The criminal, trial and judicial process is effectively sidestepped. This identifies that the relocation of the victim has developed in accordance with the consolidation of victim power under the state. The victim is eschewed for administrative law, while the state is expressly empowered to administer the criminal prosecution process (Shapland, 1986a: 222–31; Elias, 1986b: 293–309).

The victim vs the state and the consolidation of criminal law

Victim assistance is rationalised by the state as securing the personal needs of victims. Rock (1990: 415–19) notes in the history of Home Office assistance programs that compensation is granted to achieve various ends of government. These programs redress the exclusion of the victim by providing new and innovative schemes to reintegrate the victim as supplied by that authority in charge of the social, the state. These programs accordingly facilitate victim satisfaction by defining crime as a social problem. However, as the failings of these programs show, crime is ameliorated by state imposed services in which victim interests are defined in terms of criminal injuries. Victim assistance obviates the need to deal directly with the personal interests of victims by isolating them within tribunals of fact, concerned primarily with the identification of acts of violence leading to scheduled compensable

injuries. This has resulted in the continued removal of victim power to the state for the offering of an alternative administrative jurisdiction coloured by definitions of harm as provided by the state (Elias, 1986b: 293).

Theorists have identified that victim assistance is a social technology of rule rationalised by the paternal care of the victim away from the orthodoxy of criminal prosecution and control (Elias, 1986b). Compensatory remedies complement the state control of criminal law by providing an award to limit the victim's return to the criminal trial: *Victims Compensation Act 1996* NSW s21. Compensation, evidently, is awarded for counselling and rehabilitation to satisfy the victim's personal needs not addressed in the criminal trial. Victim power has thus been reconstituted by statute to address the needs of victims as identified by the victim rights movement, quelling the desire to insert themselves back into the prosecution process. Assistance schemes are therefore designed to not conflict with the state's regulation of criminal law. The power of the victim being subsumed by the state over the last 700 years, new modes of control including self-help programs restrict duplication of prosecutorial power in court. In this sense, victim assistance is consistent with the development of justice based on the rationale that the Crown, state and social 'own' crime. Here, theorists are critical of the state domination of the crime-restitution relationship with little personal input from victims. This demonstrates how victim power continues to underpin the regulatory programs of criminal justice into the twenty-first century, providing for the consolidation of criminal law under the state.

Theorists have criticised victim assistance from various positions. These include the lack of personal retribution offered by assistance programs and the way the state is established as the praxis upon which victim relations are organised (Burns, 1980). Additionally, the way market based security is offered as a feature of the state's paternal care of victims, further removing the victim from the common law, exemplifies how criminal injuries compensation complements the history of the removal of the victim for the state. Debate has focused on the way compensation is issued to victims to limit their access to the common law trial. As such, the state has been criticised as marginalising the interests of victims to provide the state exclusive access to the criminal self. This criticism asserts that victims are not compensated for personal loss as much as they are for the failings of the state in regulating social risks and threats. For example, Rock (1990: 408) indicates 'the Home Office acknowledged victim's support to be as

much a part of the criminal justice system as of the web of personal social services maintained by the Department of Health and Social Security'. This perspective is supported by a number of theorists in criminal justice, namely Elias (1993: 26–49) and Burns (1980). Elias (1993) puts the issue in terms of agency, indicating that victim policy seeks to manage victims away from the trial to establish the state as the principal agent of criminal justice administration. These theorists agree that victims are dissatisfied with criminal justice because victim assistance removes them from the traditional arena of conflict resolution. Victim assistance fails to meet the needs of victims emergent in their history, in particular, access to the criminal courts. The culpability of the criminal is constructed in terms of the social interest of the state. Victims instead are encouraged to attend to their rehabilitation, and leave prosecution and punishment for the state.

The state, exercising its sovereign prerogative, sought the transfer of prosecutorial power from the victim. This prerogative enables the state to re-empower victims in the way it so chooses. The discursive relocation of the victim to administrative law is evidenced in terms of victim rights legislation. In the review of the *Criminal Offenders Victim Act 1995* Qld, for example, the incorporation of the victim back into the criminal justice system is identified as paramount. The report indicates that this is to be achieved through the relocation of victim interests as relevant to criminal justice processes. However, this relocation is in terms of heightened respect for the emotional needs of victims, in an administrative capacity. These needs are to be satisfied in the justice system, rather than met as an exercise of common law power, in the criminal courts. For want of the double exercise of prosecutorial power, victim interests need to be catered for elsewhere. The report indicates:

> To give victims a central role in the criminal justice system requires more than devising programs to provide support services to victims and to keep them informed. While such services are essential, they are not sufficient. What is needed is a cultural shift in the perspectives of criminal justice agencies and their staff as to the place of the victim in the criminal justice system. This does not mean that judges and lawyers become social workers, anymore than social workers become lawyers when they assist victims in the criminal justice system. To change the victim's role in the system does require a paradigm shift, however, that recognises the centrality of the victim in the criminal justice system (Qld DJ&A-G, 1998: pt 3).

The development of state based criminal justice has occurred via the relocation of power from the victim to the state for the conceptualisation of criminal law as securing the social interest. However, rather than invite victims back into the criminal courts, the Qld Department of Justice and Attorney-General suggests that victims should be afforded primacy in an administrative context. This report indicates that criminal law secures the social interest to the demise of the personal retribution of the victim, identifying them instead as requiring emotional reparation. This is to occur, however, in the broader institutional framework of criminal justice than at common law. The attempt to reintegrate victims responds to the criticisms of criminal injuries compensation as lacking an understanding of victim reparation, to be instituted at all levels of criminal justice. Empathy thus replaces the transfer of power to the victim. The report also suggests that victims be empowered with rights exercisable against public officials, where such officials fail to treat victims with due respect and courtesy (Morgan and Zedner, 1992: 294–5). Victims are to be respected by the state, not as substantively empowered, but as individuals subject to a charter of rights exercisable in an administrative context. Victim power is therefore restricted to a charter of rights that fall beyond the criminal jurisdiction for the ambit of administrative law. This supports the proposition that victims are directed towards compensatory programs to ameliorate the effects of crime in order to prevent the pressing of victim interests in the criminal jurisdiction (Crawford and Enterkin, 2001: 720–1). Indicated in Chapter 2, the power of the victim's right to the body of the offender was transferred to the state around 1200. Criminal injuries compensation preserves this for the state through the discursive relocation of victim needs to an administrative context.

Rock (1990: 415) argues that victims are identified through the myriad of practices that constitute assistance programs. Compensation for criminal injuries, support, crime surveys and reparation suggest that victims are constituted as relevant to the criminal process. Rock (1990) argues that compensation mirrors traditional processes to aid the relocation of victims away from the trial. Rock (1993: 169–72) further argues that victims have no standing in the modern criminal trial. Focusing on trial procedure, Rock (1993) suggests how the modern trial has evolved to meet the needs of the state and defendant. At common law, the victim does not possess any control over the trial, but is instead subject to the needs of the state in regulating the criminal threat (Rock, 1993: 170). Victim needs are met elsewhere as their power is transferred to the ODPP and consolidated within the state.

Victim assistance attempts to quell any challenge victims may mount against the ODPP's exercise of prosecutorial power, avoiding the duplication of the exercise of common law power. This is established through the administrative milieu of criminal injuries compensation, at arms length from the common law. Inconsistent with their feudal orthodoxy, the victim is constituted in an administrative capacity so as not to challenge the criminal jurisdiction as administered by the ODPP.

Conflict as property: victim owned conflict and the genesis of criminal law and justice

Central to an understanding of the significance of the role of the victim in the development of criminal justice is the way crime is normatively viewed as the property of the state (Garland, 1981, 1985b, 1996; Cohen, 1979: 353–6). It has been suggested that victim assistance is a product of the consolidation of the power of prosecution and punishment under the state. These criticisms indicate that the state has constituted an alternate jurisdiction for the remedying of criminal wrongs. Highlighting this point, Christie (1977) argues that victims have been displaced from their conflict by administrative programs seeking their control. This is evidenced by the fact that assistance programs commonly seek to introduce victims into administrative structures that resemble orthodox common law processes devoid of victim orientated conflict. Christie (1977: 7) suggests:

> Most of us would probably agree that we ought to protect the invisible victims just mentioned. Many would nod approvingly to ideas saying that states, or Governments, or other authorities ought to stop stealing fines, and instead let the poor victim receive the money. I at least would approve such an arrangement. But I will not go into that problem here and now. Material compensation is not what I have in mind with the formulation 'conflicts as property'. It is the *conflict itself* that represents the most interesting property taken away, not the goods originally taken away from the victim, or given back to him. In our types of society, conflicts are more scarce than property. And are immensely more valuable.

Christie (1977) argues that conflict itself has a value beyond modes of compensation, or the return of property. An appropriate response to the management of crime would thus provide victims access to their

conflict, enabling the expression of personal interests. Alternatively, assistance programs remove and shield the victim from their conflict or retribution. As assistance programs compensate the victim as removed from the courts and the criminal, such programs demonstrate the way modern victims are denied their traditional 'ownership' of conflict. This crisis over conflict, evidenced in victim rights movements post 1970s, suggests that victims are entitled to settle their conflict away from the dominance of the state. Though lost to the state, this perspective emphasises how criminal prosecution and punishment derives from victim power. Other than court ordered restitution, and a limited focus on the private interests of the victim in sentencing, the retributive interests of the victim are generally eschewed for the social objectives of the state, though the rights exercised pertain to victim conflict.

The non-compatibility of victim and state interests thus lends credibility to the argument that legislation providing for criminal injuries compensation establishes an alternate juridical space for the regulation of the victim. The way assistance programs compensate for the criminal incident and the victim's lack of proximity to the conflict suggests that the powers of the victim have been instituted elsewhere: the state. Christie's (1977) thesis argues for the conflict of the dual occupation of criminal prosecution and punishment by the state and victim. The fact that statutory programs restrict victims to a minor exercise of rights suggests how the victim is kept at arms length of the common law, for want of the double exercise of criminal legal power. This establishes the link between conflict, exclusion, and new and innovative programs seeking to relocate the victim. More importantly, this suggests the link between original victim power, the rise of the state, and the contemporary relocation of the victim to accord with that history.

A key assumption in criminological theory is that the state has origins disparate from that of the victim. New victim policy thus follows the criminological trends that assume that the state and common law are empowered institutions independent of private interests. Though influenced by ideological struggles, the state and common law are seen as intrinsic constituents of society. Rather, government is a process inclusive of various agencies and institutions all of which go towards the shaping of those institutions. As this section shows, to understand the way victim assistance programs control the conduct of victims, one must move beyond the assumption that the state is the sole occupant of crime, and assess the way criminal justice has developed from the orthodoxy of the victim as traced from Chapter 2. The way victim assistance mirrors the historical exclusion of

the victim provides for its criticism as a program of rule. From the perspective of the critics of the modern plight of the victim, the state redresses victim disempowerment through the offering of socially justified compensation. As Christie (1977) points out, assistance programs obstruct the victim from their property and the arena in which this is traditionally settled. Victim assistance can thus be explained in terms of the removal of the private interests of the victim for social government. This government seeks to reintroduce the victim into structures that aim to resocialise the victim as removed from the criminal prosecutorial process. The victim's orthodox ownership of crime, therefore, indicates how victim history belies the development of the criminal justice system.

Victim assistance seeks to regulate the victim as based on similar rationales that legitimated the early removal of the victim from their role of prosecutor. The genesis of compensation, based on older common law remedies such as bot, represents the empowerment of the victim consistent with the consolidation of criminal law around the tenets of the state. The space in which assistance schemes operate was therefore shaped by the transfer of victim power within the common law to the state. The rise of the sovereign, indicated through the consolidated interests of the King in the King's Bench, led to the transfer of victim power to the rudiments of the modern state. This supports the notion that victim assistance represents a collection of practices reorganised to meet the needs of the state. Victim assistance thus responds to the transfer of victim power to the state following the rise of victim rights in the 1970s. Victim assistance has developed from the victim's need to own their conflict, and the state's monopolisation of the common law processes in which this conflict would have formerly been settled. The exercise of private remedies being an orthodox victim power, the state now provides for the exercise of such remedies consistent with its monopolisation of prosecution and punishment. Victim assistance is therefore an artefact of victim history; it establishes the fact that victim power was consolidated under the state, which in turn led to the relocation of the victim alongside its social interests. Belying the state, we therefore find the private victim of crime guiding, augmenting and changing the history of criminal law. The formation of criminal justice has thus occurred around the tenets of the genealogy of the victim as a subject of rule. The history of the victim shows that modern programs in criminal justice cannot be explained by citing the state as the repository of power. Rather, the interaction of the victim with various institutions supports the notion that victim genealogy

underpins the origins of criminal law and justice as an enterprise of the state. Further, this establishes that the victim, the state, and the growth and development of criminal law and procedure, is at once decentred and fragmented, or governmentalised, in terms of orthodox victim power.

Victim history, genealogy and the development of criminal law and justice

> We live in the era of a 'governmentality' first discovered in the eighteenth century. This governmentalization of the state is a singularly paradoxical phenomenon, since if in fact the problems of governmentality and the techniques of government have become the only political issue, the only real space for political struggle and contestation, this is because the governmentalization of the state is at the same time what has permitted the state to survive, and it is possible to suppose that if the state is what it is today, this is so precisely thanks to this governmentality, which is at once internal and external to the state, since it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on; thus the state can only be understood in its survival and its limits on the basis of the general tactics of governmentality (Foucault, 1991: 103).

The relocation of the victim at common law and statute establishes the power of the victim as constituting criminal justice. Criminal injuries compensation encompasses victim compensation programs, property recovery, and referral for counselling. Compensation may take the form of an award for property damage, for pain and suffering or other expenses moving from either the offender or the state. The origins of victim assistance reside in the passage of legislation seeking to compensate victims for various losses not remedied in the criminal courts. Such schemes are also consistent with the general move towards recognising the significant position of the victim of crime, and their need to be included in the judicial process. Here, Flatman and Bagaric (2001) suggest how the victim is now being reintegrated, albeit not to the disadvantage of the state or Crown.

The origins of victim compensation and assistance can be traced back to the awarding of the common law bot, a mode of compensation payable for harm suffered at the hands of the offender. Historically the

blood feud was substituted for a monetary payment, although the influence of Church opposition to the shedding of blood provided for the expansion of bot payments as a means of compensation. The bench on application from the victim determined this type of compensation. The early law considered bot compensation as the appropriate means of punishment. However, this subsided for botless offences in order to recognise that some offences had to be punished publicly. Wite, a fine payable to the King, or forfeiture, death, imprisonment or the pillory, soon became the most appropriate means of deterring and remedying crime (Freckelton, 2001: 15).

From this point, victim centred compensation did not characterise criminal law until legislative amendment in the 1970s (Freckelton, 2001: 89–91). However, the re-emergence of victim orientated law and punishment is specifically characterised to contain the victim from the source of their conflict, emphasising the resocialisation of the victim back into the community following a criminal threat or incident. Where the victim is relocated into the common law, as with the reform of double jeopardy, significant debate and tensions arise identifying the extent to which such reform may weaken the rights of the defendant as guaranteed by the common law.

Criticisms of victim assistance show the fundamental relationship between the criminal, the victim and the resolution of their conflict in the arena of the common law. Analysing the transfer of power from the victim to the state some 700 years earlier, victim assistance suggests that compensation regulates the victim as incompatible with the ODPP's monopolisation of the criminal jurisdiction. The basis of the victim as an influence on the development of criminal justice has generally been ignored for a perception of the victim as a silent subject of welfare assistance (*cf.* Shapland, 1986b). This chapter, however, has argued that the traditional ownership and settlement of conflict by the victim and criminal in the arena of the common law has indeed shaped the foundation of criminal law and justice. Moving from this, the relocation of that power to institutions of the Crown or early state evidence how, contrary to conventional victimological explanations, the victim subject has remained pertinent to the shaping of criminal law and justice. This is affirmed by the fact that certain victim powers have been retained at law, as is the case with private prosecution, or where such power has been reinserted into the law, as is the case with victim impact statements, apprehended violence orders, or where the due process rights of the accused may be weakened for increased victim participation.

The modern relocation of the victim suggests that the victim is being emancipated to redress the removal of the victim from criminal justice. Rather than achieve this end, as demonstrated, the relocation of the victim establishes their role in the explanation of the development of the stately enterprise of criminal justice administration. Thus, compensation programs removing victims from orthodox channels of conflict now confine victims to governing structures outside the criminal jurisdiction, leaving the criminal law for the state. Here, disincentives are offered limiting the victim's ability to participate in the common law. This is provided by the fact that victim assistance seeks to compensate for the state's failure to keep the peace and maintain communal security. This restricts the possibility of the victim litigating their private interests in court. Victim history explains this by emphasising the movement of victim power to the state, where the victim came to be regulated in the social, as a subject prone to sovereign, social, and communal rule. Mediation, for example, a recent development in victim assistance, particularises the way orthodox powers have been relocated within innovative criminal justice programs away from the criminal trial. Mediation has been identified as benefiting the victim personally, in terms of its retributive aspects, and society, in terms of the welfare of the victim and their return to civil life. Mediation proves how victim power is being relocated by the state, for the sake of the consolidation of power under the state.

The development of mediation and conferencing may be seen as new ways in which victims are able to participate in the justice system. This mode of participation allows victims to interact with their offender personally, mirroring the traditional common law processes where the accusation moved from the victim self. Moving back to private settlement and prosecution, mediation is based on various aspects of the history of victims as rationalised around their private interests. However, dissimilar to the private settlement, a key feature of mediation is that it is legitimated as constructive because of the role it plays in satisfying the needs of the victim *and* state. Demonstrated through the rationalisation of victim compensation, mediation is a legitimate exercise of victim power for it conforms with the state's administration of criminal justice as a social enterprise. Similarly the rise of victim impact statements and apprehended violence orders conform with the state's management of criminal law and justice. Supporting victim interests, these programs collectively include the victim albeit in ways that reserve the power of prosecution and punishment for the state. This suggests that new criminal justice programs are

based on the genealogy of the transfer of victim power to the state. The administration of criminal justice is thus more dependent on the victim than first realised.

Victim genealogy explains the modern apparatus of criminal justice in terms of historical developments to which the victim is akin. *Inter alia* the role of criminal justice is to support the common law in the punishment and deterrence of offenders, and to manage the needs of those interacting with the law. Given that institutions of the Crown first arose to take over the administration of justice by the victim, such as the need to police and punish offenders, it is not surprising that new programs seek to continue the evacuation of victim power for the supplementation of social concerns and order. Criminal justice itself is thus a development of victim history. New programs for the administration of victim interests can therefore be explained by the initial removal of victim interests centuries earlier. The administrative structures of the prison, the police, the ODPP, tribunals and committees for victim compensation, and other services and programs have each developed to compensate for common law change. Initially, each of these functions resided in the common law, evidenced in outlawry, the private settlement, the hue and cry, and the private prosecution. As social needs began to replace private ones, administrative structures developed to undertake and regulate those interests.

The tensions spawned by the relocation of the victim evidence that victim power has been instituted in the state. Where there is a possibility that that power will be transferred back to the victim from the state, significant tensions arise. The institutionalisation of power in the state thus conforms with Hunt and Wickham's (1994) notion of the availability of legal power in the social.[64] Thus, if the power of law is always-already available to society, it is not surprising that when pressed to transfer that power to the individual victim, conflicts arise. This conflict, avoided in part by the offering of an alternate jurisdiction for the care of the victim, suggests that the dominance of the social prevents the transfer of victim power back to the self without high-level contest. However, this establishes that the power to prosecute and punish has been assembled under the state such that a general perception arises that such power 'has no existence beyond society' (Hunt and Wickham, 1994: 113). Indeed this chapter establishes otherwise, arguing that the power of the victim has been located in the state discursively, rather than being localised within a particular arena of government (see Murphy, 1996: 192). However, it is the perception that legal power fails to exist beyond society that inhibits the

individual's claim for greater legal power. Moreover, the identification of state or social processes with the institutionalisation of legal power accounts for the perception that criminal law and procedure manifests from the inherent power of the state to constitute the social. As Hunt and Wickham (1994: 113) indicate, however, this is only able to withstand criticism in the 'traditional sense', not in the 'Foucauldian sense' of subjective power relations.

Contemporary programs seeking to relocate the victim exemplify the trend to conduct victim interests away from the common law, to the state and social. Consistent with their history, victims are contemporarily regulated outside the common law. These new programs keep victims from the common law, which is supplanted with stately interests, supplementing various alternate remedies to aide empowerment. First used to remove the victim in the twelfth century, sovereignty has augmented and directed the history of the victim since the introduction of the King's peace. From this point, the social has permeated all aspects of victim relations, accounting for various developments linking the victim to the historic institutional structures of the prison, police, public prosecutions, criminology, and separation of the criminal and civil jurisdictions. As demonstrated by the persistence of social government throughout the history of the victim, the state has continued to subsume the powers of the victim, claiming them as its own.

The relocation of the victim therefore represents a genealogy constituted by micro historical developments. The relocation of the victim is thus a discursive process explaining the development of criminal law and justice. The transfer of prosecutorial power from the victim to the state, legitimated by the need to regulate the social, evidenced contemporarily with the relocation of the victim to assistance programs, demonstrates that the victim subject has been an influential agent of criminal justice. Consequently, victims are primary points of reference in the development of the justice system even though they have long ceased monopolising the ownership of crime. Victim genealogy has, and continues to, contribute to the development of criminal justice and victims need to be cited as causative agents in the history of criminal law and procedure.

9
The Victim as an Agent of Criminal Law and Justice

The victim of crime is an agent of power. Following the governmentality literature and Foucault's genealogical method, the victim has participated in power relations with various institutions of the Crown and state over the course of common law justice since Norman Conquest. The gradual transfer, negotiation and organisation of victim power under the Crown and state leads to the conclusion, in the context of governmentality, that the victim is indeed a powerful agent of change. The victim thus exercises significant discursive power leading to the formation of criminal law and justice as an institution of control. The reconceptualisation of criminal law and justice follows as a consequence.

Each chapter reviewed considerable historical material in light of the governmentality and genealogical approach. This approach enabled the reassessment of the development of criminal law and justice by focusing on the origins of prosecutorial and punitive power. This has centred victims by identifying them as possessing common law power following an offence. On Norman Conquest, this power gave the victim certain privileges, the most significant of which was their exclusive control over the fate of the offender. Though this power has been long transferred to state institutions, its origins provide the focal point from which the development of criminal law and justice can be traced. Though the criminal law has developed significantly since the time of King William I, its fundamental powers remain in terms of the original power of the victim. These include the general power of prosecution, punishment and policing. Through the transfer of these fundamental powers to alternative institutions of the county, the Crown, and later society, the centrality of the victim is established.

The examination of the transfer of victim power to the state by way of governmental process leads to two significant conclusions. These

conclusions follow the analysis of the discursive placement of the victim in relation to the development of the Crown and the social from 1066. The first, that the history of the transfer of victim power to the state, occurring in particular over some 800 years, establishes a genealogy of the victim. This genealogy critiques traditional historical accounts by challenging the assumption that criminal law is a product of the state, acting as the consolidated source of criminal justice administration. Second, that criminal law and justice is not a manifestation of consolidated state power, but the assemblage of victim power under the 'apparatus' of the state. Criminal law thus flows from the transfer of victim power to various institutions, and cannot be singularly attributed to either the state or the social interest. The victim of crime, as a governmental agent of change, is a key figure in the history of criminal law and justice. It is this genealogical perspective, and the challenge it mounts to traditional assumptions as to the centrality of the state, which is the focus of this conclusion.

The victim and the growth of criminal law and justice

Few powers traced herein remain under the victim's effective control. However, the gradual transfer of these powers to the state attests to the centrality of the victim subject in the development of the criminal law and justice system. The diverse aspects of victim regulation traced suggest, therefore, that the victim, as a legal subject, is indeed central to our understanding of criminal law and justice.

Each chapter traced different aspects of victim power. Linking each of them is the erosion of victim power for the establishment of Crown institutions and structures. These powers soon came to be identified as the 'state', as feudalism declined and the regulatory function of the Crown expanded from the immediacy of the King to a set of complex and interdependent institutions. In their particular ways, the police, the ODPP, and the prison service evidence this expansion. In terms of the power of criminal law, the victim and state share a common history. They are intricately entwined. Although the modern criminal law identifies crime pursuant to the social interest, the rudiments of criminal law squarely reside with the victim self. This is to the extent that the victim is now in a credible position to vie for powers long subsumed by the state.

The victim on Norman Conquest held plenary power over the prosecution and punishment process. The most common modes of prosecution included mention in the county or hundred courts,

followed by private settlement. Originally, this took the form of the duel or maim, followed by pecuniary settlement or conveyance after each subject became constituted in the King's peace. From the enactment of the Assize of 1166, the victim's plenary power was eroded for the rise of itinerant justice and the presenting jury. This immediately limited the power of the victim. Though it took another century before any significant impacts were made, the Crown started to subsume the initiation process and also sought to subject offenders to organised forms of punishment. The writ actionable in common pleas was increasingly used towards the end of the thirteenth century in lieu of the criminal appeal.

The connection between victim initiated actions and the rise of various prosecuting authorities similarly demonstrates key linkages between the victim and the development of criminal law. *Inter alia,* the rise of the Attorney-General and ODPP sought to shift the loci of control of prosecutions away from the victim to the state. However, the authorities examined suggest that except where limited by statute, the power of private prosecution survives at law. In part, this explains the rise of defendant rights as a response to increased Crown prosecutorial power. Changes to the nature of feudal policing complete this picture. Much like the initiation process, the power of policing was originally possessed by the victim. Through the rise of various offices of constable, the parish constable and justice of the peace, this power was transferred to the Crown. However, the power of arrest survives today in terms of both the individual and the orthodox common law power of the victim upon which state police currently rely.

The relocation of punitive power to the state accompanied this wider shift to centralised governance. With the rise of the King's peace, and following the Assize of 1166, Crown institutions began to subsume the punitive role of the victim. Distinct from the power of prosecution and policing, plenary punitive power was formally extinguished with the abolition of the private settlement. This was commensurate with the rise of Crown institutions for the punishment of offenders. The Crown exercised its prerogative over the punitive process to the extent to which its institutional capacity would allow. In the late eighteenth century, the rise of scientific positivism removed almost all reference to the victim by conceptualising criminal deviance in terms of an offender's lack of genetic integrity.

The consolidation of criminal law and justice under the state was a consequence, then, of the initial movement of criminal legal power from the victim self to the Crown. This was demonstrated in a variety

of contexts, such that the victim was linked to certain developments akin to the rise of the rudiments of the social. These included the rise of the offence of treason; parliamentary sovereignty; substantive distinctions in homicide and assault; larceny; inchoate offences; defendant's rights and court procedure; order offences; the decline of the jury and the rise of summary jurisdiction; and the continued prominence of private prosecution. It is acknowledged that following these developments, the victim was left with a paucity of those powers held on Norman Conquest. However, this affirms the source of state power as residing in the victim. As criminal law came to be defined in the social interest, victim powers were adapted to meet the new needs of an expanding civil society. Though victims were increasingly disempowered from around 1600, their orthodoxy was transferred to state institutions seeking to use those powers to protect the social. Enmeshed with the bourgeoning needs of the community, victim power provided for the rise of various areas of criminal law that now tends to be assigned to the domain of the state as an inherent source of control.

The response to the removal of the victim can be found in the victim rights movement. The transfer of victim power to the state spawned several grassroots movements into the 1970s seeking to relocate the victim back into criminal justice. Responding to different factors, victim movements generally seek to include the victim by critiquing the dominance of the state. This dominance is evidenced in terms of the state's monopolisation of prosecutorial and punitive processes. Of the organisations identified, VOCAL seeks to influence the common law rights of the victim, critiquing the ODPP and state in its exclusive control of the criminal trial process, demonstrating how such organisations seek a more empowered role for the victim consistent with earlier practice.

The relocation of the victim in common law and statute thus results from the gradual removal of the victim from the context of the criminal trial and the reaction of the victim rights movement to this exclusion in the 1970s. This relocation is demonstrated, firstly, through the rise of statutory powers exercisable at common law, and secondly, through the rise of a statutory or administrative space for victims in the form of criminal injuries compensation. Although this relocation does not include the victim consistent with their orthodoxy, certain traditional powers have been preserved. As indicated, the victim's ability to inform the courts of an offence as the precursor for a private prosecution continues at common law. Others, such as victim impact

statements, apprehended violence orders, the revision of the defendant's due process rights, and the mitigation of culpability, suggest the inclusion of the victim as a relevant agent of criminal justice. The proposed reform of the principles of double jeopardy indicates that the victim does indeed exert influence, albeit indirectly, over the development of criminal law and procedure. The creation of an administrative arena in the form of criminal injuries compensation suggests, however, the relocation of the victim to an alternate jurisdiction away from the criminal law. This jurisdiction, which can be of significant assistance to victims following an offence, seeks to award compensation much like that of bot in feudal law. However, criminal injuries compensation seeks to direct victim interests away from the criminal courts. This is consistent with the institution of victim power under the state. For want of the double exercise of prosecutorial power, an administrative jurisdiction is offered to ensure that the ODPP maintains its control over the criminal jurisdiction. This brings in the terms of Christie's (1977) thesis as to the ownership of crime.

Victim rights, and the partial relocation of the victim in various areas of common law and statute, establish the victim as a threat to the power of the state. This threat is constituted by the fact that all state power over criminal law, even that created or modified by statute, originates from the power of the victim to apprehend, prosecute and punish felons. This tension is evidenced where the relocation of the victim has sought to return victim power to the victim subject, despite the control of criminal law and justice having moved to various institutions of the state. This tension establishes the primacy of the victim as a significant agent of power explaining the genesis of criminal law and justice.

Themes revisited: criminal law and the state

The central assumption challenged herein is the notion that criminal law and justice is a manifestation of state power alone. Before reviewing the way this challenge has been mounted, it is convenient to retrace how legal, criminological and other theorists have articulated this assumption.

Chapter 1 outlined the notion that various literatures identify the state as the centralised source of power and control. Effectively, this led to the assumption that criminal law and justice, as a jurisdiction advocating the social interest, flows from the power of the state as the guardian of the social. This provides the basis from which most non-state related

interests could be excluded from the criminal law, especially those of the victim. This chapter identified these assumptions across various literatures, including that of Offe (1984, 1985, 1996: 61–71) and Elias (1982a, 1982b), case law (*The Queen v Carroll* (2002) 213 CLR 635), legal theory (Bourdieu, 1987), literature tracing the decline of feudalism and the emergence of the state (Bloch, 1964; Anderson, 1988; Airies, 1989), criminology (Davies *et al*., 2003; Shapland, 1984, 1986a, 1986b; Davis *et al*., 1990; Wright, 1991; Shapland and Bell, 1998), and other sociological perspectives (Damaška, 1986: 8–15; Smart, 1983; Pike, 1968). The chapter also made brief reference to the way the governmentality literature seeks to critique this assumption (Dean, 1999; Garland, 1981, 1996). Discussed in the next section, the state is constituted in these literatures as a sovereign institution, legitimate and autonomous in its own right. Its independence is such that it is accorded an intrinsic value. Here, the state emerges as a natural entity constitutive of society and social relations.

As victim power was transferred to the state, criminal law and justice came to be seen as a manifestation of the will of the state. The state was thus identified as possessing or owning the criminal law. This is appropriately demonstrated by the High Court in *Pearce v The Queen* (1998) 194 CLR 610 at 622-623. Here, McHugh, Hayne and Callinan J.J. quote a lecture by Sir John Barry who considers the criminal law an instrument of social control, the power of which is exclusively derived from the state. Their Honours quote:

> Dr Leon Radzinowicz has rightly observed that the criminal law is fundamentally 'but a social instrument wielded under the authority of the State to secure collective and individual protection against crime'. It is a social instrument whose character is determined by its practical purposes and its practical limitations. It has to employ methods which are, in important respects, rough and ready, and in the nature of things it cannot take fully into account mere individual limitations and the philosophical considerations involved in the theory of moral, as distinct from legal, responsibility. It must be operated within society as a going concern. To achieve even a minimal degree of effectiveness, it should avoid excessive subtleties and refinements. It must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right

> and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime.

This excerpt encapsulates the assumption that criminal law and procedure is a product of state rule, for the exclusive control of the social interest. It is seen as a social instrument, appropriately constituted by, and controlled within, the bounds of state power. Following the literature in Chapter 1, it can be assumed that state power is seen as inherent to the exclusion of all other interests. It is this assumption that ignores the fact that the victim has been vital to the constitution of criminal law and justice over time.

The governmentalisation of criminal law: the victim, the state and decentralised justice

The transfer of victim power to the Crown and institutions of the state occurred incrementally. This means that the genesis and development of criminal law was not systematic, consistent, nor linear. Instead, victim power was subsumed by the Crown discursively, by the relocation of the victim as either relevant or less relevant to the justice process. As common law change occurs in terms of precedent, the development of criminal law is inherently fragmented – responsive to the particular facts of each action. The transfer of victim power to various institutions over 800 years argues for the reconceptualisation of the development of criminal law and justice as a process of governmental change. This process is inherently decentred, responsive to particular developments at particular times. Rather than the centralisation of power under a sovereign state, criminal law developed through the individual transfer of victim power to the Crown. An example of this is the transfer of the victim's right to the body of the offender to the King in the late twelfth century. This resulted in the abolition of private settlement, for the rise of imprisonment within the King's prisons. Clearly, some powers were never transferred, such as the power to inform a court of an offence and initiate a private prosecution. The notion that the state monopolises criminal law is therefore weakened by the genealogy of the victim as a governmental agent of change.

This leads to the further conclusion that criminal law and justice is decentralised around several related interests. These include those of

the victim, the offender, the Crown, the social and the institutions of the state. However, the constitutive elements of criminal law and justice flow from the source of criminal legal power: the victim. This fragmented development is what leads to the conclusion that criminal law and justice can be better understood as a genealogical process inclusive of the victim. Further, this is what leads to the suggestion that *a priori* victims are far from silent or disempowered. Instead, victims are causative agents of criminal law. Criminal law thus needs to be reconceptualised as moving from the power of the victim.

The governmentality literature has shown that there is nothing innate about the state. Instead, it is situated as constituting and managing social relations. This leads to the perception that the state is independent of the society that it seeks to regulate. Donzelot (1991: 173) suggests that this is what supports the assumption that the state is autonomous:

> The concept of solidarity makes it possible to arrive at a situation where the state itself is no longer at stake in social relations, but stands outside them and becomes guarantor of progress.

The social emerged as the appropriate arena of government concomitant with the rise of state institutions for the management of civil society. Here, the common law came to reflect the social as the basis of criminal law and procedure. The old vestiges of victim centred power were marginalised, as the social interest became the basis upon which criminal law was rationalised. As the common law began to adopt the values of the sovereign state, criminal offences came to be seen as an affront to the stability and security of social relations. By this time, the common law was identified in terms of its maintenance of state interests. This is established in constitutional theory where the judicature came to be defined as one of three powers. Together, the judicature, legislature and executive came to be seen as the rudiments of the state. As such, the individual was displaced as the principal regulatory agent of law for the social. Pasquino (1991: 241) suggests how law came to be seen as a codification of the rules of social functioning over the expression of the will of each subject:

> In this perspective, it is society, not law or sovereignty, which is seen as being attacked or endangered by crime, or rather the criminal. The question is whether it is law which is primordial for society – in the sense of being the immediate expression of the

> will of every subject – or whether law is no more than the secondary and variable codification of the rules of social functioning.

The rise of the state displaced the primacy of the individual victim. Thus, modern criminal law excludes those interests not applicable to the minimisation of risks to the social. However, the genealogy of the victim shows that the rise of the social interest was shaped and informed by those powers available to the victim in feudal law. This was a natural consequence of the rise of the state from the slow and gradual assemblage of institutional structures once constituted exclusively by the victim. Thus, the genesis of criminal law and justice as a state enterprise was necessarily based on the earlier powers of the victim. The state formed out of the separation of Crown institutions from the immediacy of the King, which in turn was based on the power of the victim.

The victim therefore informs the basis of criminal law and procedure despite being removed as its principal administrative agent. The powers upon which the modern criminal law functions are therefore those originally possessed by the victim. As the state cannot be viewed as separate from those individuals and powers that constitute it, neither can the criminal law that seeks to secure its fundamental tenets. Foucault (1982: 213) indicates that the state is constituted by 'complex and circular relations with other forms'. This is because the state is a manifestation of power relations. The notion that the state acts independently of the individual, securing the interests of the social, is what provides for the contemporary criminal legal focus on the social interest. However, it is the way the state, its subjects and institutions, are constituted in terms of power that provides for the centrality of the victim in criminal law. The basis of state power thus resides in the individual, or subject. Foucault (1982: 213) suggests that this aetiology allows for the challenge of state power on a subjective basis:

> The reason this kind of struggle tends to prevail in our society is due to the fact that since the sixteenth century, a new political forum of power has been continuously developing. This new political structure, as everybody knows, is the state. But most of the time, the state is envisioned as a kind of political power which ignores individuals, looking only at the interests of the totality or, should I say, of a class or group among the citizens.

The formation of the state, and the institutions which constitute it, thus derive from the subjective power of each individual. Here, it is

true that the individual ceases to hold plenary control of their subjective power once it is transferred to the state. The modern victim cannot, consequently, take over a prosecution initiated by the ODPP as the control of that power has been instituted elsewhere. In terms of the administration of criminal justice this is the executive, via the power of the legislature. However, it is the discursive placement of subjective power in an institutional setting that provides for the conclusion that criminal law and justice flows from the victim. As demonstrated in the previous chapter, this enables the victim to challenge the state in its monopolisation of criminal justice, as the powers that constitute criminal law are inherently subjective. The constitution of criminal law and justice consequently resides in the victim, consistent with Foucault's (1982: 214) analysis of the modern state as flowing from individual power:

> I don't think that we should consider the 'modern state' as an entity which was developed above individuals, ignoring what they are and even their very existence, but on the contrary as a very sophisticated structure, in which individuals can be integrated, under one condition: that this individuality would be shaped in a new form, and submitted to a set of very specific patterns.
>
> In a way, we can see the state as a modern matrix of individualization, or a new form of pastoral power.

The last section traced the genealogical development of the victim as discussed in this text. In brief, this traced the discursive relocation of the victim away from the control of criminal law and procedure for the rise of the Crown and state. While the function of criminal law has changed to secure the social interest, the powers rationalising the prosecutorial and punitive process derive from the orthodoxy of the victim. These powers are firmly located in the victim subject.

The governmentality literature, informed by the earlier work of Foucault, provides the analytic through which the state monopolisation of criminal law and justice can be critiqued. As Foucault (1982) indicates, the modern state is not something above the individual. Instead, it is an institution constituted by the transfer of power. This power resides in the subject such that it can never be completely subsumed by the state. This is consistent with Offe's (1996: 63) observations of the politics of the state in later modernity, that '[t]he affairs that are to be regulated can only be dealt with if the state *cooperates*

with the addressees of the state's orders'. Indeed, Foucault (1982) founds the notion that to conceive of the sovereign or state as the locus of power is to subscribe to error. Following this argument, the genealogy of the victim in the constitution of criminal law and justice reveals the victim as a subject of inherent power. At common law, this means that like the King himself, the victim also possesses inherent common law power. Just as the power of the King can be transferred to the parliament, victim power can be transferred to various institutional forms. Governmentality has highlighted several mentalities of rule that have supported the relocation of victim power to the state. The transfer of subjective power was thus legitimated by the rise of sovereign, social and associated mentalities of rule. Within this analysis, the victim is established as a significant agent of power and change constitutive of criminal law and justice.

The future of victim relations: consequences for legal theory and practice

The genealogy of the victim encourages the reconceptualisation of criminal law and procedure in legal theory and practice. The victim has been shown to be a subject of considerable power. In his analytics of power, Foucault (1976) considered that power could be restrictive and productive. For Foucault (1977), power is not just something that can inhibit, it can lead to the production of new areas of meaning and ways of being. Foucault (1977: 194) suggests:

> We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth.

Possessing inherent power at common law, the victim is thus in a position to produce, as Foucault puts it, new 'rituals of truth'. This means that by challenging the monopolisation of power by the state, victims can emphasise the significance of their subjectivity in the administration of criminal justice. While the management of prosecution and punishment by the police, ODPP and corrective justice are indeed necessary aspects of the modern regulation of crime, the victim is able to utilise their power to create new areas of meaning through which their interests can be inserted. This is already occurring, albeit incompletely to some, in terms of victim impact statements, victim-offender media-

tion, reparation, and sentencing legislation directing sentencing courts to consider the harm done to the victim. Indeed, the basis of the victim rights movement flows from the notion that victims possess a connection with criminal justice not dissolvable by the state. Constituted as an agent of power, the victim thus possesses the ability to effect social change. Moreover, because of this power, the victim is an agent that cannot be silenced. The victim will continue to influence and augment criminal law and justice, as they are involved in an innate relationship with the criminal form.

This may lead to the repositioning of the significance of the victim in justice studies on various levels. This may include the redefinition of the power of the victim in criminal law and procedure, and criminology. Victim genealogy has firmly connected the power of the victim with modes of prosecutorial initiation, arguing that the orthodox power that centred the victim in feudal law continues to influence the development of criminal justice today. Through the articulation of the connection of the victim with the rise of the police, the ODPP, criminal procedure, defendant rights, the law of evidence, criminal injuries compensation and other modern developments, the victim should be re-emphasised as pivotal to the shaping of criminal law and procedure more generally. Indeed, as the influence of the victim is an ongoing process, the victim needs to be conceptualised as a key influential power in the development of criminal law whether that be historically, or in the future reform of criminal law and justice.

Though modern criminal law needs to be conceptualised in terms of the social interest, an understanding of the genesis of criminal law and procedure will add to the appreciation of its development. In particular, by examining the critical role of the victim, students, practitioners and scholars of law will be able to gain an appreciation of the fluidity of criminal law as a jurisdiction responsive to discourses of power and change.

Various areas of the history of the victim require further analysis in the context of the arguments articulated herein. Specifically, these include the array of new programs seeking to relocate the victim in common law and statute. This will provide the opportunity to affect directions for future policy development focusing victim experience at common law. While victim genealogy does not seek to challenge the centrality of the social interest as the principal rationale of modern criminal law, new programs need to be developed consistent with the realisation that the victim is an agent of the criminal process.

A heightened sensitivity towards the treatment of private interests through a critical assessment of the power and authority of the state as the inherent constitutive force behind the expression of social interests encourages the recognition of important rights of agency. The legislative amendment of the common law and the enactment of executive institutions seeking to relocate the victim should thus encourage the discussion of the victim not as some subject of welfare assistance, as a mere subjectivity of diverse politics, but as a significant constitutive agent of the justice system. As is the case with victim impact statements, criminal injuries compensation and court ordered restitution, the victim is now subject to diverse modes of government historically dealt with within the one forum – the criminal trial. The genealogy of the victim can be used to understand the adaptive role of the victim for the further development of criminal justice programs to meet victim needs. Following this, boarder discussions of victim genealogy should encourage more complete understandings as to how the criminal law develops in an inherently decentralised way, inclusive of the victim.

Notes

1 Bateup (1999: 103) argues that 'Not only is power present at all points in society, but power that operates according to techniques of governmental rationality clearly exists outside the sphere of traditional state regulation, such that the population is effectively regulated and disciplined by numerous institutions throughout society.' Also see Hunt and Wickham (1994: 117–20). See Ericson and Carriere (1994) as to the criminological response to this diversification.
2 Including *inter alia* the courts, the legal profession, the police, the ODPP, and corrective services.
3 The definition of the criminal appeal in twelfth century English law differs from the concept of appeal used today. An appeal was a mode of private prosecution brought against a felon, initiated by the victim or an immediate member of their family, who witnessed the crime. The appeal was enacted pursuant to the Assize of Clarendon of 1166.
4 Originally the blood feud, or the attachment of land, then bot and wite as pecuniary remedies.
5 Civil in character because the wrong could not be remedied by any of the traditional punishments now absorbed into the emerging criminal jurisdiction (circa 1250s). Instead, civil trespass was actionable in common pleas by writ, the most common remedy being pecuniary damages.
6 Mainly property ones, such as those involving damage to chattels or land, or trespass to the person, which in the latter seventeenth century came to be actioned primarily as torts.
7 The dependency of the victim on the ODPP or state is appropriately demonstrated in the charge bargaining process in *Regina v AEM Snr; Regina v KEM; Regina v MM* [2002] NSWCCA 58. Here, plea bargaining was said to contravene the will of the victims; the ODPP offering a lesser charge without their consultation or consent. In this situation, the victim was dependant on the good intentions of the ODPP as an independent prosecuting authority. See guideline 20, ODPP (NSW) Prosecution Guidelines.
8 Strain theory is best conceptualised in terms of the work of Durkheim (1952), which asserts that crime and deviance results from a malfunctioning social order. This school is effectively silent on the role of the victim.
9 The governmentality literature comprises those works flowing from Foucault's lecture 'Governmentality', delivered at the Collège de France in 1978.
10 Burchell's (1996) notion of diverse government helps explicate the various epochs of victim rule. Burchell (1996: 19) argues that 'There may also be interconnections and continuities between these different forms of government and, in particular, between *local and diverse forms of government existing at the level of interpersonal relations or institutions dispersed throughout society on the one hand, and political government as the exercise of a central, unified form of State sovereignty on the other*, or between forms of

government existing within micro-settings like the family or the school and the macropolitical activities of government directed towards individuals as members of a population, society or nation.' (emphasis added).

11 *Gouriet v Union of Post Office Workers* [1978] AC 435 per Lord Wilberforce at 477. Though rarely instituted by an individual today, private prosecution remains significant as it forms the basis upon which police and Crown prosecutions are initiated.

12 From the late twelfth century, the King's royal justices linked central and local government. Royal justices were appointed to travel to each county, empowered by temporary commissions to hear certain types of cases at a particular time. There were four main commissions. These were, the commissions of eyre, empowering the commissioners to hold their sessions (Holdsworth, 1903–38, 1: 276, 281–3); commissions of *nisi prius*, giving royal justices jurisdiction over most civil matters, and over criminal cases removed before judgement from other courts (Holdsworth, 1903–38, 1: 281–3; 2: 300); commissions of oyer and terminer, empowering the royal justices to 'hear and determine' all criminal matters (Holdsworth, 1903–38, 1: 274, 277, 551, 639); and commissions of gaol delivery, empowering the royal justices to try all prisoners committed to gaol (Holdsworth, 1903–38, 1: 274, 277; 2: 389). By the end of the thirteenth century, the same judges generally held all commissions.

13 Mayhem was the infliction of a disabling but non-lethal injury.

14 The prerogative writs were issued from superior courts to inferior courts or officials to prevent them from exceeding their powers, compelling them to exercise their powers and to assure all persons the full measure of justice. The writs were *habeas corpus*, *certiorari*, *prohibition*, *mandamus*, *quo warranto*, *ne exeat regno* or *ne exeat colonia*, and *procedendo*.

15 The Assizes of 1166 and 1177 imposed the King's justice on each hundred to standardise the law and to centralise the administration of justice across all England. It was at this point that the King's Bench began to take on a role as a superior criminal court.

16 Greenberg (1984: 83) suggests that initially, the notion of the King's peace was limited spatially and temporally. Thus, the King's peace was limited to the King's messengers, King's highways and to all persons during religious holidays, rather than to every Crown subject at all times. By the reign of King Henry II, the onus to keep the King's peace fell on every subject.

17 The Assize of Clarendon 1166 firmly established a criminal procedure for the hearing of appeals on eyre. The declaration read, '[a]nd when a robber or murderer or thief or the receivers of them be arrested through the aforesaid oath, if the justices are not to come quite soon into the county where the arrests have been made, let the sheriffs send word by some intelligent man to one of the nearer justices that such men have been taken; and the justices shall send back word to the sheriffs where they wish to have the men brought before them; and the sheriffs shall bring them before the justices; and also they shall bring with them from the hundred and the vill where the arrests have been made two lawful men to carry the record of the county and hundred as to why the men were arrested, and there before the justices let them make their law.' Herewith, justices became more than presiding officers. Instead, the King's royal justices both attended on the case

and rendered the judgement. Moreover, this Assize established that there should be a small nucleus of judges to specialise in hearing cases, whether at Westminster or on circuit on eyre.

18 The Assize of Northampton 1177 instituted the assize of mort d'ancestor. It essentially established the common law (initiated by writ and legal action flowing from writ). The writ of right was provided originally for certain actions. The use of the writ in the initiating process was gradually expanded however, to all actions other than criminal informations or indictments. Generally, this enactment provided broad access to the court of King's Bench. By 1180, many cases were initiated in the King's Bench. From here, the King instituted the grand assize of *nisi prius*, commensurate with the increase in the number of writs being sought authorising the King's Bench to hear cases.

19 The coroner was the royal official charged with preserving the King's fiscal rights and supervising the local administration of criminal justice.

20 See Spencer (1982: 262). Appeals to the King's Bench lay only for error on the face of the record, initiated by writ of error. Appeals were thus only possible in limited circumstances until the Court of Appeal was established in 1907 by the *Criminal Appeal Act 1907* UK.

21 Approver's appeals were permitted as certain felonies were committed in the company of other felons, thus enabling the criminal information to initiate the appeal.

22 Although a writ of trespass was available from the thirteenth century, trespass could still be brought as a criminal appeal subject the additional charge of a breach to the King's peace.

23 See Baker (1990: 34) 'At intervals a commission of the peace was drawn up for each county, listing the substantial knights and gentry of the area and taking care to include the *sages et apris de la leye*, charging them both to keep the peace and to enquire into, hear and determine a long list of crimes, ranging from felonies to economic offences and sorcery. The first of these "charges" imposed an individual police responsibility on each justice; justices could arrest suspects and commit them to gaol, and could require anyone to give surety for keeping the peace… The second was in effect a general commission of oyer and terminer to any two or more of the justices (with a "quorum" of lawyers), and empowered the justices collectively to hold their sessions of the peace. Directed by statute to be held at four seasons (Michaelmas, Epiphany, Easter and the Translation of St Thomas), these were known as the general quarter sessions of the peace.'.

24 These include certain provisions under the *Theft Act 1968* UK, *Suicide Act 1961* UK, *Intercept of Communications Act 1985* UK, *Local Government Act 1972* UK.

25 Prior to the enactment of the *Director of Public Prosecutions Act 1986* NSW, the Attorney-General was the principal prosecuting power, assisted by the Solicitor-General of NSW: *Commonwealth Life Assurance Society Ltd v Smith* (1938) 59 CLR 556 at 543. Indictments may be signed by the Attorney-General, or for or on behalf of the Attorney-General, by a Crown Prosecutor or any other authorised person: *Criminal Procedure Act 1986 NSW* s50. The Attorney-General's common law powers to prosecute cannot be delegated to other ministers: *Constitution Act 1902* NSW s36. The Attorney-General

now works in conjunction with the Director of Public Prosecutions, who undertakes nearly all prosecutions.

26 The prosecution of crime in the nineteenth century became increasingly complex and burdensome for the victim. This was because criminal intent or *mens rea* required for common law offences varied widely. Some require specific intent, some either specific intent or recklessness as to the consequences of an act, while others required strict or absolute liability, requiring performance of the conduct element only.

27 See the *Director of Public Prosecutions Act 1983* Cth; *Director of Public Prosecutions Act 1986* NSW; *Public Prosecutions Act 1994* Vic; *Director of Public Prosecutions Act 1984* Qld; *Director of Public Prosecutions Act 1990* ACT; *Director of Public Prosecutions Act 1999* NT; *Director of Public Prosecutions Act 1991* SA; *Director of Public Prosecutions Act 1973* Tas; *Director of Public Prosecutions Act 1991* WA.

28 See *Regina v AEM Snr; Regina v KEM; Regina v MM* [2002] NSWCCA 58. The facts of the case are these: The accused accosted two 16-year-old girls from a railway station to a house and sexually assaulted them over several hours. The accused pleaded guilty in the District Court to aggravated sexual assault and related charges. They were sentenced to imprisonment for periods of 6 years (AEM and MM), and 5 years and 7 months (KEM).The Crown appealed against the inadequacy of the sentences. The Court of Criminal Appeal allowed the Crown appeals and the sentences were increased.

29 The Attorney-General, Hon the Attorney-General Bob Debus, MP, delivered the following address, 'There must be a recognition that sexual assaults by more than one person on a victim are cowardly and extreme examples of persons seeking power and gratification. The worst cases of these types of sexual assault are deserving of the maximum sentence able to be imposed by our society… the penalty for the new offence, contained in proposed section 61JA(1), will be severe, that is, imprisonment for life… The penalty of life will not only act as a general deterrent to potential offenders, but satisfy the sentencing principles of retribution and denunciation, which are particularly important in these types of crimes.'. See Hansard, 52nd Parliament of NSW. *Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001,* p. 16319.

30 See *Crimes (Sentencing Procedure) Amendment (Victims' Rights and Plea Bargaining) Bill 2002* NSW. This Bill, presented by the NSW Liberal/National Coalition, sought to amend the *Crimes (Sentencing Procedure) Act 1999* NSW by providing the ODPP with a duty to consult the victim or their family before a plea bargain is arranged, and to give the victim a statutory right to forward a statement to the prosecutor, including a right to consult counsel, before a decision is made as to plea bargaining. This Bill has now lapsed.

31 Passed into law as the *Trials for Felony Act 1836* UK. See Mason C.J. and McHugh J.'s discussion of the prisoner's right to counsel in *Dietrich v The Queen* (1992) 177 CLR 292. Their Honours held that 'It is little more than one hundred and fifty years since legislation was enacted to provide that all accused persons be permitted to be represented by counsel… The principal reform effected by the 1836 Act was that it enabled all persons tried for felonies "after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law" (s.1); it was already

common practice for counsel for the defence to be permitted to stand by the accused at the bar and to cross-examine witnesses on his or her behalf (Blackstone, *Commentaries*, 1st edn. (1769), vol. 4, pp 349–50).'

32 The common law presumption of *doli incapax* has been abolished in England: *Crime and Disorder Act 1998* UK s34.

33 To a certain extent, each state legislates policing power in their respective crimes legislation. See the *Law Enforcement (Powers and Responsibilities) Act 2002* NSW. This Act establishes a statutory code for the power of police though not to the exclusion of the common law powers of the constable. See s4.

34 Prior to this the Assize of 1166 required that villagers were to report to the sheriff any suspicious conduct harboured on another, together with any other matters affecting the district.

35 In 1944, Home Secretary Morrison set up a committee to discuss the post-war reconstruction of the police service in preparation for the suspected problems of policing a post-war society. Four reports were produced, which formed the basis for the *Police Act 1946* UK. This Act sought to further consolidate the police force and in particular, the special constabulary (Rawlings, 1999; Weiss, 1999). Additionally, all existing non-county borough forces, with the exception of Peterborough, were amalgamated with their county force. This reduced the overall number of provincial forces to 44 in 1969 (Rawlings, 1999).

36 See *R v Brown* (1841) 174 ER 522; *R v Ryan* (1890) 11 LR (NSW) L 171 as to the continuity of the individuals power to apprehend offenders of the peace. Also see *Christie v Leachinsky* [1947] AC 573 per Lord Simonds at 595, 'My Lords, the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other. This case will have served a useful purpose if it enables your Lordships once more to proclaim that a man is not to be deprived of his liberty except in due course and process of law'.

37 See *Criminal Procedure Act 1986* NSW Sch 1, tables 1 and 2. In 1981, the Lusher Royal Commission recommended that the Police Prosecutions Branch be abolished: *Report of the Commission to Inquire into New South Wales Police Administration*, Commissioner Mr Justice Lusher, July 1981, p. 255.

38 Various issues come into play here, including the apprehension most individuals would feel towards bringing a common law prosecution themselves, or in spending money on a lawyer where no private remedy is guaranteed. But for the police, therefore, many crimes would go unprosecuted.

39 Although certain jurisdictions have legislated for the power to inform a court of an offence, this has not been to the decline of the individual's power of private prosecution. Thus, unless parliament has modified the common law, police and individuals exercise the same power of information.

40 *Crimes Act 1900* NSW s352: Person in act of committing or having committed offence (1) Any constable or other person may without warrant apprehend (a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act, (b) any person who has committed a serious indictable offence for which the person has not been tried, and take the

person, and any property found upon the person, before an authorised Justice to be dealt with according to law. In Victoria, this privilege has been substantively abolished from the common law: *Crimes Act 1958* Vic s457 (also see *Crimes (Powers of Arrest) Act 1972* Vic).

41 Though the victim had discretionary power to enact various forms of punishment, or commute such punishment to lesser forms, such discretion was largely guided by precedent and social custom. Thus, the victim would be under enormous social pressure to enact that punishment which had become associated with the crime. This use of social custom carried through until punishments came to be codified by the King. Accordingly, discretion is defined here in terms of the attitude of the law rather than that of the community.

42 Contracts negating the interests of public policy are invalid. For example, where a prosecution is private, it is contrary to public policy for a contract to be made to stifle or withdraw the prosecution, because of the interest of the public in the prosecution of criminals: *Callaghan v O'Sullivan* [1925] VLR 664; *Clegg v Wilson* (1932) 49 WN (NSW) 46; *Public Service Employees Credit Union Co-op Ltd v Campion* (1984) 75 FLR 131.

43 Recent reforms urge the consideration of victim interests in the sentencing process. However, these generally remain discretionary and peripheral to the objects of social control and conditioning. See *Crimes (Sentencing Procedure) Act 1999* NSW s3A. Also see s21A.

44 This is at least true of the nobility, but may be less representative of the power of serfs for their position in the feudal hierarchy.

45 Defined in the context of victim history, the social contract binding all individuals to social causes was informed by feudal order. Thus, it was not so much a matter of free individuals entering into compact, but of Crown subjects shifting their allegiance from the King himself to the state as the King became more of a figure than agent of power.

46 In *R v Rowe* (1991) 53 A Crim R 196 at 201, Wallace J. remarks 'Public concern about a crime must never be allowed to bring about departure by the courts from the fundamental concepts of justice and mercy which should animate the criminal tribunals of civilised nations: *Yardley v Betts* (1979) 22 SASR 108 at 112-113. Whilst protection of the public against the commission of crimes of violence must remain of paramount concern, if it is possible, consistent therewith, for a court to be compassionate and assist in the rehabilitation of a human being so as to avoid destroying his life, then the courts ought surely to do so: *Webb v O'Sullivan* [1952] SASR 65 at 66. Mercy to the individual offender is thus not inconsistent with the recognition of the seriousness of an offence: *Scott v Cameron* (1980) 26 SASR 321 at 324.'.

47 Holdsworth (1903–38, 8: 331) states that '[t]he development of the law of treason during this period, and of offences cognate thereto, represents the contribution made by the common law to the maintenance of the authority of the state and its law.'.

48 See the *Appeals of Murder Act 1819* UK; *Criminal Law Act 1827* UK; *Prisoner Counsel Act 1836* UK; *Assize Act 1839* UK; *Quarter Sessions Act 1842* UK; *Fatal Accidents Act 1846* UK; *Indictable Offences Act 1848* UK; *Summary Jurisdiction Act 1848, 1879* UK; *Crown Cases Act 1848* UK; *Common Law Procedure Act*

1852, 1854, 1860 UK; *Judicature Act 1873* UK; *Appellate Jurisdiction Act 1876* UK; *County Courts Act 1888* UK.

49 A common scold is defined as a troublesome and angry woman who by brawling and wrangling amongst her neighbours breaks the public peace, increases discord and becomes a public nuisance to the neighbourhood. Frequently, it was a disgruntled husband bringing his wife to court.

50 See *Wilson v The Queen* (1992) 174 CLR 313 per Mason C.J., Toohey, Gaudron and McHugh J.J. at par 13: 'The earliest reported verdict of manslaughter was recorded in *Salisbury's Case* (1553) 1 Plowd 100 (75 ER 158) where co-conspirators, intending to ambush and kill Ellis, by mistake killed his servant. John Salisbury, a servant of one of the conspirators, having no part in the conspiracy, joined the affray and wounded the deceased.'.

51 See *Wilson v The Queen* (1992) 174 CLR 313 per Mason C.J., Toohey, Gaudron and McHugh J.J. at par 12: 'By the thirteenth century, a charge of homicide arising from an accidental death could be met by the plea of per infortunium or misadventure. Together with homicide committed in self-defence, this formed the category of excusable homicide. A finding of excusable homicide did not result in acquittal. Rather, the defendant could seek a royal pardon (subject to the possibility of the victim's relatives bringing a private prosecution), which issued as a matter of course in cases of misadventure. By the late fourteenth century, the judges frequently entered an acquittal without requiring that a royal pardon be secured, a trend reversed in the sixteenth and seventeenth centuries.... The excuses of accident, self-preservation and insanity marked the beginning of the move to bring homicide back to the category of cases in which the offender had a fair opportunity of avoiding the death of the victim...'.

52 From 1554 to 1848, justices were required to gather information about criminal behaviour and examine the accused and other witnesses: *Grassby v The Queen* (1989) 168 CLR 1 at 11; see the statutes of Philip and Mary 1554 and 1555 (1 & 2 Philip & Mary c 13; 2 & 3 Philip & Mary c 10). This investigative role was carried out in the absence of an organised police force. The findings of the justice were presented to a grand jury. The role of the justice changed when an organised police force which could investigate such offences came into being. The role of the magistrate came to be to determine whether there was sufficient evidence to commit an accused person to trial, this change occurring from 1848 in England (*Indictable Offences Act 1848* UK (11 & 12 Vict c 42), and from 1850 in New South Wales (*Justices of the Peace (Adopting) Act 1850* NSW). The role of the grand jury, which was formally abolished in England in 1933 (*Administration of Justice (Miscellaneous Provisions) Act 1933* UK) was to receive reports from the justice and determine whether the accused should stand trial.

53 Today informations take the form of a charge, summons or court attendance notice. Generally, charges are brought by police in local courts. From here the case is dealt with, dismissed, or undertaken by the ODPP.

54 To this end Blackstone (1783, 4: 300) remarks 'indictments... are preferred in the name of the King, but at the suit of any private prosecutor'. Although prosecutions could still be brought in the name of the victim, or their kin, the law under which the victim would prosecute was well

orientated towards public ideals. Thus, the victim was limited in their ability to plead their case based on personal interests and issues. This was left for common pleas.

55 It is not usual that an individual victim may become an informant, as the police generally monopolise the charging of all suspects. In cases of a questionable assault, for example, where the police may determine that insufficient proof exists to lay a charge and initiate a prosecution, the victim may be permitted to become the informant. In this instance, it is the victim who would then carry the responsibility of conducting the prosecution and proving the case. This, however, would not limit the ODPP's statutory power to take over proceedings.

56 Compensation funds are a creature of twentieth century government, although adapting ideas of Bentham. Britain set up its program in 1964. New Zealand set up the first fund in 1963. Following the British model, several Australian states and the Canadian provinces set up their own programs (Karmen, 1992: 162). The United States interest in victim compensation grew out of the liberal political philosophy of the early 1960s, that governments should provide security and protection for societies' vulnerable elements, in part, its victims of crime.

57 Addressing the notion of the abolition of the ODPP for the return to private prosecution raised by VOCAL, the Hon Mr Connolly, ACT Parliament, Hansard, 13 March 1991, said 'the old legal concept of the victim taking the law into their own hands, either literally by exacting retribution themselves – "an eye for an eye" in biblical parlance – or legally by launching a private prosecution, has fallen into disuse, and that is a fortunate thing. The state prosecuting crime is certainly better than the victim prosecuting crime; but the problem with private prosecutions, of course, is that, while it is all very well if you are rich and powerful – you can hire lawyers to prosecute a matter – the ordinary citizens in England basically had little option of doing that and tended to remain victims without redress.'.

58 The United States Supreme Court upholds the right of the state to register sex offenders. See *Connecticut Department Of Public Safety and Ors v John Doe* (2003) 271 F 3d 38. This case questioned the mandatory registration of sex offenders under Connecticut's Megan's Law, allowing the publication of offender details to the wider community. Chief Justice Rehnquist held that 'even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders – currently dangerous or not – must be publicly disclosed. Unless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise.'.

59 And if not from the state, by the offender to remove the need for state intervention.

60 Flatman and Bagaric (2001: 238) argue that 'the victim is the central agent in [the criminal justice] process. He or she is the party most directly affected by the criminal act. The justification for a system of criminal liability, however, almost totally marginalises the role of the victim in the criminal justice system. On one view, the reason that the state conducts criminal proceedings is that criminal conduct is regarded as being so morally offen-

sive and socially and economically damaging that it is injurious to the entire community. On this basis, the victim is effectively relegated to mere witness status… The responsiveness of the criminal law towards victims, however, is slowly changing. This has occurred primarily as a result of grass roots victims' movements in the 1970s and 1980s which were sparked by concern that the balance in the criminal justice system was too heavily skewed in favour of the accused.'.

61 Also see Macpherson, Sir William (1999) *The Stephen Lawrence Inquiry*, Report of an Inquiry Advised by Cook, T., Sentamu, J. and Stone, R., presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty. The private prosecution of the Lawrence murder evidences the exercise of the same powers in *Wallace v Abbott*, where a prosecution was brought by the family of Lawrence after a 'bungled' investigation by the police and inaction of the CPS.

62 See Letter of the NZ Solicitor-General to the NZ Attorney-General 17 December 1997, cited in New Zealand Law Commission (2000: 96), 'Private prosecution has traditionally been a last resort for those victims or concerned citizens who believe the outcome of a criminal investigation should have been but is not a prosecution… private prosecution has emerged instead as a process that substitutes for the perceived lack of police resources to investigate prosecution of certain types of white collar crime. In my view the Police should look to addressing themselves the outcome of private criminal investigation with a view to deciding objectively whether or not they the Police should prosecute. If a police prosecution follows then it should be taken over on indictment by the Crown Solicitor with police assistance in the normal way. If no prosecution follows a private prosecution should be permitted. The Crown Solicitor would however, on my policy, not be involved in it. I believe it damaging to the system of Crown prosecution to allow those who undertake it to prosecute also some cases in a Solicitor/counsel/client relativity.'.

63 Criminal injuries compensation has been rationalised as flowing from the conduct of the offender. However, the state assumes ultimate responsibility for the welfare of victims as demonstrated by the paper, Home Office (1999) 'Compensation for Victims of Violent Crime: Possible Changes to the Criminal Injuries Compensation Scheme', Procedures and Victims Unit, Home Office UK. The Home Office (1999: 4) indicates that '[s]uccessive Governments have recognised that the public feel a sense of responsibility for, and sympathy with, the innocent victim of a violent crime. They have taken the view that it is right for those feelings to be given practical expression by the provision of a monetary award on behalf of the community. Under the common law scheme this meant that the victim has no reason to sue the offender in the civil courts, with all the risks and uncertainties inherent in such action. They could instead make a risk-free claim under the scheme in the sure knowledge that a successful claim would be paid.'.

64 Hunt and Wickham (1994: 113) argue that 'All instances of law as governance are social in the traditional sense, though not in the Foucaultian sense. It will be remembered that the objects of law as governance are always-already known through governance. In this way, law as governance is always social. In any instances of law as governance, the objects

and techniques are made available by society, they are always-already available. Whether it is a child custody dispute being governed by law or an oil spill, this is the case. Both the child custody dispute and the oil spill are always-already available to the actors involved, they are socially available objects, they have no existence beyond society. Whatever techniques of law are applied to these instances – conciliation, restraining orders, negotiation, prosecution – they are always-already available, they are socially available techniques, they have no existence beyond society'.

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