

Disclosure to Unknowing Victims in Criminal Justice Investigations: Questions of Vulnerability, Ethics and Practice

Introduction

In some cases, criminal justice agents identify a victim of a crime in an investigation, but it is not known whether the victim is aware of the crime committed against them. Whilst this is not the usual context in which criminal justice investigations occur, certain crimes can be perpetrated without the victim's awareness and this lack of awareness may remain even after the crime's occurrence. Consider, for example, a victim of a sexual assault that occurs whilst they are unconscious, or an online fraud perpetrated without the victim's awareness. The occurrence of such crimes and the victim's identity may be established through video or photographic evidence, or other evidence obtained during an investigation by law enforcement officers (LEOs), the agents who are the focus of this paper. One of the next logical investigative steps is for LEOs to make contact with the victim. Conducting an interview with the victim could be desirable to attain further details and evidence of the crime, to ensure that victim support services are in place and that the victim has access to other service rights under the Victims' Code (Ministry of Justice, 2020). Moreover, if the victim is a child, the priority will be their safety, with the requisite need for a s.47 Child Protection Act 1989 visit. However, initial contact with the victim, whether they be an adult or a child, may reveal that they remain unaware of the crime, meaning that it is a disclosure by the LEOs that brings about this knowledge.

Unknowing victims stand on a boundary between unawareness and cognizance of their status as victims of crime. They therefore possess a vulnerability, because discovering the crime committed against them and their victim status is highly likely to have harmful effects; the

shock of disclosure exposes unknowing victims to harms of the crime that they have not yet experienced. Whilst knowing victims may be vulnerable in various respects (Williams *et al.*, 2009), this unique vulnerability possessed by unknowing victims raises important considerations for LEOs. We argue that, where LEOs have evidence of a crime and a victim but they remain unaware of the victim's knowledge of the crime, this should be perceived as a clue to potential vulnerability, because subsequent disclosure of the crime to an unknowing victim exposes them to the risk of harm, thereby raising significant ethical questions. However, to our knowledge, the ethical ramifications of disclosure have yet to be considered in the policing literature and there is a lack of specific professional guidance in England and Wales (and beyond) to assist LEOs faced with this situation.

We begin this paper by considering two of the primary crime contexts in which a victim can be unknowing (sexual offences and fraud), introducing cases that we refer back to throughout the paper. We then turn to explore unknowing victims' unique vulnerability to yet-to-be experienced harms that discovery of their victim status can expose them to. We apply the College of Policing's (CoP) vulnerability-related risks guidelines (CoP, 2021) and draw upon approaches in the victimology literature that orientate towards an understanding of vulnerability as a marker of internal and external exposure to risk. We also introduce our theoretical lens of therapeutic justice (TJ), which is grounded in consequentialist and deontological ways of thinking, to inform the way in which we study unknowing victims. In the final substantive section, we scrutinise the ethical issues surrounding LEOs disclosing to an unknowing victim the crime that they are a victim of, aligning our analysis with a TJ approach to policing. We argue for the balancing of the harms of disclosure against the reasons in favour of disclosure. We also ground our ethical analysis in the CoP's Code of Ethics, including its imperative to do 'the right thing when faced with difficult and complex decisions'

and its promotion of the National Decision Model as the primary tool to make ethical decisions in policing (CoP, 2014a: v and 17). We conclude by calling for the gap in professional ethical guidance and training in this area to be addressed and highlighting the need for empirical research involving UVs.

Which crimes can involve unknowing victims?

The possibility of committing a crime without detection is, of course, key to cases involving unknowing victims, as we now explore. The examples of various offences and circumstances within the two types of crime most likely to involving unknowing victims that we consider here offer an indicative rather than an exhaustive list. Also, because unknowing child victims (especially younger children) raise a host of safeguarding issues such as those alluded to in our introduction, we generally limit our consideration to adult unknowing victims (but see Ost and Gillespie, 2023).

Sexual offences

Sexual offences involving unknowing victims can occur where the criminal act takes place against a victim who is unconscious, intoxicated or otherwise incapacitated. A key, well-publicised case involving multiple victims, some of whom were unaware of being raped and/or sexually assaulted, is that of offender Reynhard Sinaga (*Attorney General's Reference No 5 of 2020*¹). Between 2016 and 2017, Sinaga selected intoxicated male victims who he found on the streets of Manchester during the early hours of the morning and lured to his nearby flat under false pretences. He then gave his victims a drink laced with a “date rape” drug and filmed himself raping and sexually assaulting them, often on numerous occasions. He only wore a

condom once. Over four trials in 2018-1029, Sinaga was convicted of 136 offences of rape and 16 other sexual offences, in relation to 44 victims (*Attorney General's Reference* [21], [28])). In the Court of Appeal's judgment in the Sinaga case, in which it was judged that the minimum term of his multiple life sentences should be raised to 40 years, Lord Burnett CJ stated that 'The police were able to identify many of the other victims from, amongst other evidence, the images on Sinaga's mobile telephones and from the trophies that he retained. These other victims only discovered what had happened to them when contacted by the police.' (*Attorney General's Reference* [33]). Evidence linking Sinaga to 190 potential victims was found during the criminal investigation, with 70 victims still being unidentified at the time of his conviction and 60 remaining unidentified in 2021 (Greater Manchester Police, 2020),

Other crimes with a sexual element can also be committed without the victim's detection. Indeed, the nature of one such crime enables its occurrence without the victim needing to be incapacitated in order to have no knowledge of it. The generally covert offence of voyeurism is often committed against unknowing victims (Wood, 2019: 23), with voyeurism being classified as a sexual disorder or a paraphilia where the voyeur observes 'unsuspecting individuals, usually strangers, who are naked or engaging in sexual activity, for the purpose of seeking sexual excitement' (American Psychiatric Association, 2013). There are numerous examples of convictions for voyeurism that have involved offences against a multitude of victims, some of whom remain unaware of their victimhood (*R v. Hutchinson* (2015) Oxford Crown Court unrep²; O'Connor, 2015; *R v. Roddis*³; *R v. Grayson* (2022) Sheffield Crown Court unrep⁴). In one case, GP Thair Altaii was found to have 19,000 photographs and videos of partially clothed female patients that he had made covertly using his mobile phone. His offending came to light after one patient noticed two mobile phones propped up facing the examination area in his surgery and reported the matter to the police. In 2018, Altaii was found

guilty of three counts of voyeurism between 2008-2014 regarding over 300 images of two women (MPTS, 2019). However, because of the amount of images involved, there may well be further unknowing victims who went to him for consultations between 2005-2014 (BenHoareBell Solicitors, 2020). Further example cases involve voyeuristic recordings of unknowing child victims and the creation of indecent images. For example, the defendant in *R v. Grayson* covertly recorded numerous images of two family members under the age of eighteen years when they were naked and in various states of undress; Ost and Gillespie, 2023).

Fraud

The other type of crime we choose to highlight is fraud, not least because fraud accounts for 39% of all crime according to recent figures from England and Wales, with 4.5 million offences in the year ending March 2022 (Poppleton, Lymperopoulou and Molina, 2021: 3; ONS, 2022).

The potential for fraud victims to remain unknowing has been highlighted in a literature review:

... there are many ‘unknowing’ victims of fraud. Such is the nature of some frauds many fall for them and unless contacted by a law enforcement agency would never know they have been defrauded. The best examples of these are some of the lottery and fake charity scams. Many people enter lotteries knowing winning is unlikely. Therefore, not receiving a prize is not an indication of fraud to them. Similarly, some people who give to charities may never learn it was in fact a scam. (Button, Lewis and Tapley, 2009: 21).

As this review suggests, the most obvious types of fraud that can go undetected by victims include lottery and fake charity donation scams (see eg FTC, 2016), with many victims remaining unaware unless they are contacted by LEOs (Button, Lewis and Tapley, 2009: 21; Cross and Blackshaw, 2014: 123).

As we now explain, unknowing victims of these and other crimes constitute a little explored category of vulnerable victims that requires careful consideration.

The vulnerability of unknowing victims to psychological harm through disclosure

The discussion in this section maps onto the first two of the four steps that the CoP's vulnerability-related risks guidelines set out:

1. Identify an individual's vulnerability or vulnerabilities.
2. Understand how these vulnerabilities interact with the situation to create harm and/or risk of harm. (CoP, 2021: 6)

Vulnerability is one of the six features of victimisation that were offered some time ago by Sparks (Sparks, 1982) and has been an increasing focus in criminal justice, legal reform and the professional and academic literature (Keay and Kirby, 2018; Williams et al., 2009; CoP 2021; Sibley, 2018). Criminological research has explored how vulnerability is the key concept utilised as 'recognition that there is a category of victims who are at greater risk of' harm because of external situational factors and/or individual factors such as ill-health (Donoghue, 2013: 809). Still, the lack of any meaningful definition of vulnerability for policing had been highlighted (Keay and Kirby, 2018) and this absence has been addressed by the CoP's guidelines. According to the definition of vulnerability adopted by the CoP, 'A person is vulnerable if, as a result of their situation or circumstances, they are unable to take care of or protect themselves or others from harm or exploitation' (CoP, 2021: 6).

What implications does this have for unknowing victims? Notably, the CoP's vulnerability guidelines are directed towards *knowing* victims: the clues that indicate vulnerability-risk are framed around the behaviour of knowing victims (pp.19-21), as is the Vulnerability Assessment Framework contained within, which is focused on, for example, the victim's behaviour and appearance as clues to vulnerability (CoP, 2021: 19-23). However, the guidelines also refer to LEOs coming into contact with 'people in crisis, who have already suffered *or are at risk of harm*' (CoP, 2021: 7 (emphasis added)), and it is this distinction that warrants further consideration in the unknowing victim context.

When knowing victims interact with LEOs in a criminal justice investigation, they have already been experiencing the harms caused by the crime. We are not meaning to suggest that knowing victims' experiences are less traumatic than unknowing victims', nor do we purport to underplay the way in which certain criminal justice processes and legal actors can exacerbate harms to victims and the work that has been done to address this (Parsons and Bergin, 2010; Risan et al., 2017; Shapland 2000; Walklate, 1989). Instead, we seek to highlight the distinction caused by the awareness that the crime has been committed because, for a knowing victim, involvement in the criminal justice investigation and interaction with LEOs will not be accompanied by the shock and impact of discovery.

We argue that the unique vulnerability unknowing victims possess is related to their lack of knowledge of the crime committed against them; that is, they are yet to face the potentially profound consequences of the knowledge of the crime committed against them (Ost and Gillespie, 2023) and are at the cusp of doing so if they are identified by LEOs who then plan to disclose to them their victim status. For instance, in referring to the victims of Sinaga who

only learnt of the sexual offences he committed against them when contacted by LEOs, Lord Burnett CJ observed that ‘The psychological harm to the victims has been significant, and notably profound in some cases’ (*Attorney General’s Reference* [33]). This highlights a significant conceptual point if we accept that ‘the concept of vulnerability is intended to mark one’s exposure to risk’ (Sibley 2018: 1468). Sibley has noted the way in which vulnerability can be utilised as a conceptual tool that can locate how external factors expose us to risk (Sibley, 2018: 1468), and this speaks to the call in the CoPs guidance for LEOs to appreciate the ways in which vulnerability interacts with the situation to increase the risk of harm (CoP, 2021: 6). For unknowing victims, risk of harm is intrinsic to their status – an *internal*, psychological vulnerability to being exposed to harm that is triggered by an *external* intervention: the disclosure by LEOs. As such, in the context of unknowing victims’ vulnerability, ‘the externalization and internalization of risk [operates] in a unique way’ (Sibley, 2018: 1469) and, if the likelihood of this harm occurring is affected by a person’s resilience (Walklate, 2011), there is an obvious difficulty because unknowing victims cannot recognize their at-risk status and thus exercise self-protection. Returning to the CoP’s definition of vulnerability above, it stands to reason that someone who is *unaware* of their victimhood cannot protect themselves from the harm that discovery of their victim status will cause them to suffer.

It is not yet possible to offer any precise articulation of the harms that disclosure of the crime(s) committed against them causes to unknowing victims – the impact of the shock of discovery in and of itself - because, to the best of our knowledge, there is no empirical study of the psychological and emotional effects of disclosure to unknowing victims. Research findings do exist documenting the ramifications of LEOs’ disclosure of a loved one’s sudden death to their next-of-kin and we draw on potential parallels in respect to this in the following section.

However, although there remains a gap in knowledge regarding the specific harms of disclosing the crime perpetrated against them, the shock of such disclosure by an LEO is highly likely to cause the now-knowing victim to *experience* emotional and psychological harms. This is vividly conveyed by the Sinaga case, in which, when LEOs disclosed Sinaga's crimes against them to unknowing victims, a LEO and the Deputy Directorate Manager of St. Mary's Sexual Assault Referral Centre explained that they:

just went very quiet and you [could] see the colour drain from their face. Just an "oh my God" look on their face ... The trauma that the men experienced wasn't necessarily the sexual assault, because they couldn't remember that. It was being visited by the police and being told what had happened to them and also being told that there's video footage ... and that was really difficult for people to accept. (BBC Two, 2021.⁵)

We are not contending that the harms to unknowing victims arising from the crime committed are caused by LEOs in cases of disclosure. Rather, whilst the direct causal effect is between the crime and the harm to the victim, disclosure causes unknowing victims to *recognise* the harms that have been done to them. From this point of awareness onwards, therefore, they are exposed to the harms that victims of crime have been shown to suffer. Research has detailed these harms as 'psychological effects, including fear, anger and depression' (Shapland and Hall, 2007: 178). This is especially likely when that crime is of a sexual nature (Shapland and Hall, 2007: 193). Alongside anxiety and a mental health breakdown, one of Altai's patients explained that as a result of the breach of trust and gross invasion of her privacy by his actions, 'I now don't know if I will ever be able to trust a Doctor again. I have even missed very important appointments as I cannot face attending the clinic for fear' (MPTS, 2019: 6; see also *R v. Grayson*: 6). In the specific example of victims of child sexual abuse who are unaware

that their abuse has been recorded, ‘the existence of abusive images always [leads] to additional psychological stress’ (von Weiler et al., 2010: 216; Gewirtz-Meydan et al., 2018). It has also been shown that victims of fraud can suffer emotional and psychological trauma, behavioural impacts and physical harm alongside their financial loss (Button, Lewis and Tapley 2009: 27-28; Cross and Blackshaw, 2014: 124; Poppleton, Lymperopoulou and Molina, 2021: 14). Indeed, 78% of fraud victims in England and Wales in the year ending March 2019 were reported as being ‘emotionally affected in some way’ (ONS, 2020). Thus, whilst recognising that different individuals respond to their victimisation in different ways (Shapland and Hall 2007: 179-180; Janssen et al, 2021: 132-133), being informed that they are a victim of crime is highly likely to have some psychological impact on a person who was previously unknowing. We return to this issue in the next section.

Unknowing victims thus have different, transitional needs and interests than the ‘usual’ victim who has already suffered harm when LEOs intervene, and this creates a distinct vulnerability which can sit alongside other more commonly recognised individual and situational vulnerabilities. Exploring this a little further in our two contextual crime examples, in the case of vulnerabilities of *knowing* victims of sexual offences, Williams et al have argued that current definitions of vulnerability are too narrow. They recommend that ‘Sexual Offences Investigative Trained Officers (SOITs) need to ... conduct appropriate risk assessments around ‘at risk’ cases involving vulnerabilities’ and consider developing additional care and support packages (Williams et al., 2009: 358, 359). In their discussion of Project Sunbird, an Australian project that used international financial intelligence on online fraud to proactively contact suspected victims of online fraud, Cross and Blackshaw explain that, where the police made contact to alert a person that they may be a victim of online fraud, a screening process assessed the risk to a victim. Whilst Project Sunbird did involve communication with potential victims

of online fraud who may have been unknowing and an assessment of the risk of police contact, the risk and vulnerability assessed related to domestic violence rather than the effects of disclosure (Cross and Blackshaw, 2014: 122).

We argue that existing understandings of vulnerability and LEOs' 'knowledge base in relation to vulnerability' (Keay and Kirby, 2018: 437) need to encompass unknowing victims, so that where the intelligence and evidence suggests that a victim might be unaware, LEOs should exercise professional curiosity and see this as a clue indicating a vulnerability risk (CoP, 2021: 5). Existing risk assessments thus need to be refined and tailored to recognise the unique vulnerability of unknowing victims and the support they will need because of the potentially life-changing information regarding their victim status if this is to be disclosed to them.

The need to consider the intervention by LEOs as an externalisation of risk within the context of UVs' distinct vulnerability, is underscored when we recognise that law (and the law in practice) 'is a social force that has inevitable consequences for people's emotional well-being, often negative consequences' (Winick, 2009: 1). The lens of TJ operates from this premise. TJ concerns itself with the way in which law and legal actors can affect wellbeing (Risan et al., 2017: 374), with one of its central premises being that 'as far as possible', the law and legal actors should 'do no harm' (King, 2008: 1113). Concentrating at this stage on the philosophical dimension of TJ - 'its normative orientation(s), assumptions and ideals' - although the theoretical ethical orientation of TJ has been argued to be inchoate, it has both consequentialist and deontological leanings (Wilson 2021: 2; Kress 1999: 558). The consequentialist nature of TJ is clearly apparent from its focus on aspects of law and practice that have consequences and its analysis of which of these consequences should be maximised and minimised (Winick, 1997: 188). Yet it also reflects Kantian deontological norms which, when translated into

criminal justice, include giving ‘primacy to ... rights and obligations’ and autonomy (Wilson, 2021: 3; Wexler, 1993: 29; Kress, 1999: 558). This is especially important to our later analysis of the ethical duties owed to unknowing victims.

We raise one final point here on vulnerability, specifically in relation to unknowing victims who may possess a certain degree of knowledge. Consider a situation where a victim is aware of one crime perpetrated against them, but not of other subsequently committed and related crimes. For example, a now-adult victim of child sexual abuse chooses not to seek out confirmation of the existence of recorded images of their abuse online, because of the additional trauma they are aware that this will cause them (Ost and Gillespie, 2019: 238). This victim may make the deliberate choice to remain unknowing about other possible related crimes, since by remaining in a state of unknowingness, they can avoid experiencing further harm and trauma. For such victims, an unknowing state could, thereby, offer them a degree of protection, what we have referred to previously as ‘a zone of spatial privacy’ (Ost and Gillespie, 2019). They would thus be even more obviously vulnerable to any disclosure which removes them from this unknowing state *that they have chosen for themselves* and the external intervention of LEOs is likely to have anti-therapeutic impacts that would be of significance for TJ (Winick, 2009: 6).⁶

The analysis in this section reveals that disclosure of their victim status to an unknowing victim connects directly to their vulnerability and exposure to risk of harm, bringing about the significant transition from unknowing to knowing victim. We now turn to consider further the implications of this for those involved, working within a framework of ethical practice.

Ethics and the disclosure decision

The Code of Ethics places the National Decision Model (NDM) at the centre of all decision making ‘to help embed ethical reasoning in accordance with policing principles and expected standards of behaviour’ (CoP, 2014a: 17). Thus, throughout this section, we consider how LEOs who have reason to believe that a victim is unknowing and are thus faced with a disclosure decision can act in accordance with the NDM, whilst also referring back to the CoP’s vulnerability guidelines, where relevant. We also situate our analysis within a TJ framework.

Is there a professional duty to disclose?

As the first part of our ethical analysis of the disclosure decision, it is necessary to consider whether there is a professional duty to disclose to unknowing victims the crime committed against them. For, if such a duty exists, then the ethical issues to be considered will not include the question of *whether* a unknowing victim should be told – this already having been decided by the existence of the duty to disclose – and would instead be limited to *how* they should be told. This aspect of disclosure decision-making accords with one of the elements of the NDM: *consider powers and policy* (CoP, 2014a: 28)

We have anecdotal evidence from LEOs who have participated in our research project on reparation for victims of child abusive images (CAI) that they consider such a duty to exist,⁷ and this is also reflected in the conception of unknowing victims having a *right* to know as expressed by one of the LEOs who made disclosures to Sinaga’s unknowing victims: ‘Their life is never going to be the same again, never ever. And you do have to think: “Would I want to know”? ... Are you better off going through the rest of your life not knowing? But you have to know. You have a *right* to know.’ (BBC Two, 2021.)

The obvious source to look to for the existence of a duty to disclose is the Victims' Code. There may, however, be a theoretical argument that unknowing victims do not actually fall within the definition of victim under the Victims' Code, which is 'a person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence' (Ministry of Justice, 2020: 3). This definition, focused as it is on someone who has *suffered* harm, would not obviously encompass unknowing victims if it requires a victim to be *aware of/experience* pain or other harm caused by a crime and consequently they may fall outside the rights that the Code guarantees. A broader interpretation would be that the definition includes anyone who has been physically, mentally, emotionally or economically harmed by a crime, regardless of whether they experience this harm, and this is the interpretation that we will adopt for the purposes of this paper.

The rights under the Victims' Code to be provided with information when reporting a crime (right 3) and to be referred to victim support services (right 4) could suggest a duty to disclose. The difficulty is that they are both constructed around *knowing* victims. Right 3 includes the right to 'written confirmation of [the victim's] allegation when they report a crime to the police or are contacted as a victim during the investigation (Ministry of Justice, 2020: 15). However, since the unknowing victim is not making an allegation and no such allegation is being confirmed where LEOs disclose the crime to an unknowing victim, it is not at all clear that this would impose any explicit duty to disclose. The right to be offered access to support services provided by right 4 applies whether or not the victim decides to report a crime, (Ministry of Justice, 2020: 17, 4.1, 4.6), but the victim would have to be a knowing victim to exercise this right. Therefore, rather than setting out any duty to disclose explicitly, the Victims' Code places LEOs under a duty to guarantee what appear to be the most pertinent rights under the Charter

once the victim knows of their victim status. This could arguably give rise to an *implied* duty on LEOs to disclose, because it would only become possible to offer unknowing victims access to support services if they are first informed of their victim status and this would thereby resonate with the over-arching principle in the criminal justice system of keeping victims of crime informed (Victim Support 2011). Elsewhere, moreover, we have suggested that there could be an argument for a right to disclose on the basis of human rights jurisprudence. Yet the argument is far from black and white and human rights could also be utilised to argue for a right *not* to be informed (Ost and Gillespie, 2019: 233-235, 238).

What is more, the Victims' Code does not obligate service provider to disclose information to a victim where this 'could result in harm to any person ...' (Ministry of Justice, 2020: 6) and we have already alluded to the as of yet unexperienced emotional and psychological harms that disclosure could lead unknowing victims to suffer. Assuming a duty to disclose based on policy principles that orient towards keeping victims informed fails to account for the distinctive vulnerability of unknowing victims. There is a parallel here with the impact that criminal law has on another vulnerable group – sex workers. According to Sibley, the criminal law impedes sex workers' ability to protect themselves because '...the law itself creates and exacerbates the conditions that make sex workers vulnerable in the first place ... this exposure to criminal justice mechanisms aimed at "protection" actually serve to expose sex workers to the juridogenic nature of law.' (Sibley 2018: 1470). Analogously, striving to subsume the response to unknowing victims within wider victim-orientated policy objectives could expose unknowing victims to the risk of harm that disclosure engenders, a risk that we have argued unknowing victims cannot protect themselves from. Presuming an automatic duty to disclose would also miss the fact that individual victims do not all have identical needs, with much being dependent on their situation and their personal coping skills (Walklate 2007: 105).

Therefore, the existence of a professional duty to disclose should not be assumed and there may be some cases in which the arguments in favour of non-disclosure that we discuss below are so compelling that LEOs could decide that non-disclosure is the most ethically appropriate decision.

An ethically appropriate approach to the disclosure decision

Being faced with an unknowing victim may well be a novel situation for LEOs. As expressed by an officer in the Sinaga case, when it comes to the reporting of a crime: ‘We’re not usually the bearers of the bad news, because when victims report, they’re the ones who are telling us ... it’s never usually the other way around.’ (BBC Two (LEO), 2021). Whilst no specific guidance as to how to deal with this situation exists, we can look to the final two of the four steps outlined in the CoP’s vulnerability-related risks guidelines, according to which LEOs should:

3. Assess the level of harm and/or risk of harm.
4. Take appropriate and proportionate action if required, involving partners where they have the relevant skills and resources. (p.6)

Step 3’s assessment of harm and risk will require a balancing exercise in which LEOs would need ‘to consider the value and likelihood of a decision’s possible benefits against the seriousness and likelihood of the harm’ (Principle 3 of the CoP’s 10 principles of Risk, linked directly to in CoP, 2021: 9). This aligns with three elements of the NDM: *gather information and intelligence; assess threat and risk and develop a working strategy; and identify options and contingencies.*

To help LEOs situate the unknowing victim at the core of this assessment, we advocate an approach to the disclosure decision that is aligned with the empirical dimension of therapeutic jurisprudence. This involves recognising LEOs as ‘therapeutic agents’ (Winick, 2009: 2), considering the ‘therapeutic/anti-therapeutic/neutral consequences of’ their practice, and drawing on relevant findings in social sciences and behavioural literature to enhance therapeutic impact (Wilson, 2021: 2). Whilst this does not suggest that it is always possible to avoid doing harm, it does require an approach to the disclosure decision that is concerned with what can be done to reduce the negative effects experienced by the victim through their interaction with LEOs. Elsewhere, the ‘importance of professionals exercising emotional intelligence skills in their work’ (King, 2008: 1126), as highlighted by therapeutic jurisprudence, has been explored in the context of *knowing* victims (Risan et al., 2017; Madsen and Holmberg, 2015). We apply TJ beyond this existing focus and argue that there is an ethical duty to reflect on the implications of disclosure for unknowing victims that we now discuss. This ethical duty arises due to the deontological and consequentialist ethical concerns that underpin TJ that we have already noted; focusing on the rights and needs of victims draws out the way in which LEOs should act to ‘understand the psychological dimensions of [unknowing victims]’ victimization’ and ‘facilitate their healing’ (Winick, 2009: 541).

As part of its focus on emotional wellbeing, a therapeutic jurisprudence approach would promote self-determination and empowerment of participants, where appropriate, as a key principle (King, 2008: 1113-1115). Notably, disclosure to an unknowing victim enables empowerment, because the victim can take control over what was a previously unknown life experience (this might include choosing to testify against the offender in court, for instance) and could subsequently gain some degree of closure. One of Sinaga’s victims had only a certain

level of awareness that something had not been quite right about the night in question. The LEOs' disclosure to him of what had happened provided an explanation for his lack of memory and affirmed his belief that something had happened: 'There's a bit of relief, because you know what happened finally, but probably not the relief that you want ... Unknowing was harder than not knowing, even though what I know is horrible.' (BBC Two (Victim), 2021).

Disclosure could also enable the previously unknowing victim to exercise the meaningful choice of taking steps that might avoid further harm, which can be especially relevant in cases of 'chronic victims' of mass marketing fraud scams, who lose a significant proportion of their savings over a series of instances involving handing over relatively small sums of money (Button, Lewis and Tapley 2009: 23). Or there could be health-related concerns for the victim that justify disclosure. For example, an unknowing victim of rape may have contracted a sexually transmitted disease, making a strong case for disclosure notwithstanding the psychological harm that will follow.

The balance could also swing in favour of disclosure if LEOs consider that there is any risk of an unknowing victim realising what has happened to them when details of the offence are revealed in open court. Disclosure would pre-empt this risk and would also mean that LEOs are then ready for the CPS's standard list of requests regarding contact with the identified victim, (bearing in mind that, subsequent to a decision to charge an offender, prosecutors are likely to seek to build their case with the victim's support).

Alongside the afore-mentioned principle of keeping victims informed, certain other values of the justice system that are victim orientated could favour disclosure, such as that of supporting victims (Ministry of Justice, 2020). And it is likely that there will be other reasons related to

the criminal justice investigation and process that are also aligned with disclosure to the unknowing victim. For instance, LEOs may need further information from the unknowing victim as part of an ongoing criminal investigation and some of this information might be crucial to build a sufficiently strong case against the offender. A secondary consideration here is that disclosure to the unknowing victim can enable LEOs to have sufficient information for the victim-based National Crime Recording Standard. That said, however, whilst recording crime without the victim's confirmation is not routine, there are exceptions, such as where the victim 'cannot be found taking the potential risks to, or apparent vulnerability of, the victim into consideration' (Home Office, 2022: 12).

TJ also recognises that the values of the justice system can conflict (Winick, 2009: 2), which is pertinent to our context because the value of supporting victims can involve its own internal conflict, rationalising both disclosure and non-disclosure. For there are important reasons to be cautious about disclosure. These reasons connect with therapeutic jurisprudence's focus on emotional wellbeing, because of the potentially damaging effects of disclosure on unknowing victims. Thus, the positive impacts of disclosure (its therapeutic effects discussed above) must be balanced against the negative impacts ('unintended anti-therapeutic effects (Winick, 2009: 2)), one of the most notable of which is the victim suffering psychological harm through their new knowledge of the crime committed against them. To take forward the earlier discussion and, focusing first on the negative effects that will be caused by the shock of disclosure, we return to the quote from the officer in the Sinaga case above that LEOs are not usually the bearers of bad news. Whilst this is true when it comes to the reporting of crimes, there are other disclosures context in which LEOs are often the bearers of traumatic news, notably, when they disclose that the CPS is not going to take a victim's case forward, or disclose the sudden death of a loved one to relatives. In the latter disclosure context, research has documented the impact

of the death notification on relatives. Although there is, of course, a distinction between being told that your loved one has died suddenly in a road traffic accident or been murdered and being told that you are a victim of a sexual offence, for instance, in each case, disclosure is a significant moment in which the person is being given highly traumatic, life-changing information (De Leo et al., 2020: 1-2). For relatives given a death notification, ‘whilst the crisis experience of the death notification itself is short, indeed, it is widely recognised that the notification has a significant impact ... with the memory of the death notice often enduring and vivid’ (Reed, 2022: 366; De Leo et al., 2020: 2). Documented reactions to death notifications include ‘emotional trauma, pain, despair, anger [and] depression’ (De Leo et al., 2020:11).

Undoubtedly the initial and longer-term negative impacts of disclosure to unknowing victims will vary and a balancing exercise between beneficial reasons for disclosure and negative impacts will need to be undertaken on an individual case-by-case basis. The empirical application of TJ embraces such an approach, rejecting the alternative adoption of a pre-designed fixed normative model that prescribes weights for relevant values to reach a solution (Kress, 1999: 584). In undertaking such a weighing and balancing exercise in the disclosure context, much depends on the crime committed and the impacts of this for the particular victim. For instance, in direct contrast to one of Sinaga’s victims quoted above, a previously unknowing CAI victim involved in our research project would prefer never to have been informed of the crime committed against her, as this knowledge has caused her to suffer serious emotional and psychological harm. As another example, if a further patient recorded by Altaii is identified, being told of the existence of these images may well have a serious emotional and psychological impact on her (as illustrated by the statement from one of Altaii’s victims quoted earlier). However, as his name was erased from the Medical Register (MPTS, 2019: 6, 13), LEOs may judge her to be at no greater risk of future victimisation than anyone else. And in

such a case, because there is no evidence that Altai showed the images to anyone else, the afore-discussed potential risk of the victim discovering the crime if LEOs do not disclose may be mitigated as it would be very unlikely that she would ever otherwise discover her victimisation.⁸ However, the arguments in favour of disclosure may well trump those supporting non-disclosure regarding a fraud victim: whilst they might experience some trauma by being informed of the deception perpetrated against them, any potential steps that could be taken to recover the money and to avoid being victimised again could only become a possibility if the crime is disclosed to them (Cross and Blackshaw, 2014: 124). The case for disclosure is thus a strong one, notwithstanding the likelihood of some psychological harm. Thus, the normative theory underpinning our application of TJ is individualistic and deontological, in that we argue that the interests and situation of each particular unknowing victim deserves equal respect and consideration.

Whether LEOs decide to disclose or not to disclose, this decision must be explained and reasoned. Looking to the professional guidance on ethical decision-making, one of the CoP's standards of professional behaviour requires that: '... you must ... take full responsibility for, and be prepared to explain and justify, your actions and decisions' (CoP 2014a: 10). If, for example, the decision is not to disclose, LEOs should explain why they have concluded that disclosure would be more harmful than beneficial, presenting factors such as there being no real risk of the victim discovering the crime and of being at risk of harm, for example.

If the decision is to disclose, to act in accordance with Step 4 of the CoP's vulnerability guidelines, then the 'appropriate and proportionate action' taken must involve the delivery of this information to an unknowing victim in a way that shows compassion, empathy, demonstrates understanding and empowers the victim 'by giving them as much control as

possible over the process' (CoP, 2021: 26-28; King, 2008: 1123). It is notable that an empirical application of TJ synergises with the trauma informed approach to interviewing victims reflected in *Achieving Best Evidence in Criminal Proceedings* (Ministry of Justice, 2022). In setting out good practice in interviewing victims, this guidance advises that 'Interview strategies and plans in investigations where trauma is likely should be developed and implemented in conjunction with a victim/witness care strategy that sets out the options for access to support and therapy and a safeguarding policy that makes it clear that the safety and welfare of victims and witnesses takes primacy over the needs of the investigation' (Ministry of Justice, 2022 [2.26]). Albeit in relation to witness interview strategies for critical incidents, Smith and Milnes's research offers useful advice on tailoring the response to the particular individual, recognising the impact and management of trauma and having in place a plan that encompasses initial contact, the interview and the post-interview processes (Smith and Milne, 2018).

Albeit in (now superseded) guidance in the context of the disclosure of a loved one's sudden death,⁹ the CoP's emphasis that 'It is important to realise that your attitudes and actions have a profound effect upon those with whom you come into contact' has resonance, as does the advice to repeat information, where necessary, because the person may not hear all that is said due to shock (CoP, 2014b: 11, 13). Ensuring the relevant support services for the victim will also be key (CoP, 2021: 26), with unknowing victims of sexual offences in particular, being highly likely to require support. As an example of good practice, LEOs involved in the Sinaga case were accompanied by crisis workers from a sexual assault referral centre when they disclosed to unknowing victims (BBC Two, 2021). When they were unaware how much knowledge the victim possessed, the LEOs developed a technique of managing the disclosure through a drip-feed of information rather than simply revealing all at once: 'So it was a matter

of giving little bits of information and seeing if they have any memory. Give the man's name and they would remember a man who was really nice to me when I was drunk and you're going to have to tell them what he has done to them' (BBC Two (LEO), 2021). Depending on the victim's response to disclosure and any further intelligence that they may provide, this stage may also involve other elements of the NDM again: *assess threat and risk and develop a working strategy*; and *identify options and contingencies*. Where the decision is to disclose, it is also important to be cognisant of the psychological impact of knowing that they are the ones who will cause the now-aware victim to experience trauma on the LEO who makes the disclosure (CoP, 2014: 14). Not only does this mean that LEOs need to exercise emotional intelligence regarding their own wellbeing, as emphasised by TJ (King, 2008: 1125), it also means that, if needed, they should be able to seek support from police forces' Occupational Health, Employee Assistance Programmes and counselling service such as Police Care UK.

In the meantime, in the absence of training and guidance other than the broader guidance offered by the CoP's vulnerability guidelines and the Code of Ethics, and having presented some of the considerations at play, we recommend that LEOs faced with a disclosure dilemma utilise the views of the force's Ethics Committee where this is available (recent research has found that 22 police force areas in England and Wales operate an ethics committee (Snelling et al., 2022)).

Conclusion

Unknowing victims are a little explored category of vulnerable victims. We have demonstrated that a victim whom LEOs are aware may be an unknowing victim is vulnerable because

disclosing the fact that they are a victim of crime to an unknowing victim constitutes an external intervention that exposes them to the risk of harm. The victim's inability to protect themselves against this risk is intrinsic to their unknowing (vulnerable) state. This clue to vulnerability should be recognised and the ethical imperative of TJ to maximise therapeutic and minimise anti-therapeutic impacts of LEOs interventions requires that the serious ramifications of disclosure of the crime committed against them to unknowing victims during a criminal justice investigation must be reflected upon.

The Victims' Code is silent on unknowing victims. Similarly, existing guidance and training is tailored towards knowing victims and thus guidance on how to respond to unknowing victims - from the initial disclosure decision, to any actual disclosure, to post-disclosure processes and support - is absent from policing practice. This absence requires attention in order to ensure that the unique vulnerability of unknowing victims is recognised and responded to appropriately. We have sought to offer some ideas on how to address this gap in a way that reflects understandings of vulnerability as an indicator of risk of harm in the victimology literature and a TJ approach to policing, and is compatible with the Code of Ethics. Beyond this paper, we are also taking practical steps to assist LEOs in the specific context of unknowing victims of CAI by designing an unknowing victim toolkit (Ost and Gillespie 2023: 15).

Our advocated approach of TJ focuses on LEOs exercising emotionally intelligent skills, on balancing what is at stake when a decision to disclose or not to disclose needs to be made, and prioritising emotional well-being. Synergising this approach with the Code of Ethics, it is imperative to avoid a 'one size fits all' approach, but rather to make a disclosure decision - whether that be to disclose or not to disclose - that is tailored around the particular unknowing victim. The decision must be one that is ethically defensible. Arguments for and against

disclosure should be considered with the unknowing victim at the centre, with pro-disclosure reasons related to the criminal justice investigation and process that are less victim-orientated taking second place. Equally as important, LEOs must be able to explain the reasons behind the disclosure decision ‘as fully as possible’ (CoP 2014a: 6). If the decision is to disclose, then as required by one of the standards of professional behaviour within the Code of Ethics, LEOs must ‘recognise the particular needs of victims ... for policing support’ (CoP 2014a: p.6). For both unknowing victim and LEOs, there is a crucial role for support services -such as mental health support and sexual violence support services - at the point of disclosure and beyond to maximize the ‘potential for healing and rehabilitation’ (Winick, 2009: 2).

Due to the very limited literature that exists on unknowing victims, this paper has been exploratory, setting the scene for future empirical work. This is especially important since, as we have noted, there is not yet an empirical study on the psychological and emotional effects of disclosure on victims. As advocated by TJ’s prioritisation of autonomy (Wexler, 1993: 29), in order to empower unknowing victims and to enable their experiences to take centre stage, a study involving victims who only discovered their victimisation through disclosure is the essential next step.

Notes

¹ [2020] EWCA Crim 1676.

² A transcript of the judge’s sentencing remarks in this case is on file with the authors.

³ [2021] EWCA Crim 1583.

⁴ A transcript of the judge’s sentencing remarks in this case is on file with the authors.

⁵ As we note elsewhere in this paper, there is currently a lack of empirical studies involving unknowing victims and thus, the first-hand accounts of UVs’ and LEOs’ experiences from the Sinaga case are provided from a BBC documentary. We add the caveat, therefore, that we cannot assume the same robustness from this source as that to be found in academic empirical studies.

⁶ In such cases, victims’ autonomy can be protected in the United States. Following the involvement of their CAI images in a federal investigation or prosecution, a victim has the right to choose not to be notified that images depicting their child sexual abuse are involved in a future federal investigation or prosecution: https://ucr.fbi.gov/stats-services/victim_assistance/cpva and https://ucr.fbi.gov/stats-services/victim_assistance/notification-preference.

⁷ See the ‘Designing a model of restorative justice for victims of online child abusive images’ Project website: <http://wp.lancs.ac.uk/model-of-restorative-justice-for-victims-child-abusive-images/>.

⁸ In contrast, for sudden death notifications in cases of homicide victims, research has demonstrated that it is imperative to inform relatives quickly to avoid them discovering death through non-official routes (Reed, 2022: 374).

⁹ See College of Policing (2022a) and (2022b). It is noteworthy that neither of these more recent publications provides guidance on a sudden death notification to next of kin in the depth that the (2014b) guidance does.

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