Part 2

Domestic and Comparative Criminal Justice

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Mainstreaming Redress in Criminal Justice

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1. INTRODUCTION

One of the most salient features of Ralph Henham's research over the past three decades has been his constant call for the radical reform of norms and structures of trial justice and sentencing to better reflect the needs and expectations of victims and communities.[1] In one of their widely acclaimed works, Findlay and Henham propose a new framework of trial justice that synthesises restorative and retributive approaches.[2] Building on this work, this chapter explores whether one of the core benchmarks of restorative approaches, namely redress, can realistically be implemented within the normative and structural framework of the English criminal justice system.

The notion of 'making amends' or 'righting wrongs' has come to feature prominently across a variety of criminal justice frameworks over the past two decades, and is something of a strange bedfellow to deeply embedded retributive objectives. Reparation, as the root of the term ('repair') suggests, is frequently used to describe a range of measures that aim to rectify the harm caused and to restore victims to their position before the act in question occurred, in so far as that is possible. Few areas of law have been untouched by the rise of reparatory justice. On the international platform, there has been increasing emphasis on reparations for historical wrongs, the search for remedies for abuses of human rights and humanitarian law, an upsurge in apologies being made by governments and heads of state, and on the need to facilitate systems of restitution and compensation within international courts

[1] Ralph Henham, 'Conceptualizing Access to Justice and Victims' Rights in International Sentencing' (2004) 13(1) *Social & Legal Studies* 27; Ralph Henham, 'Some Reflections on the Role of Victims in the International Criminal Trial Process' (2004) 11(2–3) *International Review of Victimology* 201; Ralph Henham, 'International Sentencing in the Context of Collective Violence' (2007) 7(2) *International Criminal Law Review* 449; Ralph Henham, *Sentencing and the Legitimacy of Trial Justice* (London, Routledge, 2013).

[2] Mark Findlay and Ralph Henham, *Beyond Punishment: Achieving International Criminal Justice* (London, Springer, 2007).

and tribunals. There is also recognition of a growing sense of disconnect between international policy interventions and the needs of victims and communities on the ground in the aftermath of civil conflict. As Roht-Arriaza puts it, the very idea of 'redress' is now widely seen as falling 'among the most venerable and most central of legal principles'.[3]

Domestic legal systems have not been immune from this trend; there has been significant research on the perceived growth of 'compensation culture' within the civil justice system,[4] whilst the entrenchment of human rights legislation has provided new bases for action which have not previously been open to parties before domestic courts.[5] Criminal justice has been no exception; following the rise of state compensation for criminal injuries during the 1960s and 1970s,[6] many jurisdictions also empowered their criminal courts to order offenders to pay compensation as part of a sentence for personal injury or loss incurred as the result of an offence. In more recent times, the exponential expansion of restorative justice programmes has elevated the concept of redress to a pivotal position in contemporary law and policy debates, with evidence of a corresponding decline in the state/offender dichotomy that has tended to dominate criminal justice discourse for the best part of forty years.[7] It might even be suggested that the system has reached a 'tipping' point, whereby the myriad of conflicting and conceptually incoherent aims and goals of criminal justice law and policy must finally be clarified and prioritised.

In spite of a near-universal assumption that the law should make provision for redress, considerable ambiguity pervades much of the contemporary scholarship over the more specific attributes of the concept. Indeed, its widespread usage – in both legal and non-legal contexts – often obfuscates the nature of the concept. It is not uncommon, for example, for the term 'reparation' to be used interchangeably with terms such as 'compensation', 'damages', 'restitution' or 'restoration'.[8] Such casual usage stems from a common misconception that 'reparation' equates to financial compensation. As illustrated below, redress may well *entail* some form of compensation and/or restitution of property, but the concepts should not be construed as being synonymous.

Against this backdrop, this chapter seeks to shed conceptual clarity on the proper place of redress within the criminal justice system and proposes a new 'assimilated sentencing model' (ASM) which seeks to synthesise redress alongside public censure. The chapter begins by providing a contextual account of the rebirth of redress within criminal justice discourse and traces the rise of the concept as a norm on

[3] N Roht-Arriaza, 'Punishment, Redress, and Pardon: Theoretical and Psychological Approaches' in N Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford, Oxford University Press, 1995) 13–23, 17.

[4] See generally Kevin Williams, 'State of Fear: Britain's "Compensation Culture" Reviewed' (2005) 25(3) *Legal Studies* 499.

[5] See generally Jason N Varuhas, *Damages and Human Rights* (London, Bloomsbury, 2016).

[6] See generally David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' (2013) 6 *International Review of Victimology* 377–405.

[7] Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford, Hart 2008).

[8] ibid 307.

the international platform. It calls for a rethink of the standardised parameters of the criminal justice system, and a more holistic and non-adversarial approach to the resolution of criminal conflicts. Arguing that the practical and normative limitations on redress are inherently fallacious, the chapter proceeds to unpick some of the objections that are commonly raised to redress within the criminal justice system, before proffering the ASM as a potential solution to mainstream redress as a focal point of trial justice.

2. THE REBIRTH OF REPARATION

Most common law systems see loss or damage sustained through the actions of third parties as a private wrong, actionable through the civil courts.[9] There would appear to be an assumption that the interests of victims are inherently built into the central institutions of the system, alongside the public interest in denouncing and punishing unacceptable behaviour.[10] The criminal law, which began to break away from the law of tort following the Assize of Clarendon of 1166,[11] has since been concerned with those offences considered sufficiently injurious to the interests of the state, and has thus been conceptually orientated towards the punishment of offenders as opposed to any reparatory interests of the victim.[12] This distinction was clearly arbitrary from the outset; the decision as to which forms of harm to delineate as crimes rested with those who wielded power; in earlier times this was the monarch, whereas in later times it has rested with Parliament.

Until recently, the notion of redress for victims within the criminal justice system received relatively scant attention. As noted above, this stemmed mainly from the underlying normative conception that its proper function was to regulate trial and punishment of the offender in the name of the state. It is the civil justice system, rather than its criminal justice counterpart, that has been regarded as the proper channel for victims to pursue their reparatory interests. Ashworth describes the purpose of the criminal law as 'to penalise those forms of wrongdoing which … touch public rather than merely private interests'.[13] In his view, the proper approach in determining the role of the victim within the criminal justice system is on the basis of this distinction between criminal and civil proceedings, and the rights and the interests of the victim

[9] Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6(1) *Oxford Journal of Legal Studies* 86.

[10] David B Moore and Terry O'Connell, 'Family Conferencing in Wagga Wagga: A Communitarian Model of Justice' in Christine Alder and Joy Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Canberra, Australian Institute of Criminology 1994).

[11] See further Justine Greenberg, 'The Victim in Historical Perspective: Some Aspects of the English Experience' (1984) 40(1) *Journal of Social Issues* 77–101.

[12] Ashworth (n 9).

[13] Andrew Ashworth, 'What Victims of Crime Deserve', paper presented to the Fulbright Commission on Penal Theory and Penal Practice, University of Stirling, September 1992, cited by James Dignan and Mick Cavadino, 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective' (1996) 4 *International Review of Victimology* 153.

should be pursued under the civil, as opposed to the criminal law.[14] However, civil actions are notoriously expensive and burdensome for victims with little prospect of much in the way of tangible compensation, and state criminal injuries compensation (introduced widely during the 1960s and 1970s) only provided for a minority of victims deemed 'worthy' under the law. As reparatory interests began to percolate into the criminal process itself, the rationale for the long-standing civil/criminal divide was also called into question.

One of the first critiques was advanced in a 1977 article by Randy Barnett, who called for the introduction of a 'new paradigm' which he labelled 'pure restitution'.[15] In effect, this would turn the historical orientation of the criminal law on its head, rendering the state's interests in the denunciation and punishment of crime secondary to the reparatory interests of the victim. Drawing on Epstein's theory of tort liability, Barnett called for an end to the distinction between public and private harms, and proposed 'a single system of corrective justice that looks to the conduct, broadly defined, of the parties to the case with a view toward the protection of individual liberty and private property'.[16] This approach, he contends, is a 'common sense view of crime'.[17]

The same year witnessed the publication of a second seminal article by the late Nils Christie, 'Conflicts as Property'.[18] The paper opens by recalling a practice in a rural village in Tanzania, whereby a dispute is settled through a deliberative process involving the victim, the offender, family members and community elders. In a damning critique of Western criminal justice that follows, Christie notes how conflicts between individuals have been appropriated by the state and legal professionals over the course of the centuries. Lawyers, he contends, have essentially stolen the disputes of the protagonists, a state of affairs that is reflected in the organisation of the criminal process, the legalistic manner in which the criminal law is framed, and the ways in which offenders and victims are routinely sidelined by lawyers in court. He proceeds to outline an alternative vision for a justice system that revolves around the victim and the community, with outcomes designed to provide redress for the victim as well as reintegrating the offender into society. Unlike Barnett, Christie maintains a role for a judicial officer to impose some form of additional punishment on the offender, which might exceed the reparation that might be required to rectify the harm caused to the victim.

Although they differ in the level of detail they propose, and the value they attach to the role of punishment within the criminal process, these accounts have much in common.[19] Both provide substantial critique of the conventional criminal justice

[14] See also Ashworth (n 9); Andrew Ashworth, *The Criminal Process: An Evaluative Study*, 2nd edn (Oxford, Oxford University Press, 1998).

[15] Randy E Barnett, 'Restitution: A New Paradigm of Criminal Justice' (1977) 87 *Ethics* 279–301.

[16] ibid 290, citing RA Epstein 'Intentional Harms' (1975) *Journal of Legal Studies* 391–442, 441.

[17] Barnett, ibid 288.

[18] Nils Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1–15.

[19] Other aAccounts making similar arguments emerged around the same time: see eg Gilbert Cantor, 'An End to Crime and Punishment' (1976) 39(4) *The Shingle* (Philadelphia Bar Association) 99–114; Richard L Abel, 'A Comparative Theory of Dispute Institutions in Society' (1973) 8 *Law and Society Review* 217; Charles F Abel and Frank H Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime*

system on the grounds that it tends to prioritise punishment over redress and tends to exclude the victim and the community from the conflict resolution process. There is also a moral onus placed on the offender to provide this redress to those who have been harmed. Such calls for a 'paradigm shift' were both imaginative and ambitious at the time of publication, and there was undoubtedly a realisation at some level on the part of the authors that the prevailing paradigm was so readily entrenched within societal structures that reform of this nature was unlikely in the short to medium term.

3. INTERNATIONAL TRAILBLAZING

What neither Barnett nor Christie could have foreseen, however, is the extent to which victims' interests would be catapulted to the forefront of criminal justice discourse in decades ahead. The rapid growth of the victim movement in the United States, and subsequently throughout the Western world,[20] posed major new challenges for criminal justice on legal, policy and (consequently) normative platforms. The international rise of the victim was accompanied by a growing realisation that crime was not only a legalistic offence against the state, but also carried far-reaching social ramifications for victims and communities. Such an understanding is now reflected in a range of international instruments. Obligations on the state to put in place mechanisms that allow compensation or restitution to be payable by perpetrators directly to victims were contained in the (non-binding) 1985 UN Victims' Declaration,[21] and the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[22] and Council of Europe Recommendations 85(11) and 06(08). The European Union's 2012 Victims' Directive[23] provides victims with the right to obtain a decision on compensation by the offender within a reasonable time in the course of criminal proceedings and also encourages mechanisms to recover compensation awards from the offender.[24]

This increasing emphasis placed on the idea of reparation as a moral and legal norm has gone hand in hand with the expansion of instruments that promote restorative justice, or mediation-based processes as alternatives to orthodox criminal procedure. The UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, adopted in August 2002,[25] provide that restorative justice programmes should be generally accessible at all stages of the penal procedure; and the Eleventh UN Congress on the Prevention of Crime and the Treatment of Offenders

and the Criminal (Westport, CT, Greenwood Press, 1984); Abraham S Goldstein, 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 *Mississippi Law Journal* 515.

[20] See generally Sandra Walklate, *Imagining the Victim of Crime* (Maidenhead, McGraw-Hill Education, 2006) ch 1.

[21] Principle 8.

[22] Principles 17–19.

[23] Directive 2012/29/EU.

[24] Art 16.

[25] ECOSOC Res 2002/12 (24 July 2002).

(2005) encouraged Member States to acknowledge the importance of implementing restorative justice policies, procedures and programmes that include alternatives to prosecution. The following year the United Nations published of the *Handbook of Restorative Justice Programmes*,[26] which surveyed and benchmarked a range of international best practices in the implementation of restorative schemes. The ascendancy of restorative justice has also been evident on the European Platform, with the 2001 EU Framework Decision on the Standing of Victims in Criminal Proceedings calling on Member States to promote mediation in criminal cases for offences it considers appropriate for this sort of measure[27] and to ensure that any subsequent agreements between victims and offenders are factored into the sentencing exercise.[28] Although a self-standing obligation to put in place restorative mechanisms was not contained within the 2012 Directive, it did provide that safeguards should be afforded to victims where the service is offered.[29]

Likewise, the centrality of reparation as an integral component of 'justice' is evidenced by its apparently pivotal position within the relatively nascent field of transitional justice. Such measures may assume widely different forms and extend far beyond the pecuniary or proprietary focus of many of the more traditional criminal justice instruments highlighted above. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law categorise reparations according to whether they are material or symbolic in nature. Examples of the former include proprietary and pecuniary measures, most notably restitution of rights and property and compensation for physical and mental harm or damage to property, whereas symbolic restitution is potentially much broader, including concepts such as 'rehabilitation', 'satisfaction' (including verification of facts, official apologies, judicial sanctions against violations, and acts of commemoration) and 'guarantees of non-repetition' (which may include entrenching international human rights standards and putting in place mechanisms to monitor conflict resolution). Of course, not all reparations programmes will be capable of realising all these objectives, but the instrument reflects the fact that victims have a complex range of needs which ought to be addressed using a diverse range of methods.

Indeed, on the international platform, the inclusion of reparatory mechanisms within the Rome Statute of the International Criminal Court underlines that redress need not be neatly (and arbitrarily) separated from punishment process. Article 75(1) stipulates that the Court shall 'establish principles relating to reparations to, or in respect of, victims'. It may then 'determine the scope and extent of any damage, loss and injury to, or in respect of, victims' and, under paragraph 2, 'make an order

[26] United Nations, *Handbook of Restorative Justice Programmes* (Vienna, United Nations, 2006).

[27] EU Framework Decision on the Standing of Victims in Criminal Proceedings. European Communities, Council Framework Decision (2001/220/JHA).

[28] The Framework Decision was superseded by Directive 2012/29/EU, otherwise known 'the Victims' Directive'. The Directive establishes minimum standards on the rights, support and protection of victims of crime. Although it does not oblige Member States to make restorative justice programmes available and lacks the promotional obligation contained in the 2001 Framework Decision, Art 12(2) does provide that 'Member States shall facilitate the referral of cases, as appropriate to restorative justice services'.

[29] EU Directive, Art 12.

directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. Whilst this definition of reparation is much narrower than that provided by the United Nations in its 2006 Body of Principles, the conception is broad enough to embrace different modalities of rectifying harm.[30] From a legal perspective, this is the most straightforward means of awarding reparations, although, as an alternative, the Court may order that reparations be made available through the Trust Fund established under Article 79 of the Statute.[31] Although the inclusion of these provisions has been widely lauded,[32] doubts remain as to how effective they are in practice, not least because the sheer scale of international crimes would likely dwarf monetary resources of both individual perpetrators and the Court itself.[33] Notably, in the *Lubanga* case,[34] the Court denied a prosecution request for survivors of sexual violence to be factored into the decision-making on reparation, limiting them to child soldiers who were conscripted into his militia.[35]

Few would doubt the moral basis that an offender should make amends for wrongdoing to an injured party. Wrongs have been said to damage 'morally adequate relationships' including 'victims' ability to cope and their confidence and trust in moral standards and the receptivity of those standards'.[36] They also cause damage through 'insulting' the victim since they infer that they (or their rights) are inherently less worthy than those of the wrongdoer.[37] Whilst the concept of reparation is somewhat paradoxical in that redress is fundamentally incapable of undoing the effects of a serious or traumatic crime,[38] it nonetheless serves to restore the equilibrium that has been upset by the offender's actions and thereby validate the status of the victim as a citizen whose rights have been violated.[39] Yet the case for redress not only rests on moral principles; it should also assist victims in more practical terms by making

[30] Joanne M Wemmers, *Reparation and the International Criminal Court: Meeting the Needs of Victims* (International Centre for Comparative Criminology, University of Montreal, 2006).

[31] Victims can access the Trust Fund even if they do not appear before the Court.

[32] Jonathan Doak, Ralph Henham and Barry Mitchell, 'Victims and the Sentencing Process: Developing Participatory Rights?' (2009) 29(4) *Legal Studies* 651–77; DDN Nsereko, 'The Role of Victims in Criminal Proceedings – Lessons National Jurisdictions Can Learn from the ICC' (2010) 21 *Criminal Law Forum* 399–415; Wemmers (n 30).

[33] See further Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge, Cambridge University Press, 2012). For a general critique, see Regina E Rauxloh, 'Good Intentions and Bad Consequences: The General Assistance Mandate of the Trust Fund for Victims of the ICC' (2021) 34(1) *Leiden Journal of International Law* 203.

[34] *Prosecutor v Lubanga*, Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to Be Applied to Reparations' of 7 August 2012, ICC-01/04-01/06-3129, 3 March 2015.

[35] See further Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21(9) *International Journal of Human Rights* 1204.

[36] Margaret U Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge, Cambridge University Press, 2006) 28.

[37] Linda Radzik, *Making Amends: Atonement in Morality, Law, and Politics* (Oxford, Oxford University Press, 2009).

[38] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review* 157–219. She asks: 'What could replace lost health and serenity; the loss of a loved one or of a whole extended family; a whole generation of friends; the destruction of home and culture and community and peace?' (159).

[39] Mick Cavadino and James Dignan, 'Reparation, Retribution and Rights' (1997) 4 *International Review of Victimology* 233.

the loss easier to bear. In this sense, it should help restore the dignity of victims.[40] In doing so, it may also help in bestowing a sense of trust between victims and state institutions thereby encouraging them to report crime in the future and cooperate with the criminal justice system.

Why, however, should the right to redress be located *within* the criminal justice process as opposed to outside it (ie through the use of civil justice system or mediation/restorative justice schemes that operate beyond its parameters)? As inferred above, there would seem to be an omnipresent concern that diffusing the objectives of the civil and criminal justice system would render the criminal process incoherent and incapable of carrying out its primary functions, namely the adjudication of guilt and the punishment of crime.

This need not be so. Redress within criminal justice is inextricably linked to the question around how society punishes offenders, and is not inherently incompatible with the various public interest justifications that are frequently cited as underpinning sentencing (which, in any case, often conflict with each other).[41] If punishment is regarded as 'anything that is unpleasant, a burden, or an imposition of some sort on an offender',[42] then it would seem that the criminal objective of punishing crime is capable of being met through reparation. Although the payment of a financial penalty has very obvious onerous connotations, it can also be noted that much of the restorative justice literature has highlighted that symbolic gestures, and even restorative processes themselves, are often very difficult and highly emotive experiences for the offender.[43] As Randy Barnett argues, the key difference in such a shift would be a change in the rationale for imposing punishment:

> The point is not that the offender deserves to suffer; it is rather that the offended party desires compensation. … This represents the complete overthrow of the paradigm of punishment. No longer would the deterrence, reformation, disablement, or rehabilitation of the criminal be the guiding principle of the judicial system. The attainment of these goals would be incidental to, and as a result of, reparations paid to the victim.[44]

A similar perspective is proffered by Anthony Duff, who has argued that reparative measures ought to be viewed as penal measures because they involve the intentional infliction of a burden upon an offender for transgressing the criminal law.[45] Restoration, he argues, 'is not only compatible with retribution: it *requires* retribution'.[46] Thus, although according to common law theory, the criminal law may not specifically aim

[40] Cherif M Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2) *Human Rights Law Review* 203.

[41] Andrew Ashworth and Elaine Player, 'Criminal Justice Act 2003: The Sentencing Provisions' (2005) 68(5) *MLR* 822–38; Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford, Oxford University Press, 2012).

[42] Kathleen Daly, 'Revisiting the Relationship between Retributive and Restorative Justice' in Heather Strang and Jon Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (London, Ashgate, 1999) 10.

[43] Jon Braithwaite, *Crime, Shame and Reintegration* (Cambridge, Cambridge University Press, 1989); R Anthony Duff, *Punishment, Communication and Community* (Oxford, Oxford University Press, 2003) 47; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford, Clarendon Press, 2002).

[44] Barnett (n 15) 289.

[45] Duff (n 43).

[46] ibid 43 (emphasis retained).

to resolve private conflicts, its objective in regulating offending behaviour may be furthered if reparative measures assist in terms of either reductivism, deterrence or any of the other well-rehearsed arguments concerning the objectives of the penal system.[47] As Groenhuijsen puts it, the distinction between punishment and reparation is 'a dogmatic aberration' that derives from a conceptual misunderstanding concerning crime and punishment:

> For the offender, there is no difference in the imposition of a fine on the one hand and an obligation to pay (the same amount of) restitution on the other. The proceeds of the crime have usually been spent a long time before, so the financial burden is equal in both situations. For the offender, the hardship – the pain – is neither affected by the recipient of the financial offer he has to make (the state or the victim) nor by its legal origin (tort/civil law v crime/punishment).[48]

Yet from the victim's perspective, the difference is immense. One will result in tangible compensation whereas the other will not. It may be timely to pause for thought and re-examine whether it may be possible to express denunciation 'in a currency other than that of retributive-style punishments'.[49] The nature of this new 'currency', however, needs to be carefully unpicked. Traditionally, fines and monetary damages have accounted for the vast majority of legal sanctions within most Western legal systems by acting as the primary tool for punishing, deterring, compensating and regulating.[50] However, although there may be little problem in attaching a monetary value to stolen goods or damaged property, the task of measuring physical, psychological and emotional injuries against any sort of monetary scale is fraught with difficulty since the impact of the offence will vary significantly according to the experiences of individual victims. To make reparation effective and meaningful for victims, the task of repairing harm ought not to be construed in purely financial terms. A more flexible concept is needed which is better placed to realise the various non-pecuniary components. It could, for example, include some of the salient redress features of international human rights law and transitional justice, such as apologies, explanation, guarantees of non-repetition, and uncovering facts or access to truth.[51] In developing such a concept of reparation along these broader lines, the criminal justice system could distinguish itself from the stale and ingrained dichotomy of the civil and criminal law, towards a unitary system of justice that seeks to address the reparatory rights of the victim alongside the punitive function of the penal process.

The advantages of reconceiving redress in this way would not be limited to the victim, but may also contribute to the rehabilitation of the offender. If proper processes are put in place that facilitate deliberative interaction between the victim

[47] eg Goldstein (n 19) notes that 'potential offenders are likely to be deterred from wrongdoing by the civil courts and punitive damages may be awarded there' (531).

[48] Marc S Groenhuijsen, 'Victims' Rights and Restorative Justice: Piecemeal Reform of the Criminal Justice System or a Change of Paradigm?' in H Kaptein and M Malsch (eds), *Crime, Victims and Justice. Essays on Principles and Practice* (London, Routledge, 2004) 74.

[49] Cavadino and Dignan (n 39) 241.

[50] Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (London, Routledge, 2009) 1.

[51] See Jonathan Doak, 'Enriching Trial Justice for Crime Victims in Common Law Systems: Lessons from Transitional Environments' (2015) 21 *International Review of Victimology* 139–60.

and the accused, the consequences of his or her actions may be more readily impressed upon the offender than a speech denouncing his conduct from the bench. Emotionally intelligent processes, which engage with complex but readily observed emotions such as guilt, fear, remorse and forgiveness, can assist in the alleviation of guilt and may encourage a feeling among both parties that amends have been made.[52] Although such terms may appear cliché, there is significant evidence of the rehabilitative effect of reparatory processes. Recent restorative justice studies suggest that offenders may be able to gain a sense of empathy for the victim through engaging in conferencing which, in turn, can imprint a new 'co-narrative' that affirms legal norms, vindicates victims, and denounces the act of wrongdoing without labelling any person as a villain.[53] In turn, this can help to engineer a transformed sense of identity and self-responsibility which may help them to desist from future offending.[54] Just as labelling theory has long illustrated a link between labelling someone a criminal and their propensity to commit further offences, the reverse is also true. If the offender is exonerated (and thus notionally rehabilitated) by the victim and/or the state, their capacity to desist from future offending is increased.

Yet even if it is conceded that redress within criminal justice may contribute in some measure to fulfilling the objectives of sentencing, an objection may be that it nevertheless ought to be eschewed because of the risk it poses to the principle of proportionality, which broadly states that the burden imposed on the offender reflects the seriousness of the offence. Critics warn that proportionality may be compromised in restorative practices where the victim, whose desired levels of vengefulness or forgiveness will inevitably differ from case to case, has a say in what happens to the offender.[55] Victims have long been regarded as unpredictable and irrational actors whose enhanced participation in the criminal justice systems could effect a 'reversion to the retributive, repressive and vengeful punishment of an earlier age'[56] and may introduce a new and unpredictable variable into the penalty equation and would jeopardise core principles such as 'just-deserts', certainty and objectivity.

This objection can be countered on two grounds. First, the notion of the vengeful victim is something of a myth. Far from seeking vengeance, research seems to suggest that most victims prioritise reparation over retribution and many display a desire to help the offender.[57] There is no evidence to suggest that victims are more

[52] Lucia Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57(2) *MLR* 228–50, 233.

[53] Jon Braithwaite, 'Narrative and "Compulsory Compassion"' (2006) 31 *Law and Social Inquiry* 425–46.

[54] Tom R Tyler et al, 'Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment (2007) 41(3) *Law and Society Review* 553; M Rossner, *Just Emotions: Rituals of Restorative Justice* (Oxford, Oxford University Press, 2013). On restorative justice and desistance, see generally Bart Claes and Joanna Shapland, 'Desistance from Crime and Restorative Justice' (2016) 4(3) *Restorative Justice* 302.

[55] Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford, Oxford University Press, 2005).

[56] Edna Erez, L Roeger and F Morgan, 'Victim Harm, Impact Statements and Victim Satisfaction with Justice: An Australian Experience' (1997) 5(1) *International Review of Victimology* 37–60, 40.

[57] James Chalmers, Pete Duff and Fiona Leverick, 'Victim Impact Statements: Can Work, Do Work (for Those Who Bother to Make Them)' [May 2007] *Criminal Law Review* 360–79, 374; Jonathan Doak and

punitive and would want to impose a harsher burden on the offender than the public at large.[58]

Secondly, irrespective of the personal desires of victims, it is possible to envisage a model of criminal justice that is capable of delivering redress that also encapsulates the idea of proportionality. One of the most sophisticated proposals is set out by Cavadino and Dignan,[59] who propose an 'integrated restorative justice model', wherein reparation is effected through relatively flexible proportionality principles. The model gravitates around the idea of 'public tariff', which would effectively seek to transpose existing penal sanctions into a form of redress. In practical terms, this could mean, for example, include converting monies due by way of a fine payable into a compensation order, or community service into a period of time geared towards helping specific groups or victim communities. The form and extent of such reparation would ultimately be a decision for the court which, through clear guidelines, would aim to pass a sentence that reflected both the private interests of the victim alongside the public interests of wider society. Private or informal agreements between victims and offenders could also be taken into account by the sentencer, who would be obligated to ensure that 'retributive maximum' and 'retributive minimum' standards were applied. Where such agreements were not forthcoming, the principle of proportionality would provide a 'default setting' for determination of the final outcome.

Although innovative and carefully thought out, these ideas are not unproblematic. In critiquing a similar proposal by Braithwaite,[60] von Holderstein Holtermann cautions that trying to convert orthodox disposals into reparative ones amounts to 'entering the dubious business of comparing oranges and apples – or … of finding out how many oranges it takes to exceed, say, ten apples'.[61] While this objection may appear well grounded at first sight, it should be borne in mind that the business of determining orthodox penal sanctions is also rather haphazard and prone to a measure of guesswork. The sentencer's exercise – which usually consists of determining levels of culpability and harm – also involves an imprecise conversion exercise to calculate the form and quantum of the punishment to be imposed by the court. If harm and culpability can be used as concepts to determine the degree of punishment, then so too can they be used to determine the degree of reparation.

David O'Mahony, 'The Vengeful Victim? Assessing the Attitudes of Victims Participating in Restorative Youth Conferencing' (2006) 13(2) *International Review of Victimology* 157–77; Strang (n 43).

[58] Mike Hough and Alison Park, 'How Malleable Are Attitudes to Crime and Punishment? Findings from a British Deliberative Poll' in Julian Roberts and Mike Hough (eds), *Changing Attitudes to Punishment* (Cullompton, Willan, 2002); Pat Mayhew and John Van Kesteren, 'Cross-National Attitudes to Punishment' in Roberts and Hough (eds), ibid; Joanna Mattinson and Catriona Mirrlees-Black, *Attitudes to Crime and Criminal Justice: Findings from the 1998 British Crime Survey* Home Office Research Study (London, Home Office, 2002) 200.

[59] Cavadino and Dignan (n 39).

[60] Jon Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford, Oxford University Press, 2002).

[61] Jakob von Holderstein Holtermann, 'Outlining the Shadow of the Axe – On Restorative Justice and the Use of Trial and Punishment' (2009) 3(2) *Criminal Law and Philosophy* 187, 200.

4. REALISING REDRESS WITHIN CRIMINAL JUSTICE

Although the normative arguments for accommodating reparation within the criminal justice system may appear persuasive, the question of realising it through praxis is more difficult to resolve. Since the 1970s, the preferred means of the criminal courts have been some form of compensation/restitution/reparatory order payable, by the offender to the victim for loss or injury sustained. These may either form a component of the sentence itself (as in England and Wales and New Zealand)[62] or stand-alone ancillary orders which carry little or no relevance to the sentencing equation (as in New South Wales and Victoria). Compensation orders have been shown to be problematic in a number of respects, generally being used on an inconsistent basis, and offering small (often derisory) amounts to victims that may only be payable over a long period of time.[63]

To some extent, such problems may stem from the possibility that such orders are perceived as being disproportionately severe by sentencers owing to the general lack of means of offenders to pay.[64] However, there may also be deeper, structural factors at work insofar as – for reasons above – many judges may be uncomfortable with the normative confusion that is inherent in mixing aspects of civil and criminal law and may be unsure how they ought to factor restitution into the penal system.[65] There is seemingly a fundamental tension stemming from the civil/criminal divide insofar as the victim's reparatory interest may interfere with the state's rationale for imposing a particular sentence. If, for example, a victim has suffered long-term debilitating injury, his or her entitlement to a relatively high level of compensation may impose a crushing financial burden on the defendant. This, in turn, might undermine any rehabilitatory objective of the sentence through undermining the defendant's capacity to desist from future offending because the imposition of an unrealistic burden may simply encourage them to resort to crime to obtain the necessary funds. As such, many jurisdictions impose an upper limit on the amount of compensation that can be ordered,[66] and the offender will usually be allowed to pay this over a period of time.

A further problem with compensation orders is that – like damages in the civil courts and state compensation for criminal injuries – the task of repairing harm is construed in purely financial terms. As argued above, this is likely to prove unsatisfactory for many victims and is, in any case, a poor means of appraising the nature of the harm sustained. Such an approximation exercise is exacerbated by the fact that the victim has no standing to influence this decision and must rely on the prosecutor to

[62] Originally contained in the Criminal Justice Act 1972, the power is now contained in the Powers of Criminal Courts (Sentencing) Act 2000, s 130.

[63] Brian Williams, *Victims of Crime and Community Justice* (London, Jessica Kingsley, 2005) 99.

[64] Basia Spalek, *Crime Victims: Theory. Policy and Practice* (London, Palgrave, 2006) 103.

[65] See Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Aldershot, Gower 1985) 134; Home Office, Compensation and Support for Victims of Crime: A Consultation Paper on Proposals to Amend the Criminal Injuries Compensation Scheme and Provide a Wide Range of Support for Victims (London, Home Office, 2004).

[66] In England and Wales, for example, the maximum amount is capped at £5,000 in magistrates' courts although it is uncapped for offences tried in crown courts. However, the court must take into account the means of the offenders: see ss 130–31 Powers of Criminal Courts (Sentencing) Act 2000.

request that an order be made in the first place. Moreover, some of the key symbolic forms of redress that matter most to victims (such as an explanation as to why they were victimised, or a simple apology) cannot be the subject of such a court order. It has been said that such symbolic acts may help to fulfil the needs of victims 'for telling the story, for justice, and for measures to avoid repetition'.[67]

Finally, it is questionable whether a compensation order amounts to any genuine form of accountability from the perspective of the offender. There is a real risk that they will be unable to distinguish between a compensation order and a fine because both impose financial burdens, and thus few offenders are likely to consider the impact of their actions and are unlikely to feel personally accountable given that the victim has neither applied to the court for the order nor had any significant input into determining its terms.[68] From the point of view of both victim and offender, the compensation order does little to empower either party, since neither has any control over its allocation.

5. OPTIONS FOR REFORM

Given that the compensation order is the only avenue for redress in most common law criminal justice jurisdictions, there is pressing need to consider more effective mechanisms. Perhaps the most obvious – and radical – option might be through some form of *partie civile* process, not dissimilar to that which currently operates in many continental jurisdictions.[69] The procedure basically facilitates victims seeking civil compensation orders against the offender, thereby avoiding the need for a separate legal action. Usually, victims (or their legal representatives) appear in court and will demonstrate their claim through documentary evidence. Unlike the proposal above which is confined to sentencing hearings, *parties civiles* can usually participate at any stage of the trial.[70] In a similar vein (and aside from the Trust Fund discussed above), victims before the ICC can seek reparation orders directly against the accused; the court is empowered to 'determine the scope and extent of any damage, loss or injury to, or in respect of, victims' and establish principles for reparation, restitution, compensation and rehabilitation.[71] However, given the deeply entrenched nature of the adversarial system, and the clear demarcation of the fact-finding and sentencing phases of trial, the wholesale adoption of a *partie civile* system could lead to an unwieldy and protracted trial process, and would also be likely to face significant

[67] Roht-Arriaza (n 38) 159.

[68] See Groenhuijsen (n 48) 74.

[69] See further Marion EI Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (Nijmegen, Wolf Legal Productions, 2000).

[70] However, most continental trial proceedings do not differentiate between the adjudication of guilt and sentencing stage of the process.

[71] Art 75(1). In the *Lubanga* case (n 34), the Trial Chamber considered this issue and held that the Court would be able 'without difficulty, to separate out the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted)' [121].

pushback on the grounds of perceived interference with fair trial rights (in particular, the principle of equality of arms in the fact-finding phase). As such, it is difficult to see how such a mechanism might operate successfully without more far-reaching reform to the legal system as a whole.

A slightly less radical approach, but perhaps equally controversial, would be through the adoption of what I term the ASM, a variation of the 'integrated restorative justice model' proposed by Cavadino and Dignan.[72] Essentially, the ASM would seek to capture the question of redress alongside that of public censure. In any sentencing hearing where a victim is identified and consents to be dealt with through the ASM, one of two mechanisms might be triggered: referral to an out-of-court restorative conferencing programme, or, where this is not feasible, the facilitation of a more emotionally intelligent and dialogical sentencing process that takes a holistic view of matters pertaining to both redress and punishment.

Under the ASM, it is suggested that courts be obliged to consider whether the case is suitable for referral to a restorative conference. Where both parties consented and the court was satisfied that the process stood a reasonable chance of success, the court would defer sentence pending the outcome of such referral. This would involve convening a conference involving the victim, offender and their respective family members or supporters, who would discuss the circumstances surrounding the offence guided by a trained facilitator. Where agreement was reached, this would return to the court for ratification, ensuring that it respected the rights of all parties and complied with maximum and minimum proportionality standards. Such a programme could either be overseen by a state agency or an approved third-party provider, although failure to reach agreement or to comply with the terms of the agreement would result in the offender being returned to court for a more conventional sentencing process. In Braithwaite's words, the scheme would thus operate 'in the shadow of the axe',[73] meaning that conventional court structures would be triggered where the referral had essentially failed.

A similar model already operates in respect of young offenders in Northern Ireland and New Zealand, whilst New South Wales has adopted a process known as 'forum sentencing', in which magistrates can refer cases to conferencing before passing sentence.[74] With appropriate safeguards, court-ordered mediation and conferencing could serve to complement existing sentence practice. Referrals to mediation are becoming increasingly commonplace within continental Europe; Austria and Finland both operate schemes whereby the law provides that certain cases may be diverted away from court at the prosecution stage.[75] Such a restorative intervention, however, can only work where the offender accepts responsibility for the harm and both parties agree to the process.

[72] Cavadino and Dignan (n 39).

[73] Braithwaite (n 53) 36. For a critique, see von Holderstein Holtermann (n 61), stating that 'the exact size and shape of [the shadow] remains blurry throughout' (139).

[74] Ineligible offences include those involving serious violence, murder, manslaughter, family violence and offences involving a weapon: Criminal Procedure Regulation 2010 (NSW) regs 63(2)–(4). A similar scheme, known as 'ustice Mediation' operates in Queensland.

[75] See further O'Mahony and Doak (n 57) 132–50.

For a number of reasons, restorative conferencing may not be suitable for the case in question (for example, the offender may not consent to the process or the risks of secondary victimisation may be assessed as unacceptable). Where the case is not deemed appropriate, the court itself might seek to resolve the question of redress alongside that of punishment. In a previous article, I suggested with Louise Taylor that criminal courts might strive to follow an 'emotionally intelligent' sentencing process to deliver a package that meets the needs of both victims and offenders.[76] The gist of this proposal would be that, where possible, sentencing proceedings would be stakeholder-led rather than lawyer-led. The sentencing hearing would thus gravitate around a dialogue-driven encounter, facilitated by the trial judge. Victims, if they should choose to participate, might read a statement to the court on the impact of the offence, and as part of this might include photographs, drawings or poems as is currently permitted in the Australian state of Victoria.[77]

Crucially, victims could also ask the offender the 'why me?' question, which research suggests tends to ruminate in the minds of many victims of serious crime.[78] For their part, offenders should have the opportunity to respond – and potentially challenge – victims' statements. Pleas in mitigation (which tend to be written and delivered solely by lawyers) might be either complemented or replaced by the opportunity for the offender to deliver an oral statement in person to the court. They would be free to recount aspects of their life stories and their emotions before, during and after the offence. Such emotions would not only cover the 'acceptable' feelings of shame and remorse but offenders would also be free to make protests of innocence or defiance. Just as offenders would have a right to challenge aspects of the victim's evidence, so too would victims be empowered to challenge any aspect of the offender's statement. It is, perhaps, self-evident that a risk exists that a dialogue of this nature could quite easily spiral into a freewheeling fracas, or indeed the victim narrative could become dominant, thereby drowning or pre-empting the account of the offender.[79] However, with careful formulated ground rules, close preparation with legal professionals and robust judicial oversight, this risk might be substantially reduced.

Like restorative conferencing, such an exercise would give the court a more nuanced and comprehensive understanding of the backgrounds of the victim and offender and the impact of the offence. This should enable the court to tailor a much more effective reparation package than the existing compensation order, which would speak more closely to the needs of victims and the individual circumstances of the offenders. It would also broaden the potential forms of reparation that might be made available. These would not be limited to pecuniary compensation, but might also include aspects such as an apology; an undertaking not to repeat the offence or commit any further act that would cause further distress to the victim; restitution or

[76] Jonathan Doak and Louise Taylor, 'Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing' (2013) 64(1) *Northern Ireland Legal Quarterly* 25–46.

[77] ibid.

[78] Lawrence Sherman and Heather Strang, 'Repairing the Harm: Victims and Restorative Justice' (2003) 1 *Utah Law Review* 15.

[79] Susan Bandes, 'Empathy, Narrative, and Victim Impact Statements' (1996) 63 *University of Chicago Law Review* 361, 386.

repair of damaged or stolen property; or undertaking some form of work such as cleaning graffiti, picking up litter or giving time to assist with a similar charitable or community cause. As with the existing compensation order, such reparation might operate alongside other sentencing components, with the overall 'punitive tariff' being reduced for remorse, apology, forgiveness and any acts of contrition.[80] As with the restorative referral outlined above, the overall burden imposed on the offender would also be subject to the higher and lower proportionality limits. The ASM would ensure the delivery of a package of reparative measures which might go some way to meeting victims' needs and expectations of the justice system, which is also a proportionate and just response to the offending behaviour.

Whilst the ASM may be attractive on paper, it risks – like the compensation order – being undermined by the attitudinal barrier regarding the role of redress within criminal justice that would appear to be commonplace within certain quarters of the judiciary. To offset this risk, a (rebuttable) presumption should be introduced through legislation to ensure that either a referral to restorative conferencing or a reparation order (issued through the process outlined above) will be issued in all cases involving a direct victim where an injury or loss has occurred. Under New Zealand's Sentencing Act 2002, the court is under an obligation to adjourn sentencing in order to assess the suitability of all cases for referral to restorative justice where the offender has pleaded guilty and where the judge is aware that a programme is available. Likewise, a similar obligation applies under the Act requiring that a court 'must impose [a reparation order] unless it is satisfied that the sentence or order would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate'.[81]

6. CONCLUSIONS

Randy Barnett famously proposed that a similar procedure ought to be adopted in common law jurisdictions, whereby adjudication would concern itself with 'the conduct, broadly defined, of the parties to the case with a view toward the protection of individual liberty and private property'.[82] As proposed by the ASM, viewing conflicts through such a unitary lens would potentially address a much wider set of aims above and beyond either criminal justice or the private law of tort. Victims would not be the only beneficiaries of such an approach. The injection of the victim's private interest into the somewhat elusive concept of the 'public interest' could lend additional legitimacy to the outcome of the case, thereby benefiting the criminal justice system as a whole since the community is made up of 'victims, potential victims and the fellow citizens of victims'.[83] As Weisstub contends, the civil justice system could benefit from infusing itself with the symbolism of criminal sanctions, thereby

[80] See Stephanos Bibas, 'Forgiveness in Criminal Procedure' (2007) 4 *Ohio State Journal of Criminal Law* 329.

[81] Sentencing Act 2002 (NZ) s 12(1).

[82] Barnett (n 15) 290.

[83] Cavadino and Dignan (n 39) 237.

showing itself to be 'consonant with public morality and conscience'.[84] There are also various economic arguments that could be used in support of this view: reparative sentences significantly lessen the financial burden on the taxpayer and a corresponding reduction in separate civil claims could reduce litigation in the courts.[85]

However, the prevalence of the common law paradigm which draws a neat (though unconvincing) line between the private and public realms means that such a radical reconfiguration of the criminal trial remains an indeterminate prospect. Past failings of the compensation order, and institutional reluctance to integrate restorative justice programmes within the formal parameters of the criminal justice system, indicate that opposition to such reforms remains deeply entrenched. Although the normative case for redress has been widely advanced, and a considerable evidence base exists as to how reparative justice might be operationalised in practice, the challenge now is to explore concrete means to counter the cultural and attitudinal resistance to redress in order to move towards a more legitimate and holistic form of criminal procedure, which better encapsulates the range of harms that stem from criminal acts.

[84] N Weisstub, 'Victims of Crime in the Criminal Justice System' in E Fattah (ed), *From Crime Policy to Victim Policy* (London, Macmillan, 1986) 207.
[85] Zedner (n 52) 233.