

# **A Dual Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame\***

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## **Abstract**

The dominant orientation in both mainstream and alternative forms of criminal justice theory and practice employs a single process approach: one that aims to do justice to victims primarily through conviction and punishment of the offender. In other words, justice for victims crucially involves offenders getting their ‘just deserts’. In contrast, this paper argues for a dual process approach: one that separates conceptually and, in so far as possible, in practice, the victim and the offender, and employs two distinct systems to serve the ends relevant to each respectively. We suggest that neither in principle nor in practice can a single process do justice to both victims and offenders. Rather, we set out principles for designing one track oriented to victims and another to offenders, to address the distinctive concerns of each in relation to criminal law with parallel sophistication and humanity.

Key words: victims; punishment; responsibility; blame; restorative justice, retributivism

In contemporary contexts, criminal justice processes involve multiple participants and aim to serve various ends. Participants typically include the defendant or convicted offender, the public, the state and the victim.<sup>1</sup> In England and Wales – the jurisdiction we take as our primary example, though its relevant features are reproduced in similar systems, including Australia, Canada, New Zealand and the United States – the Criminal Justice Act 2003 section 142 stipulates that the purposes of sentencing include the following ends: reparation to victims; punishment, reform and rehabilitation of the offender; and public protection. Yet,

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<sup>1</sup> Because the institutional arrangements relevant to our argument span pre-and post trial stages, our discussion applies to both defendants and convicted offenders. For ease of reference, in what follows we refer simply to ‘offenders’. Likewise, many of our arguments for a victim-oriented track apply in principle to all victims of crime, irrespective of whether an offender has been identified, prosecuted or convicted; evidently, however, eligibility criteria would have to be specified, as for example they are under current arrangements for state compensation to victims.

despite these multiple participants and various ends, the dominant orientation in both mainstream and alternative forms of criminal justice theory and practice employs what we shall call a single process approach. By this we mean that a single system and set of procedures and practices is first and foremost conceptualised, but also in practice functions, so as to encompass these multiple participants and serve these various ends. Crucially, as we describe more fully below, a single process approach aims to do justice to victims primarily through conviction and punishment of the offender. Put in the crudest terms, justice for victims involves offenders getting their ‘just deserts’. In contrast, by a dual process approach we shall mean one that separates conceptually and, in so far as possible, in practice, at least two of the participants, namely, the victim and the offender, and employs two distinct systems – with their corresponding personnel – to serve the ends relevant to each respectively. Our aim in this paper is to argue for a dual process approach as against the dominant single process model. We suggest that neither in principle nor in practice can a single process do justice to both victims and offenders. Hence we ought, so far as possible, to separate conceptually the needs and the ends in relation to victims and offenders that the criminal law legitimately aims to serve, and enact this conceptual reform in practice. This, we argue, in its ideal form entails designing one track oriented to victims and one track oriented to offenders, to address the distinctive concerns of each with parallel sophistication and humanity.

Our discussion proceeds in eight sections, encompassing historical, empirical and philosophical considerations. We begin by describing the origins and motivation for this article, both to provide some familiarity with its background assumptions, and to render a dual process approach intuitively worthy of the further exploration which the article then provides. In the second and third sections, we seek to explain why a single process approach has been so dominant – so dominant, arguably, as to have obscured the very possibility of a dual process approach. We start to answer this question by considering the historical evolution of the criminal law as a means of dispute resolution; turning then to the ascendancy of the victims’ movement and the corresponding political climate within the last few decades. In the third section, we consider some of the foundations of contemporary mainstream penal philosophy, as articulated by influential forms of modern retributivism. To anticipate, our key point is that the retributivist focus on the offender getting their ‘just deserts’ as central to justice being served invites – but does not in itself necessitate – the equation of justice for victims with punishment of offenders – this being the crucial assumption inherent in the dominant single process approach. Although we have elsewhere

argued against certain key features of modern retributivism<sup>2</sup>, it is important for our purposes here to recognise that retributivism can embrace a dual process approach yet retain these key features – so long as it refuses the invitation to equate justice for victims with punishment of offenders or, relatedly, to justify the latter by appeal to the former. In the fourth and fifth sections, we argue in favour of replacing the current single process approach with a dual process model. We first consider some inadequacies of recent attempts to address the interests and needs of victims and provide them with a meaningful yet appropriate role within a single process approach. In section five we then turn to the theoretical basis for rejecting the alignment of justice for victims with punishment of offenders, premised on the guiding values of a state-initiated centralised criminal justice system within contemporary liberal democracies. In the sixth section, having established the value of creating a separate victim-oriented track, we sketch what it might look like in practice. To maximise the chance of realizing practical change, we build so far as possible on existing structures to concretize the conceptual orientation of a dual process approach. In the seventh section we compare the view we advocate to restorative justice theory and practice. The concluding section briefly revisits the reasons to reject an alignment of justice for victims with punishment of offenders.

## 1. Origins, Motivation, and the Clinical Analogy Revisited

A central preoccupation of public concern about crime is the harm it does to victims. Recent years have witnessed increased attention to the fear and insecurity felt not only by actual victims but by potential victims of crime.<sup>3</sup> This phenomenon may be rooted in a larger socio-cultural trend in which victimization is a defining feature of how claims to moral and

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<sup>2</sup> Nicola Lacey and Hanna Pickard, 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2013) 33 *Oxford Journal of Legal Studies* 1; Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665; Nicola Lacey and Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78 *Modern Law Review* 216; see also Nicola Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge 1988) Chapter 2.

<sup>3</sup> Lucia Zedner, *Security* (London: Routledge 2009); Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012); Carolyn Hoyle, 'Victims, the Criminal Process and Restorative Justice' in Rod Morgan, Mike Maguire and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Fifth edition: Oxford University Press 2012).

political attention are made in public discourse.<sup>4</sup> Whatever the truth of this larger claim, there can be no doubt that a concern with victims of crime has had a significant impact on public and political debate, as well as on the policy platforms of the main political parties, in the United Kingdom and comparable countries, including Australia, Canada, New Zealand and the United States.<sup>5</sup> The reasons have been both principled – expressing moral sympathy on behalf of victims – and pragmatic. In a world in which not only offenders, but also victims of crime, are drawn disproportionately from the less socially advantaged and, particularly, from those suffering multiple psychological, social, and economic vulnerabilities, the insecurity presented by crime raises key issues of social justice and distribution and is hence a natural political concern for left of centre as much as right of centre parties.<sup>6</sup> Given that swing voters may be concerned about the impact of crime on their lives and their communities, and hence about the efficacy of criminal justice policy, it makes electoral sense for political parties to enhance their policy offer to victims and potential victims of crime.<sup>7</sup> Notwithstanding a marked decline in crime since the 1990s – albeit following a twenty year period of rising crime rates in many advanced democracies – victims’ interests have remained politically salient.<sup>8</sup> Indeed, the development of a criminal justice policy oriented to both the needs and satisfaction of victims has come to look like a matter of moral and political common sense in both national and international criminal justice.<sup>9</sup> In England and Wales, for example, this has been expressed in government papers claiming to ‘rebalance the system in favour of victims’ and the ‘law-abiding majority’.<sup>10</sup>

In a series of recent papers, we have argued for a reconception of criminal responsibility and the punishment of offenders that may appear to call this common sense

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<sup>4</sup> Charles Taylor, *Multiculturalism and the Politics of Recognition: An Essay* (Princeton University Press 1992).

<sup>5</sup> Hoyle (n 3 above) 412-413; Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims’ Rights* (New York University Press 2002); Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press 2007) 77-164.

<sup>6</sup> Ramsay (n 3 above); Zedner (n 3 above).

<sup>7</sup> Nicola Lacey, *The Prisoners’ Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge University Press 2008)

<sup>8</sup> Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton University Press 2016) 196-2014; Dame Helen Reeves and Peter Dunn, ‘The Status of Victims and Witnesses in the Twenty-First Century’ in Anthony Bottoms and Julian V Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Abingdon: Willan 2010) pp. 46-71; Michael Tonry, ‘Rebalancing the Criminal Justice System in Favour of the Victim: The Costly Consequences of Populist Rhetoric’ in *Hearing the Victim*. pp. 72-103.

<sup>9</sup> For example, the development of Truth and Reconciliation Commissions and of Special Tribunals (such as that on Rwanda) have arguably been shaped by a concern to put victims centre stage.

<sup>10</sup> See the announcement of the Criminal Justice Act 2003 in Home Office, *Justice for All: A White Paper on the Criminal Justice System* (Cm 5563, 2002) 1; Home Office, Home Office Departmental Report for 2007 (Cm 7096, 2007) 38; there is further discussion in Tonry (n 8 above).

into question.<sup>11</sup> Our inspiration is the clinical model of responsibility without blame, which sharply distinguishes practices of holding responsible and to account for wrongdoing that maintain respect, concern, and indeed compassion – and so can support and enable moral and psychological growth and behavioural change – from practices that invite and fuel an affective form of blame and its associated hostile expressions and actions, and so undermine these ends.<sup>12</sup> We have argued that, despite some important differences between clinical and criminal contexts, it is nonetheless both valuable and feasible to import key features of the clinical model of responsibility without blame into the legal realm.<sup>13</sup> Our core claim is that, by analogy with the clinical model, the state should approach the punishment of offenders by insisting on offenders’ agency and hence a firm attribution of responsibility for their offences; but, crucially, should do so without the sort of affective blaming which normally accompanies findings of criminal culpability and is part and parcel of the hard treatment commonly associated with retributive punishment. Rather, the state should aspire to punish with forgiveness, and to design its criminal justice apparatus so as to maximise the opportunities to create institutional counterparts of interpersonal forgiveness.<sup>14</sup> Our approach therefore shares with many versions of modern retributivism an emphasis on the offender’s responsibility for blameworthy conduct as core to the permissibility of punishment, but rejects its usual conception of what punishment involves, thereby enabling responses to crime that better serve forward-looking ends.

Many issues are raised by our alternative model. Our aspiration in this paper is to address one of the most obvious, namely, its ability not merely to give a better account of criminal justice for offenders, but also to cater for victims’ interests and needs. How is the moral and political common sense mandating proper respect and concern for victims to be accommodated within a model which appears to give little attention to victims themselves, and, indeed, argues for a form of non-blaming responsibility, followed by punishment oriented towards forgiveness? Does this not imply a disrespect and lack of concern for victims? And if so, does it not fail on fundamentally moral – never mind practical and political – grounds?

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<sup>11</sup>Lacey and Pickard (n 2 above).

<sup>12</sup> Hanna Pickard, ‘Responsibility Without Blame: Empathy and the Effective Treatment of Personality Disorder’ (2011) 18 *Philosophy, Psychiatry, & Psychology* 209; Hanna Pickard, ‘Responsibility Without Blame: Philosophical Reflections on Clinical Practice’ in KWM Fulford and others (eds), *The Oxford Handbook of Philosophy and Psychiatry* (OUP Oxford 2013) 1134–1152.

<sup>13</sup> Nicola Lacey and Hanna Pickard, ‘From the Consulting Room to the Court Room?’ (n 2 above)

<sup>14</sup> Lacey and Pickard, ‘To Blame or to Forgive?’ (n 2 above). Note that it is in principle possible to accept our core claim that the state should punish by holding responsible *without* blame while rejecting our further claim that the state should punish *with* forgiveness.

These questions demand serious consideration. In what follows, we argue that they are best addressed by a dual process approach. But before embarking on that argument, we revisit the analogy between clinical and legal contexts, in the hope of motivating some scepticism about the viability of a single process model and lending intuitive credibility to our preferred dual process alternative.

To this end, consider that forms of group therapy that employ the model of responsibility without blame do not place patients who are undertaking therapy as victims and patients who are undertaking therapy as offenders within a single therapy group – the equivalent of a single process approach – but rather provide separate groups for each – the equivalent of a dual process approach.<sup>15</sup> One reason for this rule is not straightforwardly relevant to a criminal justice context. Victims may be vulnerable to further exploitation, and offenders who are embarking on therapy to address their wrongdoing typically still pose a risk; hence placing victims and offenders in the same group may simply not be safe. However, an additional reason for this separation is applicable; namely, that the basic interests and needs of people undertaking therapy as victims and people undertaking therapy as offenders are likely to conflict, seriously reducing the likelihood that a therapy group facing the task of helping both is effective at helping either.

For instance, victims may need to speak to their experience and emotions surrounding the crime, in an environment that feels safe and supportive; they may also need to express rage and vengeance, in a way which may be raw or unconstrained, as part of a process of grieving and coming to terms with what happened to them. The former is unlikely to be possible with offenders in the group; the latter may be possible, but counter-productive to the therapeutic task of enabling offenders to take responsibility and begin to change – given that the latter goals are not typically facilitated by environments supporting affective blame. Offenders, in turn, may need to express some of the emotions, beliefs, and desires that have contributed to their offending, in order to work through them and embark on a process of change. And, in so far as these contain hateful or violent attitudes, offenders may not feel able to express them in the presence of victims; or, if offenders do choose to express them, this may understandably make victims feel angry, upset, and afraid. Offenders may also need to develop a ‘redemption script’ which, whilst acknowledging their past offending, builds a narrative in which their core self, although led astray, is and always has been fundamentally good, thereby offering a basis for a better future in which they desist

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<sup>15</sup> One exception is family systems therapy for intrafamilial abuse, where perpetrators and victims are seen together within the same therapy session. The use of such therapy is not widespread precisely due to concern that it does not offer an appropriate therapeutic environment to victims.

from crime.<sup>16</sup> Such a script – while conducive to change and reducing the risk of offending – may not be appropriate to ask victims to hear, let alone, as co-members of a therapy group, to support and believe in. These potential problems are obvious; no doubt there are also other reasons why running a joint therapy group both for those undertaking therapy as victims and as offenders is not advisable given the distinct ends of, on the one hand, acknowledging and addressing the wrong to victims and helping them to heal and recover; and, on the other, holding offenders responsible for wrongdoing in a way that enables moral and psychological growth and behavioural change.

It is striking how much these two clinical ends resonate with the ends we might hope to have in relation both to victims and to offenders in a criminal justice context. Nonetheless, we acknowledge that the parallel is not exact. Rather, we offer this comparison as a way of casting doubt on the assumption that a single process approach is evidently the best or indeed the only way to design a criminal justice system. In a therapeutic context, a dual process approach is the better option when addressing both victims and offenders, precisely because of the difficulty of designing a single system well-suited to achieving the clinical ends relevant to both. Might this be true of criminal justice contexts as well?

## **2. Explaining the Dominance of a Single Process Approach: The Historical Evolution of Criminal Law**

We hope that the clinical analogy just mooted shows that a single process approach is not the only option worth considering in fashioning institutions to deal with the aftermath of wrongful or harmful behaviour. Why, then, has it been so dominant – arguably so much so as to have obscured the very possibility of a dual process approach? To answer this question, we must bear in mind the evolution of the criminal law as a means of dispute resolution and the production of social and symbolic order. Our current system of centralised, state-initiated criminalisation developed over many centuries, gradually displacing older systems typically initiated and controlled by the victim, their family, or a community acting in the victim's or an associated sectoral interest. These older systems, notably the feud – which were always subject to the risk of an escalation of conflict and cycle of revenge – eroded as state institutions claimed further control over violence as a precondition for more effective governance. Clearly, this process happened in different ways, to different degrees, and at different times in various countries; and private conflict-

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<sup>16</sup> Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (American Psychological Association 2001).

resolution – whether oriented to revenge or to other goals such as the pursuit of compensation or social order – persists in most parts of the world to this day. But the eventual differentiation of monarchical or state law from the feud, and of criminal law – as a form of public law – from civil law, is arguably a key hallmark of modernisation.<sup>17</sup>

For our purposes, the key point about this process is that the central role of the victim was gradually displaced by state institutions. The emerging conception of crime as a public wrong, or of criminal law as a mechanism underpinning civil order, came to imply that criminal enforcement was undertaken by the state in the vindication of a collective standard of conduct – and, importantly, that the rule of law and the associated precept of equality before the law mandated universal treatment, even-handedly enforced and independent of the preferences and circumstances of any particular victim. Notably, however, this process was completed only relatively recently. In England and Wales, for example, victim-initiated prosecution remained the norm until well into the 19<sup>th</sup> Century, and it was arguably not until the creation of the Crown Prosecution Service in 1985 that a state-directed criminal justice system was complete.<sup>18</sup> As this system developed, most of the attention to reform and innovation focused, perhaps understandably, on formal state institutions and the role of police, lawyers, probation officers and other officials. Although victims have continued to play a key role as witnesses in criminal cases,<sup>19</sup> in England and Wales, for example, it was not until the enactment of the Criminal Injuries Compensation Scheme in 1964, and then the establishment of the charitable organisation, Victim Support, in the early 1970s, that systematic attention began to be given to the interests and needs of victims in, and arising from, the modernised criminal process.<sup>20</sup> From a historical perspective, we find therefore a marked change, from a system initiated and controlled by victims and associated parties – and shaped in part, although by no means exclusively, by the logic of revenge – to one where their power and role was significantly limited.

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<sup>17</sup> Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press 2016) 13-117.

<sup>18</sup> Moreover, the possibility (rarely used) of private prosecutions remains.

<sup>19</sup> The proportion of contested trials requiring them so to act is in fact small: e.g. in England and Wales, about 90% of magistrates' court cases and 70% of Crown Court Cases conclude in a guilty plea: Court Statistics Quarterly January to March 2014 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/321352/court-statistics-jan-mar-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321352/court-statistics-jan-mar-2014.pdf)> 29 (accessed 8 September 2016).

<sup>20</sup> The institutionalisation of the victims' movement in England (Reeves and Dunn (n 8 above)) was markedly different from that in comparable countries, notably the United States, where popular pressure from the early 1970s onwards was more focused on mechanisms within the criminal process. See Dubber (n 5 above); Tonry (n 8 above). This political dynamic manifested itself in the UK somewhat later (Hoyle (n 3 above), and arguably came to its full political realisation only in the New Labour era. See Paul Rock, *Constructing Victims' Rights: The Home Office, New Labour, and Victims* (Oxford University Press 2004).



This change has perhaps naturally lent itself to discontent – a feeling that victims have been marginalised and their conflicts ‘stolen’ by the state.<sup>21</sup> This may have fuelled the growing demand over the past decades that the criminal process attend more seriously to victims’ interests and needs, and accord them a more meaningful role in criminal proceedings. However, the key point is that, historically, our system of centralised, state-initiated criminalisation emerged from a system that was originally initiated and controlled by victims and associated parties, eroding their power without consistently addressing the appropriate role remaining for them within it. No wonder, then, that this very system is where we instinctively turn to find justice for victims.

### **3. Explaining the Dominance of a Single Process Approach: The Logic of Revenge**

In addition to the historical context, philosophical and psychological forces may have cemented the dominance of a single process approach. Throughout history, influential forms of conflict resolution – whether administered by private individuals, or by the state or other collective institutions – have been characterised by the logic of revenge, e.g. the ancient *lex talionis*. Although contemporary penal philosophy typically holds that vengeance has no place in criminal justice, elements of the logic of revenge may nonetheless remain in both our theories and our practices. According to that logic, victims have a right – indeed, in cultures and contexts emphasising honour, they may be considered to have a duty – to avenge a wrong perpetrated against them or their group; or, alternatively, a public or private collectivity may be regarded as having a duty to exact that vengeance on their behalf. The logic of revenge takes justice to consist fundamentally in a form of payback.<sup>22</sup> Retaliation is payment owed to the victim or their group for the harm they have suffered at the hands of the offender. In other words, according to this logic, it is precisely through the offender suffering in turn that the wrong to the victim is made right and justice is served.

As Karsten Struhl has argued,<sup>23</sup> elements of the logic of revenge can be discerned in many versions of the dominant contemporary penal philosophy, namely, the modern form of retributivism commonly known as ‘just deserts’ or the ‘justice’ model. Retributivists have

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<sup>21</sup> Nils Christie, ‘Conflicts as Property’ (1977) 17 *British Journal of Criminology* 1; See also, Steven Eisenstat, ‘Revenge, Justice and Law: Recognizing the Victim’s Desire for Vengeance as a Justification for Punishment’ (2004) 50 *Wayne Law Review* 1115; Thane Rosenbaum, *Payback: The Case for Revenge* (University of Chicago Press 2013); .

<sup>22</sup> Karsten J Struhl, ‘Retributive Punishment and Revenge’ in Karsten J Struhl and Kimora (eds), *When Young People Break the Law* (Idea Publications 2015); Rosenbaum (n 21 above).

<sup>23</sup> Struhl (n 22 above).

long been concerned to distinguish the concept of retribution from the concept of revenge;<sup>24</sup> and, unquestionably, the current system is distinct from a revenge system in various respects. Central among these differences is that the right to punish is taken out of the hands of the individual wronged and any affiliated collectivity and placed instead under the jurisdiction of the state or other legitimate authority, thereby supporting more even-handed and universal treatment of offenders.<sup>25</sup> And there is, of course, much variation within contemporary retributivism, especially in relation to the extent to which theories combine backward-looking elements with forward-looking considerations of, for example, reform and rehabilitation. Nonetheless, retributivism of many varieties is shaped by a common precept, namely, a commitment to a default – albeit in some contexts defeasible – assumption that punishment, typically in the form of *hard treatment*, is to be visited on the offender in response to, by reason of, and in proportion to their blameworthiness – in other words, because they deserve it.<sup>26</sup> Is the infliction of ‘hard treatment’ on offenders as a form of ‘just deserts’ – to adopt the popular rhetoric – so dissimilar from justice as payback, whereby offender suffering is the means by which the wrong to the victim is made right – or does this in effect introduce elements of the logic of revenge in a more sanitised guise?<sup>27</sup> As we suggest in Section 5 below, it is possible for retributivists to reject the logic of revenge while cleaving to this precept or core. The point we wish to emphasise here is that the logic of revenge inflects many forms of modern retributivism without its influence being sufficiently recognised.

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<sup>24</sup> Robert Nozick, *Philosophical Explanations* (Cambridge: Harvard University Press 1981); John Cottingham, ‘Varieties of Retribution’ (1979) 29 *The Philosophical Quarterly* 238.

<sup>25</sup> Past instances of revenge systems may yet be less distinct from modernised retributive criminal justice systems than is commonly believed. Within revenge systems, it is not typically the case that any retaliation for perceived harm is legitimate. Rather, cultural norms govern what counts as wrongdoing of the right kind and degree to be avenged, and what punishment is appropriate. See Tamler Sommers, *Relative Justice: Cultural Diversity, Free Will, and Moral Responsibility* (Princeton University Press 2012); Struhl (n 24 above).

<sup>26</sup> For critical assessment of the retributivist position, see Lacey and Pickard, ‘From the Consulting Room to the Court Room?’ (n 2 above). For further discussion of whether retributivism gives an adequate set of reasons to explain why particular forms of punishment – such as hard treatment, – as distinct from other responses are justified, see Lacey and Pickard ‘The Chimera of Proportionality’ (n 2 above).

<sup>27</sup> The definitional place of hard treatment is questioned in Matt Matravers, ‘Duff on Hard Treatment’ in Rowan Cruft, Matthew H Kramer and Mark R Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press 2011); and Matt Matravers, ‘Punishment, Suffering and Justice’ in Stephen Farrall and others (eds), *Justice and Penal Reform: Reshaping the Penal Landscape* (London: Routledge 2016). Andrew von Hirsch’s influential ‘just deserts’ theory does not assume that punishment must involve hard treatment and so stands apart from many varieties of modern retributivism: see his *Censure and Sanctions* (Oxford: Clarendon Press 1993).

Consider, in this light, that the communicative theory of punishment as espoused by Antony Duff<sup>28</sup> – one of the most humane and liberal articulations of retributivism, which marries backward-looking concerns of ‘just deserts’ with forward-looking concerns of a kind more typically associated with restorative justice – is explicit that the need for hard treatment of offenders is a requirement of the justice that is owed to victims. According to Duff, crimes are public wrongs – in the sense that the public has an interest in them – and hence appropriately fall under the jurisdiction of the state. However, the reason why conduct should be criminalised is the wrong it does to victims.<sup>29</sup> Crucially, Duff claims that to assert that conduct is wrong, and so should be criminalised, in a way that carries moral seriousness, is to commit not only to refraining from such conduct oneself but equally to censuring it in others. For Duff, such censure is owed to the public, whose values are violated through crime; to offenders, out of respect for their responsible agency; but also ‘to its victims, as manifesting concern for them and for their wronged condition’.<sup>30</sup> On Duff’s view, it is therefore *hard treatment of the offender* that communicates precisely the penal sanction *owed to victims* – albeit ideally in a way which looks not only backwards but forwards, in so far as it invites offenders not only to repent but to offer meaningful apology and reparation to victims. Indeed, Duff appears to go further, at places suggesting that one cannot truly sympathise with the victim *without* censuring the offender.<sup>31</sup> Hence Duff’s original communicative theory, despite the modesty of its retributivist sentiment and its inclusion of forward-looking considerations, nonetheless embodies a pair of intuitions that resonate profoundly with the logic of revenge, namely, that justice is fundamentally owed to

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<sup>28</sup> Antony Duff, *Punishment, Communication, and Community* (Oxford University Press 2001). Duff appears recently to have become more open to the possibility that the form of censure appropriately imposed by the state in response to criminal wrongdoing may not require hard treatment; see Antony Duff and Zachary Hoskins, ‘Legal Punishment’, *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2017/entries/legal-punishment/>. However, our argument against the equation of justice for victims with punishment of offenders applies irrespective of the form that punishment takes; if the appropriate response is some form of penal censure, its justification should not rest on the claim that it provides justice or ‘payback’ of any sort for victims; see below, Section 5.

<sup>29</sup> Antony Duff, *Punishment, Communication, and Community* (n 28 above) 61-2.

<sup>30</sup> N 28 above 28.

<sup>31</sup> N 28 above 114. Duff also emphasises that both criminal mediation and the process of sentence negotiation between victim and offender can be appropriate, partially in virtue of allowing the victim to confront the offender and help to hold him or her responsible and to account (162), as well as offering a better opportunity to fashion a sentence that offers meaningful apology and reparation (ibid 93-96). In this respect, elements of Duff’s theory are forward-looking and similar to restorative justice approaches: see section 7 below. On the relation between restoration and retribution, see Lucia Zedner, ‘Reparation and Retribution: Are They Reconcilable?’ (1994) 57 *Modern Law Review* 228.

victims and served, at least in part, through communication of censure in the form of hard treatment of the offender.<sup>32</sup>

Bringing this pair of intuitions into the light can help to explain the dominance of a single process approach. For, despite the fact that the idea of justice as involving retaliation and payback may be explicitly disavowed, the two intuitions underpinning the logic of revenge nonetheless implicitly remain embedded in much modern retributivism. On the one hand, the intuition that *justice is fundamentally owed to victims* – not simply to society – for wrongs inflicted on them by the offender secures their moral and political claim for the criminal justice process to address them. On the other, the intuition that *justice is served to victims through hard treatment of the offender* establishes punishment of the offender as one – if not the fundamental – means by which the wrong to victims is redressed and justice achieved. Crucially, in the grip of this pair of intuitions, the possibility of a dual process approach is moot. One process is all that would ever be required, precisely because what victims are due *just is* a process by which the offender is punished.

The gradual erosion of the power and role of victims from the criminal justice process, together with the retention of this pair of intuitions, can therefore explain the dominance of a single process approach. But it can also explain why the demand to focus on victims' interests and needs, which has become part of the political agenda from the 1970s onwards, has all too often resulted in what Andrew Ashworth memorably terms 'victims in the service of severity'.<sup>33</sup> For this may simply result from an equation, explicit or implicit, of justice for victims with punishment for offenders. We now argue that this equation should be severed and a dual process approach developed in its stead.

#### **4. The Argument for a Dual Process Approach: Victims' Needs and Interests**

Although the origins of our state-initiated centralised criminal justice system were victim-involving, the aspiration to reintroduce victims is challenging to it on theoretical as well as practical grounds. The legitimate power of the state to criminalise and punish forms of conduct is widely held to rest on the idea of crime as a breach of civil order<sup>34</sup> or as a public

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<sup>32</sup> For a non-retributive justification of punishment which foregrounds the rights of victims while aiming to keep victims themselves separate from the criminal justice process, see Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press 2011).

<sup>33</sup> Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective Within Criminal Justice: International Debates* (Farnham: Ashgate 2000) 186.

<sup>34</sup> Farmer (n 17 above).

wrong.<sup>35</sup> Crimes which inflict serious consequences on direct victims – offences against people and their key interests – occupy a paradigm position within this conception.<sup>36</sup> The state as a democratically elected body is thereby empowered to address those breaches or wrongs guided by basic liberal principles of equality before the law, demanding even-handedness, fairness, and consistency.<sup>37</sup> In the arguments that follow, we make the key assumption that whatever role victims are able to have within any legitimate criminal justice system must be consonant with this vision.

Following Bottoms and Roberts,<sup>38</sup> we can distinguish three kinds of interests or needs victims may be considered to have – even if, as we shall see, the lines between them are not sharp. First, there are Service Needs, which include compensation, proper treatment at court, assistance in testifying, as well as provision of information about the progress of the case, bail and remand decisions, hearings, appeal and reviews, and case discontinuance or outcomes. Second, there are Expressive Needs, which include the opportunity for victims to have a voice and to give expression to their experience during the criminal process. Third, there are Participatory/Decision-making Needs, including offering opinions on issues such as bail, sentencing, and parole, which stand to influence decisions and outcomes. Note that some of these needs apply specifically to victims of offences which result in a prosecution and trial, while others, including compensation and Expressive Needs, apply to victims of crime quite generally.

To take Service Needs first: over the past 40 years there has developed considerable provision for the delivery of services to victims across many jurisdictions; for example, in England and Wales, the Codes of Practice promulgated under the Domestic Violence, Crime and Victims' Act 2004.<sup>39</sup> As both Hoyle<sup>40</sup> and Ashworth<sup>41</sup> note, the case for providing such services is a powerful one – which does not necessarily raise any particular concerns of

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<sup>35</sup> Duff (n 28 above).

<sup>36</sup> Joel Feinberg, *Harm to Others* (Oxford University Press 1987). This is to argue not that crimes without direct victims are of less social or moral importance but rather that criminal victimization is identified as a distinctive wrong and should be responded to as such.

<sup>37</sup> For discussion, see Anthony Bottoms and Julian Roberts (eds), in *Hearing the Victim* (n 8 above); especially Matt Matravers, 'The Victim, the State, and 'Civil Society' in Bottoms and Roberts (eds), pp.1-16. Andrew Ashworth has been one of the strongest champions of these principles. See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press 2015) especially 79 and 238-44.

<sup>38</sup> Bottoms and Roberts (n 8 above) xix.

<sup>39</sup> Domestic Violence, Crime and Victims Act 2004 (Victims Code of Practice) Order 2006, as amended; see <https://www.legislation.gov.uk/uksi/2013/2907/made> (accessed 8 September 2017); see also the Criminal Justice System Code of Practice for Victims of Crime [http://www.cps.gov.uk/westmidlands/assets/uploads/files/victims\\_code.pdf](http://www.cps.gov.uk/westmidlands/assets/uploads/files/victims_code.pdf) (accessed 8 September 2017)

<sup>40</sup> Hoyle (n 3 above).

<sup>41</sup> Ashworth (n 37above).

principle. The recognition that victims of crime have not only an interest in the progress of the case, but distinctive emotional and practical needs in relation to it that make a legitimate claim on our moral and political attention, does not impinge upon the public aims of criminal justice or the rights of offenders. However, empirical research suggests that despite their obvious justification, the delivery of these victims' services is markedly uneven.<sup>42</sup> Unquestionably, more can and should be done to provide for the Service Needs of victims, as discussed below.

However, Expressive Needs and Participatory/Decision-making Needs are more complicated to align with the principles underpinning the contemporary criminal justice system. The classic example of a mechanism to serve the expressive needs of victims is that of Victim Personal Statements (VPS's). In England and Wales, for example, these were introduced in 1996, inviting victims to give the court a sense of the emotional, financial, or other impact of the offence on their lives and/or the lives of their family. While the contours of this invitation are generally acknowledged to be somewhat unclear, it can be argued that VPS's are compatible with the usual principles of criminal justice so long as they are kept within certain bounds. Namely, VPS's must focus on the impact of the offence on the victim and/or their family, and precisely not express an opinion on what an appropriate sentence or outcome of the proceedings would be. In other words, they are not allowed to bleed into Participatory/Decision-making Needs, and must be strictly subject to the prosecutor's duty to 'form an overall view of the public interest'.<sup>43</sup>

However, the risks of inviting VPS's into criminal proceedings are significant. VPS's offer victims a platform to give voice to their experience in relation to the offence and so are apt to introduce an emotionally charged dynamic into the process. This may make it difficult to keep affective blame at bay, and so result in both an increase in severity of sentencing and a decrease in the possibility of the proceedings effectively promoting offender reform and rehabilitation.<sup>44</sup> Moreover, this platform may pose a risk to victims themselves. Criminal proceedings do not contain the resources of, for example, therapy

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<sup>42</sup> Hoyle (n 3 above); Marie Manikis, '*Victims' Information "Rights" and Responses to Their Breaches: Exploring the Efficacy of the Code of Practice for Victims of Crime*' (M.Stud. Thesis, University of Oxford 2010); Marie Manikis, 'Navigating Through an Obstacle Course: The Complaints Mechanism for Victims of Crime in England and Wales' (2012) 12 *Criminology and Criminal Justice* 149; Anthony Bottoms, 'The "Duty to Understand": What Consequences for Victim Participation?'; Reeves and Dunn, 'The Status of Crime Victims and Witnesses in the Twenty-First Century'; Joanna Shapland and Matthew Hall, 'Victims at Court: Necessary Accessories or Principal Players Centre Stage?' all in *Hearing the Victim* (n 8 above) at pp. 17-45, 46-71 and 163-199 respectively.

<sup>43</sup> Ashworth (n 37 above) 438 citing the Code for Crown Prosecutors (7<sup>th</sup> ed.) 2013 para 4.12.c.

<sup>44</sup> Lacey and Pickard, 'From the Consulting Room to the Court Room?', 'To Blame or to Forgive?' (n 2 above).

groups, in providing the possibility of working through feelings and finding closure. Meaningful interpersonal forms of uptake of VPS's within the criminal process are strictly limited. Indeed, the most obvious place in the proceedings for uptake to occur would be in relation to sentencing decisions; yet, this is precisely where – if Expressive Needs are not to bleed into Participatory/Decision-making Needs – VPS's cannot straightforwardly be taken up.

To be clear, we believe that Expressive Needs are extremely important for victim wellbeing and have a claim to be met. This is both as a matter of common sense morality which demands that, as individuals and as a society, we make time to listen and attend to those who have been wronged and who are suffering; and due to the more specific obligations on a state-initiated criminal justice system (see Section 5 below). Indeed, it is hard to imagine that anyone could read eloquent, dignified and heart-rending testimonials from victims,<sup>45</sup> and conclude otherwise. But giving victims a platform for self-expression which risks them feeling their voice is not valued or heard – for which there is no adequate institutionalised uptake – arguably creates the possibility for secondary victimisation at the hands of the criminal justice system itself.<sup>46</sup>

With respect to Participatory/Decision-making Needs, many jurisdictions do license involvement of this kind. In New Zealand, family impact statements are allowed to affect sentences. Research in the United States suggests that, notwithstanding any intention to limit them to Expressive Needs only, VPS's have offender-regarding and system-regarding effects: in potentially capital cases, for example, they increase the probability of a death sentence.<sup>47</sup> In international law, too, the victim has on occasion been accorded a special status, including having standing in proceedings before the International Criminal Court and certain rights of compensation.<sup>48</sup> And, in England and Wales, with respect to offenders sentenced to life and some other categories, victims have a right to be consulted by probation services about their release, with the Parole Board obliged to take these views

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<sup>45</sup> Bottoms and Roberts (n 8 above).

<sup>46</sup> Susan A Bandes, 'Victims, "Closure," and the Sociology of Emotion' (2009) 72 *Law and Contemporary Problems* 1; Julian V Roberts and Edna Erez, 'Communication at Sentencing: The Expressive Function of Victim Impact Statements'; Paul Rock, 'Hearing the Victims on Crime: The Delivery of Impact Statements as Ritual Behaviour in Four London Trials for Murder and Manslaughter', both in *Hearing the Victim* (n 8 above) at pp.232-254 and 200-231 respectively.

<sup>47</sup> Ray Paternoster and Jerome Deise, 'A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making' (2011) 49 *Criminology* 129.

<sup>48</sup> See Carolyn Hoyle, 'Can International Justice Be Restorative Justice? The Role of Reparations' in Nicola Frances Palmer, Philip Clark and Danielle Granville (eds), *Critical Perspectives in Transitional Justice* (Intersentia 2011); Hoyle (n 3 above); M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 *Human Rights Law Review* 203.

into account.<sup>49</sup> Such Participatory/Decision-making Needs – and the bleeding of Expressive Needs into them – are not easily reconciled with the liberal principles of even-handedness, fairness, and consistency that guide modern criminal law, introducing as they do the possibility of differential treatment for otherwise similarly situated offenders on the basis of the contingency of the victim’s feelings, opinions or preferences, as well as their capacity effectively to express these.<sup>50</sup> They should therefore be rejected as inconsonant with the vision underlying our contemporary criminal justice system.

Creating a victim-oriented track that runs separately from but parallel to the track for offenders – with designated government funds and personnel to respond to victims and address their legitimate interests and needs – would in principle provide a focused means of addressing victims while preserving the integrity of the criminal process. For example, it would facilitate tailor-made service provision, unencumbered by the aims and constraints of the track for offenders. And, in particular, it could include more specialised therapeutic services to enable victims to address their experience and emotions surrounding the crime, thereby providing an adequate and appropriate context for Expressive Needs to be met. In other words, a victim-oriented track stands to address the wrongs done to victims in a way which makes a genuine difference to their wellbeing. As we now argue, this is a kind of justice for victims – as distinct from punishment of the offender – which we ought, as a society, to provide as part and parcel of the criminal justice system.

## **5. The Argument for a Dual Process Approach: Duties of the State and Excising the Logic of Revenge**

As noted above, criminal law accords a central place to crimes with direct victims as the prototype of conduct constituting a public wrong or breach of civil order such as to warrant criminalisation as opposed to other forms of public regulation. Indeed a commonly held justification for the establishment of a criminal justice system is the fact that such conduct is voluntary and the cause of serious harm to victims.<sup>51</sup> This is widely taken to imply a special responsibility to victims – namely, to recognise and address this serious harm – on the part of a state-initiated criminal justice system, which is over and above the state’s more general

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<sup>49</sup>The Parole Board Working with Others, ‘Information for Victims’ <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/427392/Parole\\_Board\\_-\\_Information\\_for\\_Victims.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427392/Parole_Board_-_Information_for_Victims.pdf)> accessed 25 October 2016; National Offender Management Service, Victim Contact Scheme Guidance Manual (NOMS 2013).

<sup>50</sup> Bottoms and Roberts (n 8 above).

<sup>51</sup> See the discussion of Duff following n 28 above; Feinberg (n 36 above); Jeremy Horder, *Ashworth’s Principles of Criminal Law* (Oxford University Press 2016) ch 8 and 9.



welfare duties to all those within its borders. It is therefore difficult to see why anyone would object in principle to *the enhancement* of what is offered to victims on a single process model – namely, punishment of the offender – by a further commitment to the creation of a separate and additional victim-oriented track of dedicated services and provision, to address legitimate Service and Expressive Needs. Rather, any resistance is likely to concern the further claim made by a dual process model, namely, that the creation of a victim-oriented track ought to be conceptually and practically distinct, so far as possible, from the offender-oriented track, and so implies the removal of victims and their right to involvement and address by the latter. In other words, the point at issue between a dual and single process approach is fundamentally whether, even if *part* of justice for victims involves a commitment to their wellbeing in relation to the harms perpetrated by the crime and the burdens of any criminal proceedings, this could possibly be *all* of it. We therefore aim in this section to address head-on the intuition that justice for victims demands punishment of offenders; first, by demonstrating the value of introducing a sharper line between the appropriate nature and enactment of justice for victims and the legitimate punishment of offenders by the state; and, second, by laying down a challenge to opponents of a dual process approach, to justify the intuition in question.

One reason to draw this line more sharply is practical; namely, that if offenders are not punished while this intuition remains, victims may feel that they in effect fail to get justice.<sup>52</sup> This is, indeed, all too real a problem with the current single process approach. Defendants may not be convicted for a host of reasons apart from their innocence, such as procedural mistrial, mistaken verdicts, inadequate evidence, or, even worse, a prejudicial discrediting of victim testimony. Many offenders are not prosecuted, or even identified. Given the limited service provision for victims, alongside widespread societal cleavage to the intuition that justice for victims is served through punishment of offenders, it is natural to feel that failures to convict and punish in cases such as these ipso facto result in failures to address the wrong done to the victim.

Indeed, the adversarial nature of the current single process system may further contribute to this problem. Given the propensity of the procedures and rituals of the courts to create a climate of side-taking, victims and those who stand accused in effect come to be pitted against one another. This cannot but reduce the possibility that a single process could satisfy the ends relevant to each party, for, once a side is taken, interests and allegiances

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<sup>52</sup> This is the kind of concern which Truth and Reconciliation Commissions and Special Tribunals aim to address in international contexts; see (n 9 above).

naturally lie with the chosen party, at the expense of the other.<sup>53</sup> In conjunction with widespread societal cleavage to the intuition that justice for victims is served through punishment of the offender, side-taking risks that victims may feel devalued if the court does not convict, especially for the kinds of reasons listed above and if the victim is convinced of the defendant's guilt.

By contrast, on a dual process approach, whereby the appropriate treatment of victims is conceptually and, so far as possible, practically distinguished from whatever treatment is accorded offenders, this risk would be mitigated. A clear and well-articulated state commitment to victim wellbeing as a form of justice, embodied in a victim-oriented set of services and practices that are carefully distinguished from offender-oriented procedures, has the potential to change societal and hence individual victims' expectations and, correspondingly, experiences. If punishment of offenders is no longer conceptualised as the fundamental means by which victims achieve justice, and if in addition victims feel the harm they have suffered is genuinely addressed through provisions designed to improve their wellbeing, it is reasonable to hope that, as a result, victims may be less dependent on conviction and punishment of offenders in order to feel that justice is served and that the wrong to them has been adequately addressed.

But there are, in addition, reasons of principle for resisting an alignment between punishment of offenders and justice for victims. For despite the centrality of crimes with direct victims to the conceptualisation and justification of criminal law, there is nothing about the modern vision of a state-initiated criminal justice system that necessitates or indeed justifies the intuition that the state owes victims, *as individuals*, punishment of 'their' offender. This vision rather suggests that the state should be thought of as owing all citizens, *as a collective*, a criminal justice system that is fair, just, effective as far as possible, and aims to embody the moral and political values of a liberal society in its response to crime. In other words, the fact that the state owes punishment of offenders who commit public wrongs to its citizenship as a whole does not license the inference that the state owes punishment of particular offenders *to the particular victims who have been wronged by those offenders*. The fact that a form of conduct is legitimately subject to criminalisation because it

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<sup>53</sup> Peter DeScioli and Robert Kurzban argue that our capacity for moral condemnation has evolved to allow by-standers to coordinate when there is a conflict between two parties. Choosing sides based on a public signal – e.g. an action that violates a known rule – means the winning party can be decided by strength of numbers, without incurring the costs of fighting. See Peter DeScioli and Robert Kurzban, 'A Solution to the Mysteries of Morality' (2013) 139 *Psychological Bulletin* 477. If correct, this hypothesis explains why adversarial contexts geared towards the making of evaluative judgments – such as criminal proceedings – carry high risks of side-taking, as that is precisely their evolved function.

victimizes does not *ipso facto* create individual rights to offender punishment in individual victims. This is a further and as yet unjustified assumption.

Moreover, any inclination we may have to make this assumption is arguably an expression of remnants of the logic of revenge – a return to the idea of justice as retaliation and payback. For, where else would it come from? Recall that, on a dual process model of the sort we are advocating, there is no question as to the appropriateness of state punishment of offenders or of the right of the citizenship as a whole to have public wrongs or breaches of the civil order robustly addressed. The issue is only whether punishment of particular offenders is owed as a matter of justice to particular victims. Hence, it is not only that this claim stands in need of justification. If we are to uphold the modern vision of a state-initiated criminal justice system as committed to embracing the rule of law and rejecting the logic of revenge – an aim widely shared in contemporary penal philosophy and embraced by most leading retributivists, including Andrew Ashworth, Antony Duff, and Andrew von Hirsch<sup>54</sup> – then whatever justification is provided must eschew the logic of revenge. Unless and until such a justification is provided, we therefore suggest that what is legitimately owed to particular victims by the modern state as a matter of criminal justice cannot be punishment of ‘their’ offender. This goes beyond the correct claim that even-handed, fair, and consistent punishment of all offenders is owed by the state to the citizenship as a whole; and that it is only appropriately considered in any particular case if the offender is blameworthy.<sup>55</sup> In the absence of such justification, the special responsibility that the state has to victims of crime as individuals – as opposed to the citizenship as a collective – is recognition of the harm done to them via a serious and sustained attempt to address its impact on their wellbeing and to serve their interests and needs in meaningful terms. This is most naturally implemented via a dedicated set of services and provisions apart from the offender-oriented criminal process: a dual process model.

We do not, of course, deny that many people in our society – victims included – adhere to the intuition that justice for victims is served through punishment of offenders. Indeed, in so far as we are correct that this intuition is an expression of remnants of the

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<sup>54</sup> For an exception, see Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press 2010).

<sup>55</sup> Indeed, it also goes beyond the stronger, retributivist claim that blameworthiness not only justifies the consideration of punishment but positively *favours* it because the offender deserves it. Even this does not yet establish that the offender deserves it *because that is what justice for victims demands*. For discussion of ideas of desert and forms of retributivism, see Mitchell Berman, ‘Two Kinds of Retributivism’ (2011) in R A Duff and S Green (eds) *The Philosophical Foundations of Criminal Law* (Oxford University Press 2011) and ‘Modest Retributivism’ (2016) in K K Ferzan and S J Morse (eds) *Legal, Moral and Metaphysical Truths: The Philosophy of Michael S. Moore* (Oxford University Press 2016) pp. 35–47.

logic of revenge and so stems from an instinct for retaliation and payback, it likely runs deep in human psychology – even if competing instincts, e.g. towards forgiveness, are just as strong.<sup>56</sup> We deny, rather, that this intuition reflects an invariant moral truth and that it should be upheld – in absence of a justification that is as yet not forthcoming. Importantly, this point can be embraced not only by theorists sympathetic to our attempt to reconceptualise criminal responsibility and punishment according to the clinical model of responsibility without blame, but equally by theorists who remain committed to a more standard retributive approach to punishment as ‘just deserts’ – so long as these theorists do not maintain that such punishment is expressive of what the state owes to victims, as opposed to requiring a distinctive source for its justification.<sup>57</sup> Rather, the burden of our argument thus far has been to establish that a single process approach is neither inevitable nor, on multiple empirical as well as principled grounds, desirable. The vision of a modernised criminal justice system – and the multiple ends it strives to achieve – are better served by a dual process model, with a dedicated track for victims and a dedicated track for offenders, of equal humanity and sophistication.

## 6. Designing a Victim-Oriented Track

How, then, should the victim track of a dual process model be constructed? Here we can only sketch its basic shape; and we acknowledge the many practical obstacles to enacting it. But a crucial preliminary point is that, in England and Wales and other similar jurisdictions, we do not start from a blank slate, but have many sources of information and institutions upon which to draw.

First and foremost, the design of a victim-oriented process must be victim-centred, in that it seeks to hear and respond to the voices of victims themselves. There is a growing body of research on what victims find wanting in the current system;<sup>58</sup> and we can design research to further clarify what victims would ideally like to see by way of support and service provision. There is however one important caveat, namely that, in so far as victims identify as one of their needs that vengeance or hard treatment be visited on the offender, a dual process approach cannot accommodate this – any more than a state-initiated single

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<sup>56</sup> Michael E McCullough, Robert Kurzban and Benjamin A Tabak, ‘Cognitive Systems for Revenge and Forgiveness’ (2013) 36 *Behavioral and Brain Sciences* 1.

<sup>57</sup> Note that forms of retributivism that justify punishment as an *intrinsic good* will straightforwardly be able to meet this requirement. For discussion, see Berman (n 55 above).

<sup>58</sup> Bottoms and Roberts (n 8 above); Julian V Roberts, ‘Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole’ in M Tonry (ed), *Crime and Justice* vol 38 (University of Chicago Press 2009); Manikis, n 42 above.

process approach legitimately can – because this would be to sacrifice the overarching goods of justice and the rule of law, as well as to return to the logic of revenge. Nonetheless, a dual process approach can aim to address – as opposed to satisfy – even this need via other means, in particular, provision within the track for victims of adequate specialised therapeutic services, enabling victims to give expression to their experience and emotions – including the desire for revenge – within a validating and caring environment. In this respect, the victim-oriented track of a dual process approach ought to work in partnership, where possible, with publicly-funded mental health services. This sort of partnership already exists between the criminal justice system and publicly-funded forensic services. Although a great deal more needs to be done to provide adequate care for the mental health needs of offenders, it is striking that no parallel intervention is part of the criminal justice system’s responsibility to victims. This must be part and parcel of any adequately designed victim-oriented track.

Second, there are existing institutions and practices to draw on. The original conception of Victim Support, as a victim-centred organisation in England and Wales operating parallel to and separately from the single track of the criminal process, remains a promising model on which to build. But although the charitable status of the organisation might be thought to underline this valuable, victim-centric autonomy, this potential advantage is offset by uncertainties about the provision of the funding on which its activities depend. It is key to our argument that the victim-oriented track is a public responsibility just as much as the offender-oriented track. It is therefore a requirement of a dual process approach that adequate funding of the victim-oriented track be put on a statutory basis. We do not under-estimate the challenge this poses. Recent cuts in public provision for victims’ services and indeed welfare services more generally across jurisdictions – in England and Wales, notably services to victims of domestic violence and abuse, including the provision of accommodation – are exemplary of the difficulty to be faced. But the moral case for public funding of an autonomous victim-oriented track, with a specialised staff with a range of therapeutic, social work, and legal skills, is a strong one. The duty which a state that establishes a criminal justice system owes to victims of crime is not fulfilled where it is left to the uncertainties of philanthropic donation or local discretion.

Third, we must address how best to manage victims’ interests and needs in relation to their inevitable role in contested cases as witnesses in the offender-oriented track. A dual process approach offers a conceptual framework for separating the state’s responsibilities and legitimate ends in relation to victims, and the state’s responsibilities and legitimate ends in relation to offenders, thereby facilitating the design of a track appropriate to each. This

framework consequently offers a way of recognising potential conflicts and mitigating potential harms that may occur when one party is asked to participate in the other track. Victims will be asked to participate in the offender-oriented track in so far as their testimony is necessary for establishment of the facts; however, the potential for this involvement to run counter to the victim-centred aims of the victim-oriented track needs to be acknowledged and as much as possible minimised.<sup>59</sup> Here, existing models for reform include the innovations introduced for young or vulnerable witnesses to give evidence remotely or – if their presence in court is genuinely required – from behind a screen. Clear protocols on the proper limits of cross-examination – which can heighten the adversarial nature of the criminal proceedings, fostering prejudicial treatment of both victims and offenders – are also important, and recent developments show them to be far more practicable than has often been assumed.<sup>60</sup> In parallel to these reforms, the victim-oriented track itself should provide support for victims in managing their emotions and practical lives as the prosecution and trial process of the offender-oriented track unfolds.

Fourth, we can also learn from reflection on existing models for criminal injuries compensation – a key concern for many victims. Evidently, there are important differences between at least three possibilities: a self-standing statutory compensation mechanism which proceeds separately from the criminal process; an independent civil action for damages; and a legal mechanism such as that existing in several civilian countries which allows victims to attach a civil case for compensation to criminal proceedings. Arguably, in keeping with the line of argument offered here, the establishment of criminal offences with direct victims as a category of conduct expressing a distinctive public notion of wrongdoing itself implies a statutory duty to provide an autonomous mechanism for criminal injuries compensation. But – even leaving aside the fact that such compensation will in many cases be symbolic rather than material – it must be seen in the context of the public obligation to meet victims' interests and needs. Crucially, therefore – and in stark contrast to civil actions of various forms – such a scheme should be cast as a state act of recognition, healing, and restoration, and not as a payback primarily due from the offender.

Fifth and finally, given that victims do sometimes express a wish for communication with the offender, a dual process approach should have the resources to facilitate – though it should not mandate – apologies or other forms of direct recompense in certain specific

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<sup>59</sup> Offenders may also be asked to participate in the victim-oriented track, when victims express a wish for direction communication and reparation; see below.

<sup>60</sup> See for example the toolkits prepared for advocates by the Advocates' Gateway, hosted by the Inns of Court College of Advocacy: <https://www.theadvocatesgateway.org/toolkits> (accessed 7 September 2017).

contexts. As restorative justice offers an obvious model, we turn now to consider both the affinities and oppositions between a dual process approach and restorative justice.

## 7. A Dual Process Approach and Restorative Justice

Restorative justice practices and their articulation within the criminal justice process vary widely across jurisdictions. What all share however is an aspiration to work towards a restorative and reconciliatory outcome – as well as a reduction in the risk of future offending – via a confrontation between a victim (or victim representative) and an offender, often mediated by a third party and involving other participants acting as either neutral parties or ‘supporters’ of each side. In the central role in the process accorded to victims as well as the emphasis on addressing their interests and needs, restorative justice is typically considered a ‘victim-centric’ approach, and as such bears some affinity to a dual process approach. Nonetheless, in the forms instantiated in or alongside modern criminal justice systems, it is a single process approach, aiming to achieve various ends within one process, and embodying the intuition that justice is owed to victims and served in large part by demands placed on the offender – including participation in the process, community accountability, acknowledgement of wrongdoing, apology, and reparation. For all its affinities, it is therefore in key ways at odds with the approach advocated here.

Inevitably, views about the merits and impact of restorative justice vary. Consonant with some of the motivations we have adduced in favour of a dual process approach, Andrew Ashworth notes that, although restorative justice is supposed to heal wounds, restore relationships, and reduce re-offending, ‘there is no evidence it can do all these things satisfactorily, and it seems likely that a focus on one may not enhance others’.<sup>61</sup> Conversely, there is evidence that, at least when enacted as a successful ritual, wherein a kind of emotional synchrony between victim and offender is achieved, restorative justice can be a positive experience for both.<sup>62</sup> It has also been argued that the interpersonal process

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<sup>61</sup> Ashworth (n 37 above) 93.

<sup>62</sup> Meredith Rossner, *Just Emotions: Rituals of Restorative Justice* (Oxford University Press 2013); for a classic statement of the case for restorative justice, see John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989). Experimental studies suggest that, even when victims believe they will be satisfied by punishment alone, punishment that is accompanied by offender acknowledgement and apology – such as can occur in restorative justice processes when successfully facilitated – produces more victim satisfaction. See Victoria McGeer and Friederike Funk, ‘Are “Optimistic” Theories of Criminal Justice Psychologically Feasible? The Probative Case of Civic Republicanism’ (2015) *Criminal Law and Philosophy* 1.

embodied in a restorative justice approach both represents what victims want,<sup>63</sup> and serves to reduce the risk of future offending.<sup>64</sup> Any full evaluation of restorative justice is beyond the scope of this paper. Rather, what we want to emphasise is that the instantiation of a dual track process has the capacity to mitigate or even remove a number of key difficulties restorative justice faces: fairness, side-taking, and the potential for coercion.

Why should adherence to a dual track process underpin the possibility of good restorative justice practices? One key difficulty faced by restorative justice is guaranteeing equality before the law and fairness as between victims and offenders. In the case of an unduly powerful offender or an unduly vulnerable victim (or vice versa) it is hard to rule out pressure to participate in restorative practices, and difficult for the facilitator to be sure that the outcome is a fair one, undistorted by power relations. Indeed, we described above the threat that VPS's can pose to ensuring equal treatment before the law – and to keeping emotional dynamics conducive to affective blame at bay. This, we suggest, is mirrored in restorative justice; side-taking concerns perhaps even more so, as the kinds of psychological processes conducive to side-taking may be heightened in smaller groups and more intimate settings. In addition, for restorative justice to be successful, both participants must be willing and able to participate fully; yet this condition may not be met. On the one hand, offenders may not be able – at the time of the restorative justice circle – to reflect and acknowledge the offence and offer a genuine apology, due to their own psychological state of readiness, in which case one of the main reparative tools of restorative justice for victims is unavailable and victims may rightly feel that closure has not been achieved. On the other hand, victims may be unready or unable to reconcile let alone forgive, in which case one of the main rehabilitative tools of restorative justice for offenders is unavailable. Indeed, compelling either party to participate in a restorative justice process – given the psychological demands on each – is not only likely to negatively impact on the outcome but is also arguably unjust.

Hence despite its purported victim-centric orientation, restorative justice risks placing undue burdens on victims. The reason a dual process approach helps to resolve these problems is very simple. It sets up a process which caters effectively and justly for the interests and needs of both victims and offenders. It therefore reduces the likelihood that power imbalances and side-taking have an impact on the outcome, or that victims feel pressure to participate as the only way to have their needs recognised and met or, alternatively, for the sake of the community or the offender. A dual process approach

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<sup>63</sup> Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press 2002).

<sup>64</sup> Hoyle (n 3 above).



therefore maximises the chances that restorative justice is selected only in cases for which it is truly appropriate.

## 8. Conclusion

On the one hand, in so far as a single process approach requires a certain form of victim participation to serve offender-related ends, and offender participation to serve victim-related needs and interests – as in restorative justice – it is not only hostage to that participation, but arguably asks something of both parties, but of victims in particular, which we may feel uncomfortable with or indeed view as straightforwardly wrong. On the other hand, in so far as a single process approach focusses on victim interests and needs in so far as these are satiated by punishment of the offender, it risks sidelining genuine concern for the overall wellbeing of victims by the call for ‘just deserts’. The solution, we have argued, lies in a centralised dual process approach to a modern criminal justice system, with one track of the system designed to serve the interests and needs of victims, and one track of the system designed to determine criminal responsibility and convict and sentence offenders, in such a way as to promote reform and rehabilitation to the best of the system’s ability. The two tracks with their key participants will no doubt be required to interact to some extent – particularly in relation to the need for victims to act as witnesses, and desires of either party for apology and direct recompense. A dual process approach nonetheless offers a framework to clearly separate as a matter of principle the various ends which a centralised, state-initiated criminal justice system ought to serve, thereby increasing the likelihood that they are in fact met in practice, and providing a clear rationale for when – and how – such interaction can best be facilitated for both parties.

Such a system is therefore, we argue, far preferable to the current single process approach, which muddies justice with vengeance by inviting the equation of justice for victims with punishment of offenders. But we suspect this intuition may be part of any residual resistance – apart from the evident practical challenges – to exploring the dual process alternative we have articulated. We end, therefore, with one final argument for its rejection. The intuition that justice is served to victims through punishment of the offender – if it is not to be interpreted as an empirical claim as to what brings most victim satisfaction, in which case it is of questionable truth<sup>65</sup> – seems to express, as Hart put it, a ‘mysterious piece of moral alchemy in which the combination of the two evils of moral

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<sup>65</sup> McGeer and Funk (n 62 above).

wickedness are transmuted into good'.<sup>66</sup> What, in reality, does a tit-for-tat style revenge-alchemy offer victims? Without further justification, there ought to be no place for such ideology in contemporary legal systems – retributive and non-retributive alike – which aim to fashion more measured and nuanced responses to crime, potentially serving forward-looking considerations expressive of the values of a broadly liberal society, including inclusion and reintegration of all offenders, alongside the imperative to hold offenders responsible and to account. Hence, until this intuition can be adequately clarified and upheld, the empirical as well as principled grounds in favour of rejecting a single process approach are overwhelming; and, if indeed the intuition that justice for victims proceeds via punishment of offenders is at some point made good, it must yet be weighed against these other concerns. To return to our initial analogy, we accordingly conclude that, as with therapy, so too with criminal justice – we need a track for victims and a track for offenders.

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<sup>66</sup> HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (John Gardner ed, 2nd edn, Oxford University Press 2008) 234–5.