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## WHERE DO THEY BELONG? GIVING VICTIMS A PLACE IN THE CRIMINAL JUSTICE PROCESS

**ABSTRACT.** Historically, victims once had an active participatory role in the criminal justice process and were responsible for not only initiating but also for prosecuting offenders. In common law countries, victims were gradually sidelined and by the 20th century, their role was reduced to that of a witness to a crime against the state. The exclusion of victims from the criminal justice process is a major source of dissatisfaction for victims as many of them want to participate in the criminal justice process. This has fuelled initiatives with restorative justice that claim to more fully include victims than conventional criminal justice. This paper examines three different approaches found in the literature on how to let victims participate. One view is that victims should leave the criminal justice system and that criminal justice should be replaced by alternative, restorative justice schemes in which victims are granted full recognition and respect for their dignity. A second approach is to integrate restorative practices such as victim-offender mediation in the criminal justice process. The third approach is to integrate victim participation and respect (so-called restorative values) in the criminal justice system. These three approaches are discussed and compared with one another. The paper closes with recommendations for criminal law reform.

### I THE FORGOTTEN PARTY

In 1970s, victimologists began to draw attention to the plight of crime victims, describing them as the ‘forgotten party’ in the criminal justice system. Once an active participant, common law systems had successfully managed to completely remove victims from the criminal justice process. All that remained of their role was the role of witness to a crime against the state.

900 years earlier, in the 11th century, the victim occupied a key position in common law and was responsible for the apprehension, charge and prosecution of offenders. This was known as private

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prosecution and victims controlled every aspect of the judicial process including punishment.<sup>1</sup> Stephan Schafer<sup>2</sup> refers to this period as the “golden age” of the victim because victims exercised such an important role in the criminal justice process, which centred on the reparation of the victim. Interestingly, reparation of the victim was, according to Schafer,<sup>3</sup> an indication of how evolved a society was. For example, the Saxons and the Germans introduced the use of “wergeld”, which effectively meant that they renounced a vendetta after a murder or serious bodily injury, provided that the offender compensated the victim or his family.<sup>4</sup> The agreement between the victim (or the victim’s clan) and the offender put an end to any further violence.<sup>5</sup>

From the 13th century onward, the absolute power of the victim to initiate a prosecution began to diminish with the rise of monarchical structures.<sup>6</sup> The idea that crime is a threat to the social or public order rather than a private matter involving the victim, can be traced back to this era.<sup>7</sup> The King’s peace and the development of offences against the security of the realm in terms of treason, and later, public order offences, marked changes that impacted the role of victims.<sup>8</sup> As Kirchengast writes: “The gradual introduction of communal and then social concerns into the common law displaced the victim from their orthodox position as private prosecutor, opening up the new jurisdiction of civil law for the enforcement of distinctly personal rights.”<sup>9</sup>

As to why this change occurred, no one really knows, however, it is commonly believed to be because it gave the king more money and more power and not because of any legal argument.<sup>10</sup> Instead of

<sup>1</sup> See T. Kirchengast, *The Victim in Criminal Law and Justice* (2006).

<sup>2</sup> S. Schafer, *The Victim and His Criminal: A Study in Functional Responsibility* (1968).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* See also J.P. Alline, Les victimes: des oubliées de l’histoire du droit? in R. Cario and D. Salas (eds), *Oeuvre de justice et victimes* (2001) 25–58.

<sup>5</sup> L. Viau, *Victimes des ambitions royales*, 30, *Thémis*, 1 (1996), at [www.lexum.umontreal.ca/themis/96vol30n1/viau.html](http://www.lexum.umontreal.ca/themis/96vol30n1/viau.html).

<sup>6</sup> See *supra* note 2.

<sup>7</sup> See J. Wemmers, *Introduction à la victimologie* (2003).

<sup>8</sup> See *supra* note 2.

<sup>9</sup> See *supra* note 1, p. 5.

<sup>10</sup> J. Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008).

paying compensation to the victim, offenders were ordered to pay compensation to the state.<sup>11</sup> This practice still exists today and is referred to as a fine. Gradually, the state and its offices and institutions replaced the King but power was never returned to the victim. From the 17th century onwards, parliamentary sovereignty grew and the King became less influential personally. Instead he was seen merely as a figure of sovereignty. Laws were passed by the legislature and were no longer passed by the King alone. As a result, crimes ceased to be considered a violation of the King's peace and instead were viewed as threats to civil society and social interests. This trend was further consolidated in the late 18th century with the introduction of criminological perspectives, which further moved criminal justice away from the victim to the security of society.<sup>12</sup>

This historic overview shows us that it was not offenders or the accused and their legal representatives who pushed victims out of the criminal justice system and took away their rights. While victims' rights are sometimes presented as though they are in constant conflict or tension with the rights of the accused<sup>13</sup> it was in fact the State that shut out the victim and not the defendant.

The absence of the victim was not even noticed by authors until well into the second half of the 20th century. The first scholars to draw attention to the plight of the victim, people like the late Margery Fry for example, emphasized the financial needs of crime victims and advocated for the compensation of crime victims by the state. This resulted in the introduction of state compensation programs in many developed countries: the first being New Zealand, which did so in 1963. The exclusion of victims from the criminal justice system was not questioned at the time. The fact that victims were unlikely to receive compensation from the offender was not considered a reason to address victims' needs in criminal justice system but was used as a reason to introduce compensation by the state outside and by-and-large independent of the criminal justice system.<sup>14</sup>

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<sup>11</sup> See *supra* note 4.

<sup>12</sup> See *supra* note 1.

<sup>13</sup> See for example, M. Baril, *Vers une distribution equitable des droits et des libertés: le cas des criminels et de leurs victimes*, Mémoires de la société royale du Canada, quatrième série, tome xxxiii, 105–113 (1985); K. Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (1999).

<sup>14</sup> For an overview of state compensation programs see D. Greer, *Compensating Crime Victims: A European Survey* (1996).

Victims' status in the criminal justice process was not considered an issue until the 1970s when, under influence of the women's movement, researchers began to look at crimes against women such as rape. The seminal research by Burgess and Holstrom<sup>15</sup> on rape victims in the USA revealed the blatant ill-treatment of victims by criminal justice authorities. Victims – even victims of serious violent crimes like sexual assault – were considered witnesses to a crime against the state. As witnesses they could be used and abused by the Prosecution and the defence to prove their point.

This total disregard for the victim had to change. Many countries introduced a Bill of Rights for victims, for example. These generally follow the rights found in the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>16</sup> and include rights such as information, compensation and access to services. The rights contained in these laws provide services to victims but in general they do not provide victims with procedural rights or a right to participate in the criminal justice process. However, the main problem with these rights is that, like the UN Declaration, they are non-enforceable.<sup>17</sup>

An important step in bringing victims back into the criminal justice process and allowing them to participate in it was the introduction of the Victim Impact Statement (VIS). First introduced in California in 1974,<sup>18</sup> VISs have since been introduced throughout the USA as well as in several common-law countries including Australia, Canada, England and Wales. VISs offer victims an opportunity to express to the court how they were impacted by their victimization. The VIS is typically a written statement, although in some jurisdictions (e.g. Canada) victims can read their statement aloud in court. The VIS is presented to the court after a determination of guilt and before sentencing. Unlike testifying as a witness, victims do not have

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<sup>15</sup> A. Burgess and L. Holstrom, *Rape: The Victim and the Criminal Justice System*, in I. Drapkin and E. Viano (eds), *Victimology: A New Focus* (1975), 21–30.

<sup>16</sup> Resolution 40/34 adopted by the General Assembly of the United Nations on 29 November 1985.

<sup>17</sup> S. Sullivan, *Équilibrer la balance: L'état des droits des victimes au Canada* (Ottawa: Centre Canadien de ressources pour les victimes de crimes, 1998); A.N. Young, *The role of the victim in the criminal process: A literature review* (Ottawa, Justice Canada, Victim Policy Centre, 2001); E. Erez and J. Roberts, *Victim Participation in the Criminal Justice System*, in R. Davis, A. Lurigio and S. Herman (eds) *Victims of Crime*, 3<sup>rd</sup> ed. (2007); R. Davis and C. Mulford, *Victims Rights and New Remedies: Finally getting victims their due*, 24 *Journal of Contemporary Criminal Justice*, 198–208 (2008).

<sup>18</sup> See Sullivan, *supra* note 17.

to be invited to make a VIS. All victims have the legal right to make a VIS provided, of course, that they meet legally defined criteria for who is a victim. VISs allow victims to play an active role. Unlike testifying which puts victims in a passive role, answering only questions that are put to them and unable to offer new information that is not requested of them, the VIS allows victims to say what they feel is important for the court to know.<sup>19</sup> Moreover, while most victims' rights are non-enforceable, the VIS is generally fixed in criminal law, thus constituting a legal right.<sup>20</sup>

Despite the very limited role that the VIS offers victims, they have nonetheless been highly controversial. On the one hand, the VIS has been criticized as being too little and too late.<sup>21</sup> For example, VISs only allow victim input at the end of the criminal justice process while research suggests that victims want to be included in the criminal justice process from the early stages onward.<sup>22</sup> Victims seek recognition immediately following their victimization and not months or years later.<sup>23</sup> On the other hand, legal scholars and practitioners have expressed concern that VISs will upset the delicate balance of justice. It is feared that VIS will open the way for arbitrariness in sentencing as subjective victim input could influence sentencing decisions.<sup>24</sup> Consequently, some authors argue that victims will never be fully recognized in the criminal justice process and that they are better off in alternative, restorative justice programs.<sup>25</sup>

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<sup>19</sup> D.P. Kelly and E. Erez, Victim Participation in the Criminal Justice System, in R.C. Davis, A. Lurigio and W. Skogan (eds), *Victims of Crime*, 2nd ed (1999), 231–244.

<sup>20</sup> See, Young, *supra* note 17; J. Wemmers, *supra* note 7; Davis and Mulford, 2008, *supra* note 17.

<sup>21</sup> J. Wemmers, *Victims and the Criminal Justice System* (1996).

<sup>22</sup> J. Shapland, J. Wilmore and P. Duff, *Victims in the Criminal Justice System* (1985); Wemmers, *supra* note 21.

<sup>23</sup> *Ibid.*

<sup>24</sup> See Erez and Roberts, *supra* note 17; See also E. Erez, *Victim Impact Statements*, Trends and Issues in Crime and Criminal Justice, (Australian Institute of Criminology, 1991), 33.

<sup>25</sup> K. Roach, *supra* note 13; E. A. Fattah, Victims' Rights: Past, present and future. A global view, in R. Cario and D. Salas (eds), *Oeuvre de Justice et Victimes* (2001).

## II RESTORATIVE JUSTICE

Currently one of the main new policy reforms for dealing with crime in many western countries, restorative justice focuses on the reduction of harm and making right the wrong.<sup>26</sup> It is an umbrella concept under which various concrete projects, such as victim-offender mediation and conferencing, fall. Restorative justice overtly recognizes the victim and the harm suffered as a result of the crime. Many authors, such as Marshall<sup>27</sup> for example, emphasize that restorative justice is any process in which victims and offenders actively participate. This approach is also reflected in the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, which was supported by the Economic and Social Council of the United Nations in 2002.<sup>28</sup>

Restorative justice is characterized by certain values and principles. One such value is respect for the dignity of the individual.<sup>29</sup> This is a basic human right, which can be found in the 1948, *Universal Declaration of Human Rights*. At first glance this may seem old and unimaginative, however, if we recall that victims are not traditionally a recognized part of the conventional criminal justice system and that their role in criminal justice is limited to that of witness for the criminal justice process, then recognition of the victim as a person with rights, is a major break with the past. Victims' rights are not considered human rights and to do so is new. Many common law countries – such as Canada and the US – have civil or constitutional rights that apply to citizens. These civil rights instruments typically include a special set of rights for the accused, however, there is nothing about victims in these documents. Efforts to include victims' rights in the US Constitution failed and after years of lobbying were finally abandoned in 2004. This notion of dignity is often interpreted to mean that the accused should be treated as a subject and not as an

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<sup>26</sup> H. Zehr, *The Little Book of Restorative Justice* (2002); J. Shapland, A. Atkinson, H. Atkinson, B. Chapman, J. Dignan, M. Howes, J. Johnstone, G. Robinson and A. Sorsby, *Restorative Justice: the views of victims and offenders*. Ministry of Justice Research Series 3/07 (2007).

<sup>27</sup> T. Marshall, *The Evolution of Restorative Justice in Britain*, 4 *European Journal of Criminal Policy and Research* 21–43 (1996).

<sup>28</sup> United Nations Commission on Crime Prevention and Criminal Justice, *Report on the 11th session 16–25 April 2002*, (E/2002/30, E/CN.15/2002/14); For a discussion see, D. Van Ness and K. Heetderks Strong, *Restoring Justice* (2002).

<sup>29</sup> Justice Canada, *Statement of Values and Principles of Restorative Justice* (2004).

object of the law.<sup>30</sup> From a human rights perspective both the accused and the victim would be treated as subjects of the law.

A second restorative value is inclusion or the participation of victims and offenders.<sup>31</sup> Victim participation recognizes the victim as a subject rather than an object of the law. Restorative justice is a process and how outcomes or decisions are reached is important. Victims are invited into the process and given an opportunity to express their views and concerns. As active participants victims and offenders are empowered and can influence what happens.

A third value is reparation. Offenders are encouraged to be accountable and recognize the consequences of their behaviour. The restorative process overtly recognizes and validates victims and their suffering and seeks to repair the victim. Reparation can take many different forms from monetary compensation to symbolic reparation or an apology. Recognition in itself can promote healing.<sup>32</sup>

Many of these so-called restorative values coincide with the literature on victims' needs. Key needs that are found in the victimological literature are information, support, reparation, protection and a status or recognition in the criminal justice system. Victims come to the criminal justice system seeking recognition and validation of what happened to them.<sup>33</sup> For example, based on 22 in-depth interviews with victims of violence, Judith Herman concludes that the most important object of the victims in her study was to gain validation from the community. This often meant a confession by their offender, however, validation by bystanders was also important, as was recognition by family members, the wider community or legal authorities.<sup>34</sup> Victims want to know what is going on in their case, they want to be informed about what to expect and they want to be notified of any

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<sup>30</sup> S. Walther, *Victims' Rights: A View From Germany*, paper presented at Victim Participation in Justice and Therapeutic Jurisprudence: A comparative analysis, Onati International Institute for the Sociology of Law (March 1–2 2007) (paper on file with the author).

<sup>31</sup> Justice Canada, *supra* note 29; See also, M. Umbreit, B. Vos, R.B. Coates, and M.P. Armour, *Victims of Severe Violence in Mediated Dialogue with Offender: The impact of the first multi-site study in the U.S.*, 13 *International Review of Victimology* 27–48 (2006).

<sup>32</sup> J. Wemmers and K. Cyr, *Can Mediation Be Therapeutic for Crime Victims? An Evaluation of Victims' Experiences in Mediation with Young Offenders*, 47 *Canadian Journal of Criminology and Criminal Justice* 527–544 (2005).

<sup>33</sup> Shapland *supra* note 22; Wemmers *supra* note 21; *supra* note 32; J. Herman, *Justice from the Victim's Perspective* 11 *Violence Against Women* 571–602 (2005).

<sup>34</sup> Herman *supra* note 33.

developments as they occur.<sup>35</sup> Receiving information can help victims' recovery from their victimization, while not knowing can make victims anxious and augment their stress.<sup>36</sup> Victims want to be included in «their» case and they want to be recognized in the criminal justice process. Being treated with consideration and respect is important for victims' sense of justice<sup>37</sup> and their well-being.<sup>38</sup> For example, based on interviews with 435 victims of crime whose cases were handled by the Dutch criminal courts, Wemmers reports that rather than focus on the outcome of their case, the victims in her study focused on how they were treated by authorities in the criminal justice system and that for these victims, fair procedures meant being treated with dignity and respect.<sup>39</sup> In a different study, Wemmers and Cyr examined the relationship between victims' fairness judgements and their well-being. The authors report a significant correlation between victims' fairness judgements and their psychological well-being.<sup>40</sup> Victim participation can empower victims, enabling them to regain a sense of control over their lives. Victims seek support – often informal support but sometimes formal – from others. Recognition and support from authorities can help the victim regain their self-confidence and their sense of self-efficacy. Restorative justice offers victims the recognition that they seek.

But what about victims' need for protection? Every human being needs to feel safe and secure.<sup>41</sup> Victimization can rob victims of their sense of security, making them feel vulnerable. Certain victims fear their offender in particular. Before they can start healing, victims need to have their feeling of safety restored. Just as cross-examination in the courtroom can be traumatizing for a victim,<sup>42</sup> so can the prospect of mediation with the offender. This has been a major point

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<sup>35</sup> P. Carr, K. Logio, and S. Maier, *Keep Me Informed: What Matters for Victims as They Navigate the Juvenile Justice System in Philadelphia*, 19 *International Review of Victimology* 117–136 (2003).

<sup>36</sup> M. Maguire, *The Needs and Rights of Victims of Crime*, in M. Tonry (ed) *Crime and Justice: A Review of the Research* 363–433 (1991).

<sup>37</sup> For a comprehensive study on victims' fairness judgements, see Wemmers, *supra* note 22.

<sup>38</sup> J. Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 *Journal of Traumatic Stress* 159–166 (2003).

<sup>39</sup> *Supra* note 21.

<sup>40</sup> *Supra* note 32.

<sup>41</sup> A.H. Maslow, *Toward A Psychology of Being*, 2<sup>nd</sup> ed. (1968).

<sup>42</sup> See for example, *supra* note 33; S. Lees, *Carnal Knowledge: Rape on Trial* (1997).

of contention between victim advocates and advocates of restorative justice. Clearly safeguards need to be in place in order to protect victims from further victimization. However, this applies equally to conventional criminal justice system and to restorative justice. As a first step, authorities must communicate with victims in order to be aware of their concerns, and this alone – feeling validated – can be helpful for victims as they realize that they are not completely powerless.

### III WHERE TO PLACE VICTIMS

Restorative justice is a general concept under which several different concrete programmes fall. The *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* considers restorative *any* process that includes parties and respects restorative values. Our definition of restorative justice does not tell us where to place it. A review of the restorative justice literature reveals three possibilities: (1) abolitionism or replacing criminal justice with restorative justice; (2) adding or integrating restorative justice programmes on to the existing criminal justice system; (3) the integration of restorative values in the criminal justice system. In the following, these three approaches will be described and the advantages and disadvantages of each one will be discussed.

#### 3.1 *Abolitionism*

Many people credit the abolitionist movement with the birth of restorative justice. In particular, the abolitionist, Nils Christie, is considered one of the forefathers of this movement with his seminal work on conflicts as property in which he criticises the criminal justice system for «stealing» conflicts from victims and offenders. Christie<sup>43</sup> argues that conflicts should be returned to their rightful owners and victims and offenders should have the opportunity to deal with the offence themselves. Like the abolitionists, who wish to abolish the conventional criminal justice system, Ezzat Fattah<sup>44</sup> sees restorative

<sup>43</sup> N. Christie, *Conflicts as Property*, 17 *The British Journal of Criminology* 1–23 (1977).

<sup>44</sup> E.A. Fattah, *A Critical Assessment of Two Justice Paradigms: Contrasting the Restorative and Retributive Justice Models*, in E.A. Fattah and T. Peters (eds), *In Support for Crime Victims In A Comparative Perspective*, 99–110 (1998); See also E.A. Fattah, *supra* note 25.

and retributive justice as two very different approaches and argues in favour of a «paradigm shift» in which restorative justice replaces retributive justice. This approach leaves no room for compromise: any attempt to combine restorative with retributive justice would necessarily mean abandoning restorative principles.

Examples of the abolitionist approach are diversion programs in which criminal cases are diverted out of the criminal justice system. Often these are less serious cases with young offenders. Although these programs often boast restorative values, they typically owe their existence to efficiency concerns and an overburdened criminal justice system. An example is the so-called *Dading* project that was created in Amsterdam in the 1990s.<sup>45</sup> This project was created by a group of abolitionists and involved indirect mediation. Following a civil legal model, lawyers representing victims and offenders would try to negotiate an agreement between parties. The project organizers managed to obtain the collaboration of the Public Prosecutor's Office in Amsterdam, not because the Chief Public Prosecutor was an abolitionist but because he was a pragmatist. The court was burdened with as an enormous backlog of cases and it was felt that it was better to do something (namely restorative justice) than to let the cases grow old and then dismiss them, which effectively meant doing nothing.

Similarly, many of the restorative justice programs for young offenders fall under this heading. For example, in Canada, victim-offender mediation for young offenders is considered an “extra-judicial measure”. In other words, it is outside of the conventional criminal justice system. If victims and offenders come to an agreement, the case is diverted out of the criminal justice system.

While the abolitionists were able to gain some ground and establish some programs, it was always unlikely that restorative justice would ever fully replace the conventional criminal justice system. Authors, like Groenhuijsen,<sup>46</sup> warned that as long as the restorative justice movement talked about a paradigm shift, the movement was doomed to fail. Criminal justice personnel, he argued,

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<sup>45</sup> For a description of this project in English, see, J. Wemmers, Restitution and Conflict Resolution in The Netherlands, in B. Galaway and J. Hudson (eds), *Restorative Justice: International Perspectives*, 431–444 (1996); For a complete evaluation of this project see, J. Wemmers and T. Van Hecke, *Strafrechtelijk Dading*, Wetenschappelijk Onderzoek en Documentatie Centrum, K10 (1992).

<sup>46</sup> M. Groenhuijsen, *Victims' Rights in the Criminal Justice System: A call for more comprehensive implementation theory*, in J.J.M. Van Dijk, R. Van Kaam and J. Wemmers (eds), *Caring for Victims of Crime*, 85–114 (1999).

would never fully embrace restorative justice as long as doing so meant giving up everything that they believed in.

Clearly, criminal justice personnel have a vested interest in maintaining the status quo but what would this approach mean for victims? Is it in their best interest? By definition, restorative justice recognizes victims and their suffering and includes them, giving them an active role in responding to crime. Repeatedly research has shown that restorative justice programs such as mediation are associated with greater victim satisfaction than the conventional criminal justice system.<sup>47</sup> For example, Australian research by Heather Strang,<sup>48</sup> which compared victims' experiences in restorative and conventional justice, found that 69% of victims who participated in conferencing were satisfied while 48% of victims whose cases were handled by the conventional criminal justice system felt this way. Similarly, recent experiments with restorative justice in England and Wales also show extremely high levels of victim satisfaction: between 80 and 90%.<sup>49</sup>

However, the abolitionists give full control regarding how to deal with the offence to the victim and offender and they effectively ignore society's interest in crime. Crime affects both society on the whole and the victim in particular. The conventional criminal justice system has been criticized for ignoring victims' interests and focusing exclusively on society's interest, however, that is not to say that society does not have an interest. Cavadino and Dignan<sup>50</sup> use the example of a homicide in order to illustrate this point. If, in a homicide case the victim's family and the offender were to agree on a monetary compensation of the family instead of prison, many of us would feel that this was wrong. This would be seen as a distasteful buy-out; putting a dollar-value on a human life. The only reason that we can justify diversion programs for minor offences is because in these minor cases, once reparation has been made to the victim, the debt owed to society is negligible. When it comes to serious crimes, it is not enough that the victim and the offender come to an agreement; the offender has a debt to society as well.

Repeatedly, research has shown that victims support the criminal justice model. Giving full control to the victim also means that the victim alone carries the responsibility for punishing the offender and

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<sup>47</sup> J. Shapland *et al.*, *supra* note 26.

<sup>48</sup> H. Strang, *Repair or Revenge: Victims and Restorative Justice* (2002).

<sup>49</sup> J. Shapland *et al.*, *supra* note 22.

<sup>50</sup> M. Cavadino and J. Dignan, *Reparation, Retribution and Rights*, 4 *International Review of Victimology* 233–253 (1997).

that is a tremendous burden. While victims want to be included in the decision-making process, and be consulted before decisions are made, they do not wish to be responsible for deciding sentencing.<sup>51</sup> Victims stress the criminal nature of the act committed against them and do not agree with the abolitionist terminology which talks about ‘conflicts’ instead of ‘crimes’.<sup>52</sup>

Finally, the abolitionist approach fully exposes victims to offenders. While victims complain about being shut-out of the criminal justice process, there are many good reasons to shield victims from their offenders. Victims may be frightened of their offender; they may fear re-victimization. Traumatized victims may be unable to face their offender. Research shows that on average, one out of every three victims of violent crime suffers from Post-traumatic stress disorder.<sup>53</sup> Some offenders are manipulative and dangerous and clearly unfit for a face-to-face meeting with their victim. The abolitionist approach fails to take these victims and offenders into consideration.

### 3.2 *Add Restorative Justice Practices to Criminal Justice*

A second model is the “add-on” approach in which restorative justice programs are grafted on to the criminal justice system. By the late 1990s a number of authors, such as Mike Cavadino and Jim Dignan<sup>54</sup> and Lode Walgrave<sup>55</sup> argued in favour of a combination of restorative practices and criminal justice. Cavadino and Dignan presented what they called an *Integrative Restorative Justice Model* in which retribution and restorative principles are combined. In this model the conventional criminal justice officials would set the upper and lower limits of a possible agreement between the victim and offender and they would have the last word before the case could be closed.

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<sup>51</sup> *Supra* note 22; See also J. Wemmers and K. Cyr, *Victims’ Perspectives on Restorative Justice: How much involvement are victims looking for?* 11 *International Review of Victimology* 259–274 (2004).

<sup>52</sup> See, J. Shapland, *The Criminal Justice System and the Victim*, 10 *Victimology: An International Journal* 585–599 (1985). Shapland finds that victims adhere to the criminal justice ideology.

<sup>53</sup> D.G. Kilpatrick, B. Saunders, L.J. Veronen, C.L. Best and J.M. Von *et al.*, *Criminal Victimization: Lifetime Prevalence, Reporting to Police and Psychological Impact*, 33 *Crime and Delinquency* 479–489 (1987).

<sup>54</sup> *Supra* note 50.

<sup>55</sup> L. Walgrave, *La Justice Restaurative: À la recherche d’une théorie et d’un programme*, 32 *Criminologie* 7–30 (1999).

Restorative justice would be carried out by local schemes with the criminal justice system as a back-up.

Walgrave<sup>56</sup> took another approach, emphasizing restorative outcomes rather than procedures. He advocated a so-called maximalist approach in which restorative justice would have priority in the criminal justice system. Walgrave could be seen as an abolitionist since he is in favour of a complete transformation of the conventional criminal justice system. However, unlike the abolitionists, who would replace criminal with civil law, Walgrave recognizes the interest of society in the case. Therefore, in Walgrave's maximalist approach, three parties should participate in mediation: victims, offenders and community representatives. He also recognizes that restorative justice cannot be the only response to crime and will have to co-exist with other social responses to crime such as retribution and rehabilitation. Hence, Walgrave's maximalist approach is not so much about abolishing criminal justice but about integrating restorative practices in the criminal justice system.

An example of this add-on approach, in which restorative justice practices are integrated in the criminal justice system, is the case of Belgium, where since 2005, restorative justice is possible at any stage in the criminal justice process.<sup>57</sup> This legislation entails that at all stages of the criminal justice process victims and adult offenders are offered the possibility to participate in victim-offender mediation. Unlike the abolitionist approach, successful mediation does not necessarily mean that the court will dismiss the case. Mediation is independent of the traditional criminal proceedings and the judge is under no obligation. The outcome of a possible mediation will only be made known to the court if both the victim and the offender agree that this information can be shared. When both parties agree to disclose the results of the mediation then the judge can take the outcome into account.

Prison-based mediation programs, which exist for example in Canada, are another example of this add-on approach where restorative justice practices are built onto the existing system.

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<sup>56</sup> *Ibid.*

<sup>57</sup> *Lois, Décrets, Ordonnances et Règlements*, Lois introduisant des dispositions relatives à la médiation dans le Titre préliminaire du Code de procédure pénale et dans le Code d'instruction criminelle, *Moniteur Belge*, 33323–33325 (27.07.2005). For a comprehensive discussion of the Belgian legislation see, T. Van Camp and V. De Souter, Belgium, in D. Miers and I. Aertsen (eds), *Regulating Restorative Justice: A Comparative Study of Legislative Provisions in European Countries* (forthcoming).

*Restorative Opportunities* is the name of a nation-wide program that is offered by Corrections Canada.<sup>58</sup> Offenders who have been found guilty of a crime and have been sentenced to two or more years of prison can participate in mediation with their victims. Mediation can be initiated by the offender, the victim or by services representing them (such as parole services). The outcome of the mediation has no formal impact on the sentence; that is it does not result in early release.

Like the abolitionist approach, adding restorative justice practices to the conventional criminal justice system means that victims are recognized and given a place in the criminal justice response. However, because restorative practices like mediation play a limited role in this approach, victim participation and recognition is also limited. Outside of the mediation or conference setting, victim recognition and participation in the criminal justice process is not self-evident. Instead of participating throughout the criminal justice process, victim participation is finite and limited to mediation. In the case of prison-based programs, the victim can be excluded from the criminal justice process and years after the offence, when the offender is nearing release back into the community, finally be recognized and have an opportunity to participate.

Unlike the abolitionist approach, which sees crime as a private matter, or the conventional criminal justice system, which sees crime exclusively as a public matter, this approach recognizes both the victim's and society's interest in crime. This corresponds with victims' perceptions of crime as an act that has been committed against them personally but one that also has ramifications for the society or the community.<sup>59</sup>

Restorative justice is associated with very high levels of victim satisfaction.<sup>60</sup> The integration of restorative justice practices in the criminal justice system might improve victim satisfaction with the criminal justice system. While no systematic evaluation of the Belgian situation has been done, as we have seen, the available research on

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<sup>58</sup> For information about this program see, Correctional Service of Canada, *Restorative Opportunities. Fact Sheet for Victims*. Accessed 25 February 2009, available at <http://www.csc-scc.gc.ca/text/rj/fsvctms-eng.shtml>.

<sup>59</sup> See Shapland *et al.*, *supra* note 22; Wemmers and Cyr, *supra* note 51.

<sup>60</sup> See Shapland *et al.*, *supra* note 22; J. Wemmers and M. Canuto, *Expériences, attentes et perceptions des victimes à l'égard de la justice réparatrice: Analyse documentaire critique* (Ministère de la Justice, Canada, 2002).

mediation within the context of the criminal justice system does show strong victim satisfaction.

When restorative justice practices are integrated within the conventional criminal justice system, there can be some protection of victims. This all depends on how cases are recruited. If for example, as in the Belgian model, all victims are repeatedly offered the possibility of participating in mediation with the offender, regardless of the offender or offence characteristics, then there is relatively little protection of victims. The only way in which victims are protected is that victims who do not wish to participate in mediation can say no and they will not be forced to do so. It should be said that in comparison to the conventional criminal justice system where victims can be and sometimes are forced to testify, this approach is more responsive to victims' wishes. However, unless there are exclusion criteria and cases are screened prior to victim recruitment, it leaves open the possibility that a well-intentioned victim will be confronted with an offender who does not accept full responsibility for his actions or who is perhaps dangerous and mentally unstable. Research shows that while secondary victimization is not common in restorative justice, it can happen when the offender does not accept responsibility for his actions and shows no remorse.<sup>61</sup>

The prison-based program, *Restorative Opportunities*, is much more careful when it comes to victim protection. Offenders and their representatives are not allowed to contact the victim. Requests from offenders to meet with their victims are first screened by authorities as to their appropriateness and to the offender's motivation.<sup>62</sup> Then, only if victims are registered with victim services can they be contacted regarding possible mediation. These precautions are meant to minimize the risk of secondary victimization.

However, no matter how it is organized, when restorative justice programs are added on to the conventional criminal justice system this inevitably means that the victim has to agree to mediation or conferencing in order to have the opportunity to be recognized and participate in the handling of their case. If the victim declines the offer to participate in a restorative justice program, for example because they are afraid of the offender, their case will remain within the conventional criminal justice system, where their role is limited to that of a witness to a crime against the state. As we have established

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<sup>61</sup> *Supra* note 48; Wemmers and Cyr, *supra* note 51; Shapland *et al.*, *supra* note 26.

<sup>62</sup> It should be noted that this procedure applies in all provinces in Canada except British Columbia, where victims are contacted regardless of their registration.

at the outset of this paper, in common law countries, victims have been pushed out of the criminal justice system. Victim participation is limited to the victim impact statement, which only takes place after the offender has been found guilty. In the criminal justice process, there is no victim but an “alleged” victim of an “alleged” crime. Only after a verdict by court is the victim recognized by the court. This means that a victim who seeks recognition and wants to participate in the process effectively has to agree to participate in a restorative justice program.

Finally, the “add-on” approach leaves the conventional criminal justice process essentially unchanged. Restorative and retributive justice exist in two separate systems that work side-by-side. There is no integration or cross-pollination between the two systems. The dialogue in the courtroom and the attitudes towards victims and their involvement in court remain unchanged. Victims are still seen as a foreign body that does not have a role to in the courtroom, besides that of witness.

### *3.3 Integrate Restorative Justice Values in the Criminal Justice System*

The third approach is to integrate restorative justice values instead of restorative justice practices into the criminal justice system. In other words, instead of integrating mediation or conferencing or any other restorative program into the criminal justice system, restorative values such as participation and respect for the dignity of the victim would be woven into the criminal justice process. Much like a three-party system where in addition to the state and the accused, victims have a formal and recognized role, this approach gives participatory rights to victims. That is not to say that victims would necessarily have all of the same rights as the accused or even that they would be considered an equal party, however, they would have a formal status. This is currently not the case in common law, which emphasizes just two parties – the state and the offender.

An example of this approach is the newly established International Criminal Court (ICC) in The Hague, The Netherlands. The ICC is the first international tribunal to give rights to victims. Inspired by the 1985 UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the ICC allows victims to participate in criminal justice proceedings and makes it possible for victims to obtain reparation through the court. Article 68, Section 3 of the Rome Statute states that, “where the personal interest of victims are

affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>63</sup> Victims do not participate in procedures directly but through their legal representative. The ICC deals with mass victimizations: genocide, crimes against humanity and war crimes. Because of the large number of victims involved it would be impossible for victims to participate directly. Moreover, the court is in The Hague and many of the victims are thousands of kilometres away, living on other continents. Their legal representative is obliged to represent their client’s (i.e. the victim’s) interests before the court.

At the ICC, victims’ legal representatives are present in the courtroom. They sit at a separate table, next to the Prosecutor and across from the Defence. Because they are in the courtroom and are able to intervene and speak on behalf of their clients (the victims), their presence has a significant impact on the dialogue in the courtroom. The victims’ legal representatives make the judges, and everyone else in the courtroom, aware of victims’ views and concerns regarding the various questions under consideration by the court. The victims’ legal representative can be present in the courtroom throughout the trial and as such can continually exercise influence on the legal discourse. Victims and their concerns become an integral part of the criminal justice process.

Abolitionists would say there are already too many lawyers in court and that by adding more lawyers we only move the conflict further away from victims. Having legal representation, victims are not personally active in the court. This would be a problem if victims seek active and direct participation in the criminal justice process. However, research on the role that victims would like to have in the criminal justice system consistently shows that victims generally seek consultation and consideration.<sup>64</sup> Victims do not seem to seek an active decision-making role. For example, Michael Kilchling<sup>65</sup> asked German victims what kind of role they would like to have in the criminal justice system and found that most expressed the desire to

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<sup>63</sup> *Rome Statute of the International Criminal Court*. Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of and International Criminal Court on 12 July 1998.

<sup>64</sup> See Shapland *et al.*, *supra* note 22; M. Kilchling, *Opferinteressen und Strafverfolgung* (1995); Wemmers, *supra* note 21; Wemmers and Cyr, *supra* note 51.

<sup>65</sup> Kilchling, *supra* note 64.

fulfil an “in-between” role: neither full exclusion nor full control. Similarly, when Wemmers and Cyr<sup>66</sup> asked victims in Quebec what role they felt that victims should play in the criminal justice system, most victims expressed a wish to be consulted and considered but felt that giving victims decision-making power in the criminal justice process would be inappropriate. Victims do not want the burden of decision-making.<sup>67</sup> Thus, when the legal representative presents the victim’s concerns and the judges decide, this is in line with victims’ wishes: it offers them the recognition that they seek without burdening them with too much responsibility either.

In addition, the legal representative shields and protects the victim. Victims are not directly questioned and confronted with the accused because they are not in court. Nor do they have to defend themselves. Their lawyer knows the law and knows how to use it to ensure that the victim’s concerns are heard. A person who is still suffering the emotional effects of their victimization cannot be expected to be able to sustain intense interrogation. This is exactly what traumatizes many victims who act as witnesses in the court. In other words, as participants, victims may feel safer and more protected than as a witness.

The recognition of victims by legal authorities that this approach offers would likely enhance victim satisfaction with the criminal justice system. For example, research shows that when victims are notified of the developments in their case, they are more likely to feel that the process has been fair than when they are not notified.<sup>68</sup> Research on victim participation in Germany, specifically the *Nebenkläger* or subsidiary prosecutor, found that victims with legal representation experienced fewer difficulties in obtaining information about case developments and were much more satisfied with their overall treatment in the legal process.<sup>69</sup> By providing victims with the recognition that they seek and giving them, through legal counsel, a clear understanding of how the criminal justice system works, victim participation in the criminal justice process can help empower victims and combat the sense of powerlessness that many victims feel during criminal proceedings.

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<sup>66</sup> Wemmers and Cyr, *supra* note 51.

<sup>67</sup> See Shapland *et al.*, *supra* note 22.

<sup>68</sup> *Supra* note 21.

<sup>69</sup> I. Bacik, C. Maunsell and S. Grogan, *The Legal Process and Victims of Rape* (1998). Cited in J. Doak, *Victims’ Rights in Criminal Trials: Prospects for Participation*, 32 *Journal of Law and Society* 294–316 (2005).

By providing victims with a formal status in criminal procedures, we address the origin of the problem of the exclusion of victims in the criminal justice system. Over 20 years ago Joanna Shapland<sup>70</sup> asserted that “the neglect of crime victims by lawyers, the police and the judiciary is endemic, with its roots in their non-recognition”. If victims were recognized in substantive law, she argued, then perhaps they would not be neglected by criminal justice authorities. More recently, Beloof<sup>71</sup> came to a similar conclusion, arguing that victims will achieve real rights when they get legal standing. While much has changed since the start of the victims’ movement, the treatment of victims in the criminal justice system remains an issue.<sup>72</sup> When Prosecutors in Quebec were asked what they thought of the idea of providing victims with their own lawyer, some felt that this would be futile as they would not have a formal role to play, while others believed that victims would probably be better informed and generally treated better if they had legal representation.<sup>73</sup> Research shows that victims wish to remain part of the criminal justice system and they want the state to recognize the crime that was committed against them.<sup>74</sup> However, they do not understand why the criminal justice system and the criminal law should emphasize just two parties – the state and the offender. This integrated model corresponds with the research on the role that victims want to play in criminal justice procedures.<sup>75</sup>

Despite its many strengths, victim participation at the ICC has also been strongly criticised. To begin with, while the court deals with cases of mass victimization, to date only a handful of victims has actually been granted the right to participate, leading Chung to

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<sup>70</sup> *Supra* note 52, p. 585.

<sup>71</sup> D.E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy and Review*, Brigham University Law Review 256–370 (2005).

<sup>72</sup> E. Brickman, *Development of a national Study of Victim Needs and Assistance*. Report submitted to the US Department of Justice, Award no. 98-VF-GX-0011 (2003); D. Lievore, *No Longer Silent: A study of women’s help-seeking decision and services responses to sexual assault*. Report prepared by the Australian Institute of Criminology (2005); J. Wemmers and K. Cyr, *Victims’ Needs Within the Context of the Criminal Justice System*, International Centre for Comparative Criminology, Université de Montréal (2006); Davis and Mulford, *supra* note 17.

<sup>73</sup> J. Wemmers, *Victims in the Criminal Justice System and Therapeutic Jurisprudence*, 3 *Victims and Offenders* 165–191 (2008).

<sup>74</sup> *Supra* note 52; Herman, *supra* note 33.

<sup>75</sup> *Supra* note 52; Kilchling, *supra* note 65; *Supra* note 22; Wemmers and Cyr, *supra* note 51.

conclude that the ICC does not offer meaningful participation to victims. According to Chung, a former Senior Trial Attorney in the Office of the Prosecutor of the ICC, at least 509 applications to participate in ICC proceedings had been received by the Registry as of May 2008. But only 107 victims had been granted the right to participate at the investigation phase and only 18 were granted the right to participate in an ICC case.<sup>76</sup> Moreover, the time it takes to process applications is extremely long and applicants can wait more than a year to obtain the right to participate, in either the situation or the case. In part, the slow pace has been due to extensive litigation relating to victims' participation.<sup>77</sup> One could argue, as Chung does, that this is a waste of resources and that it is taking away resources from other court activities such as investigations, victim protection or defence counsel. Chung criticizes the Chamber and judges for their preference for innovation rather than "non-controversial rulemaking."<sup>78</sup>

However, there is nothing non-controversial about victims and the criminal justice system. Just the introduction of a simple written statement by victims at sentencing on the consequences of the offence, the victim impact statement – has been controversial in domestic courts.<sup>79</sup> For example, in the USA, the Supreme Court was asked to rule on whether victim impact statements should be permitted in cases where the offender risked capital punishment.<sup>80</sup> Bringing the victim into the criminal justice process after complete exclusion is not easy. It requires that the Prosecution be willing to give up some of its power and share the stage with the victims' legal representatives. This does not mean that we must sacrifice the rights of the accused. Rather we must abandon the notion that crimes only affect society and we must acknowledge that in addition to society, victims also have a legitimate interest in their case. The above research on victims and the criminal justice system suggests that the integrated model, which

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<sup>76</sup> See C. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?* 6 *Northwestern Journal of International Human Rights* 459–545 (2008).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, p. 508.

<sup>79</sup> For an excellent overview of the arguments for and against victim impact statements, see *supra* note 20; E. Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, *Criminal Law Review* 545 (1999).

<sup>80</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991).

forms the basis of victim participation at the ICC, can offer victims meaningful participation by giving them a place in the courtroom.

#### IV CONCLUSION AND RECOMMENDATIONS

Over 30 years after the birth of the victims' movement and the discovery of the plight of the victim, victims are still essentially witnesses to a crime against the state with few rights. During this time, restorative justice has emerged as an approach that advocates victim participation and recognition of the harm committed against the victim. Despite the strong role that it gives victims, the restorative justice movement has not changed victims' role in the conventional criminal justice system. In parts, this is because many advocates of restorative justice see it as an alternative to the conventional criminal justice system. While restorative justice has been successfully introduced as an alternative approach for minor offences in many jurisdictions, it is unrealistic to think that restorative justice could ever completely replace the conventional criminal justice system. More importantly, as we have seen, victims see themselves as part of the criminal justice system and wish to remain in the criminal justice framework.<sup>81</sup> Hence, the abolitionist approach may be provocative and intriguing but it does not correspond with what victims want.

The idea of grafting restorative justice programs onto the conventional criminal justice system may seem like a happy medium. On the one hand it recognizes victims and allows their participation, and on the other hand it recognizes society's interest in the crime and leaves the conventional criminal justice system in tact. However, it also limits victim participation and keeps victims outside of the criminal justice process. Thus, keeping victims in their traditional role as objects of law rather than subjects, which, as we have seen, is the main source of their frustration with the criminal justice system.

If we truly want to address the plight of victims then we must stop excluding victims and start including them in the criminal justice system. The introduction of victim impact statements in common law systems was an important first step in that regard. But it is not enough. The emergence of restorative justice, and in particular restorative justice values, provides an opportunity for criminal justice authorities to treat victims as well as offenders with dignity and respect. Restorative justice values correspond with what victims want:

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<sup>81</sup> *Supra* note 51; Wemmers and Cyr, *supra* note 51.

recognition and validation from the criminal justice system as well as protection from the offender without burdening victims with too much responsibility. Decision-making power would remain in the hands of authorities. The International Criminal Court and its integration of restorative values such as participation is an example of how victims can be given a place in the criminal justice process. We need to begin to recognize that crime affects victims as well as society and that victims belong in the criminal justice process.