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Reparation and Retribution: Are They Reconcilable?

Lucia Zedner*

Introduction

The recent history of criminal justice contains an apparent anomaly: the simultaneous renaissance of retributive and reparative models of justice. This article will explore the genesis and competing claims of these two models, how it is that their fortunes have coincided, and with what consequences. Many writing in this field have felt driven to champion the claims of one or the other.¹ Some of these writings read like missionary tracts whose proselytising purposes tend to obstruct measured analysis. Yet the greatest possibilities for illuminative debate have arisen where rival champions have entered into battle with one another to expose the inadequacies or undesirability of the other's model.² The consequence, however, is that positions have become polarised. Retributive and reparative justice are posed as antinomies whose claims rival one another and whose goals must be in conflict. The most radical writers propose a major paradigm shift in which reparation would take priority over punishment as the goal of the criminal justice system.³ From the opposing camp, adherents of retributivism generally argue that reparation is merely incidental to the main purpose of punishment. According to this latter view, the place of reparation within the criminal justice system serves pragmatic purposes but is conceptually anomalous. More recently, welcome attempts to bridge the gap traditionally posed between reparation and retributivism have been mooted by those who question the usefulness of this dichotomised approach to penal theory.⁴

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This article draws upon my contribution to a comparative project 'Wiedergutmachung im Strafrecht/ Reparation in Criminal Law' at the Max Planck Institute for Foreign and International Criminal Law, Freiburg. The project looks at the relationship between punishment and reparation at the level of both theory and practice in sixteen countries. I am grateful to Andrew Ashworth, Michael Cavadino, James Dignan, Nicola Lacey, Andrew von Hirsch and Susanne Walther for their comments and suggestions.

- 1 The best of such writings include: on reparative justice, Barnett, 'Restitution: A New Paradigm for Criminal Justice' (1977) 87 *Ethics* 279; Wright, *Justice for Victims and Offenders* (London: Sage, 1991); and on retributivism, von Hirsch, *Doing Justice* (Boston: Northeastern University Press, reprint 1986); Ashworth, 'Criminal Justice and Deserved Sentences' (1989) CLR 340.
- 2 For example, see the debate between Braithwaite and Pettit, and von Hirsch and Ashworth: Braithwaite and Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990); von Hirsch and Ashworth, 'Not Not Just Deserts: A Response to Braithwaite and Pettit' (1992) 12 OJLS 83 and reply by Braithwaite and Pettit, 'Not Just Deserts, Even in Sentencing: A Reply to von Hirsch and Ashworth' (1992) 4(3) *Current Issues in Criminal Justice* 225–239; Ashworth and von Hirsch, 'Desert and the Three Rs' (1993) 5(1) *Current Issues in Criminal Justice* 9. Another such debate is Van Ness, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4(1) *Criminal Law Forum*, and Ashworth, 'Some Doubts about Restorative Justice' (1993) 4(2) *Criminal Law Forum* 1.
- 3 See, for example, Barnett, *op cit* n 1; Abel and Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Westport, Connecticut: Greenwood Press, 1984); Fattah, 'From a Guilt Orientation to a Consequence Orientation' in Kueper and Welp (eds), *Beitraege zur Rechtswissenschaft* (Heidelberg: C.F. Mueller Juristischer Verlag, 1993) 771–792.
- 4 See Watson, Boucherat and Davis, 'Reparation for Retributivists' in Wright and Galaway (eds), *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage, 1989); Cavadino and Dignan, 'Reparation, Retribution and Rights,' unpublished paper delivered at the British Criminology Conference, Cardiff, 1993.

This article asks whether the penal system can or should embrace both punitive and reparative goals simultaneously. It does so by analysing the genesis and the claims of retributive and reparative justice; by examining the central criticism of reparation — that it fails as punishment; and, finally, by asking whether and in what respects reparation and retribution can be reconciled. If reparation does have a place within the penal system, then what is, or ought to be, that place? This is neither a missionary tract nor a determined attempt at reconciliation. Rather, it seeks to subject both retributive and reparative justice to critical examination in order to tease out strands of congruity and accord as well as those of difference and incompatibility. In a criminal justice system which is characterised above all by diversity and tension, it would be curious for sentencing to enjoy unity or even coherence of aim. Sentencing embraces an array of diverse functions and rightly so. Pluralism is a necessary feature of our penal system and we should resist the temptation to seek intellectual elegance or unanimity at all costs.

A Punishment as Retribution

Before examining the genesis and claims of reparative justice, let us briefly recapitulate the present state of discussion regarding the purposes of our penal system. This history is familiar and it serves little purpose to rehearse it at length here. This said, if the import of the potential paradigm shift proposed by reparative justice is to be fully appreciated, then an overview of the prevailing paradigm is essential.

Since the heyday of welfarism in the 1960s, the political agenda in sentencing has changed markedly: disillusionment with the welfare model of justice prompted growing calls for a 'return to justice', a movement which signifies both renewed regard for due process and the renaissance of retributivism in sentencing.⁵ Propounded first and most vigorously in the United States by Andrew von Hirsch,⁶ desert theories have more recently become highly influential in Britain. Using classical notions of free will, moral responsibility and culpability, desert theory reifies corresponding notions of censure and sanction as the 'just' response to offending behaviour. Within this framework, it claims to grade the gravity of crimes in order that sanctions of comparable severity may be applied. In Britain many academics, most notably Andrew Ashworth, have welcomed the attempt made by desert theory to develop a coherent, structured approach to sentencing and have applauded the move toward certainty and consistency in the imposition of penalties which it is said to promote.⁷ Early proponents of desert theory envisaged that it would serve to delimit levels of punishment, or even bring about a general lowering of the tariff. Instead, since the political swing towards conservatism in Britain in the 1980s, the retributivism of desert theory has been appropriated to serve demands for tougher penalties for serious crime.⁸

5 See Ashworth, *Sentencing and Criminal Justice* (London: Weidenfeld and Nicolson, 1992) 66–68, for a discussion of the return to retributivism.

6 von Hirsch, *Past or Future Crimes* (Manchester: Manchester University Press, 1986); von Hirsch and Ashworth (eds), *Principled Sentencing* (Edinburgh: Edinburgh University Press, 1992); von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993).

7 Ashworth, *op cit* n 1, 350.

8 Hudson, *Justice through Punishment: A Critique of the 'Justice' Model of Corrections* (Basingstoke: Macmillan, 1987) 22.

Replacing the prevailing 'cafeteria system' of choices with a clear commitment to proportionality, the Criminal Justice Act 1991 was hailed as the most important sentencing legislation in 40 years.⁹ The preceding White Paper furnished perhaps the most useful statement of the Government's objective of achieving 'better justice through a more consistent approach to sentencing, so that convicted criminals get their "just desserts"' (*sic*).¹⁰ In outlining the aims of this new sentencing system, the Government declared that 'the first objective for all sentencings is denunciation of and retribution for the crime.' In so doing, it sought to relegate other purposes of 'public protection, reparation and reform of the offender' secondary to this main aim.¹¹ Scarcely had the Act come into force,¹² however, than it was subject to intense criticism from sentencers who resented the 'straight-jacket' imposed upon their exercise of discretion. Most controversial was the requirement that proportional sentences be handed down without reference to the offender's past record. Under attack from magistrates, judges and, most fiercely, from Lord Chief Justice Taylor, the Government rapidly abandoned its adherence to desert theory.¹³ Just nine months after the 1991 legislation had come into force, the Criminal Justice Act 1993 once more gave sentencers the discretion to consider previous convictions.¹⁴

The current abandonment of desert theory in Britain probably owes more to certain political shibboleths concerning the independence of the judiciary than to doubts about its internal coherence or ability to deliver justice. However, retributivism is not free from criticism on philosophical, moral and, indeed, social grounds. Desert theory is predicated on assumptions of free moral choice and ignores the social context of structural disadvantage in which many offenders act.¹⁵ Emphasis on proportionality thus seeks to detach justification for punishment from wider theories of social justice. Moreover, despite the importance it ascribes proportionality, it gives little concrete guidance as to the appropriate level of penalty. To say that a penalty should be proportional is immediately appealing. It appears instinctively 'right' that a penalty should be no more or less than that merited by the offence. But closer reflection raises difficult questions about whether one can so readily match the gravity of an offence with a number of years of imprisonment, still less with the myriad forms and conditions of probation. The problem becomes particularly acute in respect of more complex or diffuse crimes such as fraud, blackmail or perjury where it is far from obvious what the 'proportionate' punishment might look like.¹⁶ Moreover, the quantum of punishment is always liable to shift according to extraneous criteria such as policy

9 Ashworth, *op cit* n 5, p 308. The Criminal Justice Act 1991, s 2(1)(a) and s 6(2)(b) both state that the sentence should be 'commensurate with the seriousness of the offence.'

10 Home Office, *Crime, Justice and Protecting the Public* (London: HMSO, 1990) 2.

11 *op cit* n 10, p 6.

12 In October 1992.

13 Some flavour of these criticisms can be gleaned from the following quotation from a contemporary editorial in *The Times*: 'the Criminal Justice Act should not become an instrument for the statutory suppression of common sense . . . The problems which afflicted the Criminal Justice Act in its first six months illustrate the difference between sensible guidelines and rigid prescription . . . the scales of justice cannot be reduced to an algorithm,' *The Times*, 23 March 1993.

14 It has been argued that the provisions of the 1993 Act provide sentencers with even greater discretion than they enjoyed prior to the 1991 Act: see Thomas, 'Custodial Sentences: The Criterion of Seriousness,' *Archbold News* (London: Sweet & Maxwell, 1993) 14.

15 Hudson, *op cit* n 8.

16 Lacey, *State Punishment* (London: Routledge, 1988) 17. The difficulties entailed in arriving at a proportional punishment for these 'more complex' crimes are recognised even by desert theorists; see von Hirsch and Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 OJLS 34.

considerations, availability of resources and priority given to criminal justice expenditure. Thus, although just deserts may provide a framework for internal order and consistency, the scale itself is susceptible to external political, moral and economic pressures. The danger is that just deserts, far from introducing objectivity and fairness into punishment, will create a sentencing framework very much at the mercy of the prevailing political climate.¹⁷ Finally, and perhaps most fundamentally, desert theory derives from eighteenth-century notions of divine justice which inevitably fail to address many of the problems of social order which late twentieth-century criminal justice is called upon to regulate.¹⁸

B The Renaissance of Reparative Justice

The renaissance of reparative justice derives its impetus from an even earlier historical tradition, for it harks back to the origins of Anglo-Saxon law when little distinction was made between public and private wrongs. Both were dealt with by a system for gaining compensatory redress via monetary payments known as the 'bot' whose sum was fixed according to the nature and extent of the harm done.¹⁹ Only with the growth of royal jurisdiction in the twelfth century was direct restoration to the victim sacrificed to the wider purposes of securing the 'King's Peace.'²⁰ Crimes were differentiated from other social wrongs on the grounds that they were so serious as to offend not only against the interests of the victim but against King and community as well. Accordingly, the rights of the victim to compensation were usurped by fines payable to the Crown and personal apologies were supplanted by demands for atonement to God. Over time, the original restorative purpose of the 'bot,' the claim of the victim to redress and, indeed, the interest of the offender in making good have been effectively submerged beneath the wider social purposes of maintaining order.

Only in the late twentieth century have proponents of reparative justice revived the argument that crime should be seen not only as a wrong against society but also as a dispute between offender and victim requiring resolution.²¹ Particularly influential were the demands of Nils Christie that the criminal justice system recognise and restore the property rights of participants to 'their' conflict.²² But one might go further and argue that not only has the State 'stolen' the conflict, by the artifice of legal language it has transformed the drama and emotion of social interaction and strife into technical categories which can be subjected to the ordering practices of the criminal process. That small proportion of conflicts which enter the criminal justice system undergo an elaborate process of inquiry, classification and judgment by police, lawyers and judges by means of which they are translated to fit the legal categories of crime. The criminal justice process may thus be seen as a means of repackaging conflicts in order to render them amenable

17 von Hirsch has argued that 'a sentencing theory cannot, Canute-like, stop the waters from rising: where the law-and-order pressures in a particular jurisdiction are sufficiently strong, punishments will rise, and no penal theory can stop that'; von Hirsch, 'The Politics of "Just Deserts"' (1990) *Canadian Journal of Criminology* 402. The possibility remains, however, that desert theory is particularly susceptible to such pressures.

18 As Fattah argues, belief in an avenging God who is satisfied only when wrongdoing is met with the infliction of equivalent pain has little resonance in our increasingly secular society; Fattah, *op cit* n 3.

19 Roebuck, *The Background of the Common Law* (Oxford: Oxford University Press, 1988) 29.

20 Greenberg, 'The Victim in Historical Perspective' (1984) 40 *Journal of Social Issues* 79.

21 Wright, *Justice for Victims and Offenders* (London: Sage, 1991).

22 Christie, 'Conflicts as Property' (1977) 17 *Brit J Criminology* 1.

to legal regulation. The adversarial system further distances and embattles the two parties, whilst high standards of proof demand absolute attribution of culpability. The intimate relations between many victims and offenders involved in crimes against the person,²³ the blurred distribution of victim and offender status and of causal responsibility which are inimical to securing a conviction are diminished and denied.²⁴

The renaissance of reparative justice may be seen in part, therefore, as a rebellion against law's dominion and the reassertion of populist rights of participation. The proliferation of academic research about victims has contributed to this debate.²⁵ And public attitude surveys have been particularly influential in revealing that many victims would welcome the opportunity to seek some reparation from, or even reconciliation with, 'their' offender in place of traditional punishment.²⁶ These findings come at a time when confidence in the criminal justice system to 'do anything' about crime is low. Disillusionment among many academics, policy makers and criminal justice professionals with the existing paradigm of punishment fuelled hopes that some limited good might be achieved by compensating victims for the wrongs they had suffered.²⁷ Politically also, reparative justice has attracted widespread support across the spectrum. Those on the Left see compensation to victims as a natural extension to national insurance and as an important corollary to welfarism. Conservative interest has been characterised as representing the softer face of the 'Law and Order lobby,' though one should note that the image of the deserving victim has also been used effectively as grounds for demanding tougher punishments. More generally, the financial backing given to Victim Support, to compensation, mediation and reparation schemes by the Conservative government during the 1980s has been seen as entirely consistent with its wider search for lost 'community.'²⁸

The arguments advanced for incorporating reparative elements into the criminal justice system are for the most part pragmatic and economic ones. At the most basic level, reparative justice is supported on the grounds that it is functional for the state to secure the payment of compensation or to support other ventures which seek to repair the damage done by crime. To the extent that reparative ventures are actually perceived by victims as having desirable effects, they reduce the possibility of a disgruntled victim taking the law into his or her own hands to seek redress. In the same vein, they lessen the likelihood that the victim will become so disaffected that they themselves turn to crime. Moreover, the prospect of

23 Fattah, *Understanding Criminal Victimisation: An Introduction to Theoretical Victimology* (Canada: Prentice-Hall, 1991) ch 7.

24 McBarnett, *Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981).

25 For example, Shapland *et al*, *Victims and the Criminal Justice System* (Aldershot: Gower, 1985); Maguire and Pointing (eds), *Victims of Crime: A New Deal?* (Milton Keynes: Open University Press, 1988); Morgan and Zedner, *Child Victims: Crime, Impact and Criminal Justice* (Oxford: Oxford University Press, 1992). For an overview, see Zedner, 'Victims', in Maguire, Morgan and Reiner (eds), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 1994).

26 Hough and Moxon, 'Dealing with Offenders: Popular Opinion and the View of Victims' (1985) 24 *The Howard Journal* 160.

27 This approach also raised questions about the responsibility of the state to compensate victims and was instrumental in the establishment of the Criminal Injuries Compensation Board in 1964. The provision of state-funded compensation has little bearing, however, on the questions concerning the purposes of punishment discussed here.

28 In 1990, the British Government announced the 'Victim's Charter' which reaffirmed the rights of victims, amongst other things, to compensation from the offender and the state. Though it should be noted that with these rights come also new responsibilities, see Miers, 'The Responsibilities and Rights of Victims' (1992) *MLR* 482.

reparation may encourage victims to report crimes, to cooperate with the police and to appear at trial, hence increasing the efficacy of the criminal justice process.²⁹ Given that the vast majority of crimes are detected only with the aid of the general public, it must be desirable for these forms of cooperation to be encouraged.

A consequentialist variant on this view is the recognition that to the social costs of crime are added the further costs of punishment. The financial costs of traditional punishments (above all imprisonment) to the taxpayer or to society generally are a heavy burden. To the extent that these penalties are seen to fail, their costs become unjustifiable. Reparative sentences, by contrast, lessen the financial burden on the taxpayer and further shift the burden onto the offender (via the payments of fines, compensation orders and through community service). The cost of the criminal justice process to victims is also recognised: victims are required to give considerable time and energy to reporting crimes and assisting police investigations. For a few, there is the additional trauma of being required to give evidence as a witness in court. Reparation, it is argued, recognises the reliance of the criminal justice system on victims, either by ensuring that they receive financial compensation from the offender, 'paying' for their cooperation or compensating them for the further 'secondary victimisation' suffered at the hands of the criminal justice system. Finally, proponents of reparation suggest that the costs suffered by the offender (the stigma of conviction, the pains of imprisonment, the disadvantages faced on release from custody) are so burdensome as to be counterproductive. Reparative sentences would, it is argued, not only lessen the burden of punishment on the offender but offer the possibility for constructive, forward-looking sentencing. Making good, whether via monetary compensation or other reparative endeavour, is also applauded as having psychological advantages over traditional retributive penalties. Reparation, it is argued, relieves the offender's feelings of guilt and alienation which may precipitate further crimes. The effect is said to be restorative not only to the victim but also to the offender, increasing their sense of self-esteem and aiding reintegration.³⁰

These pragmatic purposes are largely uncontroversial, such controversy as exists arising mainly from doubts about the ability of reparation to achieve them. The theoretical reorientation posed by a fully developed reparative schema is more challenging. Such a schema would demand the abandonment of culpability of the offender as the central focus of sentencing and, in its place, pay much closer attention to the issue of harm. It would reconceive crimes less as the willed contraventions of an abstract moral code enshrined in law but, more importantly, as signals of social disfunction inflicting harm on victims (and perhaps also offenders) as well as society. According to this view, criminal justice should be less preoccupied with censuring the code-breakers and focus instead on the process of restoring individual damage and repairing ruptured social bonds.³¹ In place of meeting pain with the infliction of further pain, a truly reparative system would seek the holistic restoration of the community. It would necessarily also challenge the sole claim of the state to respond to crime and would instead invite (or perhaps demand) the involvement of the community in the process of restoration.

29 Though the ultimate consequence of full victim cooperation might be that the criminal justice system becomes impossibly overloaded with cases.

30 Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

31 Van Ness, *op cit* n 2.

Whilst early proponents of reparative justice hailed it as a new paradigm which should replace the existing model of punishment, such claims ring rather hollow now. Increasingly, demands for an entirely new paradigm have been abandoned in favour of more muted discussion about the possibilities of integrating reparative into prevailing retributive schema. At the level of practice, the criminal justice system has always embraced an eclectic array of aims and initiatives, but at a theoretical level this bid for reconciliation has met with resistance. Is reparative justice no more than a conceptual cuckoo in the criminal law nest?³²

C What is Reparative Justice?

Before going on to consider the relationship between reparation and retribution in detail, it is worthwhile pausing to reflect upon what exactly is meant by reparative justice. For although it has attracted many proponents, it is far from clear that they share a common vision as to its shape and purpose.³³ The tendency of the 'movement' toward reparative justice (if one can call it that) to embrace an array of possibilities is reflected in the slippery quality of the language used to convey its key concepts. 'Making good' is suggestive only of restoration to the victim and conveys little of what involvement in reparative schemes may mean for the offender. 'Compensation' suggests a civil purpose analogous to damages and misses the penal character inherent in such disposals. 'Mediation' purports to be orientated toward dispute resolution, but commonly refers to projects which are often more concerned to divert offenders from prosecution or mitigate their sentence than to take account of the interests of the victim.³⁴ 'Restitution' seems to be too narrow a term, suggesting little more than the returning of property or its financial equivalent to the person from whom it was unlawfully taken.³⁵ As such it tends to conflate the functions of civil and criminal law.

'Reparation' is not synonymous with restitution, still less does it suggest a straightforward importation of civil into criminal law. Reparation should properly connote a wider set of aims. It involves more than 'making good' the damage done to property, body or psyche. It must also entail recognition of the harm done to the social relationship between offender and victim, and the damage done to the victim's social rights in his or her property or person. According to Davis, reparation 'should not be seen as residing solely in the offer of restitution; adequate reparation must also include some attempt to make amends for the victim's loss of the presumption of security in his or her rights.'³⁶ This way of thinking echoes, consciously or not, the concept of 'dominion' developed by Braithwaite and Pettit.³⁷ For dominion to be restored, what is sought is some

32 A question posed by Campbell, 'Compensation as Punishment' (1984) 7 *Univ New South Wales LJ* 338.

33 Cavadino and Dignan have developed a typology which embraces six possible models of reparative justice (Conventional model with limited elements of reparation; 'Victim allocation model'; Diversion model; Separatist model; Court-led hybrid model; and Integrated 'restorative justice' model), *op cit* n 4, p 4.

34 Davis, *Making Amends: Mediation and Reparation in Criminal Justice* (London: Routledge, 1992).

35 Hodgson Committee, *Profits of Crime and their Recovery* (London: Heinemann, 1984) 5.

36 Davis *et al*, *Preliminary Study of Victim-Offender Mediation and Reparation Schemes in England and Wales* (London: Home Office RPU, 1987) 7.

37 'An agent enjoys negative liberty . . . if and only if he is exempt from the constraints imposed by the intentional or at least the blameworthy actions of others in choosing certain options'; Braithwaite and Pettit, *op cit* n 2, p 61.

evidence of a change in attitude, some expression of remorse that indicates that the victim's rights will be respected in the future. Achieving such a change in attitude may entail the offender agreeing to undergo training, counselling or therapy and, as such, these may all be seen as part of reparative justice. A forced apology or obligatory payment of compensation will not suffice; indeed, it may even be counterproductive in eliciting a genuine change of attitude in the offender. But is 'symbolic reparation' alone sufficient? According to Braithwaite, if reparation is not to come too cheap it must be backed up by material compensation.³⁸ Accepting Braithwaite's view, the distinctions made between material and non-material or symbolic reparation tend to lose significance. It would seem that in most cases for full reparation to be achieved some mixture of the two will be required. Let us examine each in turn.

The most obvious and concrete form of reparative justice is compensation.³⁹ Monetary compensation recognises the fact that crime deprives its victim of the means to pursue life choices: it seeks to recognise that deprivation and to restore access either to those means which have been denied or to comparable alternative means. Compensation orders payable by the offender were introduced by the Criminal Justice Act 1972, which gave the courts the power to make an ancillary order for compensation in addition to the main penalty in cases where 'injury, loss or damage' had resulted. Ten years later, under the Criminal Justice Act 1982, it became possible to make compensation orders as the sole penalty against an offender. Where fines and compensation orders were given together, the 1982 Act required that payment of compensation should take priority over the fine. The importance given to compensation was enhanced further under the Criminal Justice Act 1988, which required the courts to consider making a compensation order in every case of death, injury, loss or damage and, where the court failed to give such an order, to furnish reasons for not doing so.⁴⁰ Difficulties remain in determining what constitute reasonable grounds for failing to make such an order or, where such an order is made, in determining the degree of harm caused and hence the level of compensation payable. In practice, compensation orders are set with reference to the ability of the offender to pay and, given that the majority of offenders are of limited means, they rarely result in complete restoration. In so far as reparation also seeks to promote the reintegration of the offender, it would surely be counterproductive to heap intolerable burdens on him. Although in seeking to embrace both reintegration and restoration simultaneously, reparative justice is necessarily riven by tensions, we should not see these aims as competing or necessarily in conflict: they are rather two sides of the same coin.

Less tangible but nonetheless important is what we might call 'symbolic reparation.' This might be an apology made by the offender to the victim or other attempts at reconciliation. The reparation here is 'symbolic' in that it does not

38 Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

39 For extensive discussion of the role and form of compensation, see Miers, *Compensation for Criminal Injuries* (London: Butterworths, 1990).

40 In 1991, 58 per cent of offenders sentenced in magistrates' courts for offences of violence, 37 per cent for burglary, 40 per cent for robbery, 51 per cent for fraud and forgery, and 58 per cent for criminal damage were ordered to pay compensation. Overall, 26 per cent of offenders sentenced for indictable offences in magistrates' courts were ordered to pay compensation. In Crown Courts, the figures were lower — only 12 per cent of those sentenced (partly because compensation orders are not normally combined with custodial penalties). The comparable figures of those ordered to pay compensation are proportionately lower: 25 per cent for violence, 8 per cent for burglary, 18 per cent for fraud and forgery, and 19 per cent for criminal damage. Barclay, *Digest 2: Information on the Criminal Justice System in England and Wales* (London: HMSO, 1993) 20.

entail the return of money or material goods. Proponents of reparative justice argue that if the apology is not merely an empty gesture but one which conveys remorse and a genuine change of attitude, then such symbolic reparation is quite as important as more tangible returns.⁴¹ Mediation seeks to provide a way for parties to resolve disputes without recourse to the vagaries of the courts. It aims to allow both parties to retain control over the dispute and to voice their grievances under the supervision of a mediator, whether a trained professional or lay volunteer.⁴² In theory, the mediator acts only as a conduit and ideally any resolution is reached by the mutual agreement of the two parties. In practice, the form and organisation of mediation schemes vary considerably and it is worth examining a little more closely their development and form.

One of the first mediation schemes in Britain arose out of a discussion group set up by Philip Priestley in 1969 on behalf of NACRO.⁴³ This initiative sought to provide a forum in which both victims and offenders could express their views and feelings. Many early mediation and reparation schemes, however, were as much concerned with diverting the offender from punishment as with the interests of the victim.⁴⁴ Reparation 'in the service of diversion' both saved the offender from the pains of punishment and reduced the ever growing burden on the courts.⁴⁵ Early initiatives begun by Juvenile Liaison Bureaux (for example, in Devon and Northamptonshire) focused mainly on young offenders. Used in conjunction with police cautions, these schemes aimed to promote diversion of young offenders out of the criminal justice system. It was less clear what benefits they provided to victims. The National Association of Victim Support Schemes,⁴⁶ as the voice of the victims' lobby, was notably circumspect about the benefits of mediation for victims and remained reluctant to give wholehearted support.

The early 1980s saw several important developments in the promotion of reparative programmes. Probation services were instrumental in establishing local mediation schemes, the first being in South Yorkshire and the West Midlands in 1983.⁴⁷ Those seeking to promote mediation and reparation schemes joined together in 1984 to found a central organising body — FIRM (Forum for Initiatives in Reparation and Mediation).⁴⁸ In 1984, the then Home Secretary Leon Brittan agreed to fund a number of reparation projects in Cumbria, Leeds, Wolverhampton and Coventry on an experimental basis. These and other voluntary schemes take a variety of forms. Most seek to bring about some communication between victim and offender (though not necessarily face-to-face) using a mediator (often a probation officer). Their aims also vary from simply providing a conduit for communication enabling the parties better to understand one another, to eliciting an apology or some tangible form of restitution from the

41 Indeed, Launay claims that 'British victims are reluctant to accept material reparation from their offenders and are usually content with their explanations and apologies': Launay, 'Victim-Offender Conciliation' and McGurk *et al* (eds), *Applying Psychology to Imprisonment: Theory and Practice* (London: HMSO, 1987) 12.

42 Davis, *op cit* n 34; Davis *et al*, *op cit* n 36.

43 The National Association for the Resettlement and Care of Offenders.

44 Davis, *op cit* n 34, p 23.

45 Davis *et al*, 'Reparation in the Service of Diversion: The Subordination of a Good Idea' (1988) 27 *The Howard Journal* 129.

46 NAVSS has since been relaunched as Victim Support.

47 Though given the role of the probation service, it is hardly surprising that these early schemes focused primarily on the offender.

48 Later relaunched as Mediation UK.

offender (often with the hope of a reduced sentence in return), to attaining resolution of the conflict or even reconciliation.⁴⁹

Mediation may be introduced into the criminal justice process at various points. Some schemes operate primarily as agents of diversion at the pre-prosecution stage, for example the police may issue a formal caution but recommend mediation.⁵⁰ Most pre-prosecution schemes are organised by Juvenile Liaison Bureaux as a means of diverting young offenders from court.⁵¹ Others may be court-based providing for mediation before court proceedings or on adjournment before sentence. In England and Wales it is possible for the prosecutor or the court to discontinue, but not defer, a case in its preliminary stages and recommend mediation.⁵² In Scotland the Procurator Fiscal may defer cases for mediation provided that they are deemed to be of sufficient seriousness to merit prosecution. Yet another type of mediation is introduced after conviction but before sentence.⁵³ Finally, mediation may take place post-sentence, for example in relation to Intermediate Treatment, as a condition of probation or community service, or (more rarely) during a prison sentence. The latter type of mediation scheme was developed at the youth custody centre in Rochester, Kent.⁵⁴ Under the so-called Victims and Offenders In Conciliation (VOIC) programme, young offenders serving sentences for burglary meet with victims of burglary in groups for one and half hour sessions over three weeks to discuss the impact of the crime.

Sceptics continue to question whether mediation schemes can ever really operate properly 'in the shadow of the court.' Victim Support has warned of the additional burdens — in terms of time, energy and goodwill — which mediation may place on victims.⁵⁵ As a consequence, its development has been slow. By 1990 there were just fourteen mediation schemes in operation. In the consultation period preceding the 1991 Act, the Government was anxious to glean attitudes towards schemes which elicited direct reparation, whether by some personal service or an apology to the victim. They found that court-based reparation schemes, in particular, enjoyed 'little support . . . there was often confusion whether reparation was for the benefit of the victim or a means of rehabilitating the offender.'⁵⁶ Moreover, it was found that victims felt under pressure to cooperate, a consequence which the Government considered wholly undesirable. As a result, 'the Government has concluded that reparation to victims should not be a requirement of orders made by the courts.'⁵⁷ This waning of support at the level of central government has dulled, but certainly not eradicated, enthusiasm for mediation at the local level.

49 Davis *et al*, *op cit* n 36. A study by the Home Office over two years (1985–87) found that in six schemes dealing with juveniles cautioned by the police, 57 per cent of all agreements involved an explanation and apology with just over 25 per cent involving material reparation. Marshall, 'Victim-Offender Mediation,' 30 *HORS Research Bulletin* (London: HMSO, 1991) 9.

50 As in Exeter, London, Corby and Northamptonshire.

51 Davis *et al*, *op cit* n 36, p 3.

52 Though under s 23 of the Prosecution of Offences Act 1985, the accused can demand that the prosecution be continued: Wright, *op cit* n 21, p 86.

53 As in Home Office funded schemes set up in Leeds, Coventry and Wolverhampton or locally funded schemes in Rochdale, South Glamorgan, South Yorkshire and Southampton. Most court-based schemes deal with less serious adult offenders appearing in magistrates' court; an exception is the Leeds scheme, set up explicitly to deal with high-tariff offenders.

54 Launay, 'Bringing Victims and Offenders Together: A Comparison of Two Models' (1985) 24 *The Howard Journal* 200.

55 Reeves, 'The Victim and Reparation' (1984) 31 *Probation Journal* 136.

56 Home Office, *op cit* n 10, p 24.

57 *ibid*.

Mediation is, as we have seen, modelled (even predicated) upon the bringing together of two individuals to express their views and seek resolution. But what should happen, for example, where the offender is a large corporation and the victim is the community? Who then should speak on their respective behalves? The problem of the absence of 'authoritative consent' to speak on behalf of a group has been recognised by Fiss in respect of civil dispute resolution: it is no less pressing in criminal cases.⁵⁸ The problem is particularly acute where the victim is a 'nebulous social entity',⁵⁹ such as an ethnic or racial minority group subject perhaps to persistent criminal damage, abuse and assaults but who have no formal organisational structure and lack procedures for generating authoritative consent. Is it possible to envisage a model of reparative justice which might deal adequately with such a problem? Proponents of reparative justice might respond in two ways. First, it is not difficult to think of ways by which a representative might be elected to speak on behalf of the victim group. Nor must mediation necessarily take the form of bilateral negotiation; rather, it might well bring together the various parties in group discussion.⁶⁰ Second, even if there are problems of who should speak, at the very least the reparative model acknowledges the right of the parties to retain some say over resolution. In court neither party is allowed a voice other than in so far as their knowledge is deemed legally relevant to establishing the facts of the case. Any voice, it might be argued, is better than none.

It was argued above that it is theoretically desirable that reparation entail both material and symbolic elements. Happily, it would appear that in practice the dichotomy between material and non-material reparation is rarely so complete as it may first appear. Sums paid in compensation seldom approach the actual value of the loss suffered and the significance of the payment may often be largely symbolic. In turn, mediation may lead to practical actions making good damage done, and thus its impact is also material.⁶¹ So far so good, but the question remains in what proportions respectively should the material and the symbolic (or perhaps better, the psychological) elements of reparation apply and who should determine the nature and weight of these ingredients.⁶² The danger remains that, without careful consideration of questions such as these, the 'recipe' for reparation remains elusive.

D Is Reparation Compatible with Punishment?

So far we have explored the case for reparative justice and how it might best be realised. But if its aims are to be pursued within the terrain of the criminal process, the question arises whether, or to what extent, reparation can plausibly fulfil the purposes of punishment.⁶³ To answer this we need to ask rather basic questions about the nature of punishment and the principles upon which it should be applied.

58 Fiss, 'Against Settlement' (1984) 93 Yale L Rev 1078.

59 *ibid* 1079.

60 As in the VOIC programme discussed above.

61 For example, young offenders who commit acts of vandalism may be called upon to make good the damage done or to do other practical work for the victim.

62 An analogous point is made by Ashworth and von Hirsch respecting the problematic relationship between 'recognition and recompense' in Braithwaite's promotion of restorative justice, 'Desert and the Three Rs,' 5(1) *Current Issues in Criminal Justice* 10.

63 Though this begs the question whether a just response to crime must necessarily be punitive. A more radical critique of the prevailing paradigm might well challenge the assumption that offending behaviour must always be met by the infliction of further pain in order for justice to be done.

This is not the place to enquire into the philosophical foundations of the criminal law nor to explore at length theories of punishment. It is enough to recognise that certain basic elements of the prevailing paradigm must be fulfilled if reparation is to claim a place within it. These include: first, the imposition of 'pain';⁶⁴ second, that the sanction is invoked in response to social wrongs (crimes); and, third, that it is applied against culpable offenders. Reparative justice must satisfy each of these elements if it is to escape the tag of 'conceptual cuckoo'. Let us examine them in turn.

(a) Punitive Quality

Perhaps the most telling objection to reparative justice is that it has no intrinsic penal character and that to enforce civil liabilities through the criminal courts is not, of itself, to punish. Lacey argues that 'there must be some idea of additional loss, inconvenience or stigma in order to preserve . . . a genuine distinction between punishment and compensation.'⁶⁵ To the extent that a disposal is solely concerned with securing compensation, its punitive quality seems to be in doubt. In 1970, the Advisory Council on the Penal System supported compensation orders solely on the grounds that it was unreasonable to expect most crime victims to pursue claims for damages through the civil courts.⁶⁶ The Dunpark Committee (1977), which examined the role of compensation within the Scottish system, likewise concluded that restitution could only be justified on the grounds of 'doing something for victims.'⁶⁷ In the view of the Committee, compensation orders had no penal function, providing no more than a convenient means of settling civil suits within the criminal process. In 1974 the Court of Appeal described them as 'a convenient and rapid means of avoiding the expense of resort to civil litigation.'⁶⁸ Certainly, the argument for pragmatism has some merits. It is unnecessarily burdensome on victims' time and resources to expect them to pursue a separate claim via the civil courts. Neither does it make good administrative or economic sense to require a separate court to consider the case all over again. On grounds of efficiency, therefore, the victim is spared the effort of a civil action to obtain redress. To accept this view would be to conclude that although the pursuit of reparation may be pragmatic, it is conceptually incoherent.

It is questionable, however, whether a compensation order can properly be seen as no more than a civil instrument riding on the back of a criminal trial. Unlike the French device of the *partie civile*,⁶⁹ compensation in English law is fully integrated into the criminal process and has the formal status of a penalty. Moreover, a shift in the attitude of the courts is discernible. A decision of the Court of Appeal in 1984 established that a criminal court may make a compensation order against an offender even where there was no right to sue in the civil courts.⁷⁰ The Lord Chief Justice stressed that although compensation orders

64 Or what Lacey terms 'unpleasant consequences,' *op cit* n 16, p 7.

65 *ibid* 35.

66 Advisory Council on the Penal System, *Reparation by the Offender* (Widgery Report, 1970) para 50.

67 Lord Dunpark, *Reparation by the Offender to the Victim in Scotland* (Edinburgh: HMSO, 1977) Cmnd 6802.

68 Scarman J in *Inwood* (1974) 60 Cr App R 70, 73.

69 Or the German *Adhaesionsverfahren*, though interestingly this device for attaching civil proceedings to the criminal process is rarely used; see Mueller-Dietz, 'Compensation as a Criminal Penalty?' in Kaiser, Kury and Albrecht (eds), *Victims and Criminal Justice* (Freiburg: Eigenverlag Max-Planck-Institut, 1991) 202.

70 Chappell (1984) Cr App R 31.

were commonly used as an easy means of ensuring that a victim received compensation without the expense of resort to civil proceedings, it was not the case that 'the criminal remedy is the mirror of an underlying civil remedy.' The implication here was that compensation orders were an integral part of the criminal process, justifiable even where no civil liability existed.⁷¹ One might conclude that compensation orders do not have a 'given' meaning but can become more or less punitive according to the manner in which they are imposed.

It is significant also that compensation orders extort money which, in the vast majority of cases, offenders would not otherwise have been required to pay. First, the action for recovery is brought about without financial cost to the victim. And, secondly, the state has the coercive mechanisms to ensure that repayment is actually made. In this sense, it may be said that the compensation order inflicts 'pain' which is 'additional' to that which civil law would otherwise exact. These factors also help to ensure that compensation orders are perceived both by offenders and society as 'real' punishment. But the danger here is that to claim compensation orders operate as a punishment may lead us to the unhappy conclusion that for the offender the compensation order is undifferentiated from the fine and has little or no reparative quality. If the goal of restoring the recipient to a position akin to that which existed prior to the offence is obscured in the offender's mind by the punitive bite of the penalty, then it is unlikely that its avowed reintegrative aspects will be effective.

The objection that compensation lacks 'penal value' becomes even more difficult to maintain in light of the fact that, since 1973, it has been possible to impose compensation as the sole penalty.⁷² Stigma attaches to conviction whatever the subsequent penalty and, where compensation is ordered alone, it too is accompanied by the shaming mechanism of the guilty verdict. We might do well to separate out notions of censure and sanction. It is possible to argue that the public drama of the trial, the naming of the defendant and, in particular, the formal attribution of guilt goes a long way toward fulfilling the requirements of censure. Once the demands of reproof have thus been met, is it not excessive to demand that penal sanctions also be endowed with censuring qualities?⁷³

In respect of mediation and reparation, the issue of punitive quality becomes more complex still. Purists might argue that the offender must enter into the process voluntarily and participate willingly in seeking an outcome. To the extent that participation is coerced, the reintegrative impact of mediation may be lost. But such a view is predicated upon reaching a resolution which is fully agreed upon by both parties. If the offender is a less than willing participant who agrees only reluctantly and under pressure, then it is more likely that he or she will fail to abide by the resolution reached. How, then, should enforcement be assured? Should mediation agencies have access to the full coercive powers of the court and, if they were to do so, would there not be a danger that the reparative potential would be undermined? Proponents of reparative justice might argue that discussion about enforcement is to miss the very point of mediation — that the outcome should be freely agreed and its terms willingly met. The experience of mediation in other

71 See also Campbell, *op cit* n 32, for the development of this view. Cf. *Att Gen's Ref No. 10 of 1992 (R v Cooper)* [1993] Crim. L.R. 631.

72 Powers of the Criminal Courts Act 1973, s 35(1).

73 The answer may vary according to the broader social context in which the criminal justice process operates. On the relationship between censure and sanction, and the counterarguments for adding sanctions or 'hard treatment' to censure, see Narayan, 'Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment' (1993) 13 OJLS 166. See also von Hirsch, *op cit* n 6, ch 2.

areas (for example, the settlement of family disputes)⁷⁴ suggests that we would do well, however, to reflect further on what should happen if offenders fail to fulfil their part of the bargain. Should offenders be brought back to court, as would happen on breach of any other community disposal, and, if so, by whom and with what consequences?

(b) Recognition of Social Wrong

As we have seen, the original appeal to reparative justice was made through an evocation of a nostalgic vision of a bygone community in which disputes were settled by the parties to them.⁷⁵ Present mediation practice reflects this view and tends to treat crime as a personal issue between offender and victim. Not only does mediation take the private conflict as its sole object, but its organisational context sets it apart from the public symbolic processes of criminal justice. Most schemes promote mediation as an alternative to formal procedures, as a way of diverting the offender away from public prosecution. They host discussions between the immediate parties alone with only the mediator in attendance and shield their participants from media exposure. Whilst proponents might argue that all these measures are purposively designed to ensure that the parties retain a sense of ownership over 'their' dispute, such tactics tend also to overlook the wider interests at stake. They tend also to strip the process of its power to signify public disapprobation and to inflict shame upon the offender. To this extent, it is arguable that reparation, narrowly conceived, fails to recognise that it is not only the victim but also society that has been wronged by the disregard shown for its norms and the general threat posed to public dominion. Another objection is that to make reparation to identifiable victims the primary aim of criminal justice would be effectively to decriminalise the mass of 'victimless' offences. The model of mediating a dispute between two parties may operate with some plausibility in respect of interpersonal crimes of violence or theft, but offers little by way of resolution to crimes such as motoring violations, vandalism or public order offences.

It is surely possible, however, to put forward a broader conception of reparative justice which recognises that the rights infringed by crime are not those of the victim alone but are held in common socially.⁷⁶ It is this social aspect which distinguishes crime from the private harms inflicted by torts. Thus, even where there is no identifiable victim, reparation to the wider community for actual harms or public 'endangerment' is owed. Is it possible also for reparative forms of justice to fulfil the public functions (both recognition of the social wrong and public shaming) demanded by infringement of the criminal law? Proponents might legitimately argue that it is misplaced to look upon compensation and mediation as the only means to reparation and that penalties such as community service orders are better placed to make reparation to the wider community. One might then ask how far, or indeed whether, the community feels itself to be 'repaired' by such activities. Until there is empirical research which offers evidence as to the psychological impact of 'community service' on the community it purports to serve, it is probably unwise to make assertions about its wider reparative quality.

74 Roberts, 'Mediation in Family Disputes,' 46 MLR 537.

75 Christie, *op cit* n 22.

76 See Watson, Boucherat and Davis, 'Reparation for Retributivists' in Wright and Galaway (eds), *Mediation and Criminal Justice* (London: Sage, 1989) 19. See also Braithwaite and Pettit, *op cit* n 2.

Even to propose such research raises questions about the very entity of 'community' and whether it actually refers to more than the geographical location in which mediation, reparation or community service orders take place.

If reparative justice, as currently conceived, fails to respond adequately to the social wrong which has been perpetrated, is it possible to envisage modifications which would allow it better to fulfil the public purposes of punishment? One would be to open up the mediation process, either by allowing the public to observe the proceedings or by permitting the media to report on both process and outcome. This would meet the requirement that the offender's offence be publicly known and censured. The danger in using the media as instruments of censure in this way is, however, that, as Dignan has pointed out, 'the kind of shaming indulged in by much of the media is highly stigmatising and might well make the process of reintegration all the more difficult.'⁷⁷ A stronger and perhaps more controllable version of public participation would be to elevate the mediator from the position of go-between in an essentially bilateral negotiation to that of a third party representing the public interest. If mediation is to respond adequately to the social wrong which has been done, then it must take due heed of the wider social purposes of the criminal trial. These include the reassertion of normative order, the reestablishment of the rights and obligations of citizens, the interpretation and development of doctrinal law and of policy, and even the elaboration and maintenance of legal ideology.⁷⁸ One may debate how and to what ends these goals should be pursued, but a system which wholly failed to acknowledge their place would scarcely merit the label of criminal justice.

(c) Response to Culpability

A third charge laid against reparative justice is that it shifts the focus on to harm and, in so doing, risks ignoring the fundamental basis of criminal liability for serious offences — the offender's *mens rea*. Ashworth has argued that a reparative approach:

ignores one cardinal element in serious crimes — the offender's mental attitude . . . Criminal liability and punishment should be determined primarily according to the wickedness or danger of the defendant's conduct: that should depend on what he was trying to do or thought he was doing, not upon what actually happened in the particular case.⁷⁹

To make harm the focus of the debate thus ignores the current centrality of intent as the determinant of moral wrong. Attempts, conspiracy, conduct crimes (such as careless driving), precursor offences (such as possessing firearms or explosives), fraud and theft (which requires no more than the intention permanently to deprive) are all deemed to be criminal irrespective of any harm done. Some attempts, most notably attempted murder, are serious crimes involving high levels of culpability, though the physical harm caused may be negligible. Is there not a danger that a penal system predicated upon response to harm would miss much that we currently conceive of as crime?

77 Dignan, 'Reintegration through Reparation: A Way Forward for Restorative Justice?' (unpublished paper delivered at the Fulbright Colloquium: *Penal Theory and Penal Practice*, University of Stirling, September 1992) 7.

78 See the analogous arguments made in respect of settlement and the civil process in Fiss, *op cit* n 58, p 1085.

79 Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1985) 6 OJLS 97.

In answering this question, we should recall that the vast majority of petty (and not so petty) offences are crimes of strict liability. Here the requirement of moral responsibility has long been abandoned in recognition of the need to regulate and sanction a wide variety of socially harmful actions.⁸⁰ An appraisal of the Canadian criminal statistics leads Fattah to the dramatic conclusion that 'while the abstract concept of moral guilt does still have some proponents in the legal community, it has lost any practical significance and could easily be abandoned without dire consequences.'⁸¹ A less radical response may be to argue that to pose culpability and harm as antinomies fails to recognise the intimate relationship which generally exists between them. Responding to harm necessarily entails close attention to its origins, although under a reparative schema the emphasis may shift away from attributing moral guilt to ascertaining causal responsibility.⁸² Moreover, if reparation is to respond appropriately and in a symbolically apt way, then it will need to differentiate between more or less responsible offenders. According to this view, whilst culpability would no longer be the primary determinant of punishment, the offender's state of mind would nonetheless remain integral to the choice of disposal.

It is also worth questioning whether a harm-orientated system would necessarily draw a penal map so very different from that which we currently employ. The answer depends rather on the scope of our notion of harm. It may be possible to fashion a broader understanding of harm based on the presumption that we have the right as citizens to go about our lives without fear of others intentionally or recklessly injuring us in any way. According to this view, to the extent that an offender threatens our presumption of security, he or she inflicts harm upon us and should be held liable for so doing. Thus attempts, conspiracies and even recklessness which threaten the social and legal order, and our place within it, can all be seen as potential harms. Critics might object that this is to stretch the notion of harm too far, but the evidence of criminological research clearly indicates that the impact of crime extends far beyond the person formally noted in police records as the victim.⁸³ A generalised sense of insecurity is a major social cost of crime which constrains life choices and diminishes quality of life.⁸⁴ To recognise these costs as harms would allow us to bring within the reparative model offences which are normally considered to be 'victimless'. For example, the Second Islington Crime Survey revealed that fear of crime in the city arises largely in reaction to 'local incivilities' such as graffiti, vandalised street lighting, boarded-up shop fronts, youths or drunks loitering on street corners and other signals of a hostile environment.⁸⁵ The sense of insecurity thus engendered may lead those vulnerable to remain at home at night, to limit their movements outside the home to 'safe' areas and even to move to another 'safer' neighbourhood. Whilst we might readily concur that these are real and tangible harms, correlating the relationship between them and actual crimes is highly problematic. To relate diffuse harms such as these with the culpability of individual offenders is probably impossible and it is

80 It has been estimated that over half the 7,000 offences in English criminal law require no proof of fault; see Ashworth, *Principles of Criminal Law* (Oxford: Oxford University Press, 1991) 142.

81 Fattah, *op cit* n 3, p 774.

82 A complicating factor is that the causal responsibility of the victim may also acquire a new importance: see Fattah, *op cit* n 23.

83 See, for example, Morgan and Zedner, *Child Victims: Crime, Impact and Criminal Justice* (Oxford: Oxford University Press, 1992) 27ff.

84 Maxfield, *Fear of Crime in England and Wales* (London: Home Office Research Study 78, 1984).

85 Crawford *et al*, *The Second Islington Crime Survey* (Middlesex, 1990) 82.

questionable upon what grounds liability might then be imposed. The danger here is that, in responding to the cumulative impact of such 'incivilities', we overstate our collective claim to protection and condone intrusion into the lives of vandals, drunks and young delinquents out of all proportion to their, individually petty, offences.

Finally, whilst culpability is the central component of criminality, we should not overlook the place of harm in determining the gravity of the offence. In many areas of crime, harm already determines which offence will be charged and what sentence will follow. An obvious example arises in the case of interpersonal violence. Without any change in the offender's *mens rea*, the crime charged may vary between simple assault and manslaughter, depending on the degree of harm caused.⁸⁶ Harm here (and in many other areas of crime) is a determinant both of liability and of the seriousness of the crime. But as von Hirsch and Jareborg have pointed out: 'virtually no legal doctrines have been developed on how the gravity of harms can be compared.'⁸⁷ By explicitly recognising that harm has a place alongside culpability in determining both liability and offence seriousness, something already tacitly recognised by criminal law and penal practice, a reparative approach might offer the possibility of developing a more coherent basis for our penal system.

The case for full and proper recognition of harm as a basis for liability can be made most strongly in respect of modern environmental and corporate crimes which have the potential to cause very grave and widespread harms.⁸⁸ Under the present system, as Fattah has argued:

grave negligence causing a serious nuclear disaster and claiming hundreds of thousand lives or irreparable harm to the environment leads to much more lenient response than the wilful killing of a single individual because in the first instance there was no deliberate intent to cause harm.⁸⁹

The orientation toward culpability limits both the scope of the criminal law and its ability to respond adequately to the proliferating array of crimes in which culpability is often low but where the consequences for the community are liable to be very high.

E Can Reparation Comply with the Principles of Punishment?

So far we have examined the capacity of reparative justice to mirror or incorporate the chief elements of punishment. If reparative justice is to claim a full place within the penal system, then it must also accord with the principles which delimit the intrusive powers of the state. Can reparation satisfy the requirements for fairness, consistency and proportionality which currently underpin and frame our penal system? Once again, let us look at each element in turn.

86 If no harm ensues the crime would be simple assault attracting a maximum of six months imprisonment (Criminal Justice Act 1988, s 39); if injury follows then the maximum rises to five years imprisonment for assault occasioning actual bodily harm (Offences Against the Person Act 1861, s 47); and finally, if the victim dies, then the offender might be guilty of constructive manslaughter and liable to a maximum of life imprisonment.

87 von Hirsch and Jareborg, *op cit* n 16. See also Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984).

88 The examples of Bhopal, Chernobyl, Exxon Valdez, Piper Alpha and Zeebrugge immediately spring to mind.

89 Fattah, *op cit* n 3, p 782.

(a) Fairness

A primary criticism faced by the reparative approach is that it would create a system of penalties which would have little regard to the means of the offender and so impinge differently on rich and poor. At worst it might allow the very rich to 'buy' their way out of punishment by paying off their victim for harms suffered. Such payments might even become part of the calculus carried out by the rational offender as an 'acceptable cost' readily offset by the benefits of the crime. Particular problems arise in respect of reparative conduct by the offender put forward in mitigation at trial, the difficulty being that an offender with the means to make good may receive a more lenient sentence than an impoverished one. In the case of *Crosby and Hayes* (1974)⁹⁰ the two offenders sought to make amends, one had the means to pay compensation and the other had not. On appeal, it was held that it was wrong in principle to give differential sentences on grounds of financial means. As Ashworth has argued, to allow mitigation in such cases could become a source of discrimination contravening the principle of equality before the law and allowing rich offenders to be treated more leniently than poor ones.⁹¹ The point was reiterated in *Copley* (1979) in which Lord Lane insisted that it should not be open to offenders to buy their way out of prison or to secure shorter sentences by offering money in the way of compensation.⁹² On the same logic, neither should impoverished offenders suffer longer sentences because of their inability to compensate.

In practice, in the interests of fairness to the offender, the amount payable in compensation is often scaled down below that which is proportional to the harm done. Critics of reparation would argue that it is right that fairness to the offender should take priority over that to the victim. But a pure restitutionist approach might insist that the harm be 'made good' at whatever cost is necessary. Can it be right that an offender with meagre resources suffers, in real terms, a greater punishment than the wealthy offender for whom the payment is no burden at all? Is it desirable that an impoverished offender might work for years to pay off a compensation order (perhaps to a victim whose own wealth makes the sum received negligible)? All these factors clearly do considerable damage to the idea of fairness in criminal law. Yet one might argue that this conception of justice is predicated on being fair to the offender and that an alternative version might equally well be predicated on the rights or interests of the victim and be prepared to sacrifice fairness to the offender to this end.

(b) Consistency

The attempt made by desert theory to develop a coherent, structured approach to sentencing has been applauded as a move toward certainty and consistency.⁹³ For the same reason Ashworth has objected to reparative justice on the grounds that it would allow the victim to influence sentencing, as happens in the United States through the use of victim-impact and victim-opinion statements. In so doing, it would be damaging to the pursuit of consistency.⁹⁴ If victims are given the

90 *Crosby and Hayes* (1974) 60 Cr App R 234.

91 Ashworth, *op cit* n 5, pp 179–180.

92 *Copley* (1979) 1 Cr App R (S) 55. This point has been reaffirmed in *Att Gen's Ref No. 10 of 1992 (R v Cooper)* [1993] Crim. L.R. 631 and *Att Gen's Ref No. 5 of 1993 (R v Hartland)* [1993] Crim. L.R. 794.

93 Ashworth, *op cit* n 1, p 350.

94 Ashworth, 'Victim Impact Statements and Sentencing' (1993) CLR 498–509.

right to influence the penalty, a twofold danger arises. Both the form of the penalty (be it reparative or retributive) and its size (be it monetary value or duration) may vary according to the temperament of the victim. But are such criticisms well-grounded?

First, there is a danger of presuming that the objective calculus posited by desert theory is in practice feasible or realistic. Individual sentences will always depend in part on subjective assessments regarding the gravity of the offence made by the sentencer. Thus, while just deserts may promise consistency, it cannot guarantee it.⁹⁵ Second, Ashworth's objection makes certain assumptions about the reparative justice model which are questionable. It is not necessarily the case that reorientating the system around 'making good' must inevitably entail allowing the victim to usurp the role of the state in determining the appropriate sentence. Reparation is owed not just to the victim but to all those whose interests are threatened, and the author would agree that it is not appropriate for the victim to determine the nature or extent of reparation.⁹⁶ The harm suffered is a social one and it is for society to determine what is necessary to effect reparation. Just as the state now makes judgments about the seriousness of the offence and the severity of punishment deserved or, indeed, about the harm done and the quantum of compensation owed, so within a reparative model the state could retain the right to determine the penalty. One might even envisage a system which imports a standardised scale for determining the seriousness of harm analogous to that suggested by von Hirsch and Jareborg in their development of a 'living standard analysis' for gauging criminal harm.⁹⁷ Whereas their model is backward-looking and concerned solely with 'how much harm a standard act of burglary did,'⁹⁸ a reparative schema would need to furnish criteria for assessing what would be necessary to 'make good' the harms done. Within this schema, victim-impact statements might furnish necessary information about the harm inflicted and the consequent needs of the victim upon which impartial judgments might be made about the reparation required. By developing a framework for making such judgments systematically, the risk that offenders would find themselves at the whim of vindictive or overly forgiving victims is surely overcome.

(c) Proportionality

The final and most important claim of desert theory is that it secures proportionality between offence and punishment.⁹⁹ If reparative penalties are to be made proportional to the harm done, by what standard is compensation to be made? Should the car thief who has stolen a Mercedes pay ten times that demanded of the thief who has taken only a Mini though the intention in each case is to steal? Or should one base the calculation on the basis of the harm actually suffered by the victim? Or, as has been suggested above, should it reflect what is necessary to 'make good'? It may be that the owner of the Mercedes is a wealthy woman who

95 Above all in a criminal justice system which places such a high value on the independence and the exercise of discretion by sentencers. The mechanistic formulae of the Minnesota Guidelines would simply not be acceptable in England, as the judicial response to the attempts to impose proportionality under the Criminal Justice Act 1991 bears witness.

96 Ashworth, *op cit* n 2.

97 von Hirsch and Jareborg, *op cit* n 16.

98 *op cit* n 16, p 16.

99 Though see criticisms of this claim above.

has a fleet of cars and the loss of one is immaterial, whereas the owner of the Mini relies on her car as the sole means of mobility. Desert theory requires that the car thief should bear responsibility only for his own conduct, but reparative justice would insist that responsibility extends to the harm caused by his conduct. In deciding to 'throw the dice,' the offender must bear responsibility for the way it falls.¹⁰⁰ A particular difficulty arises in respect of mitigation or incapacity. The offender who is drunk, drugged or insane may bear less culpability but his victim suffers no less harm as a consequence of his actions. Why should the victim of an intoxicated offender receive less compensation than the victim of a fully competent offender inflicting the same level of harm?

The difficulties which arise in relating monetary payments to loss or damage to property become infinitely greater in respect of loss of life or limb, or psychological harm. Critics question the feasibility of assessing harm done without recourse to extensive medical and/or psychiatric evidence, victim impact statements and the like. More tellingly still, they argue that there can be no rational relationship between monetary payments and these forms of loss. Yet tort law relies every day on making just such calculations. Similarly, desert theory relies on making tenuous estimations of proportionality between offence and sentence length. Deciding how many years imprisonment are merited by a rape or a robbery is no more or less contrived than fixing on some value (monetary or other) in relation to harm. And even if the calculation is based on a series of inadequate equivalences, at the very least reparation provides for some tangible or symbolic compensation to the victim, whereas punishment alone provides none at all.

Conclusion: Can Reparation and Punishment be Reconciled?

In reality, reparation in its pure form has nowhere replaced the paradigm of punishment. In Britain, demands for the replacement of punishment by reparative justice have been muted. Instead, provision for compensation only to identifiable victims is incorporated into the existing stigmatising and retributive array of penalties. Incapacitation, for example, is generally regarded as appropriate for the most serious of crimes such as murder, rape and assault. Yet an offender imprisoned is effectively deprived of their ability to repay in the very cases where the harm caused (and therefore the claim to compensation) is greatest. Whilst it is often possible for compensation to run in tandem with other penalties, problems arise where the two are in conflict: custody may be inimical to compensation. For example, in *Huish*, Croom-Johnson LJ stated that 'very often a compensation order is made and a very light sentence of imprisonment is imposed, because the court recognises that if the defendant is to have an opportunity of paying the compensation he must be enabled to earn the money with which to do so.'¹⁰¹ In general, however, unless an offender clearly has the means to pay¹⁰² or has good prospects of employment on release from prison, it would be inappropriate to impose a compensation order alongside custody. The concern is that the burden of

100 Honoré, 'Responsibility and Luck' (1988) 104 LQR 530; O'Malley, 'Punishment and Moral Luck' (1993) Irish CLR 40.

101 *Huish* (1985) 7 Cr App R (S) 272.

102 See *Dorton* (1987) 9 Cr App R (S) 514, in which the Court of Appeal commented that where a court is satisfied that the offender has, or will have, funds available then a compensation order in addition to a custodial sentence was appropriate.

paying compensation on release from a custodial sentence is liable to be 'counterproductive and force him back into crime to find the money.'¹⁰³

Difficulties also ensue where retributive and reparative sentences are in competition with one another. For example, fines and compensation orders both make financial demands on the offender's, often limited, resources: which, then, should take priority? Since 1982, English law has given priority to the imposition of a compensation order over a fine.¹⁰⁴ The effect is for courts to reduce the sum payable as a fine or to refrain from fining altogether in order to allow the compensation order to be paid. In this respect, it might be said that the compensation order does indeed allow the offender to 'buy his way out of the penalties for crime.'¹⁰⁵ More recently, the Court of Appeal has conceded that other penalties may be reduced to enable a compensation order to be paid. Most acute of all are the problems faced when different rationales point to differential levels of punishment: the harm caused in the instant case may be slight but the malice of the offender great. Which penalty should then prevail?

So far attention has been focused on areas of conflict and difficulty. Let us close by considering some points at which reparation and retributive punishment coincide. First, both retribution and reparation are predicated upon notions of individual autonomy. Unlike rehabilitative or 'treatment' orientated models of justice, both reparation and retribution presume that offenders are rational individuals able to make free moral choices for which they may be held liable. The offender may thus be legitimately called to account, whether by making good or suffering a proportionate punishment. However, both approaches are open to the objection that they ignore the structural imperatives of deprivation and disadvantage under which many offenders act. Both assume that all offenders are rational, free-willed individuals despite the disproportionate incidence of mental illness and disorder, social inadequacy and poor education among our offending population.

Secondly, it might be argued that both reparation and retribution derive their 'authority' from the offence itself and impose penalties according to the seriousness of the particular crime. Unlike the utilitarian aims of general deterrence or rehabilitation which import wider notions of societal good, both retribution and reparation exclude (or nearly exclude) consideration of factors beyond the particular offence. The offender's personal history, the social or economic causes of crime or the need to prevent future offending (all of which extend the limits of intrusion by the state under deterrent or rehabilitative theories) are here deemed irrelevant. As such, both retributive and reparative justice, it is said, impose strict constraints on the intrusion of the state into the lives of offenders. This apparent congruity is not, however, as close as it first seems. The seriousness of the offence is set according to two different sets of criteria. Retribution demands punishment proportional primarily to the intent of the offender, whereas reparative justice derives its 'proportionality' from the harm inflicted on the victim. Whilst intent is generally focused on outcomes, and intent and harm may thus coincide, the two may point to very different levels of gravity. If reparation and retribution were to be wholly reconciled, then it would be necessary to devise a measure which integrated intent and harm in setting offence

103 *Inwood* (1974) 60 Cr App R 70.

104 Criminal Justice Act 1982.

105 Wasik, 'Sentencing' in Murphy (ed), *Blackstone's Criminal Practice* (London: Blackstone, 1992) 1714. Though this view assumes that compensation has no penal value.

seriousness. A greater difficulty still is that, if reparative justice is to be more than a criminal analogue to civil damages, then it should go beyond the offence itself to enquire about its wider social costs and the means to making them good.¹⁰⁶

Finally, reparation and retribution have been described by Davis as each a 'species of distributive justice, the root metaphor in each case is that of justice as balance, the object being to restore the distribution of rights which existed prior to the offence.'¹⁰⁷ Whilst one seeks to restore equilibrium by depriving the offender of his rights, the other pursues the same goal by recompensing those whose rights were injured by the crime. This redistribution of rights is analogous to Ashworth's notion of criminal justice as a 'form of social accounting.'¹⁰⁸ In respect of mitigation, for example, laudable social acts by the offender are balanced against crimes to arrive at the appropriate penalty. Ashworth suggests that this calculus is based upon rehabilitative reasoning which sees the offender's subsequent conduct as evidence of his reform. Another possible view is that mitigation is justified here on the grounds that some restoration of the legal order has been made.

These 'distributive' or 'accounting' metaphors go some way to describing the common ethos of retributive and reparative justice. But they rely on a very narrow conception of reparative justice as solely restitutive in intent, seeking only to return to the preceding legal order.¹⁰⁹ Moreover, the legitimacy of a justification based on 'restoring the balance of rights' is open to question on a number of counts. First, to use the criminal justice system solely as a means of restoring the balance of rights which existed prior to the offence is to condone the reinforcement of pre-existing social inequality. Secondly, many of those activities defined as criminal and those groups identified as offenders reflect the interests and values of a socially dominant group. If reparation, with retribution, seeks to restore the values which criminalisation underpins, it is likely not merely to recreate but to accentuate social inequality.¹¹⁰ Thirdly, as Davis has also argued, to demand that offenders bear the full burden of restoring the distribution of rights is to expect too much from that 'unrepresentative and generally impecunious group of citizens who come to the attention of the criminal courts,' both practically and as a matter of principle.¹¹¹ A powerful objection to the increased use of compensation orders, for example, is that they ignore the fact that very many offenders are in straitened financial circumstances. To impose further financial burdens upon impoverished offenders may simply be counterproductive.

In the light of these conceptual links, the concurrent re-emergence of retributive and reparative thinking is perhaps less surprising than it first appears. Ironically, however, the very points at which reparative and retributive justice coincide appear on closer inspection to be the points of greatest weakness within the

106 The danger here is that this process of making good will necessarily entail wider social intervention of the sort that was so troublesome in respect of traditional crime prevention. Though we should remember that it is also arguable that retribution should properly take into account structural factors which limit the free will or culpability of the offender.

107 Davis, *op cit* n 34, p 11.

108 Ashworth, *op cit* n 5, p 133.

109 They may also be inadequate as the foundation for desert theory. Significantly, von Hirsch has also now disavowed his earlier subscription to the idea that sanctions can be justified on the basis of restoring a balance, on the grounds that this does not provide a sufficient reason to invoke the coercive powers of the state, nor does it provide an adequate basis for determining 'how much' punishment is owing under a retributivist schema: von Hirsch, 'Proportionality in the Philosophy of Punishment' (1990) 1 *Criminal Law Forum* 265.

110 Hudson, *op cit* n 8. Though victim surveys have gone a long way toward illustrating that the least powerful in society are most likely to suffer as victims of crime.

111 Davis, *op cit* n 34, p 12.

reparative justice model. Its frailty is greatest in respect of its 'redistributive' purposes which, while theoretically attractive, are predicated on a fictitious just society in which the only imbalance of rights is caused by crimes themselves. A truly reparative model might better recognise that much crime is not simply a cause but also the consequence of social injustice and that the victim, the community *and* the offender are probably in need of repair if criminal justice is to contribute toward a more reintegrated society.

We began with the questions 'can and should' the penal system embrace both punitive and reparative goals: let us return to them by way of conclusion. From our discussion it would seem that whilst 'making good' entails certain difficulties within a criminal justice system, reparation is quite capable of fulfilling the basic demands of punishment and, thus far, is reconcilable with retribution.¹¹² The danger, however, is that the attempt to accommodate reparative justice to the rationale of punishment so perverts its underlying rationale as to strip it of much of its original appeal, not least its commitment to repairing ruptured social bonds. We are accustomed to seeing criminal justice as the repressive arm of the state, but might it not better be conceived as one end of a continuum of practices by which social order is maintained? Punishment has a very limited ability to control crime and, to the extent that it is disintegrative, it inflicts further damage on society. Given that the high profile 'law and order policies' of the past decade have done little to stem spiralling crime figures, perhaps it is time to explore the integrative potential of reparative justice on its own terms.

112 A conclusion also reached by differing routes by Campbell, *op cit* n 32, and Watson *et al*, *op cit* n 4.