

Criminal Proceedings: An Obligation or Choice for Crime Victims?

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Introduction

Prior to the 1980s, it was a criminal offence for any person, including the victim,¹ not to disclose to the State the commission of a crime reasonably suspected of being committed.² Although this legal obligation has since been repealed in Australia, there remains significant social, legal, and moral 'pressures' on victims to report crimes to the police and to assist the State in the identification and conviction of offenders. Indeed, if a crime victim fails to report the crime and assist the State, a number of adverse consequences may follow for the victim.

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1 The writer acknowledges a range of negative consequences and connotations arising from the very use of the term 'victim' as compared to the term 'survivor'. However, for the purposes of this article, it is equally important to stress that many victims do not become survivors and in any event the argument in this paper is that the criminal justice system does in fact victimise the person against whom the crime was originally committed. Further, although this paper focuses upon adult victims of crime, it should be emphasised that child victims/witnesses experience analogous, though qualitatively different trauma. For child victims, the notion of choice is even more problematic and deserves proper analysis separately.

2 In Victoria the leading case was *R v Crimmin* [1959] VR 270 where the victim of a shooting refused to report the crime or disclose the (known) identity of the offender. The Full Court held, that by not assisting the State, the victim had committed the offence of 'misprison of felony'. Also see *R v Wilde* [1960] *Criminal Law Review* 116. In England, the offence was called 'compounding a felony' which was repealed in 1967; see N Walker, *Crime and Criminology: A Critical Introduction* (Oxford University Press, 1987) pp 161-162. In 1981 the distinction between misdemeanours and felonies was abolished in Victoria thereby abolishing the ancient offence of misprison of felony. In Victoria, the equivalent offence is now contained in s 326 of the *Crimes Act 1958* which makes it an offence to conceal a serious indictable offence for a benefit (except if the victim receives the benefit for compensation).

However, if the victim does report and assist the State, by, for example, providing statements and giving evidence in court proceedings, the criminal justice system has not treated victims particularly well. The range of difficulties and injustices experienced by victims through their treatment by criminal justice agencies is well documented.³ In particular, victims in most jurisdictions have been denied any official status or rights and accordingly have been excluded from key stages of decision-making and been deprived of relevant information. The adequacy of State-based support services for victims has also been seriously questioned.⁴

A tension therefore exists between, on the one hand, the State encouraging victims to participate in the criminal justice system, and, on the other hand, that same State justice system treating victims poorly if they do provide assistance. In short, the assistance appears to be unilateral rather than reciprocal. This tension *problematizes* the notion of 'choice' for victims, particularly those groups of victims who experience the most trauma and dissatisfaction with the criminal justice system. These are typically victims of rape, other sexual offences and serious non-sexual assaults.⁵ The difficulties

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- 3 See for example J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System* (Gower, 1985); J Shapland, 'Fiefs and peasants: accomplishing change for victims in the criminal justice system' in M Maguire and J Pointing (eds), *Victims of Crime: A New Deal* (Open University Press, 1988) p 187; S Walklate, *Victimology: The Victim and the Criminal Justice Process* (Unwin Hyman, 1989) pp 108-131; M Wright, *Justice for Victims and Offenders: A Restorative Response to Crime* (Open University Press, 1991) pp 10-25; D Cohen and J Shapland, 'Facilities for victims: the role of the police and the courts' (1987) *Crim L R* 28-38; Victorian Parliament, Legal and Constitutional Committee *Report Upon Support Services for Victims of Crime* (1987) esp Chs 5 and 6.
 - 4 See for example, Victorian Parliament, *Report Upon Support Services for Victims of Crime* (1987) Ch 4. The NSW Task Force on Services for Victims of Crime made some sixty-five recommendations to improve services for victims in that State, see *Report and Recommendations* (1987). More recently, the 'Fogarty' Report into support services for youth in Victoria has identified major deficiencies.
 - 5 In relation to homicides, 'secondary' victims can include the parents, spouse and children of the deceased. These secondary victims also experience significant trauma not simply as a result of the initial crime, but, subsequently, through their treatment by the media and the criminal justice system. For discussion of the type of difficulties experienced by these victims, see, for example, S Tremellen *Murder and Culpable Driving: A Report on the needs of families bereaved through violent crime* Victim-Survivor Project (1992) Victorian Court Information and Welfare Network. See also G McGrath, 'Horror Revisited', paper presented at the Australasian Police Commissioners Conference *Victims*

experienced by these groups of victims are compounded when there is a pre-existing or continuing relationship between the offender and the victim. By 'problematizes' is meant questions as to whether the choice is exercised in a truly *voluntary* capacity, whether the choice is exercised on the assumption that it will *benefit* the victim, whether there are any meaningful alternative *choices* for crime victims and whether some categories of victims have less choice than others. In short, the idea that the 'natural,' 'appropriate,' or 'correct' response of the victim is to report and assist the State, should not be taken for granted. It is time to question this socio-legal expectation.

In an attempt to unravel this problematic notion of choice for victims, this article consists of five sections:

- Part One considers possible arguments as to why victims in general should report and assist the State, notwithstanding their poor treatment by the criminal justice system.
- Part Two outlines the adverse consequences that can flow if the victim fails to report and assist.
- Part Three presents an argument that a fundamental ideological shift is required away from retributive notions of justice to a restorative/reparative conception of justice. Within that shift, more imaginative and constructive responses by the State to the victimisation process is required. In particular, victims should have real and legitimate choices regarding how *they* want to deal with, and hopefully resolve, *their* victimisation. However, real choices can only be made on the basis of relevant information first being provided to the victim by State agencies.
- Part Four briefly describes what a victim oriented criminal justice system might look like and required reforms to the current criminal justice system.
- Part Five outlines some obstacles to proposed reforms.

It is important to stress that this paper is based on two premises. First, the existing State-based criminal justice system (the institutions, personnel, procedures, and inter-relationships) will continue to be the primary response of the State to crime and victimisation. It is not suggested that the existing apparatus be dismantled. For a range of political, legal and social reasons, such a proposal is clearly absurd. However, what is proposed is significant

changes to the way in which that system treats victims, changes to the power and rights of victims, and taking the notion of choices for victims seriously.

Second, not all victims would wish to avail themselves of the sort of changes proposed in this paper. It may be that most victims are generally satisfied with their current role and treatment within the criminal justice system. However it is suggested that *some* victims (as a minimalist position) are not in fact satisfied and would welcome reform. In any event, for any victim to be able to exercise a meaningful choice and make a meaningful decision in this regard, the victim requires information and knowledge about his or her rights and role in the traditional criminal justice system and what alternative options might look like. At present, the State denies victims that knowledge and information.

Finally, the focus of this article is more on the ideas, theory, and principles which govern, or ought to govern, State-centred criminal justice practices and policies rather than providing a technical description of legal practices and procedures. The primary object of the article is to generate discussion and thinking about alternative responses to the victimisation experience; alternatives which accord victims the highest priority and maximum choices.

Part One: Arguments for Victims Assisting the State

It is important to stress that arguments as to why victims should assist the State do not apply universally to all crimes and all victims. These arguments must firstly be placed in a cultural context. For some crimes, there exists significant social ambiguity as to whether the victim ought to resolve the crime privately, without any recourse to the State, or, report it to the State for appropriate action.⁶

Examples of these ambiguous cases could include minor shopthefts, an employer who discovers an employee pilfering, and, unfortunately, domestic violence, which apparently two-thirds of the Australian community regard as a 'private' matter.⁷ There is also a

6 For one of the few articles on the legitimacy of private citizens managing crime privately, see L W Kenned, 'Going it Alone: Unreported Crime and Individual Self-Help' (1988) 16 *Journal of Criminal Justice* 403-412. There is of course a huge literature on private forms of policing, a topic outside the scope of this article.

7 Public Policy Research Centre, *Domestic Violence Attitude Survey* (1988) Canberra, Office of the Status of Women, Department of the Prime Minister and Cabinet, discussed in J Mugford, S Mugford and P Eastaale 'Social Justice, Public Perceptions, and Spouse Assault in Australia' (1989) 16 *Social Justice* 103 at 108.

range of behaviours, currently criminalised, which some argue should be decriminalised and hence not reported to the State.⁸

However, the focus of this article is those crimes where it is generally accepted that the State, rather than the victim, should take responsibility for 'dealing with' the victimisation event. Not surprisingly, these unambiguous cases are our most serious crimes, such as murder, manslaughter, other forms of homicide, armed robbery, burglary, rape, and other sexual offences. The arguments considered below apply to these type of offences located at the extreme end of the crime-seriousness spectrum.⁹ It is also important to note that some of these arguments are interconnected.

Moral duty

On this principle, the victim and the whole community have a moral duty to ensure that those who breach the criminal law receive an appropriate punishment. The principle of just-deserts requires that offenders receive punishment 'proportionate' to the seriousness of the crime.¹⁰ A rationale (ends) for exacting retribution (means) is the restoration of a type of moral equilibrium which had been 'unbalanced' by the offender committing the crime.¹¹ If victims determined the outcome of crimes then there would be a real possibility that the offender would not receive a proportionate, and hence 'just,' sentence, and the 'moral scales' would remain unbalanced.

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- 8 For example, mercy killings: see Victorian Law Reform Commissioner, Working Paper No 8 *Murder: Mental Element and Punishment* p 24, taken up by the Victorian Inquiry into Options for Dying with Dignity, *Final Report*, Social Development Committee (1987). In relation to cannabis use, see Qld Advisory Committee on Illicit Drugs, *Cannabis and the Law in Queensland: A Discussion Paper* (July 1993).
 - 9 For an excellent analysis of the development of a crime seriousness index, see Victorian Bureau of Crime Statistics and Research, *Seriousness Index - Indictable Offences*, Discussion Paper (1992).
 - 10 For a concise summary of desert theory and retribution, see Walker, note 2 above, Ch 11; A Ashworth, 'Criminal Justice and Deserved Sentences' (1989) *Crim L R* 340; Victorian Sentencing Committee *Report* (1988) Vol 1 88-94. In *Veen (No 2) v R* (1988) 164 CLR 465 at 472, the High Court seems to suggest that proportionality in sentencing is part of Australian common law; for discussion see R Fox, 'The Killing of Bobby Veen: The High Court on Proportion in Sentencing' (1988) 12 *Crim L J* 339-366.
 - 11 Walker, note 2 above, Ch 3, refers to punishment as 'annulling' the offence. See also Victorian Sentencing Committee, *Report*, note 10 above, at pp 100-105

One problem with this argument is that it assumes retribution or just-deserts ought to be the primary, or at least one of the primary, purposes of sentencing (and indeed that sentencing is an appropriate response to the victimisation experience). However, the morality of just-deserts as a sentencing aim has been seriously questioned.¹² Moreover, State-centred sentencing systems based on just-deserts do not necessarily provide proportionate or 'just' sentences, as evidenced by the plethora of critics, some of whom argue that particular sentences are too severe and some who argue that particular sentences are too lenient.¹³ In short, both the ends and the means of this moral argument are questionable.

The need for consistency

A second argument is that one of the central criteria for a 'just' criminal system is the need for certainty and uniformity in the way accused and convicted persons are dealt with.¹⁴ Even if consistent outcomes (ends) for 'like' cases cannot be achieved in practice, the application of similar approaches and principles ought to guide the processes (means).¹⁵ This, according to the argument, can only be achieved by the State assuming responsibility for the 'processing' of those accused and convicted.

The problem here is the growing body of evidence of discriminatory and inconsistent approaches and practices at all stages of the criminal justice system.¹⁶ There now exists a strong case

12 See for example, J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press, 1990) pp 5-7. For a fuller discussion see A Ashworth and A Von Hirsh, 'Not Not Just Deserts: A response to Braithwaite and Pettit' (1992) 12 *Oxford Journal of Legal Studies* 83-98.

13 The source of sentencing disparities is the central role of judicial discretion. For detailed discussion, see R G Fox, 'Controlling Sentencers' (1987) 20 *ANZ Journal of Criminology* 218-246; R G Fox and A Freiberg, 'Sentencing Structures and Sanction Hierarchies' (1986) 10 *Crim L J* 216-235.

14 Article 26 of the *International Covenant on Civil and Political Rights* (ratified by Australia in 1980) provides that all persons are equal before the law and should be dealt with equally. For discussion of the need for consistency, see P Sallmann and J Willis, *Criminal Justice in Australia* (Oxford University Press, 1984) p 60.

15 See *R v Bibi* (1980) 2 Cr App R (S) 177 and *Lowe v R* (1984) 154 CLR 606 at 610.

16 See for example M Findlay, S Odgers and S Yeo, *Criminal Justice in Australia* (Oxford University Press, forthcoming) Ch 10; F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice* (Cambridge University Press,

demonstrating institutionalised, structural discriminatory practices within both the processes and the outcomes of criminal justice administration. Indeed, discrimination within the entire legal system is the subject of a recent major inquiry.¹⁷ Moreover, the criminal justice system relies on officials (police, prosecutors, judiciary) exercising significant discretionary powers which, by definition, do not sit comfortably with the ideal of consistency.

Protection of accuseds' rights

At law, all accused and convicted persons possess certain rights: the right to be presumed innocent, the requirement that the State prove guilt beyond reasonable doubt, and the right not to be tried unfairly.¹⁸ On this view, alternatives to State-based criminal justice conjure up images of lynch-mobs in our darker past.¹⁹ Taken to the extreme, victims have some sort of obligation to recognise and accord accused persons these rights.²⁰

Whilst this is a valid argument *per se*, the notion of rights in this context is neither universal nor absolute. In many situations the accused is not presumed innocent,²¹ burdens of proof can shift,²² and the legislature can decide what constitutes a fair or unfair criminal

1990); T Gifford, *Where's the Justice?* (Penguin Books, 1986); K Carrington et al, *Travesty: Miscarriage of Justice* (Academics for Justice, 1991).

17 Australian Law Reform Commission, *Equality Before the Law* (DP 54, 1993).

18 *Dietrich v R* (1992) 109 ALR 385.

19 P Brett, M Waller and C Williams, *Criminal Law: Text and Cases* (6th ed, Butterworths, 1989) pp 12-13.

20 See B Martin, 'Reconciling the Interests of the Victim with the Rights of the Accused' in P Grabosky (ed), *National Symposium on Victimology* (Australian Institute of Criminology, 1982) p 11.

21 In some proceeds of crime legislation, the law presumes that property in the possession of the accused is derived from the proceeds of crime and the onus is on the accused to rebut that presumption, see for example, A Freiberg, 'Criminal Confiscation, Profit and Liberty' (1992) 25 *ANZ Journal of Criminology* 44.

22 In murder cases, the burden or onus of raising the issue of provocation or self-defence rests on the accused but once the issue is raised, the evidentiary burden remains on the Crown. In the judicial determination of whether to exclude disputed confessional evidence, once the court is satisfied the confession or admission is voluntary, the onus is on the accused to establish that it would be unfair or against public policy to allow the confession or admission to be admitted as evidence.

trial.²³ However, protection of accuseds' rights is clearly a central consideration in *any* responses to the victimisation process.

Enhancing denunciation

On this argument the public criminal justice system performs important denunciatory functions by demonstrating to the community that particular conduct is simply unacceptable and this denunciatory role assists in maintaining social cohesion.²⁴ Accordingly, by reporting and assisting the State, the denunciatory function of criminal law is enhanced.

In theory this is a powerful argument but whether the law manages to achieve this in practice is debatable. In fact the legislature and the judiciary have been increasingly criticised for not sufficiently denouncing particular crimes such as rape,²⁵ culpable driving, and criminal assaults in the home.²⁶ In any event the connection between denunciation and social cohesion is questionable both in terms of empirical evidence and logic.

Protection of victim

Only the State can provide adequate protection to prevent victims (and indeed the community generally) being harassed before or during the trial by the offender, or being revictimised by the offender after the trial.

23 For example, the Victorian Government recently passed legislation providing that, in serious offences, a criminal trial can still proceed even if the accused has no legal representation; the issue is left to the trial judge, see *Crimes (Criminal Trials) Act 1993* (Vic) s 27, amending s 360 of the *Crimes Act 1958* (Vic).

24 For a discussion of the denunciatory or expressive role of sentencing, see Walker, note 2 above, at pp 93-5; Victorian Sentencing Committee, *Report* (1988) para 3.8.

25 See Australian Law Reform Discussion Paper, note 17 above, Ch 11, and Victorian Law Reform Commission, Discussion Paper No 46 (1992) arising from the case of *R v Hakopian* (rape of a prostitute). According to Findlay, Yeo and Odgers, note 16 above: 'For justice to be done and seen to be done, there is a pressing need for more detailed and scientifically based information about public attitudes on sentencing. The legislature and courts have a responsibility to take into account accurate public opinion when devising sentencing policy'.

26 See for example, Women's Policy Co-ordination Unit Department of Premier and Cabinet Victoria, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence, Report* (1985) Ch 7; The Law Reform Commission of Australia, *Report on Domestic Violence* (ALRC 30, 1986) esp Ch 7.

It is true that accused persons remanded in custody are physically prevented from harassing their victims directly. However (a) the vast majority of accused are granted bail;²⁷ (b) there are reports of accused persons harassing victims within the court confines (and even whilst in custody via telephone calls or letters);²⁸ and (c) the extent of revictimisation in Australia is simply unknown.²⁹

Rule of Law

If offenders and accused persons were not dealt with by the State, and their fate was left to their victims for private resolution, the public's faith in the criminal justice system would quickly deteriorate, ultimately leading to a breakdown in the Rule of Law.³⁰ Whilst this is a valid argument, it is not suggested that the entire public criminal justice system be dismantled. All that is being suggested is that victims' choices be expanded. This is hardly likely to lead to a breakdown in the Rule of Law.

Public protection

On this view, the victim has a social and moral obligation to ensure that the offender does not continue to victimise other members of the community.³¹ The victim must therefore report the crime to the police and assist the State to isolate the offender from the public for as long as is reasonable. Again, this appears to be a valid argument, but, as stated above, the vast majority of accused are granted bail and

27 In Victoria, of 35,804 applications for bail in 1990, in 34,951 cases, bail was granted, see Victorian Law Reform Commission, *Report on Bail* (1992) p 2.

28 Victorian Parliament Constitutional and Legal Affairs Committee, *Report on Support Services for Victims of Crime* (1987) p 96.

29 Although there has been several notable cases of so-called 'pay back' crimes where the offender, after release from custody, has attacked the same victim a second time, there does not appear to be any reliable data indicating the extent of revictimisation; cf N Polvi, T Looman, C Humphries & K Pease, 'Repeat Break and Enter Victimisation: Time Course and Crime Prevention Opportunity' (1990) 17 *Journal of Police Science and Administration* 8.

30 By 'Rule of Law' is meant the principle that laws will not be applied arbitrarily, that all citizens will be treated equally before the law, and that the common law will protect civil liberties. For fuller discussion see B Gaze and M Jones, *Law, Liberty and Australian Democracy* (Law Book Company, 1990) pp 27-29.

31 In limited circumstances, the citizen can have a duty to assist the police in preserving the peace, see D Nicolson, 'The Citizen's Duty to Assist the Police' [1992] *Crim L R* 611.

the problems in predicting dangerousness and recidivism are well documented.³²

Part Two: Adverse Consequences for Not Reporting or Assisting

If a victim decides, for whatever reason, not to report his or her victimisation or assist the State, a number of adverse consequences may flow for the victim:

- To be eligible for State-funded compensation, the victim is required to report the crime to the police within a reasonable period of time (except where 'special circumstance' exist)³³ and to make the application for compensation within one year after the offence (unless an extension is granted).³⁴ In other situations, most notably criminal assaults in the home, if the victim withdraws criminal proceedings, the victim may find it difficult to satisfy the tribunal that she or he was the victim of a criminal act.
- To be eligible for restitution or compensation from the offender, the victim, police, or Director of Public Prosecutions must formally seek such an order from the court.³⁵ By definition, this entails that criminal proceedings be first initiated.
- If the victim of a crime, most notably a criminal assault in the home, reports the incident to the police but subsequently withdraws the complaint, there is a real possibility that should

32 See for example Walker, note 2 above, at pp 104-106.

33 *Criminal Injuries Compensation Act 1983* (Vic) s 20(2)(b). Indeed, some writers suggest that victim compensation schemes were introduced to encourage victims to report the crime and assist the State: see D Miers 'Responses to Victimisation: Compensation for Acts of Criminal Violence' in D P Farrington, K Hawkins and S M Lloyd-Bostock (eds), *Psychology, Law and Legal Processes* (Macmillan, 1979) pp 111-122. On 9 September 1993 the High Court of Australia ratified the principle that a victim/survivor of child sexual abuse is entitled to apply for criminal injuries compensation even though several years had elapsed from the time of the crime to the time of the reporting of the crime to the police and the application for compensation: see *Sharon Arnold v Crimes Compensation Tribunal* (High Court of Australia, Melbourne Registry, No M128; application heard 17 June 1993 and consent order granted 9 September 1993).

34 *Criminal Injuries Compensation Act 1983* (Vic) s 20(2)(c).

35 *Sentencing Act 1991* (Vic) ss 84(5), 86.

the same victim subsequently report a similar incident, the police may be reluctant to attend or take the complaint seriously. More generally, widespread withdrawal of such complaints may lead to the development of institutionalised negative attitudes within police forces as a whole, to particular categories of victims (for example criminal assault in the home, rape, and commercial victims).³⁶

- Most domestic and commercial insurance policies require that the victim report the incident to the police as a precondition for payment of a claim relating to theft.
- Many people find it difficult to understand why a victim in a violent relationship remains in that relationship and why, at the very least, the victim does not report their victimisation to the police.³⁷ This failure to understand the complexities and realities of violent relationships is a prime contributing factor to the development of a 'blame the victim' ideology.³⁸ Blaming the victim not only delegitimises the individual victim's experiences and realities, but also legitimates cultural acceptance of violence and power imbalances. Thus, the victim who reports and seeks assistance is socially constructed as a more deserving, legitimate, and real victim than the victim who, for whatever reason, fails to report and assist the State.³⁹
- Although not empirically researched to date, the failure of a known victim to assist the police could lead to inappropriate pressures being placed on that victim by the police to provide assistance. For example, it is highly probable that the last thing a rape victim wishes to undergo, after reporting the rape, is a forensic medical examination. However, if the victim refused

36 See H Eijkman, 'Police, Victims and Democracy' in P Moir and H Eijkman (eds), *Policing Australia: Old Issues and New Perspectives* (Macmillan, 1992) pp 266-298. Also see South Australia, *Report of the Committee of Inquiry on Victims of Crime* (1981) p 50.

37 Two thirds of respondents in one national survey thought the woman in a violent relationship could always leave: see J Mugford et al, note 7 above, at p 108. See also L Okun, *Woman Abuse - Facts Replacing Myths* (State University of New York Press, 1986) p 39.

38 K Ferraro, 'Rationalising Violence: How Battered Women Stay' (1984) *Victimology: An International Journal* 203-212; S Walklate, note 3 above, at pp 158-161. L V Davis and B Carlson, 'Attitudes of Service Providers Towards Domestic Violence' (1981) 17 *Social Work Research and Abstracts* 34-39.

39 For analogous discussion see N Christie, 'The Ideal Victim' in E A Fattah (ed), *From Crime Policy to Victim Policy* (Macmillan, 1986) Ch 1.

to undergo the medical examination, it is also highly probable that attempts would be made to persuade the victim to change her or his mind.⁴⁰ The extent and nature of such possible pressures require further research.

Although the above range of adverse consequences may flow for the 'uncooperative' victim, there are a number of reasons why victims should not necessarily feel obliged to report their victimisation to the police and/or to further assist the State in the detection, adjudication, and punishment of offenders. In other words, the victim's decision not to assist may have a logical and defensible basis.

First, whose crime is it? If a crime is defined quintessentially as an act against the individual victim rather than an act against the State (or the community), then by definition, the victim, not the State, should possess the ultimate right in determining how best to respond to their own victimisation.⁴¹ Virtually all crimes against the person simultaneously constitute civil wrongs actionable by the victim/plaintiff.⁴² In the case of civil wrongs, the State does not generally attempt to take over or usurp the rights and role of the plaintiff. Christie and others have argued that a crime is essentially an act against the individual but that the State has 'stolen' what was the conflict 'belonging' to the victim.⁴³

More recently, Fattah suggests:

The offence should cease to be regarded as an affront to the State and be viewed as an offence against the individual victim, not as a violation of an abstract law but a violation of the rights of the victim.⁴⁴

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- 40 In this context, research is needed to identify in what cases of rape forensic medical evidence is relevant to the issues at trial and in what cases such evidence is not relevant.
- 41 For an argument that a crime should be seen quintessentially as an act against the individual, see E A Fattah, 'From Crime Policy to Victim Policy: The Need for a Fundamental Policy Change' (1991) 29 *International Annals of Criminology* 43-60.
- 42 Historically, there was no distinction between a crime and a civil wrong; see Wright, note 3 above, at pp 1-8; J Greenberg, 'The Victim in Historical Perspective: Some Aspects of the English Experience' (1984) 40 *Journal of Social Issues* 77-102; and A Freiberg, 'The State as a Victim of Crime' (1988) 21 *ANZ Journal of Criminology* 20-30.
- 43 N Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1-15.
- 44 Fattah, note 41 above, at 44.

According to Fattah, the purpose of this change in thinking is to replace retribution/punishment with distributive/restorative justice which primarily serves the interests of the victim.

Although Fattah does not indicate how such an ideological shift could take place, it is clearly arguable as a matter of first principle that a crime is essentially an act against the individual victim and thus the victim should have legitimate choices which should be recognised by the State (analogous to choices possessed by civil litigants). This then is an argument as to the appropriate principle.

The second argument for increasing victims' choices is that the State-based criminal justice system fails to provide meaningful justice for a significant number of victims and this state of affairs is unfair.⁴⁵ The State does very little to restore the dominion of victims, or attempt to reintegrate the victim.⁴⁶ In fact, in many cases, the State actually exacerbates the victim's trauma, creating secondary wounds which can leave victims worse off than if they had not reported the crime.⁴⁷ This then is an argument based on empirical evidence.

A related consideration is that the existing criminal justice system does not appear to be particularly successful in preventing offenders from reoffending. Recidivist rates are disappointingly high,⁴⁸ and it is not only victims but also offenders who complain about their treatment by the criminal justice system. Therefore, any alternative responses to crime which not only addresses the interests of the victim, but also the offender, are more likely to benefit all parties. Offenders cannot be left out of *any* analysis of alternative choices for victims. This is an argument relating to the efficacy of the State system.

45 Wright, note 3 above, at pp 12-15.

46 See J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press, 1990) pp 91-92. Although for a critique of the Republican concept of justice, see A Von Hirsch and A Ashworth 'Not Not Just Deserts: A Response to Braithwaite and Pettit' (1992) 12 *Oxford Journal of Legal Studies* 83-98.

47 See Shapland et al, note 3 above.

48 Measuring recidivist rates is notoriously difficult because of methodological problems. However the Victorian Office of Corrections estimates that for persons who receive a custodial sentence, some 70% will re-offend: see Office of Corrections, *Annual Report 1991-92* p 71. Walker puts the figure as 2/3 for Britain: see Walker, note 2 above, at p 31.

Clearly, victims already possess and exercise choices. Many, indeed the majority, of rape and other sexual assault victims exercise their choice not to report the offence to the police (or anyone else).⁴⁹ Persuading commercial victims of crime to report their victimisation to the police is a serious problem for the State,⁵⁰ and many victims of criminal assault in the home exercise their 'choice' not to report their victimisation.⁵¹

It is suggested however that in these cases, although the victims are exercising choices, the choices are being exercised for the *wrong* reasons. Moreover, in the case of crimes against the person, it could be argued that victims do not actually perceive themselves as having choices; the reasons for not reporting and not assisting the State may simply be so overwhelming that any alternative course of action is not seen as an option.

Specifically, many rape victims refuse to report because of fear that they will not be believed by the police or the court,⁵² fear of the social stigma attaching to the status of 'rape victim',⁵³ fear of reprisal from the offender, and fear of trauma from cross-examination by defence counsel and other legal processes.⁵⁴

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- 49 In Australia, estimates of rape victims who do report vary: see Australian Bureau Of Statistics, *Crime Victims Survey* (1983) (28%); and Australian Institute of Criminology, *Crime Victim Survey* (1989) repeated in 1992 (32%).
- 50 See P Willie, 'Preparation of Commercial Crime Prosecutions' (1984) in M Read, *Preparation of Criminal Trials in Victoria* (Melbourne, Office of the Director of Public Prosecutions) p 117. Also see *Organisations as Victims* (1990), Special Edition of the Australasian Society of Victimology.
- 51 In Australia, estimates of reporting rates vary but for an excellent concise account see E Matka, 'Domestic Violence in NSW' (1991) *Crime and Justice Bulletin No 12*, NSW Bureau of Crime Statistics and Research.
- 52 See for example, Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure, Appendixes to Interim Report No 42* p 119.
- 53 Walklate, note 3 above, at p 161, and South Australia, *Report of the Committee of Inquiry on Victims of Crime* (1981) pp 43-45. The South Australia Report, *Strategies for Change: A Review of Services Provided to Adult Victims of Rape and Sexual Assault in South Australia* (M Carmody, December 1991), refers to estimates of between 10% and 25% of rape victims reporting to the police, p iii.
- 54 See Victorian Law Reform Commission, *Rape: Reform of Law and Procedure, Interim Report No 42* (1991). See also Walker, note 2 above, at p 20.

Victims of criminal assault in the home decline to report for a range of often connected reasons including fear of reprisal, and a belief that the offender will not re-offend as the parties enter the so called 'honeymoon' period in the cycle of violence.⁵⁵

However, in all the above examples, the victims' choices are negatively based: the choices are made for the wrong reasons. The decision by a victim not to report or assist the State should be based on the idea that the alternatives will do more to restore the victim, to empower the victim, to maximise the victim's dominion and hopefully also to reduce the prospects of the offender reoffending, specifically against the particular victim.

The problem is that exercising choices for these reasons and goals is not presently viable partly because the State has not provided the structures or institutional processes within which such choices could be made, and partly because of the hegemonic dominance of the traditional ideology that a crime is quintessentially an act against the State/ community, rather than against the individual victim. It is not surprising that the State has failed to develop and encourage alternatives for crime victims, for to do so would be to undermine the legitimacy and centrality of the State-based criminal justice system.

In summary, for the type of offences the subject of this article, most victims do not have meaningful choices in deciding whether criminal proceedings should be commenced or the outcome of those proceedings. The decision not to report is invariably made for negative reasons and if the offence is reported, from that point on, the case simply develops its own momentum with the victim sucked into the legal vortex. Regardless of how the victim perceives their situation, she or he is under significant pressure not to pull out and to proceed to the end.

Part Three: Changing Ideologies

For many victims of crime, particularly victims of serious personal violence, the traditional and current response of the State is unsatisfactory because it is *offender-* rather than *victim-*oriented. To improve the situation, one option is to tackle the various 'weak spots' in the system on an ad hoc basis. Whilst some reforms have been

55 Ferraro, note 38 above, and D Rowan, 'The Syndrome of Battered Women' in S Hatty (ed), *Proceedings of National Conference on Domestic Violence* (1985, Australian Institute of Criminology) Vol 1 p 25.

achieved in this regard,⁵⁶ the difficulty remains that the fundamental philosophy or ideology upon which the entire justice system is based remains unchanged. Until that pivotal ideology is changed, no significant reforms for victims will occur. For this reason, it is suggested that the State and the community should adopt a new restorative/reparative ideology to replace the traditional retributivist justice model. Once this ideological shift takes place, the notion of choice for victims will be consistent with the overall aims of the system.

It is however essential to stress that such a shift:

- Does not mean that offenders will cease to be punished for their wrongs or escape responsibility for their actions.
- Does not mean the scrapping of the existing criminal justice system. It is clearly ludicrous to suggest the total abandonment of current State systems of criminal justice. There will always remain a need for police forces, courts, and correctional resources. What is being suggested is a change in the role and power relations within that apparatus (police-victim, courts-victim, offender-victim, media-victim).
- Does not mean that victims will be actively cajoled and pressured not to report crimes to the police or assist the State. To the contrary, victims should be given choices and relevant information to enable those choices to be exercised in a meaningful way.
- Does not mean that offenders will be treated more harshly. One of the fundamental misunderstandings regarding the victim's movement is the idea that any improvements to the position of the victim automatically means a corresponding deterioration in the position of the accused.⁵⁷ This is patently incorrect. In fact, in many ways, a victim oriented response to crime could improve the position of *both* the victim and the offender.

The type of ideological shift proposed should however mean:

56 For example, in the expansion of support services such as Network, increases in crimes compensation payments and increasing police sensitivity to victim interests and needs through the development of protocols between the police and support services.

57 For discussion of these perceived dangers in the victims' movement, see E A Fattah, 'Prologue: On Some Visible and Hidden Dangers of Victim Movements' in Fattah (ed), *From Crime Policy to Victim Policy*, note 39 above, at pp 1-14.

- The interests, welfare, needs, and rights of the victim (psychological, emotional, social) ought to be regarded by the State as the paramount, overriding consideration. A crime should be regarded quintessentially as an act against the individual victim rather than an act against the State; and
- A more imaginative and creative responses to the victimisation experience.

Part Four: What Might a Victim-Oriented Criminal Justice System Look Like?

The response of the State, and the community, to the criminal event would be premised on attempting to restore (repair) the victim as much as possible to their emotional, psychological, and social position prior to their victimisation. A central part of this overall goal would be to ascertain *what the victim wishes to do, or what their opinion is*, in relation to a particular issue. In most cases, the initial and long term wish of the victim is to be protected from further violence. Addressing the victim's interests would be the paramount goal and policy of all criminal justice agencies and personnel. To use Braithwaite and Pettit's notion, the 'maximisation of the victim's dominion' would drive all policy.⁵⁸

(a) The initial decision whether to report

In principle, if the victim did not wish to report their victimisation, that should be their choice. However, for that choice to be meaningful it must be a fully informed and free choice so that it represents the genuine wishes and expectations of the victim. For such a choice to be made, the victim would have to have full knowledge of what to expect from the State criminal justice system and what the range of consequences could be for not reporting. It also means that appropriate structures, support, and processes be available for alternative ways to deal with their victimisation. In particular, if the offender was known to the victim, the power relationship between the parties would have to be addressed. Not surprisingly, very few, if any, victims of serious offences against the person are in a position to make such a free and informed choice for

58 Braithwaite and Pettit, note 46 above, at pp 91-92. In postmodern terms, the shift suggested is analogous to the idea of a reader 'interacting' with the text and not 'privileging' the author - ie the crime victim 'interacting' with legal processes and not privileging traditional legal doctrine regarding the 'appropriate' role of the victim.

the reasons outlined above.⁵⁹ One category of victims who experience a gross imbalance of power is survivors of criminal assault in the home. On the one hand, it could be argued that these victims should have no choice in whether the offender is prosecuted or not; a system of mandatory or compulsory prosecution may be required in order to overcome the range of psychological, emotional, social, and physical pressures against reporting which can be exerted upon the victim. These pressures can be exerted directly by the offender or, in more subtle ways by other members of the victim's family or indeed through prevailing cultural norms. However, one objection to mandatory prosecution in this context is that it denies the victim a choice and the very denial of that choice may perpetuate the victim's actual and experienced sense of powerlessness. One of the themes in this article is that the right of the victim to exercise choice is essential to the empowering process and for this reason, the author is against mandatory prosecutions.

(b) Post-reporting choices

If the victim has reported the offence (or the offence has otherwise come to the attention of the police), and the victim decides that she or he does not wish to proceed with the matter in terms of the criminal justice system, then the victim should not be under any obligation to participate further in the criminal proceedings. However, difficulties arise in the situation where the police or the DPP have other, independent, evidence upon which the accused can be prosecuted but the victim does not wish the criminal proceedings to proceed any further. In this scenario, there cannot be a universal, all-encompassing principle. The resolution of the issue will be determined by the facts of each case. If, for example, the case is a serial rape, serial killer, or serial armed robbery, then public considerations arguably outweigh the personal interests of one victim.

(c) Sentencing

Even if victim impact statements are available, it should be emphasised to victims that they have a choice in deciding whether to participate. State authorities ought not put the victim under any pressure to take part if he or she does not wish to.⁶⁰ Moreover, the

59 In Victoria, however, Centres Against Sexual Assault (CASA) routinely advise victims of sexual assault of their choices regarding whether or not to commence criminal proceedings.

60 On the basis of the limited research that has been carried out to date, it appears that about half of eligible victims are prepared to submit a victim impact statement, and less than 10 percent exercise their right to

sentencing process offers considerable potential to implement the restorative ideal referred to above. New sentencing options such as mediation need to be developed if the notion of empowering victims is to be taken seriously. Restitution payments by the offender to the victim should also take precedence over the payment of fines to the State.⁶¹

(d) Role of the offender

In many cases, the accused/offender could play an important role in this restorative process, particularly where the offender and victim had some form of relationship, or were at least known to each other, prior to the commission of the crime. Indeed, if there is an ongoing relationship between the victim and the offender, changing the nature of that relationship, particularly in terms of power balances, is of the highest priority.

Evidence for the significance of the offender's role can be found in the experience of mediation programs in the United States, Canada, Europe and to a lesser extent Australia.⁶² Whilst these mediation programs have typically focused upon property crimes and young offenders, it is possible that the dynamics and operative principles of those mediation programs could be applied to the more

personally address the court on sentencing: see E Eretz, 'The Effect of Victim Participation in Sentencing on Sentencing Outcome' (1990) 28 *Criminology* 451-474, and E Eretz, 'Victim Participation in Sentencing: Rhetoric and Reality' (1991) 18 *Journal of Criminal Justice* 19-31. It is suggested that the right of the victim to participate in sentencing is not as important as initially proposed.

61 See Parliament of Victoria, Law Reform Committee, *Restitution For Victims of Crime: Interim Report* (November 1993), and A Frieberg and S Glacken, 'Restitution For Victims Of Crime: The Convergence of Civil and Criminal Remedies' (1993) *Law Institute Journal* 794-797.

62 For general reviews of victim-offender mediation programmes, see T Fisher, 'Victim/Offender Mediation: A Survey of Overseas Practices and Research' (1993) 4 *Australian Dispute Resolution Journal* 125-138. For specific programmes, see M S Umbreit and R B Coates, *Victim Offender Mediation: An Analysis of Programs in Four States of the US* (Minnesota Citizens Council on Crime and Justice, 1992); A Morris and G M Maxwell, 'Juvenile Justice in New Zealand: A New Paradigm' (1993) 26 *ANZ Journal of Criminology* 72-90; P E Peachey, 'The Kitchener Experiment' in M Wright and B Galaway (eds), *Mediation and Criminal Justice: Victims Offenders and Community* (Sage, 1989) pp 221-235. For Queensland, see Alternative Dispute Resolution Division, Department of Justice and Attorney-General, *Report on the Crime Reparation Project, Beenleigh Magistrates Court* (1993).

serious offences.⁶³ If so, then victim-offender mediation offers the following potential advantages:

- By addressing the key emotional, psychological and social needs and interests of the victim, there is a greater chance of restoring or repairing the victim to their previous status. In particular, the victim could experience a greater sense of 'justice' than under traditional criminal justice processes. A critical aspect of mediation is the empowerment of the victim in contrast to the traditional 'distancing' and disempowering of victims.
- The offender is brought face to face with the victim and perhaps for the first time, appreciates in a meaningful way the consequences of their action. In theory this offers a greater prospect of non-offending than the current focus of punishment. This not only benefits future potential victims but also encourages discourse and thinking about long-term aspects of the victimisation and criminalisation event.

Mediation requires of course that no power imbalance exists between the victim and the offender. Indeed, one of the purposes of mediation is to restore, or perhaps more accurately, to create, power for the victim. This problem of power imbalance is perhaps the greatest obstacle to implementation of mediation. However, a more significant objection to the use of mediation in this context is that it deflects attention away from the fundamental, underlying structures of the violence, specifically in the most common scenario of a male offender and female victim.⁶⁴ Mediation is therefore not suggested as an alternative to the formal criminal justice system but, at best, a sub-system in appropriate cases and strictly managed to protect not only the interests of the victim, but also of the offender.

Part Five: Some Obstacles to Reform

Changing ideologies is not something that can be achieved through legislative reform. An ideology is a set of values, attitudes and

63 Some German victim-offender mediation programs handle violent crime, see T Marshall and S Merry, *Crime and Accountability: Victim/Offender Mediation in Practice* (HMSO, 1990) p 103.

64 See D R Stallone, 'Decriminalisation of Violence in the Home: Mediation in Wife Battering Cases' (1984) 2 *Law and Inequality* 493. In Stallone's study, 36 percent of victims who participated in mediation had increased fear for their safety and 41 percent had increased fear of retaliation from the offender.

beliefs⁶⁵ regarding, in this case, the appropriate response to victims and offenders.⁶⁶ Ideological shifts require cultural shifts. To some extent, political processes have to be involved in changing ideologies but ultimately, individuals have to be persuaded that one particular set of goals and principles is in fact more attractive and appropriate than another set. In other words, 'ways of thinking' have to be altered.

A number of serious obstacles to the type of reforms described in this article can be identified:

- A victim-centred justice system does not 'fit' comfortably with the organisational practices and ideologies of the key criminal justice agencies.⁶⁷ Police investigators for example, see their primary function as identifying the offender and gathering sufficient evidence to secure the conviction of the guilty. There has also been a tendency for police to see themselves essentially as 'crime fighters' rather than victim-welfare service providers.⁶⁸ The Office of the DPP is perceived as representing the interests of the community in general, not the individual victim, and for a range of reasons, has minimal contact with victim pre-trial and post-trial.⁶⁹

65 For a discussion of ideologies in criminal justice policy formulation see W B Miller, 'Ideology and Justice Policy: Some Current Issues' (1973) 64 *The Journal of Criminal Law and Criminology* 141-162.

66 See A Phipps, 'Ideologies, political parties and victims of crime' in M Maguire (ed), *Victims of Crime: A New Deal*, note 3 above, at p 177.

67 Shapland refers to criminal justice agencies as 'fiefs', see J Shapland, 'Fiefs and peasants: accomplishing change for victims in the criminal justice system' in M Maguire (ed), *Victims of Crime: A New Deal*, note 3 above, at p 187.

68 See H Eijkman, 'Police, Victims and Democracy: Rewriting the Priorities' in P Moir and H Eijkman (eds), *Policing Australia: Old Issues, New Perspectives* (Macmillan, 1992) 266-298; and H Eijkman, 'Police as Victims: Implications for Police Welfare Services and Education' (1990) 1 *Journal of the Australian Society of Victimology* 1-15.

69 For the role of the victim in prosecution decision-making, see P Sallmann, 'The Role of the Victim in Plea Negotiations' in *National Symposium on Victimology* (1982) AIC 17; P Clarke, 'Is There a Place for the Victim in the Prosecution Process?' (1986) 8 *Canadian Criminology* 1-13; B Martin, 'Reconciling the Interests of the Victim with the Rights of the Accused' in *National Symposium on Victimology* (1982) AIC 11-16. For discussion on contact between the victim and the DPP, see Victorian Law Reform Commission *Interim Report*, note 54 above, at p 35.

If the underlying premise of the entire system was altered, major administrative changes would be required. It can therefore be expected that key criminal justice agencies, and other interest groups, would not accept the ideological shift proposed in this article, not simply because of the consequent administrative changes but also because the principle of a victim-centred system is inconsistent with traditional state ideology.

- It can also be expected that a range of community-based groups would be against the idea of a victim-centred system for the sort of reasons outlined in Part One above. The views of groups such as VOCAL, NETWORK, and VACRO need to be further researched, particularly in view of their potential political influence.
- Governments are unlikely to introduce major victim-oriented reforms if (a) the financial repercussions cannot be justified and (b) the reforms have the potential to create political damage.
- A range of technical, legal difficulties arise. For example, it is not clear exactly where victim-offender mediation would fit within the current criminal procedures and in particular, it is difficult to 'graft' mediation onto existing sentencing options.⁷⁰

Conclusion

One of the major, though hidden problems experienced by victims of personal violence is simply that the criminal justice system as a whole is not designed to address the victim's interests or rights as the primary goal. Instead, the primary objectives of the State's response to crime and victimisation is the identification, adjudication, and sentencing of the guilty.

Victims are simply utilised and expended by the State to achieve this goal. Considerable intangible pressures are exerted upon victims to assist the State, yet, when victims do assist, there is little reciprocal assistance provided to the victim by the State criminal justice system. This experience has resulted in some victims who

⁷⁰ In Victoria, an offender/victim mediation order could not form part of a sentence of imprisonment, suspended term of imprisonment, or community-based order. Mediation could possibly be accommodated in sentences pursuant to Division 5 of the *Sentencing Act 1991* (Vic). For fuller discussion, see Victorian Parliament, *Restitution Report*, note 61 above, at pp 155-159.

have assisted the State confirming that they would exercise their choice differently if they were revictimised.⁷¹

A fundamental shift in ideologies is required away from retributivist practices to victim-oriented practices. Part of that shift will be the creation of new, more imaginative and positive choices for victims. These might include the use of victim-offender mediation programs in appropriate cases of serious offences against the person. Choices for victims require the State to provide all relevant information at all relevant stages of the victimisation process.

Unless radical ideological shifts take place to drive more constructive approaches, victims of crime, like their offenders, will remain marginalised and powerless. The challenge now is to develop strategies to facilitate the required ideological shifts.

71 For a description of the type of difficulties faced by victims in court, see South Australia, *Report of the Committee of Inquiry on Victims of Crime* (1981) p 34.