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A NEW MODEL OF THE CRIMINAL JUSTICE PROCESS: VICTIMS' RIGHTS AS ADVANCING PENAL PARSIMONY AND MODERATION

ABSTRACT. In common law jurisdictions theoretical models of the criminal process were developed to enable a greater understanding of the values and forces behind this process. This article discusses victim engagement in the process with a particular look at their contribution to punitiveness during the prosecution and court proceedings. It argues that although existing models remain useful, a complementary model should be added that accounts for recent victim-initiatives, as well as empirical knowledge in the area of victim participation. This model posits that victim participation does not necessarily advance punitiveness and when advancing non-punitive aims, it does not necessarily operate within a restorative justice framework. The proposed model conceives victim participation as contributing to penal parsimony and moderation in criminal proceedings.

I INTRODUCTION

Over the years, legal scholars in common law jurisdictions have developed theoretical models of the criminal process that enable a greater understanding of its values and underpinning forces. The development of models is a helpful theoretical endeavour since several versions of reality on the ground, existing side by side, can legitimately explain in different ways various elements of a system's operation.[1] One of the longestlasting models was created by legal

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[1] Richard Ericson, *The State and Criminal Justice Reform*, in STATE CONTROL: CRIMINAL JUSTICE POLITICS IN CANADA 21-37 (Robert S. Ratner & John L. McMullan eds., 1987).

scholar Herbert Packer, and remains useful today.[2] Packer created a model that conceives criminal justice as crime control or due process. Kent Roach's work contributed substantially to this model, creating a complementary model rooted in practice, empirical research, and normative appeal to account for more recent developments around victim participation in the criminal process.[3] At the time of Roach's analysis, victim-related initiatives within this process were starting to emerge and included several active forms of participation.[4] Roach developed two new models of criminal justice taking these developments into account, namely a punitive and non-punitive model of victims' rights. The former refers to victim participation[5] as advancing the retributive and expressive importance of punishment while the non-punitive model stresses the importance of crime prevention and restorative justice.

This article discusses the different ways victims have been conceived and engage in the criminal justice process, with a particular look at their relationships with state agencies and defendants. It argues that although Roach's models continue to capture developments in victim participation, a new complementary model should be added to encompass more recent victim-related initiatives, normative reflections, as well as empirical knowledge in the area of victim participation and its relationship to punitiveness. This additional model builds on Packer's and Roach's by suggesting that victim participation within criminal justice does not necessarily advance punitiveness and, when advancing non-punitive aims, does not necessarily operate within a restorative justice framework. The proposed model conceives victim

[2] Herbert Packer, *Two Models of the Criminal Process* 113 U. PENN. L.R. 1 (1964).

[3] Kent Roach, *Four Models of the Criminal Process* 89(2) J. CRIMINAL L. & CRIMINOLOGY 671 (1999).

[4] As highlighted by I. Edwards, *An Ambiguous Participant: the Crime Victim and Criminal Justice Decision-Making* 44 BRITISH J. CRIMINOLOGY 967 (2004), victim initiatives can be divided into passive as well as active forms of participation. Passive forms include the right to receive information and mechanisms that enable victim inclusion as a passive receptor of services. More active forms of participation include victim consultation, providing information, and more recently victims taking on the role of agents of accountability see Marie Manikis, *Expanding Participation: Victims as Agents of Accountability in the Criminal Justice Process* 1 PUBLIC LAW 63 (2017).

[5] Roach discusses victim participation as understood by D.E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model* UTAH LAW REV 289 (1999). In this piece, Beloof complements Packer's models by suggesting a model of victim participation that is rooted in values of due process, respect and dignity for the victim. He relies on American examples to illustrate this model.

participation as contributing to non-punitiveness as well as penal parsimony and moderation in criminal proceedings.

The following article is divided into four parts. First, it begins by outlining Packer's model of criminal justice and its expansion by Roach and Beloof to account for the reality of victim participation in common law criminal justice systems. Second, it examines mechanisms of victim participation at the various stages of the process, including at the prosecutorial stage and during court proceedings. Based on cases and empirical studies across common law jurisdictions, it argues that within these different mechanisms victim participation can and has served punitiveness, but can and has also advanced non-punitive goals, penal parsimony and moderation. Third, this article explores victims' and defendants' interests through empirical studies and mechanisms of participation and suggests that they can have similar interests in advancing non-punitive and parsimonious goals. Finally, based on these policies, empirical studies and normative developments, this article expands on Packer and Roach's work by proposing a complementary model of the criminal process that challenges the idea that victims are necessarily agents of punitiveness or that they need to operate within restorative justice frameworks to advance non-punitive aims. This new model understands the contribution of victim participation as advancing non-punitive and parsimonious values within criminal proceedings.

1.1 *Existing Models of Criminal Justice*

Two of the most notable theoretical models of common law criminal justice processes are Herbert Packer's 1968 models of crime control and due process. The crime control model, described as a 'high speed assembly line conveyor belt' operated by trusted police and prosecutors, emphasizes the utility of criminal sanctions, speedy processes, guilty pleas as a finality, as well as broad and unfettered law enforcement powers. It looks to the legislature, as opposed to the courts, as its validating authority and relies on the centrality of the criminal sanction as a guarantor of social freedom and public order. In this model, the trial is not as central as the earlier administrative fact-finding stages. State abuses should be taken seriously but through processes outside criminal proceedings. By contrast, the due process model refers to an 'obstacle course' that starts with some scepticism about the utility of the criminal sanction and places great value on the presumption of innocence, the protection of individual rights, and accountability processes to prevent wrongful convictions and state abuses. This

scepticism rests on the liberal values of the primacy of the individual and the centre of interest lies on the criminal trial.

Although Packer's models remain useful in legal analysis, they have attracted several criticisms. Indeed, his due process model was argued to be empirically irrelevant in many cases[6] and critical theorists have argued that instead of restraining state powers, due process is an illusion that enables and legitimates crime control.[7] One of the most fundamental challenges to Packer's dualistic account of the criminal process comes from restorative justice. Proponents of the latter take issue with Packer's assumption that there is a perpetual conflict between due process and crime control.[8] They seek a complete and comprehensive transformation of the existing criminal process that moves away from professional participants that value retribution, guilt, blame and punishment.[9] Restorative justice seeks to restore relationships damaged by crime by including victims, offenders and communities in the process and emphasizing the values of mutual understanding, accountability, forgiveness and compassion.

Three decades later, in his seminal work on victims' rights, Kent Roach contributed to this discussion by expanding Packer's models of criminal justice. Roach added two new models, namely a punitive model and non-punitive model of victims' rights, that accounted for the development of victims' rights in most common law jurisdic-

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[6] See eg Malcolm Feeley, *Two Models of the Criminal Process: An Organizational Perspective* 7 L. & SOC'Y REV. 407, p. 415 (1973). Feeley has argued that any analysis of organizational behavior must be open to identify the multiple and diverse goals, values and incentives of the various systems and that organizational interests often defy the contrasting ideologies of crime control and due process. He also notes that due process is irrelevant in minor cases because rights are expensive and defendants generally accept guilty pleas without a trial. Due process rights are hollow symbols of fairness.

[7] RICHARD ERICSON, the constitution of legal inequality (1983); Michael Mandel, *Fundamental Justice, Repression and Social Power*, in THE CHARTER'S IMPACT ON THE CRIMINAL JUSTICE SYSTEM (Jamie Cameron ed., 1996).

[8] STEVEN PENNEY, VINCENZO RONDINELLI & JAMES STRIBOPOULOS, Criminal Procedure in Canada 27 (2013).

[9] JOHN BRAITHWAITE, Restorative Justice and Responsive Regulation (2002); DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, Restoring Justice: An Introduction to Restorative Justice (3rd ed. 2006); LAW COMMISSION OF CANADA, Transforming Relationships through Participatory Justice (2003).

tions.[10] Indeed, in those jurisdictions, although victims are not formal parties in proceedings, they have been provided with rights in the criminal justice process that include rights to being informed about a case, consult with prosecutors on decisions, and provide a victim impact statement at sentencing.

Roach describes his first model as the punitive model of victims' rights. He describes this model as a 'roller coaster' that is in many ways similar to Packer's crime control model and relies on the importance of criminal sanction and punishment. For Roach, the punitive model stresses the innocence of victims, their re-victimization by the adversarial model, and the guilt of offenders. It also defends the criminal sanction as a form of protection against harm, which also needs protecting from due process challenges by the accused. In this respect, it pits victims' rights against those of the accused. As formulated by Roach, 'victims' rights have become the new rights-bearing face of crime control'[11] since concern about victims is framed as a form of due process and procedural justice for victims, which serves as a legitimating language for crime control.[12] Accordingly, this serves to enact criminal laws, make arrests, declare convictions, and imprison a minority of people who break these laws while opposing due process claims. Similar to the crime-control model, punitive forms of victims' rights focus on factual as opposed to legal guilt, which undermines the presumption of innocence. This model suggests that victim participation advances punitive mindsets without placing blame on the victim. It also rejects restorative justice on the basis that it forces victims to face offenders and values the offender's rehabilitation.

Roach's non-punitive model of victims' rights is inspired by restorative justice and represented as a 'circle of healing'. It values a transformation of the existing criminal justice system into one that relies on preventing crime through community-building and restorative justice, instead of sanction and countering due process claims. Indeed, it aims to restore relationships damaged by crimes and brings constituencies together to make them whole. According to Roach, some

[10] Roach, *supra* note 3.

[11] Roach, *supra* note 3, at p. 706.

[12] Although not explicity mentioned in Roach's piece, his punitive model is primarily based on developments that gave rise to Beloof's model of victim participation. Beloof describes his model as rooted in a due process rationale in order to increase values of respect towards victims, while minimizing secondary victimization by enabling victims to bring forward their independent interests from those of the state and the accused. See D.E. Beloof , *supra 3*.

manifestations of the circle include gated communities with private police forces and neighbourhood watches or self-policing of families and communities. This model recognizes that victims are not inherently punitive and their practical interests are not always in punishment. Some victims do not report crimes not only because of the inadequacy of the system, but also because they may judge the matter to be too minor and have found a better way to deal with their victimization through strategies such as avoidance, shaming, apologies, and informal restitution. Hence, in this model, non-reporting is not seen as a problem, but rather as a sign of scepticism about the utility of the criminal sanction. Although the non-punitive approach is not deferential to traditional crime control strategies and agents, it nevertheless de-centers their importance and recognizes that responsibility is not only individual but also systemic. Within this model, victims have the power to decide whether to accept apologies and plans for reparation instead of only making representations to criminal justice agencies who retain the ultimate power to impose punishment. This process marginalizes due process, since the offender recognizes factual responsibility and therefore there is no need to prove legal guilt beyond a reasonable doubt. Contrary to the due process model, this restorative justice model does not encourage the offender to deny responsibility for the crime and, as opposed to the crime control model, it focuses on duties to repair harm.

Since Roach's new models of criminal justice and Beloof's discussion of the victim participation model as a form of due process, several changes have occurred in the area of victims' rights in common law jurisdictions. New policies that include service and procedural rights were developed that recognize victim participation at various stages of the process.[13] Empirical studies have examined the effects of some of these policies on the system's punitiveness, as well as victims' expectations and perceptions *vis à vis* these policies. Finally, new reflections on the role of victims as participants in the criminal justice process have been added to the literature. In light of these developments, it is worth examining whether Roach's models that classify victims as either punitive or non-punitive are still applicable today. Are victims necessarily agents of greater punitive-

[13] Common law jurisdictions introduced victim impact statement (VIS) schemes during the criminal process, as well as duties by prosecutors to enable victim consultation with them during decisions. England and Wales introduced additional measures for victims to seek review of prosecutorial decisions and the federal *Crime Victims' Rights Act* in the United States has provided standing for victims of crime to enforce their rights in criminal proceedings.

ness when they operate within the criminal process? Conversely, do they necessarily need to be part of a restorative process in order to advance non-punitive aims?

The following section addresses these questions and argues that victims can indeed advance punitiveness and thus adhere to Roach's punitive 'roller coaster' model.[14] However, this piece offers a novel contribution to the literature by expanding victim participation beyond the punitive approach and suggesting that the victim can also contribute to penal parsimony, moderation and non-punitive aims without necessarily espousing Roach's restorative justice model. In this respect, this piece relies on examples found in recent policies and empirical studies across common law jurisdictions to propose a complementary model which operates within the criminal process and conceives victims as advancing non-punitiveness, penal parsimony, and moderation within criminal proceedings.

Penal moderation and parsimony are inherent to this proposed model and refer to criminological perspectives developed in the last decade that imagine a criminal process that does less by adopting minimalist and merciful approaches to state sanctions.[15] Penal parsimony has a long history in discussions relating to punishment, sentencing and imprisonment and continues to be the focus by criminologists.[16] In his work on penal moderation, Loader proposes that this concept is rooted in a public philosophy that includes notions of restraint, parsimony, and dignity. Restraint can be understood in two ways that advance the 'minimum necessary'.[17] One relates to the punishment itself and the other advances an attitude of care and caution regarding who is affected, why and in what ways.[18] Parsimony responds to the sociological truism that penal responses to crime can in some situations be ineffective.[19] Although victim participation within this model would advance this premise, it can also

[14] Roach, *supra* note 3.

[15] Mary Bosworth, *Reinventing Penal Parsimony* 14:3 THEORETICAL CRIMINOLOGY 252 (2010).

[16] Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"* 1:2 CRIMINAL LAW FORUM 259 (1990); NORVAL MORRIS, The Future of Imprisonment 59 (1974); Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy* 105 COLUM L.R. 1233 (2005).

[17] Ian Loader, *For Penal Moderation: Notes Towards a Public Philosophy of Punishment* 14:3 THEORETICAL CRIMINOLOGY 349, p. 354 (2010).

[18] *Id.* at p. 353.

[19] *Id.* at p. 355.

advance penal moderation as defined by Loader, namely as a public philosophy focused on the limits rather than purposes of punishment. Finally, dignity is also embedded in this proposed model by highlighting that victims can advance the idea that offenders remain humans and citizens and support the inclusion of harm reduction measures into criminal justice.[20]

II VICTIM PARTICIPATION IN THE CRIMINAL JUSTICE PROCESS: ADVANCING PUNITIVENESS, MODERATION AND PARSIMONY

The literature on victim participation in criminal justice has often framed the interests of victims in opposition to those of the accused. Indeed, the rhetoric of 'balancing rights' or 'balancing interests' of the accused with those of victims reinforces a zero-sum game perception of criminal processes where victims advance punitive aims.[21] Similarly, Roach's punitive model has discussed this dichotomy by suggesting that within models that introduce victim participation, there is a reinforcement of victims as agents of punitiveness.[22] According to Roach, a model that recognizes victims and defendants as having similar interests operates outside of criminal proceedings and within a restorative justice model.

Although Roach's punitive model remains relevant to our understanding of the criminal process, this section provides a more nuanced portrait of the contribution of victims within the criminal process. It suggests that victims can and have also advanced non-punitive and parsimonious interests, which can be shared with defendants' interests within criminal justice proceedings, without adopting a restorative justice model. This argument primarily rests on empirical studies that examine the rationales for victim engagement in the process, as well as research findings that suggest that victims and defendants can share similar non-punitive, moderate and parsimonious interests. This analysis focuses on victim participation in both prosecutorial decisions and court proceedings.

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[20] *Id.*

[21] Andrew Ashworth, *Some Doubts About Restorative Justice* 4 CRIM. L. FORUM 277 (1993); DAVID GARLAND, The Culture of Control (2001); JD Jackson, *Putting Victims at the Heart of Criminal Justice: the Gap between Rhetoric and Reality*, in RECONCILING RIGHTS IN CRIMINAL JUSTICE: ANALYSING THE TENSION BETWEEN VICTIMS AND DEFENDANTS (E Capes ed., 2004).

[22] Roach, *supra* note 3.

2.1 *Victim Participation in Prosecutorial Decisions*

Across common law criminal justice systems, victims have been provided with various mechanisms to engage with prosecutorial decisions. Most policies recognize that victims have a right to be consulted by prosecutors during determinative stages of prosecutorial decision-making.[23] This form of contribution does not necessarily advance punitiveness. Indeed, studies have shown that victims do not necessarily seek punitiveness and often favour the withdrawal of prosecutions or ask for forms of mitigation. Individual cases have also illustrated this reality. In the Canadian case of *Charbonneau*,[24] a complainant of alleged domestic violence claimed before the trial judge that the incident was a unique episode and that, in this context, it would be best not to prosecute the defendant since a prosecution would affect the accused's progress in anger management therapy and hence be against public interest. It is worth noting the complexity that can arise from domestic violence cases since victims' rationales for seeking the withdrawal of prosecutions or asking mitigation can be influenced by numerous motives, including fear, children's interests, and emotional dependency.[25]

Many American jurisdictions have gone further and developed mechanisms that enable victim standing in criminal proceedings in situations where prosecutors have failed to enable victim participation. Examples include cases where prosecutors entered into plea agreements[26] or non-prosecution agreements with defendants with-

[23] Examples include, in England and Wales, the prosecutorial duty to take into account victims' views on whether a prosecution is required in the public interest (Code for Crown Prosecutors (CPS Directorate 2010) s. 4.18, decisions on whether to accept guilty pleas (s. 10.3), and requests for compensation and ancillary orders (s. 15)). In the United States the Federal *Crime Victims' Rights Act* 18 U.S.C. s. 3771 (a)(5) provides that victims have a reasonable right to confer with the attorney for the Government in the case. Similarly, in Canada, victims have the right to convey their views about decisions to appropriate authorities, which include prosecutors and have those views considered. See *Canadian Victims Bill of Rights*, 2015, s. 14.

[24] *R. v. Charbonneau*, (1990) 500-35-000381-908 (Superior Court of Quebec).

[25] In the case of *Guerrero Silva,* 2015 QCCA a victim of domestic violence wished that her abusive spouse be treated with parsimony and not be separated from their child. The Quebec Court of Appeal interpreted this as a form of forgiveness, but nevertheless highlighted that special care was needed in domestic violence cases to ensure that forgiveness is expressed without undue pressure.

[26] *In re Dean,* 527 F 3d 391 (2008).

out consulting with victims[27] or without requesting restitution for them in those agreements.[28] Courts have also recognized victims' separate interests by highlighting that they cannot accept guilty pleas until the prosecution has consulted them and informed the court about their views.[29] Victims have been heard and offered robust redress for a prosecutor's failure to do so.[30] These forms of participation do not necessarily advance punitiveness. They are not meant to directly influence substantive decision-making, but rather enable victims to take part in the process itself, and are therefore considered procedural forms of participation.[31] Hence, in this respect, mechanisms that enable victim consultation with prosecutors, do not necessarily advance punitiveness and thus can go beyond Roach's punitive model.

England and Wales similarly permit victim consultation in prosecutorial decision-making, but also offer victims different mechanisms of involvement than the American mechanism of standing. Indeed, victims have been offered more substantive forms of participation that enable them to review prosecutorial decisions in the context of criminal proceedings.[32] The review mechanisms available in England and Wales are two-fold and include judicial review of prosecutorial decisions in courts, as well as internal administrative review of decisions not to prosecute within internal prosecutorial processes.

The judicial review process available for victims in England and Wales enables victims to seek judicial review of decisions to prosecute as well as decisions not to prosecute. This process enables victims – as well as other interested parties – to seek review of prosecutorial decisions in contexts where the law or policies have not been properly interpreted or applied, when evidence has not been carefully considered, and in situations where it can be demonstrated that the decision was reached as a result of fraud, corruption, or bad faith.

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[27] *Doe v. United States,* F. Supp. 2d, No. 08-80736-CIV-MARRA, 2013 WL 3089046 (S.D. Fla. June 19, 2013).

[28] *Lindsey v. State*, A.3d, No. 495, 2014 WL 4236370 (Md. Ct. Spec. App. Aug. 27, 2014); and subsequently *Griffin v. Lindsey*, A.2d, No. 88, 2015 WL 4627383 (Md. Aug. 4, 2015).

[29] *United States v. Stevens*, F. Supp. 3d, No. 3:17-CR-00008 (JAM), 2017 WL 888302 (D. Conn. Mar. 6, 2017).

[30] *United States v. Heaton,* 458 F. Supp. 2d 1271 (2006).

[31] Beloof, *supra* note 5; Manikis, *supra* note 4.

[32] Manikis, *Id.*

This suggests that the victim as a public participant has an important role to play in ensuring state accountability in the event of problematic decisions. The fact that it covers both decisions to prosecute and decisions not to prosecute suggests that it is not an inherently punitive process. However, despite its non-punitive potential, some limitations in achieving those aims exist. The standard of review usually retained by courts is reasonableness, which is harder to attain for the claimant than a standard of correctness, although the lower standard of correctness has occasionally been applied. Further, the final decision to review rests on prosecutors and not the court. Finally, although this process enables victims to potentially challenge problematic decisions, accessibility remains an important limitation as many victims do not have the resources or time to undertake these processes.[33] Despite these limitations, this mechanism offers the space for victims to challenge decisions to prosecute and therefore expands Roach's models beyond victim involvement that advances punitiveness and restorative practices. Indeed, although victims can have interests that advance punitiveness, their interests can also advance non-punitive aims and moderation within the criminal process – without necessarily resorting to restorative justice practices.

The internal administrative review mechanism in England and Wales, also referred to as the Victims' Right to Review Scheme ("VRRS"), was created in 2013 by the Crown Prosecution Service ("CPS") as a response to the decision in *Killick*.[34] In that case, the Court of Appeal of England and Wales recommended that the European Union Directive on victims[35] be followed by recognizing an accessible way for victims to seek review of decisions not to prosecute. Indeed, the Court recognized that judicial review is not an accessible mechanism and thus it would be important to enable victims to seek review using a more accessible review process. This mechanism's scope is more limited by only enabling victims to seek review of decisions not to prosecute, contrary to the judicial review process mentioned above which also permits requests to review decisions to prosecute. This suggests that contrary to victim participation within the judicial review process, the administrative review

[33] See the court's comments in *R. v. Killick* [2011] EWCA Crim 1608; [2012] 1 Cr. App. R. 10.

[34] *Id.*

[35] Directive 2012/29/EU of the European Parliament and of the Council of the 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

mechanism would advance punitiveness since only prosecutorial decisions not to prosecute can be reviewed and its standard of review, correctness, is easier to achieve.

The *Janner* case is an example of the punitiveness that can be achieved by victim participation in this process.[36] In this case, the CPS decided not to prosecute Lord Janner over sexual offence allegations based on his incapacity to stand trial, supported by medical evidence of severe dementia and prosecutorial expertise suggesting that charges would not be in the public interest. Despite proven to be unpopular, the Director of Public Prosecutions maintained her decision, and released a detailed statement explaining the motives behind it. Following the statement, the victim requested an independent review under the VRRS which was exceptionally examined by an external counsel. This external reviewer recommended review by the CPS, which prompted the CPS to review its decision and reach a different conclusion. Hence in light of the victim's contribution on the public interest, it was re-decided that it was in the public interest to bring proceedings against *Janner*. This mechanism's overall contribution towards punitiveness by victims is less clear, considering that only 697 out of a total of 6,657 requests to review were upheld by the CPS.[37]

The ways that laws and policies are drafted, shaped and implemented can limit the nuanced ways that victims can advance non-punitive goals and penal moderation and parsimony. The VRRS offers an example, since it is only available for decisions not to prosecute without the possibility for victims to challenge decisions to prosecute. This limitation imposes considerable restrictions for victims that share non-punitive interests and favour alternatives, accountability, or second chances to prosecutions even if they do not necessarily favour restorative justice. As will be discussed below, this limitation can be modified with simple legislative changes that would enable victims to contribute to moderation and parsimony within the criminal justice process.

This section examined several mechanisms that enable victim participation in the context of prosecutorial decisions. Although victims can have interests that advance punitiveness, their interests can also advance non-punitive aims without necessarily resorting to

[36] See J Ware, *Lord Janner Sex Abuse Claims: CPS Grants Review on Decision not to Charge Dementia SuffererPeer*, THE INDEPENDENT (May 16, 2015), http://www.independent.co.uk/news/uk/crime/cps-grants-review-of-lord-janner-sex-abuse-case-decision-10254852.html.

[37] See *Victims' Right to Review Data*, THE CROWN PROSECUTION SERVICE (Nov. 16, 2017), https://www.cps.gov.uk/publication/victims-right-review-data.

restorative justice. Some of the mechanisms discussed create space for punitive, parsimonious and non-punitive aims. Others have not provided this space, mainly because of their limited scope. This suggests that Roach's models can be expanded to account for mechanisms that enable victim contribution to non-punitive, parsimonious and moderate aims within the criminal process.

2.2 *Victim Participation in Court Proceedings*

Across common law jurisdictions, victims have also been provided with mechanisms that enable participation during various stages of the process, including pre-trial and sentencing proceedings. The following examples suggest that the involvement of victims in these proceedings do not necessarily advance punitiveness and therefore expand Roach's models.

Victims have participated in decisions about the content and modification powers of no-contact orders issued by courts. In such settings, victims as protected persons in no-contact orders have been provided with possibilities to request relief – either to terminate or modify these orders.[38] These victim interests do not necessarily advance punitive goals. For instance, in the context of non-contact orders, prosecutors may have an interest in preserving the punitive dimension of these orders, while this may not be shared by victims as their interests may evolve over time.

As highlighted above, in the United States, victim policies have recognized separate standing for victims in criminal proceedings. In several American policies, standing is envisaged as the ability for victims to defend their interests and contest a denial of their rights in an appellate court. In this respect, it is often the case that victims of crime have their own separate legal representation with independent standing to assert and seek enforcement of their rights in court, without relying on the prosecutor to convey the victim's position or arguments.[39]

For instance, in sentencing decisions, victims may challenge the amounts provided in restitution. This occurred in *United States v. Monzel*,[40] where the victim challenged the amount offered by the Court in a petition for mandamus through her attorney. In other cases, the victim's exclusion from the sentencing proceedings resulted in a situa-

[38] See *Ostergren v. Iowa Dist. Ct. for Muscatine Cnty.*, 863 N W 2d 294 (2015).

[39] See *State ex rel. Montgomery v. Padilla*, No. CR2013-248563-001 DT, 2015 WL 5311205 (Ariz. Ct. App. Sept. 10, 2015).

[40] 641 F.3d 528 (2011).

tion where victims were not provided with restitution while they had an interest in this and subsequently asked for this form of redress.[41] Finally, victims also challenged situations where prosecutors failed to allow them to present impact statements at sentencing.[42] Victim participation to obtain and challenge amounts of restitution usually advances Roach's punitive model since these amounts are generally more onerous for defendants. Conversely, challenges to obtain the right to be heard and submit an impact statement are not inherently punitive, since victims are merely asking to be heard.[43] Further, even when submitting these statements, victims do not necessarily advance punitiveness and, as will be seen below, can advance other aims, including non-punitiveness, moderation, and parsimony.

Empirical studies that examine victims' rationales for their involvement in the criminal process have shown that victims are not inherently punitive or vengeful, and do not necessarily seek harsh responses against defendants. In the sentencing context, victim responses across common law jurisdictions reveal consistent trends about not wanting to influence the outcome or contribute to punitive sentences, but rather be heard and communicate with the authorities[44] and the offender about the effect that the crime has had on them.[45] In parallel, research that examined aggregate quantitative data across common law jurisdictions has shown that sentencing severity did not increase since the recognition of victims as participants in these processes.[46]

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[41] See *Barber v. Superior Court of California* 134 S Ct 265 (2013)*; United States of America v. Skipwith* 482 F 2d 1272 (1973).

[42] See *Kenna v. U.S. Dist. Court for Cent. Dis. Of Cal.*, 435 F 3d 1011, p. 1016 (2006).

[43] JULIAN ROBERTS AND MARIE MANIKIS., Victim Personal Statements: A Review of Empirical Research (2011); Marie Manikis, *Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims* 65(2) 65(2) UTLJ 85 (2015)

[44] FIONA LEVERICK ET AL., An Evaluation of the Pilot Victim Statement Schemes in Scotland (2007); CAROLYN HOYLE ET AL., Evaluation of the 'One Stop Shop' and victim statement pilot projects (1998); Edna Erez et al., *Victim Harm, Impact Statements and Victim Satisfaction with Justice: An Australian Experience* 5:1 INTL R. CRIMINOLOGY 37 (1997).

[45] ROBERTS AND MANIKIS, supra note 43

[46] See ROBERTS AND MANIKIS, *supra* note 43; Edna Erez & L. Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience* 23 J. CRIM. JUSTICE 363 (1995); Cheryl Marie Webster & Andrew N Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, in CRIME AND JUSTICE (Michael Tonry ed., 2007); LEVERICK, *supra* note 44; MINISTRY OF JUSTICE, THE STORY OF THE PRISON POPULATION: 1995-2009 (2009); and VICTORIA VICTIMS' SUPPORT AGENCY, A VICTIM'S VOICE: VICTIM IMPACT STATEMENTS IN VICTORIA (2009).

That being said, when looking at case studies on an individual and qualitative basis, it can be seen that victim impact statements (''VIS'') can and have served both punitive and parsimonious goals depending on the regime's scope and limitations.[47] Across common law jurisdictions, several examples can be provided where VIS have been used as aggravating or mitigating factors.[48]

For instance, in Canada, some courts have recognized and considered the information contained in VIS as an aggravating factor at sentencing, which arguably advances punitiveness,[49] albeit on an individual rather than systemic level. Canadian appellate courts have also found that VIS can be used for therapeutic purposes and in some situations a request for leniency is considered a mitigating factor in sentencing. In *Carr*,[50] a case of driving under the influence causing death, VIS were submitted by the deceased victim's family that requested leniency for the accused who knew the victims. Similarly, in *F(R)*,[51] victims requested leniency for their father and expressed a desire for their family to be reunited as soon as possible. This element in combination with other factors were considered by the Judge as mitigating elements that reduced the sentence.

In the United States, the victim's involvement through VIS has also been recognized as a mitigating factor, albeit in more limited ways. This impact was highlighted in death penalty cases– particularly where defendants suffered from a mental illness or were abused as children, or when the VIS was meant to be a message to the system or offender.[52] These results further highlight that in some ways, these

[47] See Edna Erez & L. Rogers, *The Effects of Victim Impact Statements on Criminal Justice Outcomes and Processes: The Perspectives of Legal Professionals* 39 BRITISH J. CRIMINOLOGY 216 (1999).

[48] + See Annette van der Merwe & Ann Skelton, *Victims' Mitigating Views in Sentencing Decisions: A Comparative Analysis* 35(2) OXFORD J.L. STUDIES pp. 355-372 (2015).

[49] See Julian Roberts and Marie Manikis, *Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm* 15(1) CAN. CRIM. L. REV 1 (2010).

[50] *R. v. Carr*, 2008 ABQB 228. Similarly, see the victim's request for the sentencing court's clemency towards the offender in *R. v. Perry*, 2011 QCCQ 2293 and in *R. v. Deschnes*, 2012 QCCQ 10546.

[51] *R. v. F(R)*, [1994] OJ No 2101 (ONCA). A similar request for clemency was requested by the victim in *R. v. Guerrero Silva,* 2015 QCCA 1334

[52] See Trina Gordon & Stanley Brodsky, *The Influence of Victim Impact Statements on Sentencing in Capital Cases* 7:2 J. FORENSIC PSYCHOLOGY PRACTICE 45 (2007), which suggests that although VIS in capital proceedings did not necessarily have substantial effect on the acceptance of aggravation or mitigation issues, participants were more likely to be lenient in sentencing in the presence of the VIS when

statements can advance a non-punitive or parsimonious contribution of victims in the criminal process.

The English approach has also recognized victim personal statements (referred to as VPS)[53] as evidence that must be treated as such. Victims can decide whether to make these statements, but the responsibility for presenting admissible evidence remains with the prosecution.[54] Contrary to the VIS, the VPS also extends to pre-trial decisions, including bail. The courts have also carved out a space for considering VPS as mitigating factors at sentencing, while rejecting an approach that would consider those statements as an aggravating factor. In *Perks*,[55] although the husband of a robbery victim, proposed to the Court that the offender should be sent to prison, the Court of Appeal rejected the use of VPS as aggravating and explained that victim opinions should generally not influence the sentence. It went on to create two exceptions to this general rule where VPS can be used to mitigate the sentence to some degree: where the offender's sentence is increasing the victim's distress, and where the victim's forgiveness or unwillingness to press charges provides evidence that her suffering must be less than would normally be the case. This noteworthy case paved the way for the use of VPS as mechanisms for victim participation that advance non-punitiveness and parsimony.

In *Nunn*,[56] the mother and sister of a person whose death was caused by a dangerous driver pleaded that the sentence was too long, which would make it difficult for them to cope with the trauma. They also highlighted that they knew the offender and that he had suffered enough. Although the court stated that victims' opinion of the desired level of sentence should play no role, it nevertheless identified an exception to that rule where the sentence is causing anguish to the victim. The notion of mercy to the victims was mentioned as a justifi-

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Footnote 52 continued
there were mitigating circumstances such as mental health issues, or sexual abuse as a child.

[53] For the current regime on VPS see https://www.cps.gov.uk/legal-guidance/victim-personal-statements as well as *Victim's Code of Practice,* ch. 2 Part A, para 1.12. This different terminology was partially adopted in recognition that victim state ments may have a cathartic effect on victims, but as empirical research reveals, are often ignored by the courts. See Andrew Sanders et al (2001) 'Victim Statements : Don't Work, Can't Work' Criminal Law Review, 447–458.

[54] *Perkins v R*, 2013 EWCA Crim 323.

[55] *R. v. Perks*, [2001] 1 Cr App R (S) 19.

[56] *R. v. Nunn,* [1996] 2 Cr App R (S) 136.

cation for considering the adverse consequences of this sentence on the victims and finding it relevant for sentencing purposes. In the similar case of *Roche*,[57] the mothers of the victim and the offender were sisters and stated to the court that the four-year sentence of imprisonment was adding to their grief and preventing their healing. The Court of Appeal highlighted that it can never become an instrument of vengeance when victims call for this, but it can nevertheless, in appropriate circumstances and to some degree, become an instrument of compassion when victims call for mercy. It reduced the sentence to three years of imprisonment. Finally, the Court of Appeal also diminished the sentence in a case of attempted rape where the victim chose to forgive her partner and was working towards the improvement of their relationship.[58] Hence it has become apparent in this jurisdiction that some victims have indeed contributed to the advancement of moderation and parsimony and the system has allowed space for this.

In New Zealand, the case of *Clotworthy,*[59] illustrates that mitigation was also taken into account by the Sentencing court following a VIS that indicated that there would be no value in imprisonment following a violent offence. An agreement was reached where the offender accepted to pay a substantial amount for the victim to undergo plastic surgery to repair the scarring from the assault, and that he would undertake two hundred hours of community work. The sentencing judge offered a suspended sentence of two years imprisonment, on the condition that the terms of the agreement were carried out. Although this agreement was referred to as a form of restorative justice, several commentators have rightfully criticized this framing on the basis that this practice rather amounts to mitigation within the standard sentencing rules.[60] Within this framing, restorative justice rests on a different value system that seeks to substitute

[57] *R. v. Roche,* [1999] 2 Cr App R (S) 105.

[58] See *R. v. Mills,* [1998] 2 Cr App R (S) 252.

[59] *R. v. Clotsworthy* (1998) 15 CRNZ 651 (CA). It is worth highlighting that this case was appealed following an appeal by the Crown. The Court of Appeal replaced the sentence with one of three years imprisonment due to the gravity of the offence. This suggests that it is not victims' rights and participation that necessarily contribute to greater punitiveness but rather limitations placed by the implementation of policies.

[60] See Allison Morris & Warren Young, *Reforming Criminal Justice: The Potential of Restorative Justice*, in RESTORATIVE JUSTICE: PHILOSOPHY AND PRACTICE (Heather Strang & John Braithwaite eds., 2000). The authors do not see restorative justice as merely mitigation, but rather a different value system. In this sense, this judgement would rather be framed in mitigating terms rather than restorative justice.

the foundation of liberal sentencing. Braithwaite has also challenged the presumption that victims will demand more punishment than courts in the context of criminal proceedings.[61] The evidence in this decision as well as other instances, suggests that victims sometimes demand less than the courts deem appropriate, which contributes to advancing penal moderation and parsimony.

These illustrations further challenge the notion that victim participation in criminal proceedings is inherently punitive as emerging evidence shows that, when given the opportunity and tools, victims can sometimes demand less punishment and more moderation and parsimony than what the system deems appropriate.

III A NEW AND COMPLEMENTARY MODEL OF THE CRIMINAL JUSTICE PROCESS

A complementary model of victims' rights can be added to the ones developed by Roach. Like Roach and Packer's models, this new model 'aspires to offer positive descriptions of the operation of the criminal justice system, normative statements about values that should guide criminal justice, and description of the discourses which surround criminal justice'.[62] It is not meant to operate to the exclusion of others or to be accepted as the only legitimate positive, normative, or discursive guide to the criminal process. This model nevertheless enables an appreciation of the different values that underscore the criminal justice process. As highlighted by Ericson, multiple models are helpful since they draw a portrait that recognize various versions of what is happening, side by side, which can account for the diverse ways that the system operates.[63] In light of the foregoing analysis, a model that considers victim involvement as non-punitive and advancing moderation and parsimony within the state model of criminal justice can be added as a third model of victims' rights. While this model has some features that are similar to the punitive models of victims' rights as well as crime control, it also shares resemblances with the due process model and the non-punitive restorative model without being considered as part of restorative justice. This model can be referred to as a non-punitive, parsimonious, and moderate model of criminal justice.

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[61] John Braithwaite, *In Search of a Restorative Jurisprudence*, in RESTORATIVE JUSTICE AND THE LAW 150 (Lode Walgrave ed., 2002).

[62] Roach, *supra* note 3, at p. 672.

[63] Ericson, *supra* note 1.

Similarly to the punitive and crime control models, this model relies on victim involvement in criminal proceedings and encourages reporting crimes to state authorities. The sanction can be useful in some cases, but by no means necessary. Contrary to the punitive model, the new model recognizes that victims, like defendants, can have similar interests, including focusing on legal rather than factual guilt, preserving the presumption of innocence, supporting due process claims, advancing state accountability, and avoiding wrongful convictions. Like Roach's non-punitive model, it recognizes that victims' involvement and reporting is not inherently punitive and that the criminal process can also offer spaces for reparation and long-term approaches, such as apologies, restitution, therapy, parsimonious sanctions, and second chances.

As developed earlier, the concepts of penal moderation and parsimony are inherent to this model and have been developed within theoretical criminological perspectives in the last decade that imagine a criminal process that advances minimalism, moderation and merciful approaches to state sanctions.[64] Penal parsimony has a long history in discussions relating to punishment, sentencing and imprisonment,[65] but in the context of a new victims' rights model it also encompasses processes within the wider criminal process that include broader practices and decisions. Examples of these approaches were seen throughout the foregoing analysis. For instance, the Crime Victims Rights Act ("CVRA") in the United States has recognized victim standing in criminal proceedings – allowing for their voices to be heard with regards to certain decisions, including restitution and prosecutorial decisions. In some ways, this development has some similarities with civil law jurisdictions that allow for victims' more active involvement in the criminal trial, including a right to present, lead, and challenge evidence. Indeed, as discussed, greater participatory rights, such as standing and active involvement in criminal proceedings are not inherently punitive and would be welcome within a model of criminal justice that promotes moderation and penal parsimony. Further, the victim's right to seek review of prosecutorial decisions in England and Wales shows that this approach has recently been taken on board by courts and prosecutorial services. The current English mechanism of victims' right to review decisions not to prosecute can also be expanded to include more accessible reviews of decisions to prosecute. As discussed above, this

[64] Bosworth, *supra* note 15.

[65] von Hirsch, *supra* note 16; MORRIS, *supra* note 16; Tonry, *supra* note 16.

would increase accountability and allow for a more parsimonious and moderate approach in the criminal process. For instance, in the aforementioned scenarios, it may be that a victim is convinced that the prosecution has indicted the wrong person and wants them to either be acquitted or not prosecuted, so that the search for the true perpetrator can go on. It might also be a realization that some of the criminal process' measures offer a limited response and would rather see more parsimonious approaches that tackle the root cause of criminality. Further, the vehicle of VIS available across common law jurisdictions has enabled victims to address the offender and the court, which has often contributed to greater mitigation, leniency, understanding, apologies, and enabled a therapeutic approach between victims and offenders. It is worth reiterating that, as suggested by the studies mentioned above, victims are not inherently punitive and do not primarily use these mechanisms to seek punishment or revenge. In this respect, this model rejects the zero-sum game found in Roach's punitive model since it recognizes common and overlapping interests between victims and offenders.

This proposed model is also different from Roach's non-punitive model of victims' rights since its non-punitiveness, moderation, and parsimony are within the compound of liberal criminal justice processes, rather than within parallel systems premised on different theoretical foundations. Indeed, the non-punitive 'circle' model that Roach proposes is not based on a liberal model of governance or adversarial processes, but rather on decentralized systems such as restorative justice, family conferences, and Aboriginal justice. This different foundational premise is shared by Morris and Young's conception of restorative justice, which sees it as more than mere mitigation in criminal proceedings, but rather as a different value system that seeks to substitute the usual liberal process.[66] The additional model suggests that the criminal justice process can achieve non-punitive and parsimonious aims while preserving its central tenets such as the presumption of innocence and due process guarantees. Contrary to Roach's model, it recognizes some reservations and nuances with regards to restorative justice. These reservations are not premised on concerns about victims having to face offenders or placing too much emphasis on the offender's rehabilitation, but rather on its insufficient procedural safeguards and limited checks and balances. Although restorative justice is not primarily premised on the idea of punishment, it can nevertheless have punitive effects on

[66] Morris & Young, *supra* note 60.

individuals[67] without the guarantees that enable the prevention of wrongful convictions.[68]

Further, unlike crime control, this model recognizes the values but also the abuses, errors, and overly punitive aims that can be supported by the state. For these reasons, an essential feature of this model includes greater victim involvement towards state accountability, which can also advance non-punitive and parsimonious approaches. For instance, the policy developments in England and Wales offer victims the possibility to seek review of prosecutorial decisions, which can indeed favour transparency of decisions and change prosecutorial decisions when erroneous. The feature of accountability borrows aspects of the due process model, as it promotes greater transparency and checks of certain decisions not only for victims but also defendants' interests. Hence, instead of a zero-sum approach to victim and defendants' interests, this model recognizes that both can often have common interests, including favouring a process that enables greater transparency, state accountability and is free from judicial errors and wrongful convictions, while advancing parsimony and moderation.

As with the literature on penal parsimony, this model depends in part on a 'moderation-as-politics'[69] approach that brings penal moderation to the public to legitimize the notion of penal parsimony. This is particularly the case in the context of victim participation, where victims are inherently part of the public and therefore their approach and shared values is in great part influenced by public opinion, politics and the media.[70] There are empirical indicators that support the need for moderation to be in the public sphere in order to facilitate a parsimonious approach[71] and evidence suggests that moderation sentiments exist in the public.[72] Moderation is generally

[67] Kathleen Daly, *Revisiting the Relationship between Retributive and Restorative Justice*, in RESTORATIVE JUSTICE: FROM THEORY TO PRACTICE (Heather Strang & John Braithwaite eds., 2000); RA Duff, *Alternatives to Punishment – or Alternative Punishments?*, in RETRIBUTIVISM AND ITS CRITICS (Wesley Cragg ed., 1992).

[68] Ashworth, *supra* note 21.

[69] Loader, *supra* note 17.

[70] Sonja Snacken, *Punishment, Legitimate Policies and Values: Penal Moderation, Dignity and Human Rights* 17:3 PUNISHMENT & SOCIETY 397 (2015).

[71] Tapio Lappi-Seppala, *Penal Policy in Scandinavia* 36 CRIME & JUST 217 (2007).

[72] Austin Lovegrove, *Sentencing and Public Opinion: An Empirical Study of the Punitiveness and Lenience and its Implications for Penal Moderations* 46:2 AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY 200 (2013).

reached in situations where the public, which includes victims, is placed in more engaged and informed positions. Indeed, research by Doob and Roberts shows that providing individuals with more information on specific cases, including with respect to both the incident and offender characteristics, decreases punitiveness dramatically.[73] Hence, less social distance between victims and offenders and more information about available options and their efficacy are factors that diminish punitive attitudes and contribute to moderation and parsimony.[74]

Further, studies that examine punitiveness have created processes that aim to inform citizens about criminal punishment through experts to enable citizens to participate in critical discussions with other participants.[75] Results have shown that those participants were less punitive, less in favour of imprisonment, less inclined to assign severe sentences, and were more supportive of alternative sanctions. They valued principles of equity and fairness with respect to the social, economic, and cultural circumstances of offenders.[76]

Empirical findings on penal parsimony suggest that public and victim participation within the criminal process can indeed facilitate and advance moderate and parsimonious values. This further lends support to the argument that Roach's models of victims' rights should be expanded to include a model that sees victim participation as advancing non-punitiveness, penal moderation and parsimony within the liberal criminal justice setting.

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[73] ANTHONY DOOB & JULIAN ROBERTS, Sentencing: An Analysis of the Public's View of Sentencing (1983).

[74] See Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole* 38 CRIME & JUST 347, p. 395 (2009); Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On…* 3 INTERNATIONAL R. VICTIMOLOGY 17, p. 21 (1994).

[75] Paul L. Simpson et al., *Assessing the Public's Views on Prison and Prison Alternatives* 11:2 J. PUBLIC DELIBERATION 1 (2015); Geraldine Mackenzie et al., *Measuring the Effects of Small Group Deliberation on Public Attitudes towards Sentencing* 25 CURRENT ISSUES CRIMINAL JUSTICE 745 (2014); Robert C. Luskin et al., *Considered Opinions: Deliberative Polling in Britain* 32 BRITISH J. POLITICAL SCIENCE 455, p. 463 (2002).

[76] Simpson et al., *supra* note 75, at pp. 12–14.

IV CONCLUSION

Recent developments in the area of victim participation suggest that Roach's models of criminal justice continue to be useful in understanding the ways victims are integrated and influence the criminal process. Indeed, through the various policies that have recognized victim participation in the criminal process, victims can and have advanced punitiveness when involved in criminal proceedings. In addition to this, however, theoretical, empirical, and policy analyses of victim participation through its various relationships with state agencies and defendants have also shown that participation can and has contributed to non-punitive aims, penal moderation, and parsimony within the criminal justice process without resorting to models such as restorative justice, which rest on entirely different theoretical foundations This suggests that a model of victim involvement can be developed to complement Packer and Roach's lasting work on criminal justice models. This new proposed model of victims' rights is rooted in a state-run liberal system and suggests that victims within the criminal process can and have contributed to values of penal moderation, parsimony, mercy, accountability, and non-punitiveness. This approach is in many ways very different from Roach's punitive model of criminal justice that is rooted in the idea that victims necessarily bring greater punitiveness when involved in state-run criminal proceedings, but also differs from his non-punitive model which focuses on external systems that operate on different foundational premises. The new proposed model can also be understood within a public criminology perspective that enables penal moderation and parsimony within the criminal justice process.