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# Restitution to Victims of Crime— An Old Correctional Aim Modernized

Stephen Schafer\*

## I.

The case for restitution to victims of crime has rested on two obligations: an obligation of the criminal perpetrator who inflicted personal or property harm, and also an obligation of society which failed to protect the victim. In either case, compassion for the victim has prompted proposals for compensation schemes.

Unfortunately, this is a narrow view of the matter. Might not victim compensation be viewed from a broader perspective? Such an effort would require a fresh view of the goals of corrections. Heretofore penal systems have relied on deterrence and retribution,<sup>1</sup> probably with some penological success for the hundreds of years they have been employed, but which have often been concealed by such designations as punishment, treatment, rehabilitation, or correction itself. However, there has been no major reform of penal aims for ages. Punishment in the above sense may look at the avoidance of future victims, but it ignores prior victims.

Current victim compensation schemes contain equally incomplete views of this matter. Present schemes are little more than tort (or insurance) law propositions placed into a criminal law environment. So far there has been no effort to combine the criminal law concern for the perpetrator with the tort law concern for the victim. In effect, as Tallack noted more than half a century ago, the result has been that "the unfortunate victim of criminality is habitually ignored."<sup>2</sup>

## II.

The failure to consider the plight of the victim is nearly universal. In no country can a victim of crime expect full restitution for his loss or injury. In the rare case where there is any compensa-

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1. Deterrence and retribution have been so considered whether labeled punishment, treatment, rehabilitation, correction or something else.

2. TALLACK, REPARATION TO THE INJURED; AND THE RIGHTS OF THE VICTIMS OF CRIME TO COMPENSATION 10-11 (1900).

tion system, it works either on a very limited scale or not at all. Where there is no system, the victim usually has only the insufficient remedies of tort law at his disposal.<sup>3</sup> While punishment for crime is regarded as the state's concern, and thus receives ample official and public support, crime as the source of the victim's loss is regarded almost as a private matter. The state will not concern itself with it. Sutherland and Cressey rightly pointed out that "under the current system, the state undertakes to protect the public against crime and then, when a loss occurs, takes the entire payment and offers no effective remedy to the victim."<sup>4</sup>

A rare case to the contrary notwithstanding, the victim generally has no part in the active disposition or "settlement" of the criminal case. Under existing penal law, might it not be possible to justify compensation as a part of the offender's punishment? After all, criminal justice applies punishment not only to deter future criminal acts. It is also an important part of criminal punishment to appease the victims and to conciliate the disturbed society through "bloodless" punishment of the guilty party.<sup>5</sup> The individual victim is a part of the society, and for that reason criminal proceedings ought to be applied in the interests of this individual victim as well as in the interests of society as a whole.

Victims not only desire indemnification for the damage caused to them, but also often think of criminal justice as socialized revenge. Hence, they expect retributive satisfaction as much as material satisfaction. They expect moral censure of the perpetrator, coupled with a certain measure of vengeance. Almost all theories of punishment consider the effect of the crime on the victim. The evil visited on the wrongdoer in punishment is intended not only to make the power of moral and legal order felt by the criminal but, at the same time, endeavors to compensate the victim by offering him some "spiritual" satisfaction. Amid all the involved and interminable discussions of the purposes of punishment, it is generally accepted that one of the tasks of punishment is the awarding of what might be called "idealistic damages" or "spiritual restitution." This task of punishment was prominent in the golden age of classic criminal law when criminal justice throughout the world attempted to roughly adjust the quality and quantity of the punishment to the quality and quantity of the victim's injury. More recent trends, however, seem to direct attention away from the gravity of the victim's injury towards the personality of the criminal. This does not mean that the de-

3. SCHAFFER, *RESTITUTION TO VICTIMS OF CRIME* 101-08 (1960).

4. SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 278 (6th ed. 1960).

5. See VON HENTIG, *THE CRIMINAL AND HIS VICTIM* 217 (1948).

gree of injury or harm loses its significance. It is merely a shift of emphasis. Rather than being regarded as an injury to the victim, criminal harm is being viewed as society's loss. Judges and correctional administrators view the the perpetrator's personality primarily in terms of society's needs, rather than those of the victim. This tendency of modern criminal law did not lead to the rejection of vengeance or reprisal; but the victim's injury, as viewed from his perspective, began to lose importance. Instead of shifting toward material restitution, modern criminal law has even phased out its past concern with spiritual restitution.

Arguably, satisfaction to the victim, if it consisted only of vengeance, would not accord with society's present moral and cultural dignity. The question also arises as to whether punitive harm to the criminal in fact is restitution to the victim for his injury and, if so, to what extent. The general experience is that despite some satisfaction of the victim's demand for vengeance, his continuing pain and suffering can hardly be permanently compensated for by mere penal revenge. This is particularly so under a modern correctional policy under which ethical considerations place definite limits on maximum punishments. Moreover, the victim knows that the perpetrator's punishment is meant primarily to appease society's craving for vengeance. He knows, therefore, that his own interests rank second to society's. The victim feels inadequately redressed, while the criminal, having paid his debt to society, feels no further obligation, either to his individual victim or to society as a whole.

### III.

At first glance, the exclusion of the victim from the disposition of the criminal case appears entirely consistent with the movement from the individualistic to the universalistic view of crime. One tries to understand the criminal as a member of his cultural group. His crime is viewed in terms of his social relationships. The relationship of the criminal to his political and cultural community and to the other members of his group determines how we shall treat him. Modern criminology tends, and should tend, to direct attention to what I tentatively call the criminal's "functional responsibility," rather than to the isolated criminal act.

The individualistic concept of crime was a product of the eighteenth century. At that time it constituted a revolutionary change from medieval arbitrariness to a penological rule of law concept. In the individualistic era man demanded the right to pursue his own ends, to act independently, and to have his indi-

viduality respected by all. Criminal justice, in compliance with this call, viewed the criminal act isolated from social problems. Justice intervened with necessarily formalistic and rather bureaucratic legal thinking. Communal interests were regarded as fictions. The doctrines dominating the crime problem were based on the understanding that the individual and not the society was the paramount consideration. Criminal proceedings were conducted in defense of individual rights, and punishment was applied as against the individual guilt of the offender. With criminal law thus obsessed with the safeguards of individual freedom, one might expect a well integrated institution of restitution to victims of crime.<sup>6</sup>

However, the criminal law continued to regard compensation as a matter apart. Only pure penal functions were thought to be proper objectives of public prosecution.<sup>7</sup> The victim was not allowed to be interested financially in the outcome of the prosecution nor to disturb penal purposes.<sup>8</sup> In fact, the individualistic criminal law proved to be individualistic only in viewing the criminal as an individual, in safeguarding the offender's individual

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6. If restitution was not built into this individualistic structure, this might be due to the centuries old monopoly of the state to conduct criminal trials.

Preceding state control of criminal law "composition" was the last stronghold of the "private" criminal law. The settlement of the amount of composition to be paid by periodic tribal assemblies provides an early example of judicial proceedings. There is more than a germ of truth in the suggestion that the composition, the medieval ancestor of the present day restitution to victims of crime, was one of the fertilizers of the state criminal law. Composition soon was emasculated by that very law by being expelled from the penal system and left to the field of civil law. First the monetary satisfaction was owed entirely to the victim or his family, and served as a requital of the injury. However, as the central power in a community grew stronger, this financial satisfaction had to be shared with the state or overlord or king as a commission for the "trouble in bringing about a reconciliation between the parties." OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* 162-63 (1918). This share gradually increased in favor of the community power. Finally, as the state fully monopolized the institution of punishment, the rights of the injured were slowly separated from the penal law. STARKE, *DIE ENTSCHÄDIGUNG DES VERLETZTEN NACH DEUTSCHEM RECHT UNTER BESONDERER BERÜCKSICHTIGUNG DER WIEDERGÜTMACHUNG NACH GELTENDEM STRAFRECHT* 1 (1959). Composition, as the obligation to pay damages, became divorced from the criminal law and had to enter a special field in civil law. The victim became the forgotten Cinderella of the criminal procedure. PFENNINGER, *STRAFPROZESS UND RECHTSSTADT FESTSCHRIFT ZUM 70*, 193 (1956).

7. VON HENTIG, *PUNISHMENT, ITS ORIGIN, PURPOSE AND PSYCHOLOGY* 216-17 (1937).

8. WAECCKERLING, *DIE SORGE FÜR DEN VERLETZTEN IM STRAFRECHT* 15 (1946).

rights, and in considering his crime as an attack of one individual against another. Individualistic principles were not practiced when the victim was excluded from the privileges of criminal procedure and relegated to the hardships of the tort law process.

#### IV.

It was not until the end of World War I that a greater conscious recognition of social forces brought about a crisis and, with it, a change. This was the change from the individualistic to the universalistic understanding of crime. But did the new universalism improve the victim's lot? No, rather it increased the disregard for the victim's plight. By looking at the offender as a social phenomenon, whose criminal behavior originated in the abnormalities of his social existence or in the society's attitude towards him, the defensive function of criminal law started to lean towards the interests of the universe (*i.e.*, society), rather than those of the individuals concerned. The universalistic approach recognized that the individualistic orientation only led to a shrewd confusion of the functioning social forces. The universalistic conception viewed the crime problem in terms of man's relation to his social environment. This approach was sharply spelled out by the totalitarian exaggeration of the universalistic understanding of crime. A supra-universalistic interpretation of the crime problem was attempted in Nazi Germany, in Fascist Italy, and in our present time in the Soviet territories. In such a system the primacy of a social, or more accurately a political, idea is placed not only over individual interests, but also over the conventional group interests of the society. Thus, direct defense and care is not offered to the individuals nor even to the group, but to the idea itself.

#### V.

The effort to find separate bases for penal and civil liability also contributed to the continued lack of penological importance of restitution to victims of crime. The multitude of theories distinguishing between civil and criminal responsibility are of two types. According to the subjective view, penal liability results from the deliberate infringement of law. But civil liability may also result from accidental violation, thus the subjective view, failing to cover these accidental violations does not further the case for restitution. According to the objective view, penal wrong follows from some kind of direct injury to the victim. However, insofar as civil liability depends on the statement of the victim,

the case for handling restitution in the criminal trial itself is not advanced. Generally speaking, since the disappearance of talionic composition, the conventional view had been that crime is an offense against the state, while a tort is an offense against individual rights.<sup>9</sup> This view is fortified by the universalistic concept of criminal law. Speculations about the elusive boundary between criminal and civil wrongs have deterred the acceptance of restitution to victims of crime as the reparation of a criminal injury and have strengthened the misconception that it is equivalent to the recovery of an ordinary debt.

The universalistic view of criminal law, recognizing man's relationship to his society, should not cause continued indifference to restitution to the victims, but on the contrary, should logically help its rejuvenation. Under the universalistic view, the victim cannot be regarded as just somebody who was involved in a crime situation. The victim has played a role in the crime, and is important in many respects. The law must regard him in every respect.

## VI.

If it were correctly realized that "spiritual satisfaction" is implicit in all systems of punishment and corrections, a new concept of punishment might arise. This new concept would strongly support restitution as an aim of punishment. Restitution would assume punitive and correctional significance, and in fact, would mean the rejuvenation of the medieval idea of composition — "making up," by "making whole." This would constitute a substantial effort towards preserving law and order. Most importantly, it would assist in the reform of the criminal.

This concept can be termed a "synthetic punishment," *i.e.*, one which unites all objectives of corrections in a single method. Such "synthetic punishment" reflects the universalistic concept of crime by meeting the functional responsibility of the criminal and by advancing both his reformation and correction in general.

In addition to punishing breaches of the law, the state should see to it that any injury caused by such a breach is properly repaired. That restitution to victims of crime deserves a place in the disposition of the criminal case should be evident if only because, but for the crime, the victim would not have suffered the damage for which he seeks restitution.

To be regarded as a proper adjunct of criminal procedure, restitution or compensation must be given a correctional character.

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9. BINDING, 1 DIE NORMEN UND IHRE ÜBERTRETUNG 433-79 (3d ed. 1916); SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 14 (4th ed. 1947).

There is really nothing new about requiring an offender to pay money. The present day fine is only a survival of the composition through *wergild* and *bote*.<sup>10</sup> Under the new scheme, the administrator of criminal justice would not deal with civil damages, but with correctional restitution. This becomes part of the sentence and thus an institution of the criminal law. As Margery Fry pointed out: "to the offender's pocket it makes no difference whether what he has to pay is a fine, costs or compensation. But to his understanding of the nature of justice it may make a great deal."<sup>11</sup>

## VII.

Restitution under a state compensation system based on fines would guarantee recovery of damages to the victim. Needs of restitution, felt for centuries, would finally be filled. The state would fulfill another important social welfare function. It has been contended that such a scheme constitutes an admission of the state's obligation, and an easing of the perpetrator's conscience. Thus, it has been said that a state compensation program would not aid the possible reform of the criminal, but rather would possibly exempt him at state expense from an obligation which he ought to discharge.<sup>12</sup>

In terms of correctional benefits of a modern restitution scheme, the offender should be made to understand that he has directly injured the victim as well as the state and law and order. Thought of in this way, restitution would not only redress the injury or loss of the victim, at least in part, but would help in the correctional rehabilitation of the offender at the same time. "What is required is an evaluation in terms of the deterrent and reformatory potentialities of the requirements of restitution . . ."<sup>13</sup> As von Hentig rightly pointed out, "in many cases payment to the injured party will have a stronger inner punishment value than the payment of a sum to the neutral state."<sup>14</sup>

Virtually all correctional systems attempt to arouse understanding and the expiation of a sense of guilt by the criminal. This psychic process can be initiated and assisted by others, but it cannot be experienced for the criminal by others. Restitution, re-

10. Wolfgang, *Victim Compensation in Crimes of Personal Violence* 50 MINN. L. REV. 223, 225 n.14 (1965).

11. FRY, *ARMS OF THE LAW* 124 (1951).

12. Inbau, Miller, Montrose, Mueller, Silving, Williams & Weihofen, *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 191 (1959).

13. Note, 39 COLUM. L. REV. 1185, 1187 (1939).

14. VON HENTIG, *op. cit. supra* note 7, at 217.



quiring an effort by the offender, may be especially helpful in strengthening his feelings of responsibility. Eglash called it "creative restitution."<sup>15</sup> Based on and related to the offense, this restitution may redirect those same conscious or unconscious thoughts, emotions, or conflicts which motivated the crime.

"Rectification" or "making good" is an effective disciplinary or educative technique with children. Even with adult criminals, the relationship between the offender and the restitution to his victim may be reformatory, corrective, and rehabilitative as well. "Correctional restitution," or perhaps, "punitive restitution," may be a correctional or penal instrument through which the criminal can feel and understand his social responsibility and thus alleviate his guilt feelings.<sup>16</sup>

### VIII.

In recent research on the criminal-victim relationship in violent crimes,<sup>17</sup> an attempt was made to examine the extent of an offender's willingness to compensate his victim. Research was conducted on 819 inmates who were received in Florida correctional institutions between July 1, 1962 and June 30, 1963. All had been convicted of criminal homicide (1st and 2nd degree murder), or aggravated or simple assault, or violent theft (robbery or burglary). In none of the 819 cases was restitution or compensation made by the offender. In only eighty-eight cases was the inmate's positive or negative restitutive attitude detected.<sup>18</sup> The distribution of these indications according to the three crime types, sex of offender, and positive or negative response, shows the following:

	MALE		FEMALE		TOTAL	TOTAL NUMBER STUDIED
	POSI- TIVE	NEGA- TIVE	POSI- TIVE	NEGA- TIVE		
CRIMINAL HOMICIDE	15	1	3	0	19	19
AGGRAVATED ASSAULT	10	9	2	1	22	250
THEFT WITH VIOLENCE	24	20	2	1	47	550
TOTAL	49	30	7	2	88	819

15. See AICHORN, *WAYWARD YOUTH*, ch. 10 (1935); Eglash, *Creative Restitution, Some Suggestions for Prison Rehabilitation Programs*, *Am. J. Correction*, Nov.-Dec. 1958, p. 20.

16. Eglash, *supra* note 15, at 20.

17. Research of the author, supported by the U.S. Department of Health,

This chart may indicate that the overwhelming majority of those who have committed a form of criminal homicide do wish that they could make some reparation. Among those sentenced for aggravated assault, a much smaller proportion feel obliged to do something for their victim. The remainder felt that their debt was only to the state. Among those who committed robbery or burglary only a little more than one half of the offenders accepted an obligation to their victim. The rest could perceive no legal, moral, ethical or social link with persons outside the prison staff.

In the course of interviewing the inmates convicted of criminal homicide — many of them close to their execution — their feelings of self-devaluation and apprehension which caused their desire to redress the wrong done the victim appeared to have developed out of immediate fears of the penal consequences. Their proximity to death made them compassionate for their victims. Not the punishment as pain, but the realization of the limits of their natural life seemed to awaken them to their social obligations, which included the reparation of their wrongdoing. However, this attitude was not detected in the inmates sentenced for aggravated assault or theft with violence. Many of these offenders evidenced no guilt feelings and could neither understand nor accept their functional responsibility to society or to their victims. Their understanding of incarceration seemed limited to what they viewed as merely a formal or normative wrong, which had to be paid for to the agencies of criminal justice, but to nobody else. Their adherence to this isolated and narrow attitude was not due to deviant logic, but to inability to understand their crimes as harms imposed upon other individuals.

## IX.

Some penologists and criminologists hold the view that punitive or correctional restitution should, in certain cases, completely replace punishment. The implementation of this suggestion would relieve the state of the burden of supporting those sentenced for minor offenses. Such a reduction in the number of inmates would allow greater individual attention for those remaining. But emptying crowded prisons by substituting restitution for punishment

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Education, and Welfare. The research was conducted under the title "Criminal-Victim Relationships in Violent Crimes" and is unpublished to date.

18. "Restitutive attitude," as used here, means a tendency of one's positive emotional and affective reaction to his obligation and responsibility toward the victim. The "restitutive attitude" conclusion was based on personal interviews of the prisoners by the author during which a pre-prepared questionnaire was followed.

may amount to little more than an evasion of correctional responsibility. The use of correctional restitution as the only punishment for crime might diminish the sense of wrongdoing attached to that crime. Thus the degree of socio-ethical reproach which the wrongdoer feels or should feel may be reduced. Moreover, a system under which the wealthy or professional criminal can conceivably buy his liberty, while the poor criminal might serve a prison term for a minor offense, would most certainly produce social injustice. Such restitution might thus have an opposite effect from that intended. Deviance requires correction. A man should not be permitted to buy himself an exemption from correction. It is not the medieval composition, but restitution which should be rejuvenated. The extent to which these potentialities are enhanced or diminished when restitution is exacted by private parties serves as a warning against replacing punishment or corrections by restitution.<sup>19</sup> The social and correctional value of criminal restitution may be destroyed if individuals are permitted to compromise crimes by making restitution. Instead of refining the universalistic orientation, this would lead us back to the early and primitive supra-individualistic trends of criminal law.

Correctional restitution may be distinguished from civil damages on this very point. While civil damages are subject to compromise and are not in every case satisfied by the wrongdoer himself, restitution, like punishment, should always be the subject of judicial consideration in criminal procedure. Correctional restitution is a part of the personal performance of the wrongdoer. It should be both burdensome and reformatory, as well as just for all criminals, irrespective of their means and crimes, whether they be millionaires or laborers, murderers or shoplifters.

The proposal that the offender should, by his own work, compensate for the damage he has caused, has been made more than once. Herbert Spencer suggested that prison work and the prisoner's income should be the means of making restitution, and that the offender should be kept in prison until the damage was repaired.<sup>20</sup> Garofalo suggested if the offender was solvent his property should be confiscated and restitution made therefrom by order of the court; if he was insolvent, he should be made a state workman.<sup>21</sup>

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19. Note, 39 COLUM. L. REV. 1185, 1187 (1939).

20. SPENCER, *ESSAIS DE MORALE DE SCIENCE ET D'ESTHETIQUE*, II, *ESSAIS DE POLITIQUE*, VIII, 352 (4th ed. 1898).

21. GAROFALO, *CRIMINOLOGY* 419-35 (1914); this is a somewhat changed presentation of his proposal submitted to the International Prison Congress held in Paris in 1895, where he suggested that instead of going to prison, the

Another proposal tried to balance the burden of fines and restitution between the rich and poor. According to this proposal, a poor man would pay in days of work, a rich man by an equal number of days' income or salary. If two dollars represented the value of a day's work, and the poor man were sentenced to pay two dollars, he would be discharged by giving one day's labor to the victim. The rich man, instead of being sentenced to give so many days of labor, would pay an equal number of days' income or salary. If this represented 200 dollars a day, for example, he would have to pay 200 dollars.<sup>22</sup> It has also been suggested that the "noble way" to care for the victim is to make it possible for the offender to fulfill his obligation through the income of his free work.<sup>23</sup> This noble way may at the same time be reformatory or corrective, as long as it is not forgotten that the "punitive" side of restitution is an effective aid in reforming the criminal. If restitution is unconnected with the offender's personal work, and can be performed from his property or by others, this would still help the victim, but would minimize the reformatory-corrective character of the restitution. On the other hand, if the performance of the restitutive obligation affected the freedom of work of the offender, or even his personal liberty, this would be an extension of the punishment to which he was sentenced. However, if the offender were at liberty after he had served his punishment, but still had to make restitution to his victim through his personal work, restitution would retain its reformatory-corrective character. This could be regarded as a part of the sentence and not as an extension of it.

## X.

There is something very sad in the disparity between our passion for treatment and our inability to effectively employ it. Restitution to victims of crime is not the total answer to the failure of our correctional system. However, it could make a valuable contribution to the solution. A modified revival of medieval composition and a rejuvenation of civil law compensation, to form a new concept of correctional restitution, would be an effective response of criminal justice to the functional responsibility of the

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man should work for the state, retaining for himself only enough wages to keep him from starving and the rest should go into a *caisse d'épargne* for the reparation for the wrong done. *The Paris Prison Congress, 1895, Summary Report*, London, without date.

22. BARROWS, THE SIXTH INTERNATIONAL CONGRESS: REPORT OF ITS PROCEEDINGS AND CONCLUSIONS 52 (1903).

23. WAECKERLING, *op. cit. supra* note 8, at 130.

criminal. The universalistic trend of criminal law attempts to lift crime from its isolated individualistic position and to analyze crime and criminals within a broad social perspective. In our modern understanding of the crime problem, all aspects of deviance and social relationships are to be considered and measured. Consequently, a growing interest in the interrelationship and interpersonal reactions between a criminal and his victim may be anticipated.