

1970

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### Recommended Citation

Bruce R. Jacob, Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process, 61 J. Crim. L. Criminology & Police Sci. 152 (1970)

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## REPARATION OR RESTITUTION BY THE CRIMINAL OFFENDER TO HIS VICTIM: APPLICABILITY OF AN ANCIENT CONCEPT IN THE MODERN CORRECTIONAL PROCESS

BRUCE R. JACOB\*

### I. INTRODUCTION

In theory victims of crime have for centuries had available to them the civil remedy of a tort action against persons who have wronged them through the commission of crime. In practice, however, this remedy is in most instances of little value. In many cases the offender is unknown; or where he is known, the victim often cannot afford the expense, in terms of money and time, of bringing a law suit against the offender.<sup>1</sup> In addition, since perpetrators of violent crimes are typically poor or financially destitute,<sup>2</sup> a judgment against such offenders would be uncollectible. Moreover, if convicted and imprisoned, an offender's incarceration merely serves to compound his destitute condition for as a rule inmates of today's prisons are able to earn very little, if any, money during their confinement.<sup>3</sup>

During the last decade there has developed throughout the world an increased interest in legislation to provide monetary indemnification to

victims of crime, particularly victims of crimes of violence.<sup>4</sup> This recent concern for the plight of crime victims is largely attributable to the writings of Margery Fry, an English penal reformer, who set forth her views in a book and a newspaper article published during the 1950's. Miss Fry had originally been interested in the possibility of requiring that reparation be made by the criminal offender to his victim as part of the process of reforming or rehabilitating the offender.<sup>5</sup> Due to the practical difficulties inherent in such an approach she later became disenchanted with this idea and instead advocated that society should assume this obligation and compensate victims of crime as a matter of social welfare policy.<sup>6</sup> All of the victim-indemnification plans adopted in recent years in New Zealand,<sup>7</sup> Great Britain<sup>8</sup> and the United States<sup>9</sup> have been designed primarily to provide "compensation" rather than "reparation" or "restitution". As used in the following discussion, the term compensation will refer to payment made from state funds to victims of crime. The words reparation and restitution signify payment made by the criminal offender to his victim as indemnification for the harm or injury caused by the crime, reparation being a broader term which seems to include the concept of restitution.<sup>10</sup>

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This paper was submitted to Professor Lloyd E. Ohlin of the Harvard Law School, for the course on Crime and Society, given in the Fall semester, 1968. The author gratefully acknowledges Professor Ohlin's guidance and encouragement.

<sup>1</sup> Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223 (1965).

<sup>2</sup> HOME OFFICE, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, CMND. NO. 1406, at 2 (1961); Geis, *State Compensation to Victims of Violent Crime*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 157, 159 (1967); Mueller, *Compensation for Victims of Crime: Thought Before Action*, 50 MINN. L. REV. 213, 220, n. 25 (1965).

<sup>3</sup> It has been estimated, for example, that ninety percent or more of the inmates of the United States penitentiary in Atlanta, the largest of the correctional institutions in the federal system (and one of the better institutions in America from the standpoint of providing wage-earning opportunities to inmates), are "indigent" in the sense that they would not have or be able to raise as much as \$300 to retain legal counsel. Interview with Mr. Lee Jett, Jr., Chief of Classification and Parole, United States Penitentiary, Atlanta, Georgia, December, 1966.

<sup>4</sup> See generally *Compensation to Victims of Crime of Personal Violence: An examination of the Scope of the Problem: A Symposium*, 50 MINN. L. REV. 211 (1965).

<sup>5</sup> M. FRY, *THE ARMS OF THE LAW* 126 (1951).

<sup>6</sup> Fry, *Justice for Victims*, *The Observer* (London), July 7, at 8, 1957, col. 2, reprinted in *Compensation for Victims of Criminal Violence*, 8 J. PUB. L. 191, 192-93 (1959); see also Geis, *supra* note 2 at 160.

<sup>7</sup> See Cameron, *Compensation for Victims of Crimes of Violence, The New Zealand Experiment*, 12 J. PUB. L. 367 (1963).

<sup>8</sup> HOME OFFICE & SCOTTISH HOME OFFICE, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, CMND. NO. 2323 (1964).

<sup>9</sup> Such plans have been adopted in California, New York, Maryland, Massachusetts, and Hawaii. See e.g. CAL. PEN. CODE §§13600-03 (West 1965); CAL. WELFARE & INST'NS CODE §11211 (West 1965).

<sup>10</sup> According to WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1923, 1936 (Unabridged, 1966) the words "reparation" and "restitution" have quite similar meanings. Both mean "the act of restoring." "Repara-

In this paper existing victim compensation plans will be examined along with a discussion of arguments for including the element of reparation in victim indemnification schemes. Also to be considered are the possible ways in which the earnings of convicted offenders might be increased so as to make practicable the incorporation of the concept of reparation in existing victim indemnification plans or in future legislation to provide financial assistance to victims of crime.

## II. RECENTLY-ADOPTED VICTIM COMPENSATION PLANS

One of the theories which has been advanced in support of proposals for legislation involving compensation by the state to victims is that the state has a duty to protect its citizens from crime and that if it fails to do so it incurs an obligation to indemnify those who are victimized.<sup>11</sup> A second argument is that since the state imprisons offenders and thereby renders most of them unable to answer to their victims in terms of tort damages, the state should be responsible to such victims.<sup>12</sup> The third and most widely accepted reason for adoption of compensation schemes is that the state should aid unfortunate victims of crime as a matter of general welfare policy.<sup>13</sup>

The New Zealand Criminal Injuries Compensation Act became effective on January 1, 1964.<sup>14</sup> It established an administrative tribunal which has power to hold hearings on claims for compensation and make awards. Compensation is limited to personal injuries resulting from certain crimes of violence.<sup>15</sup> No compensation is allowed for loss of or damage to property.<sup>16</sup> The government reserved to itself the right to collect from the offender after an award has been made to the victim.<sup>17</sup> On August 1, 1964, the British government introduced a non-statutory scheme establishing an administrative board to assess and award compensation to victims.

Compensation is limited, under the British procedure, to cases involving personal injuries resulting from crimes of violence.<sup>18</sup> In making its decision the board is to consider among other things whether or not the victim was partially to blame for his own injuries.<sup>19</sup>

Under a 1967 California act<sup>20</sup> a crime victim, or a member of his family or a dependent who has sustained injury or pecuniary loss as a result of physical injury or death<sup>21</sup> may obtain compensation through an administrative procedure. When an award is made, the state becomes subrogated to any right of action accruing to the claimant as a result of the crime for which the award was made.<sup>22</sup> The act also contains the following unique provision which applies during the sentencing phase of the offender's trial:

Upon conviction of a person of a crime of violence . . . resulting in the injury or death of another person . . . the court shall take into consideration the defendant's economic condition, and unless it finds such action will cause the family of the defendant to be dependent on public welfare, may, in addition to any other penalty, order the defendant to pay a fine commensurate in amount with the offense committed. The fine shall be deposited in the Indemnity Fund in the State Treasury . . . and the proceeds in such fund shall be available for appropriation by the Legislature to indemnify persons filing claims pursuant to this chapter.<sup>23</sup>

A recent New York statute also creates an administrative board with power to entertain claims by victims for compensation for physical injuries.<sup>24</sup> This act apparently is applicable to claims involving all types of crimes except those arising from the operation of a motor vehicle in which injury was not intentionally inflicted.<sup>25</sup> The Massachusetts victim compensation law which became effective on July 1, 1968,<sup>26</sup> limits compensation to crimes

tion," in addition, means "the act of making amends, offering expiation or giving satisfaction for a wrongdoing," "Restitution" also means "making good or giving an equivalent for some injury."

<sup>11</sup> Culhane, *California Enacts Legislation to Aid Victims of Criminal Violence*, 18 STAN. L. REV. 266, 272 (1965).

<sup>12</sup> *Id.*

<sup>13</sup> CMD No. 1406, *supra* note 2, at 7.

<sup>14</sup> Geis, *supra* note 2, at 161. See also Weeks, *The New Zealand Criminal Injuries Compensation Scheme*, 43 SO. CAL. L. REV. 107 (1970).

<sup>15</sup> Cameron, *supra* note 7, at 370.

<sup>16</sup> *Id.* at 371.

<sup>17</sup> Geis, *supra* note 2, at 161.

<sup>18</sup> S. SCHAFER, *THE VICTIM AND HIS CRIMINAL* 121 122 (1968).

<sup>19</sup> *Id.* at 121, 123.

<sup>20</sup> CAL. GOV'T. CODE §§13960-13966 (West Supp. 1969). See also Shank, *Aid to Victims of Violent Crimes in California*, 43 SO. CAL. L. REV. 85 (1970).

<sup>21</sup> CAL. GOV'T. CODE §13961 (West Supp. 1969).

<sup>22</sup> *Id.* §13963.

<sup>23</sup> *Id.* §13964.

<sup>24</sup> N.Y. EXECUTIVE LAW art. 22, §§620-635 (McKinney Supp. 1969).

<sup>25</sup> *Id.* §621.

<sup>26</sup> MASS. ANN. LAWS ch. 258A, §§1-7 (1968). See also Floyd, *Massachusetts Plan to Aid Victims of Crime*, 48 B. U. L. REV. 360 (1968).

involving force or violence, or threats of force or violence, which have caused personal injury or death.<sup>27</sup> The claimant may obtain an award by filing a claim against the Commonwealth in the district court.<sup>28</sup> Both the Massachusetts<sup>29</sup> and New York<sup>30</sup> statutes contain subrogation provisions.

Hawaii enacted victim compensation legislation in 1967,<sup>31</sup> under which claims are processed by an administrative commission. It should also be noted that Senator Yarborough (D-Tex.) has introduced victim compensation bills in the United States Senate.<sup>32</sup>

The above-described plans for compensating victims of crime are based almost entirely upon the state welfare or compensation approach rather than on the basis that the offender himself should be made to pay for his crime. It is true that the California act contains the provision that fines may be imposed against offenders who are able to pay and that such fines are to be contributed to a victim indemnity fund, and that several of the above schemes contain subrogation provisions; but, in view of the economic status of most offenders, it is unlikely that the state or government will be any more successful in pursuing these remedies than private victims have been in the past in pursuing civil tort remedies against offenders.

### III. REPARATION OR RESTITUTION BY THE OFFENDER AS AN ELEMENT OF THE CORRECTIONAL PROCESS

#### A. *Brief Historical Background of the Concept of Reparation or Restitution*

In primitive cultures the victim of crime punished the offender through personal retaliation or revenge. He inflicted physical injury or damage and took what he wanted from the offender as reparation for the commission of the crime.<sup>33</sup> In a

<sup>27</sup> MASS. ANN. LAWS ch. 258A, §1 (1968).

<sup>28</sup> *Id.* §2.

<sup>29</sup> *Id.* §7.

<sup>30</sup> N.Y. EXECUTIVE LAW, Art. 22, §634 (McKinney Supp. 1916).

<sup>31</sup> HAWAII REV. STAT. §351 (1968). Rubin & Glen, *Development in Correctional Law*, 14 CRIME & DELIN. 155, 170 (1968). See MD. ANN. CODE Art. 26A, §§1-17 (Supp. 1968).

<sup>32</sup> Yarborough, *The Battle for a Federal Violent Crimes Act: The Genesis of S 9*, 43 SO. CAL. L. REV. 93 (1970); Yarborough, *S. 2155 of the Eighty-Ninth Congress—The Criminal Injuries Compensation Act*, 50 MINN. L. REV. 255 (1965).

<sup>33</sup> S. SCHAFER, *supra* note 18 at 8; Wolfgang, *supra* note 1, at 223; See Comment, *Compensation to Victims of Violent Crimes*, 61 NW. U. L. REV. 72, 76, 77, 78 (1966).

case involving an act committed against a family, clan or one of its members by a person outside the group, the group joined in the process of retaliation, or the "blood revenge" or "blood feud," as it has been called.<sup>34</sup>

As primitive groups settled, reached higher levels of economic development, and began to possess a richer inventory of economic goods, the goods themselves came to be equated with physical or mental injury; and unregulated revenge was gradually replaced by a system of negotiation between offender and victim and indemnification to the victim through payment of goods or money. The process of negotiation and the payment to the victim has become known as the process of "composition."<sup>35</sup>

In England, under this system, the offender could "buy back the peace he had broken" by paying "bot" to the victim or his kin according to a schedule of injury tariffs.<sup>36</sup> The "Dooms of Alfred," laws in effect during the time of King Alfred, for example, provided that if a man knocked out the front teeth of another man, he was to pay him eight shillings; if it was an eye tooth, four shillings; and if a molar, fifteen shillings.<sup>37</sup> By Alfred's time, about 870 A.D., private revenge by the victim was sanctioned by society only after a demand for composition had been made by the victim and his demand had been refused by the offender.<sup>38</sup> An offender who failed to provide composition to his victim was stigmatized as an "outlaw," and this allowed any member of the community to kill him with impunity.<sup>39</sup>

The transition or evolution from private revenge to composition has apparently occurred in many primitive cultures or societies as they have settled down and become economically stable. As a striking example of this, in primitive areas of Arabia about one hundred years ago it was noted that blood vengeance was practiced among the nomadic tribes outside the towns, while those living in the towns utilized the composition process as the means of redressing criminal wrongs in order to avoid the socially disintegrating effects of retaliation.<sup>40</sup> Composition was used as a means of punishing crime

<sup>34</sup> S. SCHAFER, *supra* note 18, at 8, 10; Wolfgang, *supra* note 1 at 224.

<sup>35</sup> S. SCHAFER, *supra* note 18, at 5, 11, 14; Wolfgang, *supra* note 1, at 224.

<sup>36</sup> Comment, *supra* note 33, at 78, 79.

<sup>37</sup> S. SCHAFER, *supra* note 18, at 16.

<sup>38</sup> Comment, *supra* note 33, at 78.

<sup>39</sup> S. SCHAFER, *supra* note 18, at 17.

<sup>40</sup> Wolfgang, *supra* note 1, at 225.

and obtaining indemnification for the victim among the ancient Babylonians (under the Code of Hammurabi);<sup>41</sup> the Hebrews (under Mosaic law);<sup>42</sup> the ancient Greeks;<sup>43</sup> the Romans;<sup>44</sup> and the ancient Germans.<sup>45</sup> It is clear that the origins of modern systems of criminal law are found in the victim's right to reparation for the wrong done to him.

In England, the king and his lords or barons required that the offender pay not only "bot" to the victim but a sum called "wite"<sup>46</sup> to the lord or king as a commission for assistance in bringing about a reconciliation between the offender and victim, and for protection against further retaliation by the victim.<sup>47</sup> In the Twelfth Century the victim's share began to decrease greatly. The "wite" was increased until finally the king or overlord took the entire payment.<sup>48</sup> The victim's right to reparation, at this point, was replaced by what has become known as a fine, assessed by a tribunal against the offender.<sup>49</sup> The disappearance of the concept of reparation to the victim and the complete shift to the state of control over the criminal law was apparently the result of a number of factors,

<sup>41</sup> S. SCHAFER, *supra* note 18, at 12. The Code of Hammurabi in some instances required payment amounting to thirty times the value of the damage caused by the crime. Individual compensation was largely related to property damages and did not apply to personal injuries.

<sup>42</sup> *Id.* at 11, 12. For example, if two men were involved in a fight and one hit and injured the other, the perpetrator was required to pay for the loss of the injured man's time. Also, the Law of Moses required fourfold restitution for stolen sheep and five-fold restitution for an ox.

<sup>43</sup> *Id.* at 11. The death fine is referred to by Homer. In the *Ninth Book of the Iliad*, Ajax, in reproaching Agamemnon's offer of reparation reminds him that even a brother's death may be appeased by a pecuniary payment, and that the murderer, having made such payment, may remain at home free.

<sup>44</sup> S. SCHAFER, *RESTITUTION TO VICTIMS OF CRIME* 4 (1960). In ancient Roman Law, Schafer tells us, a thief was required to pay double the value of the stolen object. In cases where the stolen property was found in the course of a house search, he was required to pay three times its value, and if he had resisted the search he was to pay four times its value. In cases of robbery the offender was required to pay four times the value of the stolen object.

<sup>45</sup> S. SCHAFER, *supra* note 18, at 15; Comment, *supra* note 33, at 78. Tacitus, reporting on the Germanic tribes in the first century, A.D., commented that "even manslaughter will be compensated for with a certain number of cattle or arms, and the whole household accepts this satisfaction."

<sup>46</sup> Comment, *supra* note 33, at 78.

<sup>47</sup> S. SCHAFER, *supra* note 18, at 18; S. SCHAFER, *supra* note 44, at 6, 7.

<sup>48</sup> S. SCHAFER, *supra* note 18, at 19; Wolfgang *supra* note 1, at 228.

<sup>49</sup> S. SCHAFER, *supra* note 18, at 19; Geis, *supra* note 2 at 159; Comment, *supra* note 33, at 79.

including desire on the part of the king and his lords to exercise stronger control over the populace and greed on the part of feudal lords who sought to gain the victim's share of composition.<sup>50</sup>

### B. The Reparation or Restitution Concept in the Modern Criminal Process

The ancient concept of composition or reparation to the victim has in more modern times become incorporated into the civil law of torts. Nevertheless, vestiges of the reparation concept are present in modern systems of criminal justice.

In the German legal system there is a process termed the "adhesive" procedure in which a civil claim for compensation by the victim of a crime can be dealt with in the criminal proceeding against the offender, in the discretion of the court. This procedure is apparently utilized in about half of the German states.<sup>51</sup>

In pre-Castro Cuba compensation to the victim was awarded during the criminal proceeding against the offender, and the government established a fund, containing the earnings of prisoners, fines and other contributions, from which the victim was paid.<sup>52</sup> The fund did not possess sufficient amounts to provide full compensation to all victims, and compensation was often paid on a partial basis. The government was subrogated to the right of the victim to sue the offender.

At the beginning of the nineteenth century in the United States several states had laws providing that a person convicted of larceny, in addition to his punishment, could be required to return to the owner an amount of money twice or three times the value of the stolen goods or, in the case of insolvency, to perform labor for the victim for a certain period of time.<sup>53</sup> In England there are presently statutes which empower magistrates' courts to order a person convicted of felony to pay compensation to the victim for the loss of property resulting from the crime and to order a person convicted of committing malicious damage to property to pay compensation for the damage.<sup>54</sup>

Reparation by the offender to the victim is required by criminal courts today chiefly in cases involving property crimes and principally in connection with the use of the suspended sentence or

<sup>50</sup> S. SCHAFER, *supra* note 18, at 5, 21; Comment, *supra* note 33, at 79-81; Wolfgang, *supra* note 1, at 228.

<sup>51</sup> S. SCHAFER, *supra* note 18, at 23, 106.

<sup>52</sup> Geis, *supra* note 2, at 160.

<sup>53</sup> S. SCHAFER, *supra* note 18, at 14; Wolfgang, *supra* note 1, at 229.

<sup>54</sup> CMND No. 1406, *supra* note 2, at 2.

probation.<sup>55</sup> Restitution is often imposed as a condition of probation,<sup>56</sup> and it is not uncommon for a large probation agency to supervise the collection of millions of dollars in restitution for crime victims each year.<sup>57</sup> The victim's civil remedy remains unaffected by the existence of the probation condition. If the victim obtains a judgment against the offender, payments made under the probation order can apparently be used to offset the civil damages awarded; also, a finding for the defendant in the civil action will not necessarily terminate his obligation to make payments as a condition of probation.<sup>58</sup>

In addition to formal procedures providing for restitution to the crime victim, informal methods have evolved which achieve the same end. For example, one of the prevalent methods used by professional thieves when they are arrested is to suggest to the victim that the stolen property will be restored if the victim refuses to prosecute.<sup>59</sup> Other types of prosecutions, as well, are terminated (or never initiated) as a consequence of an informal arrangement under which the criminal has agreed to make restitution. Embezzlement cases are a typical example of this.

### C. *Reparation or Restitution as a Means of Rehabilitating the Offender*

Stephen Schafer, the author of several works on restitution or reparation by the offender to his victim,<sup>60</sup> conducted a research study among inmates in the Florida correctional system several years ago to determine their attitudes on the subject. He surveyed inmates who had committed three types of offenses—criminal homicide, aggravated assault, and theft with violence. His study indicated<sup>61</sup> that the overwhelming majority of

those who had committed some form of criminal homicide wished that they could make some reparation. The author could detect no attitude, positive or negative, in most of the offenders in the other two categories. Schafer believes that the high percentage among criminal homicide offenders is at least partially due to the fact that many of those surveyed were soon to be executed for their crimes, and that their desire to make reparation might have been attributable to their proximity to death. In discussing the offenders sentenced for the other two types of offenses, Schafer said:

These offenders, at least many of them, did not appear to be intropunitive and thus could not accept their functional responsibility. Their orientation was such that they could not understand their wrongdoing in terms of social relationships, not even in terms of the victim. Their understanding of incarceration seemed limited to what they viewed as merely a normative wrong that has to be paid to the agencies of criminal justice, but to no one else.<sup>62</sup>

It is Schafer's position that the offender should be made to recognize his responsibility to the injured victim and that this can be accomplished through the process of reparation.<sup>63</sup>

Albert Eglash, a psychologist interested in corrections, has suggested that restitution, if properly used as a correctional technique, can be an effective rehabilitative device.<sup>64</sup> Since restitution requires effort by the inmate, it may be especially effective as a means of rehabilitating the passive-compliant inmate who adapts well to institutional routine without becoming trained for freedom and initiative or responsibility. Restitution as a constructive activity may contribute to an offender's self-esteem. Since restitution is offense-related, it may redirect in a constructive manner

<sup>55</sup> Wolfgang, *supra* note 1, at 229.  
<sup>56</sup> *See, e.g.* 18 U.S.C.A. §3651 (1969) and N.Y. CODE CR. PRO. §932(j) (McKinney 1958), which allow restitution to be required as a condition of probation.

<sup>57</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 35 (1967).

<sup>58</sup> Comment, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 183 (1967).

<sup>59</sup> Wolfgang, *supra* note 1, at 229 n. 21.

<sup>60</sup> *See* notes 18 and 44 *supra*; *see also* Schafer, *Victim Compensation and Responsibility*, 43 So. Cal. L. Rev. 55 (1970); Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243 (1965).

<sup>61</sup> In Schafer's study, positive or negative attitudes toward restitution were shown in only eighty-eight

cases. The findings in those cases were as follows:

	Posi- tive	Nega- tive	Total Number
Criminal Homicide	18	1	19
Aggravated Assault	12	10	22
Theft with Violence	26	21	47

S. SCHAFFER, *supra* note 18 at 82, 83.

<sup>62</sup> *Id.* at 83.

<sup>63</sup> *Id.* at 127; Schafer, *Restitution to Victims of Crime—an old correctional aim modernized*, 50 MINN. L. REV. 243, 249-50 (1965).

<sup>64</sup> Eglash, *Creative Restitution, Some Suggestions for Prison Rehabilitation Programs*, 20 AM. J. CORRECTION 20 (Nov.-Dec. 1958).

those same conscious or unconscious thoughts, emotions, or conflicts which motivated the offense. Further he believes that restitution can alleviate guilt and anxiety, which can otherwise precipitate further offenses. Eglash was of the view that, although a prison inmate can be encouraged to participate in a restitutional program, the inmate himself should decide to engage in the program if it is to have rehabilitative value.<sup>65</sup>

#### D. Reparation as a Philosophical Aim of Penology

The concept of reparation by the offender to the victim, which for many centuries had an established position in the punishment of crime, is largely disregarded in modern criminal law. The emphasis in current criminal law theory is on the reformatory or rehabilitative aspects of punishment while the victim's plight is ignored.<sup>66</sup> As Schafer has said, "It is rather absurd that 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 individual victim."<sup>67</sup>

What is needed is a fundamental rethinking of our philosophy concerning the purposes of the criminal law, penology and punishment, with a view toward developing a new formulation or synthesis of these aims.<sup>68</sup> Generally speaking, the aims of penology in recent years have been rehabilitation, protection of society through neutralization or removal of the dangerous offender from the community, deterrence and retribution. The concept of reparation could be added to this list as a separate aim or as a corollary of one or more of the other four. As has already been pointed out, reparation, if properly utilized in the correctional process, might contribute significantly to the rehabilitation of offenders.<sup>69</sup> Reparation as an element of the correctional process would provide the victim with the satisfaction or retribution which he seeks, both in the spiritual and in the material sense.<sup>70</sup>

In 1959 a White Paper entitled *Penal Practice in*

*a Changing Society* was presented to the British Parliament and was one of the factors which led the British government to adopt a victim compensation plan. The paper stated:

The basis of early law was personal reparation by the offender to the victim, a concept of which modern criminal law has almost completely lost sight. The assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society in its dealings with offenders increasingly emphasizes the reformatory aspects of punishment. Indeed in the public mind the interests of the offender may not infrequently seem to be placed before those of the victim.

This is certainly not the correct emphasis. It may well be that our penal system would not only provide a more effective deterrent to crime, but would also find a greater moral value, if the concept of personal reparation to the victim were added to the concepts of deterrence by punishment and of reformation by training. It is also possible to hold that the redemptive value of punishment to the individual offender would be greater if it were made to include a realization of the injury he had done to his victim as well as to the order of society, and the need to make personal reparation for that injury.<sup>71</sup>

It seems clear that the concept of reparation or restitution to the victim should be incorporated as a major aim of modern correctional theory and practice. However, the committee which produced the above document emphasized that the concept of reparation could be successfully incorporated into modern correctional programs only if the convicted offender's earnings can be raised. The problem of achieving wages for prison inmates commensurate with those prevailing in the outside world will not be resolved, they indicated, "until society as a whole accepts that prisons do not work in an economic vacuum, and that prisoners are members of the working community, temporarily segregated, and not economic outcasts."<sup>72</sup> Furthermore, no solution will be reached, "until the general level of productivity and efficiency of prison industry approximates much more closely to [*sic*] that of outside industry."<sup>73</sup>

<sup>65</sup> *Id.* at 21.

<sup>66</sup> S. SCHAFER, *supra* note 18, at 26; see Comment, *supra* note 3 and Note, *But What About the Victim?—The Forsaken in American Criminal Law*, 22 U. FLA. L. REV. 1 (1969).

<sup>67</sup> S. SCHAFER, *supra* note 18, at 27.

<sup>68</sup> CMND. No. 1406, *supra* note 2, at iv; Mueller, *supra* note 2, at 220.

note 2, at 220.

<sup>69</sup> Schafer, *supra* note 63, at 248.

<sup>70</sup> S. SCHAFER, *supra* note 18, at 113.

<sup>71</sup> CMND No. 1406, *supra* note 2, at 4, 5.

<sup>72</sup> HOME OFFICE, *PENAL PRACTICE IN A CHANGING SOCIETY*, CMND. No. 645, at 17 (1959); Geis, *supra* note 2, at 163.

<sup>73</sup> CMND. No. 645, *supra* note 72, at 17.

#### IV. PRISON INDUSTRIES AND WAGE-EARNING OPPORTUNITIES FOR PRISON INMATES

##### A. *History of Restrictions on the Development of Prison Industries and on the Use of Inmate Labor*

At various times in the history of this country schemes have been proposed to limit or prohibit the output of prison factories or to limit the use of prison labor. During periods when private businesses had difficulty in selling goods they exerted political influence to prevent prisons from engaging in enterprises seen as competitive.<sup>74</sup> During periods when unemployment was extensive, labor unions sought to restrict the use of convict labor for the reasons that goods produced by prisoners might undercut prices and wages of free labor, and that the employment of prisoners might decrease the number of jobs available to free labor.<sup>75</sup>

In the early 1800's goods produced by inmate labor were allowed to be sold on the open market, and the contract or lease system of hiring out prisoners to private industry was adopted in many states. The states realized income from the contract arrangements. This system flourished during the Civil War, as the labor of inmates was utilized in the production of goods for use in the war, and by 1867 the contract or lease system is said to have prevailed in most of the prison systems in the United States.<sup>76</sup> Some of these contractual arrangements resulted in exploitation of the prisoners and horrifying work conditions.<sup>77</sup>

From time to time during this period labor organizations fought for restrictions against the use of inmate labor. For instance, as early as 1823 cabinet makers in New York protested against the competition posed by prison labor.<sup>78</sup> During the depression following the Civil War, trade unionists and manufacturers began a concerted attack against the contract system. A National Anti-Contract Association was organized by manufacturers whose products competed with those made

by prisoners and, in 1886, at its meeting in Chicago, the association adopted a resolution in support of national legislation which would prohibit the sale of any convict-made goods outside the state in which such goods were manufactured.<sup>79</sup>

In 1929 Congress enacted the Hawes-Cooper Act,<sup>80</sup> the first of a series of laws restricting prison industries and the use of inmate labor. That act provided that, beginning January 19, 1934, convict-made goods (with certain exceptions)<sup>81</sup> transported into any state or territory of the United States should be subject to the operation of the laws of that state or territory to the same extent as if such goods had been produced within that state or territory. This empowered the states to prohibit the sale of such goods within their boundaries, including those entering the state through channels of interstate commerce, and to make it a criminal offense to engage in the sale of such goods. Through the lobbying efforts of such groups as the American Federation of Labor, nineteen states, by 1933, had adopted such statutes. It should be noted that the A.F.L. only opposed the sale of convict-made goods on the open market and did not object to the sale of such goods to state governmental departments and agencies.<sup>82</sup>

The state of Alabama had contracted to supply a private company with cotton cloth produced by prisoners and prison labor needed in the manufacture of shirts. The contract expired in 1933 and the state claimed it was unable to enter into a new agreement with the company because of the existence of the Hawes-Cooper Act and statutes of

<sup>79</sup> *Id.* at 84. Bulletins issued by the United States Bureau of Labor Statistics in 1905 and 1925 contained a thorough survey of both the private contract and the state controlled systems of utilizing convict labor which were then in existence. The reports presented evidence to the effect that industries operating under both types of systems, through false labeling and unfair advertising of products, brutal treatment of labor, etc., had engaged in unfair competition to the detriment of free industry and free labor. The 1925 report showed that, in 1923, prison industries (including both private contract and state-controlled industries) had employed 51,799 convicts and had produced a wide variety of goods, including garments, linens, shoes, furniture, brooms and brushes, rope and twine, farm products and coal. The value of these products was \$73,820,125. Of this total, goods of a value of \$44,843,355 had been sold on the open market and \$26,122,338 of the latter amount were sold outside of the state where produced. *Id.* at 84, 85.

<sup>80</sup> *Id.* at 90; 45 STAT. 1084 (1929).

<sup>81</sup> The exceptions included goods made by convicts on probation or parole, and commodities manufactured in federal correctional institutions for use by the federal government.

<sup>82</sup> Gill, *supra* note 76, at 91.

<sup>74</sup> THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 175 (1967); S. BATES, PRISONS AND BEYOND 96, 97 (1938).

<sup>75</sup> SMITH, A CURE FOR CRIME 91 (1965); Mohler, *Convict Labor Policies*, 15 J. CRIM. L. & C. 530, 568 (1925).

<sup>76</sup> Gill, *The Prison Labor Problem*, 157 ANNALS 83 (1931).

<sup>77</sup> S. BATES, *supra* note 74, at 96; *Correction in the United States: A Survey for the President's Commission on Law Enforcement and Administration of Justice*, 13 CRIME & DELIN. 1, 199, 200 (1967).

<sup>78</sup> Gill, *supra* note 76, at 83.



various states prohibiting the sale of convict-made goods. Alabama attempted to bring an original action in the Supreme Court against the nineteen states which had enacted statutes prohibiting the sale of convict-made goods, seeking a ruling declaring their statutes invalid as being violative of the interstate commerce clause of the Constitution. In 1933, in *Alabama v. Arizona*,<sup>83</sup> the Supreme Court declined to accept jurisdiction and denied leave to file the complaint without actually reaching the issues involved. However, in *Whitfield v. Ohio*,<sup>84</sup> the Court upheld a conviction under an Ohio criminal statute prohibiting the sale of convict-made goods, and, in so doing, indicated that the federal act was valid.

In 1935 Congress enacted the Ashurst-Sumners Act,<sup>85</sup> which made criminal the transportation of prison-made goods to states where the sale of such products was prohibited and required that prisoner-made goods in interstate commerce be so labeled. That statute was upheld as a valid exercise of the power of Congress in *Kentucky Whip & Collar Co. v. Illinois Central Railway Co.*<sup>86</sup> The Kentucky Whip Co. had brought an action of mandamus against the railroad company to compel shipment of convict-made goods through interstate commerce, and the ruling of the Supreme Court was in the railroad's favor. The Court, per Mr. Chief Justice Hughes, stated that Congress may use its power to regulate interstate commerce to protect free labor against the competition of convict labor.<sup>87</sup>

Congress passed an act in 1940<sup>88</sup> prohibiting the interstate transportation of convict-made goods for any purpose. Some items were excepted from the operation of this statute, such as agricultural commodities and commodities manufactured in state correctional institutions for use by that state or its political subdivisions, or manufactured in federal institutions for use by the federal or District of Columbia governments.

#### *B. Present Restrictions on the Development of Prison Industries and on the Use of Inmate Labor*

The three federal acts referred to above are still in effect,<sup>89</sup> and many of the states still have laws

<sup>83</sup> 291 U.S. 286 (1934).

<sup>84</sup> 297 U.S. 431 (1936).

<sup>85</sup> 49 STAT. 494 (1935).

<sup>86</sup> 299 U.S. 334 (1937).

<sup>87</sup> *Id.* at 352.

<sup>88</sup> 54 STAT. 1134 (1940).

<sup>89</sup> See 18 U.S.C. §§1761, 1762 (1964); 49 U.S.C. §60 (1964).

prohibiting the sale of convict-made goods, except for sales of goods made by inmates in correctional institutions of the state to the state or its agencies, institutions, or political subdivisions.<sup>90</sup> There is a federal statute requiring that in government contracts for the purchase of materials in the amount of \$10,000 or more there must be inserted a stipulation to the effect that no convict labor will be employed in the manufacture, production or furnishing of the materials to be supplied to the government under the contract.<sup>91</sup> A similar statute prohibits the Postmaster General from entering into a contract for the purchase of equipment or supplies manufactured by convict labor.<sup>92</sup> Federal laws also proscribe the use of convict labor in federally-financed highway construction projects<sup>93</sup> and in federal airport development projects.<sup>94</sup>

Federal Prison Industries is a government corporation<sup>95</sup> which conducts industrial operations, utilizing inmate labor, within the federal correctional system. It produces such items as canvas duffel bags and mail bags, brushes, metal furniture, and mattresses.<sup>96</sup> One statute regulating its operations provides that it may produce goods for consumption in federal correctional institutions or for sale to federal agencies only—that commodities shall not be produced for sale to the public in competition with private enterprise.<sup>97</sup> Federal Prison Industries is required to diversify, in so far as practicable, its industrial operations so "that no single private industry shall be forced to bear an undue burden of competition from the products of the prison workshops, and to reduce to a minimum competition with private industry or free labor."<sup>98</sup>

Political pressure exerted by private businesses and private business lobbies has had an effect in restricting the development of prison industrial programs and the use of inmate labor. Private interests persuade state officials and state agencies to buy materials from them instead of from prison industries. There have even been instances in which construction firms and labor unions have prevented prison labor from being used in construction of, and maintenance work on, prison buildings.<sup>99</sup>

<sup>90</sup> See, e.g., MASS. GEN. LAWS ch. 127 §67A (1965).

<sup>91</sup> 41 U.S.C. §35(d) (1964).

<sup>92</sup> 39 U.S.C. §2010 (1964).

<sup>93</sup> 23 U.S.C. §114 (b) (1964).

<sup>94</sup> 49 U.S.C. 1114 (c) (1964).

<sup>95</sup> 18 U.S.C. §4121 (1964).

<sup>96</sup> FEDERAL PRISON INDUSTRIES ANNUAL REPORT 8 (1967).

<sup>97</sup> 18 U.S.C. 4122 (a) (1964).

<sup>98</sup> 18 U.S.C. 4122 (b) (1964).

<sup>99</sup> CORRECTIONS, *supra* note 57, at 55.

*C. The Effects of Restrictions on Prison Industries and on the Use of Prison Labor on Inmate Productivity and Wages*

Today, largely as a result of restrictive legislation and political pressures, there are severe constraints upon the development of industrial work programs within correctional institutions. In some prisons agricultural or other outside work, such as work on public highways, is engaged in by substantial numbers of inmates. However, shops which presently operate within correctional systems are likely to be small and inefficient in their operations<sup>100</sup> and, on the whole, the vast majority of the approximately 220,000 inmates<sup>101</sup> of our penitentiaries at present have very little work to keep them occupied other than housekeeping and maintenance duties.

Even in the federal correctional system, which has a highly developed industrial program, only about thirty percent of the inmate population is employed in industry.<sup>102</sup> It is true, of course, that some inmates are needed for housekeeping.<sup>103</sup> But, even in the federal penitentiary in Atlanta, in which approximately fifty percent of the inmate population is engaged in industrial work, the remaining inmates work an average of only four hours per day at maintenance chores.<sup>104</sup> If the Atlanta situation is typical of the situation in American prisons generally, there is evidently not enough housekeeping activity in our prisons to keep a very high percentage of inmates occupied. Housekeeping and maintenance work assignments are often invented merely to occupy inmate time and crews assigned to such work are usually heavily overmanned. The period in which assigned work is expected to be done is generally several times the period actually needed to complete it.<sup>105</sup> Under these conditions there is little incentive to develop effective work habits or skills. The lack of sufficient industrial and other meaningful work for confined inmates has caused idleness to become, perhaps,

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 45 (Table 1).

<sup>102</sup> FEDERAL PRISON INDUSTRIES ANNUAL REPORT 8 (1967).

<sup>103</sup> This includes general maintenance and work in the prison kitchen or dining room or laundry room.

<sup>104</sup> Interviews With Inmates and Officials of United States Penitentiary, Atlanta, Georgia, 1966-68. While the author served as faculty supervisor of the Emory Law School Legal Assistance for Inmates Program.

<sup>105</sup> SMITH, *supra* note 75, at 31; CHALLENGE OF CRIME, *supra* note 74, at 176; CORRECTIONS, *supra* note 57, at 54.

the most prevailing characteristic of our prisons.<sup>106</sup>

Wages are generally not paid to inmates except those employed in industry or other prison enterprises operating on a profit basis. For those inmates who are fortunate enough to be employed in paying operations, wages are extremely low. Federal Prison Industries reported that in 1967 wages for inmates employed ranged from \$.14 to \$.35 per hour<sup>107</sup> depending upon the type of work involved, and federal prisoners assigned to work in industries earned an average of approximately \$40 per month.<sup>108</sup> The states are generally less generous than the federal government in payment of wages to inmates. A 1957 study in thirty-three states reported a daily rate of payment ranging from \$.04 to \$1.30, and the average was \$.34 per day.<sup>109</sup> Admittedly, this is an outdated study, but, in view of the fact that the present average wage in Federal Prison Industries, one of the most advanced prison industrial programs in the county, is little more than \$1.00 per day, it is unlikely that the average state prison wage has increased radically since 1957. It should be noted that a federal statute and some state laws permit a reduction in sentence as a form of payment for work, and these laws may allow credit for meritorious work whether performed in a prison industrial operation or in some other type of prison work activity.<sup>110</sup>

*D. The Effects of Restrictions on Prison Industries and on the Use of Prison Labor on the Rehabilitation Process*

Idleness is destructive. When a convicted offender is deprived of usefulness and responsibility while confined in prison, it is unreasonable to expect that he will live a useful and responsible life upon his release.<sup>111</sup> Yet, the typical inmate of a penitentiary does not learn to lead such a life; his confinement merely serves to provide him leisure time and associations which enable him to become

<sup>106</sup> CHALLENGE OF CRIME, *supra* note 74, at 176.

<sup>107</sup> FEDERAL PRISON INDUSTRIES ANNUAL REPORT (1967) 6. Prison inmates are not protected by the minimum wage provisions of the Fair Labor Standards Act, 29 U.S.C.A. §§201 *et. seq.* (1965). See *Huntley v. Gum Furniture Co.* 79 F. Supp. 110 (W.D. Mich. 1948).

<sup>108</sup> CHALLENGE OF CRIME, *supra* note 74, at 176.

<sup>109</sup> SURVEY, *supra* note 77, at 200. In the Massachusetts correctional system inmates working in industrial shops receive twenty-five to fifty cents per day. E. POWERS, THE BASIC STRUCTURE OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN MASSACHUSETTS 101 (1968).

<sup>110</sup> See, e.g., 18 U.S.C. §4162 (1964).

<sup>111</sup> SMITH, *supra* note 75, at 31.

more sophisticated in methods of engaging in criminal conduct.<sup>112</sup>

A follow-up on the arrest records of 6,907 offenders released from the federal correctional system between January and June, 1963, showed that forty-eight percent had been arrested for new offenses by June, 1965.<sup>113</sup> This high rate of recidivism among those who have been released after serving sentences in our penitentiaries is caused by a number of factors, including unemployment.<sup>114</sup> If inmates were given useful work while in prison and were encouraged to develop initiative, job skills and good work habits, they would be better equipped to obtain and keep employment upon their release from prison.

Based on his own first-hand experience, ex-inmate Nathan Leopold forcefully stated the case for enlarging and improving prison industrial programs and other work programs, in the following passage:<sup>115</sup>

[W]hat passes for work in some prisons borders on the ridiculous. Much of it is contrived *ad hoc*, merely to have something to keep the men busy. But the normal person will rebel against working at an obviously useless task. . . . Certainly such practices do nothing either to earning power of the inmates or to inculcate in him that self-discipline which makes for a good workman.

Even where factories of a kind exist, they usually lag years behind modern industrial development and so do little to prepare the inmate for remunerative employment upon his release. In part, this is due to the conflict in the market between goods manufactured in prison and those produced by free labor. The feeling on the part of labor organizations has always been that the products of prison labor compete unfairly with those of free labor . . . and so reduce the number of jobs available. And labor organizations form powerful pressure groups; prisoners are nobody's constituents. The result has been that more and more restrictions have been placed on what may be manufactured in prison and how it may be marketed. . . . [W]hile there may be justification for the complaint of free labor, it is certain that good work habits and industrial skills are both important elements in rehabilitation. If

we want our prisons to rehabilitate, some solution must be found which will permit modern manufacturing methods, requiring sound work skills, to be introduced into them. Much crime is caused, in part, by economic pressures; much recidivism can be traced to inability of the released prisoner to find work. A way must be found to increase the wage-earning potential of the prisoner.

Leopold also said that "If prison is to rehabilitate, among the things it must help to do is to buttress the individual's decision-making faculty; it must help to mature the individual, to make him self-reliant."<sup>116</sup> Sanford Bates, a former Director of the United States Bureau of Prisons and a leading penal reformer, has said that the greatest obligation of a prison is to instill in inmates the habit of diligence.<sup>117</sup> Through their labor inmates can "acquire habits of industry rather than indolence, self-reliance rather than dependence, and, if possible, be equipped with skill and training necessary to fit them for resumption of economic life on the outside."<sup>118</sup>

#### *E. Potential for Improvement of Prison Industries and Work Programs for Convicted Offenders*

Federal Prison Industries in 1967 produced and sold goods having a value of \$58,300,000 to the federal government and its agencies.<sup>119</sup> An average of over 5,000 federal inmates were employed during 1967,<sup>120</sup> and a total of \$2,600,000 was paid to inmate workers in industrial assignments. This represents an average of \$494 per inmate.<sup>121</sup> Although wages paid are quite low in comparison with wages paid in free industry, the overall success of Federal Prison Industries is encouraging.

The initiation of several recent training programs suggest that the opposition of labor unions and private businesses to the use of prison labor may not be as strong as in the past. At the federal penitentiary at Danbury, Connecticut, the International Ladies Garment Workers Union has established a program to train sewing machine repairmen on machines furnished by several local companies and provides a card to graduates of the program which aids them in finding employment upon release.<sup>122</sup> Also, a large electronics corporation

<sup>112</sup> *Id.* at 42.

<sup>117</sup> BATES, *supra* note 74, at 92.

<sup>118</sup> *Id.* at 93.

<sup>119</sup> FEDERAL PRISON INDUSTRIES ANNUAL REPORT 5 (1967).

<sup>120</sup> *Id.* at 4.

<sup>121</sup> *Id.* at 6.

<sup>122</sup> CORRECTIONS, *supra* note 57, at 33.

<sup>112</sup> INSTITUTE OF JUDICIAL ADMINISTRATION, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TENTATIVE DRAFT ON SENTENCING ALTERNATIVES AND PROCEDURES 72, 73 (1967).

<sup>113</sup> CHALLENGE OF CRIME, *supra* note 74, at 46.

<sup>114</sup> CORRECTIONS, *supra* note 57, at 32. Arnold, *A Functional Explanation of Recidivism*, 56 J. CRIM. L. C. & P.S. 212 (1965).

<sup>115</sup> Leopold, *What is Wrong with the Prison System?* 45 NEB. L. REV. 33, 51 (1966).

is conducting a vocational training program, financed by both federal and state funds, for a state corrections department.<sup>123</sup>

All states and the federal government have authorized the use of probation as a correctional technique.<sup>124</sup> Nationwide statistics show that in 1965 the number of felony offenders in adult felony correctional institutions was 221,597<sup>125</sup> while the number of felony offenders on probation in that year was 257,755.<sup>126</sup> Thus, probation is the correctional method used for most offenders today, and it is likely to be used even more in the future. Its strength and popularity as a means of dealing with the offender rest upon several reasons: (1) it enables the offender to maintain a job and to support himself and his family while satisfying his obligation to society; (2) it enables him to earn money with which to make reparation or restitution to his victim; (3) because of the first two reasons plus the fact that the offender is kept out of the "finishing school for crime" (the penitentiary), he is more likely to become rehabilitated through probation than through the use of any other correctional device; and (4) probation is considerably less expensive than incarceration. During the fiscal year 1964 the per capita cost of probation in the federal system was \$.59 per day, while the cost of housing a prisoner in a federal institution was \$6.35 per day. It should also be noted that, during that same period federal probationers earned \$62,000,000.<sup>127</sup>

The first "work-release" law was adopted in Wisconsin in 1913 for misdemeanants.<sup>128</sup> Since that time work-release programs have been initiated for felony offenders by a number of states,<sup>129</sup> including Wisconsin, and the federal government.<sup>130</sup> These laws allow carefully selected inmates to obtain employment in a community near the prison and to be released each day for the purpose of work

while being required to return to the prison at the end of the work day. Since work release was first authorized under federal law, in October, 1965, approximately three thousand federal inmates have participated in the program, earning more than \$2,500,000.<sup>131</sup> This correctional device provides incentive to inmates and has many of the advantages which have made the use of probation so widespread. Enough jobs may not be available near some correctional institutions restricting full implementation of the program. However, this problem can be solved by the enactment of laws such as the Montana statutes<sup>132</sup> which authorize selected penitentiary inmates to be confined in county jails and thereby allowed to participate in work-release programs in areas of the state where jobs are available.

#### V. HISTORICAL EFFORTS OR PROPOSALS TO COMBINE THE ELEMENT OF REPARATION BY THE OFFENDER WITH PROGRAMS FOR INCREASING THE PRODUCTIVITY AND EARNINGS OF PRISONERS

##### A. *Early Proposals and Efforts, Including the International Prison Congress Debates, 1878-1900*

Sir Thomas More suggested in 1516 in *Utopia* that restitution should be made by offenders to their victims and that offenders should be required to labor on public works.<sup>133</sup> The philosopher Herbert Spencer in the last century proposed that the prisoner's income, derived from prison work, should be utilized for making reparation to his victim and that he should be kept in prison until restitution is completed.<sup>134</sup>

At the International Prison Congress held in Stockholm in 1878 Sir George Arney, Chief Justice of New Zealand, and William Tallack, a British penal reformer, proposed a return in all nations to the ancient concept that the criminal offender should be required to make reparation to his victim.<sup>135</sup> Raffaele Garofalo raised the issue at the International Penal Congress held in Rome in 1885,<sup>136</sup> and it received consideration at the International Penal Association Congress held in Christiania in 1891 at which the following resolutions, among others, were adopted:<sup>137</sup>

<sup>131</sup> ATTORNEY GENERAL'S ANNUAL REPORT 41 (1967).

<sup>132</sup> MONT. REV. CODES §§95-2217-26 (Supp. 1969).

<sup>133</sup> SIR THOMAS MORE'S *UTOPIA* 23-24 (J. C. Collins Ed. 1904).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 23, 24; Geis, *supra* note 2, at 160.

<sup>136</sup> Schafer, *supra* note 18, at 24.

<sup>137</sup> SCHAFFER, *supra* note 18, at 114.

<sup>123</sup> *Survey, supra* note 77, at 201.

<sup>124</sup> *Id.* at 160.

<sup>125</sup> CORRECTIONS, *supra* note 57, at 45, Table 1.

<sup>126</sup> *Id.* at 27.

<sup>127</sup> DRAFT ON SENTENCING ALTERNATIVES, *supra* note 112, at 73.

<sup>128</sup> CORRECTIONS, *supra* note 57, at 11; WIS. STAT. ANN. §56.08 (1) (Supp. 1969).

<sup>129</sup> Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Maryland, Maine, Minnesota, Nebraska, New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Utah, and Washington. See CHALLENGE OF CRIME, *supra* note 74 at 176 and Rubin, *supra* note 31, at 168.

<sup>130</sup> 18 U.S.C.A. §4082 (1969). See Jobson, *Work-Release: A Case for Intermittent Sentences*, 10 CRIM. L. Q. 329 (1968); Carpenter, *The Federal Work-Release Program*, 45 NEB. L. REV. 690 (1966).

Modern law does not sufficiently consider the reparation due to injured parties.

Prisoners' earnings in prison might be utilized for this end.

At the Sixth International Penitentiary Congress, held at Brussels in 1900, the reparation issue was the subject of exhaustive discussion.<sup>138</sup> Professor Prins, of the University of Brussels, proposed that reparation to the victim should be taken into account as a condition of suspension of sentence or of conditional release after imprisonment.<sup>139</sup> Garofalo made a recommendation which was summarized as follows by the American delegate to the Brussels Congress in his subsequent report to the Congress of the United States:<sup>140</sup>

In the case of prisoners having property, steps should be taken to secure it, and to prevent illegal transfers. As to insolvent offenders, other methods of constraint must be sought. The minimum term of imprisonment being sufficiently high, its execution should be suspended in the case of offenders who beyond the cost of the process have paid a sum fixed by the judge as reparation for the injured party, exception being made in the case of professional criminals and recidivists. The State Treasury would gain, since it would not only be spared the expense of supporting the prisoner, but would be reimbursed for all other expenses. The delinquent would be punished and the injured party reimbursed.

In the case of serious offenses in which imprisonment is deemed necessary, Garofalo would make parole after a certain time of imprisonment depend on the willingness of the prisoner to reimburse his victim from his earnings saved in prison.

He favors a public fund to assure reparation for those who cannot obtain it in any other manner.

The members of the Brussels Congress were unable to agree upon any specific proposal to require reparation or to apply earnings of prisoners to that end. Finally they passed a resolution merely re-adopting a mild resolution of a previous prison congress urging reforms of procedure to increase the power of the victim of crime to obtain compensation through his civil remedies.<sup>141</sup> It has been said that the Brussels conclusion "effectively managed to bury the subject of victim compensation as a significant agenda topic at international

penological gatherings from thenceforth to the present time."<sup>142</sup>

#### *B. Kathleen Smith's Cure for Crime: The Self-Determinate Sentence*

In 1965, Kathleen Smith, who had some experience as a British penal official,<sup>143</sup> advocated the adoption of what she termed the "self-determinate sentence" as a means of compensating victims of crime and rehabilitating offenders. Under her scheme the length of sentence an offender served would be determined primarily by the effort he himself made to pay restitution to his victim.<sup>144</sup> His sentence would be set in terms of money owed instead of in terms of time as under present systems. The offender's earnings while in prison would be utilized to make restitution and, as payments were made, the sentence would be reduced.<sup>145</sup>

Sentences for crimes involving victims would include: (1) compensation due to the victim for physical or psychological damage sustained and (2) supplementary fines to be levied at the court's discretion.<sup>146</sup> In cases of homicide a set scale would be used to determine the amount of compensation due to the surviving spouse and to each child or dependent of a given age.<sup>147</sup> In homicide cases in which there are no surviving dependents, fines would be imposed by the court.<sup>148</sup> In offenses involving property the offender's sentence would be based primarily on the value of the property damaged or stolen. Sentences where the crimes involved no victims would consist entirely of discretionary fines.<sup>149</sup>

The court would direct what part, if any, of the sentence could be paid from private funds and what part would have to be paid from earnings while in prison.<sup>150</sup> The value of stolen property voluntarily restored might be deducted from the amount owed under the sentence. However, such voluntary restoration would not operate to automatically discharge an offender, because fines would also be levied in such cases.<sup>151</sup>

In cases involving an offender who is too aged or

<sup>142</sup> Geis, *supra* note 2, at 160.

<sup>143</sup> She served two years as Assistant Governor of Holloway Prison.

<sup>144</sup> SMITH, *supra* note 75, at 13.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 14.

<sup>147</sup> *Id.* at 59.

<sup>148</sup> *Id.* at 59, 60.

<sup>149</sup> *Id.* at 15.

<sup>150</sup> *Id.* at 14.

<sup>151</sup> *Id.* at 15.

<sup>138</sup> *Id.* at 24.

<sup>139</sup> S. BARROWS, REPORT ON THE SIXTH INTERNATIONAL PRISON CONGRESS, BRUSSELS, 1900 at 25, 26 (1903).

<sup>140</sup> *Id.* at 23, 24.

<sup>141</sup> *Id.* at 26.

ill to work, the court would be free to impose a term of imprisonment instead of a sentence in monetary terms.<sup>152</sup> All other offenders would be required to work full-time while in prison. They would be required to join labor unions and would be paid full union rates.<sup>153</sup> From their weekly earnings an amount would be deducted as compensation for the victim. As soon as the entire sentence (the entire amount of compensation and fine due) is paid, the offender would be discharged and released from further confinement.<sup>154</sup> Amounts would be deducted from wages in the following order of priority:<sup>155</sup>

1. money for prison board and lodging
2. national insurance contributions
3. income tax withholdings
4. pocket money (a limit would be placed on this amount)
5. compulsory savings (the purpose of this would be to insure that the offender has money upon his eventual release from prison)
6. contributions to compensation to the victim
7. contributions to fine, if any, imposed by the sentencing court

Monies paid for compensation would be poured into the victim compensation fund, from which the victim would receive his compensation.<sup>156</sup>

The idea underlying the self-determinate sentence is that, since the length of time the offender would spend in prison would depend largely upon his own efforts, he would be motivated to work and improve his wage-earning capabilities, and that the development of such attitudes would contribute to the rehabilitative process.<sup>157</sup> The Smith proposal deserves consideration in the development of any proposal to combine the element of reparation by the offender to the victim with a program for increasing the level of earnings of prison inmates.

#### VI. SUGGESTIONS FOR REFORM: A PROPOSAL FOR INCORPORATING THE ELEMENT OF REPARATION INTO THE CORRECTIONAL PROCESS AND INCREASING THE PRODUCTIVITY AND EARNINGS OF INMATES

##### *A. Increasing the Productivity of Prison Industries and the Level of Inmate Earnings*

No large-scale plan to incorporate the element of reparation by the offender to the victim into

current correctional practice is likely to succeed unless earnings of prison inmates are raised substantially. In order to raise wages it is necessary to add new prison industries and work programs and increase the size and productivity of those already in existence. This is probably not possible unless we take certain steps: (1) repeal or modify the present federal and state statutory limitations which have for many years stifled the development of prison industries; (2) increase the market for prison-made or prison-grown goods and products; and (3) obtain the cooperation of labor organizations and private business and industry.

The first step has the support of the recent President's Commission on Law Enforcement and Administration of Justice which recommended that "State and Federal Laws restricting the sale of prison-made products should be modified or repealed."<sup>158</sup> If these restrictions are removed prison products can be sold on the open market in competition with those produced by private enterprises.

Even under the present restrictions there are alternative means by which the market for prison products can be increased. State prison systems are generally allowed to sell goods and products to public agencies or institutions, and Federal Prison Industries is allowed to sell its products to federal agencies. At present only a small fraction of the potential of the public market has been exploited. Federal Prison Industries could produce many items needed by other federal agencies which are currently purchased from private business. This proposal is equally applicable to state prison industries and state agencies. It was reported by the President's Commission that few state colleges or universities or local school systems make an appreciable portion of their purchases from state prisons, and there have been few sales of prison-made goods to municipalities.<sup>159</sup>

Massachusetts has a statute which provides that the state commissioner of correction "shall, so far as possible, cause such articles and materials as are used in the offices, departments or institutions of the commonwealth and of the several counties, cities and towns to be produced by the labor of prisoners. . . ."<sup>160</sup> However, there are no sanctions to implement the commendable policy of this provision. To overcome this weakness it is suggested that the state appoint a group of trustees

<sup>152</sup> *Id.* at 24.

<sup>153</sup> *Id.* at 97.

<sup>154</sup> *Id.* at 13, 14.

<sup>155</sup> *Id.* at 18, 19.

<sup>156</sup> *Id.* at 14, 15.

<sup>157</sup> *Id.* at 28, 37-38.

<sup>158</sup> CHALLENGE OF CRIME, *supra* note 74, at 176.

<sup>159</sup> See, e.g. CORRECTIONS, *supra* note 57, at 55.

<sup>160</sup> MASS. GEN. LAWS ch. 127 §53 (1965).

or directors for their state prison industrial programs. Their written consent would be required for the approval of any public contract involving more than a predetermined amount of money, such as five hundred dollars. If any such contract is awarded to private industry without the required prior approval, the contract would be voidable. It should also be required, by statute, that any contract for the construction of a public building include a provision that a certain number of workers in the project must be prisoners or convicted offenders on probation or parole or in work-release programs. Both civil and, where appropriate, criminal prosecutions should be available against the public officials and private businessmen responsible for the failure to comply with these statutory requirements.

If each prison or prison system could specialize in the manufacture or production of one line or a few lines of goods, this might lead to greater efficiency and, perhaps, lower prices for the goods produced. To make possible such specialization it is suggested that states enter into interstate compacts or agreements<sup>161</sup> for the pooling and interchange of prison-produced materials and goods. Each state would be required to buy products from the pool for use by public agencies and institutions. The prisons of each of the states in the compact would, of course, be required to purchase and use products from the interstate pool. A central clearing house and accounting office would have to be established. A board or committee comprised of representatives of member states would have the responsibility of resolving differences concerning the pricing of products.

These proposals are likely to arouse varying degrees of opposition from business and organized labor. The state should strive to cushion the economic impact on those businesses likely to be affected. Perhaps tax incentives or advantages, both state and federal, could be given to any private corporation willing to utilize prison labor or to establish an industrial plant or other enterprise at a prison. Utilization of skilled union members in overseer and instructional positions in these prison industries might serve to minimize union opposition.

Thus far we have been focusing our attention only on prison industries. Inmates should also be given farm work and work on highways, public forests and lands and public works of various

kinds.<sup>162</sup> All inmates who are able to work should be paid, if possible, and even those engaged in prison housekeeping operations should be given a wage, even if small in amount.

### *B. Compensation to the Victim of Crime*

The federal government and every state should have laws to provide compensation to victims of crime. Such legislation could be similar to one or more of the compensation plans already in existence but should be broader in scope, including property crimes as well as crimes of violence or crimes involving personal injury. The victim should receive compensation from the state regardless of whether the offender is apprehended or convicted.

A victim compensation fund should be established in each state and by the federal government. All restitution payments by offenders would be deposited in the compensation fund, and the legislature would probably have to contribute additional monies from time to time. Compensation payments to victims would be determined by a specific administrative agency and paid directly from the fund. In short, it is submitted that compensation should be awarded to the victim in a proceeding separate from the criminal proceeding against the offender and that the award made to the victim should not depend upon the outcome of the criminal proceeding against the offender.

### *C. Incorporation of the Concept of Reparation Into the Criminal Process*

Reparation for the crime should be made part of the criminal proceeding against the offender. During the sentencing the trial judge should decide how much the convicted offender should pay as reparation or restitution for his crime. The criminal trial judge would also set a term of imprisonment as the sentence for the offender as under the present system. The defendant would be allowed to appeal from the reparation decision of the court as well as from the judgment and sentence.

A number of factors should be considered by the judge in determining how much money the offender owes as reparation for his crime. The basis for the

<sup>161</sup> Such compacts are authorized, with the consent of Congress, under U.S. CONST. Art. 1, §10, cl. 3.

<sup>162</sup> See e.g. 18 U.S.C. § 4125 (a) (1964) provides that the Attorney General may make inmates available to the heads of various heads of various federal departments for constructing or repairing roads; clearing, maintaining and reforesting public lands; and building levees. Massachusetts has a similar statute. See MASS. GEN. LAWS ch. 127 § 83 (1965).

determination should include medical bills for physical injuries or the value of property lost or destroyed. If a separate administrative hearing has already awarded compensation to the victim, the amount of that award could be taken into consideration by the judge in setting the reparation penalty, but he should be free to make his own determination. He should consider the physical pain and mental anguish suffered by the victim, and loss of earning capacity, regardless of whether the tribunal making the compensation award is allowed to include these items. Arguably, the inclusion of these items may contribute to the rehabilitative process by making the offender more fully aware of the harm he has caused. Ultimately perhaps some sort of system for judging the harm done, such as workmen's compensation schedules, will have to be devised.

There are some crimes in which there is a victim who has been injured in some way, but in which the victim himself has precipitated the criminal act on the part of the offender.<sup>163</sup> This is particularly true

<sup>163</sup> CMND No. 1406, *supra* note 2, at 12; Schafer, *supra* note 18, at 5, 54, 84; Childres, *Compensation for Criminally Inflicted Personal Injury*, 50 MINN. L. REV. 271, 273 (1965).

One criminologist, Mendelsohn, has classified victims in accordance with the degree of their guilty contribution to the crime, as follows:

1. The completely innocent victim
2. The victim with minor guilt and the victim due to his ignorance
3. The victim as guilty as the offender and the voluntary victim (an example of this would be a case of double suicide)
4. The victim more guilty than the offender (including the "provoker" victim)
5. The "most guilty victim" and the "victim who is guilty alone" (including an aggressive attacker who is killed by another in self defense)
6. The "simulating victim" and the "imaginary victim" (this category includes children and senile, hysterical or paranoid persons)

SCHAFER, *supra* note 18, at 42.

There are at least two possible approaches to determining whether and to what extent a convicted offender should pay reparation to his victim, in cases in which the victim provoked the offender into the crime or in some other way precipitated the criminal act. Both are taken by analogy from the law of torts. In some states if the plaintiff, the victim of negligence, was himself negligent and the negligence contributed to the accident he is completely barred from recovery, even though his negligence was very slight in comparison to that of the other party. In other states, in the same situation, the amount of damages which the plaintiff would have been entitled to had he not been negligent is reduced through a process of comparing the amount or degree of negligence attributable to the defendant with the amount or degree of negligence attributable to the plaintiff. States in the first category are said to follow the "contributory negligence" rule, while those which use the second approach apply what is known as the "comparative

in homicide and assault cases where the victim may have provoked the offender into committing the crime. Victim provocation should be taken into consideration by the judge in assessing the offender's penalty and by the administrative agency in determining the amount of compensation to be paid to the victim.

In some types of crimes there is no victim other than society in general.<sup>164</sup> Included in this group are such offenses as treason, public drunkenness, prostitution, homosexuality between consenting adults, abortion and certain narcotics offenses. In trials of cases involving such offenses there would be no reparation issue.

The reparations penalty would not replace or make inappropriate the traditional penalty of imprisonment for a term of years. As the offender who has been "sentenced" to make reparation makes his payments, whether from prison earnings, earnings while on probation, or from some other source, the length of his sentence should be correspondingly reduced. The judge who sentenced him should have the power to reopen the case and reconsider and reduce the sentence. The court could be given completely discretionary power to thus reduce sentences, or its power could be based on a statutory table which would contain a sliding scale requiring that the sentence be reduced by a given percentage whenever the offender shows that he has paid a given number of dollars in reparation payments and the amount paid represents a given percentage of the total amount owed. The decision on whether to parole an inmate would be based, in large measure, on the effort shown by him in making reparation payments while in prison. Also, restitution could be made one of the conditions of continuing parole.

#### *D. Methods of Enabling Offenders to Raise Money For Making Reparation Payments*

The offender should be allowed to make reparation payments from any personal funds or assets which belong to him at the time of his conviction and sentence. If he has money or assets but refuses to pay reparation, the state should be allowed to attach or garnish such assets and pay them into

negligence" doctrine. Either one of these approaches could be utilized by analogy in assessing reparation or compensation to victims of crime. The first approach might be termed the "contributory criminality" doctrine while the second method could be called the "comparative criminality" approach.

<sup>164</sup> See, in this connection E. SCHUR, *CRIMES WITHOUT VICTIMS* (1965).



the state compensation fund. If the offender is employed and his potential for rehabilitation is good his sentence should be suspended either without<sup>165</sup> or with probation.<sup>166</sup> One of the conditions of suspension or probation should be that he make restitution payments.

From the prison inmate's earnings each week a certain percentage would be deducted and paid as reparation into the state victim compensation fund. Also, payments could be made from these earnings to the inmate's own family or dependents. Periodic statements would be given the inmate to show him how much of the total reparation owed to the victim has been paid at any given time. If it is impossible for a particular prison work program to pay wages or very high wages to inmate workers, a system might be devised to give an inmate credits against any debt of reparation owed to the victim, perhaps rated at the market value of his work.<sup>167</sup>

Work release should be used more widely for inmates. An inmate in such a program would be enabled to work at full civilian wages and thereby accelerate his schedule of reparation payments and obtain an early reduction of his sentence.

## VII. CONCLUSION

The government in Great Britain, in 1964, pledged its support for full employment of prisoners and decided that prison-made goods should

<sup>165</sup> More frequent use of suspension of sentence without probation is recommended in the MODEL SENTENCING ACT 27 (1963).

<sup>166</sup> *Id.* at 22; MODEL PENAL CODE § 7.01 (Proposed Official Draft, 1962).

<sup>167</sup> Mueller, *supra* note 2, at 221.

be allowed to compete on the open market.<sup>168</sup> On December 14, 1968, there was an article in the *New York Times* to the effect that Lord Stonham, a British Minister of State at the Home Office, appealed to industrialists to enter into business partnerships with prisons, by setting up shops within prisons and providing jobs to inmates. The article concluded as follows:

In such arrangements, the company would make a profit while the prisoners would be provided with work in conditions close to those in normal industry. Eventually, they would receive wages comparable to those in outside industry.

Lord Stonham said British unions had offered full support of the proposal.<sup>169</sup>

If the British government is willing to engage in reform to this extent it would seem that raising prisoner wages and increasing the productivity of prison industries is not a wholly impracticable goal.

It is suggested that the ancient concept of reparation by the offender to the victim be included as an element of our present-day correctional process, and that this concept be made workable through raising the wages of inmates. Such a program would help to insure that the victim of crime is compensated for the wrong done to him. It would provide monies which could be used for the care of the family and dependents of the offender, and the offender would be able to accumulate personal savings which would be useful to him upon his ultimate release from confinement. The program suggested could have significance and impact in terms of rehabilitating offenders and restoring them to useful lives in society.

<sup>168</sup> SMITH, *supra* note 75, at 90, 91.

<sup>169</sup> N.Y. Times, Dec. 14, 1968, p. 50, col. 3 (city ed.).