AUSTRALIA
The Law Book Co. of Australasia Pty Ltd.
Sydney : Melbourne : Brisbane

CANADA
The Carswell Company Ltd.
Toronto

GREAT BRITAIN
Stevens & Sons Ltd.
London

INDIA
N. M. Tripathi Private Ltd.
Bombay

NEW ZEALAND
Sweet & Maxwell (N.Z.) Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

U.S.A.
Quadrangle Books Inc.
Chicago

RESTITUTION TO VICTIMS OF CRIME

by

DR. STEPHEN SCHAFER

Reader in Criminology, University of Maryland

Published under the auspices of

THE INSTITUTE FOR THE STUDY AND TREATMENT OF DELINQUENCY

LONDON

STEVENS & SONS LIMITED

CHICAGO

QUADRANGLE BOOKS INC.

First published in 1960 by Stevens & Sons Limited of 11 New Fetter Lane in the City of London and printed in Great Britain by The Eastern Press Ltd. of London and Reading

Published in the U.S.A. by Quadrangle Books Inc. Chicago 1

Library of Congress Catalog Card No. 60–15709

CONTENTS

PREFACE

"The guilty man lodged, fed, clothed, warmed, lighted, entertained, at the expense of the State in a model cell, issued from it with a sum of money lawfully earned, has paid his debt to society; he can set his victims at defiance; but the victim has his consolation; he can think that by taxes he pays to the Treasury, he has contributed towards the paternal care, which has guarded the criminal during his stay in prison."[1] These were the bitter and sarcastic words of Prins, the Belgian, at the Paris Prison Congress in 1895, when during a discussion of the problem of restitution to victims of crime, he could no longer contain his indignation at various practical and theoretical difficulties raised against his proposals on behalf of the victim.

His was not the first voice claiming recognition and respect for the victim's injury, and it was by no means the last. Adherents to the classic criminal law, just as much as modern criminologists, increasingly voiced their concern; but, in fact, although the legislation of some States has, in one form or another, accepted the principle of restitution (sometimes called compensation, damages, etc.) "the unfortunate victim of criminality was habitually ignored"[2] right up to the present time. "Attention was frequently called to the hardship which ensues to a person, who loses his property by some criminal act, and who has to be content, if the offender be brought to justice, with no other satisfaction for his loss than can be afforded by the punishment of the offender by the State, as one guilty of a public wrong, but not required to make restitution for the private loss which his action has caused."[3]

For this reason I was glad to try to comply with the commission of the Home Office to work on the problem of restitution, which the Italian Garofalo considered "as one of the most important problems in penal

[1] The Paris Prison Congress, 1895, Summary Report (London).
[2] William Tallack, *Reparation to the Injured; and the Rights of the Victims of Crime to Compensation* (London, 1900), pp. 10–11.
[3] E. Ruggles-Brise, *Report to the Secretary of State for the Home Department on the Proceedings of the Fifth and Sixth International Penitentiary Congresses* (His Majesty's Stationery Office, London, 1901), p. 51.

1

THE COMMON PAST OF RESTITUTION AND PUNISHMENT

THE title of this chapter does not necessarily involve a *petitio principii*. A common past does not, of course, imply a common present and future, but neither the adherents of restitution nor its opponents can be indifferent to the fact that restitution to victims of crime is an ancient institution, has had an established position in the history of penology, and for a long period was almost inseparably attached to the institution of punishment.

The historical origin of restitution, in a proper sense, the so-called system of "composition," lies in the Middle Ages, and can mainly be found in the Germanic common laws.

Earlier sources do not offer clear information.[1] There are some sporadic references. The death fine in Greece is referred to more than once in Homer[2]; thus, in the 9th Book of the Iliad, Ajax, in reproaching Achilles for not accepting the offer of reparation made to him by Agamemnon, reminds him that even a brother's death may be appeased by a pecuniary fine, and that the murderer, having paid the fine, may remain at home, free among his own people. Not only in the time of the Greeks, but in still earlier ages, when the Mosaic Dispensation was established among the Hebrews, traces of restitution are apparent. "That Dispensation, in its penal department, took special and prominent cognizance of the rights, and claims of the injured person, as against the offender."[3] For injuries both to person and property, restitution or reparation in some form was the chief and often the only element of punishment. Among Semitic nations the death fine was general, and it continued to prevail in the Turkish Empire.[4]

Indian Hinduism required restitution and atonement: he who atones is forgiven. In India, in the Sutra period, the settling of compensation was treated as a royal right: for murder the offender was obliged by the king to compensate the relatives of the deceased or the king or both. In the

[1] K. Jordan, "Adhäsionsprozess" in *Rechtslexikon für Juristen aller teutschen Staaten enthaltend die gesamte Rechtswissenschaft*, edited by Weiske (Berlin, 1839), Vol. I, pp. 122–123.

[2] Richard R. Cherry, *Lectures on the Growth of Criminal Law in Ancient Communities* (London, 1890), p. 10. [3] Tallack, *op. cit.*, pp. 6–7. [4] Cherry, *op. cit.*, p. 11.

time of Manu, compensation was regarded as a penance: hence it could be given to the priests. Islam also enjoins restitution and atonement.[5]

These sources, as well as, for example, the Law of Moses, which required fourfold restitution for stolen sheep and fivefold for the more useful ox,[6] or the Code of Hammurabi,[7] which was notorious for its deterrent cruelty and in some cases of criminal offences demanded even thirty times the value of the damage caused, suggest that the obligation of payment imposed on the criminal was enforced not in the interests of the victim, but rather for the purpose of increasing the severity of the criminal's punishment. Where the offender against society paid for his crimes with "an eye for an eye, a tooth for a tooth," or in a similar way, he paid as an object of the victim's vengeance, not in compensation for the victim's injury.

In ancient Roman law, in spite of the fairly close relationship between criminal law and civil law, it is not easy to get reliable information concerning the position of restitution in criminal law. Indeed, according to the Law of the Twelve Tables, in the case of theft, the thief, who was not caught in the act of committing the theft, was obliged to pay double the value of the stolen object. In cases where the stolen object was found in the course of a house-search, he was to pay three times the value, or four times the value if he resisted the execution of the house-search. Again he was to pay four times the value of the stolen object if he had taken it by robbery.

In the case of slander also, the insulting person had to pay. The sum to be paid was decided by the magistrate according to the rank of the victim, his relation to the offender, the seriousness of the offence, and the place it was committed. Generally, in case of any *delictum* or *quasi delictum* the offender was obliged to pay damages, and in exceptional cases the specially assessed value of the article damaged or lost as well.

But despite these requirements, the 48th and 49th Books of the Digest (*libri terribiles*) do not contain any clear reference to restitution or compensation. At best, there are some vague passages which indicate a presumption that in certain cases the judge might be competent to consider the civil claim within the scope of the criminal procedure.[8]

5 M. J. Sethna, *Society and the Criminal* (Bombay, 1952), p. 218; M. J. Sethna, *Jurisprudence* (2nd ed., Girgaon-Bombay, 1959), p. 340.
6 Margery Fry, *Arms of the Law* (London, 1951), p. 124.
7 About 2200 B.C.
8 Herman Ortloff, *Der Adhäsionsprozess* (Leipzig, 1864), p. 6; Karl Binding, *Grundriss des Deutschen Strafprozessrecht* (Berlin, 1904), p. 115; Adolf Schönke, *Beiträge zur Lehre vom Adhäsionsprozess* (Berlin and Leipzig, 1935), p. 5.

It was only recognised towards the end of the Middle Ages that the concept of restitution was closely related to that of punishment,[9] and it was temporarily merged in penal law. In several systems, for example under the early American law, a thief, in addition to his punishment, was ordered to return to the injured party three times the value of his stolen goods, or in the case of insolvency, his person was placed at the disposal of the victim for a certain time.[10] In the Germanic common laws a further refinement transformed retaliation into the system of composition, by which even murder could be compounded for between the wrongdoer and the victim or the nearest relative of the slain.[11] The "law of injury" seems to have been ruled by the idea of reciprocity.[12]

The change from vengeful retaliation to composition was part of a natural historical process. As tribes settled down, reaction to injury or loss became less severe. Compensation or composition served to mitigate blood feuds, which, as tribes settled and became more or less stable communities, only caused endless trouble: an injury once committed would start a perpetual vendetta.[13] Composition offered an alternative which was in many ways equally satisfactory to the victim. In Germanic law compensation provided a touch of self-humiliation, which appeased the instinct for revenge felt by the victim.[14]

Composition combined punishment with damages. For that very reason it could not be applied to public crimes, but only to private wrongs[15]; and this was also the reason for its being in the first period of its practice, subject to private compromise. This feature supports the view that the penal law of ancient communities, in which crimes were met by restitution, was not a law of crimes, but a law of torts.[16] The injuring party offered a certain monetary satisfaction or something of economic value to the injured party, and if the latter accepted it, then revenge was satisfied and the "criminal procedure" was complete.

This monetary satisfaction was due entirely to the victim or his

9 In German laws the word "punishment" (*Strafe*) first appeared in sources of the fourteenth century: Herman Conrad, *Deutsche Rechtsgeschichte* (Karlsruhe, 1954), Vol. I, p. 69.
10 E. Ruggles-Brise, *op. cit.*, pp. 51–52.
11 Cherry, *op. cit.*, p. 10.
12 Bernhard Rehfeldt, *Die Wurzeln des Rechtes* (Berlin, 1951), p. 11.
13 Harry Elmer Barnes and Negley K. Teeters, *New Horizons in Criminology* (New York, 1944), pp. 400–401.
14 Hans von Hentig, *Punishment, its origin, purpose and psychology* (London, 1937), p. 215.
15 Barnes and Teeters, *op. cit.*, p. 401
16 Irving E. Cohen, "The Integration of Restitution in the Probation Services" (*Journal of Criminal Law and Criminology*, Vol. XXXIV, No. 5, January–February 1944, Chicago), p. 315.

family, and served as a requital of the injury. The amount to be handed over was dependent on the importance and extent of the injury. The Germanic common laws were objective: composition was determined by the effect of the wrongful act, and not by the offender's subjective guilt. The amount of compensation varied according to the nature of the crime and the age, rank, sex and prestige of the injured party: "a free-born man is worth more than a slave, a grown-up more than a child, a man more than a woman, and a person of rank more than a freeman." [17]

It is difficult to mark accurately the start of new developments, since the community already exercised a certain collective control over the extent of compensation. The bridge leading to the emergence of state criminal law had as a support the system of composition, and the settlement of the amount to be paid by periodical tribal assemblies provides an early example of judicial proceedings. Soon afterwards some laws (*leges barbarorum*) stipulated the amount of compensation, concerning which an intricate tariff was elaborated. Every kind of blow or wound given to every kind of person had its price.[18] From the many differences in the amount of damages and the value of the victim, there grew up such a complicated system of regulations, that the earliest codified law of many peoples, particularly that of the Anglo-Saxons, is largely devoted to this subject.[19] Presumably *Friedlosigkeit*, and in other places "outlawry," which represented the consequence of a failure of composition, developed in connection with these tariff regulations. For instance, if the wrongdoer was reluctant to pay or could not pay the necessary sum, he was declared as *friedlos* or "outlaw": he was to be regarded as ostracised, and anybody might kill him with impunity.[20]

Since that time the influence of state power over composition has gradually increased. The community claimed a share from the compensation given to the victim, and as the central power in a community grew stronger, so its share increased.

"A share is claimed by the community or overlord or king, as a commission for its trouble in bringing about a reconciliation between the

17 Ephraim Emerton, *Introduction to the History of the Middle Ages* (Ginn, 1888), pp. 87–90; Barnes and Teeters, *op. cit.*, p. 401; Edwin H. Sutherland, *Principles of Criminology* (4th ed., Chicago, 1947), p. 345.
18 Frederick Pollock and Frederic William Maitland, *The History of English Law* (2nd ed., Cambridge, 1898), Vol. II, p. 451.
19 Barnes and Teeters, *op. cit.*, p. 401.
20 Pollock and Maitland, *op. cit.*, Vol. II, p. 451; Rustem Vámbéry, *Büntetöjog* (Budapest, 1913), Vol. I, p. 68; Pal Angyal, *A magyar büntetöjog tankönyve* (Budapest, 1920), Vol. I, p. 18.

parties, or, perhaps, as the price payable by the malefactor either for the opportunity which the community secures for him of redeeming his wrong by a money payment, or for the protection which it affords him, after he has satisfied the award, against further retaliation on the part of the man whom he has injured." [21] One part of the composition was due to the victim (*Wergeld, Busse, emenda, lendis*). The other part was due to the community or the king (*Friedensgeld, fredus, gewedde*). [22] In Saxon England, the Wer or payment for homicide and the Bot, the betterment [23] or compensation for injury, existed alongside the Wite or fine paid to the king or overlord.[24]

By this twofold payment the offender could buy back the peace that he had broken. The double nature of the payment shows clearly the close connection between punishment and compensation.[25]

Before long the injured person's right to restitution grew less and less, and, after the dividing of the Frankish Empire by the Treaty of Verdun, was gradually absorbed by the fine which went to the state. One payment again took the place of the double payment, but now the king or overlord took the entire payment. After the ancient system of law, discretionary money penalties took the place of the old wites, while the bot gave way to damages, assessed by a tribunal.[26] As the state monopolised the institution of punishment,[27] so the rights of the injured were slowly separated from the penal law: composition, as the obligation to pay damages, became separated from the criminal law and became a special field in civil law.[28]

21 Heinrich Oppenheimer, *The Rationale of Punishment* (London, 1913), pp. 162–163.
22 Karl Binding, *Die Entstehung der öffentlichen Strafe in germanisch-deutschen Recht* (Rektoratsrede, Leipzig, 1908), p. 32; Angyal, *op. cit.*, Vol. I, p. 18.
23 Pollock and Maitland, *op. cit.*, Vol. II, p. 451.
24 Fry, *op. cit.*, p. 32.
25 A. B. Schmidt, *Die Grundsätze über den Schadensersatz in den Volksrechten* (Leipzig, 1885), pp. 9–16; Binding, *op. cit.* (*Entstehung der öffentlichen Strafe*), p. 34.
26 Pollock and Maitland, *op. cit.*, Vol. II, pp. 458–459; L. J. Hobhouse, G. C. Wheeler, N. Ginsberg, *The Material Culture and Social Institutions of the Simpler Peoples* (London, 1915), pp. 86–119.
27 Wolfgang Starke, *Die Entschädigung des Verletzten nach deutschem Recht unter besonderer Berücksichtigung der Wiedergutmachung nach geltendem Strafrecht* (Freiburg, 1959), p. 1.
28 J. Makarewicz, *Einführung in die Philosophie des Strafrechts auf entwicklungsgeschichtlicher Grundlage* (Stuttgart, 1906), p. 269; Rehfeldt, *op. cit.*, p. 17; Conrad, *op. cit.*, pp. 220–221.

2

THE DECLINE OF RESTITUTION

"IT was chiefly owing to the violent greed of feudal barons and mediaeval ecclesiastical powers that the rights of the injured party were gradually infringed upon, and finally, to a large extent, appropriated by these authorities, who exacted a double vengeance, indeed, upon the offender, by forfeiting his property to themselves instead of to his victim, and then punishing him by the dungeon, the torture, the stake or the gibbet. But the original victim of wrong was practically ignored." [1] After the Middle Ages, restitution, kept apart from punishment, seems to have been degraded. The victim became the Cinderella of the criminal law.[2]

The decline in the penological importance of restitution gained theoretical support from the endeavour to find different bases for penal and civil liability. The multitude of theories which distinguished between civil and penal liability showed, generally, two trends. According to the subjective view, penal liability results from the deliberate infringement of law, something with which civil liability cannot be connected, since civil liability results from a less deliberate opposing of the will of the state.[3] According to the objective view, however, penal wrong follows from some kind of direct injury to the victim which exists in itself, quite apart from any statement by the victim, something with which civil illegality cannot be connected, the latter being an indirect injury solely dependent on the victim's statement.[4] Generally speaking, since the disappearance of the period of composition the conventional view is that a crime is an offence against the state, while a tort is an offence against individual rights only.[5]

1 Tallack, *op. cit.*, pp. 11–12.
2 H. F. Pfenninger, quoted by Thomas Würtenberger, *Uber Rechte und Pflichten des Verletzten im deutschen Adhäsionsprozess* (Festschrift, Prof. Dr. H. F. Pfenninger, Strafprozess und Rechtsstaat) (Zürich, 1956), p. 193.
3 This theory fails to take into consideration the criminal offences committed by negligence. On the other hand, there are certain kinds of deliberate infringement which give rise to civil liability only.
4 This theory fails to consider that infringement of the civil law can exist independently of the statement of the victim. On the other hand, *volenti non fit injuria* has some application to criminal law.
5 Karl Binding, *Normen* (3rd ed., Berlin, 1916), Vol. I, pp. 433–479; Sutherland, *op. cit.*, p. 14.

However that may be, the system of composition only surrendered after a struggle; even after the German Busse-penal-law there are records of victims who, in spite of the common character of the criminal law, claimed besides public punishment indemnification and personal satisfaction as well. The connection between the crime and restitution (*continentia causae*) could fall into decline, but not be completely disregarded, even after the introduction of the procedure of inquisition, where the theoretical and practical distinctions between the demands of penal law and the victim are at their most acute. Court practice in the sixteenth and seventeenth centuries (*Gerichtspraxis des gemeinen Rechts*) made possible the so-called adhesive procedure (*Adhäsionsprozess*), which opened the way for the judge of the criminal case to make a decision, according to his discretion, on the claim of the victim for restitution within the scope of the criminal proceedings.[6] Penal codes of the nineteenth century also seemed to give some support to the idea of restitution in the form of the adhesive procedure, which was enacted in about half the laws of the federal German states. A few years later, however, the situation got worse, and even in the German law of criminal procedure was kept alive only by the force of tradition.[7]

Advocates of restitution, however, were not looking on with folded arms. In 1847 Bonneville de Marsangy outlined a definite plan of reparation [8]; and later on, several international Prison or Penitentiary Congresses enthusiastically advocated re-establishing the rights of victims of crime.

At the International Prison Congress held in Stockholm in 1878, two speakers, Sir George Arney, Chief Justice of New Zealand, and William Tallack, proposed a more general return to the ancient practice of making reparation to the injured.[9] Raffaelo Garofalo raised the question at the International Prison Congress held in Rome in 1885 [10]; and the problem was also discussed at the International Prison Congress held at St. Petersburg in 1890. A year later the question was again considered by the International Penal Association at its Congress held at Christiania in 1891. At that Congress the following conclusions were adopted:

6 Schönke, *op. cit.*, p. 11: Hans Heinrich Jescheck, "Die Entschädigung der Verletzten nach deutschem Strafrecht" (*Juristenzeitung*, No. 19–20, October 17, 1958, Tübingen), p. 592.
7 Schönke, *op. cit.*, pp. 28–42; Jescheck, *op. cit.*, p. 592.
8 Sutherland, *op. cit.*, p. 576.
9 Tallack, *op. cit.*, p. 3.
10 Barrows, *op. cit.*, p. 23.

(a) modern law does not sufficiently consider the reparation due to injured parties;
(b) in the case of petty offences, time should be given for indemnification; and
(c) prisoners' earnings in prison might be utilised for this end.[11]

At the International Prison Congress held in Paris in 1895, the fifth of a quinquennial series, attended by penologists such as Berenger (France), Bertillon (France), Tarde (France), Vidal (France), Bonneville de Marsangy (France), Krohne (Germany), Mittermaier (Germany), Foinitsky (Russia), Beltrany-Scalia (Italy), Garofalo (Italy), Prins (Belgium), Van Hamel (Holland), Guillaume (Switzerland), and others, the problem of restitution to victims was exhaustively discussed. The problem was one of the questions raised officially on the Agenda. Question 4 of Section I of the Agenda asked: "Is the victim of a delict sufficiently armed by modern law to enable him to obtain indemnity from the man who has injured him?"

At this Congress it was felt that modern laws were particularly weak on this point and, in some respects, the laws in different countries were harder on the victim than the offender.[12] The Italian penologists in particular had long urged that this matter should be discussed, and Garofalo and Pierantoni dealt with it in an impressive manner. It was also the subject of six valuable papers, by Cornet, Flandin, Pascaud, Poet, Prins and Zucker, which insisted that compensation or restitution should be made by offenders to the persons they had injured.[13] The Paris Prison Congress discussed the subject thoroughly, but without arriving at any clear or satisfactory conclusion. For that reason they decided to consider the matter further at the next Congress. The final resolutions of the Paris Congress were similar in principle to those passed in 1891 at Christiania, but it was decided to express no decided conclusion "in the absence of sufficient evidence," and the problem was adjourned to the Brussels Congress five years later.

The question was duly included in the programme of the next Prison Congress, the Sixth International Penitentiary Congress, held at Brussels in 1900. Section I of the First Question was: "What would be, following the order of ideas indicated by the Congress of Paris, the most practical

[11] *Mitteilungen der Internationale Kriminalistische Vereinigung* (3 Jahrg., Berlin, 1892), pp. 121, 236, 265, 281.
[12] *Report of the Delegates of the United States to the Fifth International Prison Congress* (Washington, 1896), p. 27.
[13] The Paris Prison Congress, *op. cit.*, pp. 12–13.

means of securing for the victim of a criminal offence the indemnity due him from the delinquent?"[14] On this occasion the problem of restitution was again the subject of exhaustive discussion by the most respected penologists of the time; but the question, which the Paris Congress confessed itself unable to solve, came no nearer to being solved at Brussels.

The *rapporteur* of the question, the Belgian Prins, pressed in vain for a decisive vote on the matter, which, he said, had been discussed in successive Congresses with zeal and almost with passion for fifteen years. At the end of the Brussels Congress the delegates were not able to do more than reaffirm the Paris vote: in favour of a reform of procedure, which would facilitate civil action.[15]

The connection between restitution and punishment has still not been re-established. The theory developed at the end of the Middle Ages that crime is an offence exclusively against the state had severed that connection. The concept of punishment remained untouched by the civil concept of restitution.[16] Even the adhesive procedure[17] was almost reduced to theoretical importance only. It did not, after all, fit with harmony into the changed system.[18] Even where legal systems introduced this or a similar procedure, and thus permitted the victim to claim restitution within the scope of criminal procedure, at the same time they gave the court the right to put aside the decision on the question of restitution, if it considered that civil interests might hinder the effectiveness of penal interests. The institution *Busse*, still found in some legislations, is officially regarded as having no connection with punishment, and as civil indemnification only.[19]

Attention has frequently been called to the fact that the separation

[14] *Actes du Congrès Pénitentiaire International de Bruxelles, Août 1900* (Bruxelles et Berne, 1901), Vol. II, pp. 3–153; Barrows, *op. cit.*, p. 19.
[15] E. Ruggles-Brise, *op. cit.*, p. 51.
[16] Starke, *op. cit.*, pp. 1–2.
[17] This term "adhesive" (*Adhäsion*) was first applied in 1788 by Eschenbach (*Von den Einteilungen und Quellen des Criminalprozesses, published in Plitt: Repertorium für das peinliche Recht, 1790* (Vol. II, p. 159)), to embrace the terms "denouncing procedure" (*Denuntiationsprozess*) and "mixed procedure" (*gemischter Prozess*); and has come to denote the connection between the criminal procedure and civil claim for damages (the victim used to declare his joining with the following words: *se processual quoad suum interesse privatum adhaerere velle*).
[18] Alexander Graf zu Dohna, *Die Stellung der Busse im reichsrechtlichen System des Immaterialgüterschutzes* (Berlin, 1902), §§ 1–7.
[19] Starke, *op. cit.*, p. 5; Adolph Schönke-Schroder, *Kommentar zum StGB* (8th ed., Berlin, 1957), § 13; the legal nature of the *Busse* used to be and perhaps still is strongly disputed. There are three theories: (a) the theory of punishment, (b) the theory of damages, and (c) the combined theory, representing the intermediate position, which holds that the *Busse* is the material and idealistic indemnification of the victim, interwoven with the idea of private vengeance.

of these civil and penal functions is a serious defect in the modern system of fines, which go only to the state, while the injured victim suffers all the hardships of the civil process. However, there is still a tendency to remove the question of restitution or compensation more and more from criminal procedure, palpably in the desire to avoid representation of the victim along with the public prosecution.[20] The victim, so the argument runs, should not be interested financially in the outcome of the prosecution, and concern for the victim should not disturb the criminal-political purposes.[21] History suggests that growing interest in the reformation of the criminal is matched by decreasing care for the victim.

[20] Hentig, *op. cit.*, pp. 216–217.
[21] Carlo Waeckerling, *Die Sorge für den Verletzten im Strafrecht* (Zürich, 1946), p. 15.

PART TWO

SURVEY OF FOREIGN LEGISLATION

18

RECENT DEVELOPMENTS

THE foregoing brief survey of foreign legislation on the problem of restitution to victims of crime may be compared with the position in England, where restitution tends to be embodied in the sphere of civil law.

The Probation of Offenders Act, 1907, empowered the Bench to order compensation up to the sum of £10. This limit was subsequently raised by the Criminal Justice Act, 1948. According to subsection (2) of section 11 of the latter Act, a court, on making a probation order or an order for the conditional or absolute discharge of an offender, may order the offender to pay such damages for injury or compensation for loss, as the court thinks reasonable; this compensation is without limit if ordered by a superior court, but in the case of an order made by a court of summary jurisdiction, the damages and compensation together must not exceed £100.

This seems to be the total extent to which restitution to victims of crime is dealt with in England within the scope of criminal procedure. In all other respects it retains its civil character.

As compensation and punishment are dealt with separately, various proposals have been put forward for improving the system of restitution to victims of crime in England. In recent years even the idea of state compensation has been urged in Great Britain, it being suggested that the state should pay compensation to the victims of personal violence on a scale similar to that under the Industrial Injuries Scheme.[1] In urging the acceptance of this scheme, popular attention was drawn to the case of a man who was blinded as the consequence of a criminal offence and because of the injury was awarded compensation of £11,500. Considering the fact that the two assailants of this man were ordered to pay him five shillings weekly, " the victim will need to live another 442 years to collect the last instalment." Asking for " better help " for the victims of crime is, like so many other modern ideas in criminal law and criminology, not a new notion at all. Nevertheless, when the idea was recently raised, under the impressive title of " justice for victims," it met with

1 Margery Fry, " Justice for Victims " (*The Observer*, London, July 7, 1957).

a favourable reception, and on several occasions was discussed in the House of Commons. The House appeared to be sympathetic to the idea of greater compensation to victims of crime, and such objections as were raised arose from the nature of the practical difficulties in the way of such a proposal rather than from objections to the idea in principle.

This revival of the idea of state compensation prompted a recent American " Round Table " article [2] in which several individual reactions were published containing not only practical criticism of the proposal, but also objections to the principle of state compensation.

Inter alia, concern was expressed about the abandonment of individual responsibility through the introduction of a system of state compensation, and " the sociological decadence that could come from that kind of thinking might be far worse than the economic consequences." Nevertheless, the practical benefits were also mentioned, and the " greater interest on the part of the public in the matter of law enforcement " if the institution of state compensation were to be adopted,[3] was pointed out.

Another commentator " in casting about to find something helpful to say " about the proposal of the state compensation system found that " the history of the methods we have used to take care of unfortunates " might be a helpful background.[4] The same writer suggested relating the punishment of criminals to their making reparation for the harm done by them, believing this might serve the rehabilitation of the criminals.[5]

Among other practical difficulties raised was that it would be hard to protect the public from fraudulent claims. Another argument against this form of state insurance was that: " the insured victim hardly fits the picture of the unfortunate object of pity . . . he simply calls up his insurance company and lets them worry about it." [6]

The question was also raised as to whether it might not be true that " insurance robs the insured of a good deal of the otherwise present vigilance toward the danger," and reference was made to " nonchalant victims " who take risks confident that their insurance will make good any resulting loss. It can be equally well argued that to restrict compensation to " violent " crime, as the late Margery Fry suggested, is to make an arbitrary and unnecessary distinction.[7]

[2] " Compensation for Victims of Criminal Violence, A Round Table," *Journal of Public Law*, Vol. 8, No. 1, pp. 191–253, Atlanta, 1959.
[3] *Ibid.* p. 202, Fred E. Inbau.
[4] *Ibid.* p. 204, Frank W. Miller.
[5] *Ibid.* p. 209, Frank W. Miller.
[6] *Ibid.* pp. 209–210, Henry Weihofen.
[7] *Ibid.* pp. 229–230, Gerhard O. W. Mueller.

Other difficulties raised were, *inter alia*, the possible reluctance of the victim to testify against his assailant in a criminal trial, the difficulty of establishing new criteria to determine when a victim or his survivors should be eligible for state compensation, the practice of accepting pleas of guilty to a lesser offence than that originally charged, and the measure of damages for non-material injuries.[8]

Nevertheless, these or similar technical difficulties should not prove insuperable ones. While the possibility of " sociological decadence " cannot be ignored, the penal reform should not be made dependent upon the question of insurance interests. It is more reasonable to ask how far the state compensation system might be able to help the fight against crime and the reform of the criminal.

In England, the Home Secretary's White Paper on " Penal Practice in a Changing Society," presented to Parliament in February 1959, drew attention to the fact that " the assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive " and " suggests . . . a reconsideration of the position of the victims of crime."

Thereafter, a Private Member's Bill was presented to the House of Commons, entitled " The Criminal Injuries (Compensation) Bill," [9] " to compensate those injured by certain criminal offences against the person; to provide for their dependants and for the dependants of those killed by criminal acts; and for the purposes connected therewith."

According to this Bill, where a person suffers personal injury or death as a result of being the victim of an offence, then such person and the dependants of such person shall be entitled to the same benefits as are provided for insured persons and the dependants of insured persons in the National Insurance (Industrial Injuries) Act, 1946. Where, however, an injured or deceased person through his own misconduct was partly responsible for his personal injury or death the whole or part of any benefit due to the injured person or to his dependants may be withheld.

The Bill proposed that any question as to whether an injured or deceased person was the victim of an offence, or as to whether the injured or deceased person was partly responsible for his personal injury or death through his own misconduct, should be determined by the insurance officer. The Bill gave a list of the offences concerned, these included capital murder, murder, manslaughter, assault occasioning

[8] *Journal of Public Law, op. cit.*
[9] R. E. Prentice, M.P., Bill 33, November 11, 1959.

actual bodily harm, and certain offences under the Malicious Damage Act (1861), the Offences against the Person Act (1861), the Explosive Substances Act (1883), the Larceny Act (1916), the Firearms Act (1937), and the Sexual Offences Act (1956).

Some general theoretical considerations against a state compensation system, can be found in Parts 4 and 5 of this book. The acceptance by the state of a certain degree of responsibility for damage or injuries suffered by victims of crime might have unfortunate consequences in so far as it would relieve criminals of some of their financial obligations, and lead to carelessness on the part of their potential victims. It would also perhaps be unwise to abandon the possibility of awarding punitive damages against criminals. In practice, however, there is but slight danger of the prospect of compensation inducing undue carelessness on the part of potential victims, who would be unlikely to be complacent victims of crime through the prospect of receiving state compensation for any harm they might undergo. State compensation would merely redress the balance, at present so heavily tilted against the victim.

Before inaugurating any state compensation system, it would be necessary to hold an investigation into the relationship between criminals and their victims. The author of this work submitted a proposal for such a type of research, which is under consideration, though we still lack "victim statistics." "Vulnerability components" and "categoric risks"[10] seem to be applicable even more to victims than criminals. "Individuals display a wide variety of weakness components," especially people who fall into categories prone to be victims of crime. "There are risks of being a victim of aggressions or being injured by criminal behaviour," but we have little knowledge of these risks. There seems to exist a close relationship between the doer and the sufferer,[11] though this belief is based only on uncorrelated statistics. It is difficult to devise a scheme of insurance against crime, such as a system of state compensation, without reliable statistics as to the various sorts of risks different sorts of people are likely to be.

It should be noted that the proposed Bill allows the causal connection between crime and injury, and between criminal and victim, to be decided by the insurance officer. Both are difficult problems requiring specialised legal and criminological knowledge, and the proposed insurance officer ought therefore to be armed with the proper experience.

10 Walter C. Reckless, *The Crime Problem*, pp. 2–4, 26–27 (New York, 1955).
11 Hans von Hentig, *The Criminal and His Victim* (New Haven, 1948).

PART FOUR

PUNISHMENT AND RESTITUTION

19

THE RESTITUTIVE CONCEPT OF PUNISHMENT

IF one looks at the legal systems of different countries, one seeks in vain a country where a victim of crime enjoys a certain expectation of full restitution for his injury. In the rare cases where there is state compensation the system is either not fully effective, or does not work at all; where there is no system of state compensation, the victim is, in general, faced with the insufficient remedies offered by civil procedure and civil execution. While the punishment of crime is regarded as the concern of the state, the injurious result of the crime, that is to say, the damage to the victim, is regarded almost as a private matter. It recalls man in the early days of social development, when, left alone in his struggle for existence, he had himself to meet attacks from outside and fight alone against fellow-creatures who caused him harm. The victim of today cannot even himself seek satisfaction, since the law of the state forbids him to take the law into his own hands. In the days of his forefathers, restitution was a living practice, and "it is perhaps worth noting, that our barbarian ancestors were wiser and more just than we are today, for they adopted the theory of restitution to the injured, whereas we have abandoned this practice, to the detriment of all concerned."[1] "And this was wiser in principle, more reformatory in its influence, more deterrent in its tendency, and more economic to the community, than the modern practice."[2]

The number of victims may be assumed to have increased at the same rate as criminals,[3] but there has been no improvement in the victim's lot to compare with the advances which have been made in criminology, and certainly not to compare with the amelioration of the lot of the criminal which has taken place. Criminal law, among people living at a low cultural level, is considered primitive, not because

[1] Barnes and Teeters, *op. cit.* p. 401.

[2] Tallack, *op. cit.* pp. 6–7.

[3] In England and Wales, in 1958, in certain offence groups, the number of indictable offences known to the police was 626,509, but offences cleared up were 285,462. (Criminal Statistics, England and Wales, 1958; H.M. Stationery Office, London, 1959, p. 8.) "Nothing is known statistically of those who are victimised by larceny, burglary, robbery, or even the confidence game" (Hans von Hentig, *The Criminal and His Victim*, New Haven, 1948, p. 399).

criminal justice is practised by the victim himself as a recompense for his injury, but because the state takes no part in it and no agency of social control against crime is in existence. Since, however, the time when the state took over from the victim the task of preserving law and order and keeping the peace, concern for the previous performer of this task (*i.e.*, the victim), with regard to restitution for injuries received from a criminal act, has been lacking. "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."[4]

Crime, against which the state undertakes and endeavours to protect the public, is a disturbance of some legally protected interest, usually an interest which the state protects because current thought considers such an interest to be worthy of protection. Almost all the ancient crimes, apart from political ones, involve the injury of one individual by another, though more recently created crimes frequently injure no person directly. This disturbance of a legally protected interest is regarded as crime, that is to say as a violation of law and order, whenever the violator of public security is necessarily also an offender against an individual victim. Crime gives rise to legal nexa not only between the violator and society, but between the violator and his victim. Crime upsets the balance not only between the criminal and society, but between the criminal and the individual victim.

Material damage may be *lucrum cessans* or *damnum emergens*; non-material damage comprises degradation, physical suffering and grief. While the state soon visits punishment on the breaker of its criminal laws, the individual victim of a crime is, as a result of the distinction between civil and criminal wrong, left to seek redress as best he may through the usually inadequate civil channels. Even where the law allows civil redress to be awarded to the victim concurrently with the passing of sentence for the crime, it lays down that the criminal trial is to take precedence over and in no way to be impeded by the *Adhäsionsprozess* or similar proceedings.[5]

The intention of the present survey is not to give an account of the centuries-old dispute about the difference between criminal and civil wrongs; still less to argue this much-disputed question, which is one of

[4] Sutherland, *op. cit.*
[5] Würtemberger, *op. cit.* p. 205.

those problems of the legal sciences in which the spectacular multitude of opinions have for so long failed to agree. The problem of restitution is concerned with how far legal systems try to separate criminal and civil wrong, both theoretically and practically. The overwhelming majority of provisions concerning restitution are based on the principle of distinguishing between criminal and civil wrong. Such systems reject the unitary view of wrong, according to which wrong is simply a breach of the law, it being immaterial what sort of law is transgressed.

Not only does the law treat criminal and civil wrongs separately in a quantitative sense but also qualitatively. This would mean not only to the "contempt of law" (*Missachtung*), but also the disturbance of the general sense of justice (*Sicherheitsgefühl*),[6] but as an addition only and not as a qualitative difference.

It is obvious that claims for damages may result not only from illegal acts regarded as criminal offences, but also from many other acts which, while giving rise to an action for damages, according to contemporary thought are not considered by the state as being sufficiently undesirable to merit penal prosecution. For such non-penal actions the civil law remedies are sufficient. The law, however, makes no distinction in awarding damages for torts which are also crimes and torts which are not. The present general view concerning restitution is that, no matter what the cause of damage may be, the claim for restitution, even if it was caused by crime, is a civil matter only and not to be connected with the fate of the criminal case. The fact that a tort may also be a crime is recognised only to the extent that some legal systems allow suit for restitution for injuries caused by crime to be brought within the scope of the criminal procedure. No distinction is made, however, between penal and civil damages; there is but a single concept of damages. This may be why the victim's claim for restitution is regarded as something intruding into the criminal procedure, if it can be found there at all.

At present, the only satisfaction the victim can get from criminal justice is the punishment inflicted upon the criminal. Criminal justice applies punishment not only to maintain law and order in society and to protect the interests of the community, but, in addition, to conciliate the victim by the state's "bloodless" punishment of the guilty party.[7] Even though it may not be quite true that "in present society the demand

[6] A. Merkel, "Zur Lehre v.d. Grundeinteilungen des Unrechts und seiner rechtl. Folgen" (*Kriminalistische Abhandlungen*, 1), pp. 1–75.
[7] Hentig, *op. cit.* p. 217.

for vengeance is, to be sure, somewhat general,"[8] there is probably no one who would not demand vengeance in certain circumstances.[9]

It was not inappropriate when classic Roman jurists described punishment as "satisfaction." Indeed, the victim not only expects the indemnification of the damage caused to him, but tends to think of criminal justice as nationalised vengeance and so claim satisfaction as well. The victim expects moral reproach of the crime, and in addition he expects a certain degree of injury to be inflicted upon the offender in order to satisfy his desire for revenge. Moreover, because it is believed that there is an unalterable demand for vengeance which, if it cannot be satisfied by legal, will be satisfied by illegal means, it is asserted that if the criminal is not punished, the victim will take the law into his own hands in the form of either self-redress or lynch-law.[10] This is rendered, if anything, more likely by the victim's realisation that the only satisfaction he is likely to get for his injury is the punishment inflicted upon the criminal.

Different theorists assign irreconcilable aims and purposes to punishment, viewing as they do the problem from different angles. When it comes to the question of how to satisfy the victim, however, almost all theorists hold essentially the same views. Among theories of the purpose and legal ground of punishment hardly one would omit counterbalancing the effect of the crime on the victim. Punishment satisfies our feelings of revenge against those who attack us,[11] and, *inter alia*, seems to be the expression of an instinct for vengeance. 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, to endeavour to compensate the victim for his encroached or destroyed right by offering him some spiritual satisfaction. Amid the involved and interminable discussion of the purpose of punishment it is generally accepted that one of the tasks of punishment is 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 adjusted the punishment roughly to the quality and quantity of the victim's injury.

[8] Sutherland, *op. cit.* p. 375.
[9] F. C. Sharp and M. C. Otto, "A Study of the Popular Attitude towards Retributive Punishment" (*Intern. Jour. Ethics*, 20: 341–357, 438–453, April–July 1910).
[10] Sutherland, *op. cit.* p. 375.
[11] Nathaniel F. Cantor, *Crime and Society* (New York, 1939), p. 393.

More recent criminology, however, directed attention away from the gravity of the injury towards the personality of the criminal. The German *Täterstrafrecht* (criminal law of the criminal) aimed at complete disregard of the crime and adjusted the punishment only to the personality of the criminal. This somewhat distorted revival of Lombroso's extreme and unacceptable theory wished entirely to separate punishment from satisfaction to the victim. Even constructive criminology, however, may lead to the failure of vengeance or reprisal. The tendency of modern criminology, after considering the importance of the crime itself, is to allow an increasingly dominant part to the possible reform and rehabilitation of the offender. In accordance with this development the victim's injury may lose importance, and on top of his lack of material restitution, spiritual restitution to the victim may also show a tendency to decrease.

It is in any case arguable whether satisfaction to the victim would accord with society's present moral and cultural level, if it consisted only of vengeance in some form or other. The question also arises as to whether harm to the criminal in fact involves restitution to the victim for his injury. The basis of criminal responsibility is the causing of harm. There fall on the criminal, as the causer of harm, certain consequences which are destined to destroy, to weaken or to direct in the right way the power to cause harm, and in that way to endeavour to prevent the recurrence of crime or at least to try to restrain the likelihood of it. The criminal is, however, often also the causer of injury and damage to an individual victim; this can hardly be compensated by mere revenge or satisfaction exacted by punishment, whether or not such punishment be restrained by the tenets of modern criminology.

The state, when dispensing criminal justice, does not fight against abstract legal phantoms but against the acts of living human beings. The object of punishment is not merely to grant citizens the pleasure of participating in a ritual restoration of law and order. The modern criminological approach to punishment will not tolerate retribution, but it must not neglect the victim's interests: the *tout comprendre* does not necessarily mean the *tout pardonner*. Punishment must lose its retributive character and lean towards giving the criminal a chance to work his passage back to society. One way of doing so would be to make the criminal's sentence in some way beneficial to his victim.

A thoughtful consideration of the place of restitution in criminal law calls for more than speculation about the elusive boundary between criminal and civil wrongs. It would be well to begin by abandoning

traditional concepts concerning the "state's interest" in the suppression of crime.[12] In spite of theoretical distinctions, criminal law and civil law seem to be more integrated than ever before. It is unnecessary to distinguish between civil damages and punishment in effecting restitution. Restitution is not intended for the recovery of a debt but for the reparation of a criminal injury.

The state enforces criminal justice in order to maintain law and order, in the collective interests of its citizens. The individual victim is a part of the community, and for that reason criminal proceedings are, in the last analysis, applied in the interests of this individual victim as well as in the interests of the community as a whole. It therefore seems senseless to exclude the victim from the settlement of a criminal case, and to regard him merely as the cause of, or reason for, the criminal case. Besides the abstract protection of law and order, and the reform of the criminal, the victim's claim to restitution is the third element of punishment. In the retributive sense restitution exists in punishment even at present, but true restitution could develop if spiritual satisfaction were replaced by material.

[12] *Columbia Law Review, op. cit.* Vol. XXXIX, No. 7, pp. 1186–1187.

20

THE PUNITIVE CONCEPT OF RESTITUTION

IF it were realised that spiritual satisfaction is implicit in any system of punishment, a new conception of the purpose of punishment might arise, causing a strengthening of the restitutive character of punishment on the one hand, and imbuing restitution with a punitive character on the other.

Most modern criminological literature urges that a greater part be allotted to restitution in the operation of the criminal law. If the state sets a norm of conduct, it should, besides punishing breaches of this norm, see that where it is transgressed, any injury caused is repaired. That restitution deserves a place in criminal procedure should be evident if only because, without the crime which is being tried, the victim would not have suffered the damage for which he seeks restitution. Another reason for allowing claims for restitution to victims of crime a place in criminal procedure is that it would save time, expense and the unnecessary repetition of evidence. It would also avoid the possibility that a criminal and civil court might reach different decisions on the same facts. Against the argument that a criminal court may not be versed in the niceties of civil law, so as to be able to decide the civil question of restitution, it may be argued that criminal law is the most complex of all legal sciences, and is becoming increasingly even more and more complex, and today a good criminal judge is required to be well versed in criminology, penology, and in many other aspects of the law than just the criminal law.

Voices raised against the appearance of restitution in criminal procedure would be less effective if restitution were provided with punitive character and were in this guise to take its place within the scope of criminal procedure. To require the offender to pay money as a punishment is not something new and, in this sense, would not be strange to the judge of the criminal case: the origin of the present-day fine is restitution; the only difference is that while the main point of compensation was based on the enrichment of the victim and the community, which interposed itself between the wrongdoer and the vengeance of the victim, fines serve as a source of income for the state. The judge of the criminal case would not deal with civil damages, but, if punitive restitution were allowed to be imposed as a sentence, with an institution

of the criminal law. Similarly, " 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." [1]

This or similar considerations have led to the idea of state compensation based on fines. This has achieved concrete form mainly in Cuban legislation. In criminological literature it has been proposed more than once to set up a central state fund to which fines should go, and out of which the state should pay restitution to victims of crime. There was as early as the Brussels Congress a proposal to set up a *caisse d'amendes*, into which fines imposed should be paid by the state, and from which should come relief for the loss sustained by the injured party in a crime.[2] Similar ideas appeared even earlier, in the Draft Criminal Code of Mexico of 1871,[3] later in Ferri's draft code of 1921,[4] and in the French Draft Criminal Code of 1934.[5] In this way the state would return to the victim the restitution which, in the shape of fines, was taken from him in the course of penal development several hundred years ago. It would also accord with modern sociological thinking, according to which the state is responsible for the welfare of its citizens. The point was raised, however, that this might imply some kind of admission that the state could be blamed for the commission of crime; but very early on it was pointed out that " it is not to be admitted that the State is responsible for damages caused by a malefactor." [6]

The ultimate aim of state compensation would be to guarantee that the victim should get his restitution.[7] This would close a vast lacuna in legislation. It is, however, all that state compensation can achieve, and it does not utilise the further possibility implicit in the institution of restitution: it would not aid at the same time the possible reform of the criminal, moreover it would perhaps exempt him beforehand and at state expense from an obligation which he ought to discharge.[8] The offender should, moreover, understand that he injured not only the state and law and order, but also the victim; in fact primarily the victim and

[1] Fry, *op. cit.* p. 124.
[2] Brussels Congress, *op. cit.* Report, p. 52.
[3] Art. 361.
[4] Enrico Ferri, *Relazione sul progretto preliminare di Codice Penale Italiano*, 1921, Art. 100.
[5] Art. 104.
[6] Brussels Congress, *op. cit.* U.S. Report, p. 21.
[7] Margery Fry, " Justice for Victims " (*The Observer*, July 7, London, 1957).
[8] " Compensation for Victims of Criminal Violence, A Round Table " (*Journal of Public Law*, Vol. 8, No. 1, Atlanta, 1959).

through this injury the abstract values of society. The institution of restitution is able not only within limits to make good the injury or loss of the victim, but, at the same time, to help the task of punishment. " Compensation cannot undo the wrong, but it will often assuage the injury, and it has a real educative value for the offender, whether adult or child." [9] " What is required, is an evaluation in terms of the deterrent and reformative potentialities of the requirements of restitution." [10] " 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." [11]

Although penal methods have changed and are changing, there has for a long time been no change in the concept of the purpose of punishment, which has crystallised as the reform of the offender and in efforts to bring the criminal to ways of social conformity. Whatever might be thought of the different methods of realising this task, they hardly differ in their aims, which are, *inter alia*, to make the criminal aware that he has done wrong, and to bring this about with the least possible suffering. Punishment, however, without the assistance of punitive restitution, can aim only at making the criminal aware of the wrong he has done against the state and law and order; his awareness of having wronged an individual victim will become dull or disappear. Restitution, imbued with a punitive character, however, " would have a much better reformative effect on many offenders than would other methods, because the result of the offences would be more clearly recognised." [12]

Few systems of reforming criminals do not include among their aims to arouse understanding and the expiation of a sense of guilt on the part of the criminal. This is the sort of psychological process, which, while it can be initiated and assisted by others, cannot be done on behalf of the criminal, and must in the last resort be done by the criminal himself. Restitution, again, is something an offender does, not something done for him or to him, and as it requires effort on his part, it may be especially useful in strengthening his feelings of responsibility. Being related to the offence, creative restitution may redirect in a constructive way those same conscious or unconscious thoughts, emotions or conflicts, which motivated the offence.[13]

[9] Fry, *Arms of the Law*, p. 126.
[10] *Columbia Law Review*, *op. cit.* p. 1187.
[11] Hentig, *op. cit.* p. 217.
[12] Sutherland, *op. cit.* p. 576.
[13] Albert Eglash, " Creative Restitution, Some Suggestions for Prison Rehabilitation Programs " (*American Journal of Correction*, Vol. 20:6, Nov.-Dec. 1958, New York), pp. 20–34; similarly August Aichhorn, *Wayward Youth* (New York, 1948), Chap. 10.

Besides reports that " rectification " or " making good " is an effective disciplinary technique with children, preventing repetition of misbehaviour and creating little resentment,[14] there are grounds for believing that even with grown-up criminals the relationship between offender and restitution to his victim may, in addition to recompensing the victim, be reformative as well. Punitive restitution[15] may be one of the penal instruments, through which guilt can be felt, understood and alleviated. It ties up with the rehabilitation technique, in which an offender is directed to find some way to make amends to those he has hurt by his offence.[16]

Some hold the view that punitive restitution should, in certain cases, completely replace punishment as we understand it today. One reason for this is that it would relieve the state of the great burden of supporting in penal or reformatory institutions those guilty of minor offences, and because a reduction in the number of inmates would enable individual methods to be used to better advantage on those committed to these institutions.[17] To relieve the overcrowded state of prisons by substituting punitive restitution for punishment, however, may lead to evading the problem of criminality; in addition, in the present stage of development even punitive restitution cannot be substituted for punishment, and can at best be its accessory. While it appears to be reasonable to use punitive restitution as one method of dealing with criminals, if it were to be the only sentence available for any crime it might weaken the sense of wrongdoing attached to that crime, besides reducing the terror which potential wrongdoers might feel of committing the crime. It might expose criminal justice to the danger of the criminal's escaping punishment, and could lead to social injustice in that while the wealthy, possibly professional, criminal could buy off his liberty, the poor casual criminal might eventually serve a longer punishment for a minor crime. If restitution could be substituted for punishment, or in any way make it possible to buy off punishment with money, it might well have a reverse effect from that intended. A man ought not to be permitted " to buy his way out " of criminal liability. Some earlier proposals took note of this danger, objected to the wrongdoer buying off vengeance by

[14] Norma E. Cutts and Nicholas Moseley, *Better Home Discipline* (New York, 1952).
[15] In Eglash's concept (which is without punitive elements this is called " creative " or " guided " restitution.
[16] Similarly Eglash, *op. cit.* p. 20.
[17] Sutherland, *op. cit.* pp. 576–577; similarly, but in order " to re-establish the equation between the punishment inflicted and the evil done to the individual," Prins (Paris Congress, *op. cit.* Report, p. 8).

agreement with his victim, and insisted on an official trial.[18] " The extent to which these potentialities are enhanced or diminished when restitution is exacted by private parties "[19] gives a warning to avoid replacing punishment by restitution. The social and penal value of punitive restitution may be destroyed if individuals were permitted to compromise crimes by making restitution.

Punitive restitution may be distinguished from civil damages on this very point, that, while the latter are subject to compromise and are not in every case satisfied by the wrongdoer or injuror himself, restitution, like punishment, must always be the subject of judicial consideration. Without exception it must be carried out by personal performance by the wrongdoer, and should even then be equally burdensome and just for all criminals, irrespective of their means, whether they be millionaires or labourers.

The proposal that the offender should compensate, by his own work, for the damage he has caused has been made more than once. Where the punitive aspect of restitution has been most emphasised, it has been suggested that prison work and the prisoner's income should be the means of making restitution, keeping the offender in prison until the damage was repaired.[20] Another suggestion was that, where the offender was solvent, his property should be confiscated and restitution made therefrom by order of the court; while, if he were insolvent, he should be made a state workman.[21]

Yet 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 shillings represented the value of a day's work, and the poor man were sentenced to pay two shillings, he would be discharged by giving one day's labour to the victim. The rich man, instead of being sentenced to give so many days of labour, would pay an equal number of days' income or salary, and if this represented £5 a day, he would have to pay £5.[22] A similar idea emerged after the

[18] Ferri, *op. cit.* Art. 95.
[19] *Columbia Law Review*, *op. cit.* p. 1187.
[20] Herbert Spencer, *Essais de morale de science et d'esthétique*, II. Essais de politique. VIII. Morale de la prison (4th ed., Paris, 1898), p. 352.
[21] Raffaele Garofalo. *Criminology* (tr. by R. W. Millar, Boston, 1914), pp. 419–435; this is a somewhat changed presentation of his proposal submitted to the Paris Congress, where he suggested that instead of going to prison, the 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 (Paris Congress, *op. cit.* Report, p. 9).
[22] Brussels Congress, *op. cit.* Report, p. 52, proposal favoured by Garofalo and Prins.

Second World War, that the victim should be compensated from wages for the offender's labour.[23]

The "noble way" to care for the victim is to make it possible for the offender to fulfil his obligation by way of the income of his free work.[24] This noble way may at the same time be very effective, provided that it be not forgotten that the punitive side of restitution is a great aid in reforming the criminal. If restitution be unconnected with the offender's personal work, and can be performed from his property or by others, this would help the victim, but would minimise restitution's punitive-reformative character. 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 mean the extension of his punishment.

If, however, the offender were at liberty after he had served his punishment, but had to make restitution through his personal work, restitution would retain its punitive-reformative character, while, at the same time, the state would be relieved to a certain extent of the need to solve the problem of restitution to victims of crime.

This system of restitution could be operated in the following way:

1

Restitution to the victim of crime should be entertained within the scope of the criminal procedure by the same criminal court which deals with the criminal case, and the sentence should be a combined one, of which restitution should be a part.

2

Restitution may be claimed by the victim; but in default thereof, the court should deal with restitution as part of its duties.

3

If the question of restitution may cause considerable delay in deciding the sentence so far as ordinary punishment goes, the court should pass a part-sentence concerning this latter, and should postpone the decision of restitution. In such a case, the criminal court should entertain the question of restitution after passing this part-sentence but without delay, and should couple the previously passed part-sentence with the decision concerning restitution.

[23] Georgio Del Vecchio, *The Problem of Penal Justice*, 27 Revista Juridica de la Universidad de Puerto Rico (from *op. cit. Journal of Public Law*).
[24] Waeckerling, *op. cit.* p. 130.

4

A decision on restitution should state the amount of restitution and order the instalments as a percentage of the offender's earnings, to be paid by the offender after his release from the penal institute, or after he has paid the fine if this be the only penalty. This decision should be based on a consideration of the offender's social position, personal circumstances, and reasonable but minimum standard of living.

5

Restitution should be collected in the same way as taxes, and should be deducted from earnings by the criminal's employer, or collected by the tax office from the criminal's income and paid to the victim by the latter. If restitution is not recoverable because the offender has insufficient means, it should not be able to be commuted to any other kind of penalty.

6

With the aid of fines or other sources of revenue, the state should set up a Compensation Fund, and victims should be compensated from that where the total amount of restitution turns out to be irrecoverable, or if the offender is not known. In such cases a mixed committee of members of the court, the Home Office and the Treasury should decide, on application by the victim, whether his damage was caused by crime, and if so, what sum should be paid him by the Compensation Fund, to complete his restitution.