

# RESTITUTION IN THEORY AND PRACTICE

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Murray Rothbard explained that “Few aspects of libertarian political theory are in less satisfactory state than the theory of punishment.” Rothbard certainly advanced this theory significantly, of course, by expounding upon the theory of “proportionality” and explaining the role of restitution in a libertarian society. But as he noted, in a libertarian world “there are only two parties to a dispute or action at law: the victim, or plaintiff, and the alleged criminal or wrong-doer. In a libertarian world, there would be no crime against an ill-defined ‘society’, and therefore no such person as a ‘district attorney’ who decides on a charge and then presses those charges against an alleged criminal.”<sup>1</sup> But today we have crimes defined as being against “the society” and we have district attorneys. The question explored below is how altering the focus of modern crime policy to emphasize restitution for victims rather than punishment of criminals might improve criminal justice, and not incidentally move us toward a libertarian world.

Rothbard’s theory of proportionality implies that someone who intentionally violates another person’s property rights through theft or violence forfeits his own property rights “to the extent that he deprives another of his rights.”<sup>2</sup> These rights are forfeited to victims *because* the victims have had their property rights violated. This is where many conservatives and perhaps even some libertarians depart from Rothbard. Consider Bidinotto’s arguments, for instance. While he explains that “Today, they [victims of crimes] are too often forgotten people in our legal system; and their cries for justice must be heard and answered,”<sup>3</sup> he sees restoring the victim simply as one of the “utilitarian” or social engineering goals of punishment. He argues instead that “The principle of justice holds that because individuals are thinking causal agents, they are morally responsible for the *social consequences* of their actions, and must be treated accordingly” (emphasis added). While he advocates “moral retribution . . . to reflect those

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<sup>1</sup> Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982), p. 85. See also Murray N. Rothbard, “Punishment and Proportionality,” in *Assessing the Criminal: Restitution, Retribution and the Legal Process*, ed., Randy E. Barnett and John Hagel III (Cambridge, Mass.: Ballinger, Press, 1977).

<sup>2</sup> Rothbard, *The Ethics of Liberty*, p. 85.

<sup>3</sup> Robert J. Bidinotto, “Criminal Responsibility,” in *Criminal Justice? The Legal System vs. Individual Responsibility*, Robert J. Bidinotto, ed. (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, Inc., 1994), p. 6.

negative consequences of harm and injury back onto the criminal,” he maintains that for “more serious offenses, prisons are an unavoidable punitive measure.”<sup>4</sup> But as Rothbard pointed out, his theory of proportional punishment, which requires that *at least* the initial part of punishment be restitution “is frankly a *retributive* theory of punishment,”<sup>5</sup> and it clearly does *not* demand imprisonment, particularly in a state-run facility. Indeed, as Bidinotto himself argues, when a criminal violates another individual’s rights,

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<sup>4</sup> Bidinotto admits that “Of all utilitarian strategies, making the criminal ‘restore’ his victim ... is closest to the principle of justice [that he advocates].” Robert J. Bidinotto, “Crime and Moral Retribution,” in *Criminal Justice? The Legal System vs. Individual Responsibility*, Robert J. Bidinotto, ed. (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, Inc., 1994), p. 183-196, *passim*. In addition to seeing restitution as a “utilitarian” objective, Bidinotto dismisses restitution because “...in practice, it has proven to be hard to enforced. Thanks to their irresponsible lifestyles, criminals often remain poor and infrequently employed. Outside of a prison work environment, it is difficult to compel them to pay back their victims. In addition, it is hard to translate damages for some kinds of crimes into dollar terms.” Bidinotto, “Crime and Moral Retribution,” p. 183-184. While all of this may be true, *in the current institutional environment*, none of it needs to be true. Numerous historical examples exist of different institutional environments that encouraged the effective use of restitution. cf. Joseph R. Peden, “Property Rights in Celtic Irish Law,” *Journal of Libertarian Studies* 1 (1977), pp. 81-95; David Friedman, “Private Creation and Enforcement of Law: A Historical Case,” *Journal of Legal Studies* 8 (March 1979), pp. 399-415; Bruce L. Benson, “Enforcement of Private Property Rights in Primitive Societies: Law Without Government,” *Journal of Libertarian Studies* 9 (Winter 1989), pp. 1-26; Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), chapter 2; Bruce L. Benson, “An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law,” *Review of Austrian Economics* 5 (1991), pp. 65-89; Bruce L. Benson, “The Development of Criminal Law and Its Enforcement: Public Interest or Political Transfers,” *Journal des Economistes et des Etudes Humaines* 3 (March 1992), pp. 79-108; Bruce L. Benson, “Are Public Goods Really Common Pools: Considerations of the Evolution of Policing and Highways in England,” *Economic Inquiry* 32 (April 1994), pp. 249-271. To understand the extent that modern Japan also focuses on restitution, cf. Williamson M. Evers, *Victim’s Rights, Restitution, and Retribution* (Oakland, CA: Independent Institute Report prepared for the William I. Koch Commission on Crime Reduction and Prevention for the State of Kansas, November 1994). Therefore, with sufficient institutional changes, restitution could be very viable. And significantly, Bidinotto’s own policy prescriptions are also difficult, if not impossible, to achieve in the current institutional environment. After all, he would do away with all of the social engineering objectives of criminal justice, and redefine crime to involve only an “intentional, non-consensual act entailing the initiation of force, fraud, or coercion against another person or persons.” Bidinotto, “Crime and Moral Retribution,” p. 192. This, of course, eliminates all so called “victimless” or “consensual crimes” [he suggests legalizing drugs, for instance]. Robert J. Bidinotto, “Restoring Responsibility,” in *Criminal Justice? The Legal System vs. Individual Responsibility*, Robert J. Bidinotto, ed. (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, Inc., 1994), pp. 291-292. While his proposals are very attractive from a libertarian perspective, they also require changes that may not be any more dramatic than those required to create an effective restitution-based system. Thus, the same “practical” argument that Bidinotto uses to reject a focus on restitution also undermines several of his policy proposals.

<sup>5</sup> Rothbard, *The Ethics of Liberty*, p. 88.

justice demands that action is taken to “reflect those negative consequences of harm and injury back onto the criminal,” but doing so through imprisonment also “reflects negative consequences” onto taxpayers and *fails to reflect the negative consequences off of the victim*. The victims still suffers the costs of the crime itself, since the victim receives nothing that restores the value that has been taken or destroyed.<sup>6</sup>

Rothbard did suggest that something more than restitution may be appropriate,<sup>7</sup> but this argument depends upon how restitution is perceived: the relationships between restitution and retribution are explored in Section I below, along with the question of how to determine appropriate restitution payments. Section II examines the current status, or more accurately, non-status, of restitution in the United States. The kinds of institutional changes that would be required to bring restitution to the forefront of concern in America’s criminal justice system are illustrated in Section III by discussing criminal justice in Japan. The implication of sections II and III is that sufficient reform of the public sector to induce public officials to focus on restitution is highly unlikely; instead, a significant degree of privatization is required. Section IV explains that such privatization is likely to evolve quite quickly if victims are given a clear and enforceable right to restitution, however, so reforming the criminal justice system may not be necessary. Concluding comments appear in Section V.

## I. Restitution and/or Retribution

### A. Torts, Crimes, and Restitution

In tort law, when a person is injured the negligent party is liable for damages, that is, for restitution. Furthermore, if something more than simple negligence is evident, as the harm arises out of some intentional act (e.g., providing misleading or false information that culminates in the accident, or hiding information about potential harms that arise when using a particular product), then punitive damages can be awarded; that is, the victim can be compensated for more than the actual *measurable* damages done.

Like tortfeasors, criminals also should be held accountable for the damages they do, and since crimes with victims are intentional harms, criminals’ restitution payments should cover both measurable damages for the restoration of property or health (or if restoration is impossible, as with severe physical harm or murder, for the present value of the stream of lost income) and so-called punitive damages to compensate for the invasion of another person’s property rights. Some writers refer to this as punitive

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<sup>6</sup>Perhaps victims get some satisfaction from having the criminal punished, but such revenge is not likely to be restorative. In “Crime and Moral Retribution,” Bidinotto distinguishes between moral retribution and revenge (pp. 194-196), but in fact, about the only benefit a victim gets with imprisonment of a criminal is the pleasure of revenge.

<sup>7</sup> Rothbard, *The Ethics of Liberty*, pp. 86-88.

restitution,<sup>8</sup> or perhaps retributive restitution, but it can be seen as full restitution since not all harms are measurable.<sup>9</sup> The criminal invasion of another's property rights is itself a harm, even if no measurable damages are done. Certainly, identifiable harms are obvious as the victim is now less certain about the security of his property, fears future invasions, and so on. Therefore, a burglar who breaks into a house by picking a lock (so no measurable property damage is done) and is caught before taking anything still owes the intended victim for violating the sanctity of his property rights. A person who attempts murder and fails has still invaded the intended victim's property rights, and should pay damages. Thus, payments characterized by many to be punitive are perceived here to be restorative, because they are restitution for the invasion of property rights. Indeed, if a victim is not satisfied with the restitution, demanding additional "punitive damages" or "retribution," that suggests that the victim has not been restored. *Full restoration arises when the victim is satisfied*, not when his measurable costs have been paid.

This justification for the level of restitution payments is quite consistent with Rothbard's view, which derives the right to restitution from the right to punish, which in turn derives from the right to self-defense in a libertarian world.<sup>10</sup> Indeed, he sees restitution as the price paid by the offender *to persuade* the victim not to exact some other sort of punishment. Clearly then, the payment must be enough to satisfy the victim's desire for retribution. In this regard, however, some of the arguments made here may appear to be in conflict with Rothbard. After all, he contends that the fundamental right of the victim is to exact proportional punishment. Restitution arises only if the victim is willing to accept payment in lieu of punishment. Here, on-the-other-hand, it is contended that the fundamental right is for the victim to be restored. In fact, however, Rothbard's arguments apply in a theoretical libertarian world wherein only the victim and the offender are involved in a legal dispute. Here, the issue is how to move toward that world from a very different one.

Furthermore, consider that, in all likelihood, every restitution-based system that has existed probably evolved from a situation such as the one Rothbard envisioned, where individuals exacted punishment and perhaps some were willing to forgo punishment in exchange for a sufficient economic payment. However, individuals also found that there were situations in which such unilateral exactations of punishment were either very risky or impossible because of the victim and offender's relative capacities for violence. Thus, reciprocal mutual support groups (or mutual insurance groups) evolved to assist members in their pursuit of justice. In Anglo-Saxon England, for instance, following a theft, members of tithings (neighbors) and of the hundreds (groups of tithings) were obliged to respond to the "hew and cry" and pursue the thief, and then see that the thief appeared before the hundred court. But under these circumstances, legal issues no longer involve just the

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<sup>8</sup> Cf. Evers, *Victim's Rights*.

<sup>9</sup> Rothbard, *The Ethics of Liberty*, p. 88.

<sup>10</sup> Rothbard, *The Ethics of Liberty*, pp. 85-95.

victim and the offender, and since violent extraction of punishment (e.g., blood feuds) can be quite costly to other members of such groups, rules evolved which reordered the primacy of rights to punish and to receive restitution. In early medieval England, Ireland, and Iceland, and in the large number of primitive societies that anthropologists have studied, victims did not have the right to exact physical punish *unless and until* the offender refused to pay fair restitution.<sup>11</sup> Indeed, victims who extracted retributive punishment before giving the offender a chance to pay restitution were considered to be law breakers. Thus, the emphasis placed here on the primacy of a right to restoration rather than to punishment reflects a different institutional arrangement than the one envisioned by Rothbard: one in which individual victims call upon others to back their claims against offenders, and therefore in which the interests of these others in minimizing the costs of violence come into play. In essence, potential victims are expected to trade for: (a) a right to fair (perhaps proportional) restitution and (b) support in the pursuit of justice, in exchange for promises to: (a) forgo proportional punishment if fair restitution is paid and (b) provide similar support for others.

### B. Determining Damages

The view that restitution requires more than simply compensating for measurable harms is not without its potential problems, of course. In particular, payment of damages for unmeasurable harms creates incentives for victims to claim more damages than what was actually done. There is a potential “hold-out” problem if the victim has the right to determine the payment for unmeasurable damages that will be sufficient to achieve restoration. This is partly why, in restitution-based systems such as those in medieval Iceland, medieval Ireland, Anglo-Saxon England, and elsewhere,<sup>12</sup> a third-party dispute resolution system has always evolved to mediate or arbitrate the victim’s claim. It also explains why standardized rules evolved (e.g., past judgments become precedents) regarding appropriate or “fair” damages for specified offenses in virtually all such arrangements, and why the

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<sup>11</sup> Cf. Benson, “Enforcement”; Benson, *Enterprise*, pp. 18-21, 24-26; Benson, “An Evolutionary Contractarian View”; Benson, “The Development of Criminal Law”; Benson, “Are Public Goods Really Common Pools”; Peden, “Property Rights”; Friedman, “Private Creation”; Leopold Pospisil, *Anthology of Law: A Comparative Theory* (New York: Harper & Row, 1971); Walter Goldsmidt, “Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge,” *American Anthropologist* 53 (October/December 1951); R.F. Barton, “Procedure Among the Ifugao,” in *Law and Warfare*, Paul Bohannan, ed. (Garden City, N.Y.: The Natural History Press, 1967).

<sup>12</sup> For information on Icelandic systems (and for all subsequent references to the Icelandic experience), see Friedman, “Private Creation”; for medieval Ireland, see Peden, “Property Rights”; for Anglo-Saxon England, see Benson, *Enterprise*, pp. 23-24; Benson, “The Development of Criminal Law”; Benson, “Are Public Goods Really Common Pools”; for a variety of locations, see also Benson, “Enforcement”; Benson, “An Evolutionary Contractarian View”; Pospisil, *Anthropology of Law*; Goldsmidt, “Ethics.”

victim is obliged to accept what the arbitrator/mediator and/or the commonly perceived rules determine to be “fair” payments for an offense.<sup>13</sup> In other words, in actual restitution-based systems, institutions evolve to prevent victim hold-outs.

How might restitution awards be determined? The measurable part of damages are relatively straight-forward and modern courts (private and public) have a great deal of experience in determining awards for measurable harms in property, contract, and tort cases. More significant is the question of how to determine the so-called “punitive” or unmeasurable damages portion of restitution reflecting the harms associated with the invasion of a person’s property rights. Non-measurability means that setting such damages is an inexact exercise, of course.<sup>14</sup> Determining damages on a case-by-case basis would initially involve very high transactions costs, including those associated with “hold-out” problems. However, as suggested above, standardized rules creating victims’ property rights to restitution payments perceived to be “fair” by members of the community would, in all likelihood, be established through precedent; they have in historical and primitive legal systems that were restitutive, at any rate.

History suggests that the restitution rule may be quite simple or quite complex. For example, the Hebrew Bible dictates that “When anyone, man or woman, wrongs another . . . , that person has incurred guilt which demands reparation. He shall confess the sin he has committed, make restitution in full with the addition of one fifth, and give it to the man to whom compensation is due.”<sup>15</sup> Measurable damages plus one-fifth to cover the unmeasurable part of the harm was apparently the rule of thumb established among the ancient Jewish community. Other societies have developed other rules. In some legal systems, well known rules evolved that detailed the payment to be made for every type of offense.<sup>16</sup> In medieval Iceland, the magnitude of the payment also depended in part on whether the offender tried to hide or deny the offense: an offender who pled guilty, thereby lowering the costs of pursuit, prosecution, and trial, faced a lower fine. Similarly, in many primitive and medieval societies, restitution payments have been a function of the status of both the victim and the offender, perhaps in order to achieve other goals besides restoration of the victim, such as more effective deterrence.<sup>17</sup> Repeat

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<sup>13</sup> Goldsmidt, “Ethics”; Barton, “Ifugao”; Peden, “Property Rights”; Friedman, “Private Creation”; Benson, “Enforcement”; Benson, *Enterprise*, pp. 18-21, 24-26; Benson, “An Evolutionary Contractarian View”; Benson, “The Development of Criminal Law”; Benson, “Are Public Goods Really Common Pools.”

<sup>14</sup> Rothbard, *The Ethics of Liberty*, p. 88.

<sup>15</sup> *The New English Bible*, Numbers 5: 6-7.

<sup>16</sup> Cf. Peden “Property Rights”; Goldsmidt, “Ethics”; Benson, “Enforcement”; Barton, “Ifugao”.

<sup>17</sup> A restitution-like system can actually have multiple objectives, of course. Indeed, it is doubtful that any restitution system has ever been established for the sole purpose of restoring victims. Other objectives were also determining factors, just as multiple objectives always influence collective actions. Fines for restitution presumably can have a deterrent effect if the fine is high, for instance. Of course, if restitution is to serve as a deterrent as well as a restorative device, then fines may have to be a function of the wealth of the individuals

offenders were also treated differently than first-time offenders. In Anglo-Saxon England, for instance, an offender could “buy back the peace” on a first offense, but a repeat offender was an outlaw with no protection (no property rights). In other societies with restitution focuses, repeat offenders face capital punishment.

It should also be noted that restitution-based systems have recognized the problem of collections from people with insufficient funds or financial resources. In Anglo-Saxon England, for instance, offenders had up to a year to pay large fines, and if that was not possible, they could become “indentured servants” until the fine was worked off.<sup>18</sup> Indeed, payments do not necessarily have to be monetary, as labor services or other “goods” have often served as restitution. The point is that the rules regarding restitution can be as complex as is necessary to achieve justice in virtually any situation, including our modern world.

Indeed, there are other options to those which have existed historically, which also have an inherent logic. Rothbard offered a compelling alternative that ties directly to the theory of proportionality, for instance. Since a criminal should be punished to “*the extent that he deprives the victim,*” Rothbard proposed that he should pay *more than twice* the amount that would restore the victim’s measurable harms. For instance, if the criminal steals \$15,000 then he should pay back the \$15,000 plus be punished to the same extent, thus being deprived of an additional \$15,000 of his own. But as Rothbard noted, the criminal did more than take the \$15,000: he also put the victim in a state of fear and uncertainty, and the victim should be compensated for these aspects of the ordeal as well. How much, Rothbard suggested, is unclear, but a rational system should work out the problem, as

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involved. If every individual were to face exactly the same payment for a particular kind of offense, for instance, then a wealthy individual might be less effectively deterred than a poor individual, suggesting that wealthy criminals pay more than poor criminals pay for the same offense. Of course, the potential loss of reputation may be a sufficient punishment for such individuals, so relatively high fines may not be necessary for deterrence. Certainly, there is a great deal of empirical evidence suggesting that the propensity to commit crimes falls as wealth increases [while wealth may “influence” decisions to commit crimes, it does not follow that poverty “causes” crime; rather, those who have more wealth do not choose to commit crimes as often as those with less wealth, or perhaps, those who choose to invest their time and energy in criminal activity never accumulate the knowledge and skills necessary for pulling them out of poverty (Bidinotto, “Criminal Responsibility,” pp. 12-14)]. In the same vein, however, if pursuit and prosecution are privatized, as suggested below, a restitution-based law system may involve greater payments for a particular offense made *to* a wealthy individual than to a poor individual in order to induce the wealthy person to pursue offenders, thereby deterring intentional offenses more effectively. The wealthy person has weaker incentives to pursue the offender for a specific magnitude of restitution than a poor person does. Thus, restitution may vary both as a function of the wealth of the offender and the victim, as history demonstrates. On this, see Benson, *Enterprise*, p. 25; Benson, “The Development of Criminal Law”; Benson, “Are Public Goods Really Common Pools”; Peden, “Property Rights”; Barton, “Ifugao”.

<sup>18</sup> Cf. Benson, *Enterprise*, p. 25; Benson, “The Development of Criminal Law”; Benson, “Are Public Goods Really Common Pools”.

suggested by the standardized rules discussed above.<sup>19</sup>

Restitution awards might create incentives to falsely accuse and to falsify evidence in order to collect such payments, of course. However, such incentives always exist for anyone who expects to benefit from successful criminal prosecution. Thus, we see numerous examples of police officials falsifying evidence in order to gain successful arrests and convictions, and of “informers” paid by police and prosecutors (monetary payments and/or forgiveness of crimes committed) falsifying evidence in order to get paid.<sup>20</sup> The problem is a relative one then, and there are at least two issues involved. First, do modern police officers or prosecutors have more incentives to falsify evidence (e.g., to gain promotions, reputations for being tough on crime in order to run for higher political office, etc.) than a private citizen has under a restitution system? And second, is the capacity to falsify evidence greater (e.g., is the cost of doing so lower) for modern public police officers or prosecutors, with their control over evidence and knowledge of evidentiary procedures, than it would be for an alleged victim seeking damage awards? While the answer to the first question may not be obvious one way or the other, the answer to the second appears to be clearly on the side of a restitution system. Indeed, the problem of false evidence arose in England with the advent of public rewards for successful *prosecutions*, and with the growing discretion of publicly employed Justices of the Peace acting as prosecutors in deciding who to prosecute which led to the crown witness program (criminals receive immunity from prosecution in exchange for testimony against other criminals which leads to successful prosecutions), long after restitution was abolished.<sup>21</sup> This apparently remains a problem as prosecutors trade freedom from prosecution to criminals who provide testimony against other criminals.<sup>22</sup> Rules of evidence evolved to protect the accused from the public-sector criminal-justice process (i.e., bounty-hunters seeking public rewards, criminals trading evidence in exchange for freedom or lesser charges, or police and prosecutors manipulating evidence to achieve prosecutions), not to protect them from false victims.

Restitution for the victim should be the over-riding goal of the modern criminal justice process. Some of the issues just addressed, regarding how to implement a restitution system, such as what levels of fines to impose, are of a technical nature, and while they deserve attention, they are relatively trivial compared to the question of how to actually get the criminal justice system to impose *and* collect restitution judgments. Even though we may not be able to predict precisely what the rules would be if such a system were to be put in

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<sup>19</sup> Rothbard, *The Ethics of Liberty*, p. 88.

<sup>20</sup> Cynthia Cotts, “The Year of the Rat: New Drug Laws Are Creating a Cadre of Unreliable and Unsavory Witnesses,” *Reason* (May 1992), pp. 36-41.

<sup>21</sup> Benson, *Enterprise*, pp. 65-69; Benson, “The Development of Criminal Law”; John H. Langbein, “Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources,” *University of Chicago Law Review* 50 (Winter 1983), pp. 1-135.

<sup>22</sup> Benson, *Enterprise*, pp 65-66; David W. Rasmussen and Bruce L. Benson, *The Economic Anatomy of a Drug War: Criminal Justice in the Commons* (Lanham, Maryland: Rowman and Littlefield, 1994), pp 165-166; Cotts, “The Year of the Rat”.



place, the rules would evolve to mitigate major abuses. The difficult question is, how can restitutive justice be elevated to be the primary focus of criminal justice? To see why this is a difficult question, let us consider the status of victim restitution in criminal justice today.

## II. Restitution in American Criminal Justice Today<sup>23</sup>

Over the last eighteen years or so, much of the political rhetoric and resulting statutes regarding restitution appear, on the surface, to be moving in the direction suggested above. For instance, President Reagan's Task Force on Victims of Crime recommended that federal and state statutes require courts to order restitution "in all cases" unless the court gives specific "compelling reasons" for not doing so.<sup>24</sup> This recommendation was made not for some utilitarian reason, like deterrence or rehabilitation, but in the name of justice for victims. Congress passed the Victim Witness Protection Act in October of 1982, authorizing restitution "to any victim of the offense . . . in addition to or in lieu of any other penalty authorized by the law." Furthermore, if a federal court does not order restitution, it must say why, on the record. Almost every state has also enacted or amended restitution statutes since 1977, and particularly during the four years following the President's Task Force report. California and Rhode Island even have constitutionally mandated rights to compensation for any victim losses or injuries.

Unfortunately, the perception created by such statutes and constitutional amendments is very misleading. While the victim's "right to restitution" is supposedly recognized, the statutes generally do not specify when or under what conditions state courts must order restitution.<sup>25</sup> Indeed, despite the fact that statutes and constitutional provisions in some 35 states appear to actually dictate victim restitution, the supposed goal of restoring victims is, at best, "an ancillary goal" for most of the programs that exist.<sup>26</sup> This arises in part because the criminal law process is dominated by lawyers, including judges and prosecutors, and among members of the legal profession, restitution is generally viewed as an alternative *punishment*, an "intermediate sanction" between the extremes of probation and prison, rather than a mechanism for restoring victims. Indeed, the American Bar Association's 1988 "Guidelines Governing Restitution to Victims of Criminal Conduct" states that "it should be remembered that victim restitution is not the primary goal of the criminal

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<sup>23</sup>Parts of this section draw heavily on Evers, *Victim's Rights*. Statistics and quotations not otherwise cited are from this source.

<sup>24</sup> President's Task Force on Victims of Crime, *Final Report* (Washington D.C.: U.S. Government Printing Office, 1982), pp. 17-18.

<sup>25</sup> Susan W. Hillenbrand, "Restitution and Victim Rights in the 1980s" in *Victims of Crime: Problems, Policies, and Programs* (Sage Criminal Justice System Annals, Vol. 25), Arthur J. Lurigio, Wesley G. Shogan, and Robert C. Davis, eds. (Newbury Park, CA.: Sage Publications, 1990), p. 193.

<sup>26</sup> Hillenbrand, "Restitution," p. 195. See also Alan T. Harland, "One Hundred Years of Restitution: An International Review and Prospectus for Research," *Victimology* 8 (1983) at p. 195.

process; it is only a desirable and proper component of that process.”<sup>27</sup> Furthermore, when courts rule on restitution orders, they generally deny “victim’s rights” arguments as a basis for restitution, seeing them as “offender oriented: rehabilitation, alternatives to more restrictive sentences, work experience, and strengthening community ties.”<sup>28</sup> For instance, the U.S. Supreme Court ruled that restitution orders are not debts that can be discharged under Chapter 7 of the Federal Bankruptcy Act:

Although restitution does resemble a judgment “for the benefit of” the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State and the situation of the defendant. . . . Because criminal proceedings focus on the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation, we conclude that restitution orders . . . operate “for the benefit of” the state.<sup>29</sup>

The government’s criminal justice system’s orientation is still toward the criminal and social engineering goals to punish and/or rehabilitate, not toward the victim and a goal of justice.

Not surprisingly, victims find existing restitution programs to be inadequate.<sup>30</sup> For instance, state courts only ordered 16 percent of convicted felons to pay restitution in 1990 (this included only 26 percent of the property felons), and only 14 percent of non-probationary felony convictions included restitution.<sup>31</sup> But more significantly, even when restitution is ordered, the public-sector criminal justice system has been either inefficient or impotent at enforcing the orders.<sup>32</sup> In fact, prosecutors, who see their concern as “punishing” offenders rather than making victims whole, readily admit that restitution orders are not likely to be fulfilled. While they may be mandated to seek a restitution order, they do nothing to see that it is paid.

Since collection of restitution generally adds to bureaucratic workloads, without additional resources or benefits for the public officials charged with collections, bureaucrats have no incentives to actively pursue restitution. Indeed, the reality of punishment is that there is virtually no hope of collecting restitution if a criminal goes to prison, because most criminals have little wealth, and the historical constraints on prison work programs (an issue discussed below) mean that prisoners can generate very little income to pay

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<sup>27</sup> Quoted in Evers, *Victim’s Rights*, p. 14.

<sup>28</sup> Hillenbrand, “Restitution,” p. 195. Also see Harland, “One Hundred Years,” pp 195-196.

<sup>29</sup> *Kelly v. Robinson*, 479 U.S. 36 (1986) at 52-53.

<sup>30</sup> Barbara E. Smith, Robert C. Davis, and Susan W. Hillenbrand, *Improving Enforcement of Court-Ordered Restitution* (Chicago: American Bar Association, 1989), pp. 27-28.

<sup>31</sup> Morgan O. Reynolds, *Using the Private Sector to Deter Crime* (Dallas, TX.: National Center for Policy Analysis, 1994), p. 29.

<sup>32</sup> Jan Pudlow “Without Restitution, Crime Really Does Pay,” *Tallahassee Democrat* (January 3, 1993), p. 1E.

restitution.<sup>33</sup> Furthermore, probation officers who may be charged with collecting restitution are generally unable to do so even if they want to, in part because of their large caseloads and in part because there is no way to investigate probationers' claims regarding their inability to pay.

With attitudes leading to legal doctrines such as that expressed by the Supreme Court in the above quote from *Kelly v. Robinson*, the potential for developing a victim-oriented, rights-based system of criminal justice in the current institutional environment is unlikely, if not impossible. The focus of criminal justice must change from social engineering through punishment and rehabilitation to justice for victims. How can this be achieved?

Neither statutes nor state constitutional amendments seem to be enough. The fact is that:

. . . victims regularly clash with criminal justice's internal organizational politics. They symbolize official failures, and represent outsiders whose participation will more than likely interfere in official routines. Contrary to our adversarial ideals, criminal justice personnel usually form cooperative "work-groups," which seek rapid case disposal, usually through plea bargaining, free from outside participants and surprises. Personal objectives bolster these organizational goals, making it especially difficult for victims to become institutionalized into a process that already routinely considers crimes as victimization of society, not individual victims.<sup>34</sup>

Vague and imprecise statutes and constitutional amendments will not change these fundamental incentives. They allow too much discretion for those in the criminal justice process whose incentives are to bend restitution programs to serve the goals of the entrenched criminal justice interest groups, dominated by prosecutors, police, and other bureaucrats.<sup>35</sup> Unless legislation can somehow elevate restitution to primary importance in sentencing by creating a different incentive structure for criminal justice personnel, justice for victims will not become a product of the government's criminal justice system. This would require a huge array of changes. In particular, there would have to be a major reorientation of legislation and court rulings from their current social engineering agendas focusing on rehabilitation, deterrence and incapacitation. Then there would have to be changes in the focus of "punishment." This would have to include the development of prison-work programs that are capable of generating substantial income, allocation of sufficient budgets and creation of an incentive structure for corrections and probations officials that induces them to actively pursue restitution. It is difficult to imagine this happening in the context of the government-run, bureaucrat-dominated criminal justice system of the United States. Consider how different the

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<sup>33</sup> Benson, *Enterprise*, pp. 337-339.

<sup>34</sup> Robert Elias, *The Politics of Victimization: Victims, Victimology, and Human Rights* (New York: Oxford University Press, 1986), p. 237. See also Rasmussen and Benson, *The Economic Anatomy*, pp 161-164.

<sup>35</sup> Cf. Evers, *Victim's Rights*, p. 17; see also Rasmussen and Benson, *The Economic Anatomy of a Drug War*, pp 151-174.

criminal justice system is in Japan, for instance, where restitution is an integral part of the process.

### III. Restitution in Japan<sup>36</sup>

Japan takes restitution very seriously, and it appears to work. A key feature of Japanese culture that apparently underlies the success of restitution is that there is no acceptable excuse for criminal activity. Criminals are expected to acknowledge their guilt, repent, and seek absolution from their victims, and this is the dominant focus of each stage of the criminal justice process.<sup>37</sup> In fact, the vast majority of all criminals show repentance, admitting responsibility to the victim through an intermediary (e.g., family, friend), before public prosecution. Then the criminal bargains with the victim through the intermediary (as a mediator), offering restitution in an effort to convince the victim to write a letter to the prosecutor or judge stating that no further punishment is necessary. Thus, the victim generally receives restitution before prosecution occurs, and as Evers explains: "The emphasis on restitution and pardon by the victim in the Japanese approach tends to satisfy the victim's desire that justice be done." The criminal then asks for mercy from the public sector criminal authorities and, given a letter from the victim, the punishment imposed by the state tends to be "lenient" relative to other modern countries. Without such a letter, punishment can be harsh. Indeed, the victim typically has an advisory role (although not control or a veto power) as decisions regarding charges, prosecution and sentencing are made.

The victim might be in a position to hold up the criminal by demanding a large restitution in exchange for a letter to the judge or prosecutor. The victim's ability to do so is clearly constrained, however, both by the moral standards of the society and by the fact that the criminal can refuse. The victim cannot really force payment because the criminal has a choice between making such a payment or facing what may be a harsher punishment if he is prosecuted without a victim's pardon. Even then, of course, it is likely that confessing to the prosecutor/judge, expressing sincere remorse, and explaining the unreasonable demands of the victim might mitigate the punishment, so victims' incentives are to not demand excessive restitution.

The importance of confessions in the Japanese system might suggest that there are strong incentives to extract confessions through force. However, the bargain between the victim and the offender takes place outside the official channels of coercion. The victim is not likely to benefit from a coerced confession. Furthermore, confessions alone are not sufficient for convictions in the Japanese courts. Indeed, there is no guilty plea (e.g., as through plea bargaining) in the Japanese process, although many proceedings are summary

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<sup>36</sup>This section draws from Evers, *Victim's Rights*, pp. 22-26. Statistics and quotations not otherwise cited are from this source.

<sup>37</sup> John O. Haley, "Confession, Repentance, and Absolution," in *Mediation and Criminal Justice: Victims, Offenders, and Community*, Marian Wright and Burt Gallaway, eds. (London: Sage Publications, 1989), p. 204.

in nature. Every case that is prosecuted (not all cases are, as explained below) must involve a hearing on the evidence, and even when a confession exists, the burden of proof remains with the prosecutor who must show that the confession was freely given, and must also provide corroborative evidence. Furthermore, the underlying focus on admission of responsibility and remorse also has a great moral force in Japan. In contrast to prosecutors in the U.S., who appear to be more concerned with getting large numbers of convictions, these officials in Japan apparently are concerned with obtaining confessions that are sincere, and expressions of remorse that are genuine. Thus, as Evers explains, “The rectification of crime, leniency of punishment, and rehabilitation of criminals in Japan have a moral basis that would be undermined by false confessions.”

Japan’s clearance rate apparently is very high: Evers cites sample figures that exceed 52 percent compared to the roughly 20 percent average in the U.S.. Why? Perhaps because victims, who can anticipate restitution as well as a good deal of influence on the criminal justice process, are much more likely to cooperate with policing? But not all criminals are prosecuted. Over 21 percent of the criminals who could be referred for prosecution are released by the police without additional criminal proceedings. They have the power to do this for simple cases where they and the victims are satisfied that the offender is sufficiently remorseful. The vast majority of the cases that are prosecuted are settled in a summary procedure based on documented evidence, for which the maximum public penalty (on top of the privately negotiated restitution) is a fine. For example, in 1983, 85.8 percent of the adult criminal cases that were prosecuted were through summary procedures while only 5.1 percent involved ordinary criminal trials (prosecution was suspended for 9 percent of the adult accused). Summary proceedings are not allowed for serious offenses like murder, fraud, and extortion for which fines are not statutory options for punishment (although prosecution can be suspended in such cases). While convictions rates are very high (almost 99.5 percent), few offenders receive government imposed penalties on top of their restitution other than small fines or short prison terms.

How successful is this criminal justice process which substitutes holding criminals responsible to their victims (restitution) for harsh punishment? The number of offenses and the numbers of criminals are substantially lower in every crime category than they are in any other modern, industrialized country. Furthermore, among these industrialized countries, only Japan’s crime rates have fallen continuously since World War II.<sup>38</sup> Finally, there is evidence that recidivism is very low in Japan. This is not surprising, however, since the Japanese system breeds a very different attitude among criminals. In the U.S., “Criminals all too often try to relieve their moral and psychological guilt for their crimes by portraying themselves in the forum of their own consciences as victims of society who are not responsible for their deeds. But the process of confession and restitution found in Japan discourages such self-indulgent self-forgiveness and develops honest attitudes and patterns of conduct by punishing in moderation only when criminals show remorse and

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<sup>38</sup> Haley, “Confession,” p. 204.

pay restitution.”

Could such a system be implemented in the United States in the context of the existing system of public prosecution and corrections? Perhaps, but it is highly unlikely. It would clearly take some significant changes in law, in procedures, and most significantly, in public-sector attitudes. In fact, as Evers notes, trends appear to be running in the opposite direction, as the government's influence in society is rising, while: “In Japan, society runs largely on its own; government officials do not figure importantly in making things work. Norms are mostly enforced through social pressure in the family, school, workplace, and local neighborhood. Face-to-face communities enforce conformity . . . [and] strive to curb criminal violence and to correct its practitioners. . . . In Japan, it is mostly society rather than government that is in charge of crime control.” What makes restitution work well in Japan is that private individuals and groups are much more responsible for controlling crime.

#### **IV. Making Victims Responsible: Restitution and Incentives to Privatize**

A major implication of Rothbard's theory of justice is that criminals should be held responsible for their actions, but an equally important implication is that free individuals must also take responsibility for protecting themselves and their property. Individuals reap the primary benefits from secure property rights and therefore they should have primary responsibility for that security. They certainly may cooperate with others in fulfilling this responsibility, but the cooperation of others should come at a voluntarily agreed-upon price; it should not be expected to be provided free upon demand. Indeed, this perspective suggests that no one should be forced to pay for helping to secure other peoples' property rights. Of course, they can voluntarily enter into a cooperative arrangement to produce security if the others in the arrangement accept them. Thus, the libertarian perspective also implies a fully privatized criminal justice system.<sup>39</sup>

As suggested above, successful restitution programs also appear to require much greater privatization than currently characterizes the United States. Only by taking personal responsibility for active involvement in prosecution and collections, either through direct participation or contracting with specialists (e.g., private police, prosecutors and collection agents), can victims expect to significantly increase the chances of collecting adequate restitution. However, legislation mandating privatization may not be necessary. When victims cannot expect to collect restitution, their incentives to report crimes, let alone participate in or pay for investigation, pursuit, and prosecution, are very weak. An explicit recognition of the primacy of victims' property rights to restitution should create strong incentives for victims and potential victims to get personally involved in all aspects of the criminal justice process. In other words, when victims have private property rights to restitution, they have

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<sup>39</sup> Rothbard, *The Ethics of Liberty*, p. 85, and *passim*.

incentives to invest in claiming what is due.<sup>40</sup>

A focus on restitution for victims will also lead to a society with substantially less crime: that is, such a policy is both relatively just and relatively “efficient” compared to the current criminal justice system.

Consider the issue of deterrence, for example. Raising the “expected price of crime” for the potential criminal should reduce crime. Of course, this expected price is not the actual sentence given to convicted criminals, or even the portion of that sentence served (e.g., time in prison before parole or early release). Rather, it is determined by the probabilities that: (1) the crime is either reported to or observed by someone in a position to investigate and/or apprehend the wrongdoer (e.g., public police, private security, private citizens if they are allowed to do so); (2) the wrongdoer is apprehended; (3) the offender is charged and prosecuted after being apprehended (either through public or private justice procedures); (4) the prosecution is successful so an appropriate sentence is imposed (note in this regard that over 90 percent of convictions in the United States are achieved through plea and charge bargaining which lower the level of punishment relative to what the criminal would expect with a trial); (5) the sentence is actually carried out (e.g., criminals almost never pay restitution or serve the entire prison sentence that a judge hands down today). A rough approximation of this calculation can be made for some crimes using 1992 Florida data, assuming that the relevant punishment is imprisonment (e.g., that prohibition and various “intermediate sanctions” are not severe punishments, and that restitution is generally not collected). Table 1 summarizes these calculations for robbery and burglary.

Violent crimes against persons have relatively high expected penalties compared to those in Table 1, although they also do not appear to be proportional to the harms done: a murderer had an expected sentence of 2.99 years and a sexual offender expected about 338 days. On the other hand, criminals engaged in theft in 1992 could expect about 4.5 days in prison (for auto thieves it was about 10 days). Clearly, the expected prices of most crimes are very low by any standard.<sup>41</sup> Restitution will lead to greater private sector involvement, and in turn, increase the price of crime by raising many of these probabilities.

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<sup>40</sup> Benson, “Are Public Goods Really Common Pools” .

<sup>41</sup> Bruce L. Benson and David W. Rasmussen, *Crime in Florida* (Tallahassee, FL: Report to the Florida Chamber of Commerce, March 1994). Note that these probabilities are “objective” *ex post* calculations. A potential criminal’s estimates of the expected price of crime is an *ex ante* determination and much more subjective. An individual confident of his skill clearly could have even lower expectations. Furthermore, the *ex ante* calculation would be discounted, reflecting the time delay before many of these actions occur. Criminals may be relatively myopic, further lowering their estimates. Thus, even the low level of effective deterrence implied by these estimates tends to be exaggerated.

**TABLE 1****Expected Prison Terms for Robbery and Burglary in Florida, 1992**

	(a) X	(b) X	(c) X	(d) X	(e) X	(f) X	(g) X	=	Prison Time
Robbery	.70	.25	.68	.85	.46	8.6 yrs	.45	=	65.7 days
Burglary	.60	.15	.82	.92	.26	5.5 yrs	.37	=	12.8 days

(a) *Probability of Victim Reporting*

(b) *Probability of Arrest Given a Crime is Reported*

(c) *Probability of Prosecution Given Arrest*

(d) *Probability of Conviction Given Prosecution*

(e) *Probability of a Prison Sentence Given Conviction*

(f) *Average Prison Sentence*

(g) *Average Portion of Sentence Actually Served*

(1) *Restitution and the probability of reporting.* According to the Bureau of Justice Statistics' most recent victimization survey, only about 39 percent of all Index I crimes (murder and manslaughter, sexual offenses, aggravated assault, robbery, burglary, larceny, and auto theft) are reported in the United States. Reporting varies by crime type, as suggested in Table 1, with about 50 percent of the victims of violent crimes reporting the crime, for instance, compared to 41 percent for household crimes, 92 percent for motor vehicle theft, and 15 percent of the crimes of larceny resulting in losses of less than \$50.<sup>42</sup> Thus, a major impediment to the public-sector criminal justice system's ability to deter criminals occurs at this first step of essential involvement by private citizens, and an important question is "why don't victims report crimes?" One reason may be apparent from reporting statistics. Motor vehicle thefts are likely to be reported because victims expect to recover their losses through private insurance, and the insurance companies require that the theft be reported. When an expected insurance payment is not forthcoming, the primary expected benefit that a victim anticipates from cooperating with police and prosecutors is that the criminal will be punished. But given low clearance rates, early release programs, plea bargaining that reduces sentences, and so on, such expectations are not very strong. Furthermore, any hope that cooperating with police and prosecutors will protect the victim or others from the same criminal is a false one. After all, the actual periods of incapacitation are apparently not sufficient to deter most criminals from further crimes: roughly 70 percent of the offenders released from prison are rearrested for committing another crime.<sup>43</sup> So the benefits of reporting are low.

Victims' cost of reporting a crime and then cooperating with prosecution can also be staggering. After all, "In contemporary America, the victim's well-being and fair treatment are not the concern of the criminal justice

<sup>42</sup> Bureau of Justice Statistics, *Highlights from 20 Years of Surveying Crime Victims: The National Victimization Survey, 1973-1992* (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, October 1993).

<sup>43</sup> Allen J. Beck, "Recidivism of Young Parolees," *Special Report* (Washington, D. C.: U. S. Department of Justice, Bureau of Justice Statistics, May 1987), p. 1 and *passim*.



system or any other institution. The victim has to fend for himself every step of the way.”<sup>44</sup> In *addition* to the initial loss to the criminal, victims face the costs of cooperating in the prosecution, including: (1) out-of-pocket expenses such as transportation, baby sitting, parking, etc.; (2) lost wages in order to meet with prosecutors and appear in court, often through several delays; (3) considerable emotional and psychological costs brought on by having to confronted an assailant or endure a defense attorney’s questions; (4) considerable uncertainty about the likely outcome of cooperation; and conceivably (5) retaliation by the offender who is either unsuccessfully prosecuted or not confined for very long if prosecution is successful. Many of the costs that victims must bear are dependent on the rest of the criminal justice system. For instance, victims can lose wages as they endure seemingly endless delays and continuances due to the huge caseloads that prosecutors and the courts have. Furthermore, “the criminal justice system’s interest in the victim is only as a means to an end, not as an end in himself. The victim is a piece of evidence.”<sup>45</sup>

If restitution were to become the primary goal of criminal justice, much stronger incentives for greater victim reporting and cooperation in prosecution would obviously arise, thus increasing the certainty of punishment and generating greater deterrence. If there was a right to negotiate and arrange to collect restitution in conjunction with or *before* criminal prosecution takes place, or even in the absence of criminal prosecution, as in Japan and France (see discussion below), incentives for victims to pursue criminals would obviously be much stronger. But a focus on restitution would also lead to investments that would increase the probability of arrest, prosecution, and effective punishment.

(2) *Restitution and the probability of arrest.* Private security is relatively effective at protecting property. Thus, private security is the second fastest growing industry in the U.S. There are almost three times as many private security personnel as there are public police in the U.S. today, up from roughly a one-to-one ratio 25 years ago.<sup>46</sup> However, investigations of crimes already committed still tends to be dominated by the public police, who’s clearance rates for reported crimes hover around 20 percent. There is a “private investigator” market, of course, but much of its work focuses on non-criminal investigations (e.g., search for evidence to be used in a divorce or some other civil litigation). Insurance investigators do provide investigative

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<sup>44</sup> William F. McDonald, “The Role of the Victim in America,” in *Assessing the Criminal: Restitution and the Legal Process*, Randy E. Barnett and John Hagel III, eds. (Cambridge, Mass.: Ballinger Publishing Co. 1977), p. 298.

<sup>45</sup> McDonald, “The Role of the Victim,” pp. 299-300. See also Ralph A. Fine, “The Urge to Confess,” in *Criminal Justice? The Legal System vs. Individual Responsibility*, Robert J. Bidinotto, ed. (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, Inc., 1994); and Robert J. Bidinotto, “Subverting Justice” in *Criminal Justice? The Legal System vs. Individual Responsibility*, Robert J. Bidinotto, ed. (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, Inc., 1994).

<sup>46</sup> Reynolds, *Private Sector*, p. 8.

services under some circumstances when the victim has insurance (e.g., when the losses are large enough to warrant the cost of investigating), and many private organizations and businesses (e.g., the railroad industry, American Banking Association, and American Hotel-Motel Association), rely on private investigative services because they do not get satisfactory results from public police. Furthermore, internal security organizations investigate most employee crimes for many business enterprises, partly in reflection of the very low priority public police put on such crime.<sup>47</sup> Historically, rewards offered by private citizens have also led to private pursuit of criminals, including investigative services, although such rewards are probably more likely to be offered for return of stolen goods than for successful prosecution, as public rewards tend to be. Similarly, the private bail-bonding system relies on private bounty hunters today. However, by focusing on restitution for victims, the potential scope for private investigation and pursuit of criminals would expand considerably.

As with any private property right, the right to restitution should be transferable. Victims could offer bounties or rewards, but a more likely scenario in modern America would be, in effect, the sale of the right to collect a particular fine. If the right to restitution is a marketable claim for a victim, such as it was in medieval Iceland, then it can be sold to someone willing to pursue the offender. Specialized firms (thief-takers, bounty hunters) could arise to pursue criminals and collect fines. However, the more likely alternative is that individuals would contract with "protection firms" and those contracts would include insurance which pays clients who are victimized, thereby giving the right to collect restitution to the firm which then pursues offenders to recover the payment.<sup>48</sup>

(3) *Restitution and the probability of prosecution.*<sup>49</sup> Every accused criminal is guaranteed counsel, but the same is not true for victims. The public prosecutors supposedly represent victims, but they clearly do not.<sup>50</sup> Prosecutors are, in large part, political animals who pursue their own interests by responding to the demands of powerful interest groups, rather than the

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<sup>47</sup> William C. Cunningham and Todd H. Taylor, *Crime and Protection in America: A Study of Private Security and Law Enforcement Resources and Relationships* (Washington D.C.: U.S. Department of Justice, National Institute of Justice, 1985).

<sup>48</sup> Cf. Murray N. Rothbard, *For a New York: Macmillan (1973)*, chapter 11. See also David Friedman *The Machinery of Freedom: Guide to a Radical Capitalism*, (New York: Harper and Row, 1973), chapter 29; and Benson, *Enterprise*, Chapter 14.

<sup>49</sup> This subsection draws heavily from Tim Valentine, "Private Prosecution," in *Privatizing the United States Justice System: Police Adjudication, and Corrections Services form the Private Sector*, Gary W. Bowman, Simon Hakim, and Paul Seidenstat, eds. (Jefferson, N.C.: McFarland & Company, 1992), pp. 226-227. Quotations and statistics not otherwise referenced are from this source.

<sup>50</sup> Rasmussen and Benson, *Economic Anatomy*, pp 152-164. See also Ralph A. Fine, "Plea Bargaining: An Unnecessary Evil," in *Criminal Justice? The Legal System vs. Individual Responsibility*, Robert J. Bidinotto, ed. (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, Inc., 1994); and Bidinotto, "Subverting Justice" .

interests of crime victims.<sup>51</sup> Beyond that, there appears to be far too many crimes and victims for the number of prosecutors that exist, so prosecutors dismiss or plea bargain away many crimes as a means of generating large numbers of low-cost convictions while handling the huge number of accused criminals. Thus, as Valentine explains, “the fact should be faced that the employment of private prosecution is in some cases and in some jurisdictions the only way for victims of crime to get justice. You either have private attorney to assist the state in prosecuting [the accused] . . . or he just does not get prosecuted.”

Private prosecution is actually possible in the United States in a limited way.<sup>52</sup> A private prosecutor does not take over a case in the United States, however. Rather, a victim’s attorney helps the public prosecutor (or badgers the public prosecutor when he tries to postpone, dismiss, or plea bargain the case). Indeed, a victim may have to employ an attorney “just to get a straight answer as to a trial date.” However, a private attorney acting for a victim generally must obtain the district attorney’s approval before becoming involved. But why, for instance, should a victim not be allowed to pursue prosecution without approval, even when the district attorney does not want to?

Most victims do not want to invest the time and effort it takes to cooperate with police and prosecutors, of course, so why would they invest money on top of that time and effort? Perhaps to increase the probability of successful prosecution and the severity of the resulting sentence. Revenge may be a strong motive, and the fact that some private attorneys are occasionally employed suggests that it is a sufficient motive for some victims, but we can not anticipate large investments in private prosecution without supplementing its costs or increasing its potential benefits. A restitution-based system would effectively turn crimes with victims into intentional torts, where the victim has strong incentives to pursue prosecution in order to collect damages.<sup>53</sup> This is not a far-fetched idea. For instance, in Japan, mediated negotiations between the victim and the offender over the appropriate restitution actually occurs *before* criminal prosecution, and in a very significant way it substitutes for such prosecution, as explained above. If the negotiations are successful, actual public prosecution may be waved entirely, or may involve a summary procedure resulting in only moderate additional punishment. Similarly, in France, a crime victim has the right to file a civil claim against the accused, but this claim can be filed in a criminal court and considered at the same time as the criminal case is being prosecuted by a public prosecutor. Furthermore, the civil suit can be filed even *before* the filing of a criminal proceedings. As a result, “Private prosecution is very popular in France, since it enables the victim to collect damages quickly and inexpensively.”<sup>54</sup>

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<sup>51</sup> Rasmussen and Benson, *Economic Anatomy*, pp. 152-164.

<sup>52</sup> Other countries also allow and even encourage some private prosecution. On this, see Juan Cardenas, “The Crime Victim in the Prosecutorial Process,” *Harvard Journal of Law and Public Policy* 9 (Spring 1986): 357-398; also, Reynolds, *Private Sector*, p. 27.

<sup>53</sup> Benson, *Enterprise*, pp. 349-378.

<sup>54</sup> Cardenas, “The Crime Victim,” p. 385.

Encouraging private prosecution through establishment of a restitution-based program should substantially increase the probability of prosecution, as victims will have much stronger incentives to pursue a case than public prosecutors do. Fewer cases will be dismissed, and fewer crimes will be forgiven by prosecutors through plea bargaining. This does not mean that bargains will not be struck to avoid the costs of a trial, however, and forgiveness of crimes might also arise, but it will be the victim who grants the pardon, not a prosecutor or judge. Indeed, restitution should include both payments for the costs that the crime has inflicted on victims and the cost of collecting the restitution, including the cost of prosecution (and post-prosecution supervision, as explained below), and this creates strong incentives for the guilty criminal to bargain with the victim in order to avoid the higher restitution payments that will be required after a trial.<sup>55</sup> Indeed, the incentives are quite similar to those in Japan where guilty criminals have strong incentives to bargain with victims in order to “buy” forgiveness and avoid the harsh punishment that public prosecution is likely to lead to when the criminal does not have a letter of pardon.

(4) *Restitution and the probability of conviction.* Court crowding is a major factor in limiting the deterrent effect of the probability of convictions. Prosecutors do obtain large numbers of convictions through plea and charge bargaining, of course, but these bargains almost inevitably involve reduced numbers and/or severity of the charges relative to the actual crimes committed. The private sector has responded to the impact of civil court crowding with a rapidly expanding system of private alternatives such as arbitration, mediation, and the new for-profit court firms.<sup>56</sup> However, the potential for private courts to relieve criminal court crowding is clearly limited under the existing criminal justice focus on punitive sanctions. Civil liberty concerns about private judges mandating prison sentences and other forms of punishment will probably prevent the development of any formal private

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<sup>55</sup>Courts are already overwhelmed with some kinds of tort litigation, of course, but these are generally in areas of rapidly changing law. On this see Bruce L. Benson, “Toxic Torts by Government,” in *Harmful to Your Health: Toxics, Torts and the Environmental Bureaucracy*, Richard Stroup and Ronald Hamowy, eds. (Oakland, CA: Independent Institute, forthcoming). See also Deborah R. Hensler, Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* (Santa Monica, Calif.: Rand Institute for Civil Justice, 1987). Where the law is clear, as in auto accident tort, the vast majority of cases are settled out of court.

The threat of private prosecution and the litigation costs that creates for the accused could mean that an accuser has a good deal of bargaining power, and this could lead to collections from people who are falsely accused. However, France imposes a cost on the accuser for both false and frivolous accusations: if a judge finds a claim to be groundless the accuser pays the court costs and damages to the accused, and if the accusation is believed to be intentionally false, criminal charges are brought against the accuser. See Cardenas, “The Crime Victim,” p. 386.

<sup>56</sup> Bruce L. Benson, *Privatization in Criminal Justice* (Oakland, CA: Independent Institute Report prepared for the William I. Koch Commission on Crime Reduction and Prevention for the State of Kansas, December 1994).

sector criminal courts. Informally, of course, sanctions including restitution are being imposed within business firms, and by various other groups of private citizens.<sup>57</sup>

Formal private courts would probably move into criminal justice very quickly if the system was refocused on restitution. The issues of criminal law would be determination of damage payments, at least for most crimes. Deciding damage awards is a frequent function of private arbitrators and mediators. In Japan, for instance, restitution awards are determined through mediation before criminals ever go to court, and if this mediation is successful the criminal trial is a brief summary proceeding. Furthermore, the traditional outcome of mediation is the establishment of a contract, so mediation (or arbitration, for that matter) between a victim and offender can produce a legally binding contract that specifies the amount of debt and how it should be paid. Contract issues are regularly handled by private mediators and arbitrators today.<sup>58</sup> Thus, refocusing criminal justice toward restitution would open up a much wider avenue for privatization in order to increase the probability of conviction, as the number of courts available would expand dramatically, thereby reducing plea/charge bargaining as currently practiced.

(5) *Restitution and the privatization of punishment.* Several states have laws urging judges to sentence criminals to restitution, leading to a number of experimental programs. Consider the restitution experiment in Tucson:

When "Fred Stone" broke into the Tucson house and stole the color TV, he had little idea that he would be caught. Still less did he expect to be confronted face-to-face by the victim, in the county prosecutor's office. In the course of the meeting, Stone learned that the TV set was the center of the elderly, invalid woman's life. With the approval of the Pima County, Arizona prosecutor, he agreed not only to return the TV, but also to paint her house, mow her lawn, and drive her to the doctor for her weekly checkup. By doing so he avoided a jail sentence, and saved Tucson area taxpayers several thousand dollars.<sup>59</sup>

This example makes three important points here. First, even though such restitution arrangements are sanctioned by public prosecutors and courts, some have found it desirable to produce private restitution contracts negotiated between the offender and the victim. In these cases, the prosecutor and court become an arbitrator-mediator, clearly a service that can be privatized, as noted above. Second, restitution need not be a monetary payment. If the only restitution option is a monetary fine, criminals may be judgment proof. However, restitution should allow for working off the fine, either by working directly for the victim *or* by selling labor services, perhaps in a prison industries environment. Third, restitution is a relatively efficient

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<sup>57</sup> Benson, *Privatization*; see also William C. Cunningham and Todd H. Taylor, *Crime and Protection in America: A Study of Private Security and Law Enforcement Resources and Relationships* (Washington D.C.: U.S. Department of Justice, National Institute of Justice, 1985).

<sup>58</sup> Benson, *Enterprise*, pp. 217-224.

<sup>59</sup> Robert W. Poole, Jr., "More Justice — For Less Money," *Fiscal Watchdog* (July 1977), p. 1.

form of punishment.<sup>60</sup> By comparison, imprisonment uses resources like guards and other personnel, *and* the prisoners' idle and therefore wasted time. Restitution requires far fewer resources. Some offenders may require close supervision in prison-like work places to ensure payment, but the prisoners produce marketable goods and services to pay off their debts, including the cost of supervising them to collect the debt.

If victims perceive little risk that a debtor will renege, they may allow continuation of a trade so the criminal can make periodic payments, or a contract may specify work to be done for the victim, as in the Tucson example. Both may be rare, of course (although they apparently are not in Japan). If a risk of renegeing is perceived, the debt contract with the victim might specify that a criminal contract his labor services with a "collection" agency. The criminal may or may not be required to work off the debt in a secure facility, of course, so a range of environments with varying degrees of monitoring and security will develop to maximize the likelihood that payments are made at the lowest possible costs. Indeed, such collections firm might pay the victim the discounted value of the anticipated restitution and then collect the payments itself, recovering the payment plus costs and profits.

Variants of this idea actually can be observed. For instance, in a restitution program called EARN-IT, in Quincy County Massachusetts, forty local businessmen provided jobs to offenders unable to find them elsewhere. The employers acted as supervisors during work hours, and offenders reported to probation officers.<sup>61</sup> In other experimental restitution programs, offenders returned to jail or a "half-way house" at night (most half-way houses are contracted out to private organizations, which clearly could also collect and distribute restitution payments). This model can be extended to include private firms employing labor in secure prisons. A competitive market for such labor, in which the convict has the right to withdraw from the contract with a particular prison firm (but not with the victim) if the prison firm does not live up to its agreement, means that the convict would be able to make the highest possible wage and earn his or her way out of prison as quickly as possible - a characteristic that should be attractive to the victim or bonding firm as well as the criminal.

A restitution program should actually add to the rehabilitative effects of a prison (or non-prison criminal) work program. As Poole stresses, "by integrating the offender into the work force and making him assume responsibility for his offense, restitution may just do more to rehabilitate offenders than all the fancy programs dreamed up by psychologists and sociologists over the past quarter century."<sup>62</sup> Furthermore, when a criminal is

<sup>60</sup> Friedman, "Private Creation," p. 408; also, Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87 (July 1977), p. 29.

<sup>61</sup> David C. Anderson, "EARN-IT: A Key to the Prison Dilemma," *Across the Board* 20 (November 1983), p. 37.

<sup>62</sup> Poole, "More Justice," pp. 2-3. The last eight to ten years have seen a growth in "prison industries" programs in the U.S. The impact of these programs are beginning to be studied, and one consequence appears to be a reduction in recidivism. On this see William G. Saylor and Gerald G. Gaes, "PREP Study Links UNICOR Work Experience With Successful Post-Release

working off a predetermined fine the sentence takes on a self-determinative nature: the harder a prisoner works the faster he obtains release. "He would be master of his fate and would have to face the responsibility. This would encourage useful, productive activity and instill a conception of reward for good behavior and hard work."<sup>63</sup> These incentives could significantly enhance the rehabilitative impact. Indeed, there actually are a number of reasons to expect rehabilitation to be quite effective under such a system.<sup>64</sup> Japan's restitution-based arrangements appear to produce relatively low recidivism rates, at any rate.

## V. Conclusions

Policies focusing exclusively on criminal justice, including restitution, probably have limited potential for reducing crime. A broader policy perspective is required that focuses on liberty and individual responsibility. As Walter explains,

If one is to understand the failure of government to check the crime wave, one must first recognize that government has taken to itself or been urged to assume many additional functions which are difficult to distinguish from outright criminality. Government, on all levels, is infringing upon the rights of individuals and taking their property by force. . . . And many persons condone this system; they see the similarity of actions, but feel that coercion for "the right reasons" (to benefit the collective) is permissible . . .<sup>65</sup>

The increasing attack on private property by government both reflects and reinforces (or causes) a significant change in basic attitudes: many people no longer feel obliged to respect property rights. Therefore, if they want to take someone else's property and they have enough political power to influence government officials, they can do so by establishing taxes and/or regulatory policies. But "legalized" taking through government is completely analogous to crime, including the underlying attitudes toward property: "this change in the basic attitude toward private property . . . explains the rise in crime."<sup>66</sup> Little wonder that others without the political power necessary to benefit from such takings adopt a similar attitude toward property rights and turn to crime.

The increasing power and scope of government undermines liberty and simultaneously reflects and fosters an attitude toward property rights that encourages crime. Crime is in turn used as an excuse to further limit liberty.

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Outcome," *Corrections COMPENDIUM* (October 1994), pp. 5-8.

<sup>63</sup> Barnett, "Restitution," p. 294.

<sup>64</sup> Barnett, "Restitution," p. 293. See also John Sneed, "Order Without Law: Where will the Anarchists Keep the Madman?" *Journal of Libertarian Studies* 1 (1977), p. 123.

<sup>65</sup> David Walter, "Crime in the Welfare State," in *Criminal Justice? The Legal System vs. Individual Responsibility*, Robert J. Bidinotto, ed. (Irvington-on-Hudson, N.Y.: The Foundation for Economic Education, Inc., 1994), pp. 59-60.

<sup>66</sup> Walter, "Crime in the Welfare State," p. 60.

As Logan notes, it is commonly claimed that “increasing freedom brings with it increasing crime. Liberals respond with proposals that would decrease *economic* freedom; conservatives respond with proposals that would decrease *social* freedom.” Both types of proposals tend to involve more government and less liberty. But in reality, crime is likely to decrease through greater emphasis on the tenets of individual liberty, because there is a “corollary of freedom: individual responsibility.”<sup>67</sup> Thus, in contrast to widely held beliefs, reductions in liberty (limits on people’s ability to use private property in the pursuit of happiness while recognizing an obligation to respect others’ private property) are associated with increased crime, because both reflect the same attitudes toward property rights. Therefore, while privatization *in* criminal justice, including recognition of a right to restitution, is desirable, significant reductions in crime may require much greater levels of privatization in the form of a re-establishment the sanctity of private property rights. That is, solving the “crime problem” requires a substantial movement in the direction of the libertarian society envisioned by Murray Rothbard.

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<sup>67</sup> Charles H. Logan, “Crime Stories,” *The Public Interest* (Spring 1995), p. 84.