2nd Draft

VICTIMS' RIGHTS: RESPONSIVENESS, RESTITUTION, & RETRIBUTION

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I. INTRODUCTION

VICTIMS OF CRIME

Criminals assault, rape, rob, and murder 6 million Americans every year and commit arson, burglary, and larceny upon another 29 million. 1 A robber strikes every 46 seconds; a car thief, every 19 seconds; a rapist, every five minutes; and a murderer, every 21 minutes, according to police reports.2

Increasing numbers of people tell those who conduct social-science surveys that they have been victims of violent criminals.3 Between 1973 and 1992, total violent crime rose by 24%.4 Indeed, the U.S. Department of Justice has estimated that eight out of ten Americans can expect to be victims of crime some time in their lives.5

Recent opinion surveys show that the public believes that crime is now by far "the most important" problem facing the country.6

NEED TO ADDRESS THE RIGHTS OF CRIME VICTIMS

The U.S. criminal justice system currently pits the criminal against the government, but leaves the victim on the sidelines. When political leaders and civil servants decide how to reform the criminal justice system, they tend to approach issues in too global and too short-run a way. They often think in terms of satisfying the voters overall and in the short run. They think about how to wisely allocate current budget resources to police, courts, and corrections in order to tackle current problems within the overall jurisdiction that is theirs.

But criminals attack actual individuals--not the government as a whole. If lawmakers are to enact genuine, deep-seated reform, they must address the needs and fears of individual victims and potential victims. If we in this society are to fix what is broken, we must reorient the criminal justice system. It must focus on making the offender redress the victim's grievances. It must hold the convicted criminal accountable for what he has done to the victim.

NEED FOR A JUSTICE SYSTEM THAT IS NOT CRISIS-RIDDEN

The best sort of criminal justice system would be one that is not constantly beset with drastic crises and system-wide failures. The best sort of criminal justice system would be one that is roughly like the economy: a self-equilibrating system that runs more-or-less on its own.

To go further with the analogy to the economy, just as the market economy operates largely on its own to generate prosperity for its participants, so the criminal justice system should operate so that its incentives and natural dynamics produce justice both for the accused and the victims of crime. We need both liberty preserved and justice served.7

THE SITUATION IN WHICH THE CRIME VICTIM FINDS HIMSELF

Because we live in a society where the people are suspicious of political power and where political institutions have been designed to check and constrain tyranny, the criminal justice system protects the accused in many ways. And this is as it should be.

But the victim of a crime finds himself or herself in a different situation. He or she is like an extra on a movie lot, a supernumerary in a crowd scene. True, in most important crimes, there has to be a victim. But he or she is merely an item of evidence, to be called upon, examined, and then asked to step down.

Yet the criminal has, after all, injured the victim (not some officer of the court) by his or her criminal act.8 The heart and soul of the criminal justice system should be effecting justice for the victim by holding the convicted offender accountable for his deeds--while not doing an injustice to the accused individual who has not been convicted.

REFORM BASED ON VICTIMS' RIGHTS & CRIMINAL RESPONSIBILITY

If we reform the criminal justice system by making the engine of the system offender restitution--a punitive measure that combines upholding the rights and interests of the victim with offender accountability:

* We will ensure justice and orderly civic life;

* We will have a reliable compass for directing priorities;

* We will have a criminal justice system that runs largely on its own without systemic breakdowns;

* We will have improved the physical safety and personal security of all Americans and their families.

In order to provide structure for discussing victims' rights, considering where the current problems lie, and what long-term solutions are needed, I will first introduce the major systematic reform that I propose: namely reorienting the criminal justice system to a theory of punishment called punitive restitution. I will tell what punitive restitution is and give some of the history of one of its major components, offender restitution.

Then I will treat a wide array of victims' rights issues and issues of implementation of punitive restitution. I will treat them in an order that corresponds approximately to the order in which they would come up in the course of what might ensue after a crime is committed.

This is the order in which I will look at the wide array of criminal justice issues:

(a) Issues pertaining to the perpetration of the crime and its immediate aftermath, such as police responsiveness and self-defense by the victim;

(b) Issues pertaining to the investigation of the crime;

(c) Issues pertaining to plea bargaining and prosecution;

(d) Issues pertaining to sentencing; and

(e) Issues pertaining to the period after corrections are complete or have broken off.

After looking at the many issues that will come up under these headings, I will present a brief account of how offender-restitution works in Japan. Then I will sum up and conclude.

DOING JUSTICE THROUGH PUNITIVE RESTITUTION

When one person violates the rights of another with malicious intent, that person commits a crime. The criminal's victim receives an injury--both a physical injury or loss and an injury to the sense of justice and security that the victim has enjoyed. Criminal injury must also be recognized as different from an accidental injury (a tort). The criminal chooses intentionally to do his or her criminal deed. Criminal justice consists in restoring the fabric of justice and making the guilty perpetrator repair any damage done by his or her intrusion.

Hence, if a robber or burglar steals, he or she should first of all have to restore the stolen goods (if at all possible)--or replace them or pay their replacement value (if the goods themselves cannot be returned).

If an assailant wounds his or her victim, he or she should be have to pay the victim's medical costs and compensate him or her for pain and suffering including impairments to livelihood.

On top of this full restitution, which is after all what we attempt to achieve in civil cases for damages where no criminal intent is present, the criminal should also be penalized as befits the crime.

This approach to punishment is one of desert and requital, with dispositive power resting as much as possible with the victim. It is primarily restitutive in character, but it serves the need of victims for retribution through its punitive measures and thus may rightly be called punitive restitution.

Punitive restitution should be distinguished from pure restitution, which seeks solely to make the victim whole.9 Pure restitution neglects punishment, which the criminal deserves for his or her intentional wrongdoing.10 In contrast, punitive restitution seeks (in addition to obtaining full restitution) to stigmatize the criminal for his or her wrongdoing and to impose (in addition to reparations) a further unpleasant burden as a penalty for violating the rights of others. To take an analogy from civil law, punitive restitution combines damages plus punitive damages with publicly labeling the convict as a criminal.

Almost all rehabilitation programs have failed to alter criminals' habits or bring down recidivism rates.11 Public enthusiasm for a three-strikes-and-you're-out rule shows that the public is dissatisfied with a criminal justice system that puts too many habitual criminals on parole who then commit new crimes. The existing process of plea bargaining appears to the public as a convenience for public prosecutors that makes a mockery of holding perpetrators responsible for the actual misdeeds they have done. Anyone who has been a crime victim or who knows one learns that the criminal justice system further victimizes the victim instead of repairing his or her injury.

Sentencing convicted criminals to compensate their victims is then a reparative alternative that is preferable to purely punitive imprisonment or lax probation and parole policies.

HISTORICAL EXPERIENCE WITH RESTITUTION

Restitution is one of the oldest principles of criminal justice, appearing for example, in the Hebrew Bible (where exact restitution is supplemented

by an additional penalty):

> 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. (Numbers 5:6-7)12

Restitution has a long history as an element in criminal justice and has at times been the predominant element.13

HISTORICAL TRANSFORMATION OF THE PENAL SYSTEM

Nonetheless, at other times--in particular in times of state-building--public officials have charged criminals with crimes "against the king's peace" or crimes "against the state," instead of crimes against specific individuals. Officials have substituted self-serving penalties for restitutive penalties that repaired the injury done the victim. For example, turn-of-the-century English criminologist William Tallack points out that in Europe during the Middle Ages:

> It was chiefly owing to the violent greed of feudal barons and medieval 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.14

But it should not be thought that restitution is merely an ancient relic or part of an irretrievable past. Indeed the desire of victims for restitution keeps the idea of a mainly restitutive system alive and has kept elements of restitution in "crimes against the state" systems of criminal justice. Moreover Emile Durkheim, the eminent sociologist, contended in his work Of the Division of Labor (1893) that while in the past overly punitive systems were most numerous, in modern times systems that emphasized restitution would predominate.15 Later we will look at a modern criminal justice system (that of postwar Japan) in which offender-restitution is the key component.

II. POLICE RESPONSIVENESS & SELF-DEFENSE

In 1989, American were roughly split down the middle in assessing whether the police constabulary could protect them from violent crime: 48 percent

said yes; 50 percent said no. But by 1993, the skeptics predominate, 54 percent to 45 percent.16

RAPID RESPONSE

When you drive through neighborhoods where wealthy people live, you see signs indicating that an alarm system protects the premises and sometimes stating that triggering the alarm will bring an "armed response" by a private patrol. These wealthy people are paying a considerable amount to subscribe to a service: Their local alarm is wired to a central office that dispatches a private patrol. The average householder is probably not in a financial position to install such an alarm system and pay the subscriber fees. Indeed the average household probably doesn't have contents that are valuable enough to make such expenses worthwhile.

But the average householder still has a reasonable fear of crime of robbery or intrusion. He thinks he ought to get a rapid response to his cry for help. If a householder dials 911 with a police emergency, he wants to see the police at his doorstep soon.

Many 911 calls report violent-crime emergencies. Yet the U.S. Department of Justice reports that in 1991, the police responded within five minutes to only 28 percent of them.17 George Will remarks that gun owners like to say: "Call for a cop, call for an ambulance and call for a pizza. See which comes first."18

Hence when political journalist Christopher Hitchens writes that police are often unresponsive, he does so non-ideologically, on a note of despair: "Try calling the cops in the event of an assault on your home or your person and you risk being told in so many words that such stuff is beneath their attention."19

Nonetheless, criticism of rapid-response policing has been voiced by some policy analysts. For example, Ed Kilgore, who specializes in police and crime issues and has long been a top aide to various prominent Democrat officeholders in the State of Georgia, finds rapid-response policing a waste of resources.

Writing in the Democratic Leadership Council's pre-inaugural policy blueprint for the Clinton administration, Kilgore likens rapid response to the activity of French and American forces in Indochina. The forces hear a report of enemy activity. They rush to the scene, do what they can, and rush back to base. Kilgore argues that rapid response does not solve crimes.20 He points to a study of experimental police work in Kansas City that found that how fast the police got to scene in response to an

emergency call had no significant effect on the likelihood of making an arrest (largely because witnesses waited too long before calling in a report).21 Kilgore's alternative is the currently fashionable policy of "community policing."22 What this rather vague policy entails is unclear. Probably it means that police should stay close to a given neighborhood and do more social work.23 One consequence of devoting scarce resources to community policing will be fewer resources concentrated on rapid response.

But a householder--while he has an interest in seeing crimes solved and in societal betterment--also has a separate interest when he makes that 911 call. He has an interest in a reassuring armed response and possibly in securing his immediate environment, even if no one apprehends a perpetrator. Why not separate off from the work of the public police force, armed rapid response to such victim-initiated emergency calls? Such calls could be farmed out to private security companies in the way that ambulance calls in many places are farmed out to private ambulance services.24

This plan would still leave response to third-party reports to the public police, but the plan could be broadened to include them.

The private security firms could be paid for rapid-response work out of monies in existing police budgets, with a probable savings to taxpayers.25 Supposed victims who turn in false alarms could be fined, in the same way that police in many locales fine households whose burglar alarms give false alarms.

Sometimes in an emergency, people will make use of their own weapons, rather than turning to security professionals. Perhaps the criminal has cut a victim's telephone lines. Perhaps emergency operators do not answer the line immediately or the emergency line is busy. Perhaps an operator puts the victim on hold because so many other callers are on other lines. Perhaps because of an area-wide disaster (earthquake, wind, flooding) or civil turmoil (rioting), the emergency telephone system has broken down. This happen in Los Angeles during the May 1992 disorders following the verdict in the first Rodney King-beating trial.26

NO GOVERNMENTAL RESPONSIBILITY AT LAW FOR PROTECTING THE PUBLIC

In addition to the perils of circumstance that may lead a victim to use a weapon in self-defense to disable or ward off a criminal, victims may discover that public authorities can say they have no responsibility to protect the victim.

Criminologist Don Kates gives Warren v. District of Columbia as an illustrative example.27 In this case, three rape victims sued the district government based on the following facts. Two of the victims were upstairs when they heard men who had broken in, attacking their

roommate downstairs. After half an hour, their roommate's screams had stopped. The two upstairs thought that the police must now be on the scene, since the two had made repeated telephone calls for help. But in reality, the police were not there. The roommate downstairs had been beaten into silence, and the police had somehow lost track of the upstairs roommates' requests for emergency aid. The roommates who had been upstairs went downstairs. The court's opinion in the case graphically describes what

happened: "For the next fourteen hours the women were held captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands" of their assailants.

Having set forth these facts, the District of Columbia's highest court absolved the district government and its police, because it is "fundamental [in] American law" that the police do not have a legal responsibility to provide personal protection to individuals.28 The court's decision in this D.C. case was no quirk. Statute law also states the same principle with great frequency.29

The government has performed poorly in actually protecting society from criminals and has protected itself by refusing to accept legal responsibility for this poor performance. Despite the situation this leaves the potential victim of crime in, some maintain that the government should ban or sharply curtail the sale of weapons of self-defense like guns. The stance of those who would ban guns is, however, as criminologist James Q. Wilson put it, "politically absurd": Those who would ban guns are saying, in effect, "Your government, having failed to protect your person and your property from criminal assault, now intends to deprive you of the opportunity to protect yourself."30

People use weapons--such as knives and guns--to defend themselves when personally faced with attacks by criminals. Sometimes they threaten a menacing criminal, sometimes they strike back. Of all weapons, researchers have studied the use of firearms most closely. Based on rigorous analysis of survey data, Gary Kleck of the School of Criminology and Criminal Justice at Florida State University estimates that civilians use handguns for self-defense between 800,000 and 2.5 million times a year. About eight percent of these civilians used armed self-defense to prevent a sexual crime, such as attempted rape. About 29 percent made use of a firearm to ward off some other kind of assault. About 33 percent of these defensive uses were to prevent burglaries or other theft in the home. About 22 percent were against robbers. About 16 percent were against trespassers. (Some criminals try to commit several crimes at the same time.) 31

Kleck's findings mean that more people defend themselves with a gun than the police arrest for violent crimes and burglaries.32

Not just individuals, but also collections of individuals, that is communities, have a need for self-defense. Communities sometimes organize private volunteer security patrols to reassert social control over neighborhoods and to enhance their own protection.33 Indeed this way of retaking control of streets and neighborhoods is a reasonable response of city dwellers to what James Q. Wilson and George L. Kelling, Jr. identified in 1982 as the "broken windows" syndrome.34 Disorderly and unseemly behavior on streets breaks down the civilized way of life on those streets and makes them an attractive milieu for street criminals. But the presence on the streets of people (like members of citizens' patrols) who actively uphold public propriety and civilized consideration for others will tend to discourage rough and rude street conduct. Such conduct is alluring to street criminals. But such conduct can be dampened down by social pressure.

Unfortunately, such volunteer groups are difficult to sustain over time. Part of this difficulty lies in mobility: Faced with trouble, upholders of middle-class values can decide to live elsewhere. They can move off mean streets and out of seedy neighborhoods. At the same time, it is difficult--given public ownership of the streets--for citizens' patrols to exclude the rude and obnoxious, let alone the criminal.35

Today wealthy suburbanites often have gated communities. There is as well decades of historical experience of middle-class neighborhoods that were and are owned and maintained as private cooperatives.36 City dwellers of all income-levels who are trying to control their streets and maintain order should be able to have institutions analogous to gated communities. Municipal governments should once again experiment with letting

neighborhood associations take on--on a lease or deed basis--ownership of neighborhood streets.37

Such associations could use dues or fees to hire professional watchmen to supplement or replace citizens' patrols and could discourage the presence of undesirables. A middle-class housing development in Brooklyn has, for example, hired private security patrols and successfully reduced crime rates in its development.38 Lawmakers should remove current legal impediments to community self-defense and private security arrangements.39

III. CRIMINAL INVESTIGATION

From the beginnings of the American Republic, the public viewed the role of the policeman as basically that of a member of a night watch: namely, to uphold the civic order against the principal threats to it--fire, marauding beasts, and rough, unseemly human conduct. The public saw detective work as the victim's responsibility, not a duty of the public police. The situation changed as professional private investigators (who had worked for victims

on a chancy contingency-fee basis) began to seek the stability and security of a reliable paycheck from the government payroll. At the same time, the public prosecutor took over the responsibility for prosecuting thieves from the victimized private individual. This change was not fully accomplished in most parts of the United States until the twentieth century.40

In seventeenth- and eighteenth-century America, it was financially attractive to undertake private efforts at apprehension and prosecution because the courts sentenced convicted criminals in accordance with a theory of punitive restitution: a thief might, for instance, be required to restore a stolen article and also pay treble damages to the victim. If the offender was insolvent, the victim could often keep him or sell his services as an indentured servant.41

But by the time of the American Revolution, public prosecutors had generally taken over. They wanted to put fines from criminals in government coffers (instead of victims getting the rewards from settling criminal cases based on restitution), and they sought to make jobs in the public criminal justice system better paying and higher in status. The public prosecutors' success was made possible also by the increasing influence of continental Enlightenment-era ideas of social reform according to which the higglety-pigglety of private enterprise should be replaced by a design imposed by government officials and their intelligent advisers.42

Despite governmental assumption of prosecutorial functions and governmental appropriation of fines, private investigation has continued. Today, as in the past, private individuals can hire private investigators to look into a criminal case. In the past, Pinkerton's, for example, not only guarded commercial and industrial properties, a major part of its business was supplying clients with a nationwide detective service. Pinkerton's frequently tracked down and apprehended criminals. But nowadays the private detective business is hurt by the fact that the public police department is giving the same service away down the street. Speedy apprehension of perpetrators might increase if lawmakers were to offer private individuals an incentive to investigate. Such an incentive could be offering private individuals who hire a private detective a tax credit. The private individual would only receive the credit if the apprehended accused is indicted.43 The credit would be for up to half the average cost that investigating the sort of crime in question costs the police.44

IV. PLEA BARGAINING AND PROSECUTION

All too often a plea bargain is a substitute for a criminal trial. At present about 90 percent of all local and state felony cases are plea bargained--though there are striking differences between jurisdictions.45 In almost all cases, one can simply consider the plea bargaining process as equivalent to the sentencing decision.46

Plea bargaining is a practice whereby the public prosecutor coerces the accused into pleading guilty to a less serious offense in order to escape the threat of conviction on a more serious one. Negotiations take place within the courtroom work group (judges, prosecutors, and defense attorneys) as to what the bargain will be. The practice undoubtedly leads to letting many guilty criminals get off with light sentences. It may also lead some accused but innocent persons--in some complicated cases where right and wrong are not obvious--to plead guilty.47

The traditional role of the victim in a criminal trial is that of witness. Hence plea bargaining in its pure form serves to exclude the victim from the criminal proceedings altogether.

RIGHT OF ALLOCUTION AND SUSPENSIVE VETO POWER

Given the existing trial procedures and sentencing practices, victims should have a "right of allocution," as they do in many states, to address the court before the judge pronounces sentence. Currently, approximately 35 states allow for direct testimony by the victim at the time of sentencing.48

No state currently gives a victim a veto over plea bargains.49 But perhaps victims have a right to such a veto. And some judges have recognized this by granting victims a veto in practice (but it is a veto the judge would be entitled to rescind).50

Many will find unreasonable--given America's crowded court dockets, the heavy caseloads of prosecutors, and the high costs of public trials--the suggestion that victims have a controlling veto over case disposition. Yet this presumption that victims should not have control of this sort is part of the same predisposition that leads to the rights of the victim getting short shrift in the existing criminal justice system.51

Victims could at least be given a suspensive power over plea bargains, a power to force the prosecutor to come back to the court a second time with his or her proposed disposition of the case.52

PRIVATE PROSECUTION

More in keeping with victims' rights would be a system whereby if a public prosecutor proposed a plea bargain that the victim did not approve of or if the public prosecutor declined to prosecute altogether, the victim could undertake the criminal prosecution on his or her own.53 Indeed it is an injustice for governments to deny such a remedy to victims. If restitution were the primary component of sentencing, private attorneys might well take on criminal prosecuting work for indigent victims on a contingency fee

basis.

In England up until the middle of the nineteenth century, private prosecution of crimes was the norm, and private individuals formed voluntary associations to share the anticipated costs of prosecuting.54 Some, such as Victorian-era legal historian James Fitzpatrick Stephen, considered private prosecution as a bulwark of constitutional liberty:

> [N]o stronger or more effectual guarantee can be provided for the due observance of the law of the land, by all persons under all circumstances, than is given by the power, conceded to everyone by the English system, of testing the legality of any conduct of which he disapproves, either on private or public grounds, by a criminal prosecution. Many such prosecutions, both in our days and in earlier times, have given a legal vent to feelings in every way entitled to respect, and have decided peaceably and in an authentic manner many questions of great constitutional importance.55

Since the time of James Fitzjames Stephen, the professional public police and their lawyers have largely taken over the job of prosecuting criminals

in England, and the English government now has the statutory right to take over private prosecutions at any time or to quash them.56

Whether under public or private prosecution, restitutive sentencing practices would tend to reduce charge-bargaining and impel sentence-bargaining that brought forth reparations for the victim.

For private prosecutions to proceed in criminal cases, it will be necessary to make changes in legislation and to breathe new life into legal doctrines that have long been neglected. How far the existing state of affairs is from practices in England in the nineteenth century and earlier can be seen in a typical Connecticut court decision that ruled out private prosecutions:

> In all criminal cases in Connecticut, the state is the prosecutor. The offenses are against the state. The victim of the offense is not a party to the prosecution, nor does he occupy any relation to it other than that of a witness, an interested witness mayhaps, but none the less, only a witness.
>
> It is not necessary for the injured party to make complaint nor is he required to give bond or prosecute. He is in no sense a relator. He cannot in any way control the prosecution and whether reluctant or no, he can be compelled like any other witness to appear and testify.57

As a defendant has the right to certain safeguards within the public criminal justice system, so should the victim also have certain procedural rights pertaining to plea bargaining, prosecution, and sentencing, if equity is to be maintained.

V. SENTENCING OF THE CONVICTED CRIMINAL

Since according to current practices the victim is only a witness in a criminal trial and not a party to the case, the victim's role is "written out" of the criminal-justice script by the time of sentencing. The defendant has been proven guilty. The government's side has won.

Yet these current practices block doing full justice, and they need not continue.

REFORMING SENTENCING PRACTICES

Justice in sentencing should include both making the criminal repair the injury done to the victim and punishing (and thereby morally stigmatizing) the criminal for his or her intrusive deed done with criminal intent.58 Hence, sentencing should be guided by principles of offender restitution and punishment proportional to the gravity of the offense.59 If these objectives are adhered to, deterrence of potential criminals and incapacitation of the dangerous will be additional concurring results.60

But it should be noted that if we were to overhaul the entire criminal justice in order to give primacy to restitution, then the function of prisons would change somewhat and so would the make-up of the prison population. If we put "having criminals compensate victims" first among our goals, then prisons will primarily serve as instruments for making recalcitrant criminals pay up. Prisons will continue to provide the punitive component in some sentences, and they will continue to house convicts who are hardened criminals and are therefore not welcome in society--but these will be ancillary purposes.61

To move the criminal justice system closer to one that fully upholds victims' rights and operates primarily to restore the victims' interests, legislators should require that restitution always be a condition of parole or early release.

GOVERNMENTAL COMPENSATION FUNDS

Offender restitution should be distinguished from governmental compensation funds that simply provide tax-funded relief to crime victims. A

governmental compensation fund that does not rely for its revenues on contributions from reparations-paying convicts is simply another welfare-state benefits program.62 It cannot teach the criminal anything about the meanings of justice and personal responsibility. It is a form of debtors' relief for the criminal class. It cannot rectify the injustice that the criminal has done directly to the victim.

IMPLEMENTING PUNITIVE RESTITUTION

Richard Dagger, a proponent of punitive restitution, outlines three examples of ways to make a restitutive system penal as well as reparative:63

> *Exacting more, on a proportional scale, from the offender than he originally took ("It seems reasonable to assume...that a thief who is made to pay two hundred dollars to the person from whom he stole one hundred dollars is likely to regard this as an unpleasant consequence of his theft.");
>
> *Making the offender do restitutive work that he or she regards as unpleasant and indicative of a reduced and criminal status; or
>
> *Supplementing restitution with punishments that are unpleasant and burdensome.

Suppose then that a criminal burgled a home and stole items worth $2000 (yielding perhaps $500 from a fence). He might be sentenced to something like the following:

(1) Restore the stolen items (if at all possible), or (if not) replace them or pay the victim their replacement cost; and

(2) Compensate the victim for costs (probably at least, loss of time during trial) associated with the criminal's apprehension and trial; and

(3) Compensate the law enforcement agencies for the cost of the criminal investigation and trial and administration of the restitution plan; and

(4) Pay punitive damages or suffer punitive sanctions that stigmatize the criminal and compensate the victim for his or her unjust suffering and loss of security.

The criminal's total obligation might easily amount to as much as $10,000 for a crime that yielded proceeds worth only $500 to the criminal. In this example, the criminal's total obligation could well be less than the

$10,000 if he or she confesses to the crime early in the process (thus reducing investigation and court costs), as criminals often do in Japan.

Yet (1) if the criminal's past record did not necessitate imprisonment, (2) perhaps if the criminal agreed to wear an electronic monitor or posted a good-behavior bond or found someone who would post a bond for him or her, and (3) if the criminal steadily repaid the victim, then the thief (in this example) would be on probation (until all harm had been repaired), but might not go to jail at all.64

Thus, jail space now taken up by nonviolent criminals would be available to house violent ones.

Under sentencing practices aimed at punitive restitution, wealthy people

would not escape punishment. Wealthy people have high opportunity costs. When convicted of a crime, they pay costs in terms of foregone opportunities. These costs are essentially subjective in nature, bearing on the mind of each individual criminal, but they might include, for the wealthy for example, a huge loss in prospective future income. 65 In addition, when appropriate, wealthy people could be sentenced to pay back all or part of what they owe the victim through labor rather than with money. This would be a punishing loss of status.66

Nor, under a sentencing regime of punitive restitution, should the poor be exempt. A study of restitution in New Zealand found that 43 percent of the offenders who successfully paid their restitution in full had been unemployed at the time of sentencing.67

CRIMINAL ATTEMPTS

The criminal justice system should continue to punish criminal attempts and endangerment.68 Criminal attempts should be understood to be overt acts that threaten a victim with a clear and present danger. The criminal has, after all, set a criminal act in motion, even if it was inadvertently never completed. The criminal should be penalized in proportion to the gravity of the offense attempted, but somewhat less than if he or she had succeeded. Current statutory crimes of endangerment, such as brandishing a firearm, should be reformulated to constitute criminal attempts.

RECENT RECOMMENDATIONS69

The Final Report of President Ronald Reagan's Task Force on Victims of Crime issued in December 1982 called for restitution, not for the sake of rehabilitation of the offender as had been the fashion in the 1970s, but in the name of justice for the crime victim. The report recommended that the

U.S. Congress and state legislatures enacted laws that would "require restitution in all cases," unless the court gave specific reasons for not requiring it.70 Similarly, the report recommended that judges should order restitution to the victim "in all cases in which the victim has suffered a financial loss" or provide in the record "compelling reasons" for not doing so.

The legal profession also ratified the principle of restitution as a feature of justice to victims. In August 1983, the American Bar Association approved a set of "Guidelines for Fair Treatment of Crime Victims and Witnesses," which said that victims of a crime involving "economic loss, loss of earnings, or earning capacity" should be able to expect the person passing sentence to give "priority consideration" to restitution as a condition of probation. Yet five years later, the bar association proceeded to muddle matters in a set of "Guidelines Governing Restitution to Victims of Criminal Conduct." These new guidelines said that "it should be remembered that victim restitution is not the primary goal of the criminal process; it is only a desirable and proper component of that process."

The bar association's 1988 declaration that restitution is not "the primary goal" of the criminal justice system showed that although lawmakers and practitioners had increasingly paid homage to restitution during the 1970s and 1980s, in fact no fundamental reorientation of the criminal system was going to take place.

RECENT LEGISLATIVE ACTION

During the 1970s and 1980s American legislatures passed many new laws on the subject. They did not need to authorize restitution, it had a long history in Anglo-American law. But what the legislators did that was new and different in the modern era was recognize that restitution was a requirement of justice to crime victims and not just another punitive or rehabilitative option.

In October 1982, Congress passed the Victim Witness Protection Act. This

law authorizes restitution "to any victim of the offense . . . in addition to or in lieu of any other penalty authorized by law." If the court does not order restitution or only orders partial restitution, the law requires the court to say on the record the reasons why.

Before to the 1982 act, federal courts could only order restitution as a condition of probation. Thus, the new act represented a notable change in prescribed sentencing practices.

At the state level, almost all legislatures enacted or amended restitution

statutes in the years since 1977. The state legislatures were especially active in the four years following President Reagan's Task Force recommendations and enactment of the federal Victim Witness Protection Act.

But as Susan Hillenbrand notes, "Much of this [state-level victims' rights] legislation recognizes a victim's right to restitution (or consideration [for] restitution) but is not explicit as to when or under what conditions."71

Legislatures also passed laws to make it easier to formulate court-ordered restitution that reflects victims' actual losses. The federal Victim Witness Protection Act, for example, requires that the judge receive prior to sentencing a victim impact statement detailing harm suffered. Almost every state has a similar requirement. Some states allow for written or oral statements by the victim on harm done.

Some states (like Kentucky) have made it a policy to let victims consult with prosecutors before cases are dismissed or plea bargaining is completed. Other states (like Minnesota) let the victim speak to the court before the judge ratifies a plea bargain.

RECENT PLACEMENT OF VICTIMS' BILLS OF RIGHTS IN STATE CONSTITUTIONS

Because these victims' rights measures are statutory, rather than constitutional, victims have no remedy if officials of the criminal justice system ignore, neglect, or even trample on the victims' supposed rights. To give greater effect to victims' rights, some people are calling for constitutional rights for crime victims to be entrenched in state constitutions. This is a comparatively recent development, so how well it will work is not apparent. If victims' bills of rights give the victim a handle on the workings of the criminal justice system, their impact will be beneficial.

The victims' bill of rights in Florida and Kansas talk about a victim's right to be present and heard during public criminal proceedings. But the constitutional amendments in these two states leave out all mention of a victim's right to restitution.72 Michigan's amendment puts restitution on a laundry list of other rights. The amendments in Rhode Island and California say that the victim has a right to obtain from the offender financial compensation for any injury or loss. Such provisions are clearly preferable to the slighting of restitution in the Florida and Kansas amendments.

EXISTING RESTITUTION PROGRAMS

While the purpose of restitution is to make the offender pay back the victim, this, Hillenbrand reports, is "clearly an ancillary goal" for most

existing restitution programs.73

Most victim assistance programs that have a restitution component focus on obtaining the initial restitution order. After that, they do nothing to see that the criminal pays.

That offender restitution is currently enforced by officials in the existing criminal justice system (with no one having clear responsibility for the job) leaves restitution stuck in the mud. The officials get

nothing. They have no incentive to collect money for the victim. This is partly why their functional ancestors deserted restitution in the Middle Ages. Officials in the criminal justice system have, in contrast, every incentive to pursue cases of drug possession in order to obtain control of forfeited assets.

Clearly, we need to move to developing a legitimate market in which there are factors or brokers who buy claims-to-restitution and sell them like accounts-payable to collection agencies that will make sure the victims get something back.

Victim/offender reconciliation programs have a psychotherapeutic aim of "reconciling" the victim and the offender. The victim's economic loss may well be only one of many things that divide that victim from the offender. But, even if it is central to the differences between them, rectifying that loss is unlikely to appeal to the sort of psychiatric social worker who works in such a program. The victim may discover that he gets nothing material out of various earnest attempts at reconciliation.

Restitution employment programs, in contrast, may yield better rewards to victims. However, as Hillenbrand reports:

> the rationale behind such programs is generally offender-oriented: rehabilitation, alternatives to more restrictive sentences, work experience, and strengthening of community ties. Finally, since probation itself is offender-oriented, it is unlikely that victim recovery is a primary concern of probation restitution efforts.74

The appellate courts reinforce this rehabilitative emphasis of existing restitution plans--an emphasis that operates to the neglect of victim reparations. The appellate courts seldom find victim losses by themselves alone as reason enough for ordering restitution.

When the appellate courts hand down decisions sustaining restitution orders they often deny "victim's rights" arguments as a basis for so holding. For example, when the U.S. Supreme Court ruled in 1986 that state

restitution orders are not "debts" that can be discharged under Chapter 7 of the Federal Bankruptcy Act, Justice Lewis Powell said:

> 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.75

Justice Powell's picture of existing restitution programs is no doubt an accurate one, but from the standpoint of justice and of the reparative aims of restitution his careful distinctions read like an indictment of the existing programs. These programs do not primarily serve the interests of victims, but rather the interests of the government and its administrators.

It should come as no surprise that a 1989 American Bar Association study found that victims often say that existing restitution programs do an inadequate job of obtaining payments from offenders.76 If we look back at the history of the expansion of restitution since the 1970s, we can see that restitution's promise to crime victims has gone unfulfilled. And we can see why.

Robert Elias writes:

> [V]ictims 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 dispositions, 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 crime as a victimization of society, not individual victims.77

Despite the fact that approximately 35 states call for financial restitution by the criminal to the victim,78 restitution has never really been tried in the modern era in this country. The new glorious rhetoric in constitutions and statutes is often vague and imprecise--allowing too much

discretion to those who would thwart the reparative aims of restitution. Judges may be required to give a written reason why they didn't order restitution, but that is not constraining enough. Shouldn't their reasons be good ones, perhaps ones that meet well-defined standards? Now judges enjoy virtually unchecked decision-making power about which victims receive restitution and how much. Restitution programs are all too easily bent to serve other ends by special interests entrenched in the criminal justice. Restitution has been just another entry on the menu of alternative sentencing schemes. We can, for example, imagine improving the rate at which restitution orders are fulfilled by enforcing them with greater vigor. But, given the way things are currently done, who would have the incentive to follow through and what clear directive will they be following? Unless pro-victim incentive structures are in place, and legislation, in the words of Carol Shapiro, "elevates restitution to primary importance in sentencing," victims will continue to be defrauded by victims' rights laws and constitutional amendments.79

PRISON LABOR

A major practical problem with getting money from the offender to the victim is that the offender usually has little wealth and no legitimate way to earn money. We can succeed in bringing restitution to the victim only if we enhance the legitimate opportunities for convicted offenders to work productively and earn money.80

Even if we transform sentencing practices and reorient the criminal justice system toward restitution, we will still need to improve the opportunities for prison work for criminals, who are in prison as part of their punishment or because of their dangerousness. Currently many federal and state laws restrict convict labor and hamper or ban the sale of convict-made goods.

The Hawes-Cooper Act permits states to outlaw commerce in prison-made goods within their borders.81 The Walsh-Healy Act bars convict labor on government contracts worth more than $10,000.82 The Sumners-Ashurst Act made it a federal crime to transport prison-made goods within a state for private use.83 These laws are still on the books.84 Restrictive laws also exist in various states of the Union.

Lately, a considerable number of exceptions were allowed--if prison laborers were paid the "prevailing wage" rate, if labor union officials were consulted, if free labor was not adversely affected, and if the goods were manufactured in an industry that did not have local unemployment.85

We should pass right-to-work laws for prisoners and should legalize prison-based labor and prison-based industries. These restrictive laws were put in to establish and protect labor cartels and to prevent competition,

they should be repealed.86 If prisoners had opportunities for work, it would then be reasonable to require them to work to pay restitution to their victims.

CURRENT PRISON-BASED INDUSTRY

Despite existing onerous restrictions, some service work and commercial production does go inside prison walls. Recently the National Institute of Justice commissioned a survey that listed over 70 companies that hire inmates in 16 states to work in manufacturing, service and light-assembly operations. Prisoners act as reservations clerks for Trans World Airlines and Best Western International hotels, sew leisure clothing, make water-bed mattresses, and fit electronic components together. PRIDE, a private corporation in Florida, operates under state auspices 46 prison industries from furniture-making to optical glass grinding. It had $4 million in profits in 1987.87

Convicts may be in jail or they may be out on probation or parole, but they still have a right and a duty to earn a living and not be a burden on taxpayers, and they have a duty to repay their victims.88 If as a class prisoners are prevented by law from doing work that is remunerative, then such a restriction is robbing the victim and the taxpayer.

COMMUNITY SERVICE

Sentencing offenders to community service is a form of sentencing that has already in some cases displaced restitution. If community service is chosen by the victim as the way he wants the perpetrator to pay him back, then community service is consistent with restitution.89 But if judges decide to institute a policy of forcible social work through the sentences they impose on offenders, they will both undermine genuine charity and block achieving justice for the victim.

In 1966, the Alameda (Calif.) County Court initiated the current wave of community service sentences. In cases of traffic and parking violations, the court was seeking an appropriate sentence for low-income women who were needed to take care of their families. Sentencing offenders to mandatory labor service imposed punishment while letting the offenders stay with their families and care for them. In a short time, the country court was sentencing adult men, juveniles, and individuals guilty breaking laws other than traffic and parking codes.90

From these humble origins, community service has grown into what critic Alan Harland calls "the fastest-growing industry in the criminal justice system."91 In cases involving non-violent crimes, courts now routinely sentence offenders to work for charitable groups like the Salvation Army as

a form of restitution to the community.

In New Jersey, for example, the number of community service sentences has increased from 2,500 in 1982 to nearly 34,000 in 1991. Penal community-service laborers served a total of 1.7 million hours in 1991 at one of 5,600 locations around the state. The value of the work done by these laborers in New Jersey is estimated at $13 million.

In California, with its larger population, the courts sentence 200,000 offenders a year to work a total of eight million hours, worth $25 million.92

Despite the tremendous growth in community service sentencing since 1966, it has received little critical examination. The practice has important consequences--consequences that often receive scant attention from policy analysts.

* The criminal justice system is "picking winners," namely, favored charitable groups that receive access to free or inexpensive labor. It is also creating a political constituency that will demand the continuation of community-service sentencing. Favored constituencies will tend to pressure the criminal justice system to treat crimes against individuals as crimes against society.

* The criminal justice system is breaching the "wall of separation" between church and state by assigning convicts to sectarian religious groups like the Salvation Army and Prison Fellowship Ministries.

* There is no evidence that community service reduces crime, except in the case of white-collar criminals.93 Yet, we should not forget that larcenous white-collar crimes such as fraud, forgery, and embezzlement often have identifiable victims who deserve reparations before some surrogate for society obtains benefits. Furthermore, in the case of tax offenses, it is retrogression to a more primitive level of culture for the government to levy taxes in the form of mandatory labor service rather than in the form of money.

* It is not self-evident that community service sentences save the taxpayer money. If courts use community service as a regular punishment, this necessitates establishing a permanent staff of government employees who supervise and to some extent operate the program.

Sentencing convicts to community service is cheaper than sending them to prison if you assume that they would have gone to prison for the time involved. But many offenders doing community service time would have never gone to prison at all, so costs have to be compared to other sorts of

alternative sentencing. More often, offenders are doing community service as a condition of probation after imprisonment. Since the penalty for not fulfilling the service term is jail, people are sent back to prison (thus adding to prison costs) who would otherwise simply be free on probation.94

* Deeds that are inspired by a desire to serve others are qualitatively different from penal servitude. To call both community service is to invite a destructive confusion of realms.95

Leaders in charitable groups who are skilled in inspiring volunteers will be required to become monitors and overseers of work gangs. Those who volunteer for community service out of noble motives may well be insulted that courts are condemning people to do the exact same work as a punishment. Such a policy on the part of the criminal justice system will corrupt the morale of charitable work.96

* Most importantly, community service sentencing undermines individual restitution.97 When a court sentences ice-skater Tonya Harding to 500 hours of community service, what is the recompense to Nancy Kerrigan, who is after all the injured party?98

CLEMENCY & THE PARDONING POWER

We need to take another look at clemency decisions and the message they convey about the criminal and the victim.

The essence of the problem is before us, if we look without mystification at the difference between the everyday meaning of clemency and the special technical meaning of executive clemency.

The leading philosophical work on the subject of pardons says that an act of clemency in its everyday sense takes place "whenever someone gives up a moral or legal claim against another."99 Obvious examples would be a victim of crime who forgives a criminal entirely or in part, or an accident victim who declines to collect some or all of the damages owed him or her by the person who caused the accident.

The same work says that executive clemency is an act by a government executive "that removes some or all of the actual or possible punitive consequences of a criminal conviction. It ensures that the person on whom it is bestowed will not suffer all the punishment the law usually inflicts for the crime committed."100 An obvious example would be a U.S. President or a governor of an American state who uses a prerogative of his or her office to relieve a convicted criminal of some or all of his or her

sentence.

Notice how in the act of executive clemency, the victim disappears from consideration. The focus is entirely on the offender.

The prerogative of pardoning has its roots in royal claims of sovereign power. Monarchs used the pardon as a way of consolidating royal control over the criminal justice system, as a way of protecting corrupt or malfeasant favorites, as a way to entice a bribe prior to granting the favor of the king's or queen's mercy, and to perfect justice in cases of injustice that came to the monarch's attention.

In the aftermath of the American Revolution, anything that smelled monarchical was suspect, including the pardoning power. In postrevolutionary state constitutions, governors in some states lost this prerogative to legislatures, had the pardoning prerogative restricted, or had to share the prerogative with legislatures or councils.101

Since the government runs the criminal justice system as we know it in America today and since we use the division of powers as a check and balance on tyranny, it makes sense to have a pardoning power outside of the trial and sentencing procedures.

But we should re-examine whether it belongs in the executive. The legislature would have to deliberate before it could grant a pardon. Such a process of public deliberation would likely require justifying argument. It might encourage more of an emphasis on justice. The bare prerogative of the executive to pardon seems to offer little incentive to weigh the claims of justice fully.102

Finally, we need to look seriously at bringing the victim into the pardoning process. Perhaps the victim should be able to temporarily suspend a grant of a pardon and force a reconsideration by the executive or the legislature. This might head off some ill-conceived or undeserved pardons.

On the other hand, victims ought to possess an independent pardoning power of their own. Victims ought to be able to engage in acts of mercy or be able to negotiate a material restitution plan that would be an attractive alternative for a criminal facing punitive imprisonment.103

VI. POST-CORRECTIONS

LOCATION OF RELEASED AND ESCAPED CONVICTS

Prison managers should have a positive duty (enforced by severe penalties) to inform victims of violent crimes upon the release or escape of any convict who has injured them. Understandably, many victims of violent crimes are afraid that the criminal who injured them before may come back to do it again or that he may try to harm them for testifying against him.

Telling victims about release plans or escapes provides victims with a chance to take further precautions.

MONITORING

Electronic monitoring has emerged as a technically innovative means of protecting someone's home or office against a harasser. A transmitter can be fastened to the ankle of an offender. A receiver is placed in the premises to be protected. If the offender comes within a set distance of the premises, the receiver sets off an alarm that notifies both the police and those on the premises. Such monitoring can be and has been used as part of probation or parole. But it could be used as well as a condition participating in an extramural restitution program.

An alternative (or supplement) to electronic monitoring, since monitors can sometimes be disabled or taken off without alerting the police, would requiring harassing offenders to post bonds as conditions of either

probation, parole, or participation in an extramural restitution program.

VII. A CASE STUDY OF OFFENDER RESTITUTION: POSTWAR JAPAN104

REPENTANCE AND ABSOLUTION

Around the world and in the United States, there are many half-hearted experiments with restitution. But the criminal justice system in postwar Japan is a good example of a system in which restitution is taken seriously--and it works.

Furthermore, what has succeeded in Japan might well succeed in America.105 Although Japan has a unique culture, the features of Japanese culture that encourage the success of restitution (an emphasis on acknowledging guilt, repenting, and seeking absolution) are present in the Judeo-Christian tradition and in other cultural and ethical-religious traditions found in the United States.106 In addition, postwar Japan's formal legal procedures include constitutional protections for the accused--protections that follow in large measure the example of American protections.107

John Owen Haley, an academic specialist on Japanese law, describes the underlying theme of postwar Japan's criminal justice system, as follows: "A pattern of confession, repentance, and absolution dominates each stage of law enforcement in Japan."108 The overwhelming majority of persons accused of criminal offenses admit their guilt, show repentance, seek and bargain for a pardon from their victims, and ask for mercy from the civic authorities. In response, the self-confessed offenders receive punishment that is lenient as compared to penalties in other industrial countries.

DISPOSITION OF CRIMINAL CASES

Japanese law-enforcement data give a quantitative picture of what happens. In 1978, for instance, Japanese police cleared 599,302 cases out of 1,136,448 known offenses. In the process, the police named 231,403 offenders who could be prosecuted. Yet out of this total, the police referred a mere 168,646 to public prosecutors. The police released without additional criminal proceedings 62,727 offenders (21.12 percent). They can do this under the Japanese criminal code, which gives the police the latitude to close simple cases on their own. Likewise public prosecutors usually let the overwhelming majority of cases be settled in no-contest summary proceedings that are based on documentary evidence and in which the maximum penalty is a fine. Japanese prosecutors customarily suspend prosecution in the cases that remain. For instance, in 1983 Japanese public prosecutors had a total caseload of 4,486,238 cases, of whom 2,717,488 of the accused could have been prosecuted and were not juveniles. Of these, they settled 2,331,072 (85.8 percent) in summary proceedings and prosecuted a mere 140,205 (5.1 percent) in ordinary criminal trials. They suspended prosecution in 240,211 cases (9 percent of all prosecutable cases in which the accused were adults).109

Prosecutors use summary proceedings or suspend prosecution much less often for serious offenses. For serious offences (such as murder, fraud, and extortion), for which a fine is not a statutory option, prosecutors may not use summary proceedings. In 1983, they did suspend prosecution in 2.4 percent of prosecutable murder cases, 32 percent of prosecutable fraud cases, and 28 percent of prosecutable extortion cases.110

Prosecutions almost always result in convictions. Conviction rates in Japan run consistently near 99.5 percent. Yet few offenders are subject to government-imposed penalties of more than a small fine or short prison sentence (usually less than a one-year term).111

ROLE OF VICTIM

When police, prosecutors, and judges in Japan decide how to handle offenders, they weigh such matters as the seriousness of the offense, the circumstances attending the crime, and the age and previous record of the offender. Such considerations are common in criminal justice systems. But in Japan, law-enforcement and court officials give important weight to matters that are neglected in other industrial and commercial societies: the offender's willingness to confess guilt, show penitence, and repay the harm to the victim and, as well, the victim's willingness to forgive.

Customarily, the accused not only admits guilt to the authorities, but

through his or her friends and family also tries to get the victim to write a letter to the prosecutor or judge stating that restitution has been paid and that further punishment is unnecessary.112

In this way, the victim plays a part in the criminal justice process. The victim usually obtains restitution and has an advisory role (but not decisive control) when officials determine whether to refer for prosecution, to prosecute, or to sentence the accused.

CONFESSION

Because confession is an important component in rectification and rehabilitation in Japanese society, police and prosecutors doubtless extract confessions by force sometimes. But the Japanese criminal justice system is not morally corrupted by overreliance on confessions, as the medieval European system of torture was.

Japanese courts cannot convict someone on the basis of a confession alone. Japan does not have a guilty plea of the sort found in the United States and other countries that follow the English common law tradition. Every criminal case, including ones using summary proceedings, must go through a hearing on the evidence to ascertain whether a crime was in fact committed and to judge the guilt of the person accused.113 Indeed when the accused has confessed, the burden of proof remains on the prosecution to show that the confession was made freely, and the prosecution must provide corroborative evidence.114 Furthermore, the trial judge has a positive duty to sift and evaluate evidence and, as the finder of fact, to stand behind the verdict and therefore to stand behind the truth of a confession by the accused.115

Also countering social pressures for a confession at any cost is the desire of law-enforcement and judicial officials to have a confession that is sincere and remorse that is genuine.116 The rectification of crime, leniency of punishment, and rehabilitation of criminals in Japan have a moral basis that would be undermined by false confessions.

Honest, uncoerced confession and genuine remorse put the criminal on the path of rehabilitation and provide a moral motivation for restitution. Restitution and future good behavior are discernible evidence of rehabilitation. The criminal's likely rehabilitation and restitutive effort justify punishing leniently. This integrated, balanced system of criminal justice will not work if false confessions are extracted from the accused.

SUCCESSFUL RECORD OF CRIME CONTROL

Japan's record of crime control is clear. The number of offenses and offenders are markedly lower in all categories than they are in any other

industrial country. Japan's success in reducing crime in an already comparatively low-crime society is also clear. Among the major industrial countries, only in Japan have crime rates for non-traffic offenses dropped continuously since World War II.117 To achieve such different results, the Japanese must also be doing something different. Japanese society's emphasis on sincere confession and restitution may well be that something.118

The emphasis on sincere confession and restitution in Japan may also discourage recidivism. According to a 1968 study by Japan's Ministry of Justice, only 13.4 percent of those whose prosecutions for non-traffic

offences were suspended in 1946 committed another crime by February 1967.119

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 habits of right conduct. The institutions of Japan's criminal justice system reinforce these attitudes and patterns of conduct by punishing in moderation only when criminals show remorse and pay restitution.120

The emphasis on restitution and pardon by the victim in the Japanese approach tends to satisfy the victim's desire that justice be done. After the criminal's contrition and on top of the restitution the criminal agrees to, the authorities usually impose only a small additional punishment. That punishment is probably enough to make crime unattractive (in terms of its costs and benefits) and to satisfy the natural desire of victims for retribution. In Japan, in order to obtain a pardon from the victim, the criminal has usually bargained (through intermediaries) with the victim to establish an acceptable level of restitution. Therefore, both the criminal and the victim tend to view the restitution as reasonable and any supplemental court-imposed small fine or short prison term as acceptable.121

ACTIVITIES OF SOCIETY AND OF GOVERNMENT

Could something like the Japanese criminal justice system work in the United States? It could. But current trends in the United States point in the opposite direction.

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 to "doing the right thing." These communities strive to curb criminal violence and to correct its practitioners.

Of course, when a society encourages conformity in not commiting crimes against others, it may also encourage conformity in other areas. Such peaceful traits as individuality, creativity, and eccentricity may well be legal in a conformist society, but they may also sometimes be frowned upon.

At the same time, having a society that encourages anti-crime conformity can keep the government small, keep the level of forcible coercion by officials low, and allow society with its families, voluntary institutions, businesses, and religious bodies to flourish. Thus, even though people with creative talents may pay psychological costs in overcoming social pressure in such a society, they can do so, making use of political freedom and private institutions.

In Japan, it is mostly society rather than government that is in charge of crime control. As John Owen Haley writes:

> Inasmuch as the efficacy of legal norms ultimately rests with those who control their enforcement, by depending upon informal social mechanisms for crime control, the Japanese state has in effect abandoned the most coercive of all legitimate instruments of state control. In contemporary Japan these powers thus reside with the society at large and its constituent, lesser communities of family, firm, and friends.
>
> In effect, state institutional incapacity and the successful emphasis on reintegration of repentant offenders into society and corollary reliance on informal social means of crime control have reinforced the capacity of social groups to exercise coercive controls usually reserved in the West as an exclusive prerogative of the state. The
>
> consequence [in Japan] is a weaker state and stronger, more autonomous and cohesive society.122

In contrast, in the United States, it is currently government (and increasingly the national government) rather than society that is in charge of crime control. The U.S. criminal justice system treats the criminal as if he or she has committed a crime against the government. Whereas in reality, the criminal has committed a crime against a victim. While political figures and public officials in the United States bow in obeisance to restitution, in practice they neglect restitution and shunt it aside. Likewise while penitence and absolution are part of religious and cultural traditions in America, political figures and public officials have usually stressed governmental non-reparative penalties. Such policies have

blocked the development of institutions that could provide absolution to criminals through their efforts to provide restitution to their victims.

VIII. CONCLUSION

RESTORING BALANCE TO THE SCALES OF JUSTICE

This essay has looked briefly at how frequently crimes occur and how many Americans are likely to become crime victims. The criminal justice system is out of balance. The consequences are unacceptable.

Yet the criminal justice system is also out of balance in a way that is not described by numbers. But it is this more fundamental imbalance that drives the appalling numbers with which we are all too familiar.

In 1968, in an influential article on punishment, Herbert Morris properly emphasized both the unjust enrichment that the criminal enjoys from his or her criminality and the balance that needs to be maintained in criminal justice:

> A person who violates the rules has something others have--the benefits of the system [of mutual noninterference with others' rights]--but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased....Justice--that is punishing such individuals--restores the equilibrium of benefits and burdens.123

PROBLEM OF INCENTIVES

At the same time that we look to offender restitution to bring a stronger sense of justice back into the criminal justice system, we have to be alert to the incentives that encourage people in the criminal justice system to act in various ways.

Consider the case of traffic congestion. Policy analysts have long known that toll roads with higher prices at rush hours (peak-load pricing) would cure many traffic congestion problems.124 Why don't we see toll roads with this kind of pricing structure everywhere?

The public authorities in effect own the highways. But they don't have the incentive to make the optimal use of highways that private owners would.

We may well discover that criminal-justice authorities are likewise delinquent, in this case in making sure that the victim of crime gets his or her due. If so, the proper course is fuller privatization until

incentives to recompense the victim are effectively brought to bear on the criminal. As Robert Elias writes: "Reforming the criminal process to promote victim interests may depend not merely on invoking victim rights or sensitizing officials to victim needs, but rather on addressing entrenched official incentives and even American criminal justice's purposes in the first place."125

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3"Violent Crime Jumps 5.6%," Associated Press, San Jose Mercury News, Oct. 31, 1994. This analysis is based on the U.S. Department of Justice's National Crime Survey.

4If one takes growth in population into account, the rate of violent crime per person declined modestly. This analysis is based on the U.S. Department of Justice's National Crime Survey. See "Measuring Crime," The Economist (London), vol. 333, whole no. 7885 (Oct. 15, 1994), p. 23.

5Bureau of Justice Statistics, U.S. Department of Justice, "Lifetime Likelihood of Victimization," technical report, Washington, D.C., March 1987; "83% to be Victims of Crime Violence," New York Times, Mar. 9, 1987,

p. A13.

6Gallup Organization Survey GO 422028 (January 15-17, 1994), The Gallup Poll Monthly, No. 340 (January 1994), p. 43.

7Phrase borrowed from George J. Washnis, Citizen Involvement in Crime Prevention (Lexington, Mass.: Lexington Books, 1976), p. 2.

8Compare Juan Cardenas, "The Crime Victim in the Prosecutorial Process," Harvard Journal of Law & Public Policy, vol. 9, no. 2 (Spring 1986), p. 384.

9For an example of a theory of pure restitution, see Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," in Barnett and John Hagel III, eds., Assessing the Criminal: Restitution, Retribution, and the Legal Process (Cambridge, Mass.: Ballinger, 1977), pp. 349-83.

10In addition, using criminal sentencing procedures to determine the amount of pure restitution may well be unconstitutional. Assessing pure, nonpunitive restitution for a crime may require a civil trial with civil procedures. On this topic generally, see Note, "Victim Restitution in the Criminal Process: A Procedural Analysis," Harvard Law Review, vol. 97, no. 4 (February 1984), pp. 931-46.

11"With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." Robert

(Footnote continued)

APPENDIX I

State of California

California Government Code
Public Authorities Not Responsible for Protection

Sec. 845. Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service.

Sec. 845.2. Except as provided in Chapter 2 (commencing with Section 830), neither a public entity nor a public employee is liable for failure to provide a prison, jail or penal or correctional facility, or, if such facility is provided, for failure to provide sufficient equipment, personnel, or facilities therein.

Sec. 845.8. Neither a public entity nor a public employee is liable for (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release. (b) Any injury caused by (1) An escaping or escaped prisoner; (2) An escaping or escaped arrested person; or (3) A person resisting arrest.

Sec. 846. Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody.

APPENDIX II

Constitution of The State of Kansas

Victims' Bill of Rights

Art. 15, Sec. 15. Victims' rights. (a) Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right to be informed of and to be present at public hearings, as defined by law, of the criminal justice process, and to be heard at sentencing or at any other time deemed appropriate by the court, to the extent that these rights do not interfere with the constitutional or statutory rights of the accused.

(b) Nothing in this section shall be construed as creating a cause of action for money damages against the state, a county, a municipality, or any of the agencies, instrumentalities, or employees thereof. The legislature may provide for other remedies to ensure adequate enforcement of this section.

(c) Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilty or not guilty or an acceptance of a plea of guilty or to set aside any sentence imposed or any other final disposition in any criminal case.

11(continued)
Martinson, "What Works?--Questions and Answers About Prison Reform," The Public Interest, no. 35 (Spring 1974), p. 25, see also p. 49.

"The entire body of research appears to justify only the conclusion that we do not know of any program or method of rehabilitation that could be guaranteed to reduce the criminal activity of released offenders." Lee Secrest et al., eds., The Rehabilitation of Criminal Offenders (Washington, D.C.: National Academy of Sciences, 1979).

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James Q. Wilson reports rehabilitative effects from subjecting offenders to a restrictive regime. Wilson, "'What Works?' Revisited: New Findings on Criminal Rehabilitation," The Public Interest, no. 61 (Fall 1980), pp. 3-17.

12The New English Bible. Compare Exodus 22:1-3.

13Stephen Schafer, Victimology: The Criminal and His Victim (1968; repr. Reston, Va.: Reston Publishing, 1977), pp. 5-17; Bruce R. Jacob, "The Concept of Restitution: An Historical Overview," in Joe Hudson and Burt Galaway, eds., Restitution in Criminal Justice: A Critical Assessment of Sanctions (Lexington, Mass.: Lexington Books, 1977), pp. 45-62; Bruce R. Jacob, "Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process," Journal of Criminal Law, Criminology, and Police Science, vol. 61, no. 2 (1970), pp. 152-67; Richard E. Laster, "Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness," University of Richmond Law Review, vol. 5, no. 1 (Fall 1970), pp. 71-98.

14William Tallack, Reparation to the Injured and the Rights of the Victims of Crime to Compensation (London: Wertheimer, Lea, 1900), pp. 11-12. (Tallack was secretary of the Howard Association, a prison-reform group headquartered in London.). See discussion of Tallack's historical point in Schafer, pp. 15-16, and in Murray N. Rothbard, "Punishment and Proportionality," in Barnett and Hagel, p. 262.

Compare Jacob, "The Concept of Restitution," pp. 46-47; Theodore Pluckett, A Concise History of Common Law, 5th ed. (London: Butterworth, 1956), pp. 421-23; Laster.

15Emile Durkheim, The Division of Labor in Society, trans. W. D. Halls (London: Macmillan, 1984), bk. 1, chaps. 3-7, esp. pp. 101-102, 153-54. See also Bruce Lenman and Geoffrey Parker, "The State, the Community and the Criminal Law in Early Modern Europe," in V.A.C. Gatrell, Lenman, and Parker, eds., Crime and the Law: The Social History of Crime in Western Europe Since 1500 (London: Europa Publications, 1980), pp. 12-13, 23. On the need for modifying Durkheim's account of systems with disproportional penalties, see pp. 14-15.

16Gallup Organization Survey GO 422017 (October 8-10, 1993), The Gallup Poll Monthly, no. 339 (December 1993), p. 30.

17George F. Will, "Are We 'a Nation of Cowards'?" Newsweek, vol. 122, no. 20 (Nov. 15, 1993), p. 94. See also research summarized in Robert Elias, The Politics of Victimization: Victims, Victimology, and Human Rights (New York: Oxford University Press, 1986), pp. 142-43.

18Will.

19Christopher Hitchens, "Minority Report," The Nation, vol. 258, no. 3 (Jan. 24, 1994), p. 78.

20Ed Kilgore, "Safer Streets and Neighborhoods," in Will Marshall and Martin Schram, eds., Mandate for Change (New York: Berkley Books, 1993), pp. 187-88.

21Mark H. Moore, R. Trojanowicz, and George L. Kelling, Jr., "Crime and Policing," Perspectives on Policing (U.S. Department of Justice, National Institute of Justice), no. 2 (June 1988). For summaries of confirmatory comparable results in Kansas City and four other cities, see James Q.

(Footnote continued)

21(continued)
Wilson, Thinking About Crime, 2nd ed. (New York: Basic Books, 1983), pp. 61, 71, 270 n.11; Lawrence Sherman, "'Watching' and Crime Prevention: New Directions for Police," Journal of Contemporary Studies, vol. 5, no. 4 (Fall 1982), pp. 92-93.

22Kilgore, pp. 188-91.

23Malcom K. Sparrow, Mark H. Moore, and David M. Kennedy initially say that community policing simply means police encouraging preventative public-safety measures, reducing local disorder, and staying in touch with ordinary people. But as their account develops further, they come to include social work and one-stop shopping for all urban public services. Beyond 911: A New Era for Policing (New York: Basic Books, 1990).

24See Contracting for Emergency Ambulance Services: A Guide to Effective System Design (Sacramento, Calif.: American Ambulance Association, 1994), esp. chap. 5, "Public Policy Options," pp. 51-78.

25This proposal will save taxpayers money. But even so, relying on public financing will leave some perverse incentives in place that will encourage overuse of police services.

26Compare J. Neil Schulman, Stopping Power (Santa Monica, Calif.: Synapse-Centurion, 1994), p. 187. A local fire can also disable an emergency telephone system. On March 15, 1994, a fire in a telephone company switching station shut down 911 service for most of Los Angeles. P. 206.

27Don B. Kates, Jr., "Guns, Murder, and the Constitution: A Realistic Assessment of Gun Control," Policy Briefing (Pacific Research Institute for Public Policy, San Francisco, Calif.), Feb. 1990, p. 20. The facts and citations that follow have been taken from Kates's paper.

28Warren v. District of Columbia, 444 A.2d 1 (D.C. Ct. of Ap. 1981) at 6; see also Morgan v. District of Columbia, 468 A.2d 1306 (D.C. Ct. of Ap. 1983). To the same effect, see Calogrides v. City of Mobile, 475 So. 2d 560 (S.Ct.Ala. 1985); Morris v. Musser, 478 A.2d 937 (1984); Davidson v. City of Westminster, 32 C.3d 197, 185 Cal. Rptr. 252, 649 P.2d 894 (S. Ct. Cal. 1982); Chapman v. City of Philadelphia, 434 A.2d 753 (Sup. Ct. Penn. 1981); Weutrich v. Delia, 155 N.J. Super. 324, 326, 382 A.2d 929, 930 (1978); Sapp v. City of Tallahassee, 348 So.2d 363 (Fla. Ct. of Ap. 1977); Simpson's Food Fair v. Evansville, 272 N.E. 2d 871 (Ind. Ct. of Ap.); Silver v. City of Minneapolis, 170 N.W.2d 206 (S. Ct. Minn. 1969); Riss v. City of New York, 22 N.Y. 2d 579, 293 NYS2d 897, 240 N.E. 2d 860 (N.Y. Ct. of Ap. 1958); Keane v. City of Chicago, 98 Ill. App.2d 460, 240 N.E.2d 321 (1968); and Bowers v. DeVito, 686 F.2d 61 (7 Cir. 1982) (no federal constitutional requirement that state or local agencies provide sufficient police protection).

29See Cal. Govt. Code secs. 821, 845, 846 (excerpted in Appendix I of this report), and 85 Ill. Rev. Stat. 4-102, construed in Stone v. State, 106 CA-3d 924, 165 Cal. Rptr. 339 (Cal. Ct. of Ap. 1980); and Jamison v. City of Chicago, 48 Ill. App. 567 (Ill. Ct. of Ap. 1977). See generally 18 McQuillen on Municipal Corporations, sec. 53.80.

30James Q. Wilson, "Just Take Away Their Guns," New York Times Magazine, March 20, 1994, p. 47. Compare Wilson and Mark H. Moore, "A Note on Gun Control," in Wilson, Thinking About Crime (1983), p. 262. Between 1983 and 1994, new social-science work has convinced Wilson to elevate the efficacy of self-defense with firearms from a widely held "belief" then to a set of "facts" now.

31"Q and A on Gun Defenses," Orange County Register, Sept. 19, 1993, repr. in Schulman, p. 57; Gordon Witkin, "Should You Own a Gun?" U.S. News & World Report, vol. 117, no. 7 (Aug. 15, 1994), p. 27. Compare Gary Kleck,

Point Blank: Guns and Violence in America (New York: Aldine de Gruyter, 1991), chap. 4.

32Wilson, "Just Take Away."

33Grant Pick, "Do Good Watchdogs Make Good Neighbors?" Student Lawyer, vol. 10, no. 4 (Dec. 1981), pp. 22-25, 40-43; Sherman, pp. 87-101, esp. pp. 87, 94-95; "'Guardian Angels' Given Good Marks for Avoiding Vigilantism," Criminal Justice Newsletter, vol. 17, no. 23 (Dec. 1, 1986), pp. 5-6; Special Issue: "Controlling Crime in the Community: Citizen-Based Efforts and Initiatives," ed. Arthur J. Lurigio and Lloyd Klein, Crime and Delinquency, vol. 35, no. 3 (July 1989); Washnis, esp. chap. 4; Bruce L. Benson, The Enterprise of Law (San Francisco: Pacific Research Center, 1990), pp. 208-209.

34James Q. Wilson and George L. Kelling, Jr., "Broken Windows: the Police and Neighborhood Safety," chap. 5, in Wilson, Thinking About Crime. See also Wesley G. Skogan, Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods (New York: Free Press, 1990); George L. Kelling, Jr., and Catherine M. Coles, "Disorder and The Court," The Public Interest, no. 116 (Summer 1994), pp. 57-74.

35However, this may be changing. Gary T. Marx writes: "Even in areas served by public streets we are seeing the beginning of the barricading of neighborhoods. In sections of Miami and Fort Lauderdale, for example, private guards control checkpoints and lower gates to stop cars." Marx, "Commentary: Some Trends and Issues in Citizen Involvement in the Law Enforcement Process," Crime and Delinquency, vol. 35, no. 3 (July 1989), p. 511. On neighborhoods in Dayton, Ohio, see Mitchell Owens, "Saving Neighborhoods One Gate at a Time," New York Times, national ed., Aug. 25, 1994, pp. B1-B2.

36David T. Beito, "The Formation of Urban Infrastructure through Nongovernmental Planning: The Private Places of St. Louis, 1869-1920," Journal of Urban History, vol. 16, no. 3 (May 1990); Benson, Enterprise of Law, pp. 209-211.

37Compare Bruce L. Benson, David W. Rasmussen, and Brent Mast, Crime in Florida, A Report Prepared for the Florida Chamber of Commerce (March 1994), p. 29.

38Lloyd Klein, Joan Luxenburg, and Marianna Klein, "Perceived Neighborhood Crime and the Impact of Private Security," Crime and Delinquency, vol. 35, no. 3 (July 1989), pp. 368-71.

San Francisco has had a corps of privately-financed neighborhood-beat police with the same powers as tax-funded police since the Gold Rush era.

See "City's Private Patrols on Cops' Hit List," San Francisco Examiner, Oct. 13, 1994; "Powers of Special Police Force Under Attack in San Francisco," Associated Press, San Jose Mercury News, Oct. 20, 1994; "Dispute in San Francisco Erupts Over Powers of Special Patrols," Associated Press, New York Times, Oct. 23, 1994.

39Sources of impediments include licensing requirements in the private security field and firearms regulations.

40This paragraph is drawn directly from Wilson, Thinking About Crime, p. 81. Compare William F. McDonald, "Toward a Bicentennial Revolution in Criminal Justice: The Return of the Victim," American Criminal Law Review, vol. 13 (1976), p. 652.

41Cardenas, p. 367.

42Cardenas, p. 369.

43I am indebted to Murray N. Rothbard for suggestions that helped me refine this proposal.

44I chose the value of the credit to indicate the level of savings that may be available through private rather than public investigation.

45Richard C. Monk, ed. Taking Sides: Clashing Views on Controversial Issues in Crime and Criminology (Guilford, Conn.: Dushkin Publishing Group, 1991), p. 192.

46William F. McDonald, "Expanding the Victim's Role in the Disposition Decision: Reform in Search of a Rationale," in Burt Galaway and Joe Hudson, eds., Offender Restitution in Theory and Action (Lexington, Mass.: Lexington Books, 1978), p. 102.

Psychoanalyst Karl Menninger writes: "[Criminal] charges are often played off like poker chips behind the scenes in deals between prosecuting attorneys and defending lawyers. In most cases the prosecutors rather than the judges decide the guilt and innocence." Menninger, Whatever Became of Sin? (New York: Hawthorne Books, 1973), p. 60.

47John H. Langbein, "Torture and Plea Bargaining," The Public Interest, no, 58 (Winter 1980), pp. 43-61.

48Deborah Kelly, "Victim Participation in the Criminal Justice System," in Arthur J. Lurigio, Wesley G. Skogan, and Robert D. Davis, eds., Victims of

Crime: Problems, Policies, and Programs (Newbury Park, Calif.: Sage Publications, 1990) (Sage Criminal Justice System Annuals, vol. 25), p. 178.

49Kelly, p. 177.

50William McDonald, "Expanding the Victim's Role," pp. 103-104.

51On rareness of victims' influence on plea bargaining and officials' motives for excluding victims, see Elias, Politics, pp. 150-52.

52Compare Cardenas, p. 393.

53On private prosecutions in criminal cases in France and Germany, See Cardenas, pp. 384-87. On the German system, see also William McDonald, "Expanding the Victim's Role," p. 106.

54See Adrian Shubert, "Private Initiative in Law Enforcement: Associations for the Prosecution of Felons, 1744-1856," in Victor Bailey, ed., Policing and Punishment in Nineteenth-Century Britain (London: Croom Helm, 1981), pp. 25-41; David Philips, Crime and Authority in Victorian England: The Black Country, 1835-1860 (London: Croom Helm, 1977), pp. 119-23.

55James Fitzjames Stephen, A History of the Criminal Law of England (1883; repr. Buffalo, N.Y.: William S. Hein, n.d.), vol. 1, p. 496.

56Cardenas, p. 365.

57Mallery v. Lane, 97 Conn. 132, 138. See also cases cited in Cardenas, p. 374 n. 85.

A forthcoming paper by Jeffrey C. Parker of George Mason University Law School discusses the history of compulsory testimony by witnesses and argues that it is a disincentive to knowledge and a

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57(continued)
subsidy of litigation.

58On the importance of stigmatizing the criminal, see Durkheim, bk. 1, chap. 1, pp. 47-48 and also pp. 58-60, 63. See also Joel Feinberg, "The Expressive Function of Punishment," in his Doing and Deserving (Princeton, N.J.: Princeton University Press, 1970), chap. 5; Henry M. Hart, Jr., "The

Aims of the Criminal Law," Law and Contemporary Problems, vol. 23, no. 3 (Summer 1958), pp. 401-41.

59See, for example, Rothbard, pp. 259-70; Andrew von Hirsch, "The Principle of Commensurate Deserts," in his Doing Justice: the Choice of Punishments (New York: Hill and Wang, 1970), chap. 8. It should be noted that a pure retributivist approach, like Von Hirsch's, allows neither for acts of clemency nor for designing the sentence to encourage offender restitution to the victim. See William McDonald, "Expanding the Victim's Role," p. 103.

60See Charles R. Tittle, "Restitution and Deterrence: An Evaluation of Compatibility," in Burt Galaway and Joe Hudson, eds., Offender Restitution in Theory and Action (Lexington, Mass.: Lexington Books, 1978), chap. 3.

61On the continuing role in a restitutive system of prisons as an instrument of societal self-defense, see Herbert Spencer, "Prison Ethics," in his Essays: Scientific, Political, and Speculative (New York: D. Appleton, 1892), vol. 3, pp. 165-89.

62See Robert Elias, "The Symbolic Politics of Victim Compensation," Victimology, vol. 8, nos. 1-2 (1983), pp. 213-24, esp. p. 216; Elias, Politics, p. 239.

63Richard Dagger, "Restitution, Punishment, and Debt to Society," in Joe Hudson and Burt Galaway, eds., Victims, Offenders, and Alternative Sanctions (Lexington, Mass.: Lexington Books, 1980), p. 8. See also Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" Ethics, vol. 88, no. 4 (July 1978), pp. 348-57, esp. pp. 355-57.

64This example is taken (with minor modifications) from Tittle, p. 42.

65Compare John R. Lott, Jr. "Do We Punish High Income Criminals Too Heavily?" Economic Inquiry, vol. 30, no. 4 (Oct. 1992), pp. 583-608.

66Compare Tittle, pp. 42-43; Dagger, p. 8; Pilon, p. 351.

67Burt Galaway and Walton Walker, Restitution Imposed on Property Offenders in New Zealand Courts: A Study of Orders and Compliance, Wellington: New Zealand Department of Justice, Planning and Development Division, 1985 [Study Series, No. 14], pp. 21-22. See also Burt Galaway and Philip Spier, Sentencing to Reparation: Implementation of the Criminal Justice Act of 1985, Wellington: New Zealand Department of Justice, Policy and Research Division, 1992, pp. 147, 168-69, 173.

68For a contrasting view, see Barnett, pp. 375-78.

69The information in this and subsequent sections is drawn largely from

Susan W. Hillenbrand, "Restitution and Victim Rights in the 1980s," chap. 11, in Arthur J. Lurigio, Wesley G. Shogan, and Robert C. Davis, eds., Victims of Crime: Problems, Policies, and Programs (Newbury Park, Calif.: Sage Publications, 1990) (Sage Criminal Justice System Annuals, vol. 25). The evaluation of developments is my own.

70President's Task Force on Victims of Crime, Final Report (Washington, D.C.: U.S. Government Printing Office, 1982), pp. 17-18.

71Hillenbrand, p. 193.

72For the Victims' Bill of Rights in the Kansas Constitution, see Appendix II of this report.

73Hillenbrand, p. 195. See also Alan T. Harland, "One Hundred Years of Restitution: An International Review and Prospectus for Research," Victimology, vol. 8, nos. 1-2 (1983), p. 195.

74Hillenbrand, p. 195. See also Harland, "One Hundred Years," pp. 195-96.

75Kelly v. Robinson, 479 U.S. 36 (1986), at 52-53.

76Barbara E. Smith, Robert C. Davis, and Susan W. Hillenbrand, Improving Enforcement of Court-Ordered Restitution (Chicago: American Bar Association, 1989), Executive Summary, pp. 27-28.

77Elias, Politics, p. 237. See also pp. 140-41.

78Michael Tanner, "Operation Safe Streets," Washington, D.C., 1994.

79Carol Shapiro, "Is Restitution Legislation the Chameleon of the Victims' Movement," in Burt Galaway and Joe Hudson, eds., Criminal Justice, Restitution, and Reconciliation (Monsey, N.Y.: Criminal Justice Press, 1990), pp. 73-80.

80Alan T. Harland, "Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts," UCLA Law Review, vol. 30, no. 1 (Oct. 1982), pp. 75-77.

81United States Statutes at Large, vol. 45 (1929), p. 1084.

82United States Statutes at Large, vol. 49 (1935), p. 494.

83United States Statutes at Large, vol. 54 (1940), p. 1134.

84See United States Code (1988), Title 18, secs. 1761, 1762 (1988); United States Code (1988), Title 49, sec. 11507.

85Morgan O. Reynolds, "Crime Pays, But So Does Imprisonment," National Center for Policy Analysis Policy Report, no. 149 (Dallas, Tex., March 1990), p. 18.

86U.S. President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society (Washington, D.C.: U.S. Government Printing Office, 1967), p. 176. See also discussion in Jacob, "The Concept of Restitution," at pp. 50, 52, 57.

87Reynolds, p. 17.

88On a prisoner's continuing duty to earn a living, see Spencer. See also William Tallack, Penological and Preventative Principles (London: Wertheimer, Lea, 1889), pp. 208-12.

89See, for example, Galaway and Spier, p. 173.

90Brian Willats, "Court-Ordered Voluntarism: 'Free' Labor Could Prove Costly," Philanthropy, Culture & Society (Capital Research Center, Washington, D.C.), June 1994, pp. 1-2.

91David A. Kaplan and Clara Bingham, "A New Era of Punishment: Community Service Is a Controversial Alternative to Jail," Newsweek, vol. 115, no. 20

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91(continued)
(May 14, 1990), p. 50.

92For data on New Jersey and California, see Willats, p. 2.

93Malcolm M. Feeley, Richard A. Berk, and Alec Campbell, "Between Two Extremes: An Examination of the Efficiency and Effectiveness of Community Service Orders and Their Implications for the U.S. Sentencing Guidelines," Southern California Law Review, vol. 66 (November 1992), pp. 155-94.

94Joe Hudson and Burt Galaway, "A Review of the Restitution and Community-Service Sanctioning Research," in Hudson and Galaway, Victims,

Offenders, and Alternative Sanctions, p. 190. See also Willats, p. 6. Compare analysis of boot camps, in David B. Kopel, "Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety," Policy Analysis (Cato Institute, Washington, D.C.), no. 208 (May 17, 1994), p. 32.

95For an example of an advocate of altruistic service talking about the debasement of language that arises from the use of the term "community service" to designate penal servitude, see Don Wycliff, in Williamson M. Evers, ed., National Service: Pro & Con (Stanford, Calif.: Hoover Institution Press, 1990), p. 15.

96Compare the analysis of charitable service and induced national service, in Williamson M. Evers, "Social Problems and Political Ideals in the Debate over National Service," in Evers, National Service: Pro & Con, pp. xxxv-xxxvi. See also Willats, pp. 7-8.

97Alan T. Harland, "Court-Ordered Community Service in Criminal Law: The Continuing Tyranny of Benevolence," Buffalo Law Review, vol. 29 (1980), pp. 429-31, 472.

98Compare Willats, p. 2.

99Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest (New York: Oxford University Press, 1989), p. 4.

100Ibid.

101W. H. Humbert, The Pardoning Power of the President (Washington, D.C.: American Council on Public Affairs, 1941), pp. 13-14.

102Examples of just grounds for a pardon might include innocence, an excusable crime, a morally justified act, or a deserved adjustment to a sentence. Moore, p. 11.

103Concerning the special case of murder victims and pardoning or refusing to pardon "from the grave," see the discussion in Rothbard, p. 260.

104This section draws extensively on John Owen Haley, "Confession, Repentance, and Absolution," in Marian Wright and Burt Galaway, eds., Mediation and Criminal Justice: Victims, Offenders, and Community (London: Sage Publications, 1989), pp. 195-211. I am indebted to Burt Galaway for directing my attention to this article. See also Haley, "Comment: The Implications of Apology," Law and Society Review, vol. 20, no. 4 (1986), pp. 499-507; Haley, "Justice that Works," Quarterly (Christian Legal Society), vol. 11, no. 3 (Fall 1990), p. 8; Haley, Authority without Power: Law and the Japanese Paradox (New York: Oxford University Press, 1991).

105Compare Haley, "Confession," p. 204.

106Ibid.

107Haley, "Confession," p. 195; Haley, Authority, p. 126.

108Haley, "Confession," p. 195.

109Haley, "Confession," p. 197.

110Ibid.

111Haley, "Confession," p. 198.

112Haley, "Confession," p. 200.

113Haley, "Confession," p. 202.

114Haley, Authority, p. 132.

115Haley, "Confession," p. 202.

116Ibid.

117Haley, "Confession," p. 204.

118Compare Haley, "Confession," p. 204.

119Haley, "Confession," p. 207.

120Compare Haley, "Confession," p. 208.

121Compare Haley, "Confession," p. 208.

122Haley, Authority, p. 138.

123Herbert Morris, "Persons and Punishment," The Monist, vol. 52, no. 4 (October 1968), p. 478. Compare wording in Dagger, p. 7.

124William S. Vickrey, "Pricing in Urban and Suburban Transport," American Economic Review, vol. 53, no. 2 (May 1963), pp. 452-65; Vickrey, "Congestion Theory and Transport Investment," American Economic Review, vol. 59, no. 2 (May 1969), pp. 251-60.

125Elias, Politics, pp. 237-38.