

THE EMPOWERMENT OF THE CRIME VICTIM: A COMPARATIVE STUDY OF VICTIM COMPENSATION SCHEMES IN THE UNITED STATES AND AUSTRALIA

Over the past twenty years there has been a marked resurgence in concern for the rights of crime victims.¹ The enactment of the Victims and Witnesses Protection Act of 1982 ("VWPA") in the United States, replaced the notion of the "Forgotten Victim" with the idea of "Victim's Rights."² As one commentator stated, "the Victim's rights' phenomenon is now a full-fledged component of the criminal justice system in the United States."³

One right now available for crime victims in the United States, as codified in Title 18 of the United States Code, is the right to restitution for losses suffered as the result of a crime.⁴ In addition, a number of states have amended their constitutions in order to guarantee the rights of crime victims.⁵ Not specific to the United States, the expansion of victim's rights enjoys world-wide growth and acceptance.⁶

Australia is one country in which victim's rights to restitution have seen tremendous growth. Every state in Australia has guaranteed victims their right to restitution.⁷

This Comment explores the justifications for using restitution in substantive criminal proceedings to compensate victims of crime and the ramifications of such use. The methodology employed in this Comment is a

1. See Robert C. Davis et al., *Restitution: The Victim's Viewpoint*, 15 JUST. SYS. J. 746, 747 (1992) (discussing a historical overview of the treatment of crime victims in our criminal justice system).

2. This idea has been expanded upon by David L. Roland in *Progress in the Victim Reform Movement: No longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35 (1990).

3. See Donald J. Hall, *Victims' Voice in Criminal Court: The Need For Restraint*, 28 AM. CRIM. L. REV. 233 (1991) (arguing that the scales have been tipped too far in favor of the victim at the expense of the criminal defendants' rights).

4. Part (a) of Title 18 U.S.C.A. § 3579. Order of Restitution states:

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902, of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

5. For a brief look at the attempt to unify the various state compensation programs, see Henry J. Reske, *Helping Crime's Casualties: New Model Act Says Victims Must be Informed of Rights*, 78 A.B.A. J. 34 (April 1992). The new model act was approved in August, but is waiting to be adopted by state legislatures before becoming law.

6. For a discussion on the actual effectiveness of this world-wide growth in the acknowledgment of victims' rights, see Nicholas C. Katsoris, *The European Convention on the Compensation of Victims of Violent Crimes: A Decade of Frustration*, 14 FORDHAM INT'L L.J. 186 (1990/1991). This Comment argues that inadequacy of funding frustrates the intentions of the member states to compensate crime victims.

7. For a comprehensive look at Australian victim compensation schemes, see Iyla Therese Davies, *Compensation for Criminal Injuries in Australia: A Proposal For Change in Queensland*, 3 BOND L.R. 1 (1991).

comparative analysis of the victim compensation schemes used in the United States and Australia.

Part I of this Comment discusses the general justifications for using restitution in criminal proceedings, focusing on its evolution in conformity with changes in the substantive goals of the criminal law. Part II discusses the development of criminal compensation in the United States and the argument over its constitutionality, demonstrating the advancement in this area and suggesting the need for further advancement.

In Part III, the focus is on the Australian victim compensation schemes, with detailed analysis of some of the key similarities and differences among the various Australian states. This part further focuses on some of the procedural aspects of the Australian schemes, and how they differ from those in the United States. Part IV compares the critical areas of the compensation schemes employed by the United States and Australia. Finally, Part V of this Comment summarizes those comparisons made previously, and offers possible recommendations.

I. JUSTIFICATIONS FOR THE USE OF RESTITUTION IN SUBSTANTIVE CRIMINAL PROCEEDINGS TO COMPENSATE VICTIMS OF CRIME

The use of restitution in the criminal arena is not a new concept. It has been documented in various forms in primitive society, the Middle Ages, and feudal times.⁸ The criminal arena was necessarily composed of the offender and the victim.⁹ As time passed, and "society" expanded, the victim's voice grew softer.¹⁰

In criminal proceedings, the State now stands where the victim once stood. This substitution, however, is a fairly recent phenomenon.¹¹

During the American colonial period, victims were often granted restitution upon the finding of guilt of the accused.¹² At that time, resti-

8. For a history of victim restitution, see Thomas M. Kelly, *Where Offenders Pay For Their Crimes: Victim Restitution and its Constitutionality*, 59 NOTRE DAME L. REV. 685 (1984). Kelly begins his discussion of restitution with a short historical overview, including "blood feuds" of primitive society, "personal vendettas" of the Middle Ages, and payment of a commission to the King or Lord in feudal times.

9. *Id.* at 686.

10. See Davis, *supra* note 1, at 746.

11. The exact point at which the victim of a crime changed from the person to the social order (the state) is not altogether clear. It has been speculated that the change came as a matter of efficiency, resulting from urbanization. As the distinction between private (civil) and public (criminal) wrongs grew, the voice of the crime victim became softer. *Id.*

12. Restitution was a substantive goal of the criminal proceeding in Colonial America, with victims taking an active part in the judicial proceedings. However, as noted above, with growing urbanization, retribution, rather than restitution, emerged as a primary motivation, to punish the offender. Consequently, where restitution was actually granted, the primary motivation was not restoration to the victim, but rather punishment to the criminal defendant. *Id.* "Incarceration replaced restitution as the customary punishment of guilty offenders." *Id.*, (citing Alan Harland, *One Hundred Years of Restitution: An International Review*, 8 VICTIMOLOGY 190-203 (1983); and Bruce Jacobs, *The Concept of Restitution: An Historical*

tution was actually viewed as one of the goals of the criminal justice system.¹³ However, with the growth of urbanization, the victim of the crime became the "social order," with the actual victim left to seek redress in a subsequent civil trial.¹⁴

The goals of the criminal law eventually became retribution, reformation, deterrence, and incapacitation.¹⁵ Each of these goals demonstrates a different motivation and objective. The objective of retribution is simply to punish the offender, motivated by society's desire to see the offender receive her "just desserts."¹⁶

The objective of incapacitation is to incarcerate the offender so that she may not commit further social wrongs. This is motivated by society's desire to keep social malefactors off the streets.¹⁷ Although conceptually incapacitation addresses the safety concerns of many crime victims, it fails to address the loss suffered by the victim as a result of the crime.

The objective of reformation is to rehabilitate the offender.¹⁸ This objective is specifically addressed by the use of restitution in criminal proceedings. The theory of reforming the criminal defendant may once again be cognizable as the result of restitution.

The objective of deterrence is to prevent both this offender and other potential offenders from committing similar crimes.

It has been conceded that these goals simply remain aspirations.¹⁹ However, the criminal justice system has been slow to recognize the feasibility of restitution to the victim as a valid substantive goal. In order for any justice system to function efficiently, society must feel it is legitimately addressing its problems. As such, legitimization of the system itself becomes

Overview, in RESTITUTION IN CRIMINAL JUSTICE 45-62 (Joe Hudson & Burt Galaway eds., 1977).

13. *Id.*

14. *Id.*

15. See *United States v. Bergman*, 416 F. Supp. 496 (S.D. Cal. 1976), for a systematic analysis of these goals and the reality of their failure.

16. See Michael Moore, *Law and Psychiatry*, reprinted in KADISH & SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 142-144 (5th ed. 1989).

17. However, this objective seems impracticable when confronted with the ever-increasing problem of jail overcrowding. See Pamela M. Rosenblatt, *The Dilemma of Overcrowding in the Nation's Prisons: What are Constitutional Conditions and What Can Be Done?* 8 N.Y.L. Sch. J. Hum. Rts. 489 (1991).

18. This objective has largely been undermined, as clearly the penitentiary has an ineffective rehabilitative atmosphere. See Note, *Victim Restitution In The Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984).

19. With growing crime rates, it is hard to ignore the obvious: that our system of punishment fails to deter people from committing crimes. See Rosenblatt, *supra* note 17. As such, retribution remains the only justifiable goal. This is because it requires the easiest and least justification; as long as people continue to feel good about punishing criminals, retribution is justified. See David A. Starkweather, *The Retributive Theory of "Just Deserts" And Victim Participation In Plea Bargaining*, 67 IND. L.J. 853 (1992).

the over-arching purpose of the system.²⁰

A justice system cannot function autonomously. It must be legitimized by society's faith in it. This being so, the need for compensation to crime victims becomes more apparent. As stated by one commentator: "the ability of the judiciaries to work their will stands or falls with public opinion if . . . legitimacy is both a grant from the populace and the essential source of judicial power."²¹

This idea demonstrates the obvious need for people to believe that a system in which they place their faith, is working. In order for people to support the system, they must trust it. It is this belief in the system upon which the overarching goal of the system rests.

Prior to the recent growth in the recognition of victim's rights, it was well recognized and commented upon, that people were losing faith in our criminal justice system.²² In 1978, Justice Mosk of the Supreme Court of California stated, "I must concede there is an element of accuracy to the oft-repeated contention that 'criminals have all the rights.'"²³

The crime victim was simply a prosecutor's tool. In addition to the suffering caused by the actual crime, she often had to endure the added trauma of prolonged interrogation.²⁴ Moreover, she had to carry the emotional and financial burdens, inflicted on her by the crime, without compensation.²⁵

Today, with the rise in the recognition of victim's rights, the crime victim has actually become a positive force in the substantive criminal proceedings. As crime victims become empowered by this recognition, the legitimization of the system is enforced.

In response to the plight of crime victims, the 1970's and early 1980's marked a rapid growth in the number of victim assistance programs. In 1981, President Ronald Reagan announced the week of April 19th to be National Victims' Rights Week.²⁶ In 1982, sections 3579 and 3580 were added to Title 18 of the United States Code.²⁷ Section 3579 states in relevant part, "The court, when sentencing a defendant convicted of an

20. See Kevin O'Grady et al., *The Importance of Victim Satisfaction: A Commentary*, 15 JUST. SYS. J. 759 (1992) (discussing judicial legitimacy).

21. See *id.* at 760.

22. See Davis, *supra* note 1, at 747.

23. See Justice Mosk, *Mask of Reform*, 10 SW. U.L. REV. 885, 889-90 (1978).

24. See Roland, *supra* note 2, at 35. It has often been noted that victims of crime also feel victimized by a system that simply fails to take their victimization into account. *Id.*

25. *Id.*

26. The early 1980's was a period of unprecedented interest in victim's rights. In 1982, the year after President Reagan proclaimed a National Victims' Rights Week, the VWPA was enacted. In 1984, the Victims of Crime Act was passed by Congress. This Act provides for a restitution account for crime victims funded by criminal penalties assessed in felony convictions. This same year Pepperdine published its noted series of articles on victims' rights, commissioned by a grant from the United States Department of Justice, through the American Bar Association. *Id.*

27. 18 U.S.C.A. § 3579, § 3580.

offense under this title . . . may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense."²⁸

Section 3580 lists the factors for the court to consider when making a determination of an award of restitution.²⁹ This is essentially a balancing test between the loss to the victim and the financial resources of the defendant.³⁰ The restitution award is discretionary so that no substantial hardship will be inflicted upon the defendant or her dependents.³¹

As the voice of the crime victim once again begins to be heard, the legitimization of the judicial system strengthens. As such, the justification for the use of restitution in criminal proceedings is also strengthened. The demand of the crime victim to once again be heard reinforces the required foundation of the judicial system.

II. THE DEVELOPMENT OF CRIMINAL COMPENSATION IN THE UNITED STATES

As the legislatures and courts of the United States began recognizing the validity of restitution to crime victims, the use of restitution in the criminal arena became the target of a constitutional battle. This section includes a discussion of some of the constitutional arguments made by defendants against the imposition of restitution, and how these arguments were addressed by the courts.

In the 1970's, courts in the United States began approving the imposition of restitution in the criminal arena. In 1976, the New Jersey Supreme Court in *State v. Harris*, held that "restitution is not only an appropriate but frequently a salutary technique in the criminal process, and in the purpose of the probation system contemplated by the statute."³²

In *Harris*, the defendant was ordered to make restitution as a condition of probation upon conviction for welfare fraud.³³ On appeal, the Supreme Court of New Jersey held that imposition of restitution in substantive criminal proceedings was preferable to a subsequent civil trial for damages.³⁴

The court found that ordering the defendant to make restitution had a

28. 18 U.S.C.A. § 3579.

29. 18 U.S.C.A. § 3580:

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

30. *Id.*

31. *Id.*

32. *State v. Harris*, 362 A.2d 32 (N.J. 1976).

33. *Id.* at 35.

34. *Id.* at 32.

significant rehabilitative purpose.³⁵ It stated, "Restitution in a proper case may oftentimes be a compelling reminder of the wrong done and meaningfully contribute to the rehabilitation process"³⁶ It further stated, "A fine is punitive. A jail sentence is retributive. But restitution makes sense."³⁷

Similarly, in 1978, the Supreme Court of Wisconsin held in *State v. Huggett*, that restitution was a "reasonable and appropriate condition of probation."³⁸ The defendant in *Huggett*, like the defendant in *Harris*, had also been convicted of welfare fraud.³⁹

The court in *Huggett*, illustrated a number of reasons justifying the imposition of restitution in a criminal trial.⁴⁰ These reasons were: (1) aiding rehabilitation by "strengthening the individual's sense of responsibility;" (2) giving the offender a "positive sense of making a fresh start;" and (3) "protecting the community's interest in having the victims of crime made whole."⁴¹

In 1983, the constitutionality of the statutory provisions of the VWPA requiring "restitution" to a victim of a federal crime were challenged in *United States v. Welden*.⁴² In *Welden*, defendants Edward Eugene Satterfield, Perry Don Allison and Carlton Welden were convicted of kidnapping and ordered to make restitution to their victims or the victim's estates.⁴³

On appeal, the Eleventh Circuit United States District Court held the provisions unconstitutional as violating the defendant's Seventh Amendment right to a jury trial on the "civil issue" of restitution.⁴⁴ The court also questioned whether the provisions violated the Eighth Amendment,

35. *Id.* at 34.

36. *Id.* at 35. The court found that because society has a compelling interest in making the defendant aware of the wrong she has committed, restitution makes sense because it allows the individual to make a personal demonstration of change.

37. *Id.*

38. *State v. Huggett*, 266 N.W.2d 403, 405 (Wis. 1978).

39. *Id.* at 404.

40. *Id.* at 407.

41. *United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983). The *Huggett* court stated "One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life. Conditioning probation on making restitution also protects the community's interest in having the victims of crime made whole." *Id.* at 407.

42. The provisions challenged in *Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), as set forth in Sections 3879 and 3580 of Title 18 U.S.C., may be referred to in Appendix "A," following this Comment.

43. *Welden*, 568 F. Supp. at 516.

44. The Seventh Amendment provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." The court in *Welden*, found that since the amount in question exceeded twenty dollars and the restitution provision of Section 3570 turned the order into a civil provision, the defendants were denied their right to a jury trial on the restitution order under the Seventh Amendment. *Welden*, 568 F. Supp. at 533.

comparing failure to pay restitution to failure to pay a debt.⁴⁵ The court reasoned that incarceration for failure to make restitution would be tantamount to "debtors prison."⁴⁶ In addition, the court held the provisions violated the Fifth and Fourteenth Amendments' requirements of due process and equal protection. This holding resulted from the finding that the provisions allowed too much discretion to rest in both the courts and the Attorney General.⁴⁷

However, *Welden*, on appeal to the United States Court of Appeals for the Eleventh Circuit, was overruled in *United States v. Satterfield*.⁴⁸ The *Satterfield* court held the VWPA provisions constitutional.⁴⁹

These provisions were recently refined in *Hughey v. United States*.⁵⁰ In *Hughey*, the United States Supreme Court held that an "award of restitution under the VWPA is authorized only for loss caused by the specific conduct which forms the basis for the offense of conviction."⁵¹

In *Hughey*, the defendant pleaded guilty to credit card fraud pursuant to a plea agreement.⁵² The court then ordered the defendant to pay a sum equal to the bank's losses, which was substantially more than the offense to which he had actually been convicted of (given the plea arrangement).⁵³ The Supreme Court therefore, narrowed the possible expanse of restitution awards under the VWPA, so that restitution can only be ordered for those crimes with which the defendant was actually convicted.⁵⁴

45. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

46. Although the *Welden* court expressed "serious doubts" as to whether the provisions complied with the Eighth Amendment, it construed them so as to pass constitutional muster only because of a presumption of constitutionality. *Welden*, 568 F. Supp. at 533.

47. The court stated, "This Court thinks that Congress granted too much discretion to the courts and to the Attorney General, and, by exceeding its powers of delegation, created a potential Frankenstein." *Welden*, 568 F. Supp. at 533. For a more comprehensive discussion of this case and the arguments over the constitutionality of restitutionary measures, see Andrew H. Elder, *Criminal Law; Sentencing; Restitution: The Restitution Provisions of the Victim and Witness Protection Act of 1982 Violate the Fifth and Seventh Amendments to the Constitution of the United States*—*United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), 53 U. CIN. L. REV. 263 (1984).

48. *United States v. Satterfield*, 743 F.2d 827, 836 (11th Cir. 1983).

49. The court in *Satterfield* looked to the legislative history of Sections 3579 and 3580 and found that "Congress intended to make restitution an element of the criminal sentencing process and not an independent action civil in nature." *Id.* Consequently, there was no violation of the Seventh Amendment. Furthermore, the court addressed the invalidation of the provision based on the Fifth and Fourteenth Amendments and found the rationale unsatisfactory. The lower court had found that due to the general terms in which the statutes were written they were open to possible abuse because of too much discretion in the courts and in the hands of prosecutors. However, this court found that possible future violations do not make the statute unconstitutional.

50. *Hughey v. United States*, 495 U.S. 411, 415 (1990).

51. *Id.*

52. *Id.*

53. *Id.* at 412.

54. This holding has obvious negative repercussions in plea arrangements, as illustrated by *Hughey*. However, this writer leaves that issue for another article.

However, a recent California case demonstrates a willingness to broaden the scope of allowable restitutionary awards. In *People v. Diaz*,⁵⁵ the defendant was ordered to pay restitution to the victim whose transmission was damaged when she was forced to make a sharp turn to avoid gunfire on her front lawn.⁵⁶ Diaz, arguing against the imposition of restitution, stated that, "the restitution order is neither rehabilitative nor directly related to the (sic) crime. . ."⁵⁷

The court addressed both of the defendant's arguments. First, it addressed Diaz' rehabilitation argument. The court, in finding that the imposition of restitution did have a rehabilitative effect upon the defendant, noted, "Restitution imposed in a proper case and in an appropriate manner may serve the salutary purpose of making a criminal understand that he has harmed not merely society in the abstract but also individual human beings, and that he has a responsibility to make them whole."⁵⁸

The court then addressed Diaz' causation argument. It held that the victim was not precluded from her statutory right to restitution simply because the damage occurred after Diaz was apprehended. It noted that the mere unlikelihood of such an event also did not preclude the awarding of restitution. The court reasoned that a broad cause and effect standard should be used when awarding restitution to a crime victim.⁵⁹

III. COMPENSATION SCHEMES USED IN THE AUSTRALIAN STATES

"Compensation is not a conceptual cuckoo in the law nest but a possible penal objective which can without undue theoretical difficulty, be incorporated into the notion of criminal justice and even into the concept of punishment itself."⁶⁰

A. The Implementation Of The Australian Victim Compensation Schemes

Every Australian state incorporates a scheme for awarding restitution in a criminal proceeding.⁶¹ The first scheme was incorporated in New South Wales in 1967.⁶² Although there is no national criminal compensation

55. 20 Cal. App. 4th 1257, 25 Cal. Rptr. 2d 220 (1993).

56. *Id.* at 1260.

57. *Id.*

58. *Id.* at 1264.

59. *Id.* at 1261.

60. Quoted in Tom Campbell, *Compensation as Punishment*, 7 UNSW L.J. 338, 343 (1984).

61. See Campbell, *supra* note 60, at 338, in which he states, "Since compensation has long been an aspect of civil law criminal process it is no longer correct to say that the victim is entirely forgotten in official responses to criminal activity in developed jurisdictions." See also Davies, *supra* note 7, at 1, for a brief overview of the worldwide historical uses of compensation in criminal proceedings dating back to early Greek, Roman, Jewish, Anglo-Saxon and Babylonian law.

62. See Davies, *supra* note 7, at 2.

scheme in Australia,⁶³ a statutory remedy for injuries or death as the result of a crime exists in every state.⁶⁴ The focus here is upon compensation schemes in New South Wales, Queensland, Tasmania, Victoria, The Australian Capital Territory, South Australia, Western Australia, and The Northern Territory.⁶⁵

In South Australia, Queensland, the Northern Territory, and the Australian Capital Territory, the adjudication of the restitutionary matter occurs within the criminal courts.⁶⁶ In the Australian Capital Territory, the Registrar of the Supreme Court has the discretion to award compensation even where no criminal proceedings remain.⁶⁷

In New South Wales and Victoria, tribunals have been established solely for the purpose of compensating crime victims.⁶⁸ These tribunals are distinct from the criminal courts and do not employ the same procedural and evidentiary rules of the criminal forum.⁶⁹ They are less formal than the criminal courts, with an eye towards expeditious justice.⁷⁰

The Australian criminal courts have similarly favored the used of restitution to compensate crime victims.

The common law in Australia has a long history of awarding restitution in substantive criminal proceedings. In *R. v. Hutchins*, the Court stated in reference to this common law history of awarding restitution:

While an accused cannot be allowed to purchase freedom at the price of paying for his depredation, one of the factors to which a court may have regard in fixing his sentence is an undertaking by the accused to make reparation.⁷¹

Moreover, in the Queensland Criminal Code, the judge may, in her discretion, dismiss a defendant in any property offense case without

63. Although a national Compensation Bill was passed by the House of Representatives in Australia in 1974, it failed in the Senate, and was not passed. *Id.*

64. "In circumstances where a victim dies as a result of criminally inflicted injuries, a statutory remedy exists in each Australian state and territory" *Id.* at 3.

65. As noted, *supra* note 48, a national Compensation Bill has been attempted to be passed, but failed in the Senate. See Davies, *supra* note 7, at 2 for a more comprehensive discussion on the need for a national compensation system in Australian.

66. Once the courts have jurisdiction over the criminal matter, jurisdiction over the restitutionary matter is also found, and remains even when the criminal proceeding is terminated. *Id.* at 7.

67. The jurisdiction remains simply to adjudicate the restitutionary matter. *Id.*

68. *Id.* at 5.

69. *Id.*

70. *Id.*

71. See *R. v. Hutchins* (1958) 75 W.N. (N.S.W.) noted in, Jocelyne A. Scutt, *Victims, Offenders and Restitution: Real Alternative or Panacea?* 56 AUSTRALIAN L.J. 156, 158 (April 1992).

punishment, if she simply makes satisfactory restitution to her victim.⁷² It has been stated by the Australian Law Reform that "the first line in sentencing should be discharge without conviction, accompanied where appropriate, with an order for restitution."⁷³

The impact of a measure such as this would be to benefit society, the victim and the defendant. It would help reduce jail overcrowding, restore to the victim what she lost as a result of the crime, and allow for more effective rehabilitation of the defendant. As noted earlier, restitution allows for more effective rehabilitation because it personally involves the defendant in the rehabilitative process.⁷⁴ Rather than incarcerating the defendant, or making him pay a fine into some generalized account, he actually sees the harm he has inflicted upon the victim and personally makes an effort to repair it.⁷⁵ As such, this is a more effective, and consequently more efficient, method of criminal adjudication.

One Australian commentator has gone even further than the tradition in the criminal arena would seem to dictate, by suggesting that restitution should be used in its pure form, as a gain-based remedy, to actually punish the offender.⁷⁶ The rationale for this use of restitution is that there are many losses due to crime that simply cannot be exactly measured.⁷⁷ Therefore, the emphasis should shift to what the offender gained "at the expense of" the victim.

In the recent case of *R. v. McDermott*, the Federal Court of Australia, in reviewing the lower court, held "that a pecuniary penalty order must be taken into account at the time of sentencing and that it was wrong in the circumstances of the case to regard the pecuniary penalty order as simply the removal of ill-gotten gains and not as an additional punishment."⁷⁸ In *McDermott*, the court found that since the defendant had assets, such as real

72. Although the commentator notes that in theory this makes sense, there are a number of practical problems. Most notably that the victims often do not know that they have these rights in order to enforce them. *Id.*

73. The Australian Law Reform found that restitutionary measures are extremely effective while being the least coercive. *Id.*

74. *State v. Huggett*, 266 N.W.2d 403, 405 (Wis. 1978).

75. *Id.*

76. See Campbell, *supra* note 60, at 349, who actually takes this even further, invoking the concept of punitive damages to compensate the victim's time spent and anxiety suffered as a result of the crime. Although initially this would seem to carry a high level of deterrence, Campbell speculates that this may not be true. This is because criminals may believe that if they get caught then there will be nothing to give back. Consequently, Campbell proposes that fixed penalties would be more efficient in attempt crimes. However, it may be noted that one of the reasons deterrence measures often fail is that criminals do not believe they will be apprehended.

77. *Id.*

78. In the Australian Capital Territory District Registry, General Division, the court considered in *McDermott*, 49 A. Crim. R. 370 (1990), whether a pecuniary penalty order should affect a defendant's sentence. The court held that it should, given the surrounding circumstances of the order, such as whether it would have any deterrent effect upon the defendant.

property, restitution would have a significant deterrent effect.⁷⁹

Similarly in *R. v. Stevens*,⁸⁰ the Australian Court of Criminal Appeal found that the sentencing judge had not erred when he took into account, among other things, the restitution made by the defendant to his victim.⁸¹

Many commentators have traditionally been uncomfortable with using restitution in its gain-based sense, to punish, because of the tendency to confuse the criminal issues with the civil issues in a criminal forum. However, if restitution is viewed as a substantive goal of the criminal justice system, such confusion could be abated with adequate procedural safeguards.

B. Who May Recover Under the Australian Compensation Schemes

In New South Wales, the compensation scheme categorizes victims into two areas, primary and secondary victims.⁸² The "primary victim" is a person who is actually injured as "a direct result of an act of violence"⁸³ The "secondary victim" is defined as a "'person who has sustained injury as a direct result of witnessing, or otherwise becoming aware of, injury sustained by a primary victim, or injury or death sustained by a deceased victim of the act.'"⁸⁴ In the event of death of the victim, New South Wales provides the most comprehensive criminal compensation scheme.⁸⁵

In this event, "secondary victims," as well as "close relatives" are permitted to claim compensation.⁸⁶ Similarly, Victoria allows for "dependents" to recover compensation, if they are found to be dependent upon the decedent's income.⁸⁷ However, Victoria, as well as Tasmania, has no provision for "secondary victims."⁸⁸ In South Australia and the Northern Territory, the claimant is required to be both a "relative" of the victim, and

79. The court referred to § 16A of Part 1B of the Crimes Act of 1914, which had been amended in 1990. Part 1B, which prescribes comprehensive sentencing guidelines for federal offenders may be referred to in Appendix "B" following this Comment.

80. *R. v. Stevens*, (unreported, Court of Criminal Appeal (Vic), 3 February 1976).

81. The defendant in *Stevens* had been convicted of larceny and falsification of books of account. The defendant had committed these crimes while working as a manager of a hotel. *Id.*

82. *Id.* at 10.

83. The category of "Primary Victim" exists in every Australian state, and is usually referred to as the "aggrieved person" or the "victim." *Id.* at 12.

84. The introduction of the "Secondary Victim" categorization clearly evinces a widening in the interpretation of the word "victim," therefore, allowing for compensation to this larger group. *Id.*

85. *Id.*

86. "Any sibling of a deceased victim who directly suffered consequential injury would clearly fall within the wide ambit of the definition of a secondary victim." *Id.* at 9.

87. *Id.*

88. The dependent may only recover compensation due to financial loss incurred as a result of the death of the victim. She may not recover compensation for her own victimization as a result of witnessing or learning of the death. *Id.*

financially dependent upon her.⁸⁹

In contrast, Western Australia employs an expansive compensation scheme. Here, the claimant need only be a "close relative," which is defined broadly.⁹⁰ In addition, there is no requirement of financial dependency.⁹¹

These clearly defined Australian compensation schemes indicate both the force and effect with which restitution may be used in criminal proceedings. The specificity with which each state defines its victims for the purpose of recovery, and the actual implementation of the system through either the criminal courts or specially recognized tribunals, make clear the potential effectiveness of restitutionary schemes in the criminal arena.

IV. A COMPARISON OF THE CRITICAL AREAS OF THE COMPENSATION SCHEMES EMPLOYED BY THE UNITED STATES AND AUSTRALIA

Victim compensation schemes in the United States and Australia differ in two important ways. These differences are: (1) the tribunal system, or its comparable equivalent; and (2) the rights and remedies of the victim.

One fundamental difference between the victim compensation schemes in the United States and Australia is seen in the Australian use of tribunals to determine restitution awards.⁹² These less formal tribunals may be appealed to directly by the crime victim.⁹³

Australia's use of the tribunal illustrates an inadequacy in the United States' scheme. This inadequacy stems from lack of knowledge on the part of the victim that she is guaranteed specified rights, and entitled to compensation for her loss. In addition, an inadequacy in the United States scheme becomes apparent when contrasted with the less formal structure of the tribunal system.⁹⁴ If procedural and evidentiary safeguards are maintained in the criminal arena because the defendant's liberty is at stake in a criminal trial, this concern is absent in a decision to award compensation. It does not necessarily follow that a defendant must be found guilty beyond a reasonable doubt in order to simply give back to the victim what she has gained at his expense.

The second fundamental difference between the Australian and the

89. Under these statutes the victim must not only have suffered a financial loss, but must also have been actually related to the victim. Consequently, any person who, for example, paid the funeral expenses of the victim, would not be compensated. *Id.*

90. The term "close relative" has been given a broad definition under the statute, under which grandparents and stepchildren are included. *Id.*

91. Under this statute no financial loss need be demonstrated. A showing of being a "close relative" is sufficient to meet the eligibility requirements for compensation. *Id.*

92. See Davies, *supra* note 7, at 5. These tribunals are constituted by experienced barristers or solicitors of a Magistrate, and their decisions are not open to additional administrative discretion.

93. *Id.*

94. As previously noted, the tribunals do not require the same procedural and evidentiary rules of the criminal courts. See Davies, *supra* note 7 at 5.

United States system is seen in the treatment of the crime victim's rights and remedies. Although crime victims in the United States have been "guaranteed" rights by the majority of the states, and are further empowered by the various victim's assistance programs, if these rights are not enforced, the crime victim has no standing to challenge the violation.⁹⁵

Furthermore, not only does the victim not have standing to challenge the lack or inadequacy of a restitutionary award in any criminal proceeding, but she also has no civil remedy for the additional wrong of non/under compensation.⁹⁶

In contrast, the victim compensation schemes employed in Western Australia and New South Wales, provide a right of appeal.⁹⁷ It seems clear that in Australia restitution is looked at as somewhat of an entitlement. However, in the United States, restitution is looked over as an unrequired privilege. It has always been clear in our system of rights and restraints that a right without a remedy simply has no teeth.

V. CONCLUSION AND RECOMMENDATIONS

The rights of crime victims have seen a remarkable increase in recognition over the past two decades, both nationally and globally.⁹⁸ This increase in recognition was not the result of a united humanitarian effort by politicians and world leaders. Rather, this was a necessary effect of the growing de-legitimization of the criminal justice system.⁹⁹

The state had taken over the victim's traditional place in the criminal forum and left the victim feeling inadequate and impotent. This global recognition of the rights of crime victims, therefore, was descriptive, rather than prescriptive.¹⁰⁰

Although many commentators have traditionally felt uncomfortable with muddying up the criminal forum with "civil issues" such as restitution and compensation, this concept of guaranteeing certain rights to the crime victim

95. 18 U.S.C.A. § 3579 provides in relevant part:

(h) An order of restitution may be enforced by the United States in the manner provided for the collection of fines and penalties by section 3565 or by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

Note that sub-section (h) does not give the victim a right to challenge non/under compensation. It only gives the right to enforce that which has already been granted.

96. *Id.*

97. See Davies, *supra* note 7, at 20.

98. See Roland, *supra* note 2, at 35.

99. See O'Grady, *supra* note 20, at 759.

100. The efforts to regulate victim compensation were a response to victim's anger with the system. Enactment of statutes to award restitution to crime victims was simply descriptive of that which was already being called for and affected. This was not an embryonic prescription resulting from the foresight of attentive legislators. See Roland, *supra* note 2.

does not have to be as fatalistic as commentators would have us believe.¹⁰¹

If the legitimization of our adversarial system (both criminal and civil), is our over-riding goal, then given the large numbers of crime victims in today's society, their feeling of empowerment should be conceived as a virtue, rather than a vice.

Moreover, even if the use of restitution is seen as punishment, rather than compensation, the distinction is meaningless. It helps neither the crime victim nor the offender to incarcerate the offender and let her keep what she stole. If given the choice, the victim would oftentimes simply rather receive back her property, and the offender would rather give it back than go to jail.

The philosophical line that we have drawn for ourselves is a self-limiting restraint. There are simply no practical reasons why restitution should not be imposed in criminal proceedings whenever possible and practicable. However, with this understanding, and in conjunction with the growth in recognition of victim's rights, these rights should be enforceable by those holding them (the victims), against those guaranteeing them (the states).

The Australian system of restitution, in its allowance of the crime victims to truly have a voice by appealing to specially appointed tribunals, should be an example to us, if not in form, in substance. It may be unnecessary and inefficient to form separate tribunals at this late date in order to decide restitutionary matters. Nevertheless, we may learn from Australia's recognition and enforcement of victim's rights.

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101. According to the holding in *Satterfield*, 743 F.2d at 827, the criminal/civil distinction could be addressed with a carefully worded statute.

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APPENDIX "A"

Section 3579. Order of Restitution.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor. (b) The order may require that such defendant:

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complicating and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person

under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or the deliver the amount or property due as restitution to the Attorney General for transfer to such victim or person.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States in the manner provided for the collection of fines and penalties by section 3565 or by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

Section (a)(1) was omitted here as it was included earlier. Also omitted are any amendments added after this case was decided.

Section 3580. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the courts as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegation of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

APPENDIX "B"

Matters to which a court is to have regard when passing sentence, etc.

16A(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offense, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offense.

(2) In addition to any of other matters, the court must take into account such of the following matters as are relevant and known to the court:

- (a) the nature and circumstances of the offense;
- (b) other offenses (if any) that are required or permitted to be taken into account;
- (c) if the offense forms part of a course of conduct consisting of a similar character-that course of conduct;
- (d) the personal circumstances of any victim of the offense;
- (e) any injury, loss or damage resulting from the offense;
- (f) the degree to which the person has shown contrition for the offense;
 - (i) by taking action to make reparation for any injury, loss or damage resulting from the offense; or
 - (ii) in any other manner;
- (g) if the person has pleaded guilty to the charge in respect of the offense - that fact;
- (h) the degree to which the person has cooperated with law enforcement agencies in the investigation of the offense or of other offenses;
- (j) the deterrent effect that any sentence or order under consideration may have on person;
- (k) the need to ensure that the person is adequately punished for the offense;
- (m) the character, antecedents, age, means and physical or mental condition of the person;
- (n) the prospect of rehabilitation of the person;
- (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependents.

(3) Without limiting the generality of sub-sections (1) and (2), in determining whether a sentence or order under sub-section 19B(1), or 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offense, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under the sentence or order.