Restitution is old. Is it just?

Benjamin M. Birney[*]

Restitution – in which one who harms another is required by law to make recompense in some proportion to the amount of the damage caused – is one of the most ancient forms of justice. The Hebrews encoded it in the Torah, and it appears in the laws of the Babylonians, the Romans, the Sumerians and others.[1] In modern times, restitution appears as a criminal punishment in the United States and in all fifty States.[2] Under U.S. criminal law restitution may be either mandatory or discretionary; that is, the judge sentencing a criminal is either permitted or required to order restitution.[3]

Despite the venerable heritage of restitution and its widespread use today, the idea that compensating the victim complements punishing the criminal is vulnerable to theoretical challenge. The punishments of criminal sanction are usually much harsher than the remedies of the civil law. (The remedy for most civil wrongs is money damages, which the prevailing plaintiff may or may not be able to successfully collect. The iconic remedy for a crime is incarceration.) One can justify these harsher punishments on the grounds that a crime, unlike a civil wrong, harms all people, not just a discrete group of victims. Crimes like murder, arson, and robbery are, in theory, wrongs of such a nature that the very act of committing one creates unstable conditions in society that harm everyone. Thus, a criminal punishment must be

---

[*] J.D. Candidate, 2013, University of Maine School of Law. This essay is a companion to my forthcoming comment in MAINE LAW REVIEW vol. 65, no. 1. I am grateful to colleague Nicole Gray for calling to my attention the problems with traditional justifications for restitution in light of modern procedure and for outlining some of the arguments I use in this essay.

[1] *See* Christopher Bright, *Restitution*, RESTORATIVE JUSTICE ONLINE (1997), http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/outcomes/restitution/.

[2] 18 U.S.C.A. §§ 3663, 3663A (2000 & Supp. 2011) (federal); *see* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.5(k) (3d ed. 2010) (states).

[3] *See* § 3663 (discretionary restitution in federal criminal law); § 3663A (mandatory restitution in federal criminal law).

imposed for a wrong that affects everyone; the punishment is on behalf of the community, and any compensation should naturally flow to the community.

Leaving aside its considerable theological justifications, the use of restitution as a criminal penalty is not consistent with a social understanding of criminal punishment. While the offender may well also bear civil liability to the victim, the adjudication of that civil liability is arguably an exercise that is quite distinct from the adjudication of criminal guilt or innocence. The elements of the *civil* wrong may be different than the elements of the *crime*, as may be the standards of proof, the evidence that is competent and relevant to prove those elements, and the presumptions that it is permissible to draw from that evidence. Most importantly, the person who is benefited by the adjudication of civil liability is a single person or a limited group of persons; it is not society at large except in the outermost abstract. Of course, proponents of restitution point to exactly this last characteristic as justification for its use.[4]

As is often the case, the substance of the problem with restitution is tangled up in the procedure of adjudicating criminal guilt and civil liability. If restitution were not an element of criminal punishment then the victim of a crime would have to seek civil damages against the offender through a civil trial. The victim would have to prove all the elements of the civil wrong in order to obtain a money judgment.[5] Procedurally, then, imposing restitution during the sentencing phase of the criminal process accomplishes the same result as a separate civil trial but denies the defendant the opportunity to contest the facts leading to his criminal guilt in the civil proceeding. In essence, the criminal judgment is being used to prevent the defendant from litigating the truth of the facts leading to his *criminal* guilt at the later *civil* trial. This is

[4] *See* Bright, *supra* note 1.

[5] The standard of proof in a civil trial is more favorable to the plaintiff; he need only prove the facts by a "preponderance of the evidence." This means that that it must be more likely than not, based on the evidence, that any particular fact is true. At a criminal trial, the prosecutor must prove the elements of the crime "beyond a reasonable doubt."

"offensive collateral estoppel"[6] to lawyers, and to normal human beings it means you have to pay even more money without the little issue of being able to defend yourself.

Predictably, American courts disagree as to whether offensive collateral estoppel (outside the restitution context) may asserted by one who was not party to the original litigation;[7] this is critical because the plaintiff-victim was not technically a "party" to the criminal prosecution. In a later civil proceeding, the victim can only use a criminal judgment to prevent the offender from litigating the truth of the facts leading to the victim's harm if the court is willing to overlook the fact that the plaintiff was not a party to the criminal prosecution.

This is not simply a matter of procedural arcana; it really matters to the defendant and to anyone else who might one day have to be a party to a lawsuit. In the U.S. "adversarial system," we rely on interested parties to present the most compelling and vigorous arguments to the judge and jury. We want them to make their decisions based on the best information and arguments available; we place that responsibility on the parties themselves, who have the greatest interest in making the best arguments. If offensive collateral estoppel is to be used in a civil trial, the judge has to look the defendant in the eye and tell him he cannot present any arguments or evidence against at least some of the facts and legal rulings being used against him. The defendant, "estopped to" defend himself against certain elements of the complaint, had no opportunity to defend himself against the plaintiff-victim's arguments in the earlier criminal proceeding; he faced a state prosecutor instead.

---

[6] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (stating the general rule as to "offensive[]" "collateral estoppel").

[7] *See* Carr v. District of Columbia, 646 F.2d 599, n.16 (D.C. Cir. 1980) (citing the Restatement (Second) of Judgments for the authority on the disagreement among U.S. courts). The rule that the party trying to assert offensive collateral estoppel – to prevent the other side from defending – must have been a party to the litigation that supposedly already decided the issue is called the "mutuality of estoppel rule." *Id.*

Nor is the problem of importing criminal guilt into a civil trial is not limited to offensive collateral estoppel. American courts are also divided on whether either a conviction or a guilty *plea* – which happens without any trial, and may be the result of strategic bargaining by both sides – may even be introduced as *evidence,* in a later civil trial, of the facts underlying the crime.[8]

The bottom line is this: in today's law, criminal guilt and civil liability are two very different things. An award of restitution as part of a criminal sanction stands in for a later civil trial, but denies the defendant the opportunity to contest the elements of his civil liability.

Restitution has been an element of criminal law for so long in the United States that its existence, as such, has gone virtually unchallenged. Although the U.S. Supreme Court has therefore not considered whether mandatory criminal restitution as such violates the Fifth and Fourteenth Amendments' guarantees of "due process of law," the Court has issued some rulings on analogous problems related to offensive collateral estoppel. For instance, the Court ruled that using an *equitable* judgment, obtained without a jury, to preclude re-litigation of the same facts in an action at law does not violate the Seventh Amendment's guarantee of a civil jury in all suits at law.[9]

Whether you accept restitution as a just criminal punishment depends on whether you see restitution as the functional equivalent of a civil judgment or whether you see it as a stand-alone criminal sanction. Although courts often articulate restitution as a criminal sanction,[10]

---

[8] *See* W. E. Shipley, *Conviction or acquittal as evidence of the facts on which it was based in civil action*, 18 A.L.R.2d 1287 (1951 & Supps. 2000, 2012) (documenting the divided case law on admissibility of criminal guilt or innocence in a civil trial); Newell H. Blakely, *Article IV: Relevancy and its Limits*, 30 HOUS. L. REV. 281, 452-53 (1993) (examining arguments for and against admitting as evidence in a civil trial pleas of guilty and other statements in a criminal trial; documenting a modern trend toward admissibility).

[9] Parklane, 439 U.S. at 335-36. *See also* U.S. v. Carruth, 418 F.3d 900 (8th Cir. 2005) (holding that the judicial fact-finding of the amount of restitution under the federal restitution statute does not violate the constitutional guarantee of a jury trial in civil matters); U.S. v. Wooten, 377 F.3d 1134 (10th Cir. 2004) (same).

[10] *See* Kelly v. Robinson, 479 U.S. 36, 50, 53 (1986).

legislatures often treat it partly as a civil judgment. For instance, in Maine the victim of a crime who is awarded restitution and then commences a later civil action against the offender must have his civil damages award reduced by the amount of the restitution.[11] Thus, the legislature clearly sees the restitution award as at least partly the equivalent of a civil judgment. And, to repeat, it is a civil judgment, liability for which the offender had no opportunity to contest in a civil proceeding.

I have treated these issues in a cursory manner in this article, but of course there is much, much more to discuss here, and many scholarly discussions of restitution to weigh and compare. I plan to tackle the theoretical underpinnings of restitution in more depth in a future article for which this essay serves as an abstract.

[11] 17-A M.R.S.A. § 1327 (1977).