

NOTE

A CHOICE IN CRIMINAL LAW: VICTIMS, DEFENDANTS, AND THE OPTION OF RESTITUTION

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The American prison system has expanded beyond all reasonable bounds. Presently, the United States holds the highest per capita prison population of any country in the world, while historically poor and marginalized communities make up a wildly disproportionate percentage of its prison population. It is in that light that this Note attempts to find an alternative to the current system of mass incarceration. It does so by seeking to revive the nearly forgotten tradition of criminal restitution, which holds that the purpose of the criminal law is to compensate victims for their loss, rather than to punish criminals. This Note argues that restitution would benefit both the victim and the criminal, by repairing as much of the victim's harm as possible while also allowing the criminal to avoid the harsh and socially stigmatic prison system. The Note begins with a theoretical defense of restitution, and answers common objections to it. It then turns to the practical question of transitioning from the current system. Building off of recent advances in restorative justice and in private arbitration and mediation, it argues in favor of adding an "opt-out" provision to criminal procedure codes, wherein the victim and the defendant in any criminal case could decide, by mutual agreement, to remove their case from the criminal courts and into whatever alternative dispute resolution mechanism—public or private—that they prefer. Hopefully, an opt-out system would educate the population about the restitutionary alternative to contemporary criminal law and spark a shift to restitution that is driven, not by ivory-tower theorizing, but by the free choices of real victims and defendants.

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INTRODUCTION.....	734
I. CRIMES AS “PUBLIC WRONGS”.....	738
II. RESTITUTION.....	740
A. <i>Theory</i>	740
B. <i>How a Victim-Centric Theory Helps Criminal Defendants</i>	744
1. Restitution Reestablishes Proportionality.....	744
2. The Possibility of “Psychic Restitution” Facilitates Victim-Offender Bargaining.....	746
3. Restitution Reestablishes the Criminal’s Humanity.....	747
C. <i>Objections to Restitution</i>	748
1. What About Judgment-Proof Criminals?.....	748
2. Does Restitution Adequately Deter or Incapacitate Criminals?.....	750
3. Is Restitution Amoral?.....	753
III. THE OPT-OUT PROVISION.....	755
A. <i>Outlines of an Opt-Out Provision</i>	755
B. <i>Contemporary Trends Favoring an Opt-Out Provision</i>	759
1. Arbitration and Mediation.....	759
2. Restorative Justice.....	765
CONCLUSION.....	767

INTRODUCTION

The American prison system has expanded beyond all reasonable bounds. Presently, the United States holds the highest per capita sentenced prison population of any country in the world, with almost a quarter of the world’s prisoners.¹ Nearly 2.3 million people were incarcerated in American prisons in 2010, the most recent year for which the Department of Justice compiled statistics.² If one considers unincarcerated people subject to the correctional system through probation or parole, approximately 7.1 million—or one in thirty-three³—adults are

¹ ROY WALMSLEY, *WORLD PRISON POPULATION LIST 1* *9th ed. (2011), available at <http://www.icdr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>; see also Adam Liptak, *U.S. Prison Population Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?_r=1&scp=1&sq=incarceration%20nation&st=cse. When one includes non-sentenced detainees under the term “prisoners,” China holds slightly more total prisoners than does the United States, but many fewer per capita. WALMSLEY, *supra*.

² Lauren E. Glaze, *Correctional Populations in the United States, 2010*, BUREAU JUST. STAT. (U.S. Dep’t of Just., D.C.), Dec. 2011, at 3, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>.

³ *Id.* at 2.

under correctional supervision.⁴ In addition, there are 81,000 youths,⁵ for a grand total of one in fifty Americans of all ages subject to the correctional system.⁶

But the burden of such mass incarceration is borne disproportionately by poor, inner-city black communities.⁷ In 2010, black people constituted 13.6% of the U.S. population,⁸ but approximately 38% of the total prison population.⁹ Mass incarceration of poor blacks also appears to exacerbate problems like the breakdown of traditional marriage and the two-parent family,¹⁰ feelings of alienation,¹¹ and cyclical poverty endemic to the inner city.¹²

Recently, the United States Supreme Court explicitly recognized the danger and violence ubiquitous in contemporary mass incarceration. In *Brown v. Plata*, the Court held that California's severe prison overcrowding constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.¹³ Overcrowding promoted the spread of

⁴ *Id.* at 3.

⁵ Sarah Hockenberry et al., *Juvenile Residential Facility Census, 2008: Selected Findings*, OFFICE JUVENILE JUST. & DELINQUENCY PREVENTION (U.S. Dep't of Just., D.C.), July 2011, at 2, available at <https://www.ncjrs.gov/pdffiles1/ojjdp/231683.pdf>.

⁶ The total U.S. population is approximately 315 million. *U.S. and World Population Clocks*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last visited Dec. 18, 2012). However, calculations of the percentage of Americans in prison are somewhat inexact because a few hundred thousand of the total number of "American" prison inmates appear to be "aliens" or illegal immigrants. UNITED STATES GOV'T ACCOUNTABILITY OFFICE, *CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS 10* & fig. 3 (2011), available at <http://www.gao.gov/new.items/d11187.pdf>.

⁷ See David Garland, *Introduction*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 1–2 (David Garland ed., 2001); GLENN C. LOURY, *RACE, INCARCERATION, AND AMERICAN VALUES* 22–23 (2008); Peter Wagner, *Incarceration Is Not an Equal Opportunity Punishment*, PRISON POLICY INITIATIVE, <http://www.prisonpolicy.org/articles/notequal.html> (last updated August 28, 2012). Loïc Wacquant stresses that mass imprisonment does not affect the black community *per se*; rather, its onus falls almost entirely on poor, inner-city blacks. Loïc Wacquant, *Forum*, in *RACE, INCARCERATION, AND AMERICAN VALUES* 57, 59 (2008) ("[T]he expansion and intensification of the activities of the police, courts, and prisons over the past quarter-century have been finely targeted by class, ethnicity, and place, leading to . . . hyper-incarceration of one particular category: lower-class black men in the crumbling ghetto. The rest of society—including middle-class blacks—is practically untouched.").

⁸ See KAREN R. HUMES et al., *OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010*, at 7 (2010), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

⁹ Paul Guerino et al., *Prisoners in 2010*, BUREAU JUST. STAT. (U.S. Dep't of Just., D.C.), Dec. 2011, at 26 tbl.13, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

¹⁰ See Kerwin Kofi Charles & Ming Ching Luoh, *Male Incarceration, the Marriage Market, and Female Outcomes*, 92 *REV. ECON. & STAT.* 614, 614–15 (2010).

¹¹ See Wacquant, *supra* note 7, at 61–65.

¹² See LOURY, *supra* note 7, at 20–21.

¹³ *Brown v. Plata*, 131 S. Ct. 1910, 1922–23 (2011). For a sympathetic history and discussion of American prison-condition litigation, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 *N.Y.U. L. REV.* 550 (2006).

disease¹⁴ and imposed months-long, or even year-long, delays on receipt of vital medical services.¹⁵ When finally provided, medical services were woefully substandard; approximately one inmate could be expected to die each week as a result of poor medical care.¹⁶ Overcrowding also made it extremely difficult for prison officials to keep order; the Court recounted one instance where guards did not even discover the body of a prisoner killed in a crowded gymnasium until hours after his murder.¹⁷ Perhaps it is no surprise that, coming out of such an environment, prison inmates come to form “a permanent nether caste.”¹⁸ Indeed, even when prisoners finally escape from the system, all they can expect to find are diminished job prospects, social stigma, and a lessened likelihood of ever escaping poverty.¹⁹

This discussion on mass incarceration could fill up entire volumes unto itself. I only touch upon it here, perfunctorily, in order to show the level of dysfunction in the American prison system, and to suggest that alternatives to it are desperately needed. Indeed, such dysfunction has already sparked a robust and radical literature exploring possible alternatives to the prison system.²⁰ I hope that this Note will be a new contribution to that literature.

But while the other literature focuses on the prison system itself, this Note focuses more on the philosophical issues. I will argue that the broader problems of the criminal justice system stem from a fundamental philosophical error in criminal law: the criminal law’s insistence that crimes are wrongs done against some abstract collectivity—“the people”

¹⁴ See *Plata*, 131 S. Ct. at 1933 n.7.

¹⁵ See *id.* at 1924–26.

¹⁶ *Id.* at 1927.

¹⁷ See *id.* at 1933–34.

¹⁸ See LOURY, *supra* note 7, at 21.

¹⁹ See *id.* at 20–21.

²⁰ See, e.g., JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 10–12 (2002) (presenting “restorative justice” as a system for resolving conflicts between individuals outside of government courts); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 105–15 (2003) (recommending abolition of the prison system, to be replaced by social welfare programs and a focus on repairing the ties between victims and offenders); PETER MOSKOS, IN DEFENSE OF FLOGGING 1–6 (2011) (suggesting that most people would prefer to be flogged than spend several years in prison and that, as a way of scaling back incarceration, convicted criminals should be allowed to choose between the two). Some courts have fashioned their own unique punishments as a partial alternative to prison time. See, e.g., *United States v. Gementera*, 379 F.3d 596, 598 (9th Cir. 2004) (requiring defendant, as a shaming method, to wear a sign reading, “I stole mail. This is my punishment,” in front of a local post office); Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691, 697–706 (1998) (discussing the advantages and disadvantages of fines, community service, and shaming penalties as opposed to prison sentences); Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES (Jan. 16, 1997), <http://www.nytimes.com/1997/01/16/us/crime-and-punishment-shame-gains-popularity.html?pagewanted=all&src=pm> (recounting courts’ orders that an assaulter place warning signs on his property, a thief allow victims to steal from his own home, and a man who harassed his ex-wife allow her to spit in his face).

or “the state”—rather than private wrongs, done to an identifiable victim, which can be remedied through victim compensation.²¹

As an alternative to the current system, I will defend the theory of criminal “restitution.” Restitution holds that crimes should be treated the same as torts. That is, it holds that the purpose of the criminal law should be to force the criminal to pay compensation directly to the victim, in order to undo as much of the victim’s damage as possible.²² But, in holding victim compensation as paramount, restitution would also benefit the masses of people now in prison. For example, by requiring repayment or return of stolen goods instead of prison time, restitution allows the offender to pay and then get on with life, free of the crippling social effects of a prison sentence. Adopting restitution would thereby reduce the prison’s scope in society and lead to a proportionate diminishment of its ill effects.

Nevertheless, criminal restitution is a marginal and little-appreciated theory. Whatever its theoretical benefits, little thought has been paid to practical questions of implementation. Such neglect has certainly not helped its popularity. My Note seeks to fill that gap. I will argue in favor of adding an “opt-out” provision to criminal procedure codes, wherein the victim and offender could agree to opt out of the government’s justice system and settle their case like a tort, through whatever alternative dispute resolution mechanism—public or private—they choose. As I will discuss below, my proposal has certain pitfalls and cannot realize all the benefits of a pure restitutionary legal system. But, I believe that it can constitute an important step in transitioning away from the misguided philosophies that undergird the contemporary criminal justice system, and that it can do so in a way that is motivated by the real concerns of actual victims and defendants, rather than of academics.

Before we can discuss an opt-out proposal, it is necessary to discuss the theories of crime and punishment that influence that proposal. Parts I and II will discuss what I believe are the two philosophical poles of criminal thought. Part I discusses the mainstream theory, that crimes are

²¹ For an account of the displacement of the victim in American criminal law, see William F. McDonald, *The Role of the Victim in America*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 295 (Randy E. Barnett and John Hagel III eds., 1977).

²² Due to the constraints of this Note, I will not present a rigorous theoretical defense of restitution. For such a defense, see, for example, MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 51–61, 77–95 (1982) [hereinafter ROTHBARD, *ETHICS OF LIBERTY*]; Randy Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 *ETHICS* 279 (1977) [hereinafter Barnett, *Restitution*]; N. Stephan Kinsella, *Punishment and Proportionality: The Estoppel Approach*, 12 *J. LIBERTARIAN STUD.* 51 (1996); see also BRUCE BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 11–83 (1990) (comparing private, restitution-oriented legal systems favorably to government-run, public-wrong-oriented legal systems, from an economic and historical perspective).

“public wrongs.” Part II introduces the competing theory of criminal restitution. This part differs in focus from the foundational restitutionary works by Randy Barnett, Murray Rothbard, and others. Most of the foundational works were written in the 1970s or 1980s, when the prison system was merely a fraction of its present size; concomitantly, they either did not or could not foresee the system of mass incarceration that we live under today.²³ My discussion, particularly Part II.B., is written in the context of mass incarceration, and therefore, unlike the foundational works, it considers the question of how restitution can rein in the prison system for the benefit of *defendants* to be just as important as the question of how to compensate previously neglected *victims*. Part III presents my opt-out proposal and discusses what an opt-out criminal system might look like.

I. CRIMES AS “PUBLIC WRONGS”

The prevailing approach to criminal law holds that crimes are “public wrongs,”²⁴ which are to be answered by punishing the wrongdoer, rather than by compensating the victim.²⁵ In Henry M. Hart’s enduring formulation, crimes are those acts which “incur a formal and solemn pronouncement of the moral condemnation of the community.”²⁶ As such, when a crime occurs it is construed, for legal purposes, as a wrong done to the community at large, rather than to any specific victim—hence the designation of criminal cases in terms such as “The People [or the State] v. Smith.”²⁷ Moreover, if a criminal is found guilty, it is the community’s interests that the law purports to vindicate.²⁸ As punishment for invoking the community’s moral condemnation, the criminal will be sent to a taxpayer-funded prison, where he or she will be locked away for a number of years, based on what the community deems appropriate. The

²³ For instance, in 1977, Randy Barnett believed that society was “witnessing the death throes” of a punishment- and prison-based criminal law, which he believed to be unworkable. Barnett, *Restitution*, *supra* note 22, at 280. Since then, contrary to Barnett’s optimistic predictions, the prison system has quintupled in size. See *Key Facts at a Glance: Correctional Populations*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> (last visited Dec. 18, 2012).

²⁴ See, e.g., Richard A. Epstein, *Crime and Tort: Old Wine in Old Bottles*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 231, 233 (Randy E. Barnett & John Hagel III eds., 1977) (defining the prevailing approach to crime).

²⁵ See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 24 (Barnes & Noble Library of Essential Reading 2004) (1881) (delineating the offenses for which the law seeks criminal punishment rather than victim compensation).

²⁶ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 405 (1958).

²⁷ Cf. 1 *CRIM. PROC.* § 1.5(k) (2011) (discussing the criminal law’s subordination of the victim’s interests to those of the state).

²⁸ See, e.g., *Kelly v. Robinson*, 479 U.S. 36, 52 (1986) (“The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole.”).

victim, meanwhile, may be overjoyed to see the criminal sent to prison and may find satisfaction in the idea that justice has been done. Nevertheless, the criminal law is not designed for the victim's benefit.²⁹ Under the current system, the victim's interests rank far below the community's interest in morally condemning the criminal. The victim rarely receives restitution for his or her loss and, when restitution actually occurs, it is typically given only at the discretion of the state's court.³⁰

Today, the major debates over criminal law take the "crimes as public wrongs" formulation as a given. Indeed, textbooks³¹ often explain criminal and penal theory as a debate between the familiar theories of retributivism³² and utilitarianism.³³ But while, superficially, these theories might seem very different, they are better understood as simply being two variations on the broader public-wrong conception of criminal law. Indeed, we can see how each of the dominant theories treats the "crimes as public wrongs" formulation as a given in the way they argue

²⁹ See McDonald, *supra* note 21, at 295–96 ("The damage to the individual victim is incidental and its redress is no longer regarded as a function of the criminal justice process. The victim is told that if he wants to recover his losses he should hire a lawyer and sue in civil court. The criminal justice system is not for his benefit, but for the community's. Its purposes are to deter crime, rehabilitate criminals, punish criminals, and do justice, but not to restore victims to their wholeness or to vindicate them.")

³⁰ For a discussion of contemporary victim-restitution laws, see *infra* note 38.

³¹ For a representative example, see JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 31–48 (5th ed. 2009). See also CHARLES F. ABEL & FRANK H. MARSH, PUNISHMENT AND RESTITUTION 3 (1984) ("There is a remarkable consensus . . . that the problem of crime and the criminal is actually a problem of continually shifting the emphasis our criminal institutions place upon rehabilitation, deterrence, and retribution.")

³² See, e.g., C.S. LEWIS, THE PROBLEM OF PAIN 83 (1940) (arguing that retributive punishment "plants the flag of truth within the fortress of a rebel soul"—that is, it punishes the criminal for violating the moral code); MICHAEL S. MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 104 (1997) (calling a criminal's moral culpability a sufficient condition for being punished); John Hospers, *Retribution: The Ethics of Punishment*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 181, 184, 206–08 (Randy E. Barnett and John Hagel III eds., 1977) (judging the duty to punish by considering the criminal's moral desert).

³³ See, e.g., Jeremy Bentham, *General Principles: Of the Ends of Punishment*, in THE RATIONALE OF PUNISHMENT, available at <http://www.laits.utexas.edu/poltheory/bentham/rp/rp.b01.c03.html> (last visited Dec. 20, 2012) (arguing that punishment is only worthwhile if it serves some greater good); CESARE BECCARIA, *On Crimes and Punishment*, in ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 5, 7, 10–12 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., 2008) (describing criminal justice as arising from social necessity and to be judged by its usefulness or harmfulness). It is important to distinguish utilitarianism as a criminal theory from utilitarianism as a broader philosophy that holds that the good is that which maximizes happiness and minimizes pain. For the latter, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1–7 (Dover Publication 2007) (1789); JOHN STUART MILL, UTILITARIANISM 7 (George Sher ed., 2d ed. 2001) (1861). My entire Note is a work of philosophical utilitarianism: it argues that restitution is the best theory of crime, because adopting it would lead to beneficial outcomes. However, I reject utilitarianism as a criminal theory, which uses criminal punishment as a means to achieve some broader social good.

over criminal-law controversies. Debates over the death penalty, for instance, tend to focus on how much the death penalty deters crime or whether it gives criminals their “just deserts”—two criteria which would be meaningless if the victim’s interest in compensation were paramount. The question of whether the death penalty remedies any of the victim’s harm is pushed to the periphery; while some observers may hope that the death penalty brings victims “closure,” its main justification is to punish or incapacitate the criminal. Of course, we see the same criminal-centered arguments whatever the topic, be it three-strikes laws, felon voting rights, or sex offender registries, all of which are typically justified from a retributivist or utilitarian—but not restitutionary—perspective.

The public-wrong conception of crime also explains the criminal law’s focus on the defendant’s mental state, a focus which neither retributivism nor utilitarianism seriously disputes. In contrast to tort law, which does not ask whether a tortfeasor had a “culpable mind,” criminal law treats mental state as an essential component of most criminal convictions.³⁴ But this only makes sense when we recognize that the dominant criminological philosophy construes crimes simply as acts that bring about the moral condemnation of the community, meaning that criminal law only really cares about moral “badness.” Conversely, if we were to treat crimes as private wrongs against a victim, then mental culpability would become irrelevant and all that would matter would be to tally the amount of harm actually caused.

II. RESTITUTION

A. Theory

Tallying the amount of harm actually caused is exactly what restitution seeks to do. It holds that the goal of criminal law should be to force the criminal to compensate the victim for whatever harms the criminal caused, and to bring the victim as close as possible to the position that the victim was in before the crime occurred. Restitution essentially holds that crimes should be treated the same as torts; under a pure restitutionary system there would not be different laws concerning “private” and “public” wrongs.³⁵

³⁴ 21 AM. JUR. CRIM. LAW § 121 (2d ed. 2008).

³⁵ See Barnett, *Restitution*, *supra* note 22, at 287–89. For this reason, it may be somewhat misleading to discuss restitution as a theory of “crime” at all, because “crime” implies punishment, not just repayment. Restitution, on the other hand, only requires that the person who committed the wrong pay damages. For a discussion of the distinction between the criminal law’s “punishment” and restitution’s “legal reparations,” see Geoffrey Sayre-McCord, *Criminal Justice and Legal Reparations as an Alternative to Punishment*, 11 PHIL. ISSUES 502, 503–04 (2001). But see ABEL & MARSH, *supra* note 31, at 23–49 (arguing that restitution fits the criteria of “criminal punishment” in that it involves unpleasant consequences visited upon a lawbreaker because he broke the law, and those punishments are administered and regulated

Like tort law or contract law, restitution separates society's broad interest in preventing and responding to wrongdoing from what goes on inside the actual courtroom. Therefore, restitution emphatically rejects the idea that, just because "society" has an interest in reducing crime, crimes should be considered wrongs against "society." After all, society has an interest in reducing torts and contract breaches too. But when such breaches occur, only a specific aggrieved victim has standing to bring a claim, and it is the individual victim's prosecution of the case, rather than its public prosecution, that is supposed to deter future wrongdoing.³⁶ Just because society gains external benefits from effective tort litigation does not mean that it needs to be one of the litigants.

In other words, restitution is only a subset of the law of remedies. But it is one that seeks to remedy crimes with damage awards to victims rather than with punishment to criminals. It is not a replacement for police work or social work that serves crime prevention goals, but is instead a way of rectifying crimes that were not in fact prevented.³⁷

What would a restitutionary system look like? Simply put, under a restitutionary system, if, for example, someone steals my car, the entity to challenge the criminal in court is not "the People of the State of New York." Rather, it is the person harmed by the criminal's act: the victim, me. I would bring a suit to either have my car returned in the same condition it was in before the theft occurred or, if the thief has already disposed of the car, to be paid back its full value, plus extra compensation for the inconvenience of temporarily losing my car, and for any emotional distress or other consequential damages that the crime might have provoked. Unlike the prosecutors who today claim to work on my behalf, I would be unlikely to bring suit solely to punish unjust behavior. Rather, I would bring suit—if I decided to bring it at all—for the primary means of getting my just compensation. Such a conceptualization of criminal law stands in stark contrast to the present system, which the political philosopher Murray Rothbard ably encapsulated:

What happens nowadays is the following absurdity: A steals \$15,000 from B. The government tracks down, tries, and convicts A, all at the expense of B, as one of the numerous taxpayers. . . . Then, the government, instead of forcing A to repay B or to work at forced labor

by the state). Without taking sides in this terminological debate, I will only refer to restitution as a theory of crime in this Note for the sake of simplicity.

³⁶ For a discussion of the deterrent effect of civil law remedies, see *infra* note 67 and accompanying text.

³⁷ Cf. Giorgio Del Vecchio, *The Problem of Penal Justice*, 27 REV. JUR. U.P.R. 65, 78 (1958) (arguing that crimes cannot be controlled by the exclusive use of legal sanctions but require moral and social efforts as well).

until the debt is paid, forces B, the victim, to pay taxes to support the criminal in prison for ten or twenty years' time. Where in the world is the justice here? The victim not only loses his money, but pays more money besides for the dubious thrill of catching, convicting, and then supporting the criminal; and the criminal is still enslaved, but *not* for the good purpose of recompensing his victim.³⁸

If, rather than being the victim of a car theft, I were the victim of a crime like murder—the damage from which cannot be tallied as easily as property crimes—then my heirs could seek damages based on my expected remaining lifetime earnings, as is done in wrongful-death tort suits.³⁹

³⁸ Murray N. Rothbard, *Punishment and Proportionality*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 259, 261 (Randy E. Barnett & John Hegel III eds. 1977) [hereinafter Rothbard, *Proportionality and Punishment*]. Since Rothbard's writing, many states and the federal government have enacted "victim restitution" laws. *See, e.g.*, Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A (2006); CAL. PENAL CODE § 1202.4(a) (West 2004); FLA. STAT. ANN. § 775.089 (West 2010); GA. CODE ANN. § 17-14-3 (2008); NEB. REV. STAT. ANN. § 29-2280 (LexisNexis 2009); N.Y. PENAL LAW § 60.27 (McKinney 2009); 18 PA. STAT. ANN. § 1106 (West 1998); UTAH CODE ANN. § 77-38a-202 (LexisNexis 2011); VT. STAT. ANN. tit. 13, § 70-43 (2009). However, these laws differ from a real restitutionary regime in several ways. For one, they frequently allow judicial discretion in deciding whether to order full restitution (i.e. they allow the judge to determine whether part or all of the loss should go uncompensated), which indicates that the states still consider restitution as less important than punishment. The compensable crimes are also typically limited to physical property crimes or, in the case of violent crimes, to incidental expenses like medical or funeral costs, rather than compensation for the killing itself. Finally, when ordered, restitution is typically ordered in addition to prison time. But, as discussed below, restitutionary philosophy holds that once compensation has been made, the criminal's debt to the victim disappears. Ordering both prison time and monetary restitution thus unjustly deprives the criminal twice for a single crime. *Cf.* Brian Kleinhans, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 *FORDHAM L. REV.* 2711, 2715–16 (2005) (arguing that federal restitution statutes constitute punishment in addition to compensation and therefore adding restitution on top of prison time raises various constitutional issues).

³⁹ Alternatively, courts might employ fixed scales stating the damage required to be paid for each particular crime. Rather than calculating the harm of murder in each particular case, they might say that the cost of murder is always, say, \$1 million. This is not so different from modern maximum and minimum sentencing laws, which peg the cost of crime to within a certain range of years in prison. A famous example of fixed restitution damages is Hammurabi's Code. The Code declares, for instance, that, "[i]f a man have no claim on another for corn and money, and try to demand it by force, he shall pay one-third of a mina of silver in every case." Hammurabi's Code of Laws, § 114, (L.W. King trans.), available at <http://eawc.evansville.edu/anthology/hammurabi.htm> (last visited Dec. 20, 2012), while requiring that someone who knocks out the teeth of a former slave "shall pay one-third of a gold mina." *Id.* at § 201. Needless to say, I do not support a return to Hammurabi's Code, which assumes the legitimacy of slavery, *see id.* at § 7 (governing the law of buying slaves), and contains some gruesomely retributive punishments, *see, e.g., id.* at § 194 (requiring the cutting off of a negligent nurse's breasts). I do not even necessarily believe that fixing the price of crime,

Alternatively, my heirs could seek psychic, rather than monetary, compensation.⁴⁰ For instance, they could theoretically move for the court to inflict retributive punishment on the offender, which, in modern society, can only be done through prison time.⁴¹ Conversely, if my heirs valued more rehabilitative methods, they could, for instance, seek a court order for the offender to undergo counseling or to engage in community service. We might expect them to move for psychic compensation if they believed that receiving money from a dangerous criminal was crass or socially irresponsible, or if they believed that receiving monetary restitution from a given criminal was unlikely.⁴² A court's job in such a case would be to assess the damages that would be received if damages were actually awarded monetarily, and then award psychic compensation that equated to roughly the same monetary value.

But there is an important distinction between psychic restitution and the mainstream theories that it might superficially resemble. That is, while psychic restitution could take retributive or rehabilitative forms, it would only be imposed for the benefit or the satisfaction of the victim or the victim's heirs; it remains the repayment of a debt, rather than a statement of social morality, and only differs from other debts in that it gets repaid in nonmonetary terms. Moreover, whether the victim or the victim's heirs value monetary, retributive, or rehabilitative forms of restitution is a subjective, personal choice. None is necessarily better than the other; each is just another option for victims to seek based on their own tastes. Needless to say, crime victims only receive this choice of remedies under restitution, which is tailored to their own satisfaction.

If restitution's description of criminal law is correct—that the victim is the one whose rights were violated and who thereby gains a compensable claim against the criminal—then the mainstream focus on the defendant as the primary subject of the criminal justice system is mis-

whether through a restitutionary code or modern sentencing guidelines, is a good idea—price fixing, in this context, cannot be trusted to reflect the actual impact of the crime on the victim or the victim's heirs. However, these are arguments for another day. Hammurabi's Code shows us that it is at least possible, in theory, to create a fixed scale of payments under a restitutionary system.

⁴⁰ Cf. Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 159 (1996) [hereinafter Barnett, *Getting Even*] (noting that restitutionary compensation need not be monetary); Rothbard, *Punishment and Proportionality*, *supra* note 38, at 263–64 (arguing in favor of psychic compensation for victims of physical crimes).

⁴¹ See Moskos, *supra* note 20, at 23 (noting that, in modern times, the prison is our only option for inflicting retributive punishment).

⁴² It is worth noting, however, that under a pure restitutionary system, people might be incentivized to specify in their living wills what kind of compensation they would like if they ever become victims of murder, which would limit their heirs' discretion. See Rothbard, *ETHICS OF LIBERTY*, *supra* note 22, at 86.

guided. Instead, the victim should become the law's primary focus. In Randy Barnett's words,

This [shift to victims' rights] represents the complete overthrow of the paradigm of punishment. No longer would the deterrence, reformation, disablement, or rehabilitation of the criminal be the guiding principle of the judicial system. *The attainment of these goals would be incidental to, and as a result of, reparations paid to the victim.* No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required.⁴³

Thus, in sum, through his or her status as the victim of a criminal invasion, the crime victim, or the victim's heirs or assignees, gains the right to restitution from the criminal. So criminal restitution may best be considered a strict liability tort. It holds that the criminal's subjective motivations are irrelevant, but that the criminal, as the party that caused the relevant harm, should be the one who bears the burden of returning the aggrieved party to the *status quo ante*.⁴⁴ Just as in torts, a restitutionary system would require the existence of a specific victim who suffered cognizable harm. "Society" in and of itself could never have standing to seek restitution against a criminal, except through something like the equivalent of a class action made up of many individual victims who have each suffered harm-in-fact. Nor could "victims" seek restitution for crimes like prostitution or drug-dealing, which do not harm any non-consenting party's rights.

B. How a Victim-Centric Theory Helps Criminal Defendants

1. Restitution Reestablishes Proportionality

Although the victim would benefit the most from a restitutionary system, criminal defendants have much to gain as well. First of all, restitution would place inherent limits on the scope and severity of criminal punishment, which, as discussed in the introduction to this Note, have become quite great. Indeed, restitution appears preferable to the current system because it reestablishes proportionality between the crime committed and the sanction imposed by setting an upper limit on the sanction that can be justifiably imposed.⁴⁵ For instance, under a restitutionary

⁴³ Barnett, *Restitution*, *supra* note 22, at 289 (emphasis added).

⁴⁴ For a comparison between restitution and strict liability torts, see ABEL & MARSH, *supra* note 31, at 35; Barnett, *Restitution*, *supra* note 22, at 299.

⁴⁵ See ROTHBARD, ETHICS OF LIBERTY, *supra* note 22, at 80; Rothbard, *Punishment and Proportionality*, *supra* note 38, at 263–64. Rothbard's brand of restitution is more retributive than the one defended here and his writings reflect different definitions of certain terms. Nevertheless, his theory is fundamentally restitutionary.

system, the criminal who stole my car could only be forced to pay back, at most, the cost of my car, plus extra amounts for any emotional distress the crime may have created, and compensation for my car-less time between theft and repayment.⁴⁶ Such a system would avoid such tragic absurdities like those which befell Leandro Andrade, who received two sentences of twenty-five-years-to-life for stealing \$153.54 worth of video tapes,⁴⁷ or William Rummel, who received a life sentence for obtaining \$120.75 by “false pretenses.”⁴⁸ Though the losses that both men caused could easily have been repaid, under their states’ “three strikes and you’re out” laws, they both received extremely long sentences that bore no relation to the harms actually incurred. The same conclusion holds in less extreme cases. What, after all, is the point of forcing a mugger or a scam artist to spend even a short time in prison when the victim would likely be happy to accept repayment?

Proportionality is a key part of the restitutionary philosophy. Unlike the system that condemned Andrade and Rummel, under a restitutionary system, the victim cannot forcibly extract more than the extent of his or her damages without becoming an aggressor; once the criminal has paid enough to make the victim whole, the criminal’s debt has been erased and the victim has no more right to compensation.⁴⁹ So, as the victim of a car theft, one could not try to impose both repayment and prison time on the criminal. Neither could one seek to subject the defendant to a life sentence for what amounts to a few-thousand-dollar theft. Instead, restitution holds that criminals have a right to have their punishment limited to the extent of their crimes.⁵⁰ This seems to follow from common sense. We do not, after all, condone punishments like chopping off a petty thief’s hands, primarily because we view the disproportion between the harm caused and the sanction imposed to neglect elementary justice.

Only restitution can fully establish proportionality between the crime committed and the sanction imposed because only restitution treats criminal law as a matter of accounting, rather than as an expression of philosophical convictions. Sentencing guidelines and mandatory minimum and maximum sentences try to approximate this sense of proportionality. Ultimately, however, they must fail because, as Barnett states,

⁴⁶ Cf. Rothbard, *Punishment and Proportionality*, *supra* note 38, at 262–64 (noting that restitution places a ceiling on punishment, limited by the criminal defendant’s own rights, which the criminal does not forfeit just by committing a crime).

⁴⁷ See *Lockyer v. Andrade*, 538 U.S. 63, 66–68, 70 (2003) (reinstating conviction).

⁴⁸ See *Rummel v. Estelle*, 445 U.S. 263, 265–66 (1980) (affirming conviction).

⁴⁹ See Rothbard, *ETHICS OF LIBERTY*, *supra* note 22, at 80–81. However, the victim could seek less than the upper limit, because the victim is always free to not exercise any of his or her rights. See Rothbard, *Punishment and Proportionality*, *supra* note 38, at 263–64.

⁵⁰ See Rothbard, *ETHICS OF LIBERTY*, *supra* note 22, at 80.

“[t]here is no rational connection between a term of imprisonment and the harm caused the victim.”⁵¹ To state that a first-time robbery is worth five years in prison is to make an arbitrary philosophical judgment divorced from the facts of the harm itself. No one would consider making similarly fixed damage awards for, say, first-time contract breaches. Rather, they would try to compute actual damages—which is what restitution does too.

But when criminal law moves away from the civil law’s focus on individual accounting and embraces abstract philosophy, there should be no surprise that we end up with punishments as dissonant as those seen today, where people spend years in prison, their futures ruined, for offenses that, frequently, could have been easily paid off in monetary damages. When criminal law becomes a question of philosophy, it can generate as many outcomes as there are competing philosophies, including quite harsh ones. Restitution, on the other hand, places a natural limit on what the criminal law can impose and thus places a powerful brake on the rise of the prison state.

2. The Possibility of “Psychic Restitution” Facilitates Victim-Offender Bargaining

Critics might argue that giving victims the option of exacting psychic restitution could actually make a restitutionary system substantially more punitive than the current one. That is, it could give bloodthirsty victims, rather than disinterested prosecutors, the option of what remedies to seek.

However, this view gets the situation exactly backwards. Allowing for psychic restitution actually increases the odds that victim and criminal will be able to negotiate to a mutually satisfactory solution. In discussing an analogous situation, the medievalist William Ian Miller argued that, in Biblical “eye-for-an-eye” societies—when a crime victim could literally extract an aggressor’s eye or a pound of flesh in compensation for a crime—the mere option of such retributive punishment actually served to increase the victim’s bargaining power for the *real* goal of getting better monetary compensation.⁵² If the law sets the loss of a defendant’s eye as the upper limit for a given crime, the removal of the eye, though possibly satisfying, is not monetarily worth very much to the victim, but avoiding eye-loss is worth a huge amount to the defendant. Thus, the defendant will have an incentive to scrape together as much

⁵¹ Barnett, *Restitution*, *supra* note 22, at 284.

⁵² WILLIAM IAN MILLER, *EYE FOR AN EYE* 48–50 (2006); see also Bruce Benson, *Restitution in Theory and Practice*, 12 J. LIBERTARIAN STUD. 75, 78 (1996) (asserting that, historically, this is how restitutionary systems developed).

money as possible to overcome the victim's bloodlust, settle the case, and avoid the gruesome penalty.⁵³

Today, the removal of a defendant's eye is off the table. But the same principle holds. When retributive punishment is an option under a restitutionary system, the victim certainly gains from being in a better bargaining position, but the defendant also gains. Whereas, under the current system, the defendant is subject to inflexible judicial edicts, under the system that Miller describes the defendant gains the flexibility that dealing with another private party allows. The defendant can bargain for a restitution order that would be better than an unduly retributive penalty would be for both the defendant and for the victim. For that reason, we would expect to see relatively few cases of retributive restitution actually carried out, but its shadow would powerfully facilitate interparty bargaining.

3. Restitution Reestablishes the Criminal's Humanity

As a final benefit, restitution would "rehumanize" the criminal.⁵⁴ Whereas now many criminal defendants and prisoners think of the justice system as something done to them by higher forces beyond their control,⁵⁵ restitution is a great equalizer. Of course, certain differences in bargaining power, ability to litigate, and so on, would still exist, but by treating criminals as being of the same moral status as the victim, and placing them in the position of a debtor who need only repay the debt, rather than of a monster to be condemned and locked away, restitution would do much to alleviate the social stigma that follows criminal defendants.⁵⁶ Society could—and probably should—morally condemn the more heinous crimes. But it should not deny the criminal's own moral status, which follows simply from being human, and which the current system, with its focus on locking away the morally blameworthy, tends to implicitly deny. Restitution, as Giorgio Del Vecchio noted, affirms the "great truth" of modern philosophy, "that the human being in himself possesses a supreme value and hence must not be treated as a simple means to an end extraneous to himself."⁵⁷ In a society that brands one in

⁵³ See MILLER, *supra* note 52, at 48.

⁵⁴ On the current dehumanization of the criminal, cf. LOURY, *supra* note 7, at 24–25 ("[T]he discourse surrounding punishment policy invariably discounts the humanity of the thieves, drug sellers, prostitutes, rapists, and, yes, those whom we put to death. It gives insufficient weight to the welfare, the humanity, of those who are knitted together with offenders in webs of social and psychic affiliation.")

⁵⁵ For an example of this mentality, see DEMICÓ BOOTHE, WHY ARE SO MANY BLACK MEN IN PRISON? 9 (2007).

⁵⁶ See ABEL & MARSH, *supra* note 31, at 17–18.

⁵⁷ Del Vecchio, *supra* note 37, at 76.

fifty of its own citizens as criminals, this is a lesson that we need to remember.

C. *Objections to Restitution*

Before leaving the topic of theoretical restitution, it is necessary to discuss the remaining significant objections to a pure restitutionary system. These are the objections that people most often raise in debates over restitution. For that reason alone, I believe that it is necessary to address them.

However, it is important to remember that even if restitution suffers from problems such as judgment-proof criminals or lessened deterrence (which, as discussed below, I do not believe it does in any significant sense), that is not necessarily a conclusive argument against it. Given that the current system leads to its own problems, such as mass incarceration and victim under-compensation, the real question is whether the *net* benefits of restitution outweigh the net benefits of the current system—which my entire Note, thus far, argues in the affirmative. Accordingly, this section is primarily meant to demonstrate that some of the skeptics' technical concerns are not in fact serious obstacles to realizing the net benefits of restitution.

1. What About Judgment-Proof Criminals?

What if the criminal cannot pay? As discussed earlier in part II.A., victims can theoretically take their restitution through retributive punishment. But would this mean that only poor criminals would be retributively punished and that the rest could pay their way out?

Well, it is certainly possible that some victims would rather send their assailants to be punished with a prison sentence than speculate on the unlikely event that they could be repaid. Nevertheless, even if the only options available were penal retribution or immediate repayment, poor criminals would be no worse off than they are now, when they are forced into prison without even the option of paying off their crimes. At least under restitution they would have the *option* of avoiding prison.

But, more fundamentally, to assume that either immediate payment or traditional retributive punishments are the only options for convicted criminals neglects the transformative effect that restitution would likely have on a free market. Just as the imposition of bail led to a market for bail bonds, the imposition of restitution would likely lead to a greater market for something like crime insurance;⁵⁸ people could buy insurance to protect against someday becoming a victim of crime. If the policy-

⁵⁸ See Barnett, *Restitution*, *supra* note 22, at 290 (discussing the uses of crime insurance).

holder did in fact fall victim to a crime, and the nature of the crime does not allow for the prompt return of stolen goods, then the insurance company could quickly pay a lump sum to the policy-holder in exchange for the right to receive the policy-holder's restitution payments from the criminal.⁵⁹

Such an arrangement would be economically efficient because it would shift the burden of the risk of default or of time-delayed payments from a private individual to a large company that is better able to manage risk.⁶⁰ In most cases, collection from the criminal could take place through something resembling the modern probation system, where the criminal would be technically free, but closely monitored to make sure that all payments are being made.

According to proponents of restitution, prison would only enter the picture in extreme cases where the criminal posed a high risk of trying to escape payment.⁶¹ In these cases, the criminal would be placed in a prison-like holding facility where he or she would work off all criminal debts.⁶² But this prison system would likely be preferable to the current system because the time spent in prison would become more "self-determinative;" that is, the sentence length would depend on how hard the prisoner worked or on what kinds of work the prisoner was able to get into. By contrast, the current system forces the prisoner to wait out a fixed number of years as decreed from above, thus emphasizing the prisoner's powerlessness in determining the prisoner's own fate.⁶³ Restitutionary prisons would also be quite limited, because they would only house prisoners who had a high risk of attempting to escape payment.⁶⁴ Though such a conception of the prison as a "workhouse" will likely raise the contempt of many intellectuals and other self-described humanitarians, from a prisoner's perspective it may be preferable to the current system. It appears that prisoners welcome any opportunity to escape the monotony of a tiny cell, even if it is only to do what many intellectuals would find to be degrading labor.⁶⁵

⁵⁹ Cf. *id.* (discussing various insurance schemes aimed at quicker restitution payments).

⁶⁰ Cf. *id.* (noting that "[t]he insurance company would be permitted to supervise the offender and mark his progress" in making restitution payment better than the victim could).

⁶¹ See *id.* at 289.

⁶² See *id.*; Del Vecchio, *supra* note 37, at 73–74.

⁶³ See Barnett, *Restitution*, *supra* note 22, at 294.

⁶⁴ Restitutionary prisons would be further limited because "victimless" criminals, like prostitutes or drug-dealers, would have no one to pay restitution to, and therefore could not even be a proper subject of a restitutionary criminal law.

⁶⁵ See MARIE L. GRIFFIN, *THE USE OF FORCE BY DETENTION OFFICERS* 42–44 (2001) (discussing the chain gang's popularity in a famous Arizona jail); Chuck Colson, *Justice That Restores: A Paradigm-Shift in Criminal Justice Practices*, 36 *GEORGETOWN L.J. ANN. REV. CRIM. PROC.* iii, x (2007) (recalling, from the author's own prison experience, that "[i]llness is one of the most debilitating aspects of prison life").

2. Does Restitution Adequately Deter or Incapacitate Criminals?

A frequent charge against restitution is that it cannot adequately deter crime. Its opponents argue that money damages alone will be insufficient to deter crime, but will instead simply allow the criminal to continue to commit crimes as long as the criminal can pay them off.

But, though critics may speak of restitution as allowing criminals to “pay off” crimes, this is actually a misleading phrase. Restitution does not recognize the criminal’s right to buy the ability to aggress against victims; it merely seeks to repair a violation of the victim’s rights after that violation has occurred.⁶⁶ It is therefore only a remedy, and does not preclude preventative anticrime measures, even, or perhaps especially, against the crimes that could be easily paid off. But, even if we do mistakenly characterize restitution payments as “buying” the right to commit a crime, restitution still does not markedly differ from the current system, where, for instance, five years in prison could be viewed as the “price” paid for the “right” to commit a certain crime.

Moreover, although there has been no opportunity to empirically compare restitution’s deterrent effect to that of a public-wrong system’s deterrent effect operating under similar conditions, there are reasons to believe that restitution could deter crime as well as or even better than the current system. Monetary sanctions are not to be taken lightly, especially among criminals of scarce means. Indeed, tort law and contract law proceed partly on the assumption that they are *not* in fact taken lightly and *do* serve as adequate deterrents.⁶⁷ When it comes to property crimes, the imposition of monetary sanctions would seem to eliminate incentives to commit crime to a greater degree than a prison sentence, because the criminal would have to repay whatever gain he or she received, plus consequential damages, thus eliminating all gains from theft or embezzlement. Monetary gains, of course, are not eliminated by prison time; the two belong to wholly separate classes. Moreover, resti-

⁶⁶ See ROTHBARD, *ETHICS OF LIBERTY*, *supra* note 22, at 241.

⁶⁷ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 142–43 (2d ed. 1977) (arguing that tort damages for negligence are just as important in their deterrent effect as they are in their compensatory effect). Edward Banfield, however, believes that crimes tend to be committed by people with very high time preference (i.e., high present-orientedness and little thought for the future) and doubts the deterrent effect of any form of criminal law. See Edward C. Banfield, *Present-Orientedness and Crime*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 133, 142 (Randy E. Barnett & John Hagel III eds., 1977); see also Colson, *supra* note 65, at iv (2007) (“In thirty years of work with prisoners, I have never met an inmate who thought he would get caught, and certainly most did not have the foggiest idea what the penalties for their crime were when they committed the crime.”). If this is true, the analogy of deterrence in criminal law and civil law is false. But if it is true, then the current system would deter just as inadequately as restitution, and criminal law would become primarily an *ex post* system in which a certain theory’s merits would depend on how well it dealt with crime after the fact, thus rendering deterrence largely irrelevant.

tion's deterrent effect would be especially powerful if, as it probably should, it forced the losing party to pay the other side's legal costs⁶⁸ or if it were accompanied by increased criminal enforcement, so that the likelihood of getting caught increased.⁶⁹

It is also not necessarily true that, as many proponents of the current system tacitly assume, prison time is a great deterrent to crime. Though we cannot know how many people decide not to commit crimes after weighing their costs, we can look at current recidivism rates for evidence as to how effectively the current system deters. These statistics paint a grim picture and provide at least some support for the often-expressed belief that, rather than deterring crime, prison actually breeds and perpetuates it. Currently, within three years of leaving prison, 42.7% of people convicted of homicide are rearrested and 16.6% are reincarcerated.⁷⁰ Those with fewer than two prior arrests and no prior imprisonments have a 31% rearrest rate and a 9.9% reincarceration rate.⁷¹ When we look at those convicted of robbery, burglary, and similar crimes, the recidivism rates are nearly double in each respective category.⁷² Perhaps a system where punishment was less harsh and stigmatic would give us a much lower recidivism rate. At any rate, it should be unsurprising that a system that relegates people to years spent in a cell alongside other criminals does not prepare its inmates for life in the outside world.

But what about billionaires? How would they be incentivized under restitution? It is of course possible that certain rich people would be less deterred under a restitutionary system than they are under a public-wrong system, especially when it comes to crimes like rape or murder, the perceived benefits of which, unlike property crimes, cannot be erased by forced compensation.

Nevertheless, this objection ignores practical reality. Overwhelmingly, violent crimes tend to be committed by the poor,⁷³ whereas

⁶⁸ See Barnett, *Restitution*, *supra* note 22, at 294.

⁶⁹ Cf. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968) (noting that changes in probability of conviction may deter more than severity of punishment). However, this deterrent effect would be offset by the generally high time preference that many criminals possess. See sources cited *supra* note 67.

⁷⁰ *Prisoner Recidivism*. BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=datool&surl=/recidivism/index.cfm#> (last visited Dec. 20, 2012) (click on "Analysis," check all boxes under "Demographics" and "Criminal History," and check "Homicide" under "Sentence Characteristics").

⁷¹ *Id.* (follow the directions, *supra* note 70, but under "Criminal History" click only "< 2" prior arrests and "No" prior imprisonment).

⁷² *Id.* (follow the directions, *supra* notes 70 & 71, but click "Robbery," "Burglary," "Larceny—Theft and MVT," and "Other Property Crime" instead of "Homicide").

⁷³ See Elizabeth Brown & Mike Males, *Does Age or Poverty Level Best Predict Criminal Arrest and Homicide Rates?: A Preliminary Investigation*, 8 JUST. POL'Y J. 1, 17–23 (2011), available at http://www.cjcr.org/files/Does_age.pdf; Karen Heimer, *Socioeconomic Status, Subcultural Definitions, and Violent Delinquency*, 75 SOC. FORCES 799, 817 (1997).

wealthy people tend to commit nonviolent property crimes,⁷⁴ like embezzlement, which restitution could very effectively deter. Of course, the crime rates for different socioeconomic groups will differ depending on what type of legal and social structure is in place. But we could reasonably expect that, regardless of the system in place, it makes the most sense that the poor will commit violent crimes and that the rich will commit nonviolent ones. Whereas the harshness of the lower class lives can often lead to violent outcomes, the rich have very little to gain from violent crime. In fact, to the extent that they care about maintaining their standing in the community and their sources of wealth, the rich have much to lose. It is unlikely that even someone like Bill Gates could withstand the social scorn and ostracism that would accompany revelations of serial killing. After all, the argument against deterrence assumes not that rich people will kill in secret, but that they will openly do so as long as they can pay restitution. It assumes, therefore, that only legal sanctions can deter crimes, whereas, in fact, social sanctions can be just as effective.⁷⁵

But there is a stronger argument for restitution's deterrent effect on the rich. If, as discussed above, a restitutionary system allows for retributive punishment as a form of psychic compensation, then restitution could effectively deter even those few wealthy people who do commit violent crimes. It would achieve this high deterrence even if the victim happened to be very poor and therefore, standing alone, had very little economic leverage. If a poor victim is able to threaten a wealthy criminal with a prison term as "psychic restitution" and the criminal refuses a satisfactory settlement, then the victim could simply have the criminal locked away for a fixed prison term. The threat of retributive punishment would therefore likely deter crime to the same extent as the current system, but would do so in a way that vindicates the victim's right to compensation, because any retribution would only be meted out if the victim considered it the best option available. Once again, the specter of psychic restitution would prevent a wealthy criminal from buying off the victim—or a murdered victim's heirs—at too low a price, and would

⁷⁴ See, e.g., Cynthia Barnett, *The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data*, FED. BUREAU INVESTIGATION (U.S. Dep't of Just. D.C.), at 1, 5, available at <http://www2.fbi.gov/ucr/whitecollarforweb.pdf> (last visited Jan. 18, 2013).

⁷⁵ To take one prominent example, the most serious damages that O.J. Simpson suffered were not from his criminal trial (where he was found not guilty) or his civil trial (whose damages judgments he evaded), but from society's belief that he was in fact a murderer, which led to an end of a lucrative career and to cancelled book deals. See, e.g., *News Corporation Cancels Simpson Book and TV Special*, NEWS CORP., http://www.newscorp.com/news/news_320.html (last visited Dec. 20, 2012) (cancelling Simpson's book publication because the publisher agreed "with the American public that this was an ill-considered project"). Of course, the threat of social ostracism might not deter everyone. But neither do legal sanctions.

give a poor victim strong bargaining power even vis-à-vis a wealthy criminal.

Another related objection is that, because restitution is primarily concerned with making victims whole, it lacks a method of incapacitating violent offenders who we fear are too dangerous to be let out of prison. This much, at least, is true: a restitutionary system could not accept the utilitarian goal of incapacitation through extended incarceration, because imposing a lengthened sentence based only on a *fear* that the criminal will strike again is to punish the criminal disproportionately to the harm *actually* caused, even if the criminal also pays compensation.⁷⁶

Nonetheless, we might still see some form of incapacitation as an incident of restitution. Because criminals who cannot afford to compensate their victims would be forced to work off their debts, possibly in prison, then, in practice, restitution would tend to incapacitate the most heinous criminals for a long time anyway, as their crimes would typically take the longest to work off. Moreover, those who commit violent crimes would be more likely to have to work off their debts in a restitutionary prison rather than under a probation system, because their penchant for violence would usually, though not necessarily, indicate a high risk of engaging in behavior that could lead to defaulting on their restitutionary obligations.⁷⁷ However, promoting extended incarceration for violent criminals is not inherent in restitution; it is merely a likely side-benefit. Nor is it a compromise toward utilitarian penal theory to recognize it as a commendable aspect of restitution. To the extent that restitution leads to long-term incarceration of violent criminals, it only does so in a way that respects the rights of both victims and criminals. Utilitarianism—or any other public-wrong-oriented criminal system—does not.

3. Is Restitution Amoral?

As discussed above, the dominant approach to crime holds that crimes are those acts that shock society's deepest moral convictions.⁷⁸ Restitution, meanwhile, takes morality out of the picture and only looks at repairing the victim's harm. For that reason, legal scholar Stephen Garvey calls it "atonement without punishment"⁷⁹ because, in his view, it

⁷⁶ But see Barnett, *Getting Even*, *supra* note 40, at 160–65 (arguing in favor of some preventative detention).

⁷⁷ See *supra* notes 58–65 and accompanying text.

⁷⁸ See *supra* notes 24–27 and accompanying text.

⁷⁹ Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1840 (1999). Note that what I call "restitution," Garvey calls "libertarianism." However, in this context, the substance of the two terms is the same. See *id.* at 1844–46 (describing "libertarianism" as essentially parallel to the "restitution" defended here). I hasten to add that, while many restitu-

denies the moral harm that crime causes and focuses solely on repairing the material harm to the victim.⁸⁰ Invoking the need for moral standards, Garvey concludes, “[R]estitution alone will not make amends for the harm [the criminal] has done. For that, you need punishment.”⁸¹

But, while it is indeed true that restitution does not care about abstract notions of morality when it comes to criminal *adjudication*, it is incorrect to call it morally neutral. On the contrary, restitution implicitly recognizes one of the fundamental facts of moral law: that human beings have the right to be free from forceful external invasions and, if that right is violated, they deserve a personal remedy. Therefore, restitution indirectly affirms the fundamental moral code of individual rights,⁸² which is what makes crimes like murder or rape so socially repugnant in the first place. Society condemns such crimes primarily because of the harm they cause to innocent individuals,⁸³ so it is unclear how treating them as “public wrongs” more effectively expresses our collective disgust than treating them as “private wrongs.” In fact, because calling them “public wrongs” denies individuals a remedy for violations of their rights, the current system weakens the support for individual rights on which the prohibitions against murder and rape were founded in the first place. Therefore, if the aim of criminal law is to reaffirm social morality, restitution functions better than the current system, or variations thereof.

However, it could be objected that restitution still neglects the criminal’s desert and thus fails to account for the moral differences between, for instance, someone whose car struck a pedestrian accidentally and someone who struck the pedestrian with the intent of murder.⁸⁴ But why must the community interpose its own conception of blameworthiness in a conflict between a pedestrian and a driver? Why must one driver be punished more than the other when the harm in both cases is the same?

tion theorists are libertarians, the two need not be synonymous. Garvey recognizes this. *See, e.g., id.* at 1844 n.195 (discussing libertarians who oppose restitution). Similarly, Abel and Marsh justify restitution on un-libertarian, welfare-statist grounds. ABEL & MARSH, *supra* note 31, at 4 (discussing the need to distribute the burden of crime throughout society and the need for the *state* to pay back restitution to the victim).

⁸⁰ *See* Garvey, *supra* note 79, at 1844–46; *see also* Hospers, *supra* note 32, at 204–05 (asserting the superiority of retributivism over restitution because restitution neglects the criminal’s “desert”); Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 1015–16 (1986) (arguing that restitution fails to account for the purpose of the criminal law: to reinforce society’s ideology as a means of setting boundaries on permissible group behavior).

⁸¹ *See* Garvey, *supra* note 79, at 1846.

⁸² Ironically, this is exactly what Richard Boldt claimed that restitution *cannot* do. *See* Boldt, *supra* note 80.

⁸³ *See, e.g.,* Epstein, *supra* note 24, at 238 (“The crimes of assault and battery, rape, and the like are all concerned with the inviolability of the person . . .”).

⁸⁴ *Cf.* Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 ETHICS 348, 350–51 (1978) (finding it absurd to treat accidental car accidents the same as intentional attacks).

Finally, in the criminal case, why should the community's preferred remedy trump that of the victim, who, by seeking restitution, would be stating his or her own preference for compensation instead of punishment?

III. THE OPT-OUT PROVISION

A. *Outlines of an Opt-Out Provision*

Having discussed the theory of criminal restitution, it is now time to discuss how this system could be implemented. In considering whether the public would prefer a restitutionary system to the current one, Randy Barnett stated that the only way to test public sympathy would be to see which system people would voluntarily choose, given the option of adopting either one.⁸⁵ I share Barnett's faith in the power of free choice, so I offer the following proposal. Hopefully, it will serve as an outline for a realistic proposal to reintroduce restitution into the public consciousness and thereby gain it some public support.

The proposal itself is quite simple, though it requires acceptance of what is considered today a quite radical proposition: that the victim's rights in criminal adjudication exceed those of the state. Essentially, but with room for technical modification, I propose that after an arrest, but before entering a plea, the victim and the defendant be given the option, by mutual agreement, to remove their case entirely from the criminal court system and into whatever alternative venue they choose. The prosecutor would only come into the picture if the parties fail to reach an agreement or if they agree to keep their dispute in criminal court.

In opting out of the criminal courts, the victim and the defendant leave behind the entire system of prosecutors, public defenders, and procedural complexities. But they would gain many other options for resolving their case. They could decide to move it to civil court, to a private arbitration board, or to some other alternative dispute resolution mechanism. Or, once the parties removed the case, the victim could simply decide to drop it and to allow the defendant to go free, which would be helpful in cases where the victim forgave the defendant, but where the government still planned to prosecute.

Because both the victim and the defendant must agree to opt out, we know that the decision to do so will be Pareto optimal; it will make neither party worse off and may make at least one of the parties better off. If this were not the case and the agreement left one of the parties worse off, then all else being equal, we would expect the parties to refuse agreement and to allow the traditional criminal courts to keep the case.

For instance, if the defendant were arrested without receiving a *Miranda* warning, or without some other constitutional protection, then the

⁸⁵ See Barnett, *Restitution*, *supra* note 22, at 295.

defendant would rationally refuse to opt out, because such a violation is cause for a dismissal in a criminal case, but not in a civil case or a case before a private arbitration board. Likewise, if the defendant believed that he or she could win in a criminal case under the heightened “beyond a reasonable doubt” standard of guilt, but could not win under the lower standard in a civil case, he or she would likely refuse to opt out. If the defendant could expect a more lenient sentence in criminal court—whether through plea-bargaining or because he or she personally considered prison time preferable to paying restitution—we would expect the defendant once again to not opt out.

The victim might also refuse to opt out. For one thing, even if the victim has access to a low-cost arbitration board, allowing a prosecutor to keep the case will cost the victim nothing, which leads to a bias against opting out, especially when the likelihood of winning a private case is low.⁸⁶ Moreover, we have discussed that “psychic restitution” is a valid form of compensation. But civil courts and private arbitration boards do not have the power to inflict retributive punishment on a criminal.⁸⁷ Therefore, if the victim would rather be compensated psychically by seeing the criminal punished in prison, then we would expect that the victim would refuse to opt out. Of course, if the victim wanted psychic restitution by making the criminal do some form of rehabilitative service, rather than through retributive punishment, this could likely be accomplished and enforced by noncriminal courts or arbitration boards through some sort of private contract, probably enforced by a liquidated damages provision in case the criminal later refused to cooperate.

Finally, the victim would have a lesser incentive to opt out in cases involving relatively small property crimes because many states have victim-restitution laws that require the criminal to return stolen property.⁸⁸ An opt-out provision would therefore likely have the biggest impact regarding violent crimes and larger property crimes like fraud and embezzlement which, for practical purposes, are difficult to receive compensation for under state and federal restitution laws—laws that still place the state’s interests ahead of those of the victim and tend to only allow recovery of small monetary amounts.⁸⁹ However, because victims

⁸⁶ The defendant could face the same incentive against opting out, because the criminal courts offer defendants a public defense attorney. Of course, in either case, the litigation comes at a cost, because the victim and the defendant pay taxes to support the criminal court system. However, because their tax burdens will not change based on their opt-out decisions, this would not be expected to factor into their calculations.

⁸⁷ See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 236–38 (1896) (holding that only the judicial branch can sentence a criminal defendant to a punishment like imprisonment).

⁸⁸ See, e.g., N.Y. PENAL LAW § 60.27(b) (McKinney 2009); VT. STAT. ANN. tit. 13, § 7043(b)(1) (2009).

⁸⁹ See CAL. PENAL CODE § 1202.4(b)-(c) (West 2004) (capping the recoverable amount at \$10,000 for felonies and \$1,000 for misdemeanors and leaving the decision of whether to

could theoretically seek restitution for emotional distress, consequential damages, and other intangible harms in a private venue, they would still have some incentive to opt out even from crimes covered by victim-restitution laws.

The above possibilities aside, there are nonetheless strong reasons to believe that many victims and criminal defendants would in fact choose to opt out of the criminal system. The primary reasons have been discussed at length: for the victim, the possibility of compensation; for the defendant, the possibility of avoiding the violent, overcrowded prison system and the social stigma that it imposes. Though we have scant evidence of modern restitutionary regimes, we can find some historical support for restitution's popularity. For instance, in medieval England, when the King assumed more powers over the criminal law and took away compensation for victims, victims became less and less willing to report crimes. In fact, in order to force victims into the public courts, the King ultimately had to criminalize the mere acts of settling crimes out of court and of failing to prosecute.⁹⁰

Unless people in the Middle Ages were significantly more materialistic than people today, there is some reason to believe that restitution would be popular, while an opt-out provision could serve as a practical⁹¹ first step to a full restitutionary regime. Critics often claim that restitution is just an academic proposal that ignores the existing legal distinctions between crime and tort and the centuries of reliance built thereon. Richard Epstein, for instance, admonished that legal changes must be made "by those whose knowledge is not only of what ought to be, but what in fact is."⁹² But an opt-out provision short-circuits some of these criticisms. It seeks no overhaul of the law beyond the mere act of codifying the provision itself. As such, an opt-out provision would leave

require repayment to the judge's discretion); FLA. STAT. ANN. § 775.089 (West 2010) (limiting recovery for bodily injury to things like medical and funeral expenses and lost income, but not for other reasonably foreseeable consequential damages or for pain and suffering); VT. STAT. ANN. tit. 13, § 7043(b)(2) (2009) (capping restitution at \$10,000 for victim's crime-related death).

⁹⁰ See BENSON, *supra* note 22, at 62. Until modern times, English victims themselves would prosecute criminal cases, even though they would not receive any restitution from a guilty verdict. See *id.* at 68, 75.

⁹¹ The proposal is practical because, if implemented, I believe that it could lead to a more restitutionary regime while maximizing the individual parties' social utility, and therefore causing minimal disruption in the legal order. I do not mean that it is a "middle of the road" proposal or that it stands a good chance of being adopted by state legislatures. How to successfully advance the proposal in the political sphere is a subject for another article.

⁹² Epstein, *supra* note 24, at 257; see also Ybo Buruma, *Doubts on the Upsurge of the Victim's Role in Criminal Law*, in CRIME, VICTIMS AND JUSTICE: ESSAYS ON PRINCIPLES AND PRACTICE 1, 14 (Hendrik Kaptein & Marijke Malsch eds., 2004) (arguing that restorative justice, a restitution-like system, could only play a very limited role in the criminal law, and only in certain peripheral cases).

intact the procedural and substantive differences between criminal law and tort law—such as mental state, burdens of proof, and differing discovery rules—that Epstein believed posed insurmountable obstacles to a unification of crime and tort.⁹³ Instead of sweepingly overhauling and unifying the two present systems, an opt-out provision would simply allow the parties to choose which of the two competing systems they prefer. Of course, allowing a choice in criminal law does present a sharp departure from our current situation. But, because the proposal relies on existing arrangements in civil courts and private alternative dispute resolution, it cannot be said to be impractical or to substitute theoretical philosophy for practical legal analysis. And because it relies on the parties' mutual consent, it cannot be said to foist an academic theory on an unwilling population.

One might object, however, that the victim actually has nothing to gain from an opt-out system, because the victim can already sue for money damages in civil court. That is, right now the victim can have his or her cake and eat it too: the victim can see the criminal sent to prison and, on top of that, seek money damages for any loss.

But, while it is true that the victim can indeed sue for money damages in civil court, that is still less satisfactory from the victim's perspective than opting for full-scale restitution. And it is less satisfactory even if the victim's only motivation is crass economic self-interest.⁹⁴ The very existence of criminal punishment diminishes the defendant's ability to pay any restitution at all. Most people rely on their jobs, or their ability to find jobs, for their livelihood. Someone serving a prison sentence not only has no means of making money to pay for civil damages, but also has strikingly diminished job prospects upon release from prison.⁹⁵ Therefore, if a victim wants payment, the rational option is to try to maintain the payer's solvency, not to send the payer to a prison that will dramatically erode such solvency. Moreover, for many professionals, commission of a crime is also grounds to lose their license to practice their profession.⁹⁶ So, once again, those who avoid the criminal justice

⁹³ See Epstein, *supra* note 24, at 255–56.

⁹⁴ I do not address here the moral question of whether it is justifiable to subject the criminal to both civil and criminal penalties for a single crime. I am inclined to believe that it is not. See *supra* notes 49–50 and accompanying text. But here, I assume for the sake of argument that the victim is only concerned with personal material benefits.

⁹⁵ See LURRY, *supra* note 7, at 19–21.

⁹⁶ See, e.g., CAL. BUS. & PROF. CODE § 6102(a) (West 2012) (disbarring attorneys convicted of felonies or crimes involving moral turpitude); MD. CODE ANN., HEALTH OCC. § 14-404(b)(1) (revoking medical license of physicians convicted of crimes involving moral turpitude and other health related offenses); see also Eric Dexheimer, *Texas Ex-Offenders Are Denied Job Licenses*, STATESMAN (Apr. 11, 2011, 5:22 AM), <http://www.statesman.com/news/statesman-investigates/texas-ex-offenders-are-denied-job-licenses-1389337.html?printArticle=y>. Summaries of state laws revoking licenses for each profession are plentiful online. For a

system avoid legal barriers to their future ability to pay restitution, at least under the current law. Finally, the duplicative costs of having to defend against both a criminal action and a civil action are not insubstantial and can also adversely impact a criminal's ability to pay restitution. Therefore, even if victims can receive compensation in the civil arena, it is in their interests to find alternatives to the prison-based criminal system, to the extent that they value monetary compensation. Opting out of the criminal system can therefore provide benefits that the traditional route of seeking civil remedies after a criminal case cannot.

But, to say that one side or another has nothing to gain from opting out is somewhat to miss the point. If the sides do not have anything to gain, then they simply will not opt out, and will be in the same position that they are in now. The opt-out provision would then just be a meaningless, but harmless, legal option. Only if both sides consider restitution to be a net improvement from the current situation will they decide to opt out. Accordingly, an opt-out system will only lead to more restitution if restitution is actually popular. If it does lead to more restitution, then we can be assured that restitution is something that real people actually desire, and is not just an intellectual thought experiment.

B. Contemporary Trends Favoring an Opt-Out Provision

1. Arbitration and Mediation

Contemporary trends also favor the feasibility of an opt-out proposal, and indicate that it is not as radical as it might first appear. For one thing, private arbitration (in which the parties submit their case to a private tribunal) and private mediation (in which a mediator helps the parties negotiate a mutually satisfactory agreement) have exploded in popularity during the last few decades as alternatives to the slow and cumbersome public court system.⁹⁷ The drive toward such private

representative example, see George Coppolo et al., *Consequences of a Felony Conviction Regarding Employment*, CONN. GEN. ASSEMBLY (Apr. 5, 2005), <http://www.cga.ct.gov/2005/rprt/2005-r-0311.htm>.

⁹⁷ See, e.g., *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 268, 270–73 (1995) (interpreting the Federal Arbitration Act broadly to overcome state anti-arbitration laws); Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21, 21–26 (1997) (discussing the benefits of using arbitration, as opposed to public courts, for settling employment disputes); FULBRIGHT & JAWORSKI, IDENTIFYING TRENDS IN INTERNATIONAL ARBITRATION SINCE 2004, at 2–3 (2011), available at <http://www.fulbright.com/images/publications/Arbitration.pdf> (discussing arbitration's growing use and popularity in international transactions over the last few years, and concluding that these trends will continue into the future); Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 811–14, 863–66 (2009) (lamenting the decline of the civil jury trial as due in large part to the rise in arbitration); George K. Walker, *Family Law Arbitration: Legislation and Trends*, 21 J. AM. ACAD. OF MATRIMONIAL LAW. 521, 649–50 (2008) (discussing arbitration's popularity in family law). For a comprehensive historical discussion of the explosion in arbitration through 1990, see BENSON, *supra* note 22, at 217–20.

courts—which previously have been consigned only to the civil sphere—has been influenced in large part by their perceived efficiencies as compared to public courts. Arbitration and mediation boards dispose of cases more quickly than public civil courts,⁹⁸ tend to be much cheaper than civil litigation,⁹⁹ and tend to be more informal and less legalistic than civil litigation, thus reducing the need for high-priced lawyers with complex procedural knowledge.¹⁰⁰ Interestingly, even though most arbitration and mediation services cater to large businesses, the drive toward private adjudication has taken smaller-scale forms as well. For instance, religious arbitration, though frequently maligned,¹⁰¹ has become popular in Jewish and Muslim communities. These communities are tending, voluntarily and in ever-greater frequency, to opt out of the public court system and to settle certain civil disputes among themselves in relatively inexpensive¹⁰² private courts that reflect their own value systems and uphold their own religious law.¹⁰³

Private arbitration's efficiency comes, in part, from the fact that, unlike public courts, arbitration boards are subject to a profit-and-loss system, meaning that they have strong incentives to adjust their supply of

⁹⁸ See, e.g., BENSON, *supra* note 22, at 213.

⁹⁹ See, e.g., FURGESON, *supra* note 97, at 813–14, 823 (describing the drive away from public civil courts as motivated by high costs); see also, AM. ARB. ASS'N, *Arbitration, available at* http://www.adr.org/arb_med (last visited Dec. 20, 2012) (advertising arbitration's low cost). Others doubt that arbitration is as inexpensive or efficient as popularly believed. See, e.g., Brian H. Corcoran & Mandie Landry, *Considering Arbitration's Costs and Dangers; Avoiding Litigation Is Good, Right? Not in Every Situation*, CORP. COUNSEL (Aug. 24, 2007), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=900005489106&Considering_Arbitrations_Costs_and_Dangers&slreturn=20121118001301; JACKSON WILLIAMS, PUB. CITIZEN, *THE COSTS OF ARBITRATION* (2002), available at <http://www.citizen.org/documents/ACF110A.pdf>. Benson argues, however, that many of the costs and inefficiencies that critics cite actually come from the government's overregulation of private arbitration boards, meaning that cost is not an inherent problem in arbitration. See BENSON, *supra* note 22, at 222.

¹⁰⁰ See, e.g., BENSON, *supra* note 22, at 220–22 (discussing the legal community's historic opposition to arbitration because of its efficient informality, based on relevant business customs, reduces the demand for the type of legalistic, procedural knowledge that lawyers possess).

¹⁰¹ See, e.g., Daily Mail Reporter, *Sharia Law Banned: Oklahoma to Become the First U.S. State to Veto Use of Islamic Code*, MAIL ONLINE (Nov. 2, 2010, 4:54 PM), <http://www.dailymail.co.uk/news/article-1325986/Sharia-law-banned-Oklahoma-US-state-veto-Islamic-code.html>; Maryam Namazie, *What Isn't Wrong With Sharia Law*, GUARDIAN (July 5, 2010, 9:18 AM), <http://www.guardian.co.uk/law/2010/jul/05/sharia-law-religious-courts>; Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES (Dec. 21, 2011), <http://www.nytimes.com/2011/12/22/us/politics/in-shariah-gingrich-sees-mortal-threat-to-us.html?pagewanted=all>.

¹⁰² Compare BETH DIN OF AM., BETH DIN OF AMERICA FEE SCHEDULE, available at http://www.bethdin.org/docs/Filing_Fee_Schedule.pdf (last visited Dec. 18, 2012) (costs of Jewish arbitration), with Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010–2011) (costs of civil litigation).

¹⁰³ See Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 384–87 (2010).

adjudicatory services to match the current market demand. For instance, whereas case backlogs are the bane of public courts, private arbitration boards can see them as reflecting an unmet demand that could be captured by expanding services and reaping higher profits.¹⁰⁴ Thus, privately-run services have a tendency to match the supply of a good to its demand; if they did not, and allowed huge backlogs to accumulate as public courts do, they would be foregoing the opportunity to make substantial profits. Of course, since public courts are not profit-making actors, they have no such incentive. Moreover, because public courts are technically free and open to anyone willing to incur various legal costs and wait for a trial, they face a “tragedy of the commons,” where the availability of a “free” good (justice services) incentivizes people to overuse the court system, which creates backlogs and all that they entail. If, conversely, the litigants had to pay for the use of the court system themselves, they would be more likely to economize on litigation.¹⁰⁵

But in the absence of a profit-and-loss system, public courts still need some way of rationing their caseloads. The important point is that, without the use of market prices, they must rely on other inferior non-price rationing mechanisms to allocate these cases.¹⁰⁶ One prominent rationing mechanism in the criminal context is the prosecutor’s discretion on whether to dismiss or litigate a case, or to offer a plea bargain.¹⁰⁷ However, even when prosecutorial discretion is exercised with the best intentions, the prosecutor, without access to price signals, cannot possibly know the population’s actual demand for which cases to prosecute, and will tend to make such decisions in an arbitrary and ad hoc manner, or in a manner based on hazy, individual notions of right and wrong, rather than on an understanding of victim’s concrete demands—conveyed through price signals—for criminal justice.¹⁰⁸

In this light, we may see that ubiquitous features of the contemporary criminal justice system, such as the extremely high incidence of

¹⁰⁴ Cf. BENSON, *supra* note 22, at 133 (describing the market-clearing capabilities of private arbitration boards).

¹⁰⁵ The classic formulation of the tragedy of the commons is Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

¹⁰⁶ See BENSON, *supra* note 22, at 131.

¹⁰⁷ Plea bargaining in particular makes the sheer volume of criminal cases manageable. See, e.g., Frank Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 298–322 (1983).

¹⁰⁸ For a general discussion of the necessity of a price system for effective economic calculation (i.e. for allocating scarce goods), which goes well beyond the scope of this Note, see LUDWIG VON MISES, *ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH* (S. Adler trans., 1920), available at http://library.mises.org/books/Ludwig%20von%20Mises/Economic%20Calculation%20in%20the%20Socialist%20Commonwealth_Vol_2.pdf; F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945). For a discussion of subtle but important differences between these two authors’ approaches, see Joseph T. Salerno, *Mises and Hayek Dehomogenized*, 6 REV. AUSTRIAN ECON. 113 (1993).

plea-bargaining, are not inherent in criminal disputes, but are rather a feature of *publicly-run* (i.e., *non-price-rationed*) dispute resolution.¹⁰⁹ To the extent that parties opt for private arbitration, one benefit of an opt-out system would likely be a shift to more efficient rationing methods, where victims express their demand for which cases to prosecute based on the prices they are willing to pay, and where arbitration boards, as profit-maximizing market actors, contract or expand their services, reallocate their capital goods, and raise or lower prices to fit the victim's concrete, demonstrable demand.

Finally, as an added bonus, if many people opt out, the burden on the public court system would be lower, which would reduce the need for non-price rationing mechanisms like plea-bargaining in the first place.¹¹⁰

But there are other ways to reap the benefits and efficiencies of private arbitration in the criminal justice market. Of course, because in many cases neither the victim nor the defendant (after *Gideon v. Wainwright*¹¹¹), bears much monetary cost from criminal litigation, arbitration might be more expensive for the parties than sticking with the current system. Nevertheless, as long as criminal arbitration is allowed to develop free of regulatory distortion and interference, we should expect to see a new market in low-cost, no-frills arbitration services to satisfy the demands of parties who are willing to pay a little more up front to get a speedier and more mutually satisfactory outcome than they could get from the current system. The fact that many criminal disputes involve low-income people¹¹²—who are unlikely to be able to afford the arbitration boards that today arbitrate large corporate transactions—would spark a demand for a low-cost market, similar to how the demands of Jewish and Muslim communities led to the creation of low-cost religious arbitration. Because criminal arbitration boards would not need to spend the time or possess the legal acumen to parse through legalistic issues like mental state, admissibility of evidence, or due process considerations relating to police conduct, but would rather only have to judge

¹⁰⁹ See, e.g., BENSON, *supra* note 22, at 139 (“It is the congestion problem resulting from non-price rationing that gives prosecutors and judges the discretionary power to selectively ration trials and plea bargains.”).

¹¹⁰ For an argument that plea-bargaining is both unjust and economically inefficient, see Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

¹¹¹ 372 U.S. 335 (1976) (finding a constitutional right to publicly-appointed counsel for indigent defendants).

¹¹² As an example of the sheer number of poor criminal defendants, the Department of Justice's Bureau of Justice Statistics' most recent study found that the 22 states with state public defender programs received a total of approximately 1.5 million cases of indigent defendants in 2007. Lynn Langton & Donald Farole, *State Public Defender Program, 2007*, BUREAU JUST. STAT. (U.S. Dep't of Just., D.C.), Sept. 2010, at 4, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf>. Those states that also had a public defender program in place in 1999 saw an average rise of 20% in their caseloads from 1999 to 2007. *Id.* at 19.

guilt by their own privately-imposed standards¹¹³ and then tally the damage done, arbitration could be handled cheaply and quickly by private employees without formal legal training.

But what if the parties still cannot afford to arbitrate? Well, a victim can always sell off his or her right to restitution to a third party.¹¹⁴ In a free market, this could lead to interesting arrangements where a private company could buy out the right to restitution from the victim and then conduct arbitration itself. Crime insurance could easily take on this function.¹¹⁵ Other variations of the same arrangement are also possible. Perhaps a party could take out a loan from a crime-bond company, while keeping the right to restitution, and then repay the loan after the arbitration. A party would be a good candidate for a loan if it had a high probability of success and of regaining its legal costs, but did not have the money to pay up front. In fact, various medieval restitutionary systems actually used variations on just these financing schemes. In Iceland, the victim was free to sell or give away his right to restitution,¹¹⁶ while in Ireland complex social groups called “sureties” would aid an in-group victim in enforcing a claim, or guarantee an out-group victim full restitution in the case that one of its own members defaulted.¹¹⁷ Free markets have proven capable of changing to fit all kinds of different legal conditions. Critics of restitution should not dismiss that capability.

Indeed, it is likely that the only reason private arbitration boards have not taken advantage of the low-cost criminal market is because criminal arbitration is legally unenforceable and cannot preclude a criminal prosecution,¹¹⁸ and not because of any technical difficulties in handling criminal cases. After all, if private arbitration boards can resolve

¹¹³ There is no need to fear privately imposed standards of law, as does Namazie, *supra* note 101. Namazie decries what she considers to be the lack of procedural safeguards in Sharia law. But as long as the parties voluntarily pick a particular venue, free from external coercion, then they have made their preferences as to procedural law known. In fact, because the criminal system presently allows no competition among criminal courts, we have no way of knowing that the present system is, from the victims' and defendants' perspectives, preferable to any other arrangement that might arise in a free market.

¹¹⁴ *Cf.* Barnett, *Restitution*, *supra* note 22, at 291–92 (discussing assignments to third-party insurers).

¹¹⁵ See *supra* notes 58–60 and accompanying text.

¹¹⁶ See David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399, 406 (1979).

¹¹⁷ See Joseph R. Peden, *Property Rights in Celtic Irish Law*, 1 J. LIBERTARIAN STUD. 81, 87 (1977).

¹¹⁸ See, e.g., *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239–40 (1987) (assuming that a purely criminal case is nonarbitrable). For an emblematic example of the common law rule against criminal arbitration, see 19 STANDARD PENN. PRAC. § 103:297 (2d ed. 1981) (“[A]ny dispute or controversy . . . [except those] involving questions of a criminal nature or a criminal defense, may be submitted to arbitration.”).

complex issues like international commercial class actions,¹¹⁹ then they are likely to have little trouble resolving the relatively simple issues of the criminal law. Except for the most complicated RICO or white-collar conspiracy cases (which could be handled by the same people who arbitrate other noncriminal business disputes),¹²⁰ criminal arbitration boards would not need to review extensive amounts of technical documents, familiarize themselves with the ins and outs of business custom, or develop a deep understanding of financial markets. Typically, they would be arbitrating doctrinally simple issues such as assault and battery, where—shorn of the public-wrong-oriented criminal law's focus on mental state and procedure—the primary issues are whether the defendant committed the crime and, if so, what the victim's damages are. Even if the crime is an emotionally charged one like rape or murder, the technical difficulties of resolving it pale in comparison to resolving many commercial litigations.

It might, however, be objected that, unlike business disputes, where the parties are in theory equally situated, deal dispassionately at arm's length, and often agree in the initial contract to use arbitration instead of civil litigation, criminal disputants will only seek out an arbitration board after the crime occurred, without benefit of an original contractual agreement, and with their judgments clouded by the emotions that the crime created. Moreover, unlike businesspeople—who want to foster good reputations throughout their industry—criminal disputants will not care to, or have an incentive to, cooperate with a private body that lacks the power of the state.

But, in reality, criminal disputants have little incentive to refuse arbitration and to deal with the state's criminal justice system instead. The victim certainly has little to gain, except for the satisfaction of seeing the criminal imprisoned, while the criminal would realize that, if he or she refuses to cooperate or make payment, the alternative is the brutality and stigma of prison. Both parties would therefore gain from following through on arbitration and avoiding the criminal justice system, regardless of what their temporary emotions, immediately following the crime, might indicate.

¹¹⁹ See, e.g., KATHRYN HELNE NICKERSON, INTERNATIONAL ARBITRATION (2005), available at <http://www.osec.doc.gov/ogc/occi/arb-98.html> (summarizing arbitration's popularity for international business disputes).

¹²⁰ Note that in *Shearson*, 482 U.S. at 220, the Supreme Court allowed an arbitration board to handle RICO and securities fraud claims, which were complex civil claims that also implicated criminal law. *Id.* at 239–40 (holding that the “overlap” with criminal law was not serious enough to prevent arbitration). The Court held that “potential complexity should not suffice to ward off arbitration.” *Id.* at 239 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

2. Restorative Justice

Today, the “restorative justice” movement is the dominant movement working toward reasserting the victim’s place in criminal law. Like restitution, restorative justice seeks to minimize the role of the prison and emphasizes reparations to the victim over retributive punishment.¹²¹ Unlike restitution, however, restorative justice holds that the primary goal of the justice system should be, not just compensation, but also repairing the bonds between the criminal, the victim, and the community that were severed during the criminal act.¹²² The role of the law for the restorativist is to repair property loss, empower both victims and offenders, promote peace and caring, and come to an emotional resolution of the problems preceding and following from a crime.¹²³ Restorativists frequently point to the support for such communitarian ideals in the major world religions.¹²⁴ They likewise chide the individualistic premises of the modern justice system for creating a zero-sum game where, if one party wins, the other must lose, instead of creating a win-win situation were the parties can move toward mutual healing and reconciliation.¹²⁵

Restorative justice is certainly an improvement over the current system. However, from a restitutionary perspective, it is under-inclusive. For, while parties should certainly be free to seek restitution through restorative means, restitution makes no assumptions about which remedy the parties should *in fact* choose. If the parties want to choose the “zero-sum” method of modern tort law, they would be free to do so under a restitutionary system. Without denying that restorative justice can constitute one valid form of compensation, restitution recognizes that some victims may have no interest in emotional healing, but simply want compensation for their loss. However, in an opt-out system, we may expect to see higher rates of restorative justice, perhaps administered by mediation boards, in poor, inner-city communities, where—putting aside the financing options discussed above—the likelihood of receiving full restitution from a poor criminal is relatively low, and where the community feels a shared interest in promoting and strengthening its own internal bonds as a means of overcoming its lack of social and economic power.¹²⁶ But among communities with little sense of shared interests,

¹²¹ See John Braithwaite, *Restorative Justice and a Better Future*, INT’L INST. FOR RESTORATIVE PRACTICES (Oct. 17, 1996), http://www.iirp.edu/article_detail.php?article_id=N0k4; Colson, *supra* note 64, at v–vi; Howard Zehr, *Restorative Justice? What’s That?*, (Oct. 22, 2009), available at http://www.iirp.edu/article_detail.php?article_id=NjMx.

¹²² See BRAITHWAITE, *supra* note 20, at 14–15; Colson, *supra* note 65, at vi.

¹²³ See BRAITHWAITE, *supra* note 20, at 14–15.

¹²⁴ See, e.g., *id.* at 3–5; Colson, *supra* note 65, at vi.

¹²⁵ See BRAITHWAITE, *supra* note 20, at 244–45.

¹²⁶ See Elijah Anderson, *Going Straight: The Story of a Young Inner City Ex-Convict*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 121 (David Garland ed., 2001) for

we could expect a more traditional “individualistic,” or “tort-like,” restitutionary system to take hold.

Neither outcome is necessarily better than the other; each just fits the particular circumstances or needs of different groups. But the restorative justice movement implicitly denies the wide range of forms that restitution can take. It supposes that the “right” model is to promote emotional healing and togetherness, even though many victims may want something more retributive, or simply want to be returned to the *status quo ante*. By seeking to confine all criminal disputes into one model, restorative justice is incomplete.

But despite being incomplete, restorative justice has done much to bring restitutionary ideals into the mainstream, even gaining the recognition of the American Bar Association.¹²⁷ Nevertheless, most experiments in restorative justice have, unfortunately, taken place under the direction of criminal courts and state justice departments,¹²⁸ or as merely a method of rehabilitating already-convicted prisoners.¹²⁹ As such, they operate within the dominant public-wrong conception of the criminal law. This stands in sharp contrast to the restitutionary and opt-out systems envisioned in this Note, which represent a complete rejection of the philosophy underlying the current criminal justice system.¹³⁰

Restorative justice’s limited scope, however, is not an inherent shortcoming, but simply reflects the power with which the contemporary conception of crime grips the legal system. But it bodes well for restitution’s future viability that a theory stressing the importance of individuals as opposed to the state, and of reparations as opposed to prison time, has been able to survive and grow.

a story emphasizing the need for a strong sense of community as a means for overcoming the destructive nature of inner-city life.

¹²⁷ See *Criminal Justice Section: Alternative Dispute Resolution and Restorative Justice Committee*, AM. BAR ASS’N, <http://apps.americanbar.org/dch/committee.cfm?com=100000> (last updated Aug. 21, 2012).

¹²⁸ See, e.g., 42 U.S.C. § 3796ee(b)(14) (2006) (authorizing federal grant money for state restorative justice programs); COLO. REV. STAT. ANN. § 19-2-213 (2011) (creating state “restorative justice coordinating council”); FLA. STAT. ANN. § 985.155 (West Supp. 2012) (authorizing creation of state-run “neighborhood restorative justice centers” for first-time, nonviolent juvenile offenders); MONT. CODE ANN. § 2-15-2013 (2011) (defining the purpose of the state justice department’s “office of restorative justice”); VT. STAT. ANN. tit. 28, § 2a (2008) (stating the state’s policy of integrating restorative justice principles into the criminal law).

¹²⁹ See, e.g., Colson, *supra* note 65, at xi–xii; Daniel W. Van Ness, *Restorative Justice in Prisons*, RESTORATIVE JUST. ONLINE (July 2005), <http://www.restorativejustice.org/prison/prison-cell/editions/2005/july05/rjprisons>.

¹³⁰ See, e.g., Barnett, *Restitution*, *supra* note 22, at 291–92. Many advocates of restorative justice, moreover, argue against a fully privatized system, which this Note would allow. See, e.g., BRAITHWAITE, *supra* note 20, at 258–60 (arguing that restorative justice requires a public, collectivist component).

CONCLUSION

The strength of previous victims' rights movements strongly correlates with heartening legal changes. Court-ordered restitution laws¹³¹—and the Supreme Court's subsequent decision that such obligations cannot be discharged in bankruptcy¹³²—and laws requiring the victims' input in prosecution¹³³ provide prominent examples. Hopefully, laying out the intellectual foundations for an opt-out provision, as this Note attempts to do, can produce a similar impetus toward, and interest in, a more restitutionary criminal law. The opt-out system alone would not engender pure restitution, because it would keep the criminal courts as a default option for the parties to fall back on. Nor would it address "victimless crimes" like drug possession or prostitution, in which there would be no aggrieved party with standing to opt out of the criminal courts. But I believe that any shift toward restitution and away from the public-wrong conception of criminal law, with its attendant features of mass incarceration, will constitute a net social benefit. That is especially so when, as here, the shift comes about through the voluntary, individual choices of real victims and defendants. What form that shift ultimately takes—and whether people will continue the push from an opt-out criminal system to pure restitution—is for a free people, informed of the full spectrum of choices in criminal law, to decide.

¹³¹ For a discussion of contemporary restitution laws, see *supra* note 38.

¹³² See *Kelly v. Robinson*, 479 U.S. 36, 42–43 (1986). The Supreme Court still considered these restitution laws to constitute a form of state-administered punishment, rather than a private remedy. See *id.* at 53 (“Because criminal proceedings focus on the state’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation, we conclude that such restitution orders imposed in such proceedings operate ‘for the benefit of’ the State.”). Therefore, the Court’s holding does not appear to apply to the restitution program that I have outlined here. However, even holding that restitution is a valid state interest for purposes of criminal law helps normalize it and to prepare the ground for future gains for the benefit of victims.

¹³³ See, e.g., ALA. CODE § 15-23-64 (LexisNexis 2011); DEL. CODE ANN. tit. 11 § 9405 (2007); IND. CODE ANN. § 35-35-3-5 (LexisNexis 1998); LA. REV. STAT. ANN. § 46:1844(D) (2010); W. VA. CODE ANN. § 61-11A-6(a)(5) (LexisNexis 2010).

