Compensation as Punishment

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One aspect of the recent resurgence of interest in the victims of crime has been the enactment of a variety of schemes in different jurisdictions for compensating those who have suffered injury or loss as the result of the criminal activity of others. New Zealand led the way in 1963[1] by making statutory provision for the payment of compensation by the State to victims of some crimes. Britain followed in 1964 with an experimental scheme for making payments to those suffering physical injury from criminal actions which was given more permanent effect in the Criminal Injuries Compensation Act 1969 (U.K.). To this scheme was added, in England and Wales, through the Criminal Justice Act 1972 (U.K.),[2] the general power of courts to order the offender to pay victim compensation for most offences. Broadly similar provisions have recently come into force in Scotland (Part IV of the Criminal Justice (Scotland) Act 1980 (U.K.)) following the report of the Dunpark Committee *Reparation by the Offender to the Victim in Scotland*.[3] Scottish courts may now order the offender to pay "compensation for any personal injury, loss or damage caused (whether directly or indirectly) by the acts which constituted the offence", and this may be "instead of or in addition to" any other disposal, such as a fine or imprisonment.[4] In the meantime compensation schemes have been introduced or revived in every Australian State and in the majority of States in the United States of America.[5] Since compensation has long been an aspect of civil law criminal process it is no longer correct to say that the victim is entirely forgotten in official responses to criminal activity in developed jurisdictions.

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1. Criminal Injuries Compensation Act 1963 (N.Z.) amended by the Criminal Injuries Compensation Acts, 1966, 1969 and 1971 (N.Z.).
2. Re-enacted and consolidated by the Powers of the Criminal Courts Act 1973 (U.K.).
3. Dunpark Committee, *Reparation by the Offender to the Victim in Scotland* Cmnd 6802 (1978).
4. Criminal Justice (Scotland) Act 1980 (U.K.) s.58(1).
5. Code Amendment Act 1968 (Qld); Criminal Injuries Compensation Act 1972 (Vic.); Criminal Injuries Compensation Act 1967 (N.S.W.).

The methods of compensating victims differ radically with respect to the compensatable injuries or losses, the responsibility for paying compensation and the mechanisms whereby payments are determined and administered. The most significant difference is between what might be called welfare compensation schemes whereby the State takes on the responsibilty for meeting the needs of victims,[6] on the one hand, and what I shall call criminal justice compensation schemes which directly involve the courts in ordering offenders to compensate their victims.[7] A major difference between the two methods is that welfare schemes tend to be restricted to compensating criminal injuries, whereas criminal justice schemes usually cover most types of damage or loss. Both types of scheme have been justified as attempts to 'do something' for the victim, but the former are comparable to health services, social security and unemployment payments and similar welfare state provisions which operationalise the community's care for or duty to those in need, whereas the latter, by requiring the offender to make reparation, are more obviously legal in nature and tend to be justified by the argument that it is only right that the perpetrators of injuries and damage should make good the harm they have caused and so 'make it up to' their victims.

However this distinction may be blurred where one State underwrites compensation orders for personal injuries when the offender is unable to pay, as occurs in those Australian States which have criminal justice schemes for compensating criminal injuries.

In this paper I concentrate on reparation, that is on criminal justice schemes for victim compensation,[8] explore the conceptual coherence of bringing together punishment and compensation and offer some observations on the benefits and drawbacks of integrating victim compensation into the criminal justice system.

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6. As under the Criminal Injuries Compensation Act 1969 (U.K.) and the equivalent Victorian Act, note 5 *supra*, which cover only personal injuries.
7. As in the Powers of the Criminal Courts Act 1973 (U.K.) and the Criminal Justice (Scotland) Act 1980 (U.K.), and in the majority of Australian States.
8. Welfare schemes are most aptly termed compensation programmes since their aim is to provide benefits to make up for some injury, loss or lack (the term 'compensation' has no built-in implications as to how or why the disability to be compensated came about). "Reparation" is more appropriately used in criminal justice programmes since it captures the element of the offender as an essential party to the transaction. "Restitution" may be taken to signify giving back the specific item lost by the victim, not necessarily by the offender, although this term is often used to cover both compensation in general and reparation in particular.

I.

Given the very limited extent to which it is practicable to provide effectively for the needs of victims out of the limited resources extractable from offenders, most of whom are without financial reserves and many of whom are unemployed or in prison, it might appear that the welfare model is a more hopeful basis for caring for the victim even if governments are loath to undertake the heavy and open-ended financial obligations that an adequate and comprehensive welfare compensation scheme covering all types of loss would entail.[9]

Moreover there are significant reservations, often expressed by those within the legal profession, regarding the intrusion of what is considered a matter for the civil law of tort or delict into the criminal arena on the grounds that it distracts the criminal process from its primary objectives of punishment and prevention of crime and leads to a host of unfortunate anomalies and inconsistencies which are incapable of solution without a restoration of the clear distinction between civil and criminal law[10] and which entail that victim compensation can never be more than a peripheral and minor part of the criminal process, a sort of 'quickie' civil suit tacked on to a basically criminal procedure, appropriate only to very straightforward cases and relatively menial crimes.[11]

However it is noteworthy that the extensions of compensation in the criminal law have been the result largely of external political pressures and not the proposals of those officially charged with the task of legal reform and have often been implemented against the explicit advice of legal practitioners who tend to see them as sops to public opinion with little rationale in terms of the criminal law.[12] In contrast politicians and public appear to give general support both to the criminal compensation and to reparation. Dunpark viewed his suggested reparation scheme as a way of bolstering the public's dwindling faith in the criminal law,[13]

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9. The model here could be the special State scheme which exists in Victoria in the more ambitious form recommended for the Australian Capital Territory in the Australian Law Reform Commission Report, No.15 (interim), *Sentencing of Offenders* (1980), or, at the federal level, the revival of the Australian National Injuries Compensation Bill 1974 (Cth).
10. See P.R. Duff, "The Compensation Order" [1980] *Scot.L.T.* 285.
11. Dunpark Committee, note 3 *supra*, para. 8.06.
12. See M. Wasik, "The Place of Compensation in the Penal System" [1978] *Crim.L.Rev.* 599.
13. Dunpark Committee, note 3 *supra*, para. 2.06.

noted that the courts in England and Wales are now "compensation conscious"[14] and commented on the generally favourable response to the English scheme. It seems likely, therefore, that theorists and practitioners of criminal law will have to adapt themselves to the alleged anomalies that are said to arise from the confusion of civil and criminal concepts.

Nevertheless in view of the shortcomings and difficulties in reparation legislation is there any point in pursuing the criminal justice model of victim compensation except, perhaps, as a stop-gap pending State provision for all types of criminal loss? Should we not return to the civil law the monopoly of ordering compensation for damages, perhaps making it easier for victims to raise successful actions in the civil courts whose expertise and procedures are tailored to the complexities of determining liability and quantum in such matters?

A complete answer to these questions would require extensive critiques of the adequacy of the civil law in relation to the situation of those injured by the criminal acts of others and of the appropriateness of submerging the recompense of victims within general State provisions for those in need. Both these topics are outwith the scope of this paper, although my general view is that victims have a special claim for compensation not shared by other needy persons and that these claims are unlikely to be satisfied by anything resembling the existing law of tort or delict.[15] The more positive part of the defence of the place of compensation within the criminal justice system, with which I will try to deal, requires reasons to be given why compensation should be accepted as a criminal law concept which can take its place alongside retribution, deterrence, prevention and rehabilitation as a proper and practical objective of the criminal law. As long as compensation in the criminal courts is regarded as an appendage which is justified, if at all, by the practical benefits of settling criminal charges and civil suits relating to the same illegal acts at the same time, then it is unlikely to have a major impact on the theory and practice of the criminal law. Other prospects open up if we are able to think of compensation as in itself an element of criminal justice and even view compensation as a type of punishment.

Some compensation theorists argue that the whole notion of punishment should be abandoned in favour of what is called

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14. *Id.*, para. 6.02.
15. See P. Atiyah, *Accidents, Compensation and the Law* (3rd ed. 1980).

'penal compensation'. Thus R.E. Barnett[16] has suggested that the entire criminal justice system could be based on the idea of compensation as opposed to punishment. He argues that compensation (or, as he calls it, restitution) provides a new or perhaps a renewed paridigm of criminal law according to which

> crime is an offence by one individual against the rights of another. The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused.[17]

This line of argument, which presupposes the failure of criminal justice systems to justify their activities by using the traditional theories of punishment, rejects the paradigm of punishment in favour of the paradigm of compensation.[18]

On the other hand, it is also possible to regard compensation as in itself a type of punishment which should at the very least feature in a criminal justice system. This is the position adopted by one of the pioneers of the recent revival of academic interest in the victim, Stephen Schafer, who in 1960 wrote of "correctional restitution", "punitive restitution" and "the restitutive concept of punishment". He argued that "restitution should carry out a mission not only in helping the victim in his present neglected position but, at the same time, in refining the practical concept of punishment".[19]

Neither approach, Barnett's nor Schafer's, however, is standard. The normal view, even amongst those who favour some form of reparation, is to present this as a choice for facilitating an essentially civil process. Thus the Scottish Dunpark Committee is dismissive of all arguments in support of reparation apart from that which bears on "doing something for victims", although, given the historical place of reparation in Scots law (its demise can be dated from the eighteenth century) there is, in Dunpark's view, no difficulty in principle in its reintroduction to the criminal law. The adopted aim of the Committee was simply "to facilitate the

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16. R.E. Barnett, "Restitution : A New Paradigm of Criminal Justice" (1977) 80/87 *Ethics* 287.
17. *Ibid.*
18. This is also the general view in Australia concerning criminal justice compensation schemes. They are viewed as quick methods of making at least a token effort to support victims of crime. However one Queensland judge is reported as saying that "an assessment of compensation in this matter is far different to a civil award where one is considering awarding damages. This award is a punishment in addition to other punishment which has been placed on the accused person." *Daley* (1980) 33 Q.W.N. 33, 85, *per* Stable J. in D. Chappell, "Providing for Victims of Crime: Political Placebos or Progressive Programs" (1972) *4 Adel.L.Rev.* 294.
19. Stephen Schafer, *Restitution to Victims of Crime* (1960) viii.

recovery from convicted offenders of some redress by the largest possible number of victims without disrupting court timetables or extravagant use of State funds".[20] This they saw as a way of by-passing the civil process rather than in itself a punitive or penal measure. A compensation order, they say, is "not an additional penalty but a short-circuit civil action".[21]

Dunpark is typical here in contrasting the idea of reparation and criminal justice. The former is different from, and should not be allowed to get in the way of, the latter. Thus they recommend that the making of compensation orders should be entirely at the discretion of the judge since "the primary function of the criminal courts is to enforce the criminal law for the purpose of maintaining law and order". In contrast to the procedure in Australia no provision is made for the victim to make application for compensation.[22]

The alternative view which I will explore in this paper is that compensation is not a conceptual cuckoo in the criminal law nest but a possible penal objective which can, without undue theoretical difficulty, be incorporated into the notion of criminal justice and even into the concept of punishment itself.[23]

This is a view which accords with much in the Dunpark Committee's report and with the Criminal Justice (Scotland) Act 1980 (U.K.). Compensation orders are enforced as if they were fines with the ultimate sanction of imprisonment and for this reason the means of offenders is taken into account in determining their quantum.[24] In Dunpark's view, "[a]lthough serving a different purpose and pronounced upon different considerations, the compensation order has much in common with the fine".[25] The Committee were therefore willing to recommend, and the United Kingdom Parliament to accept, that compensation orders should take precedence over a fine when the means of the offender was insufficient for both to be imposed or collected[26] and were even prepared to contemplate that in marginal cases at least a person may not be sent to prison in order that he may be able to

20. Dunpark Committee, note 3 *supra*, para. 2.10.
21. *Id.*, para. 8.06.
22. Thus the Criminal Code Amendment Act 1968 (Qld) s.663D.
23. This argument receives some support in A.M. Duckworth, "Restitution, an Analysis of the Victim-Offender Relationship: Towards a Working Model for Australia" (1980) 13 *A. & N.Z.J. Criminology* 227, 233: "Restitution allows both offender and victim to feel that justice has been well and truly done".
24. Dunpark Committee, note 3 *supra*, para. 8.08.
25. *Id.*, para. 10.01.
26. *Id.*, para. 10.04.

pay compensation to his victim.[27] Further they recommend that compensation orders be awarded in cases where there is no civil liability (as with the Trade Description Act 1968 (U.K.) and Food & Drugs (Scotland) Act 1958 (U.K.)) since "the whole purpose of this scheme is to give victims of crime a kind of rough justice at the expense of offenders and we are not to be deterred from recommending the adoption of the most practicable means of attaining that objective by the fact that they may conflict with an established principle of private law".[28] All this does not entirely square with the claim that reparation is no more than a way of short-circuit civil actions. There is, therefore, some ambivalence in the Dunpark view and in the subsequent Scottish legislation, on this issue.

I will approach the idea of compensation as punishment by considering the non-welfare arguments given in support of criminal justice compensation, that is arguments which are not directed solely to meeting the needs of victims for their own sake. First, the arguments which centre on the offender. One of the motivating forces for the Criminal Justice Act 1972 (U.K.) was the objectionableness of the offender keeping the proceeds of his crime (as is alleged to happen in the case of professional criminals who are able to put aside large sums of money pending their release from prison). Thus the Report of the Advisory Council on the Penal System, under the chairmanship of Lord Widgery, pointed out that "the criminal stands a good chance of evading detection, and it is felt to be an affront to public opinion and a positive inducement to crime if when caught and convicted he is still able to enjoy the proceeds of crime after he has paid the penalty imposed by the court".[29]

Other non-welfare offender-centred arguments point to the redemptive or reformative value of reparation. The 1959 White Paper *Penal Practice in a Changing Society* argues that "[t]he redemptive value of the punishment to the offender would be greater if it were made to include the realisation of the injury he had done to his victim as well as to the order of society and the need to make proper reparation for that injury".[30]

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27. *Id.*, para. 10.03.
28. *Id.*, para. 7.15; see P.S. Atiyah, "Compensation Orders and Civil Liability" [1979] *Crim.L.Rev.* 504.
29. Advisory Council on the Penal System (Great Britain), *Sentences of Imprisonment : A Review of Maximum Penalties* (1978).
30. *Penal Practice in a Changing Society* (1959) para. 25. See Eplash, "Creative Restitution: A Broader Meaning for an Old Term" (1958) 48 *J.Crim.L.* 619.

Second, there are more victim-centred considerations. Reparation is said to have the beneficial effect of involving the victim in the criminal process, thus bringing him back into a social ritual of which historically he was a central part but from which he has been excluded by the modern State's pervasive grasp, its tendency to see crime as primarily an injury to society as a whole and its unwillingness to share the proceeds of criminal convictions, in the shape of fines, with the private citizen. This, it is argued, helps in crime control, since the prospect of compensation will give citizens an additional motive to report offences and help in securing convictions.[31]

Further it is a recognition that he as well as society in general is the loser by the criminal's activities. Indeed is not the victim's loss far more immediate and grievous than the more diffuse and diluted damage done to the 'fabric' of society? If so, is it not only fair that the criminal process should be directed towards the damage done to victims as well as the intangible harm inflicted on society?[32]

Also, quite apart from the victim obtaining compensation, has he, as the principally aggrieved person, not a right to be involved in the process of meating out justice to the criminal? Has he not an interest in securing the proper outcome of a criminal prosecution which arose as a result of an injury inflicted on him? If the victim's satisfaction in the process of trial and disposal is important then this satisfaction is maximised, it is argued, by giving him a part to play in the system and the prospect of some personal benefit or relief from the outcome.[33]

Finally, there are arguments which centre on the nature of the relationship between offender and victim. Rather vaguely it is alleged that there is clear moral value in an offender being made to do what he can to make amends to his victim. This is seen as being intrinsically right and morally satisfying. Something to be compared to the payment of debts. Sometimes this is seen as healing a breach created by the crime between two citizens. If not a reconciliation at least a restoration of a proper debtless social relationship is achieved by direct offender compensation to the victim.[34]

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31. G. Wardlaw, "The Human Rights of Victims in the Criminal Justice System" (1979) 12 *A. & N.Z.J. Criminology* 145.
32. R.E. Barnett, note 16 *supra*, 291ff.
33. S. Schafer, note 19 *supra*, 120ff; S. Schafer, *The Victim and His Criminal: A Study in Functional Responsibility* (1968) 115.
34. Dunpark Committee, note 3 *supra*, para. 18.06.

There are thus many different considerations at stake in the non-welfare justification of reparation. Perhaps the weakest is that which relates to the unfairness of the offender keeping the proceeds of his crime since this could be rectified by heavy fines reinforced by criminal bankruptcy as readily as by enforced reparation and it is probably best put to one side.

The redemptive argument appears somewhat idealistic, since, unless it is voluntarily undertaken as an expression of regret and the desire to make amends, it is as likely to generate resentment as it is to beget a realisation of sinfulness. Dunpark is prepared to contemplate this sort of motivation for reparation in the case of children[35] but is sceptical as far as adults are concerned.[36]

The other arguments differ in their implications since some require only that the offender be made to compensate his victim, something that can be done without any direct involvement of the victim in the criminal process, while others envisage the victim being a central actor in the court room drama with a right to claim reparation, and perhaps a say in the appropriate disposal of the convicted offender. Moreover, where the idea of reconciliation and conflict resolution is taken literally, an element of personal interaction between offender and victim is assumed, an idea which has been initiated in at least one American State and which may involve a diversion from the criminal process.[37]

However, despite these differences, we can say that the idea of compensation as punishment is in general a restoration of the moral breach between victim and offender created by the offence. This objection can readily be explicated in terms of fairness and justice since it rests on the essential appropriateness of the perpetrator of the injury doing what he can to remedy the damage he has done.

It will be said that this sort of justice is the concern of civil not criminal law but the quick reply to this dogma is to say that the appropriateness of criminals compensating for the harmful consequences of their criminal acts is more evident than in the case of civil wrongs to which little or no moral stigma may attach. Thus, it can be argued, the full force of criminal sanction should be used to ensure that reparation is paid so that this can properly be seen as an aim, perhaps the aim, of the criminal law.

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35. *Id.*, para. 2.03.
36. *Ibid.*
37. Suggestions along these lines are made in A.M. Duckworth, note 23 *supra* and Jocelynne A. Scutt, "Victims, Offenders and Restitution: Real Alternatives or Panacea" (1982) 56 *A.L.J.* 156.

This thesis, I argue, need not be thought of as replacing punishment by compensation, for reparation can be viewed as a form of punishment thus rendering the standard opposition between the two concepts misconceived.

Certainly there is no *a priori* objection to viewing reparation as punishment, for it fits the philosophical consensus concerning the defining features of what constitutes 'punishment': the intentional authorised infliction of suffering on an offender for an offence.[38]

Of course it is possible to define punishment according to the specific intention with which the suffering is inflicted. This has sometimes been done in the past to give retribution primacy in the criminal law by making punishment retributive by definition, so that it is only where an offender is made to suffer because it is believed to be desirable in itself that offenders should suffer, this being what they deserve, that the official administration of loss or pain in consequences of a criminal conviction counts as punishment.

Viewing the matter in this way reparation would be distinct from punishment since its aim is to do justice to the victim and not to exact retribution for its own sake, but this would also exclude deterrence, prevention and reformation from the category of punishment. If ulterior purposes in the passing of sentence render a disposal non-punishment, then we cannot use this to exclude only the idea of compensation-punishment for the argument applies equally to deterrent-punishment, prevention-punishment and reformation-punishment which in practice are accepted as part of what punishment is all about. Indeed they are cited as the aims of punishment with which reparation is said sometimes to conflict.[39]

It may be worthwhile, at this point, to contrast reparation with rehabilitation when this takes the form of treatment which is not unpleasant or not as unpleasant as standard criminal sentencing would entail. The infliction of suffering on offenders, either in the form of fines or loss of liberty, is often said to militate against rehabilitation, an end which is usually better served by humane and supportive treatment, professional help and a readiness to let by-gones be by-gones than by deprivation, stigmatisation and the

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38. See A. Quinton, in H.B. Acton (ed.), *The Philosophy of Punishment* (1969) 196. Also J. Bentham, in T.L.S. Sprigge (ed.), *The Collected Works of Jeremy Bentham* (1968) I, Ch. 4, 23: "Exacted at the expense of the evil doer, compensation necessitates suffering exacted in consideration of and in proportion to the evil done by him and that suffering by the whole amount operates as punishment".
39. See P.R. Duff, note 10 *supra*, 285.

enforced fraternisation with other criminals. There is an understandable unwillingness to accept such benign treatment as a form of punishment, but this is because it does not involve the compulsory administration of suffering and not because its aim is rehabilitation. No such difficulty is felt, for instance, with the infliction of chastisement designed to further moral education by bringing the offender to his senses and awakening a sense of repentance and shame. This is accepted as punishment not on account of its purpose but on the account of the painful methods it involves to achieve that purpose.

Treatment is therefore standardly contrasted to punishment and as a result its place in a criminal justice system is problematic. This does not apply, however, to reparation, which is plainly penal in its effects on the offender because of the element of deprivation involved. Reparation can therefore be likened to deterrence, prevention and reformation-through-suffering and contrasted with treatment, insofar as the conceptual boundaries of 'punishment' are concerned. Indeed reparation is assimilable to one interpretation of the retributive theory of punishment according to which the object of punishment is to make the criminal pay the debt incurred by the crime or to make atonement through some sacrifice involving his own suffering and so wipe the slate clean and start again with the burden of guilt removed. Often this is put in terms of paying one's debt to society, but the victim can readily be seen as the representative of society to whom at least a large measure of the debt is owed. Thus Schafer sees reparation as turning the victim's spiritual satisfaction at seeing the offender punished into a material satisfaction and hence entirely within the traditional idea of punishment.[40]

The penal nature of reparation may still, however, be impugned by pointing to the extent of the suffering or deprivation involved. Reparation would appear to mean a simple giving back of what has been taken, or its monetary equivalent, the amount being determined by the extent of the injury, damage or loss caused by the criminal act. This is the normal standard for determining the quantum of damages in the civil courts, whereas, in punishment, it is argued, the penalty is often greater than the loss caused, or at least is not determined entirely by the amount of that loss.

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40. Thus the renewed emphasis on retribution in penal theory, to which Dennis Galligan has recently drawn attention, can be seen as dove-tailing with the idea of offender-victim reparation. See D. Galligan, "The Return of Retribution in Penal Theory" in C.F.H. Tapper (ed.), *Crime, Proof and Punishment* (1981).

Hence we refer to punitive damages or exemplary damages to indicate that the normal standards are not being applied in the interest of further objectives which take the civil law into the realm of crime.[41]

There is, however, nothing intrinsic to the concept of reparation that it should be limited to the extent of the loss or damage caused by the offender's act. For instance, when ancient codes give as the penalty for stealing one sheep the repayment of four sheep this still counts as reparation. We can, if we like, say that, in such cases, the victim is being recompensed for the trouble and anxiety he has suffered as well as the material loss so that an element of *solatium* comes into the calculation, but this is not the only way to regard the matter. Moreover in the case of many injuries and losses there are no precise monetary equivalents so that it cannot be contended that reparation must always involve no more nor less than the restoration of the monetary *status quo ante.*

The gist of my argument so far is that there is no good reason to reject reparation as a form of punishment and thus to exclude it for that reason from the mainstream of the criminal justice system.

This is not to say that reparation as a goal may not conflict with other aims of penal policy. Thus while the threat of having to pay reparation may deter (indeed this has been given as a reason for enlarging the scope of reparation) it may not do so, for instance in situations where a potential criminal may decide to attempt a crime whose outcome is in doubt but which could yield significant rewards if it is successful. Such a person might reason under a pure reparation scheme that if he fails in his attempt and is caught he will suffer no penalty because there is no loss to reparate. The interests of deterrence might be better served by fixed penalties for types of offence and attempted offences which remain unaffected by the change in outcomes of the particular acts.

Similarly the moral deserts of an offender may not be in proportion to the harm caused by his act so that retribution and reparation, while they can go together, may sometimes pull apart, as when an element of accident enters into the consequences of an intentionally criminal act or some mitigation factor is present. The

41. See *Rookes* v. *Barnard* [1964] A.C. 1129 and *Brown* v. *Cassell* [1972] A.C. 1017; also H. McGregor, "Compensation and Punishment Versus Damage Awards" (1965) 28 *Mod.L.Rev.* 629.

determinants of moral guilt go beyond the extent of the damage caused.[42]

By and large, however, reparation, deterrence and retribution go well enough together, at least in theory. The more injurious an act, other things being equal, the more wicked it is and the greater the justification for a severe penalty. The practical conflict remains however between reparation on the one hand and deterrence and retribution on the other, because in point of fact our severe penalties consist of imprisonment which usually renders an offender incapable of paying reparation. The choice may then be between a merited and deterrent-required term of imprisonment and the imposition of a compensation order.

This choice has given rise to much disquiet. If a sentence of imprisonment is not made in order that compensation can be paid is this not to subvert the purpose of the criminal law and treat with unwarranted leniency those who are able to pay compensation? Can people then buy themselves out of a prison sentence? Is this one law for the rich and employed and another for the poor and unemployed?

This conflict between reparation and heavy penalties is not, however, an inevitable part of the nature of penal things. To take present practice as sacrosanct, and minimise the potential role of reparation on the grounds that it cannot coexist effectively with existing prison regimes is to fail to take reparation seriously. If it were really thought desirable it would be possible, and has frequently been suggested in the history of penal theory,[43] to put prisoners to useful and remunerative employment, the proceeds or products of which could be used to pay reparation. Community service orders have recently been introduced to enable offenders to pay back to society something of the debt which they are said to owe to it.[44] Other forms of forced labour could be deployed to the benefit of victims, and measures of non-custodial or semi-custodial sentence more compatible with preserving the ability to make reparation could be developed.

I am not arguing that these things should be done but that they could be done and that the conflict between reparation and more

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42. We might note, in this regard, the assumption in the Scottish Act that damage done to a stolen car is to be attributed to the offender who stole it even if that damage occurs after he has abandoned the vehicle, Criminal Justice (Scotland) Act 1980 (U.K.) s.58(2).
43. See, for instance, J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1970) Ch.XV, sect. 17.
44. See Advisory Council on Penal Systems, *Non-Custodial and Semi-Custodial Penalties* (1970) 13.

recently fashionable penal objectives could thus be eliminated or reduced. If offender-compensation is taken seriously as a form of punishment then such radical rethinking might take place, just in the same way as considerations of reform and treatment have sometimes been given priority over retribution and deterrence.

This is not to say that compensation must be made perfectly compatible with retribution, deterrence and other penal objectives such as prevention, rehabilitation and cure if it is to be thought of as punishment. All differing penal aims diverge in theory and often in practice. Deterrence often requires greater penalties than retribution, less severe penalties than prevention and more severe ones than rehabilitation. But all these are accepted as differing but possibly valid aims of the penal system between which some balance has to be struck. All that the reparation theorist is asking at this stage is that we accept that the practical conflicts between reparation and other objectives of the criminal justice system should not be taken as a reason for rejecting or playing down the idea of reparation any more than it is taken as a reason for rejecting or playing down other punishment rationales, such as deterrence and reform, when these conflict with each other.

II.

The thesis that reparation is a form of punishment, if established, enables us to dismiss many current criticisms of compensation orders as irrelevant, misconceived or question-begging.

Thus it has been argued forcefully and convincingly that, in present circumstances, reparation does not provide adequate compensation for victims.[45] The average criminal is too poor, too reckless, or simply not available to make reparation. Adequate and fair compensation must be provided by the State. This is in itself a sound argument for having a State administered and financed scheme for compensating victims, but not in itself a reason for rejecting reparation. Reparation is not a simple welfare concept oriented only towards helping victims; rather its objective is to remedy the injustice which crime creates between offender and victim. Reparation may therefore be a goal to be striven for even if it cannot be fully attained, just as prevention and

45. A point which led the Australian Law Reform Commission to reject the New South Wales criminal justice type of compensation scheme in favour of the Victorian method of a tribunal based system of compensating the victims of criminal injuries: Australian Law Reform Commission Report, note 9 *supra*.

deterrence are penal objectives which can be only partly realised, but are not therefore unimportant.

It therefore makes sense to retain a system of reparation alongside a welfare system which takes up the shortfall between victim needs and reparation payments. Such a dual system exists in the United Kingdom for criminal injuries and could be extended to cover all damage and loss resulting from criminal acts. Such an arrangement may be rejected as unduly cumbersome and expensive but these are reasons of expediency which do not in themselves undermine the basis for supporting reparation-punishment.

Then there are the points which are made by those who deplore the erosion of the distinction between civil and criminal law. Some commentators take this distinction as a fixed point of argument in no need of further justification; an axiomatic premise rather than a challengeable working model.[46] But perhaps we should not make such confident assumptions about the superiority of existing institutions. The inadequacies of the system of civil liability in providing adequate remedies for the injuries incurred by the ordinary citizen in modern life are well documented.[47] The criminal law also is overwhelmed not simply by the volume of crime but the patent inappropriateness of its prime instruments for crime prevention and the threadbare nature of its standard philosophical justifications.[48] Retribution founders on our inability to assess moral guilt. Deterrence is a hypothesis disproved in relation to many groups we do know something about, such as juveniles and recidivists, and unproven in relation to the unknown class of those who, it is alleged, would have committed crimes if it were not for the fear of punishment. Its most plausbile version is now the thesis that punishment preserved the general moral tone of society by reinforcing our moral convictions. But is it right to use offenders to educate ourselves? And nobody nowadays I think takes rehabilitation as a realistic goal of penal institutions, the evidence being that prison at least often achieves the reverse. This leaves us with the unattractive idea of preventing crime by locking up proved and/or potential offenders for the period of their dangerousness. No wonder

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46. Thus the Widgery Committee comes near to dogmatism on this issue: "To empower a court to make no other order (than a compensation order) would, we think, come close to equating crime with a civil wrong", note 29 *supra*, 13.
47. See T.G. Ison, *The Forensic Lottery* (1967).
48. See Barnett, note 16 *supra*, 280-285.

theorists are looking for a new paradigm for criminal justice and seizing perhaps over hastily on the ancient idea of reparation.

Nor is there much basis in historical study for the belief that the separation of delict and crime is always desirable. The State came into the administration of justice in order to regulate the continuing feuds and conflicts of private individuals endemic to a system of private revenge and self-administered reparation, but it stayed there to acquire and develop a source of revenue and extend its political control over subjects as much as to secure the impartial administration of justice. Thus the relatively recent theory that crime is essentially an offence against the State so that the penalties for crime are owed to the State, and the relegation of victim claims to a separate branch of law, can be seen as a consequence of State greed as much as of a heightened awareness of the social cost of crime, although it clearly has such costs. Moreover it is a separation which goes much further in some developed jurisdictions than others, as we see by comparing the traditions of continental Europe with those of common law jurisdictions.

If we cannot take the civil-criminal distinction as axiomatic it requires to be demonstrated point by point that there are serious incoherences which arise by bringing the two systems closer together.

First it is argued that since in civil claims the means of the defender are not taken into account in settling liability and quantum, it is not possible for the criminal courts to provide even rough civil justice since they must always consider the means of the offender when determining how much if any reparation to order. Thus P.R. Duff, commenting on what he sees as "the conflict between the civil law aim of compensating the victim and the criminal law aim of punishing or rehabilitating the offender",[49] notes that

> the whole emphasis of s.59 [of the Criminal Justice (Scotland) Act which requires the means of the offender and his prospects of future employment to be taken into account in deciding whether to make a compensation order] is in ensuring that the compensation order is suitable for the offender. The victim is largely irrelevant. What his loss is, is secondary. This is totally unlike the position in civil law where the award will be made to meet the victim's loss.[50]

Duff concludes that this helps to demonstrate that "the criminal justice system is not a very appropriate forum in which to attempt to compensate the victim".[51]

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49. See Duff, note 10 *supra*, 287ff.
50. *Ibid.*
51. *Ibid.*

Now, of course, the means of a defender are in point of fact highly germane to civil proceedings in a variety of ways, particularly in relation to the decision made by plaintiffs to pursue their claim, and in relation to the practicalities of enforcing a civil order. It is for these sorts of reasons that so few civil claims are brought so the contrast between civil and criminal compensation should not be exaggerated in this respect. In fact the existence of public prosecution and the use of the sanctions of criminal law in the service of victim compensation can mean that in terms of cash handed over the criminal law can often approximate more closely than the civil to rough justice even when this is conceived in civil law terms. However in the case of criminal law there are of course other considerations which bear on the decision to proceed with a case. Moreover, since the disposals of criminal courts are ultimately enforced by imprisonment, unrealistic levels of reparation cannot be ordered without taking the consequences of this for the liberty of the individual into account; and again there are other factors, such as the prevention of future crimes, which have bearing on the quantum of reparation. There is no point in burdening a delinquent with a compensation order which will force him into yet further crime.[52]

All this, however, is to say only that the factors involved in prosecution and sentencing decisions are more varied than those relevant to civil cases, but this does not prevent a criminal court arriving at its decision by taking into account, inter alia, what would be the full civil damages for the injuries or losses sustained. The fact that this may not then be translated into an equivalent compensation order, because of the other factors which courts are bound to consider, does not make the civil assessment irrelevant to the process. Nor does it mean, as Duff argues, that the needs of the victim must be subordinate to the "needs of the offender"[53] in any sense other than that it is pointless to order a person to pay sums which are beyond his means and immoral to require compensation grossly in excess of the moral guilt of the offender.

These considerations may help us to deal with the specific anomalies alleged to arise from bringing together civil and criminal principles and procedures. For instance, by retaining the civil rights of a victim to pursue a claim against his injurer after a decision regarding a compensation order has been made in the

52. See R. Brazier, "Appellate Attitudes towards Compensation Orders" [1977] *Crim.L.Rev.* 710.
53. Duff, note 10 *supra*, 290.

criminal courts, the new Scottish law has had to rule on what is to happen when the civil award differs from the criminal compensation order (similar problems arise with Criminal Injuries Compensation Board). No difficulty, it is thought, arises when the civil award is the higher of the two, for the victim then gets the difference between the two sums, on top of the compensation order, but if the civil award is less than the criminal one then, (i) if the compensation order has been discharged the offender cannot recover the difference between the two sums and (ii) if it has not been discharged he pays the lesser, civil sum.[54] To the first it is objected that the victim has gained an unfair advantage, for he has got more than he would have done in the more careful and usually better informed civil process. To the second it is objected that the offender has not paid the penalty the court intended. Thus if, in Scotland, such an order had been made instead of the fine that would have been paid if no order had been made then the offender has received a lesser penalty as a result of the dual system, for the court would have imposed a fine had it foreknowledge that the compensation it ordered was going to be reduced.

We can now see that such points are in part misconceived and in part point to remediable deficiencies. They are misconceived in their assumption that to introduce compensation to the criminal courts is necessarily to make this the sole consideration to be taken into account in sentencing. The amount of harm caused is only one factor in the sentencing decision therefore it would not be surprising if criminal compensation orders were routinely less than the equivalent civil damages.

They are pertinent but remedial objections if they point to the inconsistency of mitigating the reparation in criminal courts only to go back on that decision in the civil courts, or letting the matter lie when the compensation order is reduced as a result of a subsequent civil case. What evidently ought to happen, at least in the second situation, is for the matter to be referred back to the criminal court for a sentencing decision to be made in the light of the civil judgment, it being for the criminal court to take an overall view of the offender's situation. This could leave the civil court with the task of acting as a court of reference or appeal regarding civil liability and quantum when these are in doubt in criminal cases.

Thus in the clear and simple cases to which the United Kingdom criminal courts are at present restricted in making compensation

54. Criminal Justice (Scotland) Act 1980 (U.K.) s.64.

orders, criminal courts could proceed to make their assessment of injury and loss and then their overall sentencing judgment; appeal could then be made to the civil court with respect to the estimated extent of the loss and perhaps also as regards civil liability (although it is perfectly possible for there to be liability to reparation even when there is no civil liability, as in the case of certain statutory offences). The matter would then be referred back to the criminal court for decision. In the non-clear-and-simple cases at present excluded (unreasonably from the point of view of those who wish to see justice done to all victims) the complex and time-consuming business of determining quantum could be referred to a civil court for a decision before sentence is considered. (Something like this was recommended by Dunpark but not taken up in the subsequent legislation.)[55]

Now there may be many difficulties in such a suggestion with regard to the speed and expense of such a system of reference and partial appeal, but it does indicate that there is no irreconcilable clash of principle, no inevitable anomaly lurking here, but only the need for a rather more complicated set-up than that required by a system which excludes victim compensation from the criminal justice system. This is only to be expected.

Another difficulty arising from the civil/criminal dichotomy led the Widgery Committee on reparation by the offender to hold back from recommending that compensation orders should have priority over fines so that it could be ordered without any other penalty. This is the alleged anomaly of making a disposal which seems entirely civil in a procedure in which there is representation of the State and of the offender but not of the injured party. Are criminal courts not inherently ill-equipped to deal with compensation issues because the victim is not a party to the proceedings? It is indeed odd that the sole outcome of a trial might be an award to a person not represented, perhaps not present, who may not even be consulted by the court. This is indeed an anomaly, but a remediable one readily which could be dealt with by developing the French concept of the *partie civile*, thus enabling the victim to have the right to make a claim, to bring a prosecution, to be represented, or even, as in some American States, giving the victim a right to a say in prosecution decisions and even making him or her a party to a bargain over the appropriate penalty.[56] Indeed victim involvement of this sort is

55. Dunpark Committee, note 3 *supra*, para. 11.
56. See B. Galaway and J. Hudson (eds), *Perspectives on Crime Victims* (1981) 251ff.

required if some of the claimed benefits of the compensation model of criminal justice are to be realised.

Dunpark argues, rather briskly, that victim rights in criminal process are incompatible with the adversarial nature of the Scottish criminal trial, but it is not made clear why this should be so. The Committee's view here seems to rest more on their belief that "the primary function of the criminal courts is to enforce the criminal law for the purpose of maintaining law and order"[57] (which, of course, begs the whole queston of the proper function of the criminal law) rather than on any detailed presentation of the reasons why an adversarial system cannot cope with the victim as a participant.

However, if the idea of criminal justice compensation punishment is taken seriously it is arguable that it must involve the operationalisation of the insight that in any crime there are at least three parties involved: the offender, the society and the victim.[58] It is only a small step in this direction for the courts to be empowered at their absolute discretion to make compensation orders in clear and simple cases. Criminal compensation philosophy would require a right on the part of the victim to compensation, albeit a prima facie right capable of being overborne by other objectives. This might require victim participation by right in the decision to prosecute and in the disposal of the case. To allow this is to accept that crime is not an injury solely to society but, perhaps principally, to the victim. Indeed, on the most extreme version of the reparation paradigm, the victim's compensation is the overriding consideration in a proper criminal system, so that there would be no prosecution where no complaint is laid, no victimless crimes and the reparation debts incurred by offenders may even be regarded as the property of the victim to be forgiven or sold to others at his discretion.

On such an extreme view the chief remaining distinction between civil and criminal law would be that the former deals with intentionally inflicted injuries meriting higher damages and more draconian enforcement.

The less extreme version of reparation justice would retain society's interest in controlling crime, recognising that potential future victims have an interest in how offenders are dealt with, so that the function of the criminal law would be to mediate between victims, offenders and society. These are complex three-way

57. Dunpark Committee, note 3 *supra*, para. 6.11.
58. See Howard League for Penal Reform, *Making Amends: Criminal Victims and Society* (1977) 15.

relationships. Offenders might have to compensate both victims and society, and may be used to deter other offenders or incarcerated to prevent their own future offences. Society may have a duty to aid or contribute to the compensation of the victim it has failed to protect or even to compensate offenders who can themselves often be seen as victims of social circumstances over which they had little or no control. Nor is the victim without duties and liabilities in the matter for he has a crucial role to play in protecting society's interests through obtaining justified convictions and pursuing merited claims for compensation where these have a penal aspect. Moreover a process which brought the victim's part in the crime into the centre of attention is bound to reveal that many crimes contain a greater element of victim precipitation than at present appears through defences of self-defence and pleas in mitigation on the grounds of provocation. Victimology reveals not simply who are the vulnerable members of our society with regard to crime but also those who invite criminal acts by their own behaviour. Current assumptions tend to be that contributory negligence not only is not, but could not be, a criminal concept but if victim-compensation moves closer to the centre of the crime scenario then it can no longer be assumed that the legal acts of others cannot affect the appropriate penalty for a crime which has been triggered or made possible by such acts. The supermarket system of selling and the unlocked car do contribute to theft and could affect victim compensation for such crimes. This much is already recognised by current compensation criteria.[59]

Again all this can be seen either as generating further anomalies arising from the intrusion of alien considerations into the criminal law or as a move towards a more realistic and defensible view of crime causation, prevention and amelioration, an attempt to place the crime where it belongs at the intersections of a network of social relationships rather than an isolated item of behaviour. These are disturbing thoughts for those who wish to contain the idea of offender compensation to victims as no more than rapid civil actions tagged on to the decisions of criminal courts in a restricted range of relatively minor offences.

Some objections to the reparation paradigm of criminal justice are no more than reassertions of the claim that crime is an injury to the State not the individual. Thus it is objected to giving the victim a part as of right in the criminal process that this undermines the impartiality of the judicial system by setting

59. Criminal Injuries Compensation Act 1971 (U.K.).

pressures on prosecutors, perhaps making it a duty, for them to bring cases which they might think it wise, on other grounds, to drop. It makes it more likely that the interests of the victim rather than courts of justice will affect the outcome of the trial. However these alleged disadvantages are the very things that are said to be advantages by those advocating a more victim-centred system. More prosecutions, stronger motivation to give evidence, personal satisfaction for the victim; all these can be seen as benefits. Indeed those who object to victim participation on the grounds that it distracts attention from doing justice to the accused, may simply be begging the crucial questions against victim justice.

There remains, however, the worry that the evidence of victims may be tainted by their pecuniary interest in obtaining a conviction. This possibility is clearly envisaged in existing British legislation in that compensation orders cannot be awarded in favour of members of the same family, or those living together, presumably to guard against collusion in the presentation of phoney offences and claims or dishonest or vindictive accusations.[60] Of course similar problems already exist in connection with police evidence in so far as it is in the personal or corporate interests of police to obtain convictions.

These may be thought of as the sort of problems with which the adversarial model of the criminal trial is designed to cope, but it is certainly not desirable to multiply them.

Another difficulty which may be thought to arise in the attempt to combine civil and criminal objectives and procedures concerns standards of proof. The criminal standard of 'beyond reasonable doubt' is said to be inappropriate for the assessment of compensation liability to which the civil norm of 'the balance of probabilities' ought to apply.

To an extent this difficulty evaporates once we have distinguished between decisions of criminal guilt (to which 'beyond reasonable doubt' must apply) and decisions about sentencing which are not normally thought of in terms of standards of proof but to which the lower standard is clearly appropriate, for instance in calculating the chances of recidivism, the prospective benefits of alternative forms of disposal and so forth.

In the case of compensation orders there are particular evidential issues at stake, such as the causal connection between the criminal act and the alleged injuries or losses, but again there is no doubt which standard of proof applies here and no difficulty

60. See Criminal Justice (Scotland) Act 1980 (U.K.).

in distinguishing this type of issue from those of criminal guilt. After all, criminal courts are accustomed to applying different standards of proof for different types of considerations.

There is however one aspect of the problem which cannot be dismissed so easily. If an accused is found not guilty then the question of a compensation order does not arise even though it might well be that the acquitted person would have been found civilly liable (perhaps because the evidence is strong enough for the balance of probabilities or on the basis of a negligent act which, it was decided, did not have the necessary *mens rea* to constitute a crime). The victim then seems to be the loser from the case being taken in a criminal rather than a civil court.

This is hardly an insoluble problem, however. Such victims should take their case to a civil court, or have it referred to a civil court by the judge in the criminal case, particularly where there is not a proven verdict.[61]

CONCLUSIONS

When everything possible has been said in favour of compensation punishment it is necessary to come back to the initial point that a system of reparation or criminal compensation by the offender is unlikely to be of assistance to more than a minority of victims. For this reason alone an alternative scheme would provide State compensation along the lines of the Criminal Injuries Compensation Board but generalised to cover nearly all damage, loss and injury resulting from criminal behaviour, paid from a fund to which offenders have to contribute according to their offences and their means, is attractive, and it may be desirable to conclude by making two points on this suggestion.[62]

Firstly, such a scheme could be really effective only if large sums of money were devoted to it. Nearly all such schemes as exist are confined to physical injuries or subject to a test of need on the part of the victim. The implications of the State making up for the loss of stolen property would have important implications for

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61. Thus, in many Australian States a not guilty verdict leaves it open for the victim to apply to the court for a certificate to indicate what compensation would have been paid had the accused been found guilty, and then to seek an *ex gratia* payment from the State to cover that amount.
62. Something like this exists in those Australian States, such as New South Wales, Queensland and South Australia, in which compensation orders are underwritten by the government in so far as criminal injuries are concerned. Such payments are subject to relatively low ceilings. Very little is recovered by the State from the offenders against whom the orders are made.

insurance and seems unlikely to be a realistic political goal. Moreover it could be argued that crime victims (particularly wealthy ones) should not be treated better by the State than the victims of other 'accidents'. However it is possible to argue that the State has a duty to compensate for losses which it is its duty to prevent and if this were taken seriously the high cost of property and fraud compensation might come to be accepted.

Secondly, such a scheme would destroy the connection between the individual offender and his or her victim. The knowledge that monetary penalties were used to meet victim need could have some impact on offenders and might affect public attitudes to the criminal law, particularly in reporting and testifying to observed crime, but offenders are unlikely to pay much heed to the particular State coffer into which their financial penalties are paid particularly if all that in effect happens is that fines are paid into the fund which is then topped up as necessary by the government.[63] Further, in order to secure a real connection of penalty and victim compensation it would be necessary to make a fair assessment of the damage or injury or loss done before sentence is passed thus raising many of the general objections to reparation.

If the central rationale for criminal justice compensation schemes is to do justice as between offender and victim, then the relationship between the two parties must be considered on an individual basis and not merely in the context of a bureaucratic or tribunal-centred system of meeting the needs of victims. The latter objective may well have moral priority over the former, but reparation still has to be considered as one of the most plausible grounds on which to justify the infliction of loss or suffering on those convicted of criminal offences.

63. See Wasik, note 12 *supra*, 608: "It would lack the forceful moral lesson which some other suggested measures seem to offer but it does avoid some of the pitfalls".