

# RESTITUTION: JUSTICE IN A STATELESS SOCIETY

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This paper (originally entitled 'Should Criminals Be Punished?') is also available at the Liberalia website ([www.liberalia.com](http://www.liberalia.com)), which is run by Christian Michel and which contains a variety of libertarian writings, by him and by others.

Christian Michel was born in Paris 57 years ago. After dropping out of the Sorbonne University, he did odd jobs in the film and advertising industries, before entering real life as a telex operator at an American stockbroking firm. Working his way up the corporate ladder, he eventually became finance director of a public company in Geneva. In 1986, he bought his employer's small portfolio management unit. It grew into one of the largest trust and corporate services companies, with twelve offices throughout Europe. Having sold the business to his partners, Christian Michel moved to London in June 2000. He is the author of "La Liberté, deux ou trois choses que je sais d'elle", published by the Institut Economique de Paris, 1986, and numerous articles and conference papers (for some of which see the Liberalia website).

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CHRISTIAN MICHEL

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What follows is the edited and annotated transcript of a talk delivered at a conference in Katowice, Poland, in November 1996. The original title was “Should Criminals be Punished?”

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## TOWARDS A LIBERTARIAN JUSTICE PROCESS

The purpose of this lecture is to examine whether a truly libertarian justice process is possible. By “truly libertarian”, I mean one which dispenses with all the apparatus of state-promulgated laws, state courts, state prisons. Most libertarians are anarchists. They are coherent anarchists, though. The other species of anarchists, the “leftist” or “trade-unionist”, cannot come up with a convincing answer to, precisely, this question of justice, i.e. How do you give each one his own? A central issue to life in society, I would say. Libertarians do have an answer to that question, and it is called *property rights*. Defining and enforcing property rights is the way to ascertain what each one of us is owed in society. Thus, there is an objective measure of knowing whether we are deprived of our due and whether we have a cause for seeking justice. Libertarians treat this problem of “How do we give each one his due?” objectively, as opposed to arbitrarily as all statist and leftist anarchist systems do.

However, even among libertarians, there are people who do not believe one can dispense with the state in the provision of justice. They maintain that the provision of justice is one of two reasons for keeping a minimal state apparatus (the other being relationships with other states, through diplomacy and defence). It seems that from the left to the right of the political spectrum, there is a strong consensus that justice cannot be rendered substantially differently from the way it is today, that is by state courts, and that the guilty party should be condemned to a deprivation of money in the form of a fine paid to the state, or a deprivation of movement in the form of a prison term, or both. Many jurisdictions add the death penalty, and a small number use beatings or maiming. Violence, it is believed, should be the answer to violence.

Yet, it is clear that punishment does not work.<sup>1</sup> Firstly, violence against the author of a crime does not negate the original violence perpetrated against the victim, it simply contributes to the total amount of violence committed in the world. Secondly, the deterrent effect of punishment has still to be proved. Throughout history, the most horrific tortures publicly inflicted on delinquents, have never acted as a real deterrent; if they had, our forefathers would have enjoyed the benefits of a crime-free world. If punishment were a deterrent, jails would be empty, and if jails worked, they would not be needed. Thirdly, this cycle of violence does not seem to benefit anyone. It has no redeemable value to the criminal; indeed, it is generally accepted that prisons are schools for crime. Prison terms are not only grossly ineffi-

cient, but they are irrational as well. They put the costs of dealing with criminals squarely on the shoulders of the victims or potential victims. (It is one of the few genuine discriminations remaining against women in today’s society that they have to bear the costs of running detention centres when between 80% and 90% of the inmates are men.)

There is an additional concern to a libertarian, however, and it is that the present procedure of justice is based on a collectivist principle, which places “society” clearly above the individual.<sup>2</sup> Justice is not rendered to the victim; justice today is a matter between the alleged criminal and society. The victim’s absence is conspicuous, especially under the Roman law system. The trial is conducted by a prosecutor who does not represent the victim, but acts on behalf of “society”. Even when the victim withdraws his complaint, the proceedings against the aggressor will continue.<sup>3</sup> For the purpose of a criminal action is to convict and punish a criminal, it is not to obtain a just compensation for the victim. Whether the victim is insured and has collected damages from his insurance company, is a matter independent of the court case. The judicial system is not concerned about the victim’s fate.

In other words, state organisations have confiscated the rights of the victim. They surreptitiously allege that all crimes are committed not so much against a person as against “society”.<sup>4</sup> Now this very notion of a crime against “society” leaves the door wide open to the worst manifestations of fascism. A crime is what the government says is a crime. For one government, it can be an offence to open your shop on Sunday, and for another, on Saturday; bigamy is a crime here, but is quite accepted in the Islamic world; hundreds of millions of people live under governments which would have anyone caught drinking wine sentenced to a public whipping, but which are happy to let you smoke pot, and just as many people live under governments which will throw you in jail for a cigarette of marijuana, but will actually recommend that you drink a glass of wine a day. With this logic, there is no objective reason why a government should not decree that it is criminal to be red-haired, to turn your back to a mosque or to attend this conference. So long as justice continues to be rendered in the name of society, we shall remain at the mercy of those who claim to speak in the name of society and who can declare at whim that this individual is a criminal and that this one is not.

## THE LAW OF RETALIATION

Yet our most ancient definition of justice is phrased precisely to protect us from the arbitrary actions of those in power. The fundamental principle of justice in our Judaeo-Christian society is the biblical teaching: “*an eye for an eye, a tooth for a tooth*”. The Hebrews saw in this identity of crime and punishment — “an eye for an eye” — a great advance on what went before. It meant that at least there was a law to limit the arbitrariness of rulers ; they could no

longer chop a hand off someone who had merely stolen a chicken.

The express implication of “an eye for an eye ...” is that it teaches us that there is no such thing as a victimless crime. If no tooth has been broken, then no crime has been committed. This is fundamentally libertarian. What you do with yourself, or what two consenting adults do together, may be morally wrong, but why should it be declared illegal?<sup>6</sup> There is a fundamental difference between a vice and a crime. A vice is not a crime.<sup>7</sup> Thus, if any of you would like to smoke something more flavoursome than Marlboro, or read something more spicy than *Playboy*, you may invoke Exodus XXI, 23, in your defence.

However if “an eye for an eye” is a progress from arbitrary judgments, it is not applicable. The great libertarian philosopher Murray Rothbard is one of the few modern authors who wants us to apply literally this biblical precept of “an eye for an eye”. In a somewhat surreal chapter in his *The Ethics of Liberty*, he tells us of executioners beating, or stabbing, or breaking bones, of a convicted aggressor, exactly as the aggressor did to his victim. We are supposed to accept that this process creates an equality between the crime and the punishment. It is one thing, though, to break the left leg of a sailor in a bar brawl after a heated dispute, it is something else to break the aggressor’s left leg in cold blood in a torture chamber. The pain and suffering caused to one person by certain actions can never be identical to the pain and suffering the very same actions would inflict on another individual. For instance, if you go by the principle, “an eye for a eye”, what do you do to a rapist?

This is why in every society, it seems, the law has attempted to create an equivalence, as opposed to seeking an identity, between crime and punishment. It is not an eye that prosecutors will claim for an eye, but a deemed equivalent in the form of a prison term or a fine. The problem that arises here is that this equivalence is itself created arbitrarily. Legislators and judges have never been able to find a punishment that fits the crime objectively.

### THE ONLY VICTIM IS THE VICTIM, NOT SOCIETY

So, let’s summarise what we have covered so far. We have examined what I believe are the two distinctive features of a state system of justice. First, society exerts retaliatory violence against convicted offenders in the form of a fine, a prison term, or even the death penalty. This is done arbitrarily ; the same offence may draw a different punishment in two different jurisdictions or at different times. Think of blasphemy, homosexuality, rape, treason, adultery, or substance abuse ... Second, the victim is not part of the judicial process. It is as if society *nationalises* the pain and damages caused to victims. This is collectivist mentality at work. What I propose to do now is to take you through a broad description of what another paradigm of justice could look like, one that would reverse the process, one that would place victims and not society at the centre of the system and consequently would seek to stop the cycle of violence. The purpose of such a system would be restitution to the victim, a full compensation for the loss and damages he or she suffered.

In taking this approach, we will be moving away from the traditional notion of criminal justice, which is based on the *moral* notion of guilt and punishment, to look only at the concepts of contract law. This approach is clearly within the traditional definition of justice, the *rendering to each person*

*of his own*. What this definition means is that justice has to do with property rights, and only with property rights, and their violation. Where, I wonder, do we get that idea that justice calls for punishment? Think about this : If a return to the *status quo ante* were possible and were effected, justice would have been rendered and no punishment would be justifiable. So, is the next best solution not a full compensation for the damage caused, i.e. to create a situation which cannot be the *status quo ante*, but strives to be as near to it as possible? If the blinded victim’s eyesight cannot be restored, at least he is entitled to some compensation from the aggressor for the loss of his vision, maybe in monetary terms or otherwise; but where is the benefit to anyone of taking the aggressor’s eye or of keeping him behind bars? What is the rationale of punishment ? Punishment is a sort of ritual, of climax. Punishment may satisfy deep psychological impulses for violence and vengeance, the very impulses which it should be the purpose of civilisation to eradicate, but which people who lust for political power will be only too keen to manipulate. Which is why this question of justice is central to a free society.

A judicial process based on mere restitution is a simple one, at least in theory. The only issue is the restitution to the victim of what is rightfully his — that is, his property or the equivalent in value, plus loss of time, opportunity cost, cost of retrieving the property from the criminal, etc. The judicial process starts with an issue of knowledge: Did a violation of property occur? Who perpetrated it? Can we give the property back to the owner? If not, what is the equivalent value the owner is entitled to? Justice is limited to this matter of knowledge and restitution, it has nothing to do with punishment, and there is no need for so called “legislation”.

### SELF-INTEREST DICTATES THAT WE BE OUR BROTHER’S KEEPER

If we accept that there is no crime unless a victim has been identified, and that there can be no judicial action other than the seeking of restitution to the victim from the authors of the crime, we find ourselves faced with a very big problem indeed: Is restitution always possible?

Let me illustrate this question with a few examples. When a window is broken, it looks easy for a judge, with the advice of experts, to assess the damage and get the stone thrower to pay for the cost of replacement and for any other collateral damages, such as a new carpet if rain has spoil the existing one. If a car has been stolen, the convicted thief will be required to return the car, of course, and to pay for what are easily assessable damages, such as the costs of police time in locating him and the car, such as the unauthorised mileage, fuel consumption, wear and tear, and the rental of a replacement car for the owner, etc. The problem of restitution appears more complex, indeed insurmountable, when it comes to situations like that of murder. What restitution is possible in case of murder? And to whom should the compensation go? Maybe to the heirs. But let’s assume a more difficult case, the savage murder of a young child. This is indeed an act that cannot go unsanctioned. Yet, there are no heirs here to collect compensation. The parents? Well, one could argue, if cynically, that, in monetary terms, the parents are *better off* now that they are saving on toys, food, school tuition, vacations expenses ..., all savings which will promptly amortise the costs of an unexpected funeral. There is, of course, the psychological pain and distress, but how

does a judge put a value on grief. And if the parents themselves are found to be the criminals (these horrors happen, don't they?), who is entitled to seek damages?

Let's also consider the case of a pensioner, living in isolation, as, sadly, so many do nowadays. His slain body is discovered one morning by his neighbours. No one weeps over his death, and the pension fund actually hands out one less pension. Who will bother to go through the trouble of finding the murderer, and who, in fact, is entitled to claim any restitution for this loss of life? The paradox in these circumstances is that the criminal would be better off systematically killing his victims, because if the victim is no longer there, it seems no one may seek legal action. Without a prosecutor acting on behalf of "society", it looks like my libertarian judicial process guarantees impunity to serial killers of little old ladies.

This opinion sells the resourcefulness of the market short. Government today makes solidarity between human beings compulsory, but this solidarity exists naturally. It generally exists between family members, also between members of the same church, the same village, the same firm, trade union, cultural association, etc. My point is this: The state has confiscated the solidarity that exists between people. If we privatise justice, we give back to the people the possibility of re-creating between themselves the network that exists in any society, except in our social-democratic and socialist models.

If I knew what these market solutions could be, if I knew what people can invent when they are allowed to do so, I would pretend to limit the resourcefulness of the market to that of my little imagination. My ambition here is limited to sketching a few scenarios and considering with you whether they are plausible. For instance, in my last example, I mentioned a pensioner, without any family ties, without any affiliation of any kind. This isolation is unlikely to happen in a libertarian society, for reasons which I cannot explain in the time frame of this lecture, but let us assume isolation is the case here. Even in these extreme circumstances, good old self-interest will ensure there is protection for even the most misanthropic character. How does self-interest and voluntary solidarity work in situations like the old pensioner's? I suggest the pensioner's neighbours could well pay an insurance company for a contract guaranteeing a capital amount to their Tenants Association or to their favourite charity in the event of the pensioner's murder. The landlord himself might also subscribe to such an insurance contract. Why would they do this? Because any individual without life coverage could become the target of a criminal, and of a criminal who would be guaranteed impunity. This is not the sort of situation you want in your neighbourhood. It is not a strong sales argument to put to potential tenants that a designated victim lives in the same building. Thankfully, violent crime is a rare occurrence in society, and even rarer in a libertarian society which does not display the example of institutionalised military and police violence; thus, premiums to insure against the minimal risk of murder would be extremely low (indeed, they are already today). They would be affordable to all, including cost-conscious third parties, like landlords, neighbours, and, even more, of course, to rich philanthropists. The latter, freed from the burden of taxation, would deem it their moral duty to insure the poorer lot in society. I would suggest also that many charitable institutions will buy a premium on the life of small children and destitute individuals, on the ground that it

is their charitable purpose to do so, and that, for a small premium, they stand to collect a sizeable capital, if, against all odds, one of their insured party is indeed murdered.<sup>8</sup>

In turn, the insurance company will either insist that the insured party is affiliated to a protection agency (a private police), or the insurance company will affiliate itself the insured party to such a protection agency, on the ground that a protected party is less likely to be assaulted. If the protection agency failed to solve too many cases, it would rapidly lose clients, so it is in its interest to track any and all aggressors, whoever the victim is, in order to maintain a competitive advantage.

### RESTITUTION TO THE VICTIM

In a libertarian society, the objective of the convicted criminal is to make good his victim as soon as possible and recover his freedom. The victim has no objection to a prompt restitution. So they both agree that the criminal's revenues, save for an amount to ensure his subsistence, will be assigned to the victim until such time as full restitution is effected (this procedure is followed today when someone has filed for personal bankruptcy). If the criminal does not hold a steady job, or if it is deemed that he could renege on his obligation, his victim may ask the court that he be detained in a labour camp, where the criminal will be encouraged to earn as much as possible. Indeed, it becomes the interest of the camp owners as well that as much value as possible is generated by their inmates. Even if it would take more than a lifetime to pay off his debt to the victim, the victim and her insurance company still want the criminal to work under good enough conditions so that as much as possible of the restitution is effected.

The concept of forced labour evokes immediately some of the worst episodes in the history of places like French Guyana and Australia. With a difference, however: Convicts in Australia and Cayenne were never asked to do anything useful, whatever talents they might have had. Quite the reverse. Work in Western labour camps was not meant to *produce* anything. It was pure punishment, repetitive, boring, and above all, and purposely, depressingly useless.<sup>9</sup> This is exactly the reverse of what would happen in a system centred around restitution to the victim and not punishment in the name of "society".

What is important here is that the relationship is between the criminal and the victim. Should the victim decide at any moment that he no longer has a claim against the criminal, that he considers himself fully compensated, the criminal is automatically released from all his obligations. Why should someone who is not the victim have any say in the matter? There can be no such thing as a legitimate condemnation by "society", that is by people who have not suffered the aggression. (As a concomitant of this, there can be no revenge that the criminal may rationally claim against "society".)

### PRIVATE JUSTICE

My only ambition at this point is to make a convincing case that no one would be denied justice in a stateless society. There are many parties, other than a "benevolent state", who can take an interest in meting out justice to even the poorest members of society.<sup>10</sup>

When the only conflicts in society concern private property rights, and there are none of the imaginary crimes that politicians invent, the cases brought before the courts are far fewer. (Ask yourselves whether our courts and prisons

would still be jammed, as they are today, if there were no longer tax offences and drug offences ; these victimless crimes account for half the convictions meted out by judges in France and the United States.) Independent judges, self-employed or working for private justice agencies, remunerated by the parties, would be far more effective than state-appointed ones. Why? Because litigation is costly, insurers and their clients will bring their case only to those judges who are known for their fairness and equity — Who wants the costs of an appeal? Private justice agencies would quickly lose business if their verdicts were too often contested. When the justice agency delivers a verdict of restitution, it will be after ensuring that the victim who is to receive the restitution is really the victim, that the criminal who is to pay the restitution is really the criminal, that the amount set for restitution is fair. It is not only the reputation of the justice and police agencies which is at stake, but their financial well being as well. The best guarantee that the parties to a court action can have that the proceedings will be fair is that private judges and justice agencies will be liable to them for any misjudgement.

This potential personal liability of the judge to both the plaintiffs and the defendants is one of the main differences between a statist system of justice and a libertarian one. A judge in a libertarian society is accountable for his verdicts. Unlike what happens in a statist system, he cannot expect to render a verdict and, if proven wrong, remain untouchable. His function is to restore peace between the parties. This objective cannot be achieved if a judgement is unfair to one of the parties, and if that party has no possibility of restitution from the author of the misjudgement. When a party has been wrongly condemned for a crime and made to pay damages, the judge should become liable to compensate the innocent for the financial loss suffered and for the tarnish to his reputation. Conversely, the victim (and/or his insurer) could seek compensation from a judge who has acquitted the true author of a crime, thereby depriving the victim and the insurer of due restitution.

And because the ultimate client of the private judge is the insurance company in most instances, the poor receive as good a treatment as do the rich. Indeed this happens today: the insurance company of a Rolls Royce driver does not automatically win over the company which insures a 2CV driver, even when they settle out of state courts.

One wonders why justice ever concerned itself with the notion of guilt. (Probably a ghost from the time when all justice was rendered in the name of God.<sup>12</sup>) Guilt belongs to the realm of morality. We may cast moral judgements, and, indeed, we ought to, when certain behaviours offend us. We ought to teach our moral beliefs and practice them. Being morally right, however, does not give us a claim on anyone. For if we agree with libertarians that all rights are property rights, we will agree also that no one may claim a moral law as her property. Hence, no restitution is due (what would it consist of, and owed to whom?) by the mere fact a moral law has been violated without a corresponding violation of a property right.

### CONSIDERING A FEW OBJECTIONS

Several objections spring to mind immediately.<sup>13</sup> The first one is that this system of justice puts a monetary value on every misdeed. Marxists would deride my concept of a libertarian justice process as the ultimate step in turning every human action into merchandise. This is only one way,

however, of looking at the matter. Just as marriage is more than a contract defining the mutual obligations of the spouses and the division of their assets, so there is a lot more taking place in any judicial process, libertarian or not, than the pursuit of restitution. There are a whole range of emotions, thirst for revenge, hatred, fear, guilt, compassion, which of course cannot find any equivalent in monetary terms. But is it the purpose of the judicial system purpose, impartial as it should be, to promote these emotions? As we noted earlier, there is no punishment which naturally fits the crime; punishment is always arbitrary. Restitution, at least, establishes a direct link between the aggression and the action taken against the aggressor.

Given that verdicts are always arbitrary, can't it not at least be said that all criminals under the present statist system are equal when serving their sentence? Well again, not really. Two individuals may be variously affected by the same prison terms and may even face the death penalty in a different state of psychological and spiritual preparedness. Even the seeming equality "an eye for an eye ..." is delusive: the painter's eye is worth more than the musician's. Likewise, the obligation to pay their victims for the damage they caused will not have the same impact on two criminals. A millionaire will find it a lot easier to compensate for a car theft than an unemployed rogue. Millionaires, however, generally do not feel the urge to steal cars. This is because, if having reached their financial position, they have other values, and social integration is important to them. Restitution may not bankrupt them, but it is conceivable that their social status and reputation will be severely and permanently affected by a condemnation for theft. It is falling into such disrepute which constitutes a very real sanction for the rich man, albeit it would not so affect the uncouth slob.

### SHOULD AN AGGRESSION NOT LEAD TO THE FORFEITURE OF THE AGGRESSOR'S RIGHTS?

It seems to me difficult to argue, as Rothbard does, for both restitution and the forfeiture, because of his aggression, of the aggressor's rights. Any condemnation to anything over and above restitution and compensation for all collateral costs, such as damages caused by the aggression, compensation for police and court costs, legal fees ..., is, in my view, purely arbitrary. This arbitrariness becomes especially manifest when one considers murder. Many libertarians maintain that the murderer, having taken someone's life, has forfeited his right to his own life.

Inflicting the death penalty on a murderer may satisfy certain feelings of vengeance and some people may believe it deters future criminal acts, but it is irrational in a restitution-based system. If my own life could be taken to replace the one I have cut short, there might be some reason for so doing. It does not seem, however, that science is anywhere near inventing a transfer-of-life machine. So why would my killing someone would mean that I forfeit my own right to life? Let's assume, for instance, I burgle my neighbour's house and walk away with his television set. I have deprived him of watching his favourite soap opera or football match. Does this mean that I have forfeited my own right to watch the programs I enjoy; or does it mean that I now owe my neighbour his television set, or another one just as good, plus compensation for the aggravation? If my stealing a television set does not forfeit my right to own a television set myself, how does my stealing a life forfeit my right to my own life?

A few libertarians argue that the forfeiture of a convicted murderer's right to life does not imply the death penalty; all it means is that the murderer's right to life is transferred to the victim's heirs, and it is up to them to decide whether the death penalty is applicable or not. It is therefore a case of restitution, in the form of: "a life for a life". The test of whether this transfer of rights to life is vengeance or restitution may be evidenced by the following example: Suppose Nikita slits my father's throat and is duly convicted for this murder. I am my father's sole heir, Nikita's right to life is transferred to me, I may use her as I wish, enslave her, or have her executed, and sell her organs for transplants ... An exciting proposition, maybe, but there is more to it than this. For in a genuine restitution-based system, in which this right-to-life forfeiture would be the norm, I now have the privilege to kill whoever I wish with total impunity. I can go to my old foe Michael and lodge a bullet between his eyes in broad daylight and in public. I shall be convicted of murder, of course, but when Michael's heirs come to claim my life, I shall tell them: "You may have Nikita's, she is yours. I have taken a life, I give you another just as good." To argue that only my life will do is to argue the case of vengeance, not of restitution.

### A PERMISSIVE SYSTEM?

These efforts to rationalise the death penalty seem vain to me, even bordering on the absurd. There is nonetheless some merit in the objection that restitution may in certain cases let aggressors off lightly. It could be a reason why, in order to demonstrate their own personal commitment to the highest standard of integrity, many individuals might wish to adhere to communities imposing stiffer penalties to their members should they breach this high standard. For instance, if a thief is also a devout Moslem, a judge will order him to effect the proper restitution to the victim, then, when this is done, the judge may well decide to hand the thief over to his community, if its leaders so demand, to be chastised as stated in the Koran, a fate the thief would have brought upon himself deliberately when he embraced Islam.

These stricter communities flourish, as people feel more confident dealing with their members,<sup>14</sup> not because punishment is any guarantee that people will behave — we have seen that punishment does not act as effective universal deterrent — but because the individuals who accept willingly the risk of such punishment are those who know they are unlikely to commit any serious offence. Old-fashioned punishments therefore would not disappear from a libertarian society, even if its judicial system is based on restitution. The market would ensure the survival of punishments. Nobody would be imposed punishment (and I argue here nobody has the right to impose it); punishment would be meted out only to those who have sanctioned in advance the use of punishment on themselves. Of course, those who are not confident enough in their capacity to refrain from aggression would not join voluntarily a community practising some sort of strict sanctions for criminal behaviour. They might thereby exclude themselves from certain positions in society which require high moral standards.

### CONCLUSION

In the limited format of this paper, I have attempted to show that, while no measure can recreate exactly the *status quo ante*, restitution is a less arbitrary method than punishment for dealing with criminals. Restitution can be assessed in monetary terms or in any other terms satisfactory to the

judge and the victim, such as hours of labour at the discretion of the victim, whether for his own benefit or for some social and community purpose that he supports.

A restitution-based justice system, in addition, reduces the total amount of violence present in society. This is because such a system disregards all victimless crimes, thus drastically lowering police intervention from current levels. This reduction arises also because a strict restitution-based system offers at all times the possibility of an amicable settlement of all issues: Insurance companies settle thousands of claims every day between themselves without recourse to state courts.

I believe I have also sketched a few reasons why even the poor in society would not be denied access to private justice. There is no need for a benevolent state to ensure the provision of justice to all. The market is a great deal more creative than I am, and no doubt more efficient solutions than the ones I have mentioned will be found. My purpose here is only to demonstrate that a market for justice exists theoretically. I have pointed out that restitution is not necessarily due to the "direct" victim only, but to all "secondary" victims, the family, the employer, insurance companies, etc. This is why, if the victim does not initiate legal action for whatever reason, the criminal is not so easily let off the hook; many parties other than the direct victim are likely to pursue him. Furthermore, many individuals are likely to submit themselves voluntarily to a code of conduct including the possibility of punishment, for ethical, religious or other reason, in addition to the universal obligation of restitution, if they commit an aggression.

Most importantly, I have shown that governments have not only confiscated the rights of the victim throughout history, but that they posture as the victim of crimes they have invented. The list is endless of the so-called crimes against the "national interest": evading the draft, crossing borders illegally, "moonlighting", drug-related crimes, tax evasion. Every time a government declares that it (or "society") is the victim of a crime, each one of us becomes a potential criminal. Taking justice away from government is essential to our liberty.

*I am most grateful to Dr. John Hospers, Walter Block and Alain Laurent for their constructive criticism of this text. Their contribution, of course, does not imply agreement.*

### APPENDIX

After I wrote this paper, I came across a publication by Paul Birch called *A Fatal Instability In Anarcho-Capitalism?* In this paper, Paul Birch expresses the view, as I do, that "when you are trespassed against, justice demands that you be recompensed for all the loss and suffering wrongfully inflicted upon you". And when you trespass against others, "justice demands that you return your victim to his previous indifference curve". This paper was published by the Libertarian Alliance as *A Fatal Instability In Anarcho-Capitalism? The Problem of What Happens to the Restitution Ratio*, Legal Notes No. 27, 1998. It can also be found at the author's own web site: [www.paulbirch.force9.co.uk](http://www.paulbirch.force9.co.uk).

## NOTES

1. Penalties work well as part of a contract, for instance, for late delivery; street owners may use penalties to prevent over-parking. Punishment, however, is ineffective in deterring “crimes of passion”, when the offender does not think of the consequences when he commits the deed.
2. It is clear that when there are many violent crimes in a neighbourhood, people feel unsafe and do not leave their house at night. The entire neighbourhood is affected by the crimes occurring in it, not only the victims. This does not mean that justice must be rendered “in the name of the Neighbourhood”, but only to compensate these neighbours who had to change their way of life and suffer the burden of unwanted protective measures.
3. The reason for pursuing a criminal action notwithstanding the consent of the injured party is a procedural one. It is alleged that if a legal action against a criminal could be introduced and withdrawn only at the say so of the victim, it would be too easy for the suspected criminal, or his acolytes, to threaten the victim into silence. This argument lacks conviction. Witnesses may also be subject to threats if they testify, yet there are programmes everywhere to protect them. The same programs could protect the victims. The argument also forgets that the victims may sell their right to restitution to a party which will make it its business to collect as much as possible from the offender and will not bow to pressure from any mafia. In addition, there is usually more than one injured party as a result of any violent act. For instance, the victim’s family members and his employer may consider they too are wronged by what happened to him. This means that there are quite a few people to silence. Furthermore, in most cases, the victim will claim compensation from medical and property insurance companies with which he is insured, which will lead to these companies initiating legal action against the criminal to recover their costs : insurance companies are not easily intimidated.
4. Crimes are also allegedly committed against God (it is certainly the case in Islamic societies) and against nature. Priests and ecologists decide what these crimes consist of, and then confiscate to their own benefit the penalties and the publicity attached to the sanction of these so-called “crimes”.
5. The Hammurabi code and certain Egyptian and Chinese sets of laws may be more ancient, but they have never had much influence on our legal tradition.
6. If we agree that no one may claim a moral law as his property and that all rights are property rights, we should conclude that no restitution is due — what would it consist of? — by the mere fact that a moral law has been violated without a corresponding violation of a property right.
7. *Vices Are Not Crimes — A Vindication of Moral Liberty*, 1875. I read this famous essay by the American anarchist Lysander Spooner in the French translation published by les Editions des Belles Lettres, 1993.
8. Insurance companies would think twice before accepting a policy subscribed to by an individual, for that individual’s benefit, on the life of one of these children or pensioners. (It would amount to a bet on someone’s life, which might prove too big a temptation for the beneficiary when a need for cash becomes pressing.) Insurers do not, however, have the same reservations when the policy is for the benefit of an institution, like a hospital, a church, a school or a museum or a Tenants Association.
9. This characteristic makes French and British labour camps quite unlike those of Nazi Germany and the USSR, in which minerals were extracted and dams were built, but under inhuman working conditions. The labour supply in these totalitarian regimes was abundant, its cost negligible. The thugs who ruled them could arrest and deport entire populations as they saw fit. There was no incentive, therefore, to remunerate the inmates, or even feed them properly. Forced labour, on the contrary, as we use the words herein, simply means the convict’s income is to be assigned to the victim (as happens when a divorcee’s income today is withheld by a court order to pay alimony, for instance). Ideally, of course, the condemned party would retain the job he had before the trial; Internment in a camp would be only for those who would attempt to defy the judgement. (Today, offenders are simply thrown in jail, which certainly defeats the purpose of collecting restitution payments.)
10. I would like to point out here that neither a state police nor state courts of justice are necessary. It is outside the scope of this paper on justice to discuss the functioning of private protection agencies (private police). One can simply note that, because insurance companies do not like paying out damages, they would either make it a condition of their coverage that their clients get reasonable protection, or they would provide this protection themselves, which either way creates a lucrative market for private protection agencies, the sole function of which would be to protect people, not government.
11. The same potential liability applies to police agencies, if they have acted with neglect in chasing a criminal, or with undue violence when arresting him. It would be nice, at last, to have a police accountable to those it is meant to protect.
12. It is interesting to note that prisons are still called today “penitentiaries”.
13. Whilst such an argument in favour of a justice process based on restitution rather than punishment might sound rational, it takes little notice of our deeply embedded ethical norms, where *intent* is almost as important as the act itself. For instance, this burglar sees works of art and jewellery in a flat she has broken into. She may not be able to tell the difference between cheap copies and originals. The intention to commit a theft, though, is the same. It is only by accident that she takes away fakes, which she then has the bad fortune to lose. When caught, she will spend only a few months in a camp to repay the legitimate owner, whilst her whole life of hard labour would not have been enough to earn the monetary value of the real thing. Yet, she is no more of a thief in the second instance than in the first. My answer to that critic is that there is no such thing as an aggression without consequences. Committing the smallest larceny is like having unprotected sex. Maybe nothing will happen, maybe a minor problem, maybe a very serious one. Whatever the consequence, he who has initiated the aggression must face it (why should anyone else do?).
14. I am grateful to Alain Laurent for this idea that the market will determine whether a restitution-based system is too lax or not. Communities which apply the minimum restitution-based system might end up attracting rather unsavoury parties. They might end up being ostracised by people who prefer to deal with members of other groups which apply stricter sanctions to their willing members.