

## Crime: Restitution and Retribution

Crime, defined as offenses against public law and punishable under that law, is a creation of government. Many actions currently defined as crimes were illegal before the advent of criminal law, but were offenses against private law; successful prosecution resulted in victim compensation. By designating an act to be a crime, the state replaces the victim as the focal concern of the legal system which has a number of very significant ramifications. First, making the victim whole through restitution ceases to be a primary concern of the law. As a consequence of replacing restitution with retribution victims often lose much of their incentive to seek justice and to cooperate with the legal system. Second, the legal code comes to be increasingly populated by victimless crimes, understood as crimes for which there is no complaining victim. Examples include drinking alcohol (under prohibition), smoking marijuana, or engaging in certain sexual activities with a willing partner.

Some libertarians believe that the category of crime should be replaced in its entirety by an alternative category, intentional tort, which focuses entirely on the victim. Others believe that the state should criminalize only those acts that involve harm to others. All argue that victimless crimes should be decriminalized.

The history of Anglo-Saxon Law is illustrative of how our current concept of crime has developed. Anglo-Saxon law was very much concerned with the protection of individuals and their property. Every freeman's house had a "peace"; if it was broken, the violator had to pay damages minutely detailed by the wergeld system. The primary legal institutions were voluntary organizations called tithings and hundreds. When a theft occurred, for example, the men of the several tithings that made up a hundred, and who had a reciprocal duty to pursue the thief, were informed. The hundreds were further organized into shires and together they performed the function of adjudicating disputes. Refusal to abide by the law or to accept a judgment (e.g., to

pay restitution) resulted in outlawry (ostracizing the wrongdoer and endowing victims and their supporters with the right of victims to exact revenge). Early codes also provided that “the ealdorman, and the king at need, may be called in if the plaintiff is not strong enough himself”. When the king was prepared to support the decision of the hundred, even the most powerful offenders had incentives to recognize and follow the law. Should a victim have to request such assistance, the cost to the offender included restitution (wer) and a payment (wite) to the individual called upon to exercise his power to secure compliance. While kingship evolved primarily due to external conflict (warfare), rather than as an institution to exercise power in order to resolve internal disputes, warfare was costly, and kings seeking additional revenue began to use the justice process as a source of funds. The institutionalization of wite was one of the first steps in the evolution of the revenue-generating role of law enforcement. More significantly, certain offenses began to be designated as violations of the “king’s peace,” with fines paid to the king

Initially, the king’s peace referred simply to the peace of the king’s house, but as royal power expanded, kings declared that their peace extended to places where they traveled, then to churches, monasteries, highways, and bridges. Eventually, it became “possible for royal officers such as sheriffs to proclaim the king’s peace wherever suitable” The expansion of the notion of the king’s peace produced increases in royal revenue but at the cost of victims of injustices, as payments went to the king rather than to the victims themselves. Thus, “there is a constant tendency to conflict between the old customs . . . and the newer laws of the State.”

It is true that power became increasingly concentrated under the Saxon kings, but the Norman Conquest of England greatly accelerated this centralization. As Pollock and Maitland note: “The chief result of the Norman Conquest in the history of law is to be found not so much in the subjection of race to race as in the establishment of an exceedingly strong kingship.” One of the earliest and most significant changes made in English law by the Normans was replacing the wergeld with a system of fines and confiscations to the king along with corporal and capital punishment. This change substantially reduced the incentives citizens had to maintain their

reciprocal arrangements for pursuit and prosecution and to participate in the local courts.

Apparently many of the hundreds ceased functioning altogether under William the Conqueror.

Thus, Norman kings were forced to attempt to establish new incentives for law enforcement and a new judicial apparatus in order to collect their profits from the administration of justice.

In the twelfth century the large number of offenses designated as violations of the king's peace came to be known as "crimes." Those cases that were designated as criminal referred to offenses that generated revenues for the king and sheriffs rather than compensation to a victim. Furthermore, "the king got his judicial profit whether the accused was found guilty or innocent", because a verdict of innocence meant that the plaintiff was heavily amerced ("at mercy," or fined) for false accusation. That further reduced the incentives of victims and other members of the community to report crimes. By 1168, circuit tax collectors, who were also itinerant justices, were conducting royal inquests regarding issues of justice. They also amerced communities that failed to fulfill their policing duties. The earliest development of misdemeanors involved offenses of this type. Pollock and Maitland have suggested that

A very large part of the justices' work will indeed consist of putting in mercy men and communities guilty of neglect of police duties. This, if we have regard to actual results, is the main business of the eyre... the justices collect in all a very large sum from hundreds, boroughs, townships and tithings which have misconducted themselves by not presenting, or not arresting criminals... probably no single "community" in the county will escape without amercement.

Coercive efforts to induce victims and communities themselves to pursue and prosecute criminals were not adequate, however, and state institutions gradually took over those tasks. The subsequent evolution of public policing, prosecution, and ultimately punishment can all be traced to the incentives set in motion at that time. Over the next several centuries the system changed from one that generated revenues for the royal treasury into one that involves tremendous taxpayer costs, as interest groups sought the criminalization of certain non-coercive activities, as

the public bureaucracies expanded and increased their budgets, and as the public demanded greater protection from criminals.

Most people would agree that criminals should not be allowed to impose costs on victims and when they do so criminals should be held accountable for these costs. Justice demands that action be taken to “reflect those negative consequences of harm and injury back onto the criminal,” as Bidinotto maintains. The historical roots of criminal law indicates that it did not evolve because of a “public-good” market failure, as some have contended. In fact, the development of criminal law actually deprived victims of crimes of a significant property right—the right to restitution--which had encouraged private enforcement of law. Indeed, when a criminal violates another person’s rights, the costs should be reflected back onto the criminal. However, doing so through publicly imposed punishment (rather than restitution) “reflects negative consequences” to taxpayers, and more significantly, fails to compensate the victim for the harm and injury he or she has suffered. Under a system of criminal law as it is currently understood, victims suffer the costs of the crime itself along with additional costs that arise as a result of the efforts of the police and prosecutors to convict the offender.

Libertarians have argued that restitution is a fundamental right; it is part of the “structure of liberty.” Murray Rothbard derived the right to receive restitution from the right to punish, which in turn derives from the right to self-defense. Indeed, he contended that the fundamental right of the victim is to exact proportional punishment, so restitution arises only if the victim is willing to accept payment in lieu of punishment. While Rothbard’s arguments apply in a theoretical world wherein only the victim and the offender are involved in a dispute, every restitution-based system that has existed probably evolved from a situation such as the one Rothbard envisioned, where individuals exacted punishment and some found themselves willing to forgo punishment in exchange for an economic payment. However, individuals also found that unilateral exactations of punishment were either risky or impossible because of differences in the relative capacities for violence of victim and offender. Thus, reciprocal mutual support groups, such as the Anglo-Saxon tithings and hundreds and later thief-catching societies and posses,

evolved to assist its membership in the pursuit of justice. Under those circumstances legal issues no longer involved only the victim and the offender, but other members of the community who sought peace and security, as well. Since violent extraction of retribution (or restitution) can be quite costly to other members of such groups, rules that emphasized public legal procedures emerged out of the peaceful resolution of disputes through restitution. In early medieval England, Iceland, and Ireland, and in a number of primitive societies, victims did not have the right to exact physical punishment unless and until the offender refused to pay fair restitution. Indeed, victims who extracted retributive punishment before giving the offender a chance to pay were themselves law-breakers. Thus, functioning legal systems placed primary emphasis on the right to restitution rather than to retribution.

In a fully restitution-based system there would be no crimes. Their “place” in the legal order would be filled by intentional torts, i.e., intentional acts involving the initiation of force, fraud, or coercion. Only such acts would justify pursuing restitution from the offender. Such a system would eliminate from the legal system prosecution of all “victimless” or “consensual” crimes, such as sodomy, prostitution, drug consumption, gambling (that is not fraudulently rigged), and so on. The legal system would no longer systematically victimize those whose actions do not violate the rights of others.

Even if the moral and jurisprudential justifications for restitution offered in Rothbard, Barnett, and Benson are rejected, there are other reasons why libertarians have traditionally supported restitution over retribution. Systems of criminal law tend to generate police abuse and corruption, while the vast majority of crimes against persons go unreported. Even when reported, most of these remain unsolved, and a substantial portion that are solved do not entail punishment that victims find to be satisfactory or that lead to the rehabilitation of the criminal. Many of those problems could be alleviated by refocusing the system on the victim’s right to restitution and the offender’s responsibility to pay compensation. Relatively cost-effective (efficient) deterrence would arise as victim-reporting increased, resources were shifted from prosecuting and punishing victimless crimes, and offenders were more vigorously pursued and

prosecuted. Incentives for actual rehabilitation of offenders would increase as offenders would respond to incentives to work off their debts and debt collectors would seek ways to support that effort. Libertarians generally believe that liberty, justice, and efficiency are complementary objectives if the legal system focuses on the rights of innocent persons not to be victimized and, should they be, to again be made whole.

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