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Rachel Miller  
*Macalester College*

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## RESTITUTION'S FOCUS ON THE VICTIM: SIX PROBLEMS

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*Rachel Miller*

When a criminal act is committed in a society, there is usually a response. This response has, over the millennia, come in many forms. John Stuart Mill's Sanction Theory of Duty actually revolves around this response. Mill says that an act is wrong if and only if some form of punishment would be justified for the offender who performed the unwanted action. The response exhibited by England in the late 1700s and early 1800s inspired Jeremy Bentham to develop utilitarianism. He was so disgusted with the harshness of England's response (torture for stealing bread, death for offending the wrong person), that he took the time to develop an entire ethical theory. The Code of Hammurabi's most famous section asks for the response to be in the form of *an eye for an eye*. Immanuel Kant supported retributivism, a theory that now figures prominently in the reasoning in many western legal systems. Lately, though, a new response has been proposed: restitution. Restitution is viewed as an alternative to punishment because there is no intent to harm the criminal. Rather, the intent is to restore to the victim that which he or she lost. This is intuitively appealing for many people, but especially for those disillusioned by traditional justifications of punishment and the practice of criminal punishment itself. Restitutionists most prize one aspect of restitution above all: the theory focuses on the person who

was actually affected by the crime, the victim, rather than the criminal. I will argue that it is this prized aspect of restitution that causes it many of its most severe problems.

In this paper I will only be writing on this one aspect of the theory of restitution. The purpose of this paper is not to endorse or advocate any single theory nor is it to suggest ways in which one could improve the theory of restitution. Rather, the purpose is to open the discussion of criminal punishment up to new alternatives. The real beauty of restitution is that, unlike punishment, it is not about harming people, but, rather, helping them. Randy Barnett began the discussion by designing and advocating for a system of restitution that can be used as a theory of response to crime (I will be referring to restitution as a theory of criminal response for the rest of my paper since it is a theory about how society/the government should respond to criminal activity. Punishment is also a form of criminal response, but restitution is not a form of punishment.). The purpose of this paper is to continue the discussion by pointing out possible weaker areas of the theory. These are areas which one may believe are problematic and need fixing.

### **Overview of Restitution**

While there are multiple versions of the theory of restitution, I will only be dealing with the version of the theory David Boonin refers to as pure restitution (3) and the interpretation given by Randy Barnett. Boonin writes that

The theory of pure restitution consists in the conjunction of two distinct claims: the claim that the state should not punish people for breaking the law and the claim that the state should compel people who break the law to compensate

their victims for the harms that they have wrongfully caused them<sup>1</sup>.

This means that "When a person breaks the law, on this approach, the state should force him to compensate his victims for the harms that he is responsible for having wrongfully caused them, but it may do nothing more than this".<sup>2</sup> While Boonin does not go farther into the practical details of restitution (this is because he is using restitution to show that punishment is not necessary rather than to actually advocate it), Randy E. Barnett does. Barnett first emphasizes that restitution "views crime as an offense 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"<sup>3</sup>. When a person commits a crime, it is viewed as a squabble between people, the criminal and the victim(s).

In most justifications for punishment and responses to criminal behavior, the focus is on punishing the criminal. In contrast, restitution focuses on the victim, specifically on restoring to the victim that which was lost in the course of the crime. Barnett quotes from Walter Kauffman's Without Guilt and Justice to emphasize this point, "Recompense or restitution is scarcely a punishment as long as it is merely a matter of returning stolen goods or money. . . . The point is not that the offender deserves to suffer; it is rather that the

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<sup>1</sup> Boonin, David. "The Appeal to Necessity." The Problem of Punishment. 2006. 5

<sup>2</sup> Boonin, 3

<sup>3</sup> Barnett, Randy E. "Restitution: a New Paradigm of Criminal Justice." Ethics 87 (1977). 287

offended party desires compensation.”<sup>4</sup> Although this idea is intuitively appealing, it is functionally problematic.

Barnett describes what would happen to someone who commits a crime in a state that adheres to restitution as a system of criminal response. First, the offender is put on trial. If the offender is found guilty, the court will order him to make restitution to the person offended. This restitution must be monetary.<sup>5</sup>

### **The Six Objections to Restitution’s Focus on the Victim**

The focus on the victim in restitution, rather than the criminal yields six main problems. First is the criminal attempts objection. This asks how a system of restitution could deal with criminal attempts. Second is the victimless crimes objection that states that a system of restitution cannot deal with victimless crimes and crimes against oneself. Third is the preventative laws objection that argues that a system of restitution cannot have preventative laws. The fourth objection, the irreplaceable objection, asks: how can restitution replace something that is irreplaceable? Fifth, and this objection ties in with the fourth objection, is the inequality objection which states that the focus on the victim could result in unequal responses for seemingly equal crimes. Lastly, the criminal intent objection argues that the focus on the victim could eliminate some ethically important legal distinctions, such as the distinction between murder and manslaughter.

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<sup>4</sup> Barnett, 288-289

<sup>5</sup> There are many ways in which this is done, but for the purpose of this paper, these aspects are not necessary. They do not have any implication for the focus on the victim.

### *Criminal Attempts Objection*

A system of restitution is not capable of dealing with criminal attempts. Since restitution focuses on the victim, it cannot respond to an attempted crime. Restitution can only be paid to a victim if there actually is one. In attempted crimes, such as conspiracy and attempted murder or theft, there can be no legal response in a system of restitution since there is no victim to whom the criminal can pay restitution (advocates of restitution do not believe in a debt to society). For example, Joe's wife Jane cheats on him with Smith. After coming upon some evidence supporting this and then confirming his suspicions by asking Jane herself, Joe decides that he will kill Smith. He then goes over to Smith's house and waits in front of the house until he sees Smith. Then, just as Joe is pulling the trigger, Smith's neighbor accidentally backs into Joe's car as the neighbor is backing his own car out of the driveway. Joe is then caught holding a gun that he is still pointing in Smith's direction and there is a bullet which, as a result of the car accident, missed Smith and hit a nearby tree. All evidence points to Joe having attempted to murder Smith and when asked about it, Joe confesses. But since they live in a restitution society, no one was harmed; therefore no crime was committed. He did not shoot anyone with his gun. Under restitution there can be no recourse. Joe will walk free as long as he is never successful in his attempts at crime.

The famous criminal attempts example is one of Russian roulette. A man, Joe, is standing in a park holding a gun. Of the six chambers, only one has a bullet and Joe is unaware of which chamber this is. He sees Jill sitting on a bench in the park, drinking coffee and reading the paper. He picks up the gun and points it at her head. He pulls the trigger. By doing this, he risks killing her, but he happens

to fire through one of the empty chambers. He has tried to kill her. She is unaware that he has tried to kill her, but he has. Even if a policeman in the park saw Joe do this, in a system of restitution, the policeman could do nothing about it unless he sees a bullet fly out of the gun and into Jill's head.<sup>6</sup>

There are two restitutionist responses. If someone has attempted a crime against another, then that person is less safe and therefore worse off. Since that person is worse off, then that person has suffered harm and is thus a victim. This is very convincing, but there is one very large problem with it. If one person, Bob, attempts a crime, where does the victim pool end? For example, Bob tries to kill Ben. Ben is less safe and therefore worse off. But, would it not be true that Ben's entire neighborhood is less safe and therefore worse off and harmed? Then, would the number of people who are less safe expand to Ben's city? Where does it stop? Before you know it, the attempted crime is a crime against society and that is exactly what Barnett does not want or intend.

Another restitutionist response would simply be to bite the bullet on this objection. They would say that once someone has harmed another, then that person may be prosecuted. Until then, there has been no wrongdoing. In response, I posit the following example: Police officer Joe knocks on an apartment door to remind the residents to vote. When the door opens he sees five men sitting on the floor building bombs. The man who answers the door says to Joe, "We are planning to blow up the church down the

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<sup>6</sup> Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1977. 74

This example is based on that given by Robert Nozick in *Anarchy, State, and Utopia*, but is not the same as the example used by Nozick

street.” Since Joe is a policeman in a system of restitution, he may not do anything. These men have harmed no one since they are merely building bombs and saying their intentions. The police officer may only do something after the church has been bombed and people have been harmed. This is a problem for restitution since they are literally letting people die when these deaths could have been prevented.

### ***Victimless Crimes Objection***

A system of restitution cannot deal with victimless crimes such as crimes against one’s own self. Examples of such crimes would include drug use and prostitution. Drug use is often considered a victimless crime because the only victim is the person committing the crime since that is the person feeling the health effects of the drug. How could restitution deal with this? A system of restitution could still say that meth is illegal, but then what should the state’s response be when someone is caught using or in possession? Who would have something restored? On the one hand, no one lost anything in committing this crime, so there is nothing to be restored. On the other hand, the user lost something: his health. So is the response to this crime a restoration of health? That cannot truly be accomplished since a body damaged cannot ever be fully restored. Maybe, what should be done is what is done for other irreplaceable items: assign what was lost a monetary value and then have the offender work to pay back the victim of the crime. There is a problem with this since the offender and the victim are the same person. Taking this into account, what would actually be happening is that the meth addict would be making more money for him/herself that s/he could then use to buy more meth. Effectively this method might actually encourage the offender to re-offend.



Maybe, it would be helpful to look more seriously at the idea of restoring the offender's health. There really is no surgery or magic medicine that could do this, so the closest one could come to this idea is to prevent future damage, which would basically be rehabilitation. It must be noted, though, that rehabilitation does not restore anything to the offender, which means that it is not a response in accordance with the theory of restitution, but this does not mean that it is an inappropriate response, it is just not one that is in accordance with the theory in question.

Prostitution (assuming it is entered into voluntarily, the prostitutes are not working for a pimp or anything of the sort, and the prostitute was not coerced into this particular line of work) is also a victimless crime. Assuming both parties enter into any business agreement voluntarily and without coercion, no one is being harmed in any way by the prostitute's action, then each person gets what they want, be it money or sex or both. Nonetheless, many people would argue that there are great moral and ethical problems with prostitution and selling sex for money. But, there is no way for a system of restitution to respond to prostitution as a crime since nothing was lost which needs to be restored. Unlike with drug use, there is no bad habit that needs to be kicked and, if done safely, there are no health problems as a result of committing the crime. One could argue that the person who acted as the prostitute lost his/her dignity and that that needs to be restored. This sounds fine, except that dignity is nonmaterial and unquantifiable. There is no amount of money that can fully restore dignity (money has actually been known to reduce one's dignity since they feel that they are defined by the size of their bank accounts) and there is really nothing a government can do to restore dignity in general. It is something that must be gotten on

one's own. Even more importantly I think, it is quite possible that the prostitute will not only feel that she has not lost anything that needs to be restored, but will be offended by the assertion that she has lost her dignity by pursuing a line of work to which she voluntarily committed. This means that in trying to accomplish restitution, the governing body will actually be causing more harm to one of its own citizens, something that people who support restitution are trying to avoid.

The closest one could get to restoring dignity with money would be if someone was cheated out of their money and as a result felt a loss of dignity. In such a case money would restore dignity. What could restore dignity is the admission of wrongdoing, but this can happen in a system of restitution, a system of punishment, or outside of any system at all.

What about the person who gave the prostitute business? The buyer, as s/he will now be called, harmed no one in the process and, not only did he not lose anything, he gained something: sex. There really is no response within restitution. Nothing lost and something gained makes for a happy man.

Barnett directly responds to the victimless crimes objection. He essentially bites the bullet, saying that, "While some may see this as a drawback, I believe it is a striking advantage of the restitution standard of justice. So-called victimless crimes would in principle cease to be crimes. As a consequence, criminal elements would be denied a lucrative monopoly, and the price of these services would be drastically reduced. Without this enormous income, organized crime would be far less able to afford

the 'cost' of its nefarious activities than it is today".<sup>7</sup> Barnett sees no moral or ethical issue with drug use or prostitution. Rather, he sees this as another area of the economy that should be legally opened up for business. In contrast, a Kantian would see drug use as immoral since it risks moral agency and some feminists (theorist or not) would see prostitution as a moral problem as well. If someone believes as the Kantian and feminist do, then Barnett really does not have a response. He thinks that these areas should be legal in the first place and does not see this as a problem. This then becomes a moral issue, as to whether or not such activities are immoral in and of themselves.

### ***Preventative Laws Objection***

Another problem with a system of restitution is that it cannot account for preventative laws. One example of such a law would be gun permit laws. The reason governments issue gun permits is to try and prevent gun related crimes. The purpose of such laws is to keep guns out of the hands of people who would use them to hurt others. Gun permit laws will often state that in order to get a gun permit, a person must be shown to be mentally stable and without a serious criminal record. In coordination with gun permit laws there are oftentimes also waiting periods. Both gun permit laws and waiting period laws have been shown to reduce the number of injuries and deaths from gun violence. But, if either of these laws is broken, there is not (yet) a victim. If a completely sane man has a gun and does not have a permit, no one has lost anything as a result of this crime. There is nothing to be restored, and thus

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<sup>7</sup> Barnett, 300-301

restitution would not allow for legal system to have and enforce such laws.

A more commonplace example of a set of preventative laws is the set of laws governing driver's licenses. In New Jersey, for example, there is an extremely complicated set of laws regarding who has or does not have a driver's license. Why would New Jersey, as well as many other states, have so many laws regarding driver's licenses? Many of these rules seem useless or at least extraordinarily annoying. But, these laws are in place because they prevent reckless driving (i.e. speeding and other safety hazards) in new drivers as well as car accidents with new drivers. Essentially these annoying laws are in place to save lives and keep people safe. The key point to note here, though, is that if someone drives without a license or breaks the rules of having a license, there is no victim. In a system of restitution, there is no victim until someone has been hurt. There is no victim if someone drives without a license, so a law like that would be unenforceable in a restitution society.

The restitutionist bites the bullet on this objection. The idea is: no victim, no harm, no crime. That is it. No gun permits, no driver's licenses to keep people safe.

### ***Irreplaceable Objection: Part 1***

The irreplaceable objection is twofold. First, how could a system of restitution deal with certain types of crimes such as the theft of prized items. If the idea of restitution is to restore to the victim that which was taken, then if an item that someone prizes for personal reasons is taken, how is that accounted for? Does that mean that the offender owes more restitution to the victim? Take an example. Bob steals an empty jewelry box from Jen. Across the country, Nicole steals the same type of jewelry

box from Jo (let's say that both identical jewelry boxes have the same market price). But, unbeknownst to Bob, Jen inherited her jewelry box after her mother died, whereas Jo bought hers for herself as a present. As a result, the jewelry box was priceless for Jen and only worth its market price for Jo. Does that mean that, in order to make restitution, Bob must give significantly more money to Jen than Nicole does to Jo? If yes, then the same crime does not yield the same or similar consequences and the consequence is therefore unjust. If no, then full restitution of what was lost has not and will not be made to Jen. Either way, the restitutionist finds him or herself in a pickle. The only way to truly make restitution is for Jen to get back the exact same jewelry box that Bob took. Then there are still two problems. First, if all that happens is that Bob must give back the jewelry box, then what reason does Bob have for not stealing again? Second, if Bob is not caught or the stolen jewelry box is not found then the restitutionist is in the pickle stated above.

### ***Inequality Objection***

Before continuing onto the second half of the irreplaceable objection, it is important to see how restitution could lead to unequal responses for seemingly equal crimes. There are two ways that this could happen. The first is illustrated with the jewelry box example. While both Bob and Nicole thought that they were stealing a simple jewelry box (not even with the jewelry in it), Bob was in fact stealing much more. Or was he? Jen would say that Bob stole the last item her mother ever gave her and that it has great emotional value on top of its market value. Does this mean that Bob should have to do more restitution than Nicole? Two different ideas say that Bob should not have to do more restitution than Nicole. First is the idea of

proportional punishment. Proportional punishment advocates that the punishment should fit the crime, but if the emotional worth of an object, emotional worth which was unknown to the robber at and before the time of the robbery, affects the sentence, then the punishment could become disproportionate to the crime (i.e. having to back restitution of twice the market value of the stolen object). This, though, is not necessarily something a strict restitutionist would consider since in considering this, the focus is on the criminal rather than the victim. I do not doubt that a weaker restitutionist (someone who is not very committed to the idea of full restitution, but is much more committed to the act of at least trying) would surely consider this. Secondly, Bob should not have to do more restitution than Nicole because it will set a precedent of vastly differing responses for the same crime. If emotional worth is included in deciding how much restitution someone should pay, then the legal response will differ greatly for the same crime depending on the victim's view of the worth of what was lost (in this case I am not discussing crimes such as rape and murder, but rather crimes similar to the situation with Bob and the jewelry box). This could also mean that an overly emotional victim could make it so that the criminal must pay an incredible amount of restitution in comparison with others who have committed the same crime. While I understand the need to not leave the victim of a crime out of the equation, in the case of this particular objection it almost seems, not just the focus is on the victim, that the offender's needs have been forgotten. It seems as though the offender's rights are forgotten.

Randy Barnett writes, in defense of restitution, that, "*Equality of justice means equal treatment of victims...*

Equality of justice derives from the fact that the rights of men should be equally enforced and respected. Restitution recognizes a victim's right to compensation for damages from the party responsible. Equality of justice, therefore, calls for equal enforcement of each victim's right to restitution".<sup>8</sup> This means that both Jen and Jo must receive the same amount of money. Therefore what Jen lost is not truly being restored to her. This is a problem for a theory that states as its goal that it will restore to the victim that which was lost as a result of a crime.

### ***Irreplaceable Objection: Part 2***

The second half of the irreplaceable objection is more commonly heard. Certain crimes, specifically rape and murder, eliminate something that can never and will never return. In the case of rape, what is lost is intangible, but not unimportant. First I will discuss rape. I have heard rape victims say that they have either lost the most important or best part of themselves. I have also heard rape victims say that they are no long the same person or that they feel like half people. How can a system of criminal response restore to a person their identity in the immaterial sense? How can a system of criminal response make someone feel whole? The answer is that there is no system that is capable of doing this. No system of criminal response can accomplish this, but no system of criminal response has such restitution as its goal. There is no way for a system of criminal response to replace what someone loses when raped.

Murder, like rape, is not something that can be undone and what the victim loses cannot be brought back

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<sup>8</sup> Barnett, 298-299

or restored. A murder victim has not lost a piece of jewelry or a car stereo, but has lost his/her life. There are two problems with restitution and murder. The first is the one which I have already mentioned: what the victim has lost is not something which a system of criminal response. The second, that may actually be more serious, is that the murder victim no longer exists in the material sense. There is no victim to receive the restitution. Someone who supports restitution would say that the person who was killed is not the only victim; the family and friends of the murder victim has also felt the pain of the loss. While this may intuitively make sense in the case of murder, for every crime there are secondary and tertiary victims, and this is not a policy that can be made a rule. For example, if someone is insider trading, then all the people invested in the stock market are secondary victims and their families are tertiary victims. That does not mean that all those people should receive restitution from the perpetrator. The problem of murder is a large one for the restitutionist and one that must be overcome for it to be a workable theory.

A restitutionist could say that in the case of murder, a victim's family will be appropriately compensated. But how can such a loss truly be quantifiable? Even an attempt to do so is disgusting and offensive. How can you quantify the loss, the pain, the harm felt by a mother whose child has been murdered? To even try to quantify that is repulsive and insulting. The same goes for quantifying what a rape victim has lost or quantifying the pain a rape victim has felt. Even the attempt or encouragement of the assignment of monetary value to these pains is reprehensible.

One could say in response that this is what our current system of tort laws tries to do. There are two responses to this. First, our current society does not primarily respond to criminals through tort law (though,



tort suits can often follow a criminal case, i.e. OJ Simpson, but it does not and is not meant to replace the criminal case in theory or practice). Our system of tort law also does not attempt to be an effective way of dealing with criminals since that is not its purpose and, I would argue, is not capable of doing enough to fully account for the criminals in society. Second, I will wager that no jury or judge making a decision on how much money a raped woman should get from her rapist or on how much money parents should get after the murder of a daughter thinks that they are in any way matching the pain that is felt. They also (sometimes) can take comfort in knowing that the criminal side of the judicial system is doing its part as well.

### ***Criminal Intent Objection***

The last objection to restitution that I will raise is that the focus on the victim would make implausible many of the legal distinctions between crimes. One such distinction is the distinction between manslaughter, first-degree murder, second-degree murder, and third degree murder. In all four of these situations, there is the same outcome for those who would receive restitution (i.e. the victim's family): a loved one is dead. Thus, one could argue that no matter which category a criminal falls into, s/he should receive the same response. A restitutionist would probably argue otherwise. The idea that might be advanced by a proponent of restitution is that knowledge that the murder was unintentional (manslaughter and third degree) or unplanned (second degree) would help those who have been hurt by the death to cope. This would allow for less restitution to be made in such cases. The same argument could be made for those who would fall under the various mitigating circumstances (i.e. insanity or self-defense). Then again, this argument could fall completely

flat considering that some people will not care why their loved one “died before his time,” but will only care that the victim suffered an unnatural death at the hands of another. How would or should a proponent of restitution deal with such circumstances? S/he could say that such people are not acting reasonably and it is the job of a system of restitution to be reasonable when the victims are not. But, in such a case, one runs into the problem of the restitution never fully occurring for the victim. A proponent of restitution could say that such distinctions and mitigating factors do not really change anything and as a result should not matter. I cannot, in good conscience, accept the idea that a first degree murderer is not worse than someone who is driving on a dark night and does not see the darkly dressed pedestrian crossing the street. I assume that this is a widely accepted belief since it is reflected in legal systems all over the world.

If one assumes that people have a certain concern for decency even regarding how criminals are treated, then the victim would want the intent of the criminal to be taken into account when restitution is being decided. If this were universally true, then the restitutionist would get out of this objection, but not out of the objections as a group. This is because the responses would still be unequal for two reasons: 1) each person will give intent different weight and 2) inevitably, there will be some people who do not think that intent should matter at all since there are the same consequences either way.

### ***Emotional Harm***

One way to deal with both parts of the irreplaceable objection is to say that a system of restitution should take account of the emotional harm. If something is irreplaceable, it is because of its emotional worth. This is

also a way to deal with the criminal attempts objection (assuming the victim knows of the attempt) since the almost victim would feel a certain amount of emotional stress as a result of the attempt. This is also a way to deal with the preventative laws objection since Officer Joe may feel some emotional stress after seeing the bomb and hearing bomb maker Mike talk. This seems like a simple solution: the restitutionist should take account of emotional harm.

The problems with this idea begin to become apparent in the inequality objection in that this would yield unequal treatment of the criminal for seemingly equal crimes. Since I have already discussed this, I will not rehash it here, but it is one of the problems with taking emotions into account. Another problem brought up in the irreplaceable objection that also applies here is the outright disgusting nature of trying to assign a monetary value to certain sorts of emotional loss. Like the inequality objection, since it was explained above, I will not go over it again.

There is another greater problem: how does one measure emotional pain? There is no concrete way of doing so. But, let's say that the government or some other entity comes up with a way to measure what a reasonable person would feel in a given situation (I do not know how this would happen, but assume that it does). This measure of reasonable reaction would inevitably be based on what is reasonable for the ruling group of people, in the case of the United States, white, Christian, upper class men. Then, when someone who is not of this ruling class complains that his/her restitution was not enough, it is because that person is black or female or poor or Latina or transgender or homosexual or Jewish or Muslim...etc. (the list goes on

forever). This brings with it its own bevy of problems that I will not get into now.

Taking account of emotional harm brings inequality, moral vapidity, and racism/sexism/classism/anti-Semitism/etc. These results are unacceptable.

### **Conclusion**

Restitution was advanced as an alternative to the preexisting theories of punishment. The main factor that makes it so attractive is its focus on the victim. The idea that a response system to criminal activity should be focused on the person who is hurt is incredibly attractive and really plays to our intuitions that government should be about helping the law-abiding citizen. As attractive as this feature may intuitively be, it is highly problematic. The focus on the victim yields many objections that cannot be escaped without either losing part of the theory or losing some widely accepted ethical belief. If restitution can be made to work, then it has many merits that have the potential to really change society and, specifically, the legal system. Unfortunately, I do not see how these objections can be overcome.

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