

CLASSIFYING CRIME VICTIM RESTITUTION: THE  
THEORETICAL ARGUMENTS AND PRACTICAL CONSEQUENCES  
OF LABELING RESTITUTION AS EITHER A CRIMINAL OR CIVIL  
LAW CONCEPT

by  
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## INTRODUCTION

The status of victim restitution as either a criminal concept or a civil concept is undecided. In general, civil law and criminal law have become increasingly similar and interrelated, and the historical conceptual divide between the two legal fields has become ambiguous. The current state and nature of victim restitution demonstrates this ambiguity and valid arguments can be made for treating restitution as a criminal concept, civil concept, or a hybrid of both. While the status is in flux and undecided, the status of victim restitution as either a criminal or civil concept, or something in between, matters. If restitution is a civil or partly civil con-

cept, it can be argued that civil defenses and civil liability theories would apply to victim restitution. If restitution is solely a criminal concept, then it is likely that civil defenses and liability theories would not apply to victim restitution. The status or labeling of victim restitution as either criminal or civil could change the entire process for requesting and awarding victim restitution.

This paper seeks to present the arguments for treating restitution as either a criminal or civil concept. Part I provides an introduction to the current classification problem. Part II explores the narrowing divide between criminal and civil law and provides an introduction to, a history of, and the current state of the law pertaining to victim restitution. Part III discusses the theoretical arguments supporting classifying restitution as a criminal or civil concept, particularly focusing on historical precedent and theories of punishment. Part IV discusses the practical arguments supporting classifying restitution as a criminal or civil concept. Using comparative fault as a case study, Part IV discusses the implications of introducing civil liability devices into the restitution analysis. In the end, this paper argues that the theoretical underpinnings and practical applications of victim restitution indicate that restitution is primarily a criminal concept. As a primarily criminal concept, civil liability concepts and defenses, like comparative fault, mitigation of damages, and consent, should not apply when calculating a restitution award. No matter whether a criminal or civil perspective is ultimately favored, the state of victim restitution is in flux, and appropriate classification matters so that victims can continue to receive the restitution they are entitled to.

#### I. CIVIL LAW AND CRIMINAL LAW HAVE BECOME INCREASINGLY SIMILAR AND INTERRELATED, AND THE HISTORICAL CONCEPTUAL DIVIDE HAS BECOME AMBIGUOUS

Today, it is difficult to succinctly describe criminal and civil law as distinctly separate fields: both fields target injuries to society, both types of injustices can be addressed by public officers, and both justice systems have unpleasant consequences.<sup>1</sup> The divide between criminal and civil law has not always been difficult to discern. The Framers found the divide to be clear, reflected by the fact that the Fifth, Sixth, and Eighth Amendments all refer to criminal cases, but fail to provide any specific definition of criminal law.<sup>2</sup> With little historical guidance, few commentators can point to clear, distinctive definitions for criminal law and civil law.

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<sup>1</sup> Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 403–04 (1958).

<sup>2</sup> Carol S. Steiker, *Forward: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 783 (1997).

“Today, the distinction between criminal and civil law seems to be collapsing across a broad front.”<sup>3</sup> The criminal-civil distinction has always been somewhat malleable,<sup>4</sup> developing and advancing alongside the American criminal justice system as a whole. The introduction of “hybrid” legal institutions and practices, “[f]rom civil penalties to punitive damages, civil forfeiture to criminal restitution,” has further complicated the distinction.<sup>5</sup> A hybrid legal approach uses civil remedies, either in whole or in part, to redress criminal behavior.<sup>6</sup> Some commentators argue that victim restitution is a hybrid entity,<sup>7</sup> while others see the idea as strictly part of criminal sentencing.

Today, titles may be the only remaining artifacts that concretely separate criminal and civil law. If it is possible to create a definition at all, “the solution of the puzzle [may be] simply that a crime is anything which is called a crime,”<sup>8</sup> and a criminal penalty is simply the penalty provided for committing what has been labeled a crime. However, even in light of this muddling of concepts, it is possible to look at the histories of criminal and civil law, and the purposes and motivations underlying both concepts, to understand and classify seemingly hybrid concepts.

## II. THE STATE OF VICTIM RESTITUTION IN THE AMERICAN JUSTICE SYSTEM

### A. *The Nature of Restitution and a Comparison with Other Remedies*

Generally, restitution is “an act of making good, or of giving the equivalent for, any loss, damage, or injury.”<sup>9</sup> When a victim is harmed by crime and the perpetrator is identified, restitution monies pay for the harm caused by the crime. Restitution statutes vary by state, but restitution can include medical and medication expenses, counseling and therapy costs, lost wages, lost or damaged property, and crime-scene clean up.<sup>10</sup>

Victim restitution is not a new or revolutionary idea, but only in

<sup>3</sup> Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991).

<sup>4</sup> Steiker, *supra* note 2, at 782.

<sup>5</sup> Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 45 (1996).

<sup>6</sup> Cheh, *supra* note 3, at 1327.

<sup>7</sup> Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1813 (1992).

<sup>8</sup> Hart, *supra* note 1, at 404 (emphasis omitted).

<sup>9</sup> BARRON'S LAW DICTIONARY 444 (5th ed. 2003).

<sup>10</sup> *Restitution*, THE NAT'L CTR. FOR VICTIMS OF CRIME, <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution>.

modern history has restitution begun to gain widespread recognition in the American justice system.<sup>11</sup> In ancient communities an offender was punished through self-help and retaliation.<sup>12</sup> Eventually, it became “standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense . . . [in order] to protect the offender from violent retaliation by the victim or the community.”<sup>13</sup> The families of the victims and offenders even negotiated to reasonably compensate the victim with goods or money.<sup>14</sup> During the Middle Ages, state control over criminal law supplanted community regulations and “the interests of the state gradually overshadowed and supplanted those of the victim.”<sup>15</sup> Victims’ rights were virtually eliminated and victims’ appeals for compensation were cast to the civil tort system.<sup>16</sup>

It was not until the 1950s that victims’ rights surfaced again as an important public policy.<sup>17</sup> Victim compensation programs were the first step in defining tangible victims’ rights, but as discussed below, victim compensation is different from restitution. Restitution for victims was not established for several more decades.

It is important to distinguish restitution from victim compensation. “While restitution is court-ordered payment from a convicted offender, crime victim compensation is a state government program that pays many of the out-of-pocket expenses of victims of violent crime,” and some non-violent person crimes depending on the jurisdiction, “even when there is no arrest or prosecution.”<sup>18</sup> Victim compensation statutes also vary according to state law, but victims can usually receive reimbursement for medical expenses and counseling.<sup>19</sup> Since restitution and victim compen-

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<sup>11</sup> “References to the concept of restitution have even been found among the ancient codes of some of the earliest civilizations, including the Code of Hammurabi and early Mosaic law.” David L. Roland, *Progress in the Victim Reform Movement: No Longer the “Forgotten Victim,”* 17 PEPP. L. REV. 35, 41 (1989).

<sup>12</sup> In its earliest forms the victim, if anyone, was the retaliator. As social order developed, an entire family, clan, or group on behalf of the victim often undertook revenge. Bruce Jacob, *The Concept of Restitution: An Historical Overview*, in RESTITUTION IN CRIMINAL JUSTICE 34, 35 (Joe Hudson ed. 1975).

<sup>13</sup> Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 933 (1984).

<sup>14</sup> Jacob, *supra* note 12, at 35.

<sup>15</sup> *Id.* at 37.

<sup>16</sup> *Id.*

<sup>17</sup> Spurred by the writings of penal reformer Margery Fly, Great Britain enacted an administrative victim compensation scheme in 1964, followed by a similar scheme in New Zealand, and soon after victim compensation programs were established across the United States. *Id.* at 41–43.

<sup>18</sup> *Restitution, supra* note 10.

<sup>19</sup> *Id.*

sation are likely to overlap in covering a victim's crime-related expenses, "[a] victim cannot collect both compensation and restitution for the same losses."<sup>20</sup>

Restitution is also different from civil damages. Whether or not restitution is itself a civil concept, or a civil-criminal hybrid, will be discussed in Parts IV and V. Restitution for victims of crime is "compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation."<sup>21</sup> In comparison, civil damages are "the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the [civil] wrong."<sup>22</sup> Even if the character of restitution and damages can be compared, the concepts are factually separate.

*B. Protecting Victims' Rights in Federal Criminal Proceedings: The Mandatory Victim's Restitution Act (MVRA)*

Victim restitution was federally mandated for the first time in the Victim and Witness Protection Act of 1982 (VWPA).<sup>23</sup> Since then VWPA has been amended and the statute currently in effect is the Mandatory Victim's Restitution Act (MVRA).<sup>24</sup> VWPA and MVRA are "nearly identical in authorizing an award of restitution"<sup>25</sup> and for that reason we will primarily discuss the current statute.

Today, MVRA provides one of the primary protections for victims' restitution in federal criminal proceedings. MVRA requires that a defendant convicted of certain offenses, including crimes of violence,<sup>26</sup> "make restitution to the victim of the offense or, if the victim is deceased,

<sup>20</sup> *Id.*

<sup>21</sup> BLACK'S LAW DICTIONARY 1428 (9th ed. 2009).

<sup>22</sup> FRANK GAHAN, THE LAW OF DAMAGES I (1936).

<sup>23</sup> See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.

<sup>24</sup> Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended in scattered sections of 18 U.S.C.).

<sup>25</sup> *United States v. Randle*, 324 F.3d 550, 555 n.2 (7th Cir. 2003). The main difference between the original and amended statutes is that under MVRA, "for certain [specified] offenses . . . an award of restitution . . . is calculated by looking to the victim's loss, without regard to the defendant's ability to pay an award." *Id.* VWPA instead "implicitly require[d] the district judge to balance the victim's interest in compensation against the financial resources and circumstances of the defendant . . . ." *United States v. Bruchey*, 810 F.2d 456, 458 (4th Cir. 1987).

<sup>26</sup> The MVRA requires full restitution for crimes of violence, offenses against property under Title 18 of the U.S. Code, offenses relating to tampering with consumer products, see 18 U.S.C. § 3663A(c)(1)(A)(i)-(iii) (2012), and when there is an identifiable victim or victims who have suffered a physical injury or pecuniary loss. See *id.* § 3663A(c)(1)(B).

to the victim's estate."<sup>27</sup> First enacted in 1996, MVRA orders a defendant to pay "restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant."<sup>28</sup> MVRA allows for a victim to recover for a variety of harms, each with specific limitations and requirements; recoverable harms include property damage/loss/destruction, bodily injury, loss of life, loss of income, and cost of expenses for participating in prosecution of an offense.<sup>29</sup>

C. *Protecting Victims' Rights in State Criminal Proceedings with State-Specific Victim Restitution Statutes*

Every state has statutes allowing courts to order restitution for a victim.<sup>30</sup> Most states also have constitutional amendments protecting victims' rights.<sup>31</sup> States differ as to which rights are protected, but many states protect the same general rights.<sup>32</sup> State provisions often require nondisclosure of the victim's confidential information.<sup>33</sup> States often give victims the right to information concerning protection from the defendant, victim services, the criminal justice process generally, and the specific proceeding that the victim is involved in.<sup>34</sup> A separate right is the victim's right to notice, to be given prompt notification of all proceedings, including release on bail, scheduling changes, and incarceration details.<sup>35</sup> State victims' rights statutes often include a right to be present, allowing the victim to physically attend all of the proceedings.<sup>36</sup> Many statutes con-

<sup>27</sup> *Id.* § 3663A(a)(1).

<sup>28</sup> *Id.* § 3664(f)(1)(A).

<sup>29</sup> *Id.* § 3663A(b).

<sup>30</sup> *Status of the Law: Right to Restitution*, OFFICE FOR VICTIMS OF CRIME ARCHIVE (Nov. 2002), [https://www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin6/2.html](https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin6/2.html).

<sup>31</sup> Thirty-three states have enacted victims' rights amendments. *See State Victim's Rights Amendments*, NAT'L VICTIMS' CONSTITUTIONAL AMENDMENT PASSAGE (2012), <http://www.nvcap.org/stvras.html>.

<sup>32</sup> *See* NAT'L CRIME VICTIM LAW INST., VICTIM LAW BULLETIN: FUNDAMENTALS OF VICTIMS' RIGHTS: A SUMMARY OF 12 COMMON VICTIMS' RIGHTS (Nov. 2011), *available at* <http://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12>. Many states protect some or all of the following: right to due process, fairness, dignity, respect, and privacy; right to notice; right to be present; right to be heard; right to reasonable protection; right to restitution; right to information and referral; right to apply for victim compensation; right to proceedings free from unreasonable delay; right to confer; right to a copy of the presentence report and transcripts; and right to standing and remedies. *Id.*

<sup>33</sup> *Id.* at 1.

<sup>34</sup> *See id.* at 6.

<sup>35</sup> *See id.* at 2.

<sup>36</sup> *See id.* at 2–3.

tain general protections providing crime victims with the right to be treated by agents of the state with dignity, respect, and sensitivity during all phases of the criminal justice process.<sup>37</sup> Every state has their own victims' rights statute, and while the texts of the laws are different, the underlying protections are largely the same nation-wide.

### III. THE THEORETICAL REASONS FOR CLASSIFYING RESTITUTION AS A CRIMINAL LAW CONCEPT

Victim restitution has commonly been cited as an example of the blurring between civil and criminal law. Some commentators argue that restitution is clearly a civil idea, and others argue that it is clearly criminal. Other commentators believe that restitution is a hybrid criminal–civil concept,<sup>38</sup> while still others see restitution as neither criminal nor civil, but rather, as a concept that is *sui generis*, something entirely of its own likeness that cannot be based on existing legal frameworks. In order to determine whether restitution is a civil concept, a criminal concept, or a hybrid idea, it is necessary to evaluate restitution first from a theoretical perspective and then from a practical perspective.

#### A. *Theoretical Arguments in Favor of Viewing Restitution as a Civil Concept*

Advocates in favor of treating restitution as a strictly civil concept argue that victim restitution is traditionally compensatory in nature and that it is intrinsically most similar to civil law. Plaintiffs pursue civil lawsuits seeking monetary relief, and the purpose of civil damages is to compensate the plaintiff.<sup>39</sup> In comparison, the purposes and goals of criminal law are numerous, and while victim compensation is one facet of criminal law, the criminal justice system is also focused on punishing and rehabilitating the offender.<sup>40</sup>

It is true that restitution and civil damages have a similar outcome for a victim: both provide compensation. In terms of process, like a civil damages award, restitution is paid directly to the victim rather than to

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<sup>37</sup> Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5th 343, 364 (2001).

<sup>38</sup> Kenneth Mann advocates for the hybrid theory, finding that traditional legal concepts “fail to capture the special combination of punitive purposes and civil procedural rules that characterizes hybrid sanctions, which occupy a vast middleground between criminal and civil law. The middleground is not *sui generis* in the sense that it possesses distinctive characteristics found in neither of the paradigms; rather, it mixes the characteristics of these paradigms in new ways.” Mann, *supra* note 7, at 1813.

<sup>39</sup> PEGGY KERLEY ET AL., *CIVIL LITIGATION* 134 (5th ed. 2009).

<sup>40</sup> *Id.* at 6.

paid to the state.<sup>41</sup> Additionally, in most states, if a victim is not paid the full amount of restitution, a restitution order can be enforced through a civil proceeding.<sup>42</sup> It is a principle of tort law that an offender should “‘restore’ the victim to her status quo ante.”<sup>43</sup> “Restoring the victim is in fact the fundamental, historical purpose of restitution [and] [i]t has been noted as the primary intent behind restitution legislation as well, such as the Mandatory Victims Restitution Act (MVRA).”<sup>44</sup>

Some federal circuits have discussed the theoretical likeness of restitution and civil damages. In *United States v. Martin*, the Seventh Circuit held that MVRA was essentially a civil remedy masquerading as a criminal remedy, a wolf in sheep’s clothing; MVRA “seeks to engraft a civil remedy onto a criminal statute, giving the victim of the crime the recovery to which he would have been entitled in a civil suit against the criminal and thus merely providing a procedural shortcut rather than imposing a heavier criminal punishment.”<sup>45</sup> Other courts have echoed the *Martin* opinion and have analogized the application of restitution and civil damages, stating, “restitution tracks ‘the recovery to which [the victim] would have been entitled in a civil suit against the criminal.’”<sup>46</sup>

Relatedly, the Second Circuit has likened the two concepts by conflating the availability of restitution to the availability of civil damages. In *United States v. Reifler*, the court said it saw “nothing in the statute or the legislative history to suggest that Congress meant in the MVRA to make restitution—a traditional civil remedy—mandatory in a criminal proceeding for a person who would have no right to recover in a civil action.”<sup>47</sup>

In response to those favoring a civil status for restitution, the opposition argues for a broader perspective. “The argument that restitution is a civil matter simply because it involves compensation takes too limited a

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<sup>41</sup> Kimberly J. Winbush, Annotation, *Persons or Entities Entitled to Restitution as “Victim” Under State Criminal Restitution Statute*, 92 A.L.R.5th 35, 35 (2001).

<sup>42</sup> ALLISON PARKER, HUMAN RIGHTS WATCH, MIXED RESULTS: U.S. POLICY AND INTERNATIONAL STANDARDS ON THE RIGHTS AND INTERESTS OF VICTIMS OF CRIME 31 (2008), available at <http://www.hrw.org/sites/default/files/reports/us0908webwcover.pdf>.

<sup>43</sup> Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 447 (2005) (citing Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83, 88 (2001)).

<sup>44</sup> CATHARINE M. GOODWIN ET AL., FEDERAL CRIMINAL RESTITUTION § 6:23 (2013).

<sup>45</sup> *United States v. Martin*, 195 F.3d 961, 968 (7th Cir. 1999).

<sup>46</sup> E.g., *United States v. Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000) (alteration in original) (citing *Martin*, 195 F.3d at 968).

<sup>47</sup> *United States v. Reifler*, 446 F.3d 65, 137 (2d Cir. 2006).

view of the scope of the criminal law.”<sup>48</sup> Criminal law is a multidimensional system with both “compensatory and punitive objectives,” which is better aligned with “restitution’s capacity to promote the rehabilitative, deterrent, and retributive goals of the criminal law.”<sup>49</sup>

*B. Theoretical Arguments in Favor of Viewing Restitution as a Criminal Concept*

*1. The Purposes of Restitution are Closely Aligned with the Goals of Criminal Punishment*

Advocates in favor of treating restitution as a strictly criminal concept argue that objectives of victim restitution echo the objectives of criminal law, and that victim restitution has traditionally been viewed as a criminal justice process, in both historical and modern court proceedings. Generally, the purposes for criminal punishment can be separated into the utilitarianism and retributivism philosophies. A utilitarian believes that criminal punishment furthers individual and social goals like deterrence, incapacitation, and rehabilitation.<sup>50</sup> A retributivist believes that criminals should be punished because they deserve to be penalized for their wrongdoing.<sup>51</sup> Utilitarianism and retributivism differ in that they don’t agree on the purpose criminal punishment is meant to serve in modern society.<sup>52</sup> If restitution is indeed a criminal concept, restitution should further the retributivist and/or utilitarian purposes and goals.

*a. The Purposes of Restitution are Closely Aligned with the Goals of Utilitarianism*

Utilitarians believe that criminal law exists to minimize, and exclude, “mischief,” and “augment the total happiness of the community.”<sup>53</sup> Since criminal punishment primarily involves harm instead of happiness, punishment can only be justified if it produces sufficient benefits to outweigh the costs. Utilitarian theorists believe that the following benefits flow from criminal punishment: deterrence and prevention of crime (individual offenders and the community at large will be dissuaded from committing crime when they see others punished), incapacitation (offenders will be prevented from committing additional harm), and rehabilitation (altering the skills, training, and outlook of previous offenders to prevent

<sup>48</sup> Note, *supra* note 13, at 946.

<sup>49</sup> *Id.*

<sup>50</sup> Kent Greenawalt, *Punishment*, in *CASES & MATERIALS ON CRIMINAL LAW* 30, 34–35 (Joshua Dressler & Stephen P. Garvey eds., 6th ed. 2012).

<sup>51</sup> *Id.* at 31.

<sup>52</sup> Matthew Haist, *Deterrence in a Sea of “Just Deserts”: Are Utilitarian Goals Achievable in a World of “Limiting Retributivism”?*, 99 *J. CRIM. L. & CRIMINOLOGY* 789, 793–94 (2009).

<sup>53</sup> JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 170 (2d ed., London, W. Pickering 1823).

additional crime).

Restitution fulfills the goals and benefits of utilitarianism and criminal punishment, which properly aligns restitution with criminal law. One purpose of restitution is the restoration of the victim. Restitution is often defined as “an act of making good, or of giving the equivalent for, any loss, damage, or injury.”<sup>54</sup> While the act of making good is often focused on the victim’s loss, damages, or injury, restitution arguably serves to restore other losses too. When a crime is committed it “practically and symbolically denies community.”<sup>55</sup> Crime breaks down trust in other citizens, law enforcement, and the justice system.<sup>56</sup> It can be argued that restitution seeks to provide redress for all harms associated with crime, both those detrimental to the victim and to the community.

“Restitution is not a claim that is owned by an individual but a remedy of the State.”<sup>57</sup> States created criminal justice systems, and by extension the crime victim restitution processes, to benefit those adversely affected by crime. From a utilitarian perspective, restitution does more than pay for a victim’s medical expenses and property damage. According to the Supreme Court, “[a]lthough restitution does resemble a judgment ‘[solely] for the benefit of’ the victim,” viewing the restitution process as a whole, from the initial motivations to the eventual outcomes, “undermines that [individualistic] conclusion.”<sup>58</sup> Instead, restitution is meant to provide for victims and societies. Restitution does not operate solely to repair harms sustained by victims; in fact, “[t]he victim has no control over the amount of restitution awarded or over the decision to award restitution,” and “the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State and the situation of the defendant.”<sup>59</sup> This view of restitution is consistent with Congress’s intent for MVRA. In recommending final passage of the legislation, a Senate Report states:

This legislation is needed to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due. It is also necessary to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society.<sup>60</sup>

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<sup>54</sup> BARRON’S LAW DICTIONARY, *supra* note 9, at 444.

<sup>55</sup> TODD R. CLEAR ET AL., AMERICAN CORRECTIONS 74 (9th ed. 2011).

<sup>56</sup> *Id.*

<sup>57</sup> State v. Knoll, 614 N.W.2d 20, 24 (Wis. Ct. App. 2000).

<sup>58</sup> Kelly v. Robinson, 479 U.S. 36, 52 (1986).

<sup>59</sup> *Id.*

<sup>60</sup> S. REP. NO. 104-179, at 12 (1996).

Restitution is said to be an effective deterrent because, unlike a generic fine, restitution is tailored to the harm done. Especially for crimes like “property [crimes] and white-collar crimes,” where the “criminal’s gain is usually equal to the victim’s loss, restitution provides a particularly effective deterrent.”<sup>61</sup> In cases where the value of the loss is easily understood (i.e., the value of the property the offender is considering destroying), and the offender knows he will have to restore a potential victim’s loss through restitution, the offender may be deterred from committing the crime altogether. The regular enforcement of restitution statutes may also set a community standard that provides general deterrence from criminal conduct, because the cost of committing the crime and paying restitution does not outweigh the potential benefits associated with the crime.

In terms of rehabilitation, restitution makes an offender invested in rebuilding the victim, which is one of the best ways for the offender to recognize his misdeeds and take responsibility for his harmful actions.<sup>62</sup> The offender has to pay restitution to the victim, rather than the State, which is a continual reminder to the offender that he has caused harm to another *person*.<sup>63</sup> In accordance with utilitarianism, restitution “is intended to serve *rehabilitative* and *deterrent* purposes by causing a defendant to appreciate the relationship between the criminal activity and the damage suffered by the victim. To make this relationship evident to the defendant, the permissible amount of restitution is generally measured by the injury to the victim.”<sup>64</sup>

*b. The Purposes of Restitution Are Closely Aligned with the Goals of Retributivism*

Different from their utilitarian counterparts, retributivists believe that criminal punishment exists primarily to punish the offender for his wrongdoing. Unlike utilitarians, retributivists are less concerned, and even dismissive, of any social purpose that punishment might serve.<sup>65</sup> Philosopher Immanuel Kant said “Punishment can never be administered merely as a means for promoting another [g]ood either with regard to the [c]riminal himself or to [c]ivil [s]ociety, but must in all cases be im-

<sup>61</sup> Note, *supra* note 13, at 939.

<sup>62</sup> BHARAT B. DAS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 59 (1997). See also Note, *supra* note 13, at 938 (“Through restitution, an offender can express guilt in a socially acceptable manner and can increase his self-respect by gaining a sense of accomplishment.”).

<sup>63</sup> Note, *supra* note 13, at 938.

<sup>64</sup> State v. Dillon, 637 P.2d 602, 606–07 (Or. 1981) (emphasis added).

<sup>65</sup> Michael S. Moore, *The Moral Worth of Retribution*, in CASES & MATERIALS ON CRIMINAL LAW 39, 39 (Joshua Dressler & Stephen P. Garvey eds., 6th ed. 2012).

posed only because the individual on whom it is inflicted *has committed a [c]rime*.”<sup>66</sup> By extension, retributivists also believe that the punishment should fit the crime, and the punishment should be proportional to the offense.<sup>67</sup>

Under the theory of retributivism, restitution is most similar to criminal law if the primary purpose behind criminal law is retribution. In contrast to civil law, “criminal law’s main goals are rehabilitation, deterrence, and *retribution*, [and] consequently, criminal law focuses on punishing and reforming persons who have committed morally culpable acts . . . [and it is primarily] a corrective device.”<sup>68</sup> Restitution is arguably retributivist because it is assessed as a punishment for committing a crime. Restitution, in accordance with retributivist thought, is also meticulously calculated so that it is proportional to the harm caused and crime committed.<sup>69</sup> No matter which theory of criminal law is preferred, it is clear that restitution fulfills both utilitarian and retributivist goals.

2. *In Both Historic and Modern Times, Restitution Has Primarily Been Viewed as a Criminal Concept*

Traditionally, restitution has been associated with the criminal justice system. In a very general sense, restitution was created to address *crime*, not civil wrongdoings. It was the existence of crime that spurred early common law societies to create a restitution regime as an equitable remedy.<sup>70</sup> Likewise, many of the first *criminal* codes in the United States included restitution provisions.<sup>71</sup> The judicial branch also acknowledged the integral link between restitution and criminal law early on. In *Bradford v. United States*, the Supreme Court approved the use of restitution as a condition before pardon from a crime could be granted.<sup>72</sup> “By providing for restitution in the penal sections of state codes and authorizing it as a sentencing option in addition to fines or imprisonment or as a condition on parole or probation,” the United States historically “preserved restitution as a criminal penalty.”<sup>73</sup>

The traditional notion that restitution is a criminal concept has ex-

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<sup>66</sup> IMMANUEL KANT, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 195 (W. Hastie trans., Edinburgh, T & T Clark 1887).

<sup>67</sup> CLEAR ET AL., *supra* note 55, at 70.

<sup>68</sup> Note, *supra* note 13, at 937 (emphasis added).

<sup>69</sup> See *id.* at 939 (“[Restitution] is constructed to fit the crime and to emphasize the wrongfulness of the offense and the defendant’s moral responsibility.”).

<sup>70</sup> LARRY J. SIEGEL, *INTRODUCTION TO CRIMINAL JUSTICE* 495 (12th ed. 2010).

<sup>71</sup> Note, *supra* note 13, at 934.

<sup>72</sup> 228 U.S. 446, 453–54 (1913); Note, *supra* note 13, at 934.

<sup>73</sup> Note, *supra* note 13, at 934.

tended into the modern legal system. When the Mandatory Victim Restitution Act (MVRA) was enacted in 1996, the statute was codified in Title 18 of the United States Code, the “Crimes and Criminal Procedure” section.<sup>74</sup> Laws in the United States federal code are generally codified according to subject matter, and if restitution were meant to apply to civil law, it is likely that MVRA would not have been codified in Title 18, and instead been codified elsewhere.

### 3. *Courts Have Distinguished Restitution from Civil Damages*

According to the Federal Criminal Restitution treatise, while there may be some overlap, generally, the types of harms recoverable in criminal restitution proceedings and in civil trials for damages differ.<sup>75</sup> Restitution is based on harm done and “actual loss” and unlike civil damages, restitution awards do not include intended loss or other types of damages. In contrast, civil damages are much more likely to include punitive damages, loss of consortium, and pain and suffering, concepts not traditionally included in restitution.<sup>76</sup> While advocates of treating restitution as a civil concept have argued that courts have conflated and compared restitution and civil damages, there is more to the analysis.

While the *Martin* and *Behrman* cases decided by the Seventh Circuit support treating restitution as a civil concept, *United States v. Scott*, a more recent case out of the Seventh Circuit, distinguishes restitution and damages.<sup>77</sup> *Scott*, a fraud case that granted restitution to the defendant’s employers who were victims of his fraud, individualizes restitution as “[a] measure of relief [that] is less generous than common law damages, since [in the fraud case] it does not extend to consequences beyond the diminution of the value of the property stolen or damaged.”<sup>78</sup> Another Seventh Circuit case, *United States v. Havens*, similarly distinguished the types of harm that are recoverable as restitution and civil damages.<sup>79</sup>

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<sup>74</sup> Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, 110 Stat. 1227 (codified as amended in scattered sections of 18 U.S.C.).

<sup>75</sup> Goodwin, *supra* note 44, § 6.25.

<sup>76</sup> *Id.* While these concepts have not traditionally been incorporated into victim restitution, some states do use the concepts in calculating restitution. In California, a child victim of a sexual offense is allowed to recover for noneconomic losses, including psychological harm and pain and suffering. See CAL. PENAL CODE § 1202.4 (f) (3) (F) (West 2014).

<sup>77</sup> *United States v. Scott*, 405 F.3d 615, 618 (7th Cir. 2005).

<sup>78</sup> *Id.*

<sup>79</sup> Goodwin, *supra* note 44, § 6.25 (citing *United States v. Havens*, 424 F.3d 535 (7th Cir. 2005)).

C. *Theoretical Arguments in Favor of Viewing Restitution as a Hybrid Concept.*

Kenneth Mann and other commentators<sup>80</sup> have noted that restitution appears to be more of a hybrid idea. “[T]he sanction’s purpose is punishment, but its procedure is drawn primarily from the civil law.”<sup>81</sup> Mann calls restitution a “middleground sanction” that combines elements of both civil and criminal law, and that acts as a remedial sanction within criminal procedure.<sup>82</sup> Linda Trang, in her analysis of taxing victim restitution awards, also sees restitution as a hybrid concept.<sup>83</sup> For Trang, modern restitution “is an independent basis of recovery in criminal cases with a striking resemblance to compensatory damages in tort cases.”<sup>84</sup> Trang’s characterization is based on the fact that restitution compensates victims for harm (civil in nature) but it is court-ordered after a conviction (criminal in nature). Neither Mann nor Trang expound on the hybrid nature of restitution, and instead they just use the characterization to make further arguments about the punitive sanctions and the taxation of restitution, respectively.

IV. THE PRACTICAL REASONS FOR CLASSIFYING RESTITUTION AS A CRIMINAL LAW CONCEPT, USING COMPARATIVE FAULT AS A CASE STUDY

The status of victim restitution as either a criminal or civil concept, or something in between, matters. If victim restitution is interpreted as a civil concept, then it is possible, and even logical, that civil liability concepts and defenses, like comparative fault, mitigation of damages, and consent, could apply when calculating a restitution award.

A. *If Restitution Is a Civil Concept, Criminal Defendants May Be Allowed to Assert Civil Defenses*

As discussed in Part III, if restitution is viewed as civil concept, it is likely because it is equated to civil damages. Even though the underlying offense triggering the restitution is criminal, some argue that the purpose of the restitution is solely compensation, and like civil damages “restitution tracks ‘the recovery to which [the victim] would have been enti-

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<sup>80</sup> See Grant R. Mainland, *A Civil Jury in Criminal Sentencing: Blakely, Financial Penalties, and the Public Rights Exception to the Seventh Amendment*, 106 COLUM. L. REV. 1330, 1366 (2006); Linda Trang, *The Taxation of Crime Victim Restitution: An Unjust Penalty on the Victim*, 35 LOY. L.A. L. REV. 1319, 1337–40 (2002).

<sup>81</sup> Mann, *supra* note 7, at 1799.

<sup>82</sup> *Id.* at 1799 n.15.

<sup>83</sup> Trang, *supra* note 80, at 1337.

<sup>84</sup> *Id.* at 1339.

bled in a civil suit against the criminal.”<sup>85</sup> When a plaintiff wins a civil suit against a defendant, both compensatory and punitive damages may be available. Compensatory damages, most common in negligence cases, “designed to compensate the victim for the tortfeasor’s [wrongdoing],” are arguably the civil counterpart of restitution.<sup>86</sup> In fact, the Restatement Second of Torts equates the two, defining compensatory damages as “the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.”<sup>87</sup> The defendant, in order to undermine the plaintiff’s assignment of liability and request for damages, can present the fact finder with a number of defenses including: contributory negligence (“the plaintiff’s [own] negligence . . . contributed to his or her own injuries”),<sup>88</sup> comparative negligence (measuring, comparing and reducing the defendant’s liability in light of the plaintiff’s liability),<sup>89</sup> assumption of risk (“the plaintiff voluntarily assumed a known risk with full appreciation of the dangers involved”),<sup>90</sup> and consent. If restitution is to be viewed as a civil concept, these defenses would arguably apply to the restitution determination.

To support this argument, it is useful to look at other civil concepts that are triggered by certain criminal action. Drug forfeiture is a useful example.<sup>91</sup> The underlying drug offenses, whether they are possession, distribution, etc., are explicitly criminal proceedings. After a drug conviction a federal prosecutor can pursue a criminal forfeiture proceeding to seize the drug proceeds and possibly other property used in the offense.<sup>92</sup> “Criminal forfeiture is part of the sentence in a criminal case,” and it is considered to be an action against the defendant personally (*in personam*), rather than an action against his property (*in rem*).<sup>93</sup> However, a federal prosecutor can instead opt to pursue a civil forfeiture. A civil forfeiture, while also a judicial matter, is detached from the underlying drug offense. A civil forfeiture is an action against property instead of an action against the defendant.<sup>94</sup> In a civil forfeiture a prosecutor can usually

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<sup>85</sup> United States v. Behrman, 235 F.3d 1049,1052 (7th Cir. 2000) (alteration in original) (citing United States v. Martin, 195 F.3d 961, 968 (7th Cir. 1999)).

<sup>86</sup> WILLIAM R. BUCKLEY & CATHY J. OKRENT, TORTS AND PERSONAL INJURY LAW 46 (3d ed. 2004).

<sup>87</sup> RESTATEMENT (SECOND) OF TORTS § 903 (1979).

<sup>88</sup> Buckley & Okrent, *supra* note 86, at 108.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Cheh, *supra* note 3, at 1326.

<sup>92</sup> 21 U.S.C. § 853 (2012); CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME 35 (Simon N.M. Young ed. 2009).

<sup>93</sup> CIVIL FORFEITURE OF CRIMINAL PROPERTY, *supra* note 92, at 39.

<sup>94</sup> 21 U.S.C. § 881; CIVIL FORFEITURE OF CRIMINAL PROPERTY, *supra* note 92, at 41.

access more property than what is available in a criminal forfeiture. “[B]ecause criminal forfeiture is part of sentencing, the forfeiture order imposed by a court in a criminal case is limited to the property involved in the particular offen[s]e for which the defendant was convicted. In contrast, civil forfeiture actions *in rem* may be brought against any property derived from either a specific offen[s]e or from a course of conduct.”<sup>95</sup> The accessible property, along with a lower standard of proof, make civil forfeitures more appealing to federal prosecutors and civil forfeitures are increasingly chosen over criminal forfeitures.<sup>96</sup>

Civil forfeiture actions, even when seeking the proceeds and/or property from a crime, are very similar to other civil cases. The government, as the plaintiff, files a complaint, and the defendant has the opportunity to file an answer. Next is civil discovery, followed by motions where the criminal defendant can assert a variety of civil defenses including motions to dismiss on the pleadings and motions for summary judgment.<sup>97</sup> Equating restitution to civil forfeitures, those that argue that restitution is a civil remedy occurring after a criminal episode, would allow defendants to assert civil defenses, like contributory negligence, comparative negligence, assumption of risk, and consent, in a restitution proceeding.

Traditionally courts have not applied civil concepts and defenses to criminal restitution awards, and there are only a handful of cases demonstrating the application. However, it is important to consider the practical consequences of applying civil concepts to restitution so we will demonstrate application using one civil concept, comparative fault, as a case study.

### B. *Comparative Fault Has Been Traditionally Used as a Defense to Civil Liability*

Comparative fault, also called comparative negligence,<sup>98</sup> is a principal used in civil cases to account for the plaintiff’s fault in the damages

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<sup>95</sup> CIVIL FORFEITURE OF CRIMINAL PROPERTY, *supra* note 92, at 45.

<sup>96</sup> In a civil forfeiture a federal prosecutor has to meet a lower standard of proof of the forfeitability (preponderance of the evidence) compared to criminal forfeitures (proof beyond a reasonable doubt). *Id.* at 44.

<sup>97</sup> *Id.* at 42. See also FED. R. CIV. P. SUPP. R. FOR ADMIRALTY OR MARITIME CLAIMS AND ASSET FORFEITURE ACTIONS (G)(8)(b)(i) & (c)(ii).

<sup>98</sup> The decision to use either a comparative fault or a comparative negligence defense turns on whether or not the underlying crime is negligence based. The main difference between comparative negligence and comparative fault is that the former deals with negligent harm, and the later deals with actively caused harm. *Difference Between Comparative Fault and Comparative Negligence*, PRLOG (Apr. 27, 2010), <http://www.prlog.org/10649577-difference-between-comparative-fault-and-comparative-negligence.html>.

determination. Traditionally the related contributory negligence doctrine barred a plaintiff from recovery if the plaintiff was at all negligent in the commission of the tort.<sup>99</sup> This traditional theory considered all of the plaintiff's legally relevant fault/negligence, no matter how slight, and it frequently barred the plaintiff from recovering if the plaintiff was even the slightest bit at fault. An application of modern comparative fault doctrine, which is utilized in most states, requires the jury to assign a percentage value to the plaintiff's (victim's) fault, and that proportional penalty is deducted from the plaintiff's recovery.<sup>100</sup> In tort law, the plaintiff's comparative fault is considered and determined during the fact-finding phase of the proceeding, as opposed to the sentencing and punishment phase. Civil juries must determine the portion of the plaintiff's injuries attributable to the plaintiff's own fault/negligence.<sup>101</sup>

Depending on the jurisdiction, the plaintiff's allotted fault may be barred from jury consideration. In a pure comparative fault jurisdiction, a plaintiff can recover for any fault of the other party, even if the plaintiff is more at fault.<sup>102</sup> For example, a plaintiff deemed 98 percent responsible for a tort could still recover for the 2 percent of damages that were the fault of the defendant. In a modified comparative fault jurisdiction, a plaintiff who is more at fault compared to the defendant cannot recover damages at all.<sup>103</sup> Under this theory, if a plaintiff is deemed 51 percent responsible they will not be allowed to recover any damages. Whether or not a plaintiff's fault can be considered in a civil fault determination is dependent on the statute of the applicable jurisdiction. Likewise, any application of comparative fault in a criminal case is dependent on the statutes and case law of the applicable jurisdiction.

### C. *Comparative Fault Has Not Traditionally Been Applied to Criminal Law Cases*

Traditionally, comparative negligence has only been applied in civil cases. "As a matter of historical fact, the rules of causation in criminal cases are not tied to the rules of causation in civil cases."<sup>104</sup> Determining fault in criminal and civil cases requires different processes, subject to different standards of proof, which warrants allowing or disallowing different defenses.

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<sup>99</sup> Thomas R. Trenkner, Annotation, *Modern Development of Comparative Negligence Doctrine Having Applicability to Negligence Actions Generally*, 78 A.L.R.3d 339, 344 (1977).

<sup>100</sup> *Id.* at 346-47.

<sup>101</sup> DARRELL L. ROSS, *CIVIL LIABILITY IN CRIMINAL JUSTICE* 59 (5th ed. 2013).

<sup>102</sup> Trenkner, *supra* note 99, at 347.

<sup>103</sup> *Id.*

<sup>104</sup> *People v. Tims*, 534 N.W.2d 675, 684 (Mich. 1995).

In criminal cases, the prosecution has the burden to prove the defendant's liability "beyond a reasonable doubt." In a civil case, the plaintiff first has the burden to prove the defendant's liability by a "preponderance of the evidence." If this burden is met, the burden shifts to the defendant to refute the evidence offered by the plaintiffs. The burden of proof in criminal cases is much more difficult to achieve compared to the "preponderance of the evidence," the standard used in most civil cases.

As previously discussed, a victim's negligence is often an important factor to consider in evaluating the defendant's civil liability. However, courts have unanimously said that criminal law explicitly rejects the use of contributory fault during the guilt-determination; "[c]ourts are unanimous that, unless it is the sole proximate cause of the resulting harm, the victim's conduct is irrelevant."<sup>105</sup> A "[v]ictim[']s fault is not a defense, either partial or complete, to criminal liability."<sup>106</sup> In a criminal case, if the defendant is the factual (actual) and proximate (legal) cause of the injury, and a court has established criminal liability beyond a reasonable doubt, then the victim's fault is not considered.

Some commentators disagree that criminal courts explicitly and completely reject the application comparative fault. They argue that underlying comparative fault principles already exist in criminal law, and that criminal law should openly embrace the entire comparative fault concept. Vera Bergelson argues that the consent, self-defense, and provocation doctrines used in criminal law analyze relevant victim conduct and integrate comparative fault ideas.<sup>107</sup> For example, Bergelson argues that courts already reduce a criminal perpetrator's liability for certain acts when a victim voluntarily consented to the perpetrator's act, which "infringes on some legally recognized right of the victim."<sup>108</sup> Correspondingly, Bergelson wants to expand the use of comparative fault principles in the criminal guilt determination, out of fairness for the defendant.<sup>109</sup>

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<sup>105</sup> Bergelson, *supra* note 43, at 397 (emphasis omitted).

<sup>106</sup> *Beul v. ASSE Int'l, Inc.*, 233 F.3d 441, 451 (7th Cir. 2000).

<sup>107</sup> Bergelson, *supra* note 43, at 389.

<sup>108</sup> *Id.* at 404–05.

<sup>109</sup> *Id.* at 389 ("[V]ictims may reduce their right not to be harmed either voluntarily, by consent, waiver or assumption of risk, or involuntarily, by an attack on some legally recognized rights of the perpetrator. If that happens, perpetrators should be entitled to a defense of complete or partial justification, which would eliminate or diminish their criminal liability.").

*D. With the Exception of California, a Majority of Jurisdictions Do Not Apply Comparative Fault Principles to Crime Victim Restitution Determinations*

The application of civil concepts in criminal restitution cases is a novel issue. Very few courts have had the opportunity to hear a case deciding whether comparative fault should be applied in the criminal arena. Only five states have case law on the issue: California, Colorado, Iowa, Oregon, and Wisconsin. Colorado,<sup>110</sup> Iowa,<sup>111</sup> and Wisconsin<sup>112</sup> unequivocally bar the application of comparative fault in restitution analyses, Oregon is yet to make explicit case law,<sup>113</sup> and California has allowed the use of comparative fault.<sup>114</sup> Case law from these states will be relied on for the arguments in favor and against using comparing fault in restitution proceedings.

*E. Applying Comparative Fault to Crime Victim Restitution Would Require Extensive, Undesirable Changes to Court Procedures and Policies*

Actively allowing a victim's comparative fault to be considered in the determination of a restitution award would result in complicated, socially undesirable, and unfair consequences. Allowing the victim's fault to be considered would require the creation of mini-trials. The new application of fault would also have an adverse impact on court policy and judicial resources. Finally, integrating fault into restitution would modify a prosecutor's approach to criminal cases as a whole, causing an interference with prosecutorial discretion.

*1. Applying Comparative Fault to Crime Victim Restitution Would Require the Institution of a Restitution Mini-Trial*

In order to account for victim fault in the calculating the restitution award, the court would have to create a new post-guilt proceeding. Once the guilt phase of the trial has been concluded, the court would next have to initiate a hearing or proceeding to evaluate fault and determine

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<sup>110</sup> *People v. Johnson*, 780 P.2d 504, 507 (Colo. 1989) (en banc).

<sup>111</sup> *State v. Wagner*, 484 N.W.2d 212, 216 (Iowa Ct. App. 1992).

<sup>112</sup> *State v. Knoll*, 614 N.W.2d 20, 25 (Wis. Ct. App. 2000).

<sup>113</sup> *See State v. Algeo*, 311 P.3d 865, 866–67 (Or. 2013) (en banc). The Oregon Supreme Court declined to rule on the legality of a lower court decision that applied comparative fault principles. In deciding that a jaywalking victim was 90% at fault for injuries caused when the victim was hit by a DUI driver, the trial court reduced the victim's restitution award to 10% of the victim's economic loss. *Id.* The Supreme Court concluded that it only had jurisdiction to directly review a victim's constitutional claims and it could not review any statutory claims. The Court found that it lacked jurisdiction to address the statutory question regarding the amount of restitution and affirmed the trial court's ruling. *Id.* at 873.

<sup>114</sup> *People v. Millard*, 95 Cal. Rptr. 3d 751, 757 (Cal. Ct. App. 2009).

restitution. This means that the victim would have to return to court to hear and testify about evidence concerning the offender's fault *and* the victim's own fault, essentially creating a mini-trial.<sup>115</sup> The mini-trial would focus on the victim's conduct and alleged fault, which unlike the defendant's conduct, has not been presented to a jury and has not been proven beyond a reasonable doubt. As a result, the mini-trial would juxtapose the victim's alleged fault, which has not been proven, with the defendant's fault that has been proven.

The mini-trial concept is particularly concerning to the majority of courts that have been confronted with the issue. In the Colorado case of *People v. Johnson*, the defendant was convicted of vehicular assault, but the trial court denied the prosecution's motion to impose restitution because the court believed that the restitution requested would more appropriately be awarded as a civil judgment.<sup>116</sup> The Colorado Supreme Court disagreed, remanded the case for a restitution award, and ruled that Colorado's statutory scheme "does not require the sentencing court to determine a defendant's criminal liability for restitution in accordance with the strict rules of damages applicable to a civil case."<sup>117</sup> Furthermore, the Colorado Supreme Court directed courts to award restitution in light of the victim's monetary loss, tempered with the defendant's ability to pay.<sup>118</sup> The court explicitly discouraged courts from engaging in a mini-trial on the issue of fault; "[w]e do not suggest that the sentencing court must conduct a mini-trial on the issue of damages and resolve such questions as comparative negligence or other affirmative defenses that arguably might be applicable in a civil suit brought by the victim against the defendant."<sup>119</sup>

Likewise, the Wisconsin Court of Appeals specifically identified the danger of mini-trials. In *State v. Knoll*, the defendant was convicted of operating a vehicle under the influence of an intoxicant, and he was ordered to pay restitution to one of the passengers injured in the single-vehicle collision that occurred while the defendant was behind the wheel.<sup>120</sup> The defendant appealed, arguing *inter alia*, that the passenger's

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<sup>115</sup> CAL. ASSEMBLY COMM. ON PUBLIC SAFETY, HEARING REPORT ON AB 1710 (May 4, 2010), available at [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1701-1750/ab\\_1710\\_cfa\\_20100503\\_093811\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1701-1750/ab_1710_cfa_20100503_093811_asm_comm.html) [hereinafter HEARING REPORT]. "The victim would once again be hauled into court, accused of misdeeds and negligence, and made to defend himself or herself against a convicted criminal's contentions that the damages, at least in part, were really the victim's fault." *Id.* at 10.

<sup>116</sup> 780 P.2d 504, 505 (Colo. 1989) (en banc).

<sup>117</sup> *Id.* at 507.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 614 N.W.2d 20, 21–22 (Wis. Ct. App. 2000).

contributory negligence<sup>121</sup> should reduce the restitution award.<sup>122</sup> The Wisconsin Court of Appeals primarily found that when the victim was “not a party to the crime of driving while intoxicated” the defendant may not “raise contributory negligence as a defense to restitution.”<sup>123</sup> The court supported its ban on the use of comparative fault for restitution purposes because it was concerned with the practical result of such an application, the use of mini-trials. The *Knoll* court found that application of negligence theories was inappropriate because a restitution proceeding is “not a full-blown civil trial.”<sup>124</sup> If comparative negligence were permitted in restitution proceedings, “it would involve the state in what could be an extended civil proceeding[] which is not envisioned [by statute] and would defeat the informal nature of the proceeding.”<sup>125</sup>

Conversely in California, the only state where a court has condoned weighing victim fault in the restitution analysis, the Court of Appeals was not concerned with the possibility of mini-trials. In *People v. Millard*, the court heard an appeal from a driving under the influence conviction wherein the defendant allegedly swerved his SUV into oncoming traffic, striking and injuring a motorcyclist.<sup>126</sup> During restitution proceedings, the trial court found that the victim’s negligence was a substantial factor in causing his injuries and therefore reduced his restitution by 25 percent based on the doctrine of comparative negligence.<sup>127</sup> The California Court of Appeals agreed that “a trial court may apply the doctrine of comparative negligence in awarding victim restitution against a criminally negligent defendant when the court finds the victim’s contributory negligence was a substantial factor in causing his or her injuries.”<sup>128</sup> Even allowing the courts to account for a victim’s negligence in a separate hearing, the *Millard* court believed that trial courts are experienced enough to limit the evidence so as to avoid excessively “prolonged and involved hearing[s].”<sup>129</sup> The *Millard* court sweeps the details of the prospective restitution hearings, the impact of the hearings on the court system and attorneys, and any potential violations of victims’ rights aside, impliedly asserting that this is a menial change that will flawlessly evolve on its own.

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<sup>121</sup> Comparative fault and comparative negligence are nearly identical concepts. See *supra* note 98 for a full explanation.

<sup>122</sup> *Knoll*, 614 N.W.2d at 23.

<sup>123</sup> *Id.* at 25.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 95 Cal. Rptr. 3d 751, 757–59 (Cal. Ct. App. 2009).

<sup>127</sup> *Id.* at 765.

<sup>128</sup> *Id.* at 757.

<sup>129</sup> *Id.* at 780.

2. *Applying Comparative Fault to Crime Victim Restitution Would Necessitate Judicial Re-Training and Other Costly Measures*

Introducing comparative fault into restitution awards would put trial court judges in charge of making fault decisions. Evaluating and comparing fault is inherently a subjective determination, but the subjectivity and unpredictability would be heightened if performed by criminal trial judges. Judges with civil dockets have been trained in methods and procedures for determining and weighing fault, and these judges practice fault determination on daily basis with their caseloads. Comparative fault is a complicated and ever-evolving concept, and academic research and writing on the topic is constantly being published.

Comparatively, criminal trial judges are not regularly exposed to civil concepts like comparative fault. The comparative fault analysis is not simple and straightforward, something that criminal courts could easily adopt. California, the one state that has adopted comparative fault in restitution determinations, has not established bright line guidelines for trial courts to use in applying fault to restitution. The California courts have not established what type of comparative fault (pure or modified) should be applied, nor have they created any case law addressing what victim conduct qualifies as “fault” and can thus be considered in reducing restitution.<sup>130</sup>

Reworking the victim restitution procedure would also affect the state judicial resources. In an era where court dockets are overloaded and state budgets have been significantly reduced, any additional strain on the court systems is concerning. Adding a fault hearing to the restitution process will increase the amount of court and attorney time needed for each case. Courts will feel this constraint particularly in cases where the defendant enters a plea. Normally a guilty plea would be quickly followed with short restitution hearing. But, with a fault component in the restitution determination, even if there is a plea, the prosecutor will have to prepare the entire case as if it were going to trial. This requirement of time and money will only further strain judicial budgets and dockets.

3. *Applying Comparative Fault to Crime Victim Restitution Would Unreasonably Interfere with Prosecutorial Discretion*

If comparative fault were introduced into the criminal restitution evaluation, prosecutors would be required to rethink their entire process of charging, investigating, preparing, and arguing cases. In charging cases prosecutors would have to assess the victim’s needs and evaluate whether the case was likely to provide the evidence necessary to secure an

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<sup>130</sup> See *People v. Millard*, 95 Cal. Rptr. 3d 751 (Cal. Ct. App. 2009) (Although the court concluded that they would consider the victims comparative or contributory negligence, it failed to give any guidance on how to apply those principles to victim restitution.).

adequate restitution award. In preparing for trial prosecutors would have to investigate differently and prepare to establish not only the elements of the crime charged, but also the levels of fault attributable to each party involved—to do otherwise would allow the court to reduce the victim's constitutionally mandated restitution just due to an absence of evidence. The prosecutor may be required to present as much evidence as would be required for a civil trial.<sup>131</sup>

This type of interference with a prosecutor's preparation and pursuit of justice interferes with prosecutorial discretion. Article II, Section 3 of the Constitution vests the prosecutorial power in federal executive branch, which is carried out via the U.S. Attorneys.<sup>132</sup> Whether a case is brought at the federal or state level, prosecutors decide whether to file charges, what charges to file, and against whom charges should be brought. Additionally, prosecutorial discretion gives prosecutors the discretion to decide how to prosecute the case.<sup>133</sup> Forcing comparative fault into the current criminal justice system would require prosecutors to alter litigation strategies and undermine their discretion. "Beyond the decision of whether or not to prosecute, a federal prosecutor also has discretion in deciding how to prosecute."<sup>134</sup>

Similar to the mini-trial issue, the only court that has adopted comparative fault in the restitution analysis, the *Millard* court, downplayed the potential interference with prosecutorial discretion. Without any further explanation on the interference with prosecutions or resource constraints, the California Court of Appeals said, "We do not doubt prosecutors generally have sufficient training and abilities to prepare cases and present evidence on respective faults of defendants and victims in causing the economic losses of victims."<sup>135</sup>

*F. Applying Comparative Fault to Crime Victim Restitution Would Violate Federal Statutes Enacted to Protect Victim Rights*

The Crime Victims' Rights Act (CVRA) legally grants victims specific

<sup>131</sup> HEARING REPORT, *supra* note 115, at 10.

<sup>132</sup> U.S. CONST. art. II, § 3, states that the President "shall take care that the laws be faithfully executed." See also *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (the separation of powers requires broad prosecutorial discretion because federal prosecutors "are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3) (citing 28 U.S.C. §§ 516, 547)).

<sup>133</sup> Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIRCUIT REV. 1, 6 (2009).

<sup>134</sup> *Id.*

<sup>135</sup> *Millard*, 95 Cal. Rptr. 3d at 781.

rights in federal cases.<sup>136</sup> Most states have also established similar crime victims' rights in their state constitutions or state laws.<sup>137</sup> Using victim fault in the restitution determine would violate several of the rights protected by the CVRA, MVRA, and state laws.

Under the CVRA, a victim has “[t]he right to full and timely restitution as provided in law.”<sup>138</sup> MVRA and most state constitutions require restitution awards to equal the *full* amount of the victim's economic damages.<sup>139</sup> Any reduction in a restitution award, based on alleged victim fault or some other factor, would violate state and federal statutes. While it could be argued that Congress and/or state legislatures did not intend to allow full victim recovery in instances of comparative fault, the existence of provisions that allow for an award reduction in certain circumstances suggest otherwise. It is apparent that Congress did in fact consider certain situations when it was acceptable to reduce a restitution award. For example, when a victim receives compensation from a collateral source like an insurance company, MVRA allows for the restitution order to be “reduced by any amount later recovered” by the victim in the form of compensatory damages for the same loss.<sup>140</sup>

If courts undertake a separate and subsequent procedure to determine fault and restitution, the victim's restitution would not only be reduced, violating the right to *full* restitution requirement, but the restitution would not be secured in a *timely* matter, as the victim will be subject to various appearances, testimony, and proceedings before the award is made final. The extensive nature of the entire restitution calculation will further violate a victim's CVRA-protected right to “proceedings free from unreasonable delay.”<sup>141</sup>

The CVRA also grants victims the “right to be treated with fairness and with respect for the victim's dignity and privacy.”<sup>142</sup> When a victim is

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<sup>136</sup> Crime Victims' Rights Act of 2004, Pub. L. No. 108-405, 118 Stat. 2261 (codified as amended at 18 U.S.C. § 3771 (2012)).

<sup>137</sup> See *State Victim's Rights Amendments*, *supra* note 31.

<sup>138</sup> 18 U.S.C. § 3771(a)(6).

<sup>139</sup> See 18 U.S.C. § 3664(f)(1)(A), granting victims the right to restitution “in the full amount of each victim's losses as determined by the court without consideration of the economic circumstances of the defendant.” See, e.g., OR. REV. STAT. 137.106(1) (2011) “If the court finds from the evidence presented that a victim suffered economic damages, in addition to any other sanction it may impose, the court shall include one of the following in the judgment: (a) A requirement that the defendant pay the victim restitution in a specific amount that equals the full amount of the victim's economic damages as determined by the court.”

<sup>140</sup> 18 U.S.C. § 3664(j)(2).

<sup>141</sup> *Id.* § 3771(a)(7).

<sup>142</sup> *Id.* § 3771(a)(8).

subject to extensive and frequent proceedings that rehash the details of a mentally and/or physically painful experience (especially in cases of violent, person crimes), the victim will like feel as if his or her dignity has been anything but respected. Mistreatment often does more than make the victim feel upset and disrespected. When the legal system and any of the participants (judge, attorneys, etc.) act insensitively or unfairly, often a victim will feel re-victimized.

Not only does a fault determination in the restitution award put the victim at risk of abuse and re-victimization, it also puts the victim at risk of being abused by the defendant, in violation of the CVRA “right to be reasonably protected from the accused.”<sup>143</sup> Without bright line rules to guide the comparative fault analysis, “[r]estitution award amounts would become fodder for defendants to leverage a more lenient sentence, *e.g.*, agreeing not to contest the full amount of restitution if a lesser jail or prison sentence is given.”<sup>144</sup> Turning restitution into a bargaining chip for the defendant violates the victim’s dignity and privacy, and it also allows the victim to be abused by the defendant, through the legal system that is supposed to be protecting the victim.

### CONCLUSION

While criminal and civil law aren’t easily divided, and while restitution and damages aren’t completely, conceptually distinct, it is clear that victim’s restitution is attached to criminal proceedings, and civil damages follow civil proceedings. Theoretically, arguments can be made for treating restitution as a criminal, civil, and hybrid concept, but generally, restitution best fulfills the goals of criminal punishment, and restitution has been treated, in both policy and case law, as a criminal concept. Practically, restitution should be treated as a criminal concept. If restitution is treated as a civil concept, the likely application of civil mitigation, like comparative fault, would cause practical chaos, including restitution mini-trials, judicial retraining, and notably, violations of crime victim rights. In order to maintain consistency and fairness in the application of restitution awards, it is essential to treat restitution as a criminal concept.

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<sup>143</sup> *Id.* § 3771(a)(1).

<sup>144</sup> HEARING REPORT, *supra* note 115, at 10–11.