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RESTITUTION, CRIMINAL LAW, AND THE IDEOLOGY OF INDIVIDUALITY*

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INTRODUCTION

In the past fifteen years, a flurry of academic, judicial and legislative interest has been directed toward proposals advocating an increased use of restitution in the criminal process.[1] Although some

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[1] *See generally* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS (1977); RESTITUTION IN CRIMINAL JUSTICE (1977); Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52 (1982).

A number of state legislatures have adopted provisions allowing for the use of restitution as a condition of probation. ALA. CODE § 15-22-52(8) (1977); ALASKA STAT. § 12.55.100(a)(2) (1985); ARK. STAT. ANN. § 41-1203(2)(h) (1977); CAL. PENAL CODE § 1203.1 (West Supp. 1985); CONN. GEN. STAT. ANN. § 53a-30(a)(4) (West 1985); GA. CODE ANN. § 27-2711 (1982); HAW. REV. STAT. § 706-624(2)(i) (Supp. 1984); IND. CODE ANN. § 35-38-22(a)(5) (West Supp. 1985); KY. REV. STAT. ANN. § 533-030.(3) (Michie/Bobbs-Merrill 1985); LA. CODE CRIM. PROC. ANN. art. 895(A)(7) (West 1984); ME. REV. STAT. ANN. tit. 17-A, § 1204(2)(B) (1983); MD. CRIM. LAW CODE ANN. art 27 § 641(a)(1) (1982 & Supp. 1985); MICH. COMP. LAWS ANN. § 771.3 (West Supp. 1986); NEB. REV. STAT. §§ 29-2219(2)(J), 29-2262(2)(J) (1979); NEV. REV. STAT. § 176.185(3) (1981); N.J. REV. STAT. § 2C:45-1(b)(8) (1982 & West Supp. 1985); N.M. STAT. ANN. § 31-20-6 (1985); N.Y. PENAL LAW § 65.10(2)(g) (McKinney Supp. 1986); N.C. GEN. STAT. § 15A-1343(d) (1983); N.D. CENT. CODE § 12.1-32-07 (1976). OHIO REV. CODE ANN. § 2951.01(c) (Anderson 1982 & Supp. 1984); OKLA. STAT. ANN. tit. 22, § 991a(1)(A) (West Supp. 1984); OR. REV. STAT. § 137.106 (1984); 18 PA. STAT. ANN. § 1106 (1983); TEX. CRIM. PROC. CODE ANN. art. 42.12, § 6c (Vernon 1978 & Supp. 1985); VT. STAT. ANN. tit. 28, § 252 (Supp. 1985); VA. CODE §§ 19.2-305, 19.2-305.1 (Supp. 1984); WASH. REV. CODE ANN. § 9.95.210 (2) (West Supp. 1985); W. VA. CODE § 62-12-9 (1984).

In addition, some state legislatures have authorized the use of restitution in connection with suspended sentences, conditional discharges, fines and incarceration. *See* Har-

scholarly attention has been given to the question of whether restitution[2] should be used as a criminal sentence,[3] the great bulk of writing in this area has been concerned with particular problems of implementation,[4] including issues of notice, proof, and enforcement.[5]

One of the most vexatious of these problems has involved the question of what relationship, if any, an order of restitution should hold to the "offense of conviction,"[6] the specific offense (or offenses) of which an offender has been convicted.[7] Some courts have held that an offender's restitutionary liability must be limited to injuries directly caused by the offense of conviction.[8] A strong con-

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land, *supra*, at 71-72. Other states have enacted legislation requiring courts to impose restitutionary sanctions for particular categories of offenses or harms. *Id.*

2 Strictly speaking, the terms "restitution," "reparation," and "compensation" are neither interchangeable nor overlapping. As used in the literature, restitution and reparation refer to remedies which draw wholly upon the resources of the offender. Compensation, on the other hand, refers to a making whole of the victim by the state. Restitution differs from reparation in that it contemplates a restoration in kind rather than by way of some monetary equivalent. *See generally* S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME x-xi (2d ed. 1970); Harland, *Theoretical and Programmatic Concerns in Resitution: An Integration*, in OFFENDER RESTITUTION IN THEORY AND ACTION 193, 194-95 (1978).

In the discussion that follows, the term restitution will be employed to refer to all restorative activity undertaken by an offender. In this regard, the term should be read to include the return of property by an offender to his or her victim; the payment of money by an offender to his or her victim; the provision of service by an offender to his or her victim; or the provision of service by an offender to a third party.

3 *See, e.g.*, S. SCHAFER, *supra* note 2; Barnett, *Restitution: A New Paradigm of Criminal Justice*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 349 (1977); Epstein, *Crime and Tort: Old Wine in Old Bottles*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231 (1977); Klein, *Revitalizing Restitution: Flogging a Horse that May Have Been Killed for Just Cause*, 20 CRIM. L.Q. 383 (1978).

4 Harland, *supra* note 1, at 119-20.

5 Edlehertz, *Legal and Operational Issues in the Implementation of Restitution Within the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE 63 (1977); Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984) [hereinafter Note, *Victim Restitution*]; Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 YALE L.J. 505 (1984) [hereinafter Note, *Restitution in the Criminal Process*].

6 *See generally* Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 536-42 (1982); Harland, *supra* note 1, at 81-86; Note, *Restitution in the Criminal Process*, *supra* note 5, at 511-16.

7 Note, *Restitution in the Criminal Process*, *supra* note 5, at 507.

8 *E.g.*, Fresneda v. State, 347 So. 2d 1021 (Fla. 1977)(order of restitution requiring payment in excess of amount of damage criminal conduct caused victim held improper); People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957)(restitution order for damages caused by an automobile accident held improper because conviction was for unlawfully leaving the scene of a personal injury accident); State v. Elits, 94 Wash. 2d 489, 617 P.2d 993 (1980)(restitution order in which defendant required to pay 87 separate defrauded investors held invalid because conviction included only seven counts of fraud and two counts of selling unregistered securities).

trary tendency, however, has been to allow restitution orders to stand, even though they are well beyond the technical scope of any offense of which the offender has been found guilty.[9]

Orders of restitution generally are employed in the criminal process as a condition of probation.[10] Consequently, in addressing "offense of conviction" problems, courts frequently have been forced to construe ambiguous statutes which authorize the use of probation as a criminal disposition.[11] The rules generated by this

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9 *E.g.*, People v. Lent, 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975)(restitution as to acquitted charge upheld); People v. Seda-Ruiz, 87 Mich. App. 100, 273 N.W.2d 602, 603-04 (1978)(restitution order upheld where offender had been convicted of passing three checks of nonsufficient funds even though he had been ordered to pay restitution for "many other checks"); People v. Gallagher, 55 Mich. App. 613, 223 N.W.2d 92 (1974)(restitution order requiring offender to repay cost of stolen automobile upheld even though he had been convicted of receiving only the automobile's cowl); State v. Rogers, 30 Wash. App. 653, 638 P.2d 89 (1981)(defendant who was convicted of possessing stolen property of a value less than $1500 ordered to pay restitution in excess of that amount).

An order to pay restitution may be said to exceed the offense of conviction—the offense or offenses of which the offender has been convicted, either by way of trial or guilty plea—in a number of ways. First, the ordered repayment may be for injuries caused by conduct of the offender which is related to, but not the same as, that which is a material element of the offense of conviction. *See, e.g.*, DiOrio v. State, 359 So. 2d 45 (Fla. Dist. Ct. App. 1978)(defendant convicted of unlawfully leaving the scene of an automobile accident which resulted in injury ordered to pay restitution for damages caused by accident). Alternatively, in cases where an offender had engaged in a course of conduct comprised of a series of similar acts but has been convicted of only a portion of those acts, a restitution order based upon the entire course of conduct would be beyond the scope of the offense of conviction. *E.g.*, State v. Elits, 94 Wash. 2d 489, 617 P.2d 993 (1980). This situation may arise if the additional acts which constitute additional counts or additional offenses have not been prosecuted, *cf.* State v. Scheer, 9 Wis. 2d 418, 101 N.W.2d 77 (1960)(recognizing the "common practice in Wisconsin" of prosecutor charging a defendant with the commission of "only one offense of a series"), have been dismissed, or have been adjudicated in favor of the defendant, *see, e.g.*, People v. Richards, 17 Cal. 3d 614, 552 P.2d 97, 131 Cal. Rptr. 537 (1976)(restitution as to acquitted charge improper); People v. Lent, 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975). Finally, an offense of conviction problem may present itself in cases in which an offender is ordered to pay restitution in an amount greater than the extent of damage proven at trial or admitted to in the course of pleading guilty. *E.g.*, State v. Rogers, 30 Wash. App. 653, 638 P.2d 89 (1981).

10 Goldstein, *supra* note 6, at 536; Harland, *supra* note 1, at 69. This fact had made it particularly difficult for offenders to challenge successfully orders of restitution beyond the scope of an offense of conviction because appellate courts generally have recognized broad trial court discretion in fashioning conditions of probation, *id.* at 73, and because the courts sometimes describe probation as a privilege rather than a right. *See, e.g.*, People v. Good, 287 Mich 110, 282 N.W. 920 (1938). "This defendant was not deprived of any of his rights without due process; rather he was given the additional privilege of avoiding the usual penalty of his crime by the payment of a sum of money and the observance of the other conditions attached to his probation." *Id.* at 115, 282 N.W. at 923.

11 Although statutory language authorizing the use of restitution as a condition of probation varies considerably from state to state, Harland, *supra* note 1, at 81, it is possible to distinguish states with legislation tending toward an offense of conviction limita-

interplay of legislation and case law have varied greatly from jurisdiction to jurisdiction and, in a number of instances, from case to case within a given state or judicial district.[12]

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tion, *e.g.*, FLA. STAT. ANN. § 948.03 (1)(g) (West 1975)(restitution may be ordered as a probation condition "to the aggrieved party for the damage or loss caused by [the offender's] offense . . ."), from states with legislation tending away from such a restriction, *e.g.*, WIS. STAT. ANN. § 973.09(1m)(a) (West Supp. 1983)(authorizing sentencing courts to impose any condition which is "reasonable and appropriate").

For years, the Federal Probation Act contained an offense of conviction limitation which provided that restitution was authorized only for the "offense for which conviction was had." 18 U.S.C. § 3651 (1976). Numerous federal courts have read this federal statute as strictly limiting restitutionary orders to injuries clearly within the scope of an offense of conviction. *See, e.g.*, United States v. Buechler, 557 F.2d 1002, 1008 (3d Cir. 1977)(defendant convicted of embezzling $262 could not be ordered to pay restitution of $1,989); Karrell v. United States, 181 F.2d 981, 986-867 (9th Cir. 1950)(defendant convicted of six of seventeen counts of fraud could not be ordered to pay restitution to victims of all seventeen counts); United States v. Follette, 32 F. Supp. 953 (E.D. Pa. 1940)(defendant convicted of embezzling $203 could not be ordered to pay restitution of $466). In 1982, Congress passed the Victim and Witness Protection Act, which provides, *inter alia* for the imposition of restitution as a sanction for federal offenses whenever possible. 18 U.S.C. §§ 3579-3580 (1982). This new federal provision contains no offense of conviction limitation, and one commentator has suggested that, in practice, the restriction in the old probation statute will no longer be operative. Note, *Restitution in the Criminal Process*, *supra* note 5, at 505-09.

12 *Compare* Fresneda v. State, 347 So. 2d 1021 (Fla. 1977) *and* People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957) *and* State v. Elits, 94 Wash. 2d 489, 617 P.2d 993 (1980) *with* People v. Lent, 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975) *and* People v. Seda-Ruiz, 87 Mich. App. 100, 273 N.W.2d 602 (1978) *and* People v. Gallagher, 55 Mich. App. 613, 223 N.W.2d 92 (1974) *and* State v. Rogers, 30 Wash. App. 653, 638 P.2d 89 (1981).

A good example of doctrinal inconsistency within a single state is suggested by the offense of conviction case law generated by Florida's state courts. In the only Florida Supreme Court opinion to consider the offense of conviction issue, the court held that "a condition of probation requiring a probationer to pay money to, and for the benefit of, the victim of his [or her] crime cannot require payment in excess of the amount of damage the criminal conduct caused the victim." *Fresneda*, 347 So. 2d at 1022. Despite the relative clarity of this holding, other appellate courts in Florida subsequently have developed a variety of rationales for upholding restitution orders which encompass injuries far beyond the scope of the offense of conviction. A court in the Second Judical District of Florida, for example, upheld a restitution condition of probation which went far beyond the offender's formal conviction, because the offender had agreed to pay the amount as part of a negotiated guilty plea. In finding the order proper, the appellate court reasoned that the offender's plea constituted a voluntary and knowing "waiver" of the "protections" of the probation statute found by the *Fresneda* court to prohibit expansive restitutionary sentences. Pollock v. Bryson, 450 So. 2d 1183, 1186 (Fla. Dist. Ct. App. 1984). In another case, a restitution order beyond the offense of conviction was upheld on the ground that the injury to be repaid had occurred *during* the offender's commission of the offense of which he had been adjudicated guilty. *Fresneda* was distinguished because there the crime of conviction had taken place *after* the damages which formed the basis for the restitution order had occurred. J.S.H. v. State, 455 So. 2d 1143, 1146 (Fla. Dist. Ct. App. 1984). Finally, courts in Florida's Fifth Judicial District have allowed restitution orders beyond the scope of an offense of conviction on the basis of a proximate cause standard and on the basis of a vague reasonableness standard. In one case, the offender had been convicted of a battery yet had been ordered to pay restitu-

This doctrinal irregularity has been exacerbated by the posture in which these cases have been presented. In each instance, the court was asked to reconcile the description of the offender's guilt generated by the adjudicatory process with an alternative description of the offender's guilt, termed the offender's "actual" offense.[13] The resulting gap between the offender's offense of conviction and his or her actual offense has been said to result from two sources.[14] First, the wrongdoing described by the offense of conviction often is less extensive than the offender's actual guilt because procedural and evidentiary impediments may restrain the scope of the adjudicatory process.[15] Second, a gap may exist due to the exercise of prosecutorial discretion not to charge certain counts or offenses or to accept a plea to a lesser charge as part of a negotiated guilty plea.[16]

Courts presented with an offense of conviction problem, therefore, are faced with what appears to be a Hobson's choice. On the one hand, it seems clear that victims fare better when their recov-

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tion for damages to a motor vehicle. The court, in upholding the restitution order, maintained that the *Fresneda* offense of conviction limitation did not apply. M.A.R. v. State, 433 So. 2d 29, 30 (Fla. Dist. Ct. App. 1983). In another case, where an offender had entered guilty pleas to four out of twenty counts of forgery, uttering a forgery, and fraud, the court, without even a passing reference to *Fresneda*, upheld a restitution order for all twenty counts. Rose v. State, 434 So. 2d 1014, 1015 (Fla. Dist. Ct. App. 1983).

It is significant to note that the *Fresneda* court, like the Michigan Supreme Court in People v. Becker, 349 Mich. 476, 84 N.W.2d 833 (1957), held that restitution may be ordered for any injury "caused" by the offense of conviction. *Id.* at 486, 838. While it seems plain that the causation analysis implied by *Becker* and *Fresneda* was meant as a tool for determining what losses, if any, are within the scope of the offense of conviction, more recent decisions have employed a causation analysis in order to uphold restitutionary obligations reaching far beyond the offense of which the offender had been adjudicated guilty. *E.g.*, M.A.R. v. State, 433 So. 2d 299 (Fla. Dist. Ct. App. 1983); People v. Pettit, 88 Mich. App. 203, 276 N.W.2d 878 (1979). It is one thing to conclude that restitution may be ordered for an injury which directly resulted from the conduct which forms part of the offense of conviction. It is quite another to conclude that restitution may be required for any injury which is in any way causally connected to the conduct for which a conviction has been had. *Id.* at 207-09, 881. In recognition of this distinction, some courts in other states have examined the material elements of the offense of conviction in order to determine whether a particular injury is within the scope of the offense of conviction. *E.g.*, State v. Hartwell, 38 Wash. App. 135, 684 P.2d 778, 780 (1984)(restitution order found improper because the victim's injuries were not caused by "the precise event that is the basis for the charge" (quoting State v. Bedker, 35 Wash. App. 490, 493, 667 P.2d 1113 (1983))).

13 *Cf.* Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550 (1981)(discussing and criticizing "real offense sentencing," whereby an offender is sanctioned according to his or her actual actions rather than according to that of which he or she was found guilty).

14 Note, *Restitution in the Criminal Process*, *supra* note 5, at 510.

15 *Id.*

16 *Id.*, at 510-11. *See also* Goldstein, *supra* note 6, at 537-38.

eries are not restricted by an offense of conviction limitation.[17] On the other hand, an order of restitution which goes beyond adjudicated guilt may render the adjudicatory process an empty formality which plays little or no role in delimiting consequent sanctions.[18] Professor Goldstein has suggested that the resolution of this problem in any particular case should depend on the court's understanding of the purpose that restitution is thought to serve.[19] According to Goldstein, if the court believes that restitution is an "equitable remedy" meant to serve victims' interests, the court should allow restitution beyond the scope of the offense of conviction.[20] If, on the other hand, the court understands restitution as a "punishment" meant to serve the goals of rehabilitation, deterrence or retribution, the extent of restitution should be limited to the offense of which the defendant has been convicted.[21]

Other writers have addressed this question of purpose more systematically, and have made some tentative, albeit unsatisfying, suggestions for the use of restitution as a criminal sanction. One group has put forward a "restitutionary theory of justice." This approach focuses upon the victim's right to recover his or her losses as the principal factor in determining criminal liability.[22] This theory draws upon historical data, suggesting that tribal cultures and other pre-feudal peoples made no distinction between criminal sanctions and civil remedies, to support the view that criminal activity produces a predominantly private harm.[23] The community's interest in the criminal law typically is de-emphasized,[24] and the notion that society alone suffers as a consequence of criminal activity is attacked as "fiction."[25] The traditional distinction between criminal and civil

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17 Note, *Restitution in the Criminal Process*, *supra* note 5, at 510-11.

18 *Cf.* People v. Lent, 15 Cal. 3d 481, 486-87, 541 P.2d 545, 548, 124 Cal. Rptr. 905, 908 (1975)(discussing defendant's argument that "consideration anew of charges of which he has been acquitted reduces the jury verdict 'to a sham' ").

19 Goldstein, *supra* note 6, at 536.

20 *Id.*

21 *Id.*

22 *See* Barnett & Hagel, *Assessing the Criminal: Restitution, Retribution, and the Legal Process*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 1 (1977). "Restitution recognizes rights in the victim, and this is a principle source of its strength. The nature and limit of the victim's right to restitution at the same time defines the nature and limit of the criminal liability." Barnett, *supra* note 3, at 367.

23 Barnett, *supra* note 3, at 367.

24 Barnett & Hagel, *supra* note 22, at 10.

25 Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 34 (Supp. 1984). *See also* Silving, *Compensation For Victims of Criminal Violence—A Roundtable*, 8 J. PUB. L. 236, 252 (1959)(arguing that the "corporate veil" of expressions such as "community" and "public interest" must be pierced).

law characteristic of Western jurisprudential thinking[26] routinely is dismissed as an artificial construct developed in Western Europe during the High Middle Ages.[27] In these terms, the use of restitution is said to be justified because it redirects the system's attention to the true party in interest—the individual victim[28]—and, in the process, serves to ameliorate an excessively rigid dichotomy between criminal and civil law.[29] Specifically, this theory of restitution, by stressing the central role of the victim and the reparative function of law, allows the conclusion that restitution should be fixed according to the actual injury which an offender has caused.[30]

A second theory of restitution focuses on the penal and/or rehabilitative potential of the practice.[31] Here again, the overlapping objectives of criminal and civil law are stressed, and the traditional distinction between the two spheres is criticized.[32] Advocates of this approach have, nevertheless, based their support for the use of restitution on the ground that it furthers the existing objectives of the criminal justice system.[33] They argue that employing restitution as

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26 Perhaps the classic treatment of the crime-tort issue is Jerome Hall's two-part article in the Columbia Law Review. In the first part of this article, Hall traces the crime-tort dichotomy to Lord Mansfield's famous statement that "there is no distinction better known than the distinction between civil and criminal law." Atcheson v. Everitt, I Cowp. 391 (1775). Hall next discusses Blackstone's view that criminal law and tort law are separate legal categories because the former involves harm to the "whole community," while the latter involves injuries which are "immaterial to the public." Hall, *Interrelations of Criminal Law and Torts*, 43 COLUM. L. REV. 753, 757, (1943)(quoting 3 W. BLACKSTONE, COMMENTARIES #2; 4 W. BLACKSTONE, COMMENTARIES #5). Interestingly, Hall also discusses the views of Bentham and Austin, two early supporters of criminal restitution, who both rejected the traditional crime-tort dichotomy, although for somewhat different reasons. *Id.* at 758-60.

27 S. SCHAFER, *supra* note 2, at 3-12; Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in Modern Correctional Process*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 152, 154 (1970).

28 Barnett, *supra* note 3, at 367.

29 Goldstein, *supra* note 6, at 531.

30 Barnett, *supra* note 3, at 379-80. *See also* Hofrichter, *Techniques of Victim Involvement in Restitution*, in VICTIMS OFFENDERS AND ALTERNATIVE SANCTIONS 103 (1980)(asserting that different justifications for the use of restitution produce different levels of recovery for victims).

31 Galaway, *Restitution as an Integrative Punishment*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 331 (1977); S. SCHAFER, *supra* note 2, at 123-29.

32 S. SCHAFER, *supra* note 2, at 119, 122

> The assertion that restitution is inapporpriate as a criminal sentence is unconvincing because it relies on too rigid a dichotomy between criminal and civil law. The characteristics and underlying objectives of these two systems are not markedly distinct; on the contrary, they overlap to a significant extent . . . .

Note, *Victim Restitution*, *supra* note 5, at 935-36.

33 *E.g.*, Casson, *Restitution: An Economically and Socially Desirable Approach to Sentencing*, 9 CRIM. & CIV. CONFINEMENT 349, 353-54 (1983)(restitution can further interests of deterrence); Keve, *Therapeutic Uses of Restitution*, in OFFENDER RESTITUTION IN THEORY AND

a criminal sanction assists the offender in understanding the consequences of his or her act,[34] affords him or her the opportunity to engage in "constructive self-expression,"[35] and stimulates his or her reintegration into the community.[36] In addition, general deterrence[37] is said to be served and retribution exacted[38] through the use of penal restitution. Because the practice is justified as furthering the community's interest in crime control and offender rehabilitation,[39] advocates of this approach do not insist that the amount of

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ACTION 59, 60-64 (1978)(restitution can assist in rehabilitating offender); McAnany, *Restitution as Idea and Practice: The Retributive Prospect*, in OFFENDER RESTITUTION IN THEORY AND ACTION 15, 24-27 (1978)(restitution may serve as a means of exacting retribution).

Stephen Schafer, a writer who has made a considerable contribution to the restitution literature, has proposed that restitution be used as a form of punishment rather than as an alternative to punishment. He has suggested that the practice provides a mechanism for integrating the multiple purposes of criminal sanctioning, which he identifies as: specific retribution, which is the expression of an individual victim's feelings of vengeance; general retribution, which is the expression of the community's sense of moral and legal order; and rehabilitation, which involves reform of the offender. S. SCHAFER, *supra* note 2, at 119-22.

Schafer's reading of the historical and anthropological data, although similar to that reported by advocates of the "restitutionary theory of justice," differs in that he understands the ancient practice of restitution to have involved an element of punishment. *See infra* note 70. He reaches this conclusion by arguing that when the payment of restitution approach was employed, it provided the victim not only with material compensation but also with an opportunity to express vengeance. S. SCHAFER, *supra* note 2, at 120. As the state gradually took over for the victim, *see infra* text accompanying notes 71-84, Schafer argues, general retribution absorbed specific retribution, even though the punishment imposed by the state was intended to offer the victim "spiritual retribution." S. SCHAFER, *supra* note 2, at 120. The replacement of material restitution for spiritual restitution in modern criminal law is justified, therefore, because it would re-establish the nexus between an individual victim's injury and the community's injury. *Id.* at 122.

34 Dragger, *Restitution, Punishment and Debts to Society*, in VICTIMS, OFFENDERS, AND ALTERNATIVE SANCTIONS 11 (1980). *See also* ARIZ. REV. STAT. ANN. §§ 13-603C, 13-702(t) (West Supp. 1984); Huggett v. State, 83 Wis. 2d 790, 798, 266 N.W.2d 403, 407 (1978)(use of restitution as a condition of probation may teach offender to consider the consequences of his or her conduct).

35 Eglash, *Creative Restitution: Some Suggestions for Prison Rehabilitation Programs*, 20 AM. J. CORRECTIONS 20, 21 (1958).

36 *Id.* at 21-22. *See also* COLO. REV. STAT. §§ 17-28-101(2), 16-11-204.5 (1977 & Supp. 1985).

37 Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 252 (1965); Title, *Restitution and Deterrence: An Evaluation of Compatibility*, in OFFENDER RESTITUTION IN THEORY AND ACTION 17 (1978); Note, *Victim Restitution*, *supra* note 5, at 938-39.

38 Note, *Victim Restitution*, *supra* note 5 at 939. *See also* McAnany, *supra* note 33 (suggesting a partial fit between retributive theory and restitution).

39 Incapacitation is sometimes included with rehabilitation, deterrence and retribution as a goal of criminal sanctioning. *See generally* Greenberg, *The Incapacitative Effect of Imprisonment: Some Estimates*, 9 L. & SOC. REV. 541 (1975). Few if any claims, however, have been made with respect to the incapacitative potential of restitution.

For a general overview of the evolving debate among scholars and policymakers regarding the proper aims of sentencing in the criminal process, see F. ALLEN, THE DE-

restitution ordered by a criminal court correspond to the actual injury suffered by the victim; it is contemplated that many victims may receive only partial compensation from the offender.[40]

For two reasons, these theories of restitution are unlikely to be of much help in guiding the development of doctrine in this area. First, they fail to account for the complementary relationship which exists between the adjudicatory and sanctioning phases of the criminal process. In addition, they do not comprehend the larger institutional[41] role which each plays in creating social cohesion. While repairing victims' injuries and punishing offenders' wrongs are important public interests, this article will demonstrate that the primary function of the criminal law in both the guilt-finding and sentencing stages is more ideological[42] in nature.

CLINE OF THE REHABILITATIVE IDEAL 7-10 (1981); McAnany, *supra* note 33, at 17-20. With respect to the relationship between that debate and the changing contours of the restitution discussion, compare Symposium, *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 191 (1959), and Symposium, *Compensation to Victims of Crimes of Personal Violence: An Examination of the Scope and Problem*, 50 MINN. L. REV. 211 (1965), with Symposium, *Victim's Rights*, 11 PEPPERDINE L. REV. 1 (1984). *See also* Keve, *supra* note 33, at 59 (reporting that by 1977 restitution projects were "reluctant even to suggest rehabilitation of the offender as one of the purposes of the programs").

40 Barnett describes this approach as follows:

> Punitive restitution is an attempt to gain the benefits of pure restitution . . . while retaining the perceived advantages of the paradigm of punishment . . . . The amount of payment is determined not by the actual harm but by the ability of the offender to pay.

Barnett, *supra* note 3, at 364 (emphasis omitted).

A third view of restitution is based upon practical necessity rather than theory. Without relying upon a particular reading of historical or anthropological materials or upon claims with respect to the rehabilitative, deterrent or retributive potential of the practice, adherents of this view assert that the use of restitution is justified as a practical and efficient means of repaying the injuries suffered by crime victims. Essential to this point of view is the observation that neither tort remedies nor public compensation currently provide adequate relief to persons victimized by criminal offenses. *See generally* Harland, *supra* note 1, at 120; Goldstein, *supra* note 6, at 532.

41 Roscoe Pound provided a useful definition of the term "institution." In his view, institutions are "things established with a continuous existence apart from any persons for the time being, certain of whose activities are organized without their personalities being included, and setting up organs of authority and procedures of their own . . . ." R. POUND, SOCIAL CONTROL THROUGH LAW 9 (1942). *See also* R.M. MACIVER, COMMUNITY 157-61 (1928)(describing the role of institutions in "promoting social solidarity").

42 The terms "ideology" and "ideological," as used herein, refer to the combined concepts of "particular ideology" and "total ideology" as formulated by Karl Mannheim. *See generally* K. MANNHEIM, IDEOLOGY AND UTOPIA 9 (1936). Mannheim used these terms to refer to the created relationship of individuals to their collective. Hence, particular ideology "means that opinions, statements, propositions, and systems of ideas are not taken at their face value but are interpreted in the light of the life-situations of the one who expresses them." *Id.* at 56. Total ideology, in turn, refers to the "characteristics and composition of the total structure of the mind" of a given group of people in a given epoch. *Id.* Taken together, the notion is that the ideas expressed by an indi-

It is tempting to treat these two stages of the criminal process as separate social phenomena, with adjudication understood as serving some sort of socializing or educative function and sentencing an instrumental and largely coercive role. The thesis of this article, in contrast, is that both stages must be seen as coordinate pieces of a larger institutional structure which operates in contemporary society to create a sense of community.[43] This analysis takes as its starting premise the idea that "the internal, voluntary motivation of the individual to conform to group norms" is a more effective means of obtaining social cohesion than is coercive social control.[44] Voluntary social control, in turn, depends upon the existence of a general perception among community members that they share some common characteristic and some common social space.[45] Building upon these premises, this article illustrates that criminal adjudication and sentencing work together to create and reinforce an ideology in

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vidual in a social group are "an outgrowth of the collective life of which he [or she] partakes." *Id.* at 57.

43 *Cf.* F. TONNIES, COMMUNITY AND SOCIETY (C. Lommís trans. 1963).

44 Roucek, *The Concept of Social Control in American Sociology*, in SOCIAL CONTROL FOR THE 1980s 11, 12 (J.S. Roucek ed. 1978).

Significant recent attention has been given to the proposition that the regular use of restitution to make crime victims whole would have the effect of reducing the public's distrust of and alienation from the criminal justice system. It is thought that this effect, in turn, would tend to increase the rate of crime reporting and would encourage witness cooperation in prosecutions. Goldstein, *supra* note 6, at 518-20; Hudson, *supra* note 25, at 29, 62. Although this attempt to link the victim's interest in restitution to the community's interest in crime control is logical and appears to be a compelling justification for the increased use of restitutive sanctions, a wider view of the relationship between the criminal justice system and the "crime problem" in contemporary society renders it inadequate. The United States Department of Justice's statistics, for example, indicate that less than twenty percent of all offenses known to the police in 1981 were cleared by arrest. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS FOR 1983 451, 453 (1984). Therefore, even in a hypothetical world of full reporting and full cooperation by crime victims, the vast majority of criminal offenses would go unsolved and unsanctioned. Rather than understanding the criminal justice system as an institution designed to control crime by responding to individual incidents of wrongdoing, the more accurate view is that the criminal process is but one of a number of social control institutions typically in place in any community, functioning to control crime by "suggestive" influence. Roucek, *supra*, at 121. *See also* Kittrie, *Symbolic Justice—The Trial of Criminal Cases* (Paper presented to Indiana Lawyers Committee) (1978), *reprinted in part in* N. KITTRIE & E. ZENOFF, SANCTIONS, SENTENCING AND CORRECTIONS 182 (1981)(courts offer "opportunity for the stylized enactment of selected performances").

45 *See generally* K. ERICKSON, WAYWARD PURITANS 8-9 (1966). "The people of a community spend most of their lives in close contact with one another, sharing a common sphere of experience which makes them feel that they belong to a special 'kind' and live in a special 'place'." *Id.* at 9. *Cf.* Roucek, *supra* note 44, at 12 ("internal control is especially effective in a homogeneous society characterized by consensus as to norms of conduct").

which autonomous individuals are understood as relevant subjects for the ascription of responsibility.

This ideology of individuality, like all ideologies, serves a definitional function and a "mapping" function.[46] By creating autonomous individuals and representing them to the community as reality, the criminal process teaches each community member to view himself or herself as "the author of his [or her] actions."[47] This definitional work is essential in ordering satisfactory relationships in contemporary society, because it produces the shared common characteristic of individual free will, which is a prerequisite to the construction of clear communal boundaries.

The ideology of individuality also serves a mapping function.[48] Communities not only exist in a particular geographical space; they also carve out a common social space bounded by an invisible sense of belonging.[49] In contemporary society, it is at the level of the conscious individual—the autonomous subject endowed with free will—that this process of locating communal boundaries occurs. As Jameson writes, the ideology of individuality is the "indispensable mapping fantasy by which the individual subject invents a 'lived' relationship with the collective systems which otherwise by definition would exclude him [or her] . . . ."[50]

Of course, application of this theory of criminal adjudication and sentencing is not limited to problems surrounding the use of restitution in the criminal process. The theoretical literature which has grown up in the restitution area, however, does provide a singular opportunity for the elaboration of some of these ideas, because it raises questions of purpose in a larger cultural context, and because it presses upon problems concerning the relationship between guilt-finding and sanctioning. Consequently, this article begins with a consideration of some of the most provocative work which has been undertaken concerning restitution, in order to generate further observations about the ideological functioning of the criminal process. Section II examines the historical claim, advanced by advocates of the "restitutionary theory of justice"— that tribal societies drew no distinction between private and public wrongs—and presents additional data which suggest that a tribal law of crimes did exist. Section III takes a closer look at the punishment of criminal conduct in

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46 Jameson, *Imaginary and Symbolic in Lacan: Marxism, Psychoanalytic Criticism, and the Problem of the Subject*, 55/56 YALE FRENCH STUD. 338, 394 (1977).

47 R. Coward & J. Ellis, Language and Materialism 77 (1978).

48 Jameson, *supra* note 46, at 394.

49 K. Erickson, *supra* note 45, at 10.

50 Jameson, *supra* note 46, at 394.

tribal societies and concludes that this social practice served the function of creating and reinforcing an ideology of the group, which mirrored the boundary-defining mechanisms there in place.[51] This institutional analysis of crime in tribal society is undertaken in order to create a model which then is employed to illustrate the role that criminal law plays in contemporary Western society. Section IV returns to the question of restitutionary sentencing as well as the offense of conviction problem. Based on the ideas developed earlier in the article, it argues that an order of restitution must reflect an offender's offense of conviction, because the formal process of fixing guilt ceases to be an effective ideological ritual[52] which serves the ordering requirements of the community when its description of the offender's responsibility is replaced by some alternative description of the offender's "actual" guilt. The integrity of the adjudicatory ceremony, in short, lies in its capacity to articulate the nature of the offender's freely willed conduct. This ceremony is undermined when a court fashions a sentence which goes beyond the offender's adjudicated guilt.

HISTORICAL BASES OF THE "RESTITUTIONARY THEORY OF JUSTICE"

Those writers who have adopted, in whole or in part, a "restitutionary theory of justice" have turned to some version of the historical account presented below in order to show that the 'natural'[53] response to offensive behavior has always been to order offenders to repay their victims.[54] They proffer historical data in support of their claims that contemporary Western society's dual legal system was forged from an earlier set of legal institutions in which no distinction had yet been drawn between criminal sanctions and civil reme-

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[51] Although much of the information in Section III comes from anthropological work on contemporary cultures, the past tense is employed for the sake of uniformity. The author acknowledges that this decision mirrors the tendency of western writers to think of extant stateless or simple societies as anachronistic. The truth, of course, is that the progression of cultures in western history from simple, stateless societies into increasingly complex social organizations is far fron universal.

[52] For a discussion of the role of ritual in social organization, see generally THE ROOTS OF RITUALS (J. Shaughnessy ed. 1973).

[53] In their fascinating anthropological survey of restitution, Nader and Combs-Schilling have pointed out the tendency, common among many commentators, to make erroneous generalizations in order to support assertions that one or another cultural response to antisocial behavior is "universal" and hence "natural." The real value of historical and anthropological studies, they argue, is to bring into sharper focus cross-cultural similarities in the functions and purposes which restitution has been called upon to serve. Nader & Combs-Schilling, *Restitution in Cross-Cultural Persepctive*, in RESTITUTION IN CRIMINAL JUSTICE 27 (1977). *See also* S. SCHAFER, *supra* note 2, at 3 (making a somewhat more modest claim with respect to the importance of the historical analysis).

[54] *See, e.g.*, Silving, *supra* note 25, at 236.

dies.[55] These writers argue that the growth of a separate criminal law, centered around the fictive interests of the collective, was an unnecessary consequence of the rise of nation-states and has deprived unfairly the victim of his or her rightful place in the process.[56] From this perspective, the practice of restitution is justified as a means of reinserting the victim's interest into the process which society has constructed to respond to criminal behavior.[57]

A. THE "RESTITUTIONARY THEORY OF JUSTICE" DEFINED

The historical account which is at the core of the "restitutionary theory of justice" hinges on three basic assertions. First, pre-feudal societies treated all instances of harm as a private matter and made no distinction between criminal and civil remedies. Second, when the two spheres began to diverge, punishment replaced restitution as the primary consequence of what was termed "criminal" behavior. Third, accompanying the development of this new penal focus for the "criminal" law were a number of alternative justifications for proceeding against offenders, which were based upon false notions of the community's interest.

These accounts generally start with an examination of the ways in which "primitive" or tribal societies dealt with antisocial behavior. In tribal cultures, an individual was understood as synecdochically represented by his or her family.[58] When an offense was committed, all of the victim's kin were understood to have been victimized, and all of the offender's relatives were held responsible.[59] This group orientation was central in determining responses to offensive behavior, because it made little sense to speak about the blameworthiness of an individual when responsibility for his or her act attached to a number of persons who, though related to the offender, had nothing to do with the commission of the act. The concern, therefore, was not with establishing the offender's moral responsibility, but rather insuring that the victimized family received some equivalent satisfaction.[60] Significantly, the process of exacting

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55 *See, e.g.*, Goldstein, *supra* note 6, at 529.

56 Silving, *supra* note 25, at 236-37.

57 *See, e.g.*, Goldstein, *supra* note 6, at 529-32.

58 E. ZIEGENHAGEN, VICTIMS, CRIME AND SOCIAL CONTROL 34 (1977).

59 Jacob, *The Concept of Restitution: An Historical Overview*, in RESTITUTION IN CRIMINAL JUSTICE 45 (1977); Silving, *supra* note 25, at 237.

60 The kinship system not only operated in a manner that made one's group responsible for individual behavior but also was based upon different objectives than those that exist in contemporary society. Today, action taken against a criminal by the police and courts has as its objective the suppression of crime, but in the kinship system, highest priority was placed on satisfaction of the victim and his kin derived from extracting vengeance from the perpretrator and his kin.

satisfaction from the offending clan, the "blood-feud,"[61] was not an embryonic form of communal punishment; it was, we are told, a matter of familial revenge.[62]

This process of providing satisfaction to victimized families eventually was routinized. Some cultures adopted a dueling method for settling disputes which required some form of a regulated fight between representatives of the two families.[63] Other societies developed elaborate ceremonies in which members of the offending clan voluntarily submitted to a throwing of spears or a hacking with knives.[64] In cultures that had evolved to the point of generating surplus commodities, the blood-feud could be resolved by way of "composition," which involved the transfer of valued goods from the offending clan to the victimized family.[65] Regardless of the form, the injury inflicted upon the offender and his or her kin reflected the damage sustained by the victim and his or her family. In this scheme, the moral responsibility of the individual offender was of no consequence.[66]

As the exchange of goods between kinship groups became an acceptable alternative to violence, two additional features characteristic of modern legal institutions began to emerge. The first involved the elaboration of regularized rules governing the process of composition.[67] Initially a function of custom, these rules gradually evolved into stable procedural and substantive codes.[68] Both the primacy of restitution and the emphasis on consequence rather than culpability were characteristics of the process of composition from its inception and were carried over into these early attempts at codification.[69] The object of these rudimentary documents was to set up a mechanism by which individual harms could be translated into monetary equivalents. Rather than standing as statements of some

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E. ZIEGENHAGEN, *supra* note 58, at 35.

61 Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. RICH. L. REV. 71, 71-72 (1970).

62 *Id.*

63 E. ZIEGENHAGEN, *supra* note 58, at 36.

64 A.S. DIAMOND, THE EVOLUTION OF LAW AND ORDER 22 (1951).

65 W. SEAGLE, THE HISTORY OF LAW 42 (1946). Stephen Schafer has argued that the growth of composition was correlated with the development of notions of private property. S. SCHAFER, THE VICTIM AND HIS CRIMINAL 4-5, (1968).

66 E. ZIEGENHAGEN, *supra* note 58, at 36; Silving, *supra* note 25, at 238.

67 Barnett, *supra* note 3, at 351. *See also* E. ZIEGENHAGEN, *supra* note 58, at 45.

68 A.S. DIAMOND, *supra* note 64, at 137-53; H. MAINE, ANCIENT LAW 14 (16th ed. 1897).

69 "Quite unlike the laws found today in most 'civilized' communities, the laws of primitive societies contained monetary evaluations for most offenses as compensation to the victim, not as punishment of the criminal." Laster, *supra* note 61, at 72 (footnotes omitted).

collective morality, it is claimed that the codes served a utilitarian function.[70]

The second development of consequence was the appearance of a central authority figure.[71] With the advent of regularized rules governing composition, there necessarily appeared a keeper of the rules. This figure was an institutional actor responsible for insuring that the participants adhered to prearranged procedures.[72] The involvement of this figure of central authority began an evolutionary process in which the natural tension between the victim's interests and those of the mediating institution ultimately were resolved.[73] It is the final resolution of this tension or, more precisely, the complete substitution of the institution's interests for the victim's which forms the core of the historical tale reported by advocates of this theory of restitution.[74]

At first, the rule keeper's role was entirely facilitative. If the parties to the dispute were able to work out a private settlement or if

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[70] An argument is sometimes made that, because codification is a social enterprise, the restitutionary sanctions included in these early codes necessarily served the collective function of punishment as well as the private goal of victim restitution. In fact, we are told that these early legal documents were understood as consensual guidelines rather than positive rules. Laster, *supra* note 61, at 73. If, for any reason, the need for restitution was obviated prior to any formal proceeding, those proceedings would be suspended and the matter would be at an end. The codes came into existence to insure an orderly and consistent transfer of goods subsequent to the commission of an offense. Once that transfer had taken place or once the pressure for such a transfer disappeared, no further societal interest remained. H. OPPENHEIMER, THE RATIONAL OF PUNISHMENT 162 (1913)(the state "did not include among its functions the repression of wrongs between individual and individual, between family and family, between clan and clan.").

On the other hand, Schafer has identified certain ancient codes—including the law of Moses and the Code of Hammurabi—which required the offender to pay restitution in multiples of the value of the damage done (*e.g.*, fourfold restitution for stolen sheep). S. SCHAFER, *supra* note 2, at 4. He takes this as evidence that "the obligation of payment . . . was enforced not in the interests of the victim, but rather for the purpose of increasing the severity of the criminal's punishment." *Id.* The apparent conflict between these positions is diminished, however, once one realizes that "punishment," in Schafer's view, included the victim's interest in vengeance. *See supra* note 33. Hence, he concludes that these codes illustrate "the common origin of punishment and victim compensation." Schafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV. 55, 56 (1970).

[71] Diamond reports that even in the first stage of economic development which he has identified and labelled as the "Food-Gathering" stage, *see infra* note 91, the "old men of the tribe would sometimes take it upon themselves to mediate feuds between kinship groups." A.S. DIAMOND, *supra* note 64, at 22.

[72] "Among the more advanced peoples of the [second agricultural grade] . . . the peacemaking activity is more and more exercised by the chief, with the assistance of his elders, and so we reach the threshold of a system of courts of trial." *Id.* at 43.

[73] "The decline of the role of the individual victim and his kin is, in many respects, the history of the rise of the state and its law." E. ZIEGENHAGEN, *supra* note 58, at ix. *See also* Jacob, *supra* note 59, at 46-47.

[74] *See, e.g.*, Barnett, *supra* note 3, at 352-54.

the injured party preferred to continue the blood-feud, there would be no invocation of the rules and no participation by the figure of central authority.[75] Little by little, however, the rule keeper's intervention increased, thereby transforming the nature of the process.[76] Not only were settlement negotiations gradually taken over and directed by the central authority figure, but elaborate tables were developed containing pre-established amounts to be awarded the victim.[77] Once this award system was implemented, it was only a matter of time before the proceeds were being shared between the actual victim of the offense and the previously neutral rule keeper.[78]

Eventually, as the sovereign authority of the rule keeper increased, his or her share of the composition payment absorbed the whole amount.[79] As a consequence, the creation of a new interest was seen to flow from the commission of a "criminal" act. The offender was now subjected to a proceeding under the rules not for the purpose of assisting the victim in recovering his or her loss, but rather to vindicate the interest of the sovereign.[80] In fact, this newly created state interest so eclipsed the prior interest of the individual victim that a private attempt on the part of that victim to obtain what had previously been his or her proper compensation—in short, to engage in composition—was itself held to constitute a criminal offense.[81]

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[75] In fact, many of the early codes explicitly provided the victimized clan with a choice of remedies. They could either accept composition or continue the blood-feud. E. ZIEGENHAGEM, *supra* note 58, at 44-45.

[76] *Id.* at 58-61; Jacob, *supra* note 59, at 47. *But cf.* Barnett, *supra* note 3, at 352 (shift from restitution to punishment was "sudden and rapid").

[77] *See, e.g.*, A.S. DIAMOND, *supra* note 64, at 148-51 (discussing the Code of Ethelbert, which was the first of the great English codes). "The Code of Ethelbert contains an absurdly elaborate and orderly tariff of forty clauses specifying the sum payable for every kind of injury, beginning at the top of the body with the wrong seizing of a man by the hair, and ending with the loss of a toe nail." *Id.* at 148. *See also* Jacob, *supra* note 59, at 47.

[78] The portion of the compensation payment which was claimed by the central authority figure is variously described as a *wite* or fine, Laster, *supra* note 61, at 75, or as a commission payable to the mediator in exchange for his or her assistance in administering the process. Barnett, *supra* note 3, at 353 (quoting H. OPPENHEIMER, *supra* note 70, at 162-63).

[79] S. SCHAFER, *supra* note 2, at 6-7; W. TALLACK, REPARATION TO THE INJURED 11 (1900); Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 228 (1965).

[80] *See* Laster, *supra* note 61, at 79.

[81] Jacob, *supra* note 59, at 47. Blackstone explains that the crime of *theftbote* was committed when an injured party agreed to private restitution in exchange for a promise not to prosecute. 4 W. BLACKSTONE, COMMENTARIES 133 (1826).

The substitution of a central interest for a private interest as the primary concern of the criminal law is said to have required a legitimating rationalization. Helen Silving has identified such a rationalization through comparison with the practices of the tribal cul-

According to the advocates of this historical reading, the gradual substitution of the sovereign's interest for the private interest of the victim took place in the context of a second evolutionary process. This process involved the separation of a consideration of the antisocial act's consequences from a consideration of the moral characteristics of the offender. The former had been a primary concern in a system which held restitution to victims as its goal; the latter was now the focus of a set of rules concerned primarily with guilt and punishment.[82] On a formal plane, this distinction was implemented by a division of the law into criminal and civil spheres.[83] In practice, it meant that the individual victim had no significant role to play within the criminal law and was relegated to seeking redress by way of a civil suit for damages.[84]

A final change reported was the replacement of punishment for restitution as the goal of the system.[85] This shift in function, while distinct from the change of actors, owed its theoretical foundation

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tures described above. Silving, *supra* note 25, at 237. She has argued that, just as the tribal victim's interest was served by and through his or her family or kinship group, the individual victim under this new social order also was led to believe that his or her interests were properly vindicated by and through the activities of the state. *Id.* Silving further argues that this rationalization is sheer fiction because the nature of this new social order was such that no synecdochical relationship similar to that which existed in the earlier society could possibly operate.

> To the individual the old system of identification with the group offered certain psychological compensations. In exchange for his loss of individual identity, he gained the inner security which belonging to the group afforded. His loss was thus actually repaired by indemnification of the group. Even in the event of his death, he continued 'living' in and by the group. The feudal state at first purported to give some similar assurance to the loyal vassal. But with the rise of the absolute state, the old primitive type of group bond disappeared. The parental status of the monarch was obviously fictitious . . . . Obviously, indemnification for the individual loss was not meaningful in a sense even remotely comparable to the one time indemnification of the tribe for such loss.

Id.

82 Silving, *supra* note 25, at 238.

83 *See* Goldstein, *supra* note 6, at 530. At any point in history, it is possible to identify cultures at varying stages along an evolutionary path of cultural and economic development. *Cf.* A.S. DIAMOND, *supra* note 64, at 4-5 (setting forth the need for some form of analytic framework by which social development can be described and studied). The divergence of criminal and civil law is generally fixed in the English law of the twelfth century. S. SCHAFER, *supra* note 2, at 2-12. It is argued that the introduction of feudalism, A.S. DIAMOND, *supra* note 64, at 180-87; Laster, *supra* note 61, at 75, the growth in the secular authority of the church, Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages:* "Rei Publicae Interest, Ne Crimina Remaneant Impunita", 1984 U. ILL. L. REV. 577, and the rediscovery of Roman law by scholastic lawyers, 2 F. POLLACK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 460 (1895), laid the foundation for this important historical shift. *See generally* Barnett *supra* note 3, at 352. *But see also* Fraher, *supra* (questioning whether a renewed interest in Roman law really did play a role in the development of a separate criminal law).

84 *See generally* S. SCHAFER, *supra* note 2, at 7-8, 117.

85 Laster, *supra* note 61, at 77.

to the aggrandized role of the state in the evolving criminal law. Even if the proffered "fiction" that the victim's injury belonged to the community had been accepted,[86] the fact remained that the sanction imposed did not in any obvious fashion make the community whole in the manner in which restitution repaired the harm done to an individual victim.[87] As a consequence, a variety of alternative justifications for criminal sanctioning necessarily developed. Some held that punishment served to maintain order, a public interest of clear import in these developing cultures.[88] Others argued that a need to deter anti-social behavior was at the core of the sovereign's growing concern with punishment.[89] Whatever the justification, however, the final result was the conspicuous substitution of punishment for restitution as the designated work of criminal law.

B. EXISTENCE OF PUBLIC WRONGS

The claims made by advocates of the "restitutionary theory of justice" represent a misreading of the available historical and anthropological data.[90] A.S. Diamond reports that among peoples at the first stage of economic development he has identified, the food-gathering tribes,[91] a class of "public wrongs"[92] typically existed

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86 In Medieval Europe, we are told, the kings and lesser feudal lords took an increasing interest in local disputes not principally to help preserve the peace, but rather to generate revenues. E. ZIEGENHAGEN, *supra* note 58, at 63. *But see infra* text accompanying note 108.

87 Laster, *supra* note 61, at 77-78.

88 *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 37-38 (4th ed. 1938).

89 *See* Laster, *supra* note 61, at 78.

90 On the basis of interpretations of early Hellenic, Roman and Teutonic codes, Maine concludes that the law of wrongs in which injuried parties or their confederates sought repairment from the wrongdoer antedated the law of crimes in which the state being injuried sought justice . . . . It is very doubtful that this conclusion can be supported by field investigations of unadvanced peoples by modern anthropologists.

W. RECKLESS, CRIMINAL BEHAVIOR 260 n.1 (1940). Gerhard Mueller has framed the inquiry in the following terms:

> [I]t is quite significant . . . whether community reaction to a wrong in primitive society is in the form or for the purpose of retaliation, deterrence, resocialization or neutralization, all of which are present-day theories. If it is in any of these forms that society reacts to a wrong, then we must conceive of the wrong as a crime, whereas if the reaction to a wrong is only in the form of exacting compensation to the person or group of persons (excepting the community itself as a group of persons) harmed, then we must treat it as a tort.

Mueller, *Tort, Crime and the Primitive*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 303, 308-09 (1955).

91 Diamond has created a series of classifications which attempt to organize the historical and anthropological data with respect to the economic development of human society. He conceives of the various stages as "fundamental" and "based upon the degree of control of a society over its environment." A.S. DIAMOND, *supra* note 64, at 4.

Diamond's first stage of economic development is the Food-Gathering stage. Peoples at this stage of development exist by gathering food. They live in the Paleolithic

alongside the more extensive class of private wrongs regularly described in the restitutionary account.[93] The most significant feature of these public wrongs was their incurrence of communal punishment rather than a restitutionary response.[94] To be sure, few behaviors were treated as public wrongs by the most "primitive" of these tribes.[95] Nevertheless, the distinction between public and private wrongs was recognized, and, as the economic and cultural apparatuses of the food-gatherers evolved, offenses "against public order" became increasingly common.[96]

The treatment of harmful conduct in the first written codes re-

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Age, and they have no metals or permanent dwellings and few domesticated animals. *Id.* The second developmental stage is called the First Agricultural Grade. Peoples at this stage have learned a rudimentary agriculture, although they continue to gather much of their food. *Id.* The next stage is the Second Agricultural Stage. Societies at this point of development belong to the Neolithic Age. They depend primarily upon agriculture and live in semi-permanent houses. *Id.* at 4-5. The fourth and final stage of economic advancement prior to the development of written codes of law is the Third Agricultural Grade. Peoples at this level combine agriculture with the keeping of large animals. They possess metals and live in permanent dwellings. *Id.* at 5.

Diamond's description of the peoples at each of these four stages is drawn primarily from anthropological data. It is only when he discusses societies with written codes of law that he turns to historical materials as well. *See id.* at 137-53.

92 Diamond defines "public wrongs" as "offences so outrageous that whether or not some individual is hurt, they are a matter of public concern and their punishment a matter for public action." *Id.* at 20 (footnote omitted). It is clear on the face of this characterization that Diamond's identification of public wrongs among "primitive" cultures goes directly to the three assertions made in the course of the preceeding historical account. Thus, we are told that pre-feudal societies did recognize a distinction between criminal and civil wrongs, that these societies did employ punishment when public wrongs were committed, and that they understood public wrongs as instances of collective injury. *Id.*

93 A.S. DIAMOND, *supra* note 64, at 20.

94 *See supra* note 91.

95 In fact, Diamond informs us that many societies at this stage recognized incest as the only public offense. A.S. DIAMOND, *supra* note 64, at 20.

96 In addition to incest, murder by magic and several other "sacral offenses" were treated as public offenses. *Id.* at 21.

The number of offenses treated punitively rather than by restitution remained relatively stable from the late Food-Gatherers through the First Agricultural Grade. *Id.* at 34. Diamond does report, however, that the role of the tribal elders began to change at this point. The elders began to play a more distinctive part in communal decisions of guilt and punishment; in a few of these tribes, a sort of rudimentary criminal trial began to appear. *Id.* at 35. The important aspect of this increasing activity on the part of the elders is that it was specific to public offenses. Their role in cases of private wrongdoing was limited to the mediating of private disputes. *Id.* "But in the same tribes that have blood feuds or blood revenge, and seek wergild (compensation for injury sustained) punitive procedures will be administered also by elders, councils, chiefs, or kings for those offenses considered to be crimes against the tribe rather than private injuries." W. RECKLESS, *supra* note 90, at 260.

The evidence suggests that the distinction between public and private wrongs was maintained by peoples in the Second Agricultural Grade, A.S. DIAMOND, *supra* note 64, at 42, and during the Cattle-Keepers of the Third Agricultural Grade, penal sanctions—

inforced the distinction between "criminal" and "civil" law. Gerhard Mueller has described a "dual system" in the early Germanic code, the Leges Barbarorum.[97] He identifies a similar divergence of public and private offenses in the Twelve Tables of Roman law[98] and in the codes of Babylonia and ancient Palestine.[99] In each of these instances, Mueller concedes that the sphere of private offenses was considerably larger than the category of behaviors punished as "criminal" offenses.[100] In none of these codes, however, does he find evidence that an offense, once classified as public or "criminal," was ever subject to "civil" retaliation or compensation.[101]

Although the "Central Codes" of Western Europe dating from A.D. 800 to 1100[102] were replete with provisions for the use of composition,[103] they actually contained an expanding range of offenses considered criminal wrongs.[104] In part, this expansion involved the criminalization of otherwise civil wrongs when they were committed under special circumstances.[105] More significant, however, was the increasing recognition that certain acts were to be treated as wrongs against public order whenever and however they were committed.[106] Diamond acknowledges that several of these new criminal

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particularly death—regularly were employed as collective responses to "criminal" wrongs. *Id.* at 107.

97 Mueller, *supra* note 90, at 309. *Compare* 49 LEX THURINGORUM ("Who not wilfully but by some accident kills a human being or wounds him, shall pay the lawful compensation") *with* 24 LEX SAXONUM ("Who conspires either against the Kingdom or the life of the King of France or his sons, shall be punished with the capital punishment"). The Leges Barbarorum, which includes both the Lex Thuringorum and the Lex Saxonum dates from about the sixth century A.D., or about six hundred years before the date at which the restitutionary theory's historical account fixes the beginning of the divergence between criminal and civil law in England. *See supra* note 83.

98 Mueller, *supra* note 90, at 312-13. In the Twelve Tables, for example, removal of the sacred boundary stones, sorcery and poisoning, singing of libelous songs, nocturnal devastation of crops, and several other similar behaviors were met not by a call for restitution, but by provisions mandating severe punishment. Mueller, *Victims of Criminal Violence*, 8 J. PUB. L. 218, 223 (1959). For the contrary view that Roman law did not distinguish sharply between civil and criminal offenses, see Alexander, *Compensation In a Roman Criminal Law*, 1984 U. ILL. L. REV. 521 (1984)(Roman extortion statutes performed functions of restitution and deterrence).

99 Babylonian law recognized a "distinct area of criminal law" which included "witchcraft, offenses against the administration of justice and religion, . . . [and] crimes against the sex taboo." Mueller, *supra* note 90, at 314.

100 *Id.* at 313.

101 *Id.* at 315.

102 Diamond fixes this stage at 800 A.D. to 1000 A.D. in France and 900 A.D. to 1100 A.D. in England. A.S. DIAMOND, *supra* note 64, at 167.

103 Barnett, *supra* note 3, at 352.

104 A.S. DIAMOND, *supra* note 64, at 192.

105 *Id.* In particular, offenses directed against members of the King's household or committed in the King's palace are now treated as criminal wrongs. *Id.*

106 *Id.* at 192-93

offenses, which were punished by fines, provided an important source of revenue for feudal lords and barons.[107] There were also crimes, however, "that are bootless—that is to say, not amendable by money—such as treason and murder and false coining, and some of these involve death and confiscation of property."[108]

III. Societal Responses to Criminal Behavior

It is clear that, from the earliest stages of economic development through the end of the feudal period, human society did recognize a distinction between public and private wrongs.[109] The real issue with regard to these early societies is why they set off certain offenses to be treated with "criminal" sanctions, and why those offenses were so few in number compared to the vast range of behaviors dealt with through the blood-feud and, later, through composition.

A variety of theories have been advanced in response to these questions. Perhaps, as some have argued, acts which provoked communal punishment in pre-feudal societies necessarily were treated as "crimes" because restitution to the individual victims was not possible.[110] Alternatively, Mueller has hypothesized that the distinction drawn by tribal cultures between public and private wrongs turned on the nature of the harm caused by the relevant conduct.[111]

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107 *Id.* at 193.

108 *Id.* The Jutes, Danes and Norsemen held certain acts—including treason, cowardice, homicide by waylaying and poisoning—to be *botleas*, or non-compensable and punishable by death. Mueller, *supra* note 98, at 223.

109 "[T]he majority of primitive communities recognize . . . that over and above the law of torts there is generally a law of crimes, or outrages resented not by a restricted group of relatives, but by the entire community or directors" R. Lowie, Primitive Society 425 (1925). *See also* Mueller, *supra* note 98, at 223.

110 Laster has argued, for example, that certain ancient wrongs, including incest, witchcraft, bestiality and other sacral offenses, were punished as crimes because of the absence of an individual harm. Laster, *supra* note 61, at 73. While this theory does have some explanatory force with respect to the least developed tribal cultures, where incest was commonly recognized as the sole criminal wrong, *see supra* note 95, it ceases to be useful in explaining the later pre-feudal peoples' practice of punishing witchcraft as a criminal offense. As Diamond makes clear, witchcraft was understood as the use of magic by an offender for private ends, and it often was thought to be the cause of the death or injury of some particular community member. Individual victims of witchcraft or their families, therefore, were available to receive restitution if the community had decided to employ that remedy. A.S. Diamond, *supra* note 64, at 21, 25, 34. Moreover, by the early feudal period, other offenses, including homicide by waylaying and poisoning, were treated as noncompensable crimes. Individual victims were again able to receive restitution if the community had chosen to provide it. Mueller, *supra* note 98, at 223.

111 Mueller, *supra* note 90, at 314; Mueller, *supra* note 98, at 224.

In his view, "primeval crimes,"[112] by definition, were behaviors which threatened the "very existence of society itself."[113] Most offenses, he explains, culminated in private blood-feuds or composition rather than in communal punishment, because so few behaviors were capable of endangering these rather simple social organizations.[114]

A closer examination of the collective practice of punishment in tribal societies, however, provides strong evidence for a slightly different explanation. The identification and punishment of "criminal" behavior there, as in contemporary societies, involved more than a communal response to a particular failure of social control.[115] The response also served the constructive function of reinforcing the institutional machinery by which social cohesion was obtained in the first instance. Criminal sanctioning among Diamond's food-gatherers, like modern criminal law, was a social practice[116] directly involved in the collective's ideological organization. Of course, as the other institutional features of a society change, the system of criminal law within that society also evolves.[117] Neverthe-

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112 Mueller, *supra* note 90, at 323.

113 Mueller, *supra* note 98, at 224. Mueller's view is that "primitive" cultures drew a distinction between "penal law" on the one hand and "criminal justice" on the other. Both, according to Mueller, contained the roots of our modern criminal law. Mueller, *supra* note 90, at 315. "Penal law" was characterized by punishment for offenses which endangered the community itself, while "criminal justice," which took the form of blood vengeance, involved the expression of notions of "justice" and "fairness" among the participants. *Id.* It was only much later, Mueller says, that the law of compensation came to take over for vengeance reactions. *Id.* Certain similarities to Mueller's thesis are discernible in Schafer's reading of history, particularly the view that modern criminal law represents an amalgam of collective and individual interests. *See supra* note 70. As Schafer wrote: "Crime upsets the balance not only between the criminal and society, but between the criminal and the individual victim." S. SCHAFER, *supra* note 2, at 118.

114 Rather than to act criminally, the community acted civilly, and that means urbanely or politely. The fairly unemotional and thus more rational civil sanction was used in lieu of the emotion laden criminal sanction. Usually the harmed person is a private individual. The harm to the community which may be involved is regarded as purely coincidental, not requiring community reaction. Then as now, only the most severe wrongs were singled out for community reaction or punishment, the only difference between then and now being that the list of vital values, requiring state protection, is long now and was short then, which incidentally, indicates that states grow more patriarchal with maturity. Primitive society succeeded in maintaining an orderly society with a minimum of effort, where we can succeed only by drawing an appreciable portion of the population into state service.

Mueller, *supra* note 98, at 224.

115 For an overview of social control theory, see generally Roucek, *supra* note 44.

116 For a discussion of the distinction between formal and informal social practices, see Roucek, *supra* note 44, at 11.

117 "The criminal law has quite rightly been called one of the most faithful mirrors of a given civilization, reflecting the fundamental values of which the latter rests. Whenever these values change, the criminal law must follow suit." H. MANNHEIM, CRIMINAL JUSTICE & SOCIAL RECONSTRUCTION 2-3 (1946).

less, the relationship between the foundational collective assumptions of tribal peoples and their treatment of "criminal" offenders provides a good starting point for an analysis of the ideological function of the criminal law, because it brings this institutional role into sharp focus.

A. THE PUNISHMENT OF "CRIMES" AS A SOCIAL PRACTICE IN TRIBAL SOCIETY

The people of any community, whether tribal, feudal or contemporary, derive an important sense of fixedness from their participation in the collective process of drawing boundaries.[118] Communities, in this regard, are "boundary maintaining,"[119] not only because they exist in a particular geographical space but also because they carve out some sort of a "social space."[120]

In general, social boundaries are located, in any community, at the point at which behavior deemed appropriate "in the special universe of the group" is distinguished from behavior deemed inappropriate.[121] Because the process of boundary defining is, however, essentially the process of describing the conditions of community membership, judgments with respect to the propriety of behavior must carry consequences for the social actors thought to be responsible for the conduct in the first place.[122] To describe a given act as "deviant" is to make a statement about the actor's place with reference to the boundaries of the community.[123] Therefore, in order to translate judgments regarding behavior into information concerning membership in the community, some general understanding as to the relationship between actor and act must be present.

Among the food-gatherers and other tribal peoples, the kinship group was the relevant social actor whose place in the community

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118 *See generally* K. ERICKSON, *supra* note 45, at 8-9.

119 *Id.* at 10. "When one describes any system as boundary maintaining, one is saying that it controls the fluctuation of its constituent parts so that the whole retains a limited range of activity, a given pattern of constancy and stability, within the larger environment." *Id.*

120 *Id.*

121 *Id.* at 10-11.

122 *Id.*

123 To begin with, the only material found in a society for making boundaries is the behavior of its members . . . . And the interactions which do the most effective job of locating and publicizing the group's outer edges would seem to be those which take place between deviant persons on the one side and official agents of the community on the other. The deviant is a person whose activities have moved outside the margins of the group, and when the community calls him [or her] to account for that vagrancy it is making a statement about the nature and placement of its boundaries.

Id.

was governed by judgments of its behavior.[124] Because reponsibility for an individual's conduct generally was absorbed by his or her kin,[125] the statement that a particular act was inappropriate was likely to be understood as conveying information about the membership of the responsible family in the tribe.[126] The individual participated in the collective process of defining boundaries only through the agency of his or her family.[127] Perhaps for this reason,

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124 "Individual acts were very closely associated with the behavior of the group to which the person belonged, and one's individual responsibility was in that sense transferred to one's group." E. ZIEGENHAGEN, *supra* note 58, at 34. In fact, the blood-feud was made possible only by virtue of the oppositional relationship the victimized clan and the offending clan held with the tribe. *Cf.* L. POSPISIL, ANTHROPOLOGY OF LAW 9 (1971)(feud and law distinguished on ground that former is an "intergroup phenomena," while latter is an "intragroup affair"). Sometimes, however, there was "not a large difference between 'community' which is concerned with punishing a public or criminal offense and the injured party and his or her clan or totemic group or friends who are concerned with obtaining satisfaction for a private wrong." A.S. DIAMOND, *supra* note 64, at 25. In such instances, the line between civil and criminal wrongs was of little consequence.

125 The basic unit of population within the food-gathering community was the clan. Each of these homogeneous kinship groups lived a semi-nomadic life, moving about a large but circumscribed territory gathering food. Typically, other similar groups also lived by roving about the same territory. Together, these several families, who spoke the same language and shared social relations, constituted a tribe. A.S. DIAMOND, *supra* note 64, at 8-9. The most important feature of the primary kinship group was the degree to which the individual was subsumed by the whole. Due to an intense commonality of background and experience, little or no opportunity was offered for the development of individual personality, and each member of a family stood as a microcosm of his or her clan. People lived their lives in and through their kinship group, and distinctions rarely were drawn between individuals within a family. *Id.*; E. DURKHEIM, SELECTED WRITINGS 25 (A. Giddens ed. 1972)(translated excerpt from E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1960)). The response to injurious behavior generally was collective, both in its source and expression. The conduct of one member of a family was assumed by the whole, and harm to one member was felt by all of his or her kin. E. ZIEGENHAGEN, *supra* note 58, at 25 ("individuals living in a communal situation and sharing the good or bad fortunes of the group as thier own"). In the words of Emile Durkheim, the individual clan member was "envelop[ed]" by the "collective conscience" of the group. E. DURKHEIM, *supra*, at 139.

In the discussion which follows, the terms "family," "clan," and "kinship group" are used interchangeably. To a certain extent, this usage differs from the typical practice in anthropological writing of distinguishing between primary family groups and larger kinship systems. *See generally* KINSHIP AND CULTURE (F. Hsu ed. 1971).

126 The confrontation between "deviants" and "official agents of the community" has been described as a boundary defining ritual. *See supra* note 123. Erickson defines a deviant as "a person whose activities have moved outside the margins of the group . . . ." K. ERICKSON, *supra* note 45, at 11. Because tribal societies transferred responsibility for individual behavior to one's family, however, the definition of a deviant must be broadened to refer to an offending family rather than to an offending individual. *See supra* note 124. Therefore, Erickson's model of the ritual must also be revised so that it is understood as a confrontation between a deviant family on the one side and the remainder of the community on the other.

127 Presentations are so focused upon the role and status of the individual that he [or she] appears to participate directly in the life of the society as a whole. As a

social scientists long have stressed the role that kinship groupings played in maintaining social cohesion in tribal societies.[128] In fact, any attempt to understand the social structure of tribal cultures must begin with an examination of the institutions which these peoples developed in order to regulate family relationships.[129]

The first of these institutions to appear pertained to marriage.[130] Considered as a collective institution, the complex of rules which tribal communities developed to govern marriage functioned to teach individuals about the membership of the various families in the tribe and about the relationship each of those kinship groups held to one another.[131] In order to accomplish these tasks, the rules generally addressed three distinct issues. First, the rules almost universally contained prohibitions against marriage between members of the same family.[132] Scholars such as Parsons and Farber have suggested that these prohibitions helped maintain the unity of the kinship group by preventing jealousy and competition among close relatives,[133] and by reinforcing the similarities of individuals within a given clan.[134] Second, the rules often contained provisions establishing marriage alliances between families. Claude Levi-Strauss, among others, has argued that the rules governing which families could intermarry combined with the rules prohibiting intraclan marriages to form a "principle of reciprocity."[135] In his view, this combination of prescriptive and proscriptive custom operated to stimulate cooperation between kinship groups within a tribe.[136] Fi-

consequence, a misleading impression of a "monolithic society" consisting of interacting individuals, rather than a complex society composed of subgroups of different membership inclusiveness, is likely to be created.

L. POSPISIL, *supra* note 124, at 98.

128 *See generally* E. HARTLAND, PRIMITIVE SOCIETY: THE BEGINNINGS OF THE FAMILY AND THE RECKONING OF DESCENT (1969).

129 *Id. See also* B. FARBER, COMPARATIVE KINSHIP SYSTEMS 9-14 (1968).

130 A.S. DIAMOND, *supra* note 64, at 14.

131 In discussing the educative function of marriage among the Food-Gatherers (i.e., its function was "to teach"), the author refers to Erickson's notion that members of a community "learn" about boundaries through the mediating influence of collective institutions on individual interactions. K. ERICKSON, *supra* note 45, at 10-11.

For a discussion of the very different role that marriage plays as an institution of social control in contemporary cultures, see Schoppmeyer, *Marriage and Family*, in SOCIAL CONTROL FOR THE 1980s 91 (J. Roucek ed. 1978).

132 The individual families were "exogamous" units, so marriage within a single family generally was prohibited. A.S. DIAMOND, *supra* note 64, at 14. *See also* B. FARBER, *supra* note 129, at 3.

133 *See, e.g.*, Parsons, *The Incest Taboo in Relation to Social Structure and the Socialization of the Child*, 5 BRIT. J. SOC. 101 (1954).

134 B. FARBER, *supra* note 129, at 3.

135 C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 45-50 (1963).

136 *Id.*

nally, most of these cultures developed strict rules as to which of the two families to a marriage would absorb the new couple and its progeny.[137] These rules insured that each individual held a primary identification with only one kinship group,[138] again reinforcing the corporate integrity of the family structure.[139]

Taken together, these rules served to maintain a social structure which was built upon stable and distinctive family units tied to other family units through bonds of mutual aid and cooperation. On the one hand, the rules, by prohibiting marriages within a clan and by restricting the list of potential mates available to any individual, insured the "orderly replacement" of the family culture into the next generation.[140] At the same time, by creating links between particular families, the rules inhibited the potential that kinship groups would grow differentiated from one another and assisted them in defining collective boundaries which recognized their mutual interdependence.[141]

Significantly, within this world of group thought and activity, one particular type of harmful behavior, incest, was understood as the act of an individual tribesperson.[142] This behavior, unlike most other conduct, was met with punishment directed to the individual offender rather than to his or her family.[143] With surprising regularity, cultures at the food-gathering stage recognized and punished incest, defined as marriage with a person with whom it was not permitted,[144] as their only "criminal" offense.[145]

Clearly, Mueller's thesis, that tribal societies designated certain behaviors as "crimes" because of the harm those behaviors caused

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137 For example, marriage often was "matrilocal," which meant that the new couple would take up residence with and become members of the wife's faimly. A.S. DIAMOND, *supra* note 64, at 15.

138 The principle of "jural exclusiveness" states than an individual cannot hold membership in more than one kinship group. In its more extreme form, this principle defeats the argument here advanced, because it suggests that exclusive family membership exists from birth to death, and makes impossible a transfer of membership upon marriage. B. FARBER, *supra* note 129, at 5-6. *But cf.* Fortes, *The Structure of Unilineal Descent Groups*, 55 AM. ANTHROPOLOGIST 17, 33 (1953)(link between kinship groups formed through marriage).

139 B. FARBER, *supra* note 129, at 11.

140 *Id.*

141 C. LEVI-STRAUSS, *supra* note 135, at 50-51.

142 Unlike the general case in which individual responsibility was transfered to one's family, *see supra* note 124, the wrongdoer in this particular instance was held individually responsible.

143 A.S. DIAMOND, *supra* note 64, at 20.

144 *Id.*

145 *See supra* note 95.

to the fundamental institutions of the culture,[146] can be seen operating at the intersection of these societies' marriage rules and their treatment of incest.[147] To the extent that incest, which violated both the marriage rules and the principle of reciprocity, threw into question the institutional means employed by the tribal community for the purpose of drawing boundaries, it is logical to speak of it as a threat to the "very existence of society itself."[148]

Further, the treatment of a wrongdoer who had committed incest itself can be seen as an institutional device involved in the creation of social cohesion. By violating the very rules through which families were perpetuated, the incest offender lost the "right" to have responsibility for his or her conduct absorbed by his or her kin.[149] Once stripped of a kinship identification, the offender ceased to be cognizable in the boundary-defining process and therefore was transformed into an object outside of the community.[150] In a sense, the "exterritorialized" wrongdoer became distinguishable from the rest of the community solely because he or she no longer had links to the tribe through a family group.

The incest prohibition, moreover, was figured by reference to the offender's prior status as part of a particular clan.[151] Therefore, the deliberations necessarily focused on the fact of kinship affiliation itself. The imposition of punishment made all observers aware of the existence of a stark contrast between the relational ties which remained in place linking together those men and women who had constructed "appropriate" marital relationships and the absence of such a link on the wrongdoer's part. The convocation of the community for the purpose of revoking the offender's tribal membership was not simply an unfortunate event triggered by a failure of the society's institutional machinery. Rather, it was an important

146 *See supra* text accompanying notes 111-14.

147 "[I]n the rules of marriage, or at least the rule prescribing with whom it may or may not take place, we have reached a vague begining of law." A.S. DIAMOND, *supra* note 64, at 26.

148 *See supra* text accompanying note 113.

149 This result is accurate by definition because the wrongdoer was punished as an individual rather than as a member of an offending clan. *See supra* note 143.

150 Upon the commission of this offense, the wrongdoer generally was subject to a form of excommunication in which he or she was transformed into an object beyond the margins of the community. Once the offender had been "exterritorialized," he or she was viewed as a wild animal to be hunted and killed. *Cf.* Bittner & Platt, *The Meaning of Punishment*, 2 ISSUES IN CRIMINOLOGY 79, 82 (1966)(arguing, on the other hand, that this treatment of tribal offenders was not "punishment" because it was not "redemptive").

151 One must be a member of a family in order to establish an incestuous relationship with another member of the same family. In a sense, therefore, prior membership in a given family was one of the requisite elements of this offense.

collective ritual essential in the life of the community as a means by which tribespeople were taught about the centrality of their own family affiliations and about the role those affiliations played in binding together the whole group.[152]

B. FROM TRIBAL SOCIETY TO CONTEMPORARY SOCIETY

The short list of behaviors treated as public offenses by the tribal cultures of the food gathering and initial agricultural stages[153] stands as evidence that the problem of maintaining collective cohesion was not considerable. It has been suggested that a high level of social control was inherent in these societies because a similarity of background and experience led community members to develop rather consistent mental pictures of the relatively simple world in which they lived.[154]

Emile Durkheim has described the social cohesion characteristic of tribal societies as "mechanical solidarity."[155] This phrase is meant to suggest an analogy to simple living organisms constructed of functionally equivalent and homogeneous parts.[156] As more complex forms of production developed, however, individuals and groups within the collective became increasingly differentiated on the basis of their daily labor.[157] Along with expansion in the division of labor came expansion in the range of contacts between previously isolated social groups.[158] Larger economic systems were created in which different groups of people with different back-

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152 *Cf.* K. ERICKSON, *supra* note 45, at 13 (deviant behavior is not "a simple kind of leakage which occurs when the machinery of society is in poor working order;" rather it is "an important condition for preserving the stability of social life" necessary to "[mark] the outer edges of group life").

153 *See supra* notes 95-96.

154 "Internal control is especially effective in a homogeneous society characterized by consensus as to norms of conduct. Where conflicting groups indoctrinate the young with conflicting conceptions of acceptable and desirable behavior—and even thinking—external controls become more and more necessary." Roucek, *supra* note 44, at 12.

155 E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 256-82 (G. Simpson trans. 1960).

156 Giddens, *Introduction* to E. DURKHEIM, SELECTED WRITINGS at 6 (A. Giddens ed. & trans. 1972).

157 *Id.* at 8.

Diamond reports, for example, that among the "pastoral peoples" of the Cattle-Keeping stage, the herding of cattle was confined to males. A.S. DIAMOND, *supra* note 64, at 88. In addition, when the community was forced to move to a new area, the men cut down the trees and burnt the timber while the women and children leveled and tilled the ground. *Id.* at 91. In some of these societies, a further division of labor was recognized between free men and women on the one hand and serfs on the other. *Id.*

158 E. DURKHEIM, *supra* note 125, at 150-54 (translation of excerpt from E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1960)).

grounds and world views engaged in different occupational tasks.[159] Inevitably, the collective ceased to be defined by the consistency with which each member's experiential package coincided.[160] Mechanical solidarity gradually gave way to what Durkheim labelled "organic solidarity."[161] Social cohesion soon was based upon "ties of co-operation between individuals or groups of individuals which derive[d] from their occupational interdependence within the differentiated division of labour."[162]

The development of this heightened individuation,[163] in turn, was coupled with a transformation in the norms and values of organic society. While tribal peoples had embraced a normative system which emphasized the autonomy of the clan and the importance of the collective,[164] later societies, organized according to the prin-

159 Giddens, *Introduction* to E. DURKHEIM, SELECTED WRITINGS, at 8 (A. Giddens ed. & trans. 1972). In addition to an expanding division of labor, Durkheim identified population concentration, improved transportation and improved communication as other factors in the decline of mechanical solidarity. E. DURKHEIM, *supra* note 155, at 257-60.

160 Above all, the multiplicity of ways of thinking cannot become a problem in periods when social stability underlies and guarantees the internal unity of a world view. As long as the same meanings of words and the same ways of deducting ideas inculcated from childhood are present in every member of the group, divergent thought-processes cannot exist in that society. K. MANNHEIM, *supra* note 42, at 6.

161 Organic communities "are formed, not by the repetition of similar, homogeneous segments, but by a system of different organs each of which has a special role, and which are themselves formed of differentiated parts." E. DURKHEIM, *supra* note 125, at 143.

162 Giddens, *Introduction* to E. DURKHEIM, SELECTED WRITINGS, at 8 (A. Giddens ed. & trans. 1972). "In this type, individuals are no longer grouped according to their relations of lineage, but according to the particular nature of the social activity to which they devote themselves." E. DURKHEIM, *supra* note 125, at 143.

163 The transformation of societies founded upon group-based consciousness into societies oriented toward the interdependence of autonomous individuals has been described in some significant detail by Durkheim. E. DURKHEIM, *supra* note 155, at 256-82. According to his formulation, the collective conscience of any society consists of four component parts. The first, which has been termed the "volume of the conscience collective," concerns the degree to which the knowledge and thought of individuals coincide. Giddens, *Introduction* to E. DURKHEIM, SELECTED WRITINGS, at 5 (A. Giddens ed. & trans. 1972). The second element pertains to the "intensity" with which those common ideas are held by members of the community. *Id.* The third, "rigidity," refers to the extent to which collective rules of daily conduct are subject to individual interpretation. *Id.* Finally, Durkheim argues, the hold of the community over the individual can be measured by the "content" of social life or the norms and values of the collective. *Id.*

Employing these concepts, Durkheim explained that an expanding division of labor and an expanding economic interdependence caused a decline in the volume, intensity and rigidity or the collective conscience of organic society. *Id.* at 6. The resulting growth in "individuation" meant that community members were increasingly able to develop distinct personalities and exercise independent judgement in their dealings with one another and with the material conditions of the world in which they lived. E. DURKHEIM, *supra* note 155, at 223-350.

164 In Durkheim's view, the content of tribal society was located in its celebration of the power of the community. These cultures embraced this "religion" and its associated rituals in order to give expression to the sacred power of the collective viewed exter-

ciples of organic solidarity, developed new moral[165] ideals which stressed the worth and dignity of autonomous individuals.[166] The moral content of the earlier mechanical society had been a sort of religion of the whole.[167] Durkheim called the new moral focus of organic society the "cult of the individual."[168]

A fundamental point in Durkheim's description was that "moral individualism" or the cult of the individual is itself a collective product.[169] He clearly asserted that collective cohesion at any level of social and economic development depends upon the existence of a "certain intellectual and moral community."[170] In tribal societies, this moral community consisted of a "system of collective beliefs and practices" directed toward the "special authority" and "moral supremacy" of the group.[171] In later cultures, the moral community expressed itself in a religion of the individual: a system of collective beliefs and practices directed toward endowing each community member with a free will[172] and an independent moral status.[173]

Societies characterized by a high degree of individuation are as much in need of a system of collective beliefs and practices encour-

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nally, just as they engaged in the practice of marriage and the associated conventions of exogamy and matrilocality in order to define the internal organization of the community. For a discussion of Durkheim's view of tribal religion, see Giddens, *supra* note 156, at 20-25. *See generally* E. DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (1961).

165 The term "moral" as used by Durkheim and as used herein does not have the meaning of "voluntary compliance with ethical standards." Pope, *Classic on Classic: Parsons' Interpretation of Durkheim*, 38 AM. SOC. REV. 399, 407 (1973). Rather, for Durkheim, "moral" simply meant that which is imbued with the power and authority of the collective. *Id.* Therefore, to act morally means to "act in terms of the collective interest." *Id.*

166 E. DURKHEIM, *supra* note 155, at 172, 400, 407; E. DURKHEIM, SUICIDE 240, 334, 336 (J. Spaulding & G. Simpson trans. 1951). *See also* L. VOIGT & W. THORNTON, THE LIMITS OF JUSTICE: A SOCIOLOGICAL ANALYSIS 44-51; R. Pound, *supra* note 41, at 13-14.

167 *But cf.* A.S. DIAMOND, *supra* note 64, at 81 (religion, defined as "belief in and a regardful attitude towards a supernatural being on whom man feels himself dependent and to whose will he makes an appeal in his worship," did not appear until the Third Agricultural Grade).

168 E. DURKHEIM, *supra* note 155, at 400, 407.

169 This is not to say, however, that [with the decline of mechanical solidarity] the conscience collective is likely to disappear completely. Rather it increasingly comes to consist of very general and indeterminate ways of thought and sentiment, which leaves room open for a growing variety of individual differences. There is even a place where it is strengthened and made precise: this is, in the way in which it regards the individual. As all the other beliefs and all the other practices take on a less and less religious character, the individual becomes the object of a sort of religion.

E. DURKHEIM, *supra* note 125, at 145-46.

170 Lukes, *Durkheim's "Individualism and the Intellectuals"*, 17 POL. STUD. 25 (1969)(translation of Durkheim, *Individualism and the Intellectuals*).

171 *Id.*

172 For a discussion of Durkheim's view of free will as a component of moral individualism, see Pope, *supra* note 165, at 406-08.

aging social cohesion as are societies of low individuation.[174] In both instances, the collective's boundaries must be marked by a process of inclusion and exclusion occurring at the highest level of association at which a perception of common purpose can be created.[175] In tribal societies, boundary-defining had taken place at the level of the kinship group.[176] This result was made possible by the existence of two conditions: the powerful identification each individual felt with his or her family and the similarity of one clan to another within a tribe.[177] With the transformation of homogeneous tribal societies into highly differentiated organic societies, however, neither condition could be met by the kinship group.

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[173] For if it is true that religion is, in a sense indispensable, it is no less certain that religions change, that yesterday's religion could not be that of tomorrow. Thus what we need to know is what the religion of today should be.

Now, all the evidence points to the conclusion that the only possible candidate is precisely this religion of humanity whose rational expression is the individualist morality . . . . [A]s a consequence of a more advanced division of labor, each mind finds itself directed toward a different point of the horizon, reflects a different aspect of the world and, as a result, the contents of men's minds differ from one subject to another . . . . This is why man has become a god for man and is why he can no longer turn to other gods without being untrue to himself.

Lukes, *supra* note 170, at 25-26.

[174] In order to clarify this point, it is necessary to reinforce the distinction drawn earlier between the level of individuation in a community, and the nature of the content of its collective conscience. *See supra* note 163. The former refers to the actual relationship of the members of the community to the material conditions of their world—as measured by the volume, intensity and rigidity of the collective conscience—while the latter refers to the way in which people believe they relate to their community and the larger world around them. While the distinction is of critical importance at the level of theory, the content of the collective conscience—whatever it may be—functions in practice to mediate the relationship between people at any given level of individuation, on the one hand, and the real and material conditions of their world, on the other. Taken together, this whole process of "being" constitutes the ideology of a society. *See supra* notes 45-49 and accompanying text.

The transformation of the content of the collective conscience from a celebration of the divinity of the collective to a celebration of the divinity of the individual should, therefore, be understood as an adjustment of the ideological institutions in developing society in order to accomodate increasingly individuated community members in an increasingly complex economic and cultural envrionment. *Id.*

[175] The conditions of membership in the community must be set forth for those social actors understood to be responsible for their conduct. *See supra* notes 121-23 and accompanying text.

[176] *See supra* notes 124-27 and accompanying text.

[177] This organization, just like the horde, of which it is only an extension, evidently carries with it no other solidarity than that derived from resemblance, since the society is formed of similar segments and these in their turn enclose only homogeneous elements. No doubt, each clan has its own character and is thereby distinguished from others; but the solidarity is proportionally weaker as they are more heterogeneous, and vice versa. For segmental organization to be possible, the segments must resemble one another: without this, they would not be united. And they must differ; without this, they would lose themselves in each other and be effaced.

E. DURKHEIM, *supra* note 125, at 142-43.

With respect to the first condition, individuals living in organic societies increasingly came to identify with and participate in a number of different groups at a variety of different points in the social structure.[178] Even though each person's world-view was still governed by his or her participation in social groups,[179] the relative diversity of association, together with the extensive interpenetration of one group into another, resulted in a social fabric capable of definition only at the level of the individual.[180] Each community member's "web of group affiliation"[181] effectively "circumscribed" him or her as a unique individual because of the improbability that other persons would "exhibit the same combination of group affiliations."[182]

With respect to the second condition, the various associations in place within organic societies, including familial, occupational and territorial groups, were no longer adequate constituent units upon which to build a collective, even if individuals had been able to form synecdochic identifications with a single group. This was due to a progressive differentiation of groups along both horizontal and vertical axes.[183] The horizontal differentiation involved the expanding division of labor described by Durkheim.[184] Equally important was the existence of a vertical differentiation represented by an increasing diversity of social status and material wealth from one class of individuals to another within the community.[185]

The efferent force of this heterogeneity, at the level of the indi-

178 G. SIMMEL, CONFLICT AND THE WEB OF GROUP AFFILIATION 140-41 (1955).

179 Even in fragmented contemporary society, primary groups, including families, remain as institutions of social control. Unlike tribal societies, however, where primary groups were able to accomplish the bulk of boundary maintaining work, contemporary societies must parcel out problems of social control to a variety of less intimate secondary groups to which members of the community hold individual rather than collective ties. Roucek, *supra* note 44, at 11-12. *Cf.* C.H. COOLEY, SOCIAL ORGANIZATIONS: A STUDY OF THE LARGER MIND 23-31 (1913)(individuals come to understand their individuality through "face-to-face" interactions within primary groups).

180 Imagine a three-dimensional model of a community in which individuals are represented by points and groups by lines connecting those points. In organic society, a single point typically would be connected to many other points by lines running up and down, side to side, front to back and so on. Any attempt to define the boundaries of such a community at the level of groups necessarily would fail, because the groups' lines, by definition, would be two-dimensional. In order to capture the true contours of the community, therefore, one would have to describe the model in terms of individual points, thereby indicating the height, width and depth of the whole.

181 G. SIMMEL, *supra* note 178, at 140-41.

182 Janowitz, *The Intellectual History of "Social Control"*, in SOCIAL CONTROL FOR THE 1980s 28 (J.S. Roucek ed. 1978).

183 *See generally* E. ZIEGENHAGEN, *supra* note 58, at 24-29.

184 E. DURKHEIM, *supra* note 155, at 86.

185 E. ZIEGENHAGEN, *supra* note 58, at 27-29.

vidual and at the level of the group, ultimately became inconsistent with the group-based consciousness upon which social cohesion had depended in tribal communities.[186] Although individuals were still subject to a life-long series of socializing experiences prepared for them in the context of group participation, the growing divergence in material conditions from group to group, along with the fact that individuals now participated simultaneously in a number of different associations, meant that a new level of boundary-defining had to be invented. As a consequence, the ideology of the group had to be replaced by the alternative, though imaginary,[187] perception that each member of the community stood as an autonomous individual.[188] The relationship of the members of the collective to the whole had to be reconstructed so that each person came to under-

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186 *See supra* text accompanying notes 124-27. *But see* Nader & Combs-Schilling, *supra* note 53, at 36 (asserting that clan societies are not automatically associated with collective responsibility).

187 In regard to the characterization of this perception as "imaginary," it has been observed that both group consciousness and individual autonomy must be "learned or invented," given the "erosion of biologically preprogrammed behavior" in humans. Roucek, *Introduction* to SOCIAL CONTROL FOR THE 1980s ix. (J.S. Roucek ed. 1978). A number of writers have, however, identified the dangers inherent in the fictive nature of the ideology of individuality. Barrington Moore, Jr., for example, has provided a chilling description of a hypothesized society in which the influence of collective social practice has been completely obscured by a technologically reinforced ideology of the individual. He writes:

> What would be the chief characteristics of such a society? Its most striking feature would be a change in the definition and dimensions of human autonomy and freedom. The citizen in such a state would believe that he [or she] was 'spontaneously' and 'freely' making the 'right' decisions in all aspect of his [or her] life. But in reality both governed and governers would be caught in the same silken web of oversimplified alternatives, the 'best' of which would be equally discernable to everyone, pounded home by efficient mass communications. In such a society all the members could be depended upon to repress each other in nonviolent ways so successfully that the central government could reduce its political functions substantially in favor of administrative maintainence of the new 'best of all possible worlds.' Crude police terror would be unnecessary. 'Free elections' could continue since they would not constitute a threat to the established system.

B. MOORE, JR., POLITICAL POWER AND SOCIAL THEORY 86 (1958).

A more benign treatment of the same idea has been undertaken by Tomotsu Shibutani. He has pointed out that the social practice common in contemporary western society of leaving "tips" represents an everyday working out of the ideology of individuality. Without identifying anything sinister in the practice, Shibutani calls to our attention the conflict between our perception of the leaving of a tip as a voluntary act which we are free to do or not do as we please with the reality that failure to leave a "gratuity" under circumstances in which it is called for is considered a grave breach of social convention. Leaving a tip, in other words, while a behavior we all understand as the product of individual volition, is in fact a social practice determined by intense and collectively created social pressure. T. SHIBUTANI, SOCIETY AND PERSONALITY 281-82 (1961).

188 It is this perception which is referred to hereinafter as "the ideology of individuality."

stand him or her self not principally as a member of a kinship group—where each of the various families had served as their members' agents in the process of boundary defining[189]—but as a distinct individual with a separate consciousness, a free will, and an independent relationship to the whole.[190]

In fact, it was only at the level of the individual that a sense of commonality could be located. The only common denominator to be found in organic society was the individual community member.[191] Certainly, each person brought to the collective a distinctive set of experiences and a unique pattern of group participation. This represents the high individuation about which Durkheim had written.[192] In addition, however, each individual brought a shared belief in his or her own volitional autonomy and a faith in the autonomy of all other members of the collective.[193] The strength of the collective conscience in organic society was bound up in a progressive recognition of the individual as free agent. Each community member's sense of self-actualization rendered him or her similar to every other community member, and it was this shared subjective understanding of individual personality which rendered them all appropriate constituent units upon which to build the

189 *See supra* note 126 and accompanying text.

190 The most important consequence of this perception is that individuals are presumed to have the capacity to choose from among alternative courses of conduct and, therefore, may be held individually responsible for their choices. *See infra* notes 210-13 and accompanying text. Herbert Morris has made this point explicitly in the course of arguing that a retributive system of punishment is to be preferred over other models of sanctioning because the former respects the "fundamental right" of each individual to be "treat[ed] . . . as a person." Morris, *Persons and Punishment*, in THEORIES OF PUNISHMENT 90 (S. Grupp ed. 1971). The first step of Morris's argument consists of the assertion that an "individual" is a "person" precisely because of his or her capacity to engage in rational choice. Next, Morris explains that retributive punishment is not imposed upon an individual unless that person has engaged in an act which diverges from a settled communal "norm." Finally, Morris concludes that, because the offender's counternormative conduct is, by definition, the product of his or her own free choice, it is that individual who must assume "responsibility" for the punishment which ensues, since it is his or her choice which has "caused" the resulting sanction. *Id.* at 90-102.

191 "One is thus gradually proceeding towards a state of affairs, now almost attained, in which the members of a single social group will no longer have anything in common other than their humanity, that is, the characteristics which constitute the human person in general . . . ." Lukes, *supra* note 170, at 26.

192 *See supra* note 163.

193 "[S]o each individual mind has within it something of the divine, and thereby finds itself marked by a characteristic which renders it sacred and inviolable to others." E. DURKHEIM, *supra* note 125, at 23. *See also* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, *supra* note 88, at 53 (the laws of Henry I focused on the individual culpability of the offender due to the influence of Christianity and its emphasis on individualism as opposed to the "solidarity and joint responsibility of the kindred").

collective.[194]

194 Rudolf Stammler has described the function of law—civil and criminal—as the recognition of a community of autonomous people each exercising individual volition. R. STAMMLER, THE THEORY OF JUSTICE (Husik trans. 1925). Schafer has drawn the causal arrow in the other direction. *See* Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 245-46 (1965).

> The individualistic concept of crime was a product of the eighteenth century.... In the individualistic era man demanded the right to pursue his own ends, to act independently, and to have his individuality respected by all. Criminal justice, in compliance with this call, viewed the criminal act isolated from social problems.

Id.

The French Marxist, Louis Althusser, in his work on the role of the Enlightenment philosophy of humanism in post-feudal capitalist society, has directed his attention to this point. Humanism, while "celebrat[ing] the autonomy and choice of the free individual... forgets that men [and women] only exist in the moulds prepared for them by the history of social relations." C. SUMNER, READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW 26 (1979)(summarizing Althusser's theory). In addition, Althusser has asserted that the ideology of individuality has been used by liberal society and liberal political theorists to mask "true" class consciousness of peoples living under capitalism and, by extension, to mask the fact of domination by some classes over others. L. ALTHUSSER, MONTESQUIEU, ROUSSEAU, MARX: POLITICS AND HISTORY 151-54 (1982).

The difficulty with this theory is that, as an analysis based solely upon class, it necessarily fails to capture the full range of associations which define a person's place in society. In fact, it is the complexity and discordance of these several associations which account for the heterogeneity of organic society and which render groups of individuals inappropriate primary units upon whcih to build a collective. *See supra* notes 178-86 and accompanying text.

The responding Marxist analysis would likely assert that individuals' patterns of group participation tend to occur in clusters (i.e., minority group affiliation tends to correspond to poor education which tends to correspond to poverty and so forth). This analysis might further suggest that such clusters represent the basis for a class consciousness. *See, e.g.*, C. SUMNER, *supra* at 190. In fact, there is substantial evidence to support these views. For example, although the criminal justice system in the United States claims to evaluate the conduct of autonomous individuals, the people who are processed through that system, *see generally* M. FREELEY, THE PROCESS IS THE PUNISHMENT (1979), and who are sanctioned by it, *see, e.g.*, Spohn, Gruhl & Welch, *The Effect of Race on Sentencing: "A Re-Examination of an Unsettled Question,"* 16 L. & SOC. REV. 71, 85 (1981-82), are disproportionately drawn from groups of racial minorities and the poor. As Nader and Combs-Schilling put it:

> We are a country where everybody, we say, is equal before the law. Yet our jails are full of the poor and downtrodden. It is clear from the evidence at hand that there are at least two legal systems operating in the United States—one for the upper-income groups and the other for lower-income groups. The model may be one of internal colonialism.

Nader & Combs-Schilling, *supra* note 53, at 40.

Although this view is compelling, it need not necessarily stand as a critique of the criminal process or of the ideology of individuality. The criminal process, as an institution bound up with the ideology of individuality, *see infra* 195-257 and acompanying text, operates to create a sense of common purpose by obscuring the forces which differentiate groups in the community and by reinforcing a notion of shared autonomous individuality. *Id.* At present, this project of obscuration masks the fundamental structural inequities which exist in contemprary western society. The fact remains, however, that even if there were a more equitable distribution of resources and opportunity, a consid-

C. CONTEMPORARY CRIMINAL LAW AND THE IDEOLOGY OF INDIVIDUALITY

A number of commentators have attempted to identify a ritualistic or ceremonial aspect in the operation of contemporary criminal law.[195] Some authors such as Andenaes and Hawkins have theorized that public punishment in any of its familiar forms serves to express social disapproval and reprobation.[196] According to this theory, the "educative-moralizing"[197] function of punishment inures not from the imposition of any particular sanction but rather from the intrinsically stigmatizing nature of sanctioning in general.[198] Punishment, in the words of one writer, is a "ritualistic device" meant to convey "moral condemnation."[199]

Other students of the institutional model of criminal law have stressed that the public impact of a prosecution is achieved not merely through the process of imposing punishment but also through the "dramatization of evil" which is said to occur at the adjudication phase of a criminal trial.[200] Taken together, the ritual by which culpability is determined and the ritual by which punishment is imposed constitute a public "degradation ceremony."[201] Such ceremonies, some argue, assist in "reinforc[ing] group solidarity"[202] and help to "bind persons to the collectivity"[203] by stimulating a "socialization" process through which the authority of

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erable heterogenity would still exist. Contemporary society is comprised of individuals whose high levels of individuation lead them naturally to question their place in the collective. Even in the absence of class, race and gender inequity, the criminal justice system would and should continue to function to obscure the many ways in which people would continue to be dissimilar. In these terms, the ideology of individuality is an essential element in the process of maintaining social cohesion. It creates a community of individuals who share a false but common faith in each other's autonomy. It is this shared understanding, more than anything else, which encourages cooperation and general compliance with the most basic communal rules of conduct. *Id. But see* SCHEINGOLD, THE POLITICS OF LAW AND ORDER (1984)(describing a "politicization" of the criminal justice system caused by conflicts over interests and, especially, value).

195 F. TANNENBAUM, CRIME AND THE COMMUNITY 19 (1938); Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956); Hawkins, *Punishment and Deterrence: The Educative, Moralizing and Habituative Effects*, 1969 WIS. L. REV. 550.

196 Andenaes, *The General Preventive Effects of Punishment*, 114 PA. L. REV. 949, 950 (1966); Hawkins, *supra* note 195, at 555.

197 P. TAPPAN, CRIME, JUSTICE AND CORRECTION 247 (1960); Hawkins, *supra* note 195, at 553-60.

198 Hawkins, *supra* note 195, at 553-60.

199 *Id.*

200 F. TANNENBAUM, *supra* note 195, at 19.

201 Garfinkel, *supra* note 195, at 421-23.

202 *Id.* at 421.

203 *Id.*

normative rules are "internalized."[204]

This picture of the institutional functioning of contemporary criminal law is incomplete for two reasons. First, it fails to account for the created relationship between actor and act which is an essential component of boundary-defining in any society.[205] Second, it fails to account for the requirement of mens rea, one of the most important doctrinal features of the common law of crimes.[206] To the extent that any system of sanctioning public wrongs serves to assist a community in boundary-defining, community members looking to the morality play of adjudication and punishment must share some understanding of how responsibility for behavior is ascribed. Among tribal peoples this shared understanding consisted of an ideology of the group in which responsibility for conduct was thought to belong to an offending family. In fact, a primary task of the process of identifying and sanctioning "criminal" offenders in tribal society was to reinforce the clan-based sense of responsibility upon which communal integrity depended.[207] Similarly, criminal law in contemporary society is an essential boundary-maintaining device not simply because of its capacity to articulate the particular rules of the community, but also, and perhaps more importantly, because of its role in affirming an ideology which views each individual as responsible for his or her own conduct.

An examination of the relationship between the ideology of individuality and modern criminal law doctrine lends support to this description. It is settled law that an offender is not culpable for behavior nominally in violation of a criminal statute unless his or her act was "voluntary," which is to say, a product of his or her autonomous free will.[208] In the familiar language of the criminal law, wrongful conduct, although a necessary condition for a finding of criminal responsibility, is not sufficient unless it was voluntary and accompanied by mens rea or evil intent.[209]

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204 Hawkins, *supra* note 195, at 557-60 (criminal law has a "socializing" rather than a "moralizing" impact because it encourages acceptance of the authority, rather than the morality, of communal rules).

205 *See supra* notes 122-24 and accompanying text.

206 *See infra* notes 208-09 and accompanying text.

207 *See supra* notes 149-52 and accompanying text.

208 *See, e.g.*, Hall, *supra* note 26, at 776.

209 Although there has long been a considerable confusion of terminology with respect to the requirements of volition and intention, *see, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW 395 (1978), western jurisprudence has been relatively consistent in its insistence that criminal responsibility be premised upon conduct which is the product of an offender's "free will." *See, e.g.*, 2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 99, 183 (1883). Despite this general statement of principle, it is clear that contemporary criminal law does not require an affirmative showing of volition in all cases.

Theorists influenced by the "classical" or "liberal" school of criminology[210] have attempted to provide an explanation for the existence of the requirements of volition and mens rea by arguing that these doctrinal features have been generated by an underlying morality which holds that individuals are "being[s] endowed with reason and able, within limits, to choose one of various possible courses of conduct."[211] Jerome Hall has explained that the imposition of punishment upon an offender is justified only when, and only because of, an offender's individual choice to engage in proscribed conduct.[212] As Hall writes, the criminal law "rests precisely upon the same foundations as does our traditional ethics: human beings are 'responsible' for their volitional conduct."[213]

To claim that contemporary criminal law and Western ethics rest upon the same cultural foundations, however, does not neces-

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Rather, the doctrine generally assumes that an act has been voluntarily committed and then recognizes an obligation on the part of courts to allow defendants an opportunity to overcome the presumption through the presentation of evidence indicating a lack of volition. *See, e.g.*, MODEL PENAL CODE § 2.01(1), (2) (1962)(volition presumed unless the act was "reflex or convulsion," "bodily movement during unconsciousness or sleep," "conduct during hypnosis," or bodily movement otherwise "not a product of the effort or determination of the actor").

With repsect to the requirement of *mens rea*, there generally has been greater insistence that affirmative proof of intention be presented during the course of a criminal prosecution, and most statutory offenses now specify some mental state as a requisite component for a finding of culpability. *See generally* Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 975-1016 (1932)(tracing the development of the *mens rea* concept in relation to changing objectives of the criminal law through history). In fact, the Model Penal Code provides that an offender is not guilty of an offense unless he or she can be shown to have acted "purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense." MODEL PENAL CODE § 2.02(1) (1962).

The United States Supreme Court has recognized that certain "regulatory offenses" may be enforced without a showing of intention on the part of the offender. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910). However, the Court has been willing to allow strict liability because the offender was deemed capable of avoiding the offense "with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who has assumed his responsibility." Morissette v. United States, 342 U.S. 246, 256 (1952). *See generally* Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1959-60).

210 N. KITTRIE, THE RIGHT TO BE DIFFERENT 20-21 (1971).

> During the eighteenth century's Enlightenment, or Age of Reason, new theories about the relationship of man [and woman] to society were articulated . . . . [I]t was Cesare di Beccaria who promulgated the first comprehensive theory of criminal justice founded upon the principles of human dignity . . . . In 1764, his work, On Crimes and Punishments, became the lodestone of what is now considered the liberal or classical school of criminology.

Id.

211 Hall, *supra* note 26, at 775.

212 *See, e.g.*, J. HALL, PRINCIPLES OF CRIMINAL LAW 166-67 (1947).

213 Hall, *supra* note 25, at 776.

sarily lead to the conclusion that the requirements of volition and mens rea, which are central features of the former, owe their existence to an individualistic morality, which is the central feature of the latter. To the extent that Hall's explanation posits as fact the existence of autonomous individuals exercising free choice, his theory is undermined by considerable evidence suggesting that human behavior is the product of a "complex of causal factors . . . which combine to produce a certain resultant in a given individual."[214] On the other hand, if the view is that the moral voice of the community demands proof of mens rea and volition as a prerequisite to the imposition of punishment because of a collectively held, although not necessarily factually based, belief in the concept of free will,[215] the theory is also inadequate. Such a view fails to account for the possibility that society's construction of such a subjective belief occurs, at least in part, through the operation of the criminal law itself.

Durkheim's theory of mechanical and organic solidarity[216] is especially helpful in solving this dilemma, because it avoids the "semantic confusion" inherent in viewing determinism and free choice as mutually exclusive alternatives.[217] Durkheim went beyond the simple assertion that behavior is determined by environment and experience in arguing that it is the degree to which individual con-

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214 Knight, *Determinism, "Freedom," and Psychotherapy*, 9 PSYCH. 251, 255 (1946).

215 Herbert Packer has expressed this concept as follows:

> The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will . . . . [T]he law treats man's [and woman's] conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were.

H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74 (1968). Similarly, Justice Cardozo wrote that the criminal law "assumes the freedom of the will as a working hypothesis in the solution of its problems." Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

216 *See supra* notes 155-58 and accompanying text.

217 Knight, *supra* note 214, at 251.

To claim that Durkheim's theory is helpful in understanding the relationship between determinism and free choice is not to adopt his views concerning the sociology of crimes and criminal law. Durkheim argued that the evolution of societies from mechanical to organic solidarity could be measured by a parallel evolution in their legal institutions from the use of "repressive" to "restitutive" sanctions. E. DURKHEIM, *supra* note 155, at 68-69. In fact, this thesis is fraught with a number of conceptual and empirical weaknesses and is not part of the analysis presented here. For a cogent criticism of Durkheim's theory of law, see Hunt, *Emile Durkheim: Towards a Sociology of Law*, in MARXISM AND LAW 27 (1982). Gillian Rose has explained that "Durkheim's thesis of the transition from repressive to restitutive penal law serves to open up the larger question of social cohesion in a society which is based at the same time on contractual and on cooperative law, on negative and on normative law, and to delineate the anatomic division of labor which results from this antinomy of freedom and control." G. ROSE, DIALECTIC OF NIHILISM 177 (1984)(footnote omitted). It is Durkheim's theory regarding this "larger question" which is being employed in the present discussion, not his particualr view on penal law.

duct in a community is caused by similar or dissimilar complexes of deterministic factors which governs the level of individuation in that social group.[218] Moreover, he taught that the extent to which environmental and experiential stimuli[219] are shared ultimately has much to do with the nature of a collective's constructed thought systems, particularly with reference to its understanding of the social actor—kinship group or individual—thought to exercise choice.[220]

Determinism is, at root, a "theoretical construct which fits the observed data" with respect to the actual origins of behavior.[221] Its antithesis is "indeterminism."[222] Free choice, by contrast, involves the "subjective psychological experience" by which conduct is attributed to the will of a given individual.[223] The logic of Durkheim's view suggests that a complete picture of any community must include both a description of the way in which behavior is actually determined and a description of the subjective process of attribution by which "responsible" social actors are identified.[224]

Once one accepts the notion that determinism and a subjective belief in free choice are coexisting phenomena, it becomes possible to identify different ways in which an individual can be said to exist.[225] Viewed as an entity engaged in physical activity caused by environmental and experiential stimuli which are more or less similar to those determining the behavior of others in the collective, the individual can be described as a determined being.[226] Viewed as an entity subjectively thought by self and others to be generating conduct through free choice, the individual can be identified as an ideo-

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218 *See, e.g.*, E. DURKHEIM, *supra* note 166, at 325; Lukes, *supra* note 170, at 26.

219 Durkheim recognized that social forces "act upon men [and women] from without" along with physical, chemical, biological and psychological forces. Pope, *supra* note 165, at 408 (quoting Durkheim).

220 E. DURKHEIM, *supra* note 125, at 142-44.

221 Knight, *supra* note 214, at 255.

222 *Id.*

223 *Id.*

224 *See generally* E. DURKHEIM, *supra* note 155, at 223-350. In Durkheim's work on suicide, he directly considered the relationship between "human volition" and external causal factors. E. DURKHEIM, *supra* note 166, at 287. "Durkheim describes at length the subjective states associated with various types of suicide, noting that such states may even appear to be the cause of suicide. In reality, however, they are merely the prolongations of social causes inside the individual." Pope, *supra* note 165, at 409.

225 For a thorough discussion of the multiple and conflicting ways in which individuals exist as "beings," see G. ROSE, *supra* note 217, at 54, 56-58, 70-73.

226 The determined being is an individual whose behavior is the product of a set of antecedent events and forces, including heredity, environment and, perhaps, chance. *See, e.g.*, C. ADAMS, KNOWLEDGE AND SOCIETY 149-51 (1938). The more his or her set of antecedent events and forces mirrors the sets of events and forces determining the behavior of other individuals in the community, the more that determined behavior will be like the behavior exhibited by others. *See supra* notes 157-61 and accompanying text.

logical being.[227] The question at this point is how society goes about constructing ideological beings. The case being made here is that society employs criminal law as one of a number of institutions which translate actual beingness into subjective beingness. It accomplishes this task by creating yet a third category—juridical beingness.[228] This juridical creation emerging through the process of adjudicating criminal offenses, although shaped in part by "what is psychophysically given,"[229] ultimately is the product of a system of "typical values"[230] which are "derived by a mental operation upon reality."[231] The typical values specific to the criminal law are volition and mens rea. They define the contours of juridical beingness and make possible the submersion of determined beingness into ideological beingness.

Richard Epstein has argued that the distinctive characteristic of criminal law is its insistence on determining guilt through a process of comparing the behavior of an offender to some ideal standard of conduct adopted by the community.[232] In fact, the process is more adequately described as the placing of behavioral data generated by causal factors operating upon an individual offender into preconceived idealized categories such as volition and mens rea,[233] in order to produce an image of responsibility which serves the ordering requirements of the collective.[234] The ritual[235] of adjudicating crim-

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227 Perhpas the classic statement of ideological beingness is the following definition provided by Kant: "A person is the subject whose actions are susceptible to imputation .... Accordingly moral personality is nothing but the freedom of a rational being under moral law (whereas psychological personality is merely the capacity to be conscious of the identity of one's self in the various conditions of one's existence)." G. ROSE, *supra* note 217, at 20-21 (quoting E. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 329-30 (J. Ladd trans. 1965)).

228 *Cf.* Lask, *Legal Philosophy*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 35-37 (K. Wilk trans. 1950)(the "prelegal realities" of "the individual and the collective" are "properly adopted by the law, which in the same sense, in the realm of legal meanings, coins the concepts of individual and of collective personality").

229 *Id.* at 36.

230 *Id.* at 4-6.

231 Patterson, *Introduction* to THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN, *supra* note 228, at xxix.

232 Epstein, *supra* note 3, at 243 (unlike tort law which employs a "comparative" standard of justice in which the conduct of two parties to a lawsuit are compared against each other, criminal law employs an "ideal" standard of justice in which the conduct of an individual defendant is measured against an ideal societal standard).

233 *Cf.* Patterson, *supra* note 231, at xxix ("Since the mind can operate only by the use of categories or types, 'typical values,' that is, types of value, are the subject matter of legal philosophy").

234 The words volition and *mens rea* are "signifiers" within a linguistic system. As such, they have no natural and proper meanings. Rather, they must be paired with "signified" objects in order to have some tangible significance. The process of adjudication is the process of drawing connections between these categorical words and the eviden-

inal behavior is thus the institutional process of generating a "socially constructed reality" which takes "recurrent patterns of interaction" and, through the mediating influence of the juridical models of volition and mens rea, turns them into "typifications of mutually understood categories of action."[236]

For example, suppose that a person is being tried for theft in a jurisdiction which defines that offense as "the unlawful taking of, or exercise of unlawful control over, movable property of another with purpose to deprive him [or her] thereof."[237] Further suppose that the defendant in fact entered a grocery store, took possession of a loaf of bread, and left without paying for it. The job of a prosecutor in such a case would be to array available facts according to certain familiar doctrinal categories in order to "prove the elements of the offense."[238] She would certainly argue that the taking of the loaf, together with the defendant's failure to pay for it, constituted sufficient "act[s]" within the meaning of the statute.[239] But how would she prove that those acts were undertaken voluntarily and with the requisite intention? Intention might be shown by evidence that the defendant glanced around the store and waited until he was alone before taking hold of the bread, or by evidence that he placed the bread inside his overcoat rather than in a shopping basket.[240] Volition, no doubt, would turn on evidence indicating that the defendant had been conscious and uncoerced.[241]

But what of the possibility that the defendant had been hungry and without money to purchase the bread? What if he had taken the

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tiary data generated from actual conduct. Once joined, signifier and signified—the words and data—form "signs," and it is this product which is ideology. C. SUMNER, *supra* note 194, at 20-21.

235 For a very different analysis of litigation as "ritual," see Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 92-99.

236 Ball, *A Theory of Punishment: Restricted Reprobation and the Reparation of Social Reality*, in STRUCTURE, LAW, AND POWER: ESSAYS IN THE SOCIOLOGY OF LAW 135, 141-42 (1979). "In this way social situations are defined, and shared meaning is established. A symbolic universe is constructed; everything is put in its 'right' place." *Id.* at 142.

237 *See generally* MODEL PENAL CODE § 223.2(1) (1962).

238 *See generally* MODEL PENAL CODE § 1.12(1) (1962).

239 MODEL PENAL CODE § 1.13(2) (1962) defines an "act" as "a bodily movement whether voluntary or involuntary." As explained above, *see supra* note 209, the Model Penal Code formulation presumes volition and also provides specific categories of exception to this general presumption.

240 *Cf.* MODEL PENAL CODE § 2.02(2) (1962)(defining "purposely," "knowingly," "recklessly," and "negligently," with respect to various types of material elements of offenses). If, for example, the statute required that the taking be proved with respect to a culpability level of purpose, the prosecutor would have to proffer evidence indicating that it was the defendant's "conscious object" to engage in that conduct. *Id.*

241 *See generally* MODEL PENAL CODE §§ 2.01(2), 2.09 (1962)(unconsciousness overcomes presumption of voluntary act; duress provides affirmative defense).

loaf as a symbolic protest against the store's discriminatory employment policies or its exorbitant pricing practices? Would it make any difference if the theft had been part of a college prank or dare? Clearly, each of these explanations for the defendant's conduct would be dismissed pursuant to the common law maxim that "motive," unlike intention, is irrelevant to the law of crimes.[242] The process of adjudicating guilt does not contain an inquiry as to why a particular person has engaged in proscribed behavior. It is satisfied with "proof" merely that he or she chose the wrong course of conduct and acted in furtherance of that choice.[243]

Only by way of the prior inquiry, however, is one led to consider the vast range of stimuli actually producing conduct. Motive stands as a clue that behavior is determined, and, in organic society determined uniquely from individual to individual. The hungry thief, like the indignant thief and the fraternity thief, is a determined being. As such, each is differentiated on the basis of clearly dissimilar environmental and experiential backgrounds, regardless of the fact that each has engaged in superficially similar behavior.[244] The adjudicatory process renders these dissimilarities invisible while simultaneously generating representations of what happened which are quite consistent.[245] Having been worked through the process, the hungry thief, the indignant thief and the fraternity thief, all emerge simply as thieves: ideological beings who have chosen to steal bread and who are therefore subject to punishment.[246] The fixing of guilt here is an incremental step in the collective process of boundary-defining, because it makes a statement that theft is inappropriate and violates the conditions of communal membership.[247] Specifically, the process has created grist for the boundary-defining

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242 G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 10, 14 (1965).

243 *Id.*

244 Each has taken a loaf of bread under circumstances which meet the requirements of the statute.

245 In essence, the adjudicatory process is a process of "writing history." It is the process of constructing a "text" which provides an account of "what has happened." In these terms, it is quite reasonable to claim that the process has rendered something "invisible," for history writing, by definition, is a process of selection, deletion and translation. "What makes history possible is that a sub-set of events is found . . . . History is therefore never history, but history-for. It is partial in the sense of being biased even when it claims not to be." C. LEVI-STRAUSS, THE SAVAGE MIND 257-58 (1966).

246 Motive, which stands as a clue that these individuals are different, may be taken into account in determining which punishment should be imposed. G. WILLIAMS, *supra* note 242. This concern is particularly valid if the sentencing authority employs a theory of sanctioning in which punishment is made to fit the characteristics of the offender rather than the offense. *See generally* N. KITTRIE, *supra* note 210, at 20-32.

247 "Each time the community moves to censure some act of deviation, then, and convenes a formal ceremony to deal with the responsible offender, it sharpens the authority

mill by creating social actors who can be held "responsible" for their "choices," whatever those choices may be.[248]

The fact that the vast majority of criminal cases in the United States are disposed of by negotiated guilty pleas[249] is not necessarily inconsistent with the view of the criminal process being advanced here. Whether criminal charges are adjudicated in the context of a full-blown trial, with all its ceremonial trappings,[250] or are resolved by the taking of a plea, the project remains one of comparing determined beings to a doctrinal representation of juridical beingness so as to reflect and reinforce a notion of ideological beingness.

When a defendant tenders a guilty plea, he or she waives a number of constitutional rights, the most important of which is the right to put the state to its proof at trial.[251] The settled standard for a waiver of constitutional rights is that it be voluntary, knowing and intelligent.[252] Therefore, in place of the proof presenting ritual which would occur if the defendant proceeded to trial, a more condensed fact-finding process takes place in which the court satisfies itself that a sufficient basis exists to support the conclusion that the

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of the violated norm and restates where the boundaries of the group are located." K. ERICKSON, *supra* note 45, at 13.

248 This process of constructing autonomous individuals is important in two respects. First, it enables individuals to be used in boundary defining rituals. Second, it creates and reinforces a general belief in free will, a belief which itself becomes one of the numerous causal factors determining behavior. *See supra* note 194. This second point is especially important since "the internal, voluntary motivation of the individual to conform to group norms" is, in the long run, more effective than coercive social control. Roucek, *supra* note 44, at 12. In the final analysis, however, these two consequences devolve into one, since voluntary social control itself depends upon the existence of a general perception among community members that they share some common characteristics and some common social space. *Cf. id.* (internal control "especially effective in a homogeneous society").

249 *See generally* Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979). Recent United States Bureau of Justice data indicate that approximately 90% of all felony arrests which proceed to final disposition are resolved by guilty pleas. B. BOLAND, THE PREVALENCE OF GUILTY PLEAS (Bureau of Justice Statistics 1984).

250 *See generally* T. ARNOLD, THE SYMBOLS OF GOVERNMENT (1935).

251 *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970)(guilty plea constitutes waiver of right to trial so must be made voluntarily and with knowledge); FED. R. CRIM. P. 11(c)(4) (court must advise defendant that pleading guilty results in waiver of right to trial).

252 Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(waiver must be "intentional relinquishment or abandonment of a known right or privilege"). *See also* Boykin v. Alabama, 395 U.S. 238, 242 (1969)(record must show guilty plea entered voluntarily and with defendant understanding); Bram v. United States, 168 U.S. 532, 542 (1897)(quoting 3 RUSSELL ON CRIMES 478 (6th ed. 18))(confession must be "free and voluntary" to be admissable). *But see* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972)(question left open whether waiver by defendant required to be "knowing and intelligent" with respect to procedural due process).

defendant has voluntarily and knowingly "assumed responsibility" for his or her conduct.[253] What emerges from this truncated ritual is an ideological being not substantially different from one who is generated by a complete adjudicatory proceeding. In both instances, the deterministic basis for the defendant's conduct is concealed through a process of applying "facts" to preexisting juridical referents. In the one case, those referents are the doctrinal requirements of volition and mens rea; in the other, they are the requirements of volition and informed choice.[254] In simple terms, the court's procedures for acceptance of a defendant's waiver of his or her right to a trial replicates the ideological practice of the trial itself. The image which is represented and reproduced by these two ceremonial practices is the same. The picture is of an autonomous individual held responsible for his or her freely chosen conduct.[255]

This project of reflecting and reinforcing the ideology of individuality also takes place through the imposition of punishment. In tribal society, the ideology of the group was affirmed through a process of imposing a punishment which, by its very nature, involved the withdrawal of that which was being reinforced—group membership.[256] In contemporary society, the imposition of any sanction, by

253 *See, e.g.*, FED. R. CRIM. P. 11(c)(4).

254 With respect to a conviction following trial, it can be said that the defendant has been "proved" to have committed the offense voluntarily and with the requisite intention. *See generally* MODEL PENAL CODE §§ 1.12, 1.13, 2.01, 2.02 (1962). With respect to a conviction following a guilty plea, it can be said that the defendant has voluntarily and knowingly "acknowledged" that he or she committed the offense voluntarily and with the requisite intention. *See generally* FED. R. CRIM. P. 11(d) (court must insure that the plea is voluntary); FED. R. CRIM. P. 11(f) (court must find a factual basis for the plea). *But cf.* North Carolina v. Alford, 400 U.S. 25 (1970)(court may accept guilty plea even when defendant fails to admit guilt, so long as factual basis for plea exists). The analogous relationship between formal adjudication and the taking of guilty pleas is not necessarily disrupted by the recognition of an *"Alford* plea," because the plea must still be made with volition and knowledge regarding the waiver of trial. The plea also must occur in the context of a factual record supporting the allegations in the information or indictment, at least with respect to the offense for which the defendant has "assumed responsibility." *Id. But see* Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 55-58 (1975)(suggesting that many guilty pleas, although meeting the formal standards for waiver of constitutional rights may not actually be voluntary).

255 Garfinkel suggests that a criminal prosecution as a "degradation ceremony" accomplishes "communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types." Garfinkel, *supra* note 195, at 420. In fact, the "communicative work" accomplished by a conviction, whether it be generated out of a formal adjudicatory process or by the taking of a guilty plea, involves the presentation of the offender as an individual whose status has been degraded precisely because of his or her 'decision' to engage in proscribed conduct.

256 *See supra* notes 149-52 and accompanying text.

necessary consequence of the fact of coercion,[257] involves the withdrawal of individual autonomy and freedom of choice.

IV. THE STATUS OF THE "RESTITUTIONARY THEORY OF JUSTICE"

The foregoing analysis presses toward the conclusion that human society has always depended upon the criminal law as an institutional adjunct to its boundary-maintaining function. This dependence served initially to reinforce an ideology of the group and later to reinforce an ideology of individuality. This conclusion undermines the theory of restitution presented by the advocates of the "restitutionary theory of justice." Their assertion that the individual victim of a crime is the true—and, in some accounts, only—party in interest cannot be squared with the considerable evidence respecting a collective interest and participation in the administration of a law of public wrongs from the time of tribal society to the present.[258]

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257 "[P]unishment consists essentally of a loss of a portion of self-determination." Ball, *supra* note 236, at 144. H.L.A. Hart has provided the following five-part definition of "punishment":

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for an offense against legal rules.
(iii) It must be of an actual or supposed offender for his [or her] offense.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

Hart, *Prolegomenon To the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 4-5 (1968). Clearly, the fact that punishment involves pain or some other unpleasant consequence, together with the fact that it is imposed by an authority other than the offender, leads one to the conclusion that it is coercive. Moreover, the fact that incarceration and probation involve the loss of liberty, while the imposition of a fine involves the loss of property, lends further support to the assertion. There are, of course, instances in which people "voluntarily" give up liberty and property, but these situatons are the exception rather than the rule.

258 As noted above, some tribal cultures treated witchcraft, a few other sacral offenses and incest, as public wrongs subject to individual punishment. *See supra* note 96. Some commentators have attempted to explain the tribal practice of punishing these offenses in a manner which does not disrupt the historical account employed in the "restitutionary theory of justice." Abel and Marsh, for example, have argued that evidence of the existence of sacral offenses and other crimes in early societies is not at odds with the claim that all harmful conduct was treated with a restitutionary response, because these crimes were "thought to be fraught with serious supernatural danger." C. ABEL & F. MARSH, PUNISHMENT AND RESTITUTION 27 (1984). Punishment of the offender in such an instance, they argue, was not really punishment at all. Rather, "punishment of these crimes can be seen as a sort of social rehabilitation accomplished by making restitution to the offended deity, a restitution which involves cleansing of the social (and sometimes the god's) body and the infliction of suffering upon the offender." *Id.* at 28.

This rationalization, however, misses the point, because it fails to explain the role of religion and religious ritual in tribal society. To describe these offenses as sacral wrongs is to say that their commission implicated the community's interest in maintaining the cult of the group. *See supra* note 164 and accompanying text. Upon the commission of

Insisting that the historical/anthropological account upon which the "restitutionary theory of justice" is based is flawed does not amount to rejecting the use of restitution altogether. The proposition that restitution is justified as furthering one or more of the secondary aims of the system[259] or as serving interests otherwise extrinsic to the criminal law remains to be studied.[260] In either case, however, because the criminal justice system functions primarily as a

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any of these offenses, the wrongdoer generally was subject to the sanction of exterritorialization. *See supra* note 150 . The practice of punishing sacral offenses, like the practice of punishing incest offenders, *id.*, served as a means of defining and maintaining communal boundaries. In both cases, the imposition of an individual sanction was a ritual reinforcing the content of the collective conscience. As Bittner and Platt have explained:

> [I]n archiac societies the boundaries of morality were largely coextensive with the boundaries of membership in the collectivity. . . . [A]cts of destruction of morally exterritorialized persons can be found to accompany the normal and routine administration of justice. In the Near East, for example, licensed acts of mob violence against persons who offended some religious taboo run parallel with normal retributive justice . . . .

Bittner & Platt, *supra* note 150, at 85-86.

In neither instance, however, was the offender thought of as an autonomous individual, even though he or she was singled out for individual treatment. Rather, the offender was viewed as a noxious object to be destroyed in the interests of the community as a whole. *Cf.* Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMPLE L.Q. 169 (1973)(discussing the "punishment" of animals and other objects that had caused injury or death).

259 It makes sense to describe retribution, deterrence and, to a lesser extent, rehabilitation as secondary aims of the criminal justice system, because these familiar models of punishment all presume the prior existence of autonomous individuals. *See, e.g.*, Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law"*, 1977 WIS. L. REV. 81, 98 (1977)(model of deterrence "rests on a radically individualist[ic] conception of the relationship between each person and the whole society").

260 For a discussion of the rehabilitative, deterrent and/or retributive potential of restitutionary sentences, see Klein, *supra* note 3; R. Boldt, Retribution in the Criminal Process: A Practive In Search of Justification (1986)(unpublished manuscript).

A cursory review of the offense of conviction case law reveals that there currently exists no general agreement with respect to the ways in which restitutionary sanctions may or may not further correctional or penal goals. For example, three different courts in three different states have expressed conflicting views regarding the relationship between the rehabilitative potential of restitution and the offense of conviction limitation. The California Supreme Court stated that restitution beyond the offense of conviction may serve to rehabilitate offenders if the offense for which restitution is ordered was committed with the same "state of mind" as the offense of convition. People v. Richards, 17 Cal. 3d 614, 622, 552 P.2d 97, 102, 131 Cal. Rptr. 537, 542 (1976). In contrast, the Supreme Court of Washington, in State v. Elits, 94 Wash. 2d 489, 494, 717 P.2d 993, 996 (1980)(quoting State v. Stalheim, 275 Or. 683, 688, 552 P.2d 829; 831 (1976)), maintained that the rehabilitative impact of a restitution order is "significantly diluted" when victims other than those directly harmed by the offense of conviction are to be repaid. Finally, a Florida appellate court held as clearly rehabilitative a restitution order for injuries well beyond the offense of conviction. Rose v. State, 434 So. 2d 1014, 1015 (Fla. Dist. Ct. App. 1983).

collective institution reflecting and reinforcing an ideology of individuality, the incorporation of restitution must be accomplished without substantially interfering with the criminal law's primary boundary maintaining function.[261]

A. ADJUDICATION AND SENTENCING AS COORDINATE STAGES OF THE CRIMINAL PROCESS

With respect to the use of restitution in the criminal process in general and "the offense of the conviction" problem in particular, courts and commentators have mistakenly failed to perceive the overarching institutional role of the criminal law. The tendency has been to argue for or against expansive orders of restitution on the basis of rehabilitative interests, retributive interests or victims' interests without an understanding that these interests often are in conflict with the community's interest in insuring that the criminal law functions as an effective ideological institution. Helen Silving has explained that

> [a] rational scheme of criminal justice is not a composite of rules and institutions, however rational each of these may seem to be in immediate context, but a comprehensive system oriented to an overall policy. Each rule or institution must be assessed not as a detached but as a relational phenomenon, operating in context with the total system. For it derives its functional meaning from the extent to which it contributes to the overall policy. That policy itself must be planned systematically. Systematic planning consists in advance determination [of] what values are to be realized; where values are conflicting; what hierarchical place is assigned to each, and if a compromise is contemplated, to what extent one value may be permitted to yield to another. Each rule of criminal law or procedure, each verdict, judgment or sentence, each act of execution should be a goal-directed decision rather than a groping attempt at finding causistic justice by a method of *ad hoc* compromise.[262]

Silving's compelling plea for a systematic and principled criminal process is contained in her discussion of an issue which bears substantially upon the problem addressed here. She also considered the question of what relationship should exist between adjudication and sentencing in the criminal law, although she focused on

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261 Some commentators have argued that restitution itself has the capacity to reinforce the ideology of individuality. *See, e.g.*, C. ABEL & F. MARSH, *supra* note 258, at 85 (restitution is "respectful" of the "principle of self-determination" and is also "supportive of it"). To the extent that this assertion is correct, it may provide support for the use of restitution as a criminal sanction. Even so, the use of restitution in the criminal process must be limited so as to avoid undermining the ritualistic function of the adjudicatory process. *See infra* notes 262-86 and accompanying text.

262 Silving, *"Rule of Law" in Criminal Justice*, in ESSAYS IN CRIMINAL SCIENCE 77 (G. Mueller ed. 1961).

the common practice of sentencing an offender, for rehabilitative purposes, according to his or her character with little regard for his or her offense of conviction.[263] True to her statement that "[s]ystematic planning consists in advance determination [of] what values are to be realized,"[264] Silving first identified respect for individual autonomy and dignity as the ultimate value to be served by the criminal law.[265] Consistent with this statement, she argued that retributive principles must be the primary determinants of a criminal sanction because they "emphasize . . . [the offender's] responsibility for his [or her] freely committed illegal acts, a responsibility expressed in liability to punishment."[266] In these terms, Silving concluded that it makes little sense "to follow the ritual of adjudication for the purpose of establishing 'guilt' for a particular act, if the end-result of such adjudication is assumption of an entirely new standard, that of the personality of the actor."[267] Punishment, said Silving, must be "guilt-adequate," and "[p]ursuit of other ends of criminal law within the punitive scheme . . . [must be] subject to this limitation."[268]

Although Silving's argument is persuasive, embracing retribution as the single most important "limitative principle" in the criminal law,[269] she presumed the existence of autonomous individuals whose dignity must be respected. This article, however, challenges that presumption by suggesting that the criminal process does more than simply recognize an ideology of individuality. Through its ceremonious adjudication of guilt, and through its imposition of coercive sanctions, the system creates images of autonomous individuals and represents them to the community as reality.[270] Silving wished to link the sentencing phase of the criminal process to the adjudicatory phase in order to further the capacity of the system to recognize the dignity of autonomous individuals.[271] Yet even if, as has been argued here, the primary aim of the system is to construct ideological individuals, the conclusion remains the same: adjudication and

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263 *Id.*

264 *Id.* at 77.

265 *Id.* at 85-87, 154.

266 *Id.* at 104 (distinguishing between "punishment" and non-punitive "measures" in the German "dual-track system").

267 *Id.* at 105 (suggesting, however, that non-punitive measures which are not "guilt-adequate" may also be employed, but only if they are fashioned according to the "rule of law").

268 *Id.* at 89.

269 *Id.* at 85-87.

270 *See supra* notes 245-57 and accompanying text.

271 Silving, *supra* note 262, at 86-87.

sanctioning must be consistent if the ultimate values expressed through the former are to be accomplished.

Viewing Silving's theory in the context of the analysis presented here only strengthens her call for "guilt-adequate" sentencing. Retributive principles are the manifest products of moral individualism and the ideology of individuality.[272] The fact that Silving founded her theory on the products of contemporary ideology rather than upon the ideology itself merely illustrates the power of modern institutions, including the criminal law, to present a constructed reality as actual reality.[273] Silving was correct in her identification of moral individuality as the ultimate value treated in the criminal process. To replace her manifest principles with the larger ideological analysis which produced them, therefore, only deepens the argument.

B. NEGOTIATED GUILTY PLEAS AND THE "OFFENSE OF CONVICTION" PROBLEM

Some courts and commentators have suggested that restitution orders for injuries beyond the scope of an "offense of conviction" should be enforced in cases where the gap between an offender's adjudicated guilt and his or her "actual" guilt is the result of a negotiated guilty plea.[274] In instances where an offender has engaged in a series of separate offenses against a number of different victims, dismissing certain counts or accepting a more limited plea ordinarily will preclude restitution to certain victims.[275] Similarly, if an offender has committed a number of offenses against a single victim, a negotiated guilty plea may cause the victim to receive only partial restitution.[276] The competing pressures in the system are particularly acute in these cases because the victim's interest in receiving a full recovery is believed to be hampered by an adjudicatory procedure which is "grounded upon expediency" rather than the offender's wrongdoing.[277]

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272 *See supra* notes 212-36 and accompanying text. Retributive principles are among the collective beliefs and practices generated by the cult of the individual or moral individualism. They are part of the theology of the secular religion of the individual. *See supra* notes 169-73 and accompanying text.

273 *See supra* note 236 and accompanying text.

274 Goldstein, *supra* note 6, at 537-38; Note, *Restitution in the Criminal Process*, *supra* note 5, at 510-11. *See also* People v. Gallagher, 55 Mich. App. 613, 223 N.W.2d 92, 95 (1974).

275 Note, *Restitution in the Criminal Process*, *supra* note 5, at 510 n.24.

276 *Id.*

277 *Id.* at 511. Moreover, additional pressure toward exceeding the offense of conviction is produced by a practice which is common in some jurisdictions: reading additional counts or offenses into the record during a plea-taking or otherwise noting the offender's acknowledgement of "responsibility" for additional injuries. Harland, *supra*

Even in cases where a plea bargaining process is responsible for diminishing the scope of an offender's adjudicated guilt, the limited justifications for the use of restitution do not form an adequate basis for ordering repayment beyond an offense of conviction. First, negotiated guilty pleas are not necessarily the result of an overburdened criminal process.[278] A number of writers have argued that prosecutorial reluctance to run the risks of trial rather than administrative convenience and efficiency are to blame for the high volume of guilty pleas reported in most American jurisdictions.[279] It has even been suggested that plea bargaining is itself the cause of much delay in the system.[280] Specifically, there is substantial evidence to suggest that negotiated guilty pleas produce results which are quite consistent with outcomes generated by trials.[281] In either instance, there may be a gap between the offender's adjudicated guilt and his or her "actual" guilt. This differential, however, is more likely due to the quality of the state's evidence, the difficulty of proving an offense given the requirement of proof beyond a reasonable doubt, and all of the other procedural protections afforded defendants in a constitutional scheme.[282]

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note 1, at 83. The offender's informal or quasi-formal admission of guilt under these circumstances is not an adequate basis for exceeding his or her offense of conviction. First, substantial pressure is placed upon an offender in the plea negotiation process, and it is therefore difficult credibly to describe this type of an admission as voluntary and knowing, particularly when no notice has been given that an informal acknowledgement of responsibility may form the basis for sentencing. *Cf.* Note, *Restitution in the Criminal Process*, *supra* note 5, at 514-21 (suggesting that the Federal Rules of Criminal Procedure be amended to provide for formal notice). *See also* Alschuler, *supra* note 254 (suggesting that many guilty pleas are not voluntary). Furthermore, to the extent that the plea bargaining process has already begun to undermine the integrity of the adjudicatory ritual, it is nonsensical to debilitate the process further by allowing sanctions beyond an offense of conviction. *See infra* notes 284-86 and accompanying text.

278 *See generally* Alschuler, Book Review, 12 CRIM. L. BULL. (1976).

279 *See, e.g.*, Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-61 (1968)(noting the prosecutorial practice "of bargaining hardest when the case is weakest").

280 *Id.* at 56.

281 Negotiated guilty pleas may also produce outcomes which are as rational as outcomes resulting from trials. *See, e.g.*, Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT: THE COURTS 108, 112 (N.A.C. Standards 1973).

282 Underinclusiveness associated with the strictness of rules of criminal procedure relative to civil rules is an avoidable consequence of the principle that the seriousness of criminal guilt and sanctions warrants extraordinary procedural safeguards. Any attempt to relax procedural rules in the criminal process to address this source of underinclusiveness will produce tension with this fundamental principle.

Note, *Restitution in the Criminal Process*, *supra* note 5, at 511 n.25. *Cf.* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960)(procedural protections must be afforded individual defendants in the criminal process given defendants' relative position of powerlessness as against the state). In addition, the traditional protections associated with American criminal procedure are an essential feature of the ritual itself, because they address the construction of the notion of "judicial

Even were we to assume that guilty pleas are produced by a congested criminal process, the use of restitution beyond an offender's offense of conviction still would not be justified. If the adjudicatory process is being short-circuited because of an overburdening of the criminal courts, it is illogical to further trivialize the guilt-finding ritual by assigning yet another task to an already overtaxed institution. The primary aim of the system is to create and reinforce an ideology of individuality, not to insure that all victims receive a full recovery. Both are important, perhaps necessary, functions of some institution or institutions in society. It is unreasonable, however, to expect the criminal justice system to do anything particularly well if it is asked to do too much simultaneously.

Advocates of restitution have asserted that society owes a duty to crime victims to see that some effective method of recovery is available.[283] Acceptance of this claim does not inexorably lead to

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beingness" and insure that outcomes are meaningful to observers. *See supra* notes 228-29 and accompanying text.

283 One commentator has pointed out that the resources necessary to remedy victims' injuries must come from either the victim, the offender or the state. Lamborn, *Remedies for the Victims of Crimes*, 43 S. CAL. L. REV. 22, 26 (1970). The first option, absorption by the victim, is the most common outcome in practice. *Id.* It is, however, rejected by advocates of restitution because of the belief that the state holds a responsibility to see that victims are made whole, whether by assisting them in obtaining a recovery from the offender, or by providing compensation from some sort of public fund. Goldstein, *supra* note 6; Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPPERDINE L. REV. 23, 47 (Supp. 1984); Lamborn, *supra*; Wasik, *The Place of Compensation in the Penal System*, 1978 CRIM. L. REV. 599. A variety of theories have been advanced to account for this view. The first theory argues that, because the state, as sovereign authority, must monopolize the use of force, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 342 (M. Rheinstein ed. 1954), a failure on its part to protect those citizens who have abandoned violence from those who have not creates an obligation to provide the former group with some effective remedy. Lamborn, *supra*, at 46-48. *But see* Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860 (1968)(crime victim has no cause of action against city for failure to protect). The imperfect monopolization of force by the state is said to cause certain harms, and those harms must be repaired if the government is to retain its legitimacy. Lamborn, *supra*, at 46-47. In addition, it is observed that the state's monopolization of force has the effect of making victim self-help more difficult. Except in rare situations where the offender voluntarily offers to make his or her victim whole, a victim must resort to force in order to accomplish reparation or restitution. Because contempory society views such violent self-help as itself constituting criminal behavior (of course, most jurisdictions do allow the use of reasonable force in order to prevent harm to life or property. *See, e.g.*, N.Y. PENAL LAW § 35.15 (West 1975)) a duty is said to be created whereby the state must provide the victim with some alternative means of recovering his or her losses. Lamborn, *supra*, at 46-47.

A final theory centers not on the sovereign's failure, but on its affirmative obligation to look after the welfare of its citizens. Under this theory, the victim is understood to be similar to other needy persons who are commonly aided by the state. "The social state's responsibility in such cases is primary and not predicated upon failure on its part. The community has an interest in protecting and maintaining certain standards of well-being for all its citizens." Silving, *supra* note 25, at 252. *But see* Friedsam, *Legislative Assistance to*

the conclusion that victim reparation must take place in the criminal process following an adjudication of guilt. If adjudication is to mean anything, its ceremonial integrity must be respected in the sanctioning process. If, on the other hand, a restitutionary obligation need not depend upon an offender's formal wrongdoing, there is no reason to require an adjudication in the first instance.[284] Perhaps the solution is to divert more offenders, prior to adjudication, into a non-criminal process designed to fix restitutionary liability.[285] Although establishing the contours of an alternative arbitration system is beyond the scope of this article,[286] the idea is worth exploring. Such a solution would recognize the integrity of the adjudicatory ceremony in those cases where an offender is tried and punished and, at the same time, would create an alternative mecha-

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Victims of Crime: The Florida Crimes Compensation Act, 11 FLA. ST. L. REV. 859, 864-65 (1984)(reporting criticisms of social welfare theory).

The mechanism that traditonally has been provided for the making whole of victims' injuries is a civil action sounding in tort. Hudson, *supra* note 135, at 138. Considering the general characteristics of offenders and victims and the costs of employing this process, however, it is fair to describe the tort remedy as little more than an empty promise. *Id.* at 135. In the first place, fewer than one out of five criminal offenses are closed by an arrest. This results in a situation in which most victims have no identified offender to sue. *See*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS FOR 1983, *supra* note 44, at 451, 453. Even if an arrest is made and an offender identified, the substantial costs associated with litigation, including the expense of retaining counsel, conducting discovery and proceeding to trial, are sufficient to dissuade most victims from pursuing a tort suit. Hudson, *supra*, at 139. Furthermore, a majority of crime victims are members of the least economically advantaged sectors of society, and the characteristics which make it difficult for victims to initiate litigation—poverty, advanced age and poor education—also make it likely that most will be unaware of the remedies which do exist. Hudson, *supra*, at 138; Lamborn, *supra*, at 41.

Equally important in rendering the tort remedy an inadequate solution is the fact that offenders, like victims, tend to be poor and frequently are unemployed. Lamborn, *supra*, at 38-39. Both of these characteristics are associated with judgment-proof civil defendants. *Id.* at 38. In addition, whatever financial resources an offender may have often are depleted in the course of defending both criminal and civil actions. *Id.* Leaving aside the drain which may result if a fine is imposed as a criminal sanction, and the technical issue of priority between the payment of criminal fines and the payment of civil judgments, the financial condition of the offender is sure to be worsened further if he or she is incarcerated before or after conviction. *Id.* Thus, while the typical criminal offender is far from an "ideal civil defendant" initially, the fact that the victim must compete with the criminal justice system over what are likely to be extremely limited resources almost certainly insures that little or no civil recovery will occur.

284 *Cf.* Silving, *supra* note 262, at 145 (noting the possibility that punitive sanctions described as non-punitive measures may be imposed upon offenders without the protections typically provided by the adjudicatory process).

285 *See generally* Brakel, *Diversion from the Criminal Process: Informal Discretion, Motivation and Formalization*, 48 DEN. L.J. 211 (1971). *See also* Harland, *supra* note 1, at 68 (discussing pretrial restitution).

286 *But see* Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U. L. REV. 17 (1979).

nism for repairing the injuries suffered by those victims for whom tort suits and public compensation are inadequate.