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SYMPOSIUM: COMMENT: LESSONS FROM THE PAST: REVENGE YESTERDAY AND TODAY

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SUMMARY:

... Professor Seipp's Paper transports us to the Middle Ages to discover a society that views crime and tort quite differently from the way we view these categories today. ... In Professor Seipp's world the victim of a wrong had a choice: demand revenge by determining how the wrongdoer would be punished, or demand monetary compensation. ... I believe that the decline of the victim's right to revenge represents a shift from the model of the "rule of man," which is personal, subjective, and non-uniform, to the model of the "rule of law," which is impersonal, objective, and relatively uniform. ... The law of revenge provided personal satisfaction for victims. ... Although a wrongdoer could not always choose his victim to avoid cruel punishment or exorbitant demands for compensation, in small communities where people knew each other well, they could predict who would exact harsh penalties and who would not. ... Compensation for many torts has come to include punitive damages, among others, on the ground that victim-consumers need a powerful tool to protect themselves against powerful suppliers, and on the ground that punitive damage awards may have a healing effect on the victim beyond that which compensatory damages would effect. ... These new practices talk the language of the victims' right to vengeance, and recognize that sentencing is far more personal and subjective than people usually acknowledge. ...

TEXT:

Professor Seipp's Paper transports us to the Middle Ages to discover a society that views crime and tort quite differently from the way we view these categories today. Yet our discovery of that society offers a perspective about our own. In Professor Seipp's world the victim of a wrong had a choice: demand revenge by determining how the wrongdoer would be punished, or demand monetary compensation. These two entitlements were mutually exclusive. The victim could choose either one, but to some extent, especially in earlier times, the right of revenge was considered a higher right that the victim was expected to exercise, and sometimes even to administer. This view of revenge as a higher right may have reflected the mores of the community, n1 exerting pressure on the victim to exercise the right.

Let us return to the present and ask two questions. First, how and why have we changed the Middle Ages revenge-based system of dealing with wrongs? Second, how much of the underlying revenge motif of the past do we still carry with us today?

I. How Have We Changed the System of the Middle Ages?

Our legal system has parted ways with the system of the Middle Ages in two fundamental respects: the decline of the victim's right to revenge, and the ascent of monetary and compensatory damages. Today's society generally considers the right to revenge as uncivilized and perhaps even un-Christian. n2 The law reflects this disapproval by depriving a crime victim of the right to determine the wrongdoer's punishment. Unlike in the Middle Ages, punishing criminal acts today lies exclusively within the domain of the state. n3 As a result, a crime is no longer viewed as a wrong against the victim alone, but as a wrong against society as a whole. n4 Thus, today a victim is excluded from the process of punishing the wrongdoer. The victim's only option is to sue for compensation in separate civil court proceedings. n5 The second fundamental change in our society since the Middle Ages is the ascent of money. The main form of wealth is no longer land but money and its equivalents. While land presents the image of personal and subjective sovereignty, money presents the image of impersonal and objective power. Money allows us to compare peoples' wealth and earning power, and to equalize losses caused by similar actions. Money also allows us to convert otherwise unique persons and actions into identical units, n6 thus providing a common denominator for people, actions, and the consequences of the rules of law. n7 In any event, today monetary fines and compensation seem far more valuable than in the past, and their nature negates many characteristics of revenge.

II. Why Have We Made This Shift?

A. From the Model of Personal, Subjective, and Non-Uniform Law to Impersonal, Objective, and Uniform Law

I believe that the decline of the victim's right to revenge represents a shift from the model of the "rule of man," which is personal, subjective, and non-uniform, to the model of the "rule of law," which is impersonal, objective, and relatively uniform. Under the "rule of man" model, judges or rulers can use their discretion to determine the law, and, at their pleasure, mete out different rules to similar parties or classes of parties. n8 Under the "rule of law" model, judges or rulers must follow general principles or standards, and may not change the law for particular persons or classes of persons except as permitted by law and rationalized on non-arbitrary grounds. Thus, although these models do not fully reflect reality, most of us believe that the "rule of law" reduces the influence of the unique characteristics of the judge or ruler and of the parties. n9

The historic right of victims to choose the wrongdoer's punishment n10 resulted in rules that depended on, and were shaped by, the sense of justice and personal standards of victims and their close communities. n11 The law of revenge provided personal satisfaction for victims. Whether a court punished or ordered compensation depended on the character of both the victim and the immediate community, and the prior relationship of both with the wrongdoer. So long as this personal right was recognized and no other standards for punishment were imposed, the measure of punishment could not be uniform. Moreover, because the victims could choose compensation in lieu of revenge, the right to compensation and the standards for compensation were also not uniform.

This regime rendered the law unpredictable. Not only did punishment depend on the subjective desires of the victim, but deterrence was also tied to the victim's feelings and not to the character of the wrongful act. Although a wrongdoer could not always choose his victim to avoid cruel punishment or exorbitant demands for compensation, in small communities where people knew each other well, they could predict who would exact harsh penalties and who would not. In this way, the mere reputation of people for cruelty could deter wrongful acts against their person and property. n12 Deterrence was therefore personal, subjective, and non-uniform, depending on the victim's and the wrongdoer's personalities and preferences, and perhaps on their relationship.

Today, the accepted wisdom is that non-uniform and unpredictable punishments lose some of their deterrent effect. For example, if potential criminals can hope - even if they do not know for certain - to be paroled after a short period of incarceration, they will not be as effectively deterred from criminal action as they would be if they expected to serve their full sentences. n13

Uniformity requires generalization and reduces the focus on individuals, both wrongdoers and victims. The theories of rehabilitation and retributive justice result in a less uniform law, because both theories focus on the particular wrongdoer. Yet, if such theories were adopted and applied uniformly, punishments would not fit the wrongdoers.

In addition, effective deterrence arguably depends on the public's faith that the system will consistently punish criminals according to the law. This belief led Congress to pass the Sentencing Reform Act of 1984, n14 which was enacted as a response to the drastically different penalties that federal courts imposed for similar crimes. n15 Thus,

uniformity of sentencing has become a goal in itself along with honesty and just deserts. n16 The law of revenge resulted in unfair treatment of offenders by imposing disparate sentences on those who committed similar crimes. n17

In contrast, the imposition of a compensatory scheme represents a far more impersonal, objective, and uniform system of rules. Courts award compensatory damages on the basis of a universal standard that is valued similarly by all members of the social group: money or its equivalent. A system of compensation favors objectivity because it depends on the values that society attaches to injuries, not on the personal value that victims attach to injuries. n18 Employing a compensatory system leads to uniform rules governing wrongdoing because it is transaction-oriented rather than person-oriented. n19

Objectifying and unifying the applicability of the law, however, is not without a price. A law before which all persons are equal loses its humanity and passion; it rests on ignoring personal traits and focuses instead on a broad-based, generalized model of a human being. Victims today thus face a highly impersonal legal system that does not allow them to affect the punishment of those who wronged them. The law of torts, which constitutes a victim's only recourse, is based on a far more objective scheme for determining liability, and offers compensation only for particular kinds of injury. Therefore, recovery for injuries does not always reduce the rage that victims experience, nor does it provide the catharsis associated with revenge. n20

B. The Ascent of Money and Tort Compensation

The immense value that our society places on money further distinguishes modern law from medieval England's law of revenge. When Professor Seipp described to me the medieval rule that revenge and compensation were mutually exclusive remedies, I expected victims to prefer compensation. Professor Seipp, however, explained how differently a thirteenth century victim might react. Rich victims would choose revenge. Poor victims would choose revenge because not many wrongdoers were wealthy enough to compensate for their wrongs. Further, a victim's community's strong approval of revenge would influence the victim and result in more cases of cruel punishment and fewer cases of monetary damages.

Today, the state's exclusive right to prosecute wrongdoers makes it easier for victims to sue for damages without incurring the disdain or wrath of their communities. n21 Monetary damages can also constitute the only kind of punishment in cases involving corporate defendants and similar legal entities. n22 It is difficult to view such entities as either victims or wrongdoers. Applied to such nonhuman defendants, revenge must take the form of compensation.

In contrast to revenge, remedies in the form of compensation provide uniformity. As discussed above, money does not distinguish among victims and wrongdoers, but serves to equalize people, their actions, and the consequences under the law. n23

In short, revenge and compensation represent the differences between the law meted out by individuals and their close community on the one hand, and the law meted out by the state on the other; between *Gemeinschaft* and *Gesellschaft*; n24 between focusing on the individual parties and focusing on the action or transaction; between the law of small societies and the law of large, mobile, and diverse societies. A law designed to compensate victims is more impersonal, objective, uniform, and predictable than a law based on victims' right to exact vengeance.

III. The Desire For Revenge Lives On: Modern Revenge-Based Principles

Even though we seem to strive towards objective, uniform, and predictable compensatory laws, we have retained something from the past. Even today compensation and revenge duel for recognition.

On the one hand, the principles of the rule of law rather than the rule of man still predominate. Courts refused for many years to award compensation for non-quantifiable, subjective, victim-oriented sanctions such as pain and suffering. Many courts still formally deny compensation in criminal actions. n25 On the other hand, the separation between criminal and compensatory sanctions is far from complete. Compensation for many torts has come to include punitive damages, n26 among others, on the ground that victim-consumers need a powerful tool to protect themselves against powerful suppliers, n27 and on the ground that punitive damage awards may have a healing effect on the victim beyond that which compensatory damages would effect. This is the language of revenge. n28 In addition, recent jurisprudence leans toward accepting restitutive sanctions in many criminal contexts. n29 In some cases, courts have also allowed compensation for victims' pain and suffering, n30 although Congress is attempting to impose a cap on such awards. n31

There are other developments toward revenge-based rights. Recent statutes and judicial decisions have allowed, and sometimes encouraged, victims to get involved at the sentencing stage of criminal proceedings. Instead of limiting the considerations in sentencing proceedings to the wrongdoer's personal circumstances, courts and legislatures are allowing victims and their families to express their feelings and demand revenge or suggest leniency. Courts take such sentiments into account in sentencing wrongdoers. n32 The debate surrounding such practices echoes the arguments concerning the right to revenge. Some argue that these practices misrepresent the criminal justice system as requiring the accused to prove their innocence. n33 Others argue that it may be "good for society that [the public] can hear what the [victim's] family goes through." n34 In addition, a victim impact statement may help the victim by providing a "catharsis for the surviving victim or his family." n35 These new practices talk the language of the victims' right to vengeance, and recognize that sentencing is far more personal and subjective than people usually acknowledge. n36 Thus, today we allow victims to claim revenge, but only in the form of money and only with the approval of the court. n37

IV. The Reasons for Retention and Revival of Revenge-Based Principles

A. The Rise of Community Life

One explanation for the revival of the right to vengeance is that the relationship of individuals to their communities has recently changed. A victim's right to vengeance is not entirely personal but communitarian, representing the mores of a close social group, such as the family, tribe, village, or religious group. The moral standards of those who live in such environments usually depend on, and are influenced by, the group. These standards include the choice of sanctions, the importance of the right to vengeance, and how this right should be exercised. n38 In contrast, those who live in larger communities or travel regularly are less influenced by any tightly knit group and are likely to be more individualistic and to make such decisions on their own.

The re-emergence of vengeance rights may be related to the current movement: (1) to decentralize political power, the workplace, and the cultural environment; (2) to transfer power from the national level to the states, localities, communities, and families; and (3) to resurrect the small community, both in our minds and in reality. Television and the information highway allow members of this new "community" to interact. Television has enabled millions to become involved in criminal trials and to experience the sense of community that personalizes relationships, emphasizes each citizen's role in trials, and especially, personalizes punishment. n39 The televised "town meetings" that politicians conduct send the same emotional message. In addition, the public format may produce pressure to listen to victims. The access of wrongdoers to television and the publicity given to their stories can result in a demand for equal time to the victims and their families, to ensure a more balanced picture for the audience. n40 That vision of balance may be then carried to court proceedings. The movement to smaller communities, physical or televised, and the longing for a sense of belonging, can explain the expansion of individuals' right to vengeance in criminal sanctioning. The pressure to resuscitate "family values" and community involvement, and to return power to the states and local governments, re-legitimizes seeking vengeance against those who threaten the peace, the family, and the home.

B. The Reduction in Mobility

Another possible explanation for the resurgence of revenge-based rights lies in the fundamental shift in mobility in recent years. Until recently, the United States was a mobile society; people moved to find jobs and a better life. However, the information revolution now allows numerous individuals to work at home and to change jobs without physically relocating. This trend toward work at home is strengthened by concerns over costs and the environmental hazards of auto-transportation, and by the increasing number of families consisting of two working parents who wish to spend more time with their children. As a result, the trend will probably continue. Reduction in mobility is likely to strengthen the adherence to communal mores, and accompanying revenge-based rights.

C. The Concern for the Victims' Feelings

A third explanation for the retention and strength of the vengeance-based system stems from a desire to aid the victims of crime. Just as allowing victims a voice in sentencing personalizes sanctions, punishing in a very personalized way gives a sense of satisfaction and empowerment to the victims. Crimes can be viewed as inflicting a "moral injury" that devalues the victims. n41 Revenge-like remedies can restore the victims' value in their own eyes and in the eyes of

others. n42 For example, some states, as well as Canada and Great Britain, are experimenting with ways of making a rapist, through therapy, re-live his crime from the victim's point of view. n43 This method of punishment helps restore the victim's status. n44 Thus, revenge-like punishment can in some sense repair the violation of personal integrity that crime creates.

D. Inefficiencies of Law Enforcement and Return to Self-Help

Our society's move toward rights of vengeance may also result in part from lack of faith in our law enforcement system, and its perceived failure to administer justice efficiently. During the Middle Ages courts could only enforce a person's rights if the accused chose to appear before them. n45 Revenge was thus a victim's method of self-help. Today, victims may also feel that the system has failed them, and that it affords protection only to the accused. A victim who has suffered from a crime criticizes the system for entertaining the possibility that the accused is innocent:

A good deal of my frustration stemmed from the feeling that, as a crime victim, I was an outsider to the criminal justice system ... I have witnessed how the humanity of the homicide victim is lost as they are [sic] reduced to a one-dimensional piece of evidence that is shown to the jury and then put aside. n46

Crime victims see the system as unreasonably, and perhaps cold-heartedly, favoring defendants. This adds to their desire to see those who are convicted punished severely. If victims feel that the larger community, the state, has failed them, they may turn to their communities and revert to the system of self-help that the common law replaced.

E. The Schism Between the "Haves" and "Have Nots"

The recent growing schism between the "haves" and "have nots" in American society may provide yet another explanation for the re-emergence of the system of vengeance. In the Middle Ages, most wrongdoers were quite poor. Today, although the criminal wrongdoer (especially the violent one) may be poor, the civil defendant (whether a corporation or an individual) may be quite wealthy, possessing sufficient funds or insurance coverage with which to pay compensation. n47 As we return to the norms of the past, the schism between poor and rich wrongdoers can result in bifurcation of punishment.

As such, victims' right of vengeance will apply to poor wrongdoers. The wrongdoers will suffer either very serious or very lenient punishments, depending on the victims and their communities. n48 The law, as applied to them, will be more subjective and less uniform. The poor will be punished according to the victims they hurt.

In contrast, wealthy tortfeasors will uniformly pay the same damages for similar wrongs, regardless of the mores of the victims or their communities. Unlike the developments in criminal law, there are pressures to limit punitive damages in tort law, and such limits will probably be imposed. Wrongdoers in civil cases will therefore be punished according to the wrongful acts that they committed, and the laws applicable to them will be impersonal, objective, and uniform. The wrongdoers in criminal cases will be subject to more personal, subjective, and non-uniform laws.

Thus, the thirteenth century is still with us. We are grateful to Professor Seipp for the lessons he brings from the past. These lessons help heighten our awareness and understanding of the present.

FOOTNOTES:

n1. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 *B.U. L. Rev.* 59, 63-64 (1996).

n2. Contrast the medieval church's approval of vengeance, as noted in *id.* at 63 n.27 and accompanying text, with modern Christianity's general disapproval of such behavior:

The critical, and often overlooked, movement of the destruction of enemy psalms [i.e., Psalms 109 and 137,] is this yielding of vengeance to God, and this will have to be the driving idea behind the sermons they spawn. There will be no "que sera, sera," spiritual resignation, but rather, an honest assessment of who may legitimately exercise which powers. The greatest faith finally yields all powers to the Lord, and trusts that God will ultimately keep covenant in God's own way.

Stephen A.H. Wright, *Violent Vengeance in the Psalms: Can it Possibly Preach?*, 14 *J. for Preachers* 16, 21 (1991).

n3. "As Hegel appreciated, the modern state is the citizenry's moral representative; in the face of pluralism and religious controversy, it is the only institutional voice of the community's shared moral values." Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. Rev.* 1659, 1694 (1992).

n4. See George Simmel, *The Philosophy of Money* 364 (Tom Bottomore & David Frisby trans., 1978) (1907) (asserting that the focus on the wrongdoer is the result of the state's takeover of the criminal justice system, because when the state takes over, criminal offenses are deemed "a disturbance of public order or a violation of an ethical-religious law," not merely offenses against the victims).

Courts may imply a private right of action for the victim from the existence of a criminal prohibition. This right, however, constitutes a private civil action that entitles the victim only to compensation, not to determine the criminal punishment.

n5. We should distinguish between revenge and just deserts. Both revenge and just deserts require that wrongdoers "pay" for their wrongdoings, and both represent a demand for retribution. The distinction between the two lies in the number and diversity of people to whom the punishment would be acceptable. Revenge is "payment" that would satisfy or appease the victim and at most the victim's community; it is a demand for personal retribution. Just deserts is "payment" that would satisfy or appease far more people, not only those closely connected to the wrong. It is a demand for less personal and more societal retribution. A just desert can be analogized to a market price - the aggregate retributive value that numerous people put on punishment for a certain wrong, for a variety of reasons. Revenge, in contrast, is the retributive value that one or few people put on a certain punishment for a certain wrong. Both revenge and just deserts can deter certain behaviors. The current law has reduced the legitimacy and (at least) the intensity of the desire for revenge of the victims and their close communities by transferring the right to revenge from them to the state.

When a court sentences a convicted wrongdoer, the court denounces the wrongdoer's act on behalf of society. Society's denunciation of a criminal act serves to "direct community anger away from vengeance." Ronald J. Rychlak, *Society's Moral Right to Punish*, 65 *Tul. L. Rev.* 299, 332 (1990). Society's revenge is thus transformed into just deserts. At times, however, this desire or anger is transferred to another group (e.g., the police), sometimes with tragic results. The legitimacy of police hatred and pursuit of punishment for law breakers, if not shared by large segments of the population, can be viewed as revenge rather than just deserts.

Long before a distinct system of torts and crimes emerged, communities sought to resolve disputes by compensating victims monetarily. This practice evolved from a desire to avoid the blood feuds that were the principal form of dispute resolution up to the Middle Ages. See, e.g., Roscoe Pound, *The End of the Law as Developed in Legal Rules and Doctrine*, 27 *Harv. L. Rev.* 195, 199 (1914) ("To establish this peaceable ordering [of society] two tasks had to be undertaken, (1) to regulate self help and ultimately supersede it, (2) to prevent aggression.").

Arguably, just deserts, because it is supported by more people, may have a greater deterrent effect. See, e.g., Bill Bradley, *America's Efforts to Curb Violence: The Anti-Crime Bill Is Not Enough*, *USA Today Magazine*, Nov. 1994, at 30, 33 (denouncing violence as a means of deterrence but using the language of revenge: "Every person who uses violence must pay the price in lost freedom, and 'doing time,' especially for the young, must be a memory that one doesn't ever want to repeat").

n6. See Simmel, *supra* note 4, at 359. Consider also the following statement in connection with the valuation of human life:

If the same object is valued differently in different cases and by different persons, then the whole valuation appears as a subjective process which consequently produces different results according to personal circumstances and dispositions. If, however, the object is valued equally by different persons, the conclusion seems unavoidable that the object is worth that much.

Id. If the life of the deceased is measured by the value or utility of the person to his relatives, the value is personal to them and is subjective. If, however, human life attains a value inherent in the person, then all people attain the same value, of human beings. The same rationale applies to the use of money as compared to revenge. To be sure, the use of money as punishment can be traced to vengeance. E.g., *id.* at 363 (noting that punishment is designed both to protect society and to indemnify society for the damage done to it). Yet, when tracing fines to vengeance, Simmel argues that in addition to these two objectives, or perhaps because of their ancient origins, punishment "has become satisfactory in itself, and has given rise to an impulse that is independent of its utilitarian roots." *Id.*

n7. An early example of the use of monetary sanctions as a substitute for vengeance appears in Anglo-Saxon proceedings. In many cases, courts settled disputes by making wrongdoers pay compensation ("bot") to the victim and a fine ("wite") to the king. E.g., Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 *La. L. Rev.* 1, 1-2 (1970).

n8. See generally Dean J. Spader, *Rule of Law v. Rule of Man: The Search for the Golden Zigzag Between Conflicting Fundamental Values*, 12 *J. Crim. Just.* 379 (1984) (laying out an analysis of the conflict between law and discretion).

n9. Dean J. Spader, *Megatrends in Criminal Justice Theory*, 13 *Am. J. Crim. L.* 157, 185-86 (1986) (comparing the effect of the rule of law with the rule of man in criminal sentencing, and noting that although the rule of law results in equality, predictability, and uniformity, the rule of man allows more flexibility, individualization, and creativity in sentencing). See generally Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 *B.U. L. Rev.* 941 (1995) (focusing on the institutional constraints over judges).

n10. See Pound, *supra* note 5, at 202 (stating that under archaic law, punishment for a crime depended on the "extent of the desire for vengeance awakened" in the victim).

n11. *Id.* (noting that the goal of the law of revenge was to "satisfy the desire for vengeance of the individual who might not now help himself").

n12. Similarly, today a reputation for litigiousness can deter civil suits against a defendant.

n13. Ernest van den Haag, *Punitive Sentences*, 7 *Hofstra L. Rev.* 123, 135 (1978) (noting that "to be deterrent, sentences must be predictable, and the relevant prediction refers to the time that actually must be served[,]" and that parole should therefore be abolished); see also Michele H. Kalstein et al., *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 *Harv. C.R.-C.L. L. Rev.* 575, 602-03 (1992) ("Without parole, the Commission reasoned, criminals would know the length of a sentence, and would

therefore understand the precise costs of committing a crime. Accordingly, abolishing parole would increase the certainty, and thus the deterrent effect of punishment.").

n14. Pub. L. No. 98-473, 98 Stat. 1987-2040 (1984).

n15. See Thomas J. Meier, A Proposal to Resolve the Interpretation of "Mixture of Substance" Under the Federal Sentencing Guidelines, *84 J. Crim. L. & Criminology* 377, 379-80 (1993) (citing uniformity, honesty, and proportionality as the principal goals of the Act).

n16. See Eric P. Berlin, The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest, *1993 Wis. L. Rev.* 187, 188-92 (discussing the evolution of sentencing reform and the enactment of the 1984 Act); Sean Piccoli, Bill Aims to Equalize Sentencing for Cocaine, *Wash. Times*, Nov. 7, 1995, at A4 (describing the current law under which five grams of crack cocaine qualifies a defendant as a dealer and mandates a five-year sentence, whereas it takes 500 grams of powder cocaine to qualify a defendant for a nonmandatory five-year sentence).

n17. "Just punishment notions abhor the unfairness of a sentence that depends more on sentencing authority than on the crime or on the offender's culpability." Paul H. Robinson, A Sentencing System for the 21st Century?, *66 Tex. L. Rev.* 1, 8 (1987).

n18. A theory of "objective liability" under which only particular kinds of harm warrant recovery constitutes an important part of the civil paradigm. See Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, *101 Yale L.J.* 1795, 1812-13 (1992).

n19. I am indebted to Professor Robert Meisner for this distinction.

n20. As my colleague Professor Alan Feld, Professor of Law, Boston University, suggests, the tension between revenge and compensation forms an integral part of the conflict present in Shakespeare's *The Merchant of Venice*. Although Shylock lived in twelfth century Venice, the Italians were representative of the British in Shakespeare's time. Attitudes in that era more closely resembled those prevalent today than those common in medieval England. Whereas Shylock demanded his right to revenge, the merchants - and the judicial system they controlled - recognized his right only to compensation.

n21. Courts have also expanded suits for damages by creating for victims implied private rights of action derived from criminal statutes. For example, reckless driving not only might warrant a fine, but might also create a cause of action for an injured party if the recklessness causes an injury. Similarly, Rule 10b-5 under the Securities Exchange Act of 1934 was used by the courts as a basis for implied rights of action by the victims of securities frauds.

n22. Shifting accountability from individuals to the "corporate personality" poses problems in imposing sanctions for criminal behavior by corporations. See Robert C. Clark, *Corporate Law* 676 (1986) ("Obviously, there is a problem in deciding when a corporation might be deemed to have had a criminal intent ... corporations as such cannot be put in jail. Criminal sanctions for misconduct by corporate agents must be imposed in other ways. Determining the best way is very difficult.").

n23. It is not surprising that in Roman law compensation played a far greater role than criminal punishment and that in medieval England the reverse was true. Rome was an empire with a mobile society, which required a uniform law, well known by travelling strangers who would interact in trade.

Medieval English common law procedure did, however, offer foreign merchants a measure of protection against a hostile community forum through the device of a "mixed jury," in which half the members shared the merchant's country of origin. E.g., Simon Jolly, 21 *J. Law & Soc'y* 570 (1994) (reviewing Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (1994)). This practice persisted for nearly six centuries, from the *Carta Mercatoria* of 1303 to its abolition in 1870, when the device seemed to have outlived its usefulness. Jolly notes that "[Ms. Constable] traces the move from a law of custom, society, and of belonging to a law of the state, a law of the land, a law of alienation." *Id.*

n24. "Gemeinschaft" means "community, society," whereas "Gesellschaft" means "organization, corporation." Dora Von Beseler & Barbara Jacobs-Wustefeld, *Law Dictionary, German-English* 668, 703 (4th ed. 1991).

n25. According to the traditional and "formal position" of courts and many commentators, compensation for the victim is an inappropriate punishment for a criminal offense because such an offense constitutes an affront to society as a whole. Criminal laws should vindicate the dignity of the state, not that of the individual. See Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 *UCLA L. Rev.* 52, 54 n.13 (1982).

n26. During the middle of this century, legislative use of punitive damages increased dramatically. This increase was due at least in part to the rise of the utilitarian theory of jurisprudence. Legislatures began to recognize the deterrent effect of monetary sanctions and to employ such sanctions in civil cases. Mann, *supra* note 18, at 1844-47.

The practice of awarding punitive damages for an injury has generated substantial debate. Punitive damages can be unfair or discriminatory in some cases. They may deter those who can pay, but can inflict pain on those with limited means. Although courts can attempt to limit socioeconomic bias by considering each wrongdoer's financial resources, "there will always be a bankrupt population for whom the only answer is imprisonment." *Id.* at 1872.

n27. Concern for society's weaker individuals and the desire to protect them from stronger actors support the award of punitive damages. Arguably, the consumer has little control over the safety of mass-marketed products and services. Punitive damages are a method of protecting vulnerable consumers against abuses of dominant actors. Charles P. Kindregan & Edward M. Swartz, *The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Reform*, 18 *St. Mary's L.J.* 673, 676-79 (1987) (defending our current system of torts in general).

n28. Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 *Kan. L. Rev.* 39, 50-51 (1994) (arguing that compensation and punitive tort sanctions may serve victims' needs for dignity, respect, empowerment, closure, and faith in the system).

n29. Many sentencing proposals like the Model Penal Code and the Model Sentencing Act support restitution to victims of crimes. A substantial number of criminal statutes offer restitution and many administrative agencies use restitution programs. See Harland, *supra* note 25, at 55-56. In fact, "the idea that restitutive sanctions should be woven into the fabric of the penal system is virtually unopposed in recent debate." *Id.* at 119-20.

n30. Pain and suffering awards have triggered much debate. Critics of the current system argue that large pain and suffering awards contribute to the rising cost of insurance and litigation and to an increasing fear of liability, which threatens the economy. Others argue that given the uncertainty of data on the prevalence and aggregate costs of frivolous or fraudulent suits, remedial reform of the current tort system could be counterproductive. See W. John Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 *Temp. L. Rev.* 459, 505-06, 526-27 (1992) (suggesting that reformers lack hard data to support their positions). The failure of some courts to ignore statutory caps on pain and suffering awards has provoked serious criticism on the ground that "non-pecuniary" damages are less "estimable." See, e.g., Kindregan & Swartz, *supra* note 27, at 703 ("By what twist of logic is the loss of the very essence of life given less importance than the loss of money?").

n31. Legitimizing such awards requires empathy, and juries seem to feel such empathy to a greater extent than do members of Congress.

n32. Such "victim impact statements" have been criticized as well as applauded. Consider, for example, the role of such statements in the recent sentencing of Colin Ferguson, who was convicted of murdering and injuring passengers on a commuter train in suburban New York. See, e.g., *All Things Considered* (National Public Radio broadcast, Mar. 25, 1995) (noting that the judge told survivors of the Ferguson attack that "he was very moved by their statements," but also commenting that "it is unclear if they affected his sentence").

Reactions to the use of these statements differ. One critic noted that:

The most basic requirement of the rule of law is that judges and juries must be personally impartial, that they can't decide even close cases on the basis of their sympathy or distaste for one party or another. Yet victim impact statements, when presented orally without the possibility of rational evaluation, guarantee that trials will degenerate into lawless emotionalism.

Editorial, *Victim Justice*, *New Republic*, Apr. 17, 1995, at 9. In contrast, one supporter felt that:

[Although] care should be taken to avoid inflammatory and irrelevant testimony ... the participation of victims at the post-conviction stage is a healthy development. It provides a catharsis for the surviving victim or his family, allowing those who have suffered to be heard and giving a sentencing judge some information to balance that submitted by the offender.

Editorial, *The Victims Have Their Say*, *Wash. Post*, Mar. 24, 1995, at A22. See generally Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?* 75 *B.U. L. Rev.* 187 (1995).

n33. See *All Things Considered*, *supra* note 32 (statement of Ellen Semmel).

n34. *Id.* (statement of Ann Reed).

n35. *The Victims Have Their Say*, *supra* note 32, at A22.

n36. In fact, even in the past, sentencing was more subjective than a finding of guilt or innocence because it depended on the personal circumstances of the accused.

n37. In order to obtain punitive damages, a plaintiff must prove that the defendant both violated legal norms and acted "outrageously." Kindregan & Swartz, *supra* note 27, at 696.

n38. See *All Things Considered*, *supra* note 32 (statement of George Fletcher) (suggesting that "the purpose of the criminal trial is to determine whether the defendant is guilty, to punish the defendant if he or she is guilty, but also to provide an opportunity for victims to reintegrate themselves in society and to feel once again that they are equal citizens with everyone else").

n39. Attorneys have recognized television's pervasiveness and possibly harmful effect on juror impartiality. During jury selection in the O.J. Simpson trial, potential jurors were urged to avoid watching television or reading newspapers for fear that exposure to the news would bias them. E.g., *Democracy on trial*, *The Economist*, Nov. 12, 1994, at 117.

n40. *The Victims Have Their Say*, *supra* note 32, at A22 ("The killer ... was on television every day for weeks portraying himself as the injured party and belittling the testimony of those who had been shot. He spent five hours addressing the court during pre-sentence proceedings ... it was only right, and satisfying, to let the victims and their families also have their say.").

n41. Hampton, *supra* note 3, at 1685.

n42. Although those who argue for retribution distinguish retribution from revenge because revenge implies "hate," *id.* at 1691 n.49, retributive remedies reflect the law of revenge in their concern for the victim's rights.

n43. *Id.* at 1689 (discussing such "innovative punishment programs").

n44. *Id.* at 1690.

The state, in the victim's name, forces the rapist to undergo an experience that, even while never denying his own dignity as a person, insists that he experience the rape from the victim's point of view. By doing so, not only does the state confirm the victim's importance, but it also defeats the rapist's claim to mastery by putting him in a position where he must, through his imagination, become her, and suffer as if he were her.

Id.

n45. Seipp, *supra* note 1, at 64.

n46. Steve Baker, *Justice Not Revenge: A Crime Victim's Perspective on Capital Punishment*, 40 *UCLA L. Rev.* 339, 340 (1992).

n47. The contemporary assertion of ethnic, cultural, and racial group identities contrasts with the traditional notion of the "melting pot," and has resulted in disintegration of American society. We are witnessing a counter-assertion by the "haves," the traditional power-holders in defense of their positions. Feelings of anger and revenge accompany this phenomenon. See Arthur M. Schlesinger, Jr., *The Disuniting of America* 28 (1992) ("The smelting pot ... had, unmistakably and inescapably, an Anglocentric flavor. For better or worse, the white

Anglo-Saxon Protestant tradition ... provided the standard to which other immigrant nationalities were expected to conform, the matrix into which they would be assimilated.").

n48. In the trial of four Los Angeles police officers accused of beating Rodney King, a jury in prosperous Simi Valley, California, arguably applied its community perception that police violence may be understandable, even occasionally justified. A different jury, drawn from urban Los Angeles, returned a far less favorable verdict, influenced perhaps by a less indulgent attitude toward police conduct.