6. PROLEGOMENON TO A MATERIALIST HISTORY OF RESTORATIVE JUSTICE

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1 Introduction

There is a strong strand of historicism running through the body of restorative justice. In their manifestoes its proponents invariably appeal to history, arguing that the concept has deep roots in the juridical past of humankind. They tell us that prehistoric justice was typically dispensed according to restorative principles and that punishment as we know it was historically an exceptional response to transgressions of customary norms. They believe that we have antediluvian restorative intuitions, reaching back to the origins of human society. It is a belief that enjoys something of the status of a restorationist article of faith. Thus Van Ness and Strong refer to an “ancient pattern” in Western law which required “offenders and their families to make amends to victims and their families – not simply to ensure that injured persons received compensation but also to restore community peace”. Mazrui makes a similar point in respect of the indigenous African approach to justice, asserting that “the protection of the innocent was precisely the main focus of law enforcement, rather than the punishment of the guilty per se” and that “it was more fundamental to have the victim’s family compensated than to have the villain or culprit punished”. He suggests that the reason for the intractability of the problem of crime plaguing contemporary Africa lies in the continent’s failure to adopt the principles and practices of restorative justice. Weitekamp states that “ancient forms of restorative

1 See GM Weitekamp “The history of restorative justice” in G Bazemore & L Walgrave (eds) Restorative Juvenile Justice: Repairing the Harm of Youth Crime (New York, 1999) 75 at 82.
2 Idem at 81.
3 For a dissenting view from within restorationist ranks, see K Daly “Restorative justice: The real story” (2002) 4 Punishment and Society 55 at 61-64.
4 DW van Ness & KH Strong Restoring Justice (Cincinnati, 1997) at 8.
5 A Mazrui The Africans: A Triple Heritage (New York, 1986) at 205; see, also, Van Ness & Strong (n 4) at 9.
6 Mazrui (n 5) at 209.

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justice have been used in acephalous societies and by early forms of human kind"\textsuperscript{7} and Braithwaite asserts, sweepingly, that “restorative justice has been the dominant model of criminal justice throughout most of human history for all the world’s peoples”.\textsuperscript{8}

Restorative justice was born of dissatisfaction with the patent inability of the criminal justice system to resolve the contemporary crisis of criminality and represents a major challenge to the legitimacy of that system. At the same time it is of course concerned to establish its own legitimacy as a viable alternative. The restorationist project is, ultimately, a campaign to replace criminal justice with restorative justice. It is a campaign that needs to be justified; hence the appeal to history and the claim to a historical pedigree going back to the wellsprings of human social existence.\textsuperscript{9}

2 Restoration against retribution

The historical argument for restorative justice is largely founded on opposition to the perceived domination of retributionism in the modern approach to crime and punishment.\textsuperscript{10} As intimated above, restorationists argue that our response to crime has not always been punitive, as it is today, and point out that punishment is but one of a number of possible aboriginal ways of responding to offenders. History has also bequeathed us a range of non-punitive responses to criminal conduct, so that there is nothing inevitable about the punishment paradigm. Certainly, it cannot claim historical priority over the restorative paradigm.\textsuperscript{11} According to Zehr, historically the predominance of the punishment paradigm is a recent development, spanning only “the past several centuries”.\textsuperscript{12} In other words, there always has been a miscellany of ways of doing justice, and the restorative paradigm enjoys at least as much historical purchase as the punishment paradigm. Its advocates argue that the restorative approach, in terms of which the response to criminal wrongdoing is geared towards mending the damage the offender has caused to the victim and the community, was once as jurisprudential and practical a commonplace as retributionism appears to be today.\textsuperscript{13}

In sum, then, its proponents submit that restorative justice is an integral albeit neglected aspect of our penal heritage, which can be traced back at least to a time when crime had not yet been defined as a punishable offence against the state. Thus the notion that retribution forms the historical core of our penal jurisprudence is indefensible, since

\textsuperscript{7} Weitekamp (n 1) at 93.
\textsuperscript{10} Weitekamp (n 1) at 73 and 97 extends this opposition to rehabilitation.
\textsuperscript{11} The opposition between the punishment paradigm and the restorative paradigm is derived from A Ashworth “Some doubts about restorative justice” (1993) 4 Criminal Law Forum 277 at 280.
\textsuperscript{12} H Zehr Changing Lenses (Pennsylvania, 1995) at 87; see, also, M Wright Justice for Victims and Offenders: A Restorative Response to Crime (Buckingham, 1991) at 1.
\textsuperscript{13} See Wright (n 12) at 8-9; Zehr (n 12) at 107; Van Ness & Strong (n 4) at 9.
reparation as a response to wrongdoing has a genealogy at least as long as vengeance. Our natural response to trespass was not merely to take revenge but also to ensure the restoration of the status quo ante as regards the victim and the community. Thus, restorative justice was an aspect of the aboriginal human penal impulse and is neither new nor a radical (post)modern creation. It has at least the same historical legitimacy as retribution, and if today we tend to think of retribution as the obvious response to crime there is no reason why, in the future, we should not think of restorative justice in the same terms. Restorationists contend that the answer to the contemporary crisis of criminality begins with the recovery of our restorative proclivities.

When restorationists refer to the “ancient” roots of restorative justice they refer, essentially, to composition as a restorative sanction, that is, to legal arrangements that entitled or required transgressors to make good their trespasses by way of a compensatory offering to their victims. They consider that composition was aboriginal, some reckoning that it featured as prominently as retribution in the primitive response to disputes and others holding that our ancestors were more partial to composition than to retribution.

In this way, briefly, the argument for restorative justice relies on history. This essay will attempt to evaluate this argument in terms of the materialist conception of history, as demarcated by the governing concepts and methodological resources of classical Marxism. It is an axiom of historical materialism that material production determines mental production. There is always an objective basis, sometimes patent, often latent, of our thought products. The concepts which the human mind invents are invariably responses to historically specific material conditions. The analysis of concepts must proceed, therefore, from the material conditions in which they were created and elaborated. Thus the aim of this essay is to map the history of the concept of restorative justice in relation to this basic premise of historical materialism.

3 Social evolution

Materialist historiography is overtly evolutionist. Social evolution is, of course, materialistically comprehended, according to the historical development of the forces of production and the impact of that development upon the development of human culture and social life. In other words, the materialist conception of history suggests that human society displays a general progression from lower to higher stages of social organisation, with each stage corresponding to a definite mode of production. Certainly, classical

14 See Zehr (n 12) at 106-107.
15 See Richards (n 9) at 8-9; Weitekamp (n 1) at 75. “Composition” is used here as the generic term for all those concepts and procedures which seek, by way of a make-up, to repair harm, as opposed to those that take revenge. It encompasses such notions as restitution, redress, reparation and compensation.
16 See P Stein Legal Evolution: The Story of an Idea (Cambridge, 1984) at 19; and the anthropological sources relied upon by Weitekamp (n 1).
17 See Weitekamp (n 1) at 78-79.
Marxism is unequivocally evolutionist. Indeed, “Marx’s theory of history makes no real sense except as a type of evolutionism”.

It is well known that Marx and Engels identified five modes of production in the evolution of human society. These are the primitive communist, the Asiatic, the ancient or slave, the feudal and the capitalist modes of production. Historians conventionally divide the human record into two great eras, namely, prehistory and history. According to historical materialism, primitive communism is a prehistoric mode of production, one which precedes civilisation, while the others are historical modes that span the course of human civilisation up until now.

It must be stressed, however, that these modes of production are successive only in the world-historic sense, that is, they indicate the general direction of the development of human society as a whole. The Marxist concept of social evolution has no relation whatsoever to the absurd idea that each society has passed or must pass through each of the identified modes of production in strict order. The point of social evolutionism is to discern the directionality of social development on a world-historic scale. That many societies do not fit easily into the general pattern of historical change proves only that evolutionism cannot be equated with or reduced to a “simplistic unilinealism”. Marxism eschews such crass linearity and crude teleology. It is widely accepted within Marxism that the Asiatic, slave and feudal modes were all “alternative routes out of the primitive communal system”. The modes of production are sequential only in the sense that primitive communism was primeval and capitalism is developmentally the most advanced mode, with the dissolution of primitive communism giving rise to three pre-capitalist modes, from amongst which feudalism would emerge as the mode to engender the presuppositions of capitalism.

The sequel will rely on the social evolutionary scheme outlined by Marx and Engels as the backdrop against which to examine the restorationist credo that our forebears were more inclined to restorative than to retributive justice. At this juncture it is necessary to observe that the analysis that follows is at a relatively high level of abstraction – the level of the mode of production. The process of abstraction isolates and purifies the relations chosen for analysis, and reduces them “to certain standard types, from which all characteristics irrelevant to the relation under examination are removed”. The purpose is to enable us to comprehend the fundamental material relations that ground social reality without being side-tracked by non-essential considerations. Certainly, given the extremely long timeline involved, it is not possible to undertake a materialist analysis of the history of restorative justice without resorting to abstraction to foreground essentialia. Consequently the historical presentation is unavoidably telescoped. However, any effort to traverse all of human history within the confines of an essay is perforce an exercise

20 See Marx Contribution (n 18) at 21.
21 Sanderson (n 19) at 216.
23 See V Childe History (New York, 1947) at 10-11; Hobsbawm (n 22) at 32-37.
24 P Sweezy The Theory of Capitalist Development (New York, 1942) at 17.
in compression which has to be clinically selective about content. It is hoped that such a focused approach, despite its sacrifice of comprehensiveness, will yield a comprehensible materialist appreciation of the history of restorative justice.

4 From savagery through barbarism to civilisation

Primitive communism is the aboriginal mode of production. It is the first epoch of social evolution and humankind’s first way of living on earth and obtaining sustenance from its produce. It is the only natural mode of production in human history. Marx and Engels adopted Morgan’s division of primitive communism into two stages, namely, savagery and barbarism. These two stages constituted the prehistory of humanity. Savagery was the cradle of humankind; barbarism was the precursor to civilisation, a transitional epoch in the trajectory from savagery to civilisation.

The savage unit of human social organisation was the primal horde, which lived by hunting and gathering. During this by far the longest stage of our evolution we had very little control over the natural environment and life was a constant battle to wrest from nature our means of subsistence. The primal horde was a complete social entity in and unto itself, autonomous and self-sufficient, which related to other hordes only in competition in the primal quest for food and shelter. But in its internal relations it was necessarily fully egalitarian, with individual survival depending entirely on group survival. There were no classes. The imperatives of survival imposed on early humankind a communal social organisation, marked by the most complete equality possible. Sociality and equality were thus the premises of savagery. This was the era of unadulterated primitive communism. Social life was devoted to one goal only: the collective survival of the horde, against nature and rival hordes. The only division of labour was that between the sexes. In the material conditions of savagery, this meant that everyone, bar the very young and the very old and infirm, had to participate in the acquisition of the means of subsistence, which then had to be shared amongst all members. There was enough to feed everyone, but no surplus which could benefit some members of the horde at the expense of others. Indeed, given the material conditions of the primal horde’s existence it could not occur to any member to lord it over his fellows. The relentlessness of the collective battle against the forces of nature precluded the very idea of any individualist assault upon the equality postulate. Savages were perforce communards also.

25 See L Morgan Ancient Society (Chicago, 1912) at 3-28; F Engels The Origin of the Family, Private Property and the State (London, 1940) at 19-26; E Terray Marxism and “ Primitive” Societies (New York, 1972) at 44-67.
26 E Reed Woman’s Evolution: From Matriarchal Clan to Patriarchal Family (New York, 1975) at 197; Z Manfred A Short History of the World vol 1 (Moscow, 1974) at 12 refers to it as the “primitive herd”.
27 See Reed (n 26) at 197.
28 See Manfred (n 26) at 12.
29 Ibid.
31 See Weitekamp (n 1) at 76.
Savagery spanned most of the Palaeolithic. It began to disintegrate during the Upper Palaeolithic and was replaced, during the Mesolithic and Lower Neolithic, by barbarism. The *gens* or clan, constituted by a combination of a number of hordes, was the basic unit of social life under barbarism. Unlike the horde, which always existed in a state of isolation, the clan had links with other clans via membership of a common tribe. However, barbarism retained the fundamental communist character of savagery. The members of the *gens* were also communards and they too lived and died by the principle of perfect equality in all things. Gentile society was thus the fundament of the primal horde evolved to a higher level of social organisation, but preserving all the “constituent features” of its historical forerunner.

Barbarism was exemplified by the Neolithic or food-producing revolution, considered “the greatest economic revolution in humanity’s existence” because it involved a qualitative leap in the development of the forces of production, which enabled humanity “to control more or less its own subsistence” and which “permitted the building up of food reserves”. The emergence of class divisions followed on the production of a permanent surplus. However, this remained a mere possibility for most of the epoch, since the battle for survival remained predominant, and surpluses were generally stored to ensure the availability of sufficient food between harvests. The social organisation of savagery thus continued as the template for barbarism. Only during the break-up of the gentile constitution, around 4 000 BC to 3 000 BC, do we see the germ of the institutions and relations which would become characteristic of the epoch of civilisation, namely, class inequality, rooted in appropriation of the social surplus by an unproductive class and institutionalised in the state. Our barbarian forebears thus took a giant leap which advanced human social evolution prodigiously. They were the heralds of civilisation.

In its main lines, then, the prehistory of humanity – savagery and barbarism – comprised perhaps 500 000 years of primitive communism, which was classless and acephalous, during which social existence was governed by the principle of complete equality. In other words, humans were communards for some 99 per cent of their existence. Our 5 000 or so years of history are another story altogether. If barbarism witnessed “the greatest economic revolution in humanity’s existence”, then civilisation may be said to have initiated “the greatest social revolution in humanity’s existence”. For the transition to civilisation was founded upon the defeat of the primitive communism of the prehistoric era, and the birth of social classes and class struggle.

Civilisation had its material roots in the vast increase in human productive capacity initiated by the Neolithic revolution which, over time, facilitated the creation of large and permanent surpluses. Surplus production spawned class formation, as “gradually some men elevated themselves into priest-kings, nobles, and overlords, standing above

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32 See Reed (n 26) at 197-198.
33 *Idem* at 197.
35 See G Clark *From Savagery to Civilization* (London, 1946) at 68.
36 See Mandel (n 34) at 19; Novack (n 22) at 44-45.
the common people, exacting foodstuffs, livestock and handicrafts as tribute and later as taxes. Private wealth was now accumulating in the hands of an elite, a ruling class.\(^3\)

Paradoxically, the surpluses that had liberated humankind from its subservience to the forces of nature led to the subservience of one section of humankind to another. That is the social mark of civilisation, the division of human beings into two great classes – one which produces, and one which does not produce but owns the means of production and appropriates the social surplus product – tied to each other in a relation of structural contradiction, and living out this relation in class struggle.

Civilisation thus introduces social inequality into human society, based on a qualitative change in the nature of production. Before its advent, production was geared “in its totality to fulfil the needs of the producers”.\(^3\) Production in the civilised epoch is split into the socially necessary product and the social surplus product. The former is the means of subsistence required to ensure the reproduction of the class of direct producers. The latter is surplus production that is appropriated by the class of non-producers and applied to its own subsistence and to wealth creation. This latter pursuit leads inevitably to the transition from production for use to production for exchange. In other words, civilisation is coincident with the development of commodity production, including that “commodity of commodities”, money.\(^3\) Commodity production and its accoutrements “revolutionise the whole of previous society”.\(^4\)

Civilisation gave rise to a brand new world that negated all the presuppositions of the past. Its birth required the death of aeons of social collectivism and the subjugation of the primitive communards. The achievements of civilisation were forged in opposition to the institutions and ethos of prehistory. History is, in this regard, the negation of the communism of our prehistoric ancestors. It is the record of class dictatorship and class struggle about the parameters of that dictatorship.

5 Prehistoric justice

For the prehistoric person the kinship-based commune was everything. The idea of individuality separate from the commune was inconceivable. The prehistoric worldview, engendered by the harshness of the material conditions of existence, was fundamentally communal.\(^4\) Reed observes that “individualism was so poorly developed in primitive society that there was no term to express the individual as an entity apart from the group”.\(^4\) There was no separation between the individual and the primitive commune. The individual was the commune and the commune the individual.\(^4\)

\(^{37}\) Reed (n 26) at 412.
\(^{38}\) Mandel (n 34) at 20.
\(^{39}\) Engels (n 25) at 189.
\(^{40}\) *Idem* at 198-199.
\(^{41}\) See P Lafargue *The Evolution of Property* (London, 1975) at 11.
\(^{42}\) Reed (n 26) at 161.
\(^{43}\) See Lafargue (n 41) at 12. The absence of individualism in primitive society did not imply a corresponding absence of individuation. See A Diamond *In Search of the Primitive: A Critique of Civilization* (New Brunswick, 1987) at 160; K Cameron *Humanity and Society: A World History*
Prehistoric egalitarianism necessarily meant that both personal injuries and responses to them were communal issues. Harm inflicted on a member of the commune was a harm suffered by the entire commune. "Where the interests of one member are the interests of all, an injury to one is an injury to all." The notion of a private injury or dispute or death was not conceivable in the prehistoric epoch. All such infractions impugned the integrity of the commune, and were thus perceived as infractions against the commune itself. In such circumstances of communal predominance, "the kin unit was the juridical unit, just as it was the economic and social unit".

The aboriginal form of justice was, quite simply, vengeance. In the material conditions of savagery and barbarism, the natural response to an injury to or the death of a communard was for the injured commune to seek revenge against the transgressor and his kin. This response was rooted in the human instinct for self-preservation. If the "first law of life" was self-preservation, then the "first law of man" was revenge. In prehistoric society, the well-being of each communard was vital to the life of the commune, and injuries or killings had to be avenged by the commune. There was no other way to obtain justice. There was no property which could be offered or taken in compensation. There was no central juridical authority able to impose and enforce punishment. There was only communal justice, which initially could take the form of communal blood revenge only. The primitive communards "put offences in the common fund, like everything else". Blood revenge began as an instinct, progressed to a duty and was transformed into a social custom that entitled the commune to take revenge for harm suffered by its members. Such harm was experienced and avenged collectively. Aboriginal justice was thus the justice of communal revenge. Since the transgressor, like the victim, was a member of a commune, the infraction was collectivised, with the entire commune of the transgressor becoming a legitimate target of vengeance. There was no individual victim and no individual transgressor; only the collective injury to the victim commune and collective vengeance against the transgressor commune.

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44 Briffault (n 43) at 267.
45 Diamond (n 43) at 268.
46 Lafargue (n 41) at 161.
47 W Seagle The History of Law (New York, 1946) at 36.
48 Lafargue (n 41) at 165.
49 If the injury was intra-communal, that is, if the offender and victim were kin, initially the typical sanction was expulsion from the commune. Thus the offender was usually condemned to a solitary existence, which, to one who knew only the solitary relations of life in the commune, must have been a truly terrifying prospect. Death was highly probable. Over time, the imperatives of communal survival engendered the development of an intra-communal version of the lex talionis (see par 6 below) in terms of which some form of ritual satisfaction was exacted from the transgressor. During the disintegration of primitive communism, restitution became the preferred mode of settling intra-communal disputes. See M Vermes The Fundamental Questions of Criminology (Budapest, 1978) at 44-45; S Roberts Order and Dispute: An Introduction to Legal Anthropology (New York, 1979) at 85-86; Reed (n 26) at 40; Weitekamp (n 1) at 77-80.
50 See Lafargue (n 41) at 166.
6 The talionic equation

Initially blood revenge was unbridled and indiscriminate, and easily gave rise to a protracted and belligerent blood feud between the two communes. As Vermes observes:

In the beginning the means of retaliation of injuries inflicted on the community by external agents was the unrestricted vendetta or blood feud, which extended to the whole community of the man outraging the community in question, and purposed the extirpation of all members of the insulting community, i.e. it meant warfare in its essence.\(^{51}\)

However, primitive society cannot be reduced to a state of permanent internecine warfare. The prehistoric communards soon understood the dangers of the on-going blood feud and that the war against nature was far more important than that against their human enemies, entailing as it did the potential for mutual destruction.

The imperatives of self-preservation prevailed. The primeval passion for unlimited revenge was reigned in and replaced by a system of calculated revenge. The law of the open vendetta was transformed into the law of retaliation. Revenge could still be had, but could no longer be wanton. It had to be in proportion to the injury suffered by the offended commune. Whereas initially all members of the offending commune were fair game, now only so many as had caused the harm could be the target of vengeance. This was the principle of retribution or the \textit{lex talionis}, based on a code of exact equivalence between harm suffered and revenge taken.

This code’s most popular expression is to be found in the biblical injunction of “life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe”.\(^{52}\) The fundamental communist spirit of equality which governed all other aspects of prehistoric existence was extended to include the law of retribution.\(^{53}\) The communards found it necessary to set limits to the blood feud. In so doing, they reproduced their primary existential principle of universal equality as the \textit{lex talionis}. This was a progressive and historic development which took humankind a step higher on the ladder of social evolution.\(^{54}\) The victim commune was still entitled to vengeance, but only if it amounted to people receiving their just deserts, according to the principle of equivalence. This satisfied the natural passion for revenge while preventing it from threatening the commune’s continued existence.

The primitive \textit{talio} remained indiscriminate in respect of the target of vengeance. Since all members of a commune were perfectly equal to one another, if one of them had to be the target, any one of them would do. The specific communard who caused the harm was not the prescribed target; his entire commune was.\(^{55}\) All members of the offended

\(^{51}\) Vermes (n 49) at 44; see, also, Seagle (n 47) at 36; Weitekamp (n 1) at 76.
\(^{52}\) Book of Exodus ch 21 vv 23, 25.
\(^{53}\) See Lafargue (n 41) at 168.
\(^{54}\) See Reed (n 26) at 227.
\(^{55}\) See \textit{idem} at 218; Lafargue (n 41) at 165.
commune were entitled to mark for vengeance any member of the offending commune; but at the same time blood revenge was highly regulated. It aimed to preserve life in already precarious material conditions, not to cause death. The principle of equivalence meant, literally, that account had to be kept of each and every death, with the aim of preserving or restoring the fraternal relations with other communes upon which the life of the commune depended. An episode of retaliatory killing was thus normally closed by the exchange of gifts between the two communes.\footnote{56}

In prehistoric times, savage and barbarian peoples could not conceive of justice as anything other than vengeance. Retributive justice was the natural and necessary product of the epoch of primitive communism. The principles and practices of the \textit{talio} developed logically from the material conditions in which humankind originally found itself. And since prehistory comprises by far the largest part of humankind’s existence, retributive justice in the form of equivalent physical retaliation is historically the pre-eminent human response to trespass. Just deserts, as Jacoby observes, “was not a philosophical abstraction but a fact of life throughout most of human history”.\footnote{57}

\section*{7 From communism to composition}

Proponents routinely base their faith in the prehistoric provenance of restorative justice on the claim that composition either dominated or featured prominently in prehistoric justice.\footnote{58} However, just as people who existed in “an aboriginal state of non-property”\footnote{59} could not have had serious disputes about land and other forms of property,\footnote{60} neither could they have relied upon composition, which was proprietary in its essentials, as a system of dispute settlement. Composition as a generalised mechanism of social control was neither conceptually nor actually possible for most of the many millennia which constituted the prehistory of the world.\footnote{61} Certainly, it could not have been on a par with, nor more popular than the \textit{talio} system, as the restorationists suggest. The absence of surpluses excluded composition as a generalised prehistoric form of justice, and the material exigencies of primitive communism guaranteed the primacy of the \textit{lex talionis}.

To be sure, composition did find a niche in the interstices of the \textit{talio} system. It had a significant presence in the twilight of prehistory, when the Neolithic revolution had made possible the production of regular surpluses and private property was making its debut on the historical stage. During this period, exchange and the circulation of commodities became a feature of economic life, albeit still secondary to and dependent upon the production of use values in the primitive commune. However, despite its subordination to the natural economy, the growth of the market proceeded apace. These conditions facilitated the emergence of composition as a means of resolving conflicts. Indeed,
composition became a fairly common method of settling disputes around 3,000 BC, during the break-up of barbarism and the transition to civilisation. This was the era of the urban revolution, marked by the growth of urban settlements and the progressive commodification of the social surplus. The development of this material process had a juridical parallel in the arena of dispute settlement. Hitherto the standard response to injury had been blood revenge, governed by the talionic equation. Now a pecuniary equivalent to the harm suffered began to occupy one side of the equation. The talionic equation was being transformed into an economic equation, and blood revenge was giving way to composition.

Composition evidently was much more attractive than blood revenge for the welfare and survival of the barbarian commune. Hence its fairly rapid development during the late barbarian era, when the material conditions for its existence had come into being. Indeed, many barbarian tribes embraced composition and created detailed tariffs according to which the victim commune was to be compensated. The commodification of the social surplus thus entailed a qualitative shift in the law of retaliation. On the basis of material developments in the production process, humans were able to raise the talio principle from the brutally corporeal to a calculated abstraction. In place of the physical identities of blood revenge arose the regime of economic equivalents.

The physicalities of the talio were each ascribed an economic value; bodies and their organs were now valued in relation to a universal equivalent of some sort. The latter was a commodity that served as a standard of value against which all other commodities could be exchanged. The universal equivalent shifted commodity exchange from physicality to generality. Its invention represented another qualitative leap in the intellectual development of our forebears, enabling them to advance beyond the exactitudes of identity in exchange to the abstractions of equivalence.

The institution of composition was, in this respect, the law of retaliation commodified. Lafargue expresses the transformation thus: “Then instead of life for life, tooth for tooth, beasts, iron or gold are demanded for life, tooth and other wounds.”

Humankind in this way made a further substantial juridical advance: harms need no longer be avenged physically; they could be composed in pecuniary terms. However, this advance was in itself an index of the emergence of social inequality which, in the historical period, would develop into a class structure and deny the majority of humankind the benefits of this transformation of the lex talionis.

Whilst composition did occupy a significant place in the penal culture of higher barbarism, the fundamental structural features of the prehistoric world were communist, and its justice was eminently and necessarily retaliatory. Composition developed late in the epoch of the break-up of primitive communism, when the material prerequisites of civilisation already had sprouted in the soil of barbarism. The talio was an expression of

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63 See Newman (n 30) at 163.
64 Originally the most important products in a region (cattle, wheat, rice, salt, tools, etc) would be used as the universal equivalent. Later precious metals took over, as valuable objects replaced anatomical parts in the talionic relation: See Reed (n 26) at 222.
65 Lafargue (n 41) at 174.
the egalitarian structure of primitive society, but composition was a signpost *en route* to
the class structure of civilisation. The talionic remedies were always available as of right
to the populace as a whole, but composition was virtually *ab initio* a restricted option,
delineated by class criteria.

It is in this context that the restorationists’ historical claims must be comprehended.
The restorative aspect of primitive justice was not aboriginal. It surfaced only during the
demise of the gentile constitution, in material conditions pregnant with all the antitheses
of the community justice embraced by the restorationists. Retaliation was community
justice. Composition prefigured class justice. The two were not synchronous, either in
time or in substance. The former was an expression of millennia of social egalitarianism,
the latter of the recent emergence of social inequality. With the transition from prehistory
to history, from barbarism to civilisation, both would be injected with an unmistakable
class character. Civilisation was born of the disintegration of primitive communism. The
historical successor of the gentile constitution was the class system. The non-antagonistic
relations of the primitive commune were replaced by the fundamentally antagonistic
relations of class. Civilisation was historically coterminous with class formation and its
concomitant of social inequality.

8 Asiatic justice

The first form of class society emerged some 5 000 years ago, with the great river-valley civilisations of Egypt, Mesopotamia, India and China. The large-scale irrigation works that characterised these societies revolutionised agriculture and made possible the production of permanent surpluses for the first time in human history. Marx classified the mode of production of these alluvial or hydraulic societies as Asiatic. The ruling class comprised an aristocracy which was to some extent fused with a managerial-bureaucratic elite of state officials, administrators, scientists, engineers, priests and military leaders. There was an almost total congruence between the state and the ruling class.

The dominated class was made up of peasant farmers whose labour formed the productive foundation upon which the famous cities of this era arose. Between the two major classes were minor classes of merchants and urban craftsmen. They were essentially parasitic on the surplus extracted by the state from the peasant producers. There was also a sizeable slave population, but it was not pivotal to the structure of production.\(^6^6\) The outstanding proprietary feature of the Asiatic mode of production was the absence of private ownership of land.\(^6^7\) The peasant producers continued to live in self-sufficient village communes very like those of the gentile constitution, and production in the Oriental commune was still devoted primarily to the creation of use-values.\(^6^8\)


\(^6^7\) See E Mandel *The Formation of the Economic Thought of Karl Marx* (London, 1971) at 15; Melotti (n 66) at 54. The state, in the person of the ruling despot, was the only landowner. There was private ownership of movables.

\(^6^8\) See E Mandel *Marxist Economic Theory* (London, 1977) at 58; Melotti (n 66) at 56-57.
The survival of such features of primitive communism and natural economy notwithstanding, the Asiatic formations were class societies in all their essentials. This was most apparent from the fact that the social surplus product of the peasant producers was appropriated by the ruling class, in the form of ground rent or taxes. The rulers lived lives of conspicuous opulence, and the market in manufactured goods grew significantly, as towns became virtual factories for the production of luxury and other goods to satisfy the tastes of the emperor and nobles. Needless to say, the direct producers had to make do with bare necessities. The benefits of the urban revolution, which was based upon their labour, did not reach them. They became the victims of the civilisation that they built.

Also, although production in the Asiatic mode was essentially for use, exchange of and trade in the social surplus grew significantly. The commodification of the surplus which had begun in the era of late barbarism now became widespread, as evidenced by the fact that by about 2 000 BC precious metals, especially silver, had ousted all other competitors as universal equivalent. From here it was but a short step to the role of universal equivalent being occupied exclusively by the master commodity, money.\textsuperscript{69} The natural economy was being invaded by the commodity and its apotheosis. Whatever had survived of the gentile constitution was under assault from and succumbing to the contrivances of civilisation.

The “civilising mission” of the class system in Asiatic society also extended to the juridical. The Code of Hammurabi (c 1 750 BC) represents the high-water mark of the juridification of Asiatic society. Notwithstanding the persistence of communal social relations, the Code was patently a class construct. It gave express recognition to the social classes that made up Asiatic society, prescribed different legal treatment for these various classes and made no concessions whatsoever to the egalitarian morality of the primitive commune. It identified three social classes, namely, patricians (freemen), plebeians and slaves.\textsuperscript{70} It retained the talio as a system of punishment based on exact equivalent retribution, but invested it with a class character. Retaliation became essentially the means by which the ruling class, the patricians, resolved intra-class transgressions and disputes, including murder. The Code required patricians to take revenge on patricians according to the talionic equation. But patricians were entitled to revenge many-fold against plebeian and slave offenders, to whom the benefits of the talionic equation did not apply. The Code did not make talionic vengeance available to plebeian and slave victims of patrician transgressions. These were composed: the patrician offender faced nothing more than a pecuniary sanction.\textsuperscript{71} This was the talio commodified. The commodity of commodities was enlisted as a class weapon. The physical injuries inflicted by offenders

\textsuperscript{69} The steady growth of commodity production was the undoing of the primitive commune. However, commodity production in this epoch, as in all pre-capitalist epochs, remained petty, as represented by the circuit C-M-C. This formula sums up the circulation of use-values characteristic of petty commodity production, in which commodities were sold and bought for consumption and in which money was the instrument of the exchange process. Production of exchange value was at this stage not the rationale of the production process but an adjunct to production for use or direct consumption.

\textsuperscript{70} See C Edwards \textit{The World’s Earliest Laws} (London, 1937) at 63; A Diamond \textit{Primitive Law} (London, 1950) at 31; Seagle (n 47) at 24.

\textsuperscript{71} See Diamond (n 70) at 31. See, also, ss 196-214 of the Code of Hammurabi in Edwards (n 70) at 43-44.
from the noble classes upon their lower-class victims were transformed into values, measured against the universal equivalent. Composition in the first historical societies was unequivocally a ruling-class contrivance, already thoroughly imbued with the spirit of the commodity. The plebeian and slave victims of ruling-class offenders were inserted, effectively, into the commodity circuit: the social surplus that the offenders appropriated could be employed to purchase and consume the victims’ injuries, like so many luxuries. The anti-egalitarian tendencies apparent in the prehistoric beginnings of composition matured early in the historical epoch. Asiatic justice was infused with the ethos of class and, hence, of inequality from the beginning. Despite its despotic and hypertrophied nature, the Asiatic state had not yet invented the notion of a crime as an attack upon its sovereignty. The primitive \textit{talio}, as blood revenge, survived into this first epoch of civilisation. But it was the \textit{talio} transfigured and blood revenge transformed, as both were contaminated with the imprints of those two standard-bearers of civilisation, class and commodity. Primitive justice could not withstand the frontal assault upon egalitarianism and communalism entrained in the forward march of civilisation.

The restorationists tend to present composition as the original restorative sanction in general terms without reference to social class or inequality. The impression is created that it was freely available to everybody, and that ancient restorative justice was essentially egalitarian, applicable to all members of society and operating to repair harm and maintain social equilibrium – hence its description as community justice. However, this construction is, at best, utopian. It fails to comprehend the very strong and evident links between ancient composition and class inequality. It takes no account of the material foundations of composition. And it ignores the patent historical fact that there was nothing communal whatsoever about the class-selective manner in which the rights to composition and to retaliation were invested juridically in the Asiatic formations. The restorationist belief in the existence of an ancient restorative justice thus has little historical basis. Primitive justice was community justice, but based on the principle of blood revenge, not restoration. The first form of civilised justice, as is evident from the Code of Hammurabi, was class not community justice, and its restorative aspect had no community impetus at all.

9 Ancient justice

In world-historic terms, slavery featured most prominently in the European road from barbarism to civilisation. The Graeco-Roman societies of antiquity are the archetypes here. Like the alluvial formations, they too were class societies, with all the appurtenances of such societies. And their approach to criminal justice was structured

\footnote{See Zehr (n 12) at 107; Van Ness & Strong (n 4) at 9.}

\footnote{There was a substantial amount of slavery in the hydraulic societies, and some in the barbarian era of the prehistoric commune. But slavery was never the socio-economic basis of these modes of production. In addition, the earlier forms of slavery were not private. Slaves were “owned” either by the commune or by the state. Only the ancient mode of production was a properly slave-holding mode.}

\footnote{The emergence of these slave-holding societies coincided with the dissolution of the gentile constitution. The vanquisher of the primitive commune was private ownership of the means of
by the same class concerns and prejudices as were to be found in the alluvial societies. Civilised justice is class justice because civilised society is class society.

Roman law is paradigmatic of the penal jurisprudence of this epoch and the Roman state very early on considered certain attacks upon the interests of individuals to be crimes against its integrity. Thus Roman law treated murder as a crime “so far back as we can go”.75 Other early examples of crimina included treason, perjury, arson and theft of crops.76 The list of crimes increased steadily and by the time of the emergence of the empire, “Rome had to a large extent evolved a criminal law proper”.77 Punishment for the crimina was imposed and inflicted by the state and ranged from the death penalty through banishment, penal servitude and corporal chastisement to fines.78 Composition was not a possibility for the offender, and state punishments did not have any obvious restorative dimension.

However, the ambit of Roman criminal law was not comprehensive. Many conflicts were treated as the concern only of the wrongdoer and the victim, that is, as privata delicta. These included theft, robbery, injuries to the person and malicious damage to property. The privata delicta were governed by the talio principle from the beginning. The victim and/or his agnates were entitled to blood revenge against the offender, but subject to the equivalence prescription of the lex talionis. However, by the time of the Twelve Tables, the talio principle had been commodified, in the sense that physical retaliation for harm suffered could be had “only if the parties had failed to agree upon a money composition and thus to settle their dispute by means of a peaceful settlement”.79

The Twelve Tables also prescribed the compensation to be paid in certain cases.80 Composition was clearly a major element of the law of privata delicta from an early stage. Indeed, as Jolowicz and Nicholas note “Roman law was at the time of the Twelve Tables in a state of transition from voluntary to compulsory composition for private wrongs”.81 In the later empire many of the privata delicta were transformed into crimina

production, including slaves and especially land. Aspects of the gentile constitution survived into the early years of the Roman republic. But these were battered and bastardised as most of the communards were transformed into pauperised plebeians (often condemned to debt slavery) and the bulk of the land became the private property of the patrician aristocracy.

75 J Wylie Roman Constitutional History (Cape Town, 1948) at 86. See, also, Table 9 6 of the Twelve Tables available at http://avalon.law.yale.edu/ancient/twelve_tables.asp (accessed 10 May 2012).
76 See the Twelve Tables (n 75): Tables 9 5 (treason), 8 23 (perjury), 8 10 (arson), 8 9 (theft of crops).
78 See Lord Mackenzie Studies in Roman Law ed by J Kirkpatrick (1915, repr Holmes Beach Fla, 1991) at 422-429.
79 W Kunkel An Introduction to Roman Legal and Constitutional History (Oxford, 1966) at 28. See, also, JAC Thomas Textbook of Roman Law (Cape Town, 1981) (hereafter Thomas Textbook) at 349-350; see, further, Table 8 2-6 (n 75); Inst 4 4 7 (tr JAC Thomas The Institutes of Justinian Cape Town, 1975).
80 Eg, Table 8 3 of the Twelve Tables (n 75) prescribes penalties of 300 asses and 150 asses for breaking the bone of a freeman and a slave respectively; Table 8 16 prescribes a penalty of double the value of the stolen property for theft where the perpetrator is not caught red-handed.
81 H Jolowicz & B Nicholas Historical Introduction to the Study of Roman Law (Cambridge, 1972) at 172.
extraordinaria, that is, into crimes proper. But the possibility of composing them remained, as the victim had the right to “elect between criminal and civil punishment”, the choice being governed “by whether the offender was worth powder and shot”. All in all, then, composition appears to have been either a requirement or a possibility throughout all the periods of Roman law, at least as regards the trespasses which were dealt with as privata delicta.

However, any attempt to enlist the Roman institution of composition to the cause of the contemporary restorative justice movement must be assessed in relation to the social structure of Roman society in which the “basic labour everywhere was slave labour”. The owner-slave relationship embodied the core social relations of production. The slave was the property of the slave-holder. Slaves were essential means of production. Their ability to labour, to put the instruments of production into motion, defined the process of production in the Graeco-Roman world.

The basic class contradiction in ancient Roman society was that between liberi and servi. The fundamental juridical divide was that between persons and things. Liberi were persons; slaves were not. In law, the slave was, at best, “a hybrid, both person and thing”, that is, “a man-thing”. However, the elements comprising the “man-thing” relation were not of equal value. It was the slave’s res status or thingness which dominated in law. The slave was, in this regard, a species of res, the unique instrumentum vocale, and hence a legal non-subject. He was a thing whose value depended on his human qualities, but whose legal status was constructed on the basis of the denial of those qualities. Thus, “as a person, the slave had no rights” in law.

Such literal reification of the human subject was the juridical premise of the ancient mode of production. It was the key to the destruction of the primitive commune and the transformation in the social relations of production which made possible a qualitative leap in the productive capacity of human society. This stage of civilisation was premised

83 Burchell & Hunt (n 77) at 15. Eg, D 47 2 93 provides: “It must be remembered that now criminal proceedings for theft are common and the complainant lays an allegation … Still if that be the party’s wish, he can bring civil proceedings for theft.”
84 Cameron (n 43) at 187.
85 Jolowicz & Nicholas (n 81) at 133.
86 See Inst 1 3pr; G 1 9 (tr W Gordon & F Robinson The Institutes of Gaius London, 1988). See, also, DH van Zyl History and Principles of Roman Private Law (Durban, 1983) at 81; A Watson Roman Slave Law (Baltimore, 1987) at 7. For most of its existence Rome had many more servi than liberi. Cameron (n 43) at 191 records that during the time of Cicero, Rome had a population of some 900 000 citizens and 4 500 000 slaves. More than 80 per cent of the population were thus servile and legal non-persons.
87 See G 2 14a which classifies slaves as res mancipi, along with beasts of draught and burden, land and rustic praedial servitudes. Although Justinian abolished the formal distinction between res mancipi and res nec mancipi, the slave remained a res.
88 Thomas Textbook (n 79) at 393. See, also, PR Spiller A Manual of Roman Law (Durban, 1986) at 48.
89 B Hindess & P Hirst Pre-Capitalist Modes of Production (London, 1975) at 112.
90 G 2 13 lists slaves amongst corporeal things such as land, clothes, gold and silver.
91 Thomas Textbook (n 79) at 394.
upon the commodification of the human body itself. The person became the commodity. The human body was transformed into a form of private property that could be inserted into and move through the commodity circuit, like any other item of private property.

The “man-thing” of Roman slavery was a combination of the slave-as-thing and the slave-as-person. The notion of the slave-as-thing meant, in practice, that the slave-holder had absolute power over his existence. As with any item of private property, the owner could use, abuse and even destroy the slave with impunity. The idea of the slave-as-person was especially pertinent to criminal law. Here the slave was deemed by law to be more than a res, to possess legal subjectivity. But it was a negative subjectivity, granted in order to visit criminal liability upon the slave. The slave-holders were prepared, it appears, to grant the offender slave a temporary legal persona, for the sole purpose of using the law to punish his errantry and to put him back in his place, to reduce him to the piece of property that he really was. Slave punishments were invariably corporal or capital. Composition was never an option for the slave offender. Roman criminal law operated a dual system of punishment, demarcated strictly in class terms: penalties for slave-owners were lighter than penalties for slaves. Thus, although composition became a part of Roman law early on, it was available, as the talio commodified, only to offenders from the ranks of the liberi, who were legally entitled to proffer the victim compensation as a way of avoiding the talionic retaliation. The human commodity was always excluded from the benefits of the commodification of punishment that composition entailed. This was, of course, a structural attribute of the slave system, for the slave owned no property, not even his own body, with which to compose an offence. The real effect was that the bulk of the Roman population was legally excluded from Roman “restorative justice”.

92 See Vermes (n 49) at 48; Cameron (n 43) at 194; Thomas Textbook (n 79) at 394; Manfred (n 26) at 116-117. It was not uncommon for all the slaves owned by a slave-holder to pay with their lives for an offence by one of their number, as provided for by the notorious senatus consultum Silanianum recorded in D 29 5 1. The Roman ruling class was prepared to protect the slave system by reverting to the excesses of communal revenge against a segment of the dominated class. Civilisation based on slavery reinvented a system of punishment, but only for the class of slaves, which the prehistoric barbarians had long abandoned in favour of the law of retaliation. The principle of equivalence on which the law of retaliation was based would raise the instrumentum vocale to the level of personhood, and would undermine the fundamental premise of slavery, hence the brutality of slave punishments. Subsequent laws that regulated the owner’s power over slaves had little to do with improving the lot of slaves and everything to do with protecting and maintaining the system of slavery intact. See, further, G de Ste Croix The Class Struggle in the Ancient Greek World (London, 1981) at 459-460.

93 D 48 2 12 3 stipulates: “If a slave be cited as accused, the same procedures shall be observed as if he were a freeman in accordance with the senatus consultum given in the consulship of Cotta and Messala.”

94 Conversely, the slave victim could not accept compensation for his injuries. Such compensation would have been arranged by and would have accrued to the slave-holder. See G 3 222: “The law holds that no contempt can be committed against a slave, but that the delict is committed against the owner through the slave.”

95 Eg, Inst 4 18 7 prescribes that the punishment for servi convicted of forgery of a will is death whereas it is deportation for liberi. See, also, De Ste Croix (n 92) at 458; Cameron (n 43) at 194.
The secondary class contradiction in Roman society was located within the ranks of the *liberi*, between the *honestiores* and the *humiliores*.\(^96\) Composition, although available to them, likely could not be afforded by the bulk of offenders from the class of *humiliores*. They would have had to suffer the punishment, talionic or state, prescribed for their crimes. In practice, then, it was the members of the Roman ruling class, the *honestiores*, who were the real beneficiaries of the institution of composition. The wealthy *liberi* were the only members of the Roman population who possessed both the legal right and the proprietary means to pay for their crimes, literally.

Roman law thus does not provide any substantive support for the historical arguments of the restorationists. Much the same conclusion as was reached in relation to Asiatic law is valid for Roman law: the institution of composition was thoroughly imbued with the precepts of class inequality; it had very little to do with restorative justice and everything to do with class justice.\(^97\) It was only the Roman ruling class that was not, in one way or another, prejudiced by the restorative veneer of composition. Both the *servi* and the *humiliores* had to negotiate its oppressive class contours.

### 10 Feudal justice

Of all the historical epochs, it was the Middle Ages, situated between the fall of the Roman Empire and the modern era, which was most accommodating of composition as a response to trespass. This was an era during which “the institutions of the blood feud and the talio were resorted to exceptionally only, and composition in terms of money had become the dominant punishment”.\(^98\) For a killing, the offender had to pay the victim’s *wergild* or worth money to his kin;\(^99\) for injuries, the offender had to compensate the victim with payment of *bot*, according to a detailed injuries tariff,\(^100\) and he had to

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96 The former comprised the upper classes of the free population, the latter the lower orders. See De Ste Croix (n 92) at 458; Kunkel (n 79) at 65; A Jones *The Criminal Courts of the Roman Republic and Principate* (Oxford, 1972) at 109.

97 See Vermes (n 49) at 48; Jones (n 96) at 109.

98 Vermes (n 49) at 51. See, also, F Haynes *Criminology* (New York, 1935) at 209. Indeed, a blood feud could not be initiated unless the aggrieved party had attempted composition first. Thus, the Laws of King Alfred (AD 871-901) available at [http://www.fordham.edu/Halsall/source/560-975dooms.asp](http://www.fordham.edu/Halsall/source/560-975dooms.asp) (accessed 10 May 2012), cap 42 command: “that the man who knows his foe be homesitting fight not before he demand justice of him.”

99 See, eg, the Laws of Alfred, Guthrum and Edward the Elder (c AD 879-920) available at [http://www.fordham.edu/Halsall/source/560-975dooms.asp](http://www.fordham.edu/Halsall/source/560-975dooms.asp) (accessed 10 May 2012), cap 13: “A twelve-hynde man’s wer is twelve hundred shillings. A two-hynde man’s wer is two hundred shillings. If anyone be slain, let him be paid for according to his birth.”

100 The lex Salica of the Merovingian King Clovis (AD 481-511) available at [http://avalon.law.yale.edu/medieval/salic.asp](http://avalon.law.yale.edu/medieval/salic.asp) (accessed 11 May 2012) is illustrative here. The bulk of its provisions are devoted to listing pecuniary punishments for virtually the entire gamut of crimes. Eg, lex Salica 13 3, 14 1 and 15 1 prescribe a sentence of 2 500 denars each for rape, robbery and arson respectively; in terms of lex Salica 41 1 and 2, the punishment for killing “a free Frank, or barbarian living under Salic law” was 8 000 denars, which increased to 24 000 denars if the killer disposed of or concealed the body.
compensate the state with payment of *wite*. Such pecuniary punishments were more popular in this period than in any other, making it the historical anchor of the institution of composition.

The medieval epoch is presented as one in which offenders had to make good the damage they had caused and restore the social equilibrium they had broken, by composing their offences. The primary concern of criminal law was to ensure that offenders repaired the harm they had inflicted on their victims and, by extension, on the community. Often the medieval epoch is referred to as the “golden age” of the victim, which constitutes a major endorsement of the historical claims of the restorationists. Medieval criminal law and, especially, medieval sanctions can be presented as some kind of *Shangri-la* of restorative justice, which endows the contemporary restorationist movement with historical legitimacy. This “golden age” of the victim needs to be examined through the lens of historical materialism.

The medieval epoch was the epoch of the feudal mode of production. The feudal economy was essentially a natural economy, that is, an economy dedicated in its fundamentals to the production of use-values. However, it did produce a substantial surplus, which was commodified and exchanged. It is the enhanced presence of the commodity circuit in the feudal economy that accounts for the triumph of composition as the premier feudal sanction. Feudalism raised the commodification of the *tallo* to its apogee. Every life had a legally prescribed monetary worth. Every person also had a *bot* for virtually every body part which might be injured in a criminal confrontation. Such was the dominance of composition during the feudal era.

However, feudal society was, like its Asiatic and ancient counterparts, a class society. Feudal relations of production were structured by the contradiction and conflict

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101 See, eg, the Laws of King Aethelberht (AD 560-616) available at [http://www.fordham.edu/Halsall/source/560-975dooms.asp](http://www.fordham.edu/Halsall/source/560-975dooms.asp) (accessed 10 May 2012), cap 9: “If a freeman steal from a freeman, let him make threefold *bot*; and let the king have the *wite* and all the chattels.” See, further, the Laws of Athelstan (AD 924-939) available at [http://www.fordham.edu/Halsall/source/560-975dooms.asp](http://www.fordham.edu/Halsall/source/560-975dooms.asp) (accessed 10 May 2012), cap 12: “But if it be found that any of these have given wrongful witness, that his witness never stand again for aught, and that he also give thirty shillings as wite.”


103 See Schafer (n 102) at 5.

104 See *F Bresler Reprieve: A Study of a System* (London, 1965) at 17; *Fry* (n 102) at 32. The Laws of Alfred, Guthrum and Edward the Elder (n 99) contain a title devoted to *wergild* in which is listed the *manwyth* in *thrymsas* (currency) of everybody, from king, through nobles and clergy, to ordinary freemen.

105 The Laws of King Aethelberht (n 101) comprise a detailed exposition of punishments for criminal injuries which transforms, *inter alia*, the elements of the biblical *tallo* into shilling values. Thus, cap 43 and cap 69 value the loss of an eye or a foot at fifty shillings; the various categories of teeth are governed by cap 51, which values the four front teeth the highest at six shillings each; and cap 54 is devoted to the digits of the hand, with the little finger being the most valuable at eleven shillings.
between the two major social classes, the serfs and the lords. The serfs lived and worked on strips of land granted to them by their lords. As a class, the feudal lords were unproductive, and lived off the surplus they extracted from their serfs. Serfdom was a legal status which subjected the serf to the juridical thrall of his lord. The serf was legally obliged to surrender to his lord a predetermined portion of his produce (quit-rent) or labour-power (corvée). The serf had no choice in the matter, being required by law to warrant the reproduction of the livelihood of the lord. The feudal state was centrifugal. There was no functional centralised repository of political power, which was instead parcelled and deconcentrated. The feudal manorial estate or seigniory was the real locus of political power and hence of juridical authority. In relation to the serf the king was sovereign in name only, and it was the serf’s overlord who was the practical embodiment of sovereignty. For the serf then, his overlord was the feudal state personified and the feudal manor was the feudal state materialised. The person who exploited the serf economically also dominated him politically.

Feudal exploitation was non-economic, in the sense that the lord’s appropriation of surplus was premised on his political power over his serfs. In this epoch, political power entailed juridical power. The seigniory was the basic juridical unit and the seignior the administrator and dispenser of feudal justice. The two types could be distinguished neither conceptually nor practically from each other. “Justice was the central modality of political power ... It was the ordinary name of power.” Feudal justice was thus incontrovertibly class justice. The “golden age” of the victim was structured by an unmediated vinculum between class power and juridical relations. This meant that in feudal times too, as in the Asiatic and ancient epochs, composition was essentially a ruling-class expedient. The rich could commit crimes, including murder, with no fear of being punished for their actions in any way, except by having to part with a modicum of their wealth. Composition was, however, not a genuine right of the poor, not even of the poor victim.

A criminal sanction such as medieval composition based on access to economic resources invariably favours the rich and disadvantages the poor. In fact, there was for the most part a coincidence between power and justice. This problem is acknowledged even by Schafer, the originator of the idea of the “golden age” of the victim:

> The amount of compensation varied according to the nature of the crime and the age, rank, sex, and prestige of the injured party ... Thus, the “value” of human beings and

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106 There were numerous levels of overlordship between the serf at the bottom and the monarch at the top of the hierarchy. There were thus also numerous levels of class distinctions. But they were all secondary to the primary distinction between the serf and his direct overlord.

107 See J Thompson & E Johnson *An Introduction to Medieval Europe* (New York, 1965) at 329-337; Cameron (n 43) at 248-249.


109 See Hindess & Hirst (n 89) at 224; Thompson & Johnson (n 107) at 291.


111 Manfred (n 26) at 148.

112 Anderson (n 108) at 152-153, original emphasis.
their social positions were involved in determining compensation, and a socially stratified composition developed.\footnote{97}

It was implicit in the structure of feudal society that composition could not be other than class bound. One’s position in the class system was an attribute of one’s legal persona, and had important legal consequences. Lords enjoyed legal superiority over serfs and the other dominated classes. The lord was the juridical authority in his domain. “The man who had the land judged the man who had not.”\footnote{114} There was little chance of a serf prevailing at law against a lord.\footnote{115} And feudal composition was a system that operated to protect lordly criminals while throwing the poor ones to the wolves. It was a system suffused with the iniquities of class. Wright, a contemporary restorationist, admits the class character and iniquities of feudal justice and concludes that it “hardly deserves a halo”.\footnote{116}

Despite its dominance, feudal composition was not all-embracing. Certain crimes remained botleas, that is, not commutable to pecuniary terms. In England, for example, treason, killing a sleeping enemy, cowardice in battle, arson and housebreaking were botleas and therefore not composable.\footnote{117} These were met with corporal, often capital, punishment. Over time, the list of botleas crimes slowly lengthened, as more and more crimes were deemed unemendable, and by the late feudal period, there was a decisive shift away from composition as the typical criminal sanction. The period of late feudalism witnessed the re-emergence of physical punishments, many of which were frighteningly harsh.\footnote{118} The heyday of composition was over.

\section*{11 Justice in the age of absolutism}

The demise of medieval composition coincided to some extent with the rise of the centralised state. The late feudal period saw the emergence of the true feudal monarch, who was able to impose his political will upon all his liegemen and to unite their disparate statelets into a single national state. The centralisation of feudal sovereignty was based on the support of the new urban middle classes which had grown, together with the cities, in the tenth and eleventh centuries.

Urbanisation and the growth of a market economy based on money signalled the beginning of the downfall of the manorial economy. Huberman describes the transformation thus:

\begin{quote}
After the twelfth century the economy of no markets was changed to an economy of many markets; and with the growth of commerce, the natural economy of the self-sufficing
\end{quote}

\footnote{97} Schafer (n 102) at 12.
\footnote{114} See Wright (n 12) at 4.
\footnote{115} See L Huberman \textit{Man’s Worldly Goods} (New York, 1968) at 10.
\footnote{116} Wright (n 12) at 2-3; see, also, Bresler (n 104) at 19; Karmen (n 102) at 280.
\footnote{117} See A Carter \textit{A History of English Legal Institutions} (London, 1910) at 13; A Kiralfy Potter’s \textit{Historical Introduction to English Law and its Institutions} (London, 1958) at 349; Wright (n 12) at 3; Bresler (n 104) at 20.
\footnote{118} See M Bloch \textit{Feudal Society} (London, 1965) at 365.
manor of the early Middle Ages was changed to the money economy of a world of expanding trade.\textsuperscript{119}

The merchant masters of the money economies of the feudal cities found in the monarch their best weapon against the power of the lords. The political defeat of seignorial power was accomplished on the basis of an alliance between the urban middle classes and the monarch.\textsuperscript{120} By the fifteenth century the national state had emerged, ruled by a king who had succeeded, with the backing of the cities, in centralising political power within a determinate geographical area. The age of absolutism had arrived.\textsuperscript{121} It was to be the ruination of composition.

The absolutist state was the political form required for the development of merchant capital. As the manorial economy needed the parcellisation of state power, so merchant capitalism needed its centralisation. For the merchant, “the unification of all administrative and military power in one hand, princely absolutism, was an economic necessity”.\textsuperscript{122} Merchant capital was the dissolvent of feudal relations of production. It infiltrated money into the marrow of the manor, and led a frontal assault on the integrity of the natural economy. Under its sway the regime of use value irrevocably began to succumb to the regime of exchange value. Absolutism was the political conjugate of this historic economic transformation, the material exigencies of which elevated the political to primacy in the matrix of social relations of production. The birth of generalised commodity production could occur only in an absolutist political context. The central state arrogated to itself a monopoly of force in order to guarantee the political milieu required for the impending transformation of the mode of production. The age of absolutism was thus the age which nurtured all the prerequisites of the capitalist mode of production.

In class terms, the absolutist state held the balance of power between two classes, representing two competing modes of production: the declining feudal nobility and the rising bourgeoisie. The impasse in their struggle for socio-economic supremacy facilitated the emergence of a centralised monarchy which “represented a form of relative state autonomy, balanced on the countervailing pressures of the contending classes”.\textsuperscript{123} Neither class had the strength to defeat the other, and the state was able to establish itself as autonomous arbiter, supporting now one, now the other, in order to keep both in line. The overall effect of absolutism was a combined one of extending the embattled life of the feudal mode of production while simultaneously providing the material conditions for the birth of the capitalist mode of production. Absolutism was thus essentially a politics of transition, corresponding to the historic transition from petty to generalised commodity production.

\textsuperscript{119} Huberman (n 115) at 26.
\textsuperscript{120} See Tigar & Levy (n 110) at 47.
\textsuperscript{121} Idem at 42-46. See also, generally, F Mehring Absolutism and Revolution in Germany 1525-1848 (London, 1975); C Mooers The Making of Bourgeois Europe (London, 1991).
\textsuperscript{122} Mehring (n 121) at 2, original emphasis. See, also, K Kautsky Thomas More and his Utopia (London, 1979) at 14-17.
\textsuperscript{123} H Draper Karl Marx’s Theory of Revolution Volume 1: State and Bureaucracy (London, 1977) at 477. See, also, Engels (n 25) at 196.
The impact of absolutism on crime and punishment was radical. The absolutist state defined crime as an attack upon “the majesty of the king”.124 Criminal justice became an affair of state. And the medieval regime of composition had to give way to state punishment, administered by the king’s men.125 Thus the absolutist state moved criminal justice definitively into the public arena. Crimes were reinvented as affronts to the “king’s peace” and punishments were imposed and executed by functionaries of the centralised state. Initially, it appears, the monarch simply stepped into the shoes of the victim. That is, compensation that would have been due to the victim was replaced by fines due to the Crown. Indeed, the system of fines became an important source of revenue for cash-strapped monarchs.126 However, reliance upon the fine system for revenue receded as the power and liquidity of the Crown grew. Although the fine continued as a criminal sanction, it was rapidly supplanted by a host of physical punishments, infamous for their arbitrariness and brutality.

By the fifteenth century, when absolutism reigned supreme, criminal sanctions had become primarily physical, and composition had been relegated to penological insignificance.127 The absolutist state, although transitory, thus presided over a sweeping re-definition of crime and a fundamental transformation of punishment. It took the historic step of establishing itself as the functional axis of criminal justice. It was during this period that the state became a surrogate for the crime victim who, in turn, “became the Cinderella of the criminal law”.128 The abandonment of composition was encouraged, if not prompted, by the emergence of “vagrancy and beggary as a mass phenomenon”.129 Through the growth of the money economy of the cities and the concomitant break-up of the natural economy large numbers of serfs and peasants of the latifundia became paupers. Many were forcibly ejected from the land by feudal lords; others sought refuge from feudal exploitation and access to the perceived benefits of the money economy in the cities. But these recently “liberated” people exceeded by far the number that could be absorbed into the productive life of the cities. Most of them became “surplus people” who formed a stratum of unemployed and unemployable urban poor, languishing in medieval slums.130 Dislocated and disaffected, they were ready material for the lures of criminality.131 This period witnessed an unprecedented increase in the crime rate, to levels unheard of in any previous epoch of human history. The quantitative leap in criminality necessitated a qualitative change in the nature of criminal justice. Composition had to give way to state punishment.

124 R Caldwell Criminology (New York, 1965) at 491-2; see, also, Haynes (n 98) at 210.
125 H Barnes & N Teeters New Horizons in Criminology (New Jersey, 1959) at 288.
126 See Haynes (n 98) at 209-210; Wright (n 12) at 4.
127 See Wright (n 12) at 5. See M Foucault Discipline and Punish: The Birth of the Prison (London, 1977) at 3-72 for an engaging study of the power relations underlying the brutalities of punishment in pre-revolutionary France.
129 Vermes (n 49) at 55.
130 See Mehring (n 121) at 3-4.
131 Vermes (n 49) at 55.
Historically, the extent of a society’s reliance upon composition as a sanction is an index of the penetration of commodity relations into its socio-cultural life. In other words, the growth of composition can be superimposed onto the development of commodity relations in the system of production. Through the ages, movement from the talio to composition was the juridical expression of the progressive commodification of social relations. That movement reached its apogee in the classical feudal era, when composition held sway as the generalised mode of dealing with crime. During the era of absolutism, however, that movement was definitively halted, arguably even reversed. The era which nurtured the preconditions of the capitalist mode of production and which prefigured the transition from petty to generalised commodity production was also the era which jettisoned composition.

Absolutism was, essentially, the political response to the extended crisis of the feudal mode of production. It was feudalism on the threshold of its death agony. It was the epoch of the break-up of the natural economy. It was a period of turmoil and dislocation, of political violence and social distress. There was no place for composition here. The penal flagship of classical feudalism ran aground in the treacherous waters of late feudalism. Savage punishments replaced composition. Brutality in punishment was the necessary juridical corollary of absolutism in politics. There was a complete correspondence between absolutist penology and the violence of the socio-economic transformation then in progress. Absolutism resurrected a version of pre-talionic blood revenge, that is, an indiscriminate vengeance that was not governed by the talionic principle of equivalence. The absolutist state took the place of the victim commune and imposed on the offender a punishment that was typically hugely disproportionate to the crime. Absolutist justice was the antithesis of restorative justice.

12 The rise of capitalism

The transition from feudalism to capitalism signalled the final demise of composition as a system. Composition, for so long the measure of the commodification of social relations of production, had to be sacrificed in order to ensure the final victory of the commodity. Unlike all its predecessors, which, at best, sustained various levels of petty commodity production, the capitalist mode of production is a mode of generalised commodity production. The entire production process is geared from start to finish to the production of commodities. The commodity is the elemental cell of capitalist production. Exchange value is the raison d’être of the production process.

Capitalism is a mode of production that entails “the commodification of everything”, including labour power, the unique value-producing commodity. Yet the capitalist state has, from its inception, eschewed composition as a generalised penological option, despite its historical consonance with the process of commodification. It has, instead, elected to keep alive the public conception of crime and punishment developed by the absolutist state, but modified by the enlightenment principle of legality and a clearly discernible

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132 The process of proletarianisation was the most violent aspect of this transformation.
133 This is the title of the first chapter in I Wallerstein Historical Capitalism (London, 1995).
talionic posture. England is paradigmatic here. The early capitalist state appropriated the pre-talionic penal practices of the absolutist state lock, stock and barrel. The era of primitive capitalist accumulation was also the era of savage punishments for criminal offences.\textsuperscript{134} The death sentence was routinely imposed for even the pettiest crimes. The early English capitalist state had a particular liking, which lasted well into the nineteenth century, for the death sentence as its punishment of choice. By 1820 England had at least 200 capital statutes that prescribed the death penalty as punishment for close to 7 000 offences.\textsuperscript{135}

The early and singularly violent texture of criminal law in the home of the capitalist mode of production was determined by the exigencies of the appropriation of the means of production by the rising capitalist class. The new proprietary regime had to be guaranteed, and any dissidence from the recently expropriated, however episodic, had to be crushed. The new proletariat had to be taught that resistance to the capitalist project was futile and that, in the world of the commodity, capitalist ownership of the means of production was inviolable. In this era the law was unequivocally the handmaiden of capitalist class terror against the proletarian masses. This was the era of primitive accumulation, of the forceful separation of the direct producers from the means of production, an era which was inequitable to its core, and which left no margin for the equivalent niceties of composition. The latter did not accord with the tumult which marked the social relations of production of early capitalism.

\section*{13 The political economy of the prison}

Theoretically, mature capitalism could have resurrected composition as a generalised system of punishment. Indeed, an assiduous commodification of punishment would have been fully consistent with the idea of capitalism as a system of generalised commodity production. It did not happen because, it appears, mature capitalism invented a system of punishment that accorded even better with its relations of production, namely, imprisonment. From the mid-nineteenth century, imprisonment became the standard capitalist means of dispensing criminal justice. The material roots of this development are to be found in the nature of commodity relations, and more particularly in the nature of that most unique of commodities, labour-power. The capitalist mode of production is predicated upon the constant sale of labour-power by the proletariat to the bourgeoisie. This sale is the ultimate source of all surplus value, and hence of the extended reproduction of the mode of production. In other words, the economic foundation of the capitalist system is to be found in the sale and purchase of labour power, the only commodity capable of creating value.

The legal form of this elemental capitalist transaction is the contract of employment, in terms of which the worker sells his labour-power to the capitalist for a given period of time, in exchange for a wage. The capitalist economy is thus an economy of labour time. By selling their labour power, the workers put it at the disposal of the capitalists

\textsuperscript{134} See L Radzinowicz Ideology and Crime (London, 1966) at 3.

\textsuperscript{135} Vermes (n 49) at 56; see, also, D Hay “Property, authority and the criminal law” in D Hay et al (eds) Albion’s Fatal Tree (London, 1975) 17 at 18; Diamond (n 61) at 322-323; Bresler (n 104) at 32.
for an agreed time, during which the workers produce commodities. Therefore the value of every commodity emerging from the capitalist production process is determined by the amount of socially necessary labour time that was required to produce it. This is the law of value,\textsuperscript{136} which defines value in terms of abstract labour time.\textsuperscript{137} Value is a relation that embodies the essentialia of capitalist social relations of production. It is the signature relation of the political economy of capitalism. It percolates throughout the social fabric and leaves its impress on all superstructural relations. There is little in the capitalist universe that is not structured, in one way or another, by the value relation. Certainly, in the current postmodern incarnation of capitalism, the law of value’s domination of daily life is relentless and complete.

Imprisonment is the penological analogue of the value relation. It is the law of value juridified. Industrial capitalism found in the prison the best juridical correlate of the commodity. Imprisonment, not composition, was the institution that accomplished the commodification of punishment most thoroughly. It was the form of punishment that accorded most fully with the juridical worldview by which the new ruling class, the bourgeoisie, comprehended social relations.\textsuperscript{138} Pashukanis delineates the relationship between the rise of the prison and the law of value in capitalist society:

Deprivation of freedom, for a period stipulated in the court sentence, is the specific form in which modern, that is to say bourgeois-capitalist, criminal law embodies the principle of equivalent recompense. This form is unconsciously yet deeply linked with the conception of man in the abstract, and abstract human labour measurable in time. It is no coincidence that this form of punishment became established precisely in the nineteenth century, and was considered natural.\textsuperscript{139}

Commodity relations express the exchange of equivalent amounts of abstract human labour; imprisonment of a criminal offender expresses the exchange of an amount of abstract freedom equivalent to the severity of the crime. The affinity between the two was organic.\textsuperscript{140}

In the pre-capitalist world, composition was the natural penal accessory of the growth of commodity relations. But pre-capitalist commodity production was petty, and labour power itself had not yet been transformed into a commodity. All the pre-capitalist class societies – alluvial, slave and feudal – were formally unequal societies, privileging

\begin{itemize}
  \item \textsuperscript{136} See Mandel (n 34) at 17-18.
  \item \textsuperscript{137} See Marx \textit{Contribution} (n 18) at 51.
  \item \textsuperscript{139} E Pashukanis \textit{Law and Marxism: A General Theory} (London, 1978) at 180-181.
  \item \textsuperscript{140} It is not being suggested here that the bourgeoisie had a grand plan to develop the prison as its penal instrument of choice. This vulgar Marxist position has been rightly criticised by M Ignatieff “State, civil society and total institutions: A critique of recent social histories of punishment” in S Cohen & A Scull (eds) \textit{Social Control and the State: Historical and Comparative Essays} (Oxford, 1985) 75 at 92-95. In many senses, the prison “chose” itself. Certainly, a degree of accident was involved in its development. There may also have been significant non-bourgeois, including proletarian, support for the prison, as Ignatieff suggests. However, this does not detract from the fact that there is an objective correspondence, based on the principle of equivalence, between imprisonment and the commodity form.
\end{itemize}
the non-producers over the producers. Pre-capitalist composition, although based on the principle of equivalence, nevertheless was biased in favour of the ruling classes. Capitalism generalised commodity production and commodified labour power. It also established formal equality as its primary juridical principle. This break with the pre-capitalist pattern of class-determined juridical regimes was necessary, demanded by the configuration of the capitalist mode of production. Marx explains:

> The exchange of commodities of itself implies no other relations of dependence than those which result from its own nature. On this assumption, labour-power can appear upon the market as a commodity, only if, and so far as, its possessor, the individual whose labour-power it is, offers it for sale, or sells it, as a commodity. In order that he may be able to do this, he must have it at his disposal, must be the untrammelled owner of his capacity to labour, i.e., of his person. He and the owner of money meet in the market, and deal with each other as on the basis of equal rights, with this difference alone, that one is buyer, the other seller; both, therefore, equal in the eyes of the law.\(^\text{141}\)

It was thus the nature of capitalist relations of production which determined the contours of the capitalist legal form. The generalisation of commodity relations required a legal milieu of equality. The commodification of labour-power brought with it, ironically, “a very Eden of the innate rights of man”.\(^\text{142}\)

Composition was too infused with the pre-capitalist credo of inequality to predominate in the new Eden of equality inscribed in the bourgeois worldview. Instead, the capitalist state turned to the prison to punish those who violated its legal prescriptions. Imprisonment was the one form of punishment that fully recognised the criminal as the “untrammelled owner” of his freedom. It was the penal institution that expressed most completely the total triumph of commodity relations and the final destruction of the natural economy. Criminals would pay for their crimes with the one currency that all could afford and possessed, namely, freedom, measured in time. The measure of abstract human labour at the heart of the capitalist economy became the great leveller in the criminal justice system. The prison banished the class inequalities that had marked pre-capitalist composition. Capitalist legality was necessarily egalitarian. All were and were required to be equal before the law. And all who broke the law would be subject to a form of punishment that was egalitarian. In other words, capitalism transformed crime, too, into a relation of equal exchange. The criminal perforce would have to exchange his offence and the damage he had caused for a specified period of his existence in a prison. Capitalism thoroughly commodified crime and punishment as it did everything else.

The crime did more than harm the victim. It also taxed the integrity of the social relations of production of capitalism. These relations entail the notion of the rights-bearing autonomous individual so pivotal to liberal bourgeois philosophy. In other words, capitalism posits, as its elemental human component, an unencumbered individual. The criminal was, in this connection, the autonomous individual *in extremis*. He had gone beyond the pale and broken the fundamental rule of the commodity economy, namely, equality in exchange. He had, by means foul, engineered an unequal exchange with

\(^{141}\) Marx *Capital* (n 18) at 165.

\(^{142}\) *Idem* at 172.
his victim. He had abused his autonomy and had to pay for his errantry. However, his
offence was not a private matter for settlement with his victim, for the entire system was
his victim. He had breached the social contract. He had partaken of the poisonous fruit
of inequality in the “very Eden of the innate rights of man”. His crime was a public one,
and he had to atone for it by yielding to the state a measured portion of his life, equivalent
to the damage he had caused.\textsuperscript{143}

Capitalism’s penal focus upon the offender was thus a necessary concomitant of the
architecture of its social relations of production. These relations require formal equality
in all things. Capitalist personhood implies equality of rights for all. The criminal
violates this law of equality and must be made to pay for his crime. In this sense, crime
in capitalist society is not so much an attack upon the rights of the victim as it is upon this
law of equality from which victims derive their rights. The victim became a casualty of a
criminal justice system that reserved the benefits of agency for the offender.

\section{14 Capitalism in crisis}

The material roots of restorative justice lie in the crisis conditions of late capitalism. It
has its roots in the capitalist reconstruction project that commenced in the late 1970s.
By then, the contradiction between capitalist relations and the forces of production,
long concealed by the post-war prosperity founded upon the Bretton Woods system, re-
asserted itself in the form of sustained downward pressure on the rate of profit. By then,
too, the welfarist stratagem, to which many capitalist states had resorted in an attempt
to dissipate proletarian disenchantment, was foundering and hostility to capitalism
returned with a vengeance. In response to this crisis, the bourgeoisie turned its back on
welfare capitalism and embraced the neo-liberal notion of popular capitalism in its stead.
The precepts of popular capitalism were formulated with a view to giving all citizens a
material stake in the mode of production. Its watchword was privatisation, entailing the
dismantling of most of the components of the welfare state and the steady repeal of social
legislation. State assets were sold off to private capitalist consortia. Ordinary working
people were assured by capitalist ideologues that they too could enjoy a slice of the profit
pie and were lured by opportunities to invest in the economies of their countries via the
equity market. The idea was to free the economy from state interference and control, and
thereby to prove that capitalism was a dynamic system that could bring good fortune to
all who embraced its values.\textsuperscript{144}

Capitalism was no longer only for the capitalists. It was for everybody. It was a
people’s mode of production. Welfare capitalism had empowered the state, which had
now become a hindrance to progress. Popular capitalism wished to liberate the market
from the strictures of state control. The free market was the key to prosperity. The wider
the process of commodification, the more opportunity there would be for avoiding crises
and promoting growth – hence privatisation; hence the celebration of the market as the
great leveller; hence the enthusiasm for entrepreneurship and free enterprise.

\textsuperscript{143} See Foucault (n 127) at 89-90.

\textsuperscript{144} For a detailed exposition of the tenets of popular capitalism see J Redwood \textit{Popular Capitalism}
The primary target of the popular capitalist reconstruction was the state. Its overbearing presence was hampering the working of the market and had to be resisted. It was an interloper which had to be expelled from the relations between private commodity owners. The assault on the state was, in reality, an assault on the range of social rights that the proletariat had won in the form of welfare capitalism. But every worker now supposedly had the right to break free of a life of dependence upon the state, and to discover his true worth in the heady atmosphere of the free market. The key to prosperity was not in class solidarity but in individual achievement. The possibility of a better life lay in a private, not a social, future. People could make their own futures, without help or interference from the state. Popular capitalism was proffered by its ideologues as the solution to the structural crisis of and proletarian disaffection with the mode of production. It promised to sideline the class struggle and to transform every citizen into a proprietor, motivated by the ideals of individual incentive and self-promotion, and dedicated to making capitalism work. It sought to replace classes with consumers.145

The intellectual origins of restorative justice are to be found in the postulates of popular capitalism. Restorative justice is in many respects the penological equivalent of popular capitalism. The correspondence between the two is remarkable. Restorative justice emerged virtually at the same time the popular capitalist programme was being implemented.146 Like the popular capitalists, the restorationists decried the state as an interloper. They proposed a criminal justice system founded on the relationship between offender and victim as private citizens. Just as popular capitalism advocated the privatisation of state assets, so restorative justice agitated for the privatisation of crime. Just as the weight of the state was hampering the free development of the capitalist market, so its control of the criminal justice system was obstructing the development of a solution to the crisis of criminality. Like the popular capitalists, the restorationists framed their campaign in terms of a rejection of the role of the state.

This was the motif of Christie’s celebrated 1976 lecture in which he argued that crimes are private conflicts that the state has taken from the individuals involved.147 Christie’s thesis is at the heart of the theory of restorative justice. The restorative justice movement is committed to ousting the state from its position of dominance in the criminal justice system, and to reconstituting crimes as the property of the offender and victim, to be resolved according to restorative principles. Restorative justice is thus crucially about extending the premises of popular capitalism to criminal justice. Both view the state as an obstruction to progress; both seek to base their projects on the individual as property owner.

There are, of course, important differences. Popular capitalism was concerned to guarantee the existence of capitalism as a mode of production. Its rejection of large-scale state involvement in the economy was ultimately aimed at revitalising the capitalist

146 See Sylvester (n 9) at 499.
147 See N Christie “Conflicts as property” (1977) 17 British J of Criminology 1-15. Although it contains no express reference to restorative justice, the lecture has acquired the status of a theoretical classic of the restorative justice movement.
economy, thereby protecting the integrity of the capitalist state. However, it did not question the non-economic role of the state and certainly did not contemplate a privatised criminal justice system. If anything, popular capitalism envisaged a criminal justice system in which the state was much more active than before, as it strove to improve the levels of delivery of its services to consumers. The proponents of restorative justice, by contrast, were concerned to construct a criminal justice system that did not bear the imprint of state influence. They took seriously the notion that crime was a private matter, to be dealt with by the parties involved, without state interference. And whereas popular capitalist penology remained heavily statist in all its essentials, restorative justice aspired to a way of doing justice that was fundamentally non-statist.

Their differences notwithstanding, restorative justice is a juridical expression of the ideology of popular capitalism. Both were born of the structural crisis of the capitalist mode of production that exploded in the 1970s. The one was a campaign to solve the economic crisis of capitalism; the other a project to find a way out of its crisis of criminality. Both elected privatisation as the mast on which to nail their colours. In the case of restorative justice, privatisation entailed the resurrection of the notion of composition, which had flowered briefly in medieval times, only to be demolished in the age of absolutism. The restorative sanction is the latter-day rendering of the composition of criminal offences. It is about repairing the harm occasioned by the crime, although not according to so patently proprietary a morality as historical composition. The evolution of pre-capitalist systems of composition had been linked to the level of the development of petty commodity production within the natural economy. Restorative justice is the culmination of this movement, in the conditions of generalised commodity production of late capitalism. It represents the historical apogee of the commodification of legal relations. And since the commodity is the exemplification of the capitalist property regime, restorative justice is as deeply proprietary as historical composition. Restorative justice is, in this connection, composition modernised or, perhaps more accurately, postmodernised.

15 Conclusion

Albeit somewhat attenuated, this survey of the history of restorative justice has shown that the restorationists’ claims of historical priority for the institution of composition are unsustainable. So, too, are their efforts to discount the prehistoric reliance upon “punitive processes”. Composition is essentially an institution of historical society, that is, class society, which is perhaps some 5 000 years old. All of human existence before that was classless. Our prehistoric ancestors could not have enlisted composition as their principal response to wrongdoing simply because the material circumstances of their existence precluded it. Instead, their justice was initially the justice of blood revenge,

148 See Mawby & Walklate (n 145) at 84.


150 See Sylvester (n 9) at 502.
later that of the *lex talionis*. Composition emerged only after the Neolithic Revolution, and grew as commodity production grew. It was the *lex talionis* commodified. There is thus not so great a division between retribution and restoration as restorationists would have us believe. \(^{151}\) Retribution is governed by the legal equivalent of retaliation or requital. Restorative justice is but the primitive law of retaliation infused with the spirit of that most pivotal element of property, the commodity. It is the civilised version of the *talio*.

What is more, composition was overlaid from the beginning with the inequalities of social class. Although it may have been formally available to all, in practice it always favoured the rulers as against the ruled. In other words, from its inception it was an institution that articulated class rule and operated to protect upper-class offenders from the unpleasant punishments that lower-class offenders had to endure because they could not afford to “pay” for their crimes. Thus there is little in the history of composition on which restorationists can legitimately rely. Rather, that history reveals a clear and unflattering connection between composition, on the one hand, and class rule and commodification on the other. It has been conclusively shown that adherents are given to mythmaking in their efforts to excavate ancient origins for restorative justice. \(^{152}\) The materialist perspective that frames this essay constitutes an epistemological constraint on the historical excesses of restorative justice, and repudiates the myth of autochthony.

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**Abstract**

The proponents of restorative justice regularly attempt to harness history to their cause. They argue that the origins of restorative justice mostly coincide with the origins of human society and that restorative composition is at least as prominent historically as retributive punishment. This essay relies on the theoretical resources of historical materialism to analyse critically the historical claims of restorative justice. The conventional division between prehistory and history is comprehended materialistically, with reference to the modes of production – primitive communist, Asiatic, slave, feudal and capitalist – which have structured the human record thus far. The essay considers humanity’s response to transgressions across these modes of production, with a view to assessing the space occupied by composition, as opposed to punishment, in our dispositional history. The materialist analysis of this history discerns a close relationship between composition and commodification, in the sense that usage of the former was dependent upon the development of the latter. Commodification is a specifically historical phenomenon and had no place in our prehistory, which spans the vast bulk of human social existence. In the consequence, the claims that restorative justice has a prehistoric provenance are indefensible.

\(^{151}\) See Daly (n 3) at 58-61.

\(^{152}\) See *idem* at 61-64; Sylvester (n 9) at 502-505; Richards (n 9) at 20-21; Bottoms (n 149) at 88.