THE O.J. SIMPSON case has brought to the fore the long-debated issue of whether the criminal justice system should aim not so much to inflict pain and suffering on those with mens rea, or "guilty minds," as to compel criminals to make restitution and secondarily to incapacitate those who have proven by their conduct to be dangerous to others.

Restitution — making criminals work to pay off their debts not to society, but to their victims — would reconnect the victim to the justice system. Having to restore victims would remind criminals that they violated the rights of others. When people of modest means commit murder, making full restitution might take them most of the rest of their lives.

Such a system would pose some practical problems, but recent experiments with prison labor have been promising, harking back to medieval times, when monetary restitution even for murder (coupled with outlawry for repeat offenders) was actually the norm. And any practical problems attached to such a system must always be compared with those of our current method of punishment.

Under the prevailing punishment paradigm, a rape victim, for example, is considered — obscenely in my view — merely a witness to a crime committed against society, the people, the state, etc. No effort is made to compel her attacker to compensate her for her suffering. In most jurisdictions, she would be committing the crime of compounding a felony if she were to accept compensation from her attacker in lieu of punishment.

If convicted, her attacker would be incarcerated in an institution that would either grossly over- or underpunish him. If the rapist were a first-time offender with a background similar to that of those reading this column, incarceration would be a heavy sentence indeed, introducing him to a chamber of horrors. (This is one reason why judges are so lenient with first-time offenders.) If he were a hardened criminal or a street gang member, however, he would fit right into the gang structure that runs most penitentiaries in this country. He would get to lift weights and watch Ricki Lake on television.

Opponents of a restitution-based system often ask how it would respond to a hypothetical rich murderer who could simply write a check to the family of the victim. Untill the accusation of murder was made against O.J. Simpson, it was easy for restitution advocates to dismiss such objections as highly improbable.

But it is not necessary to build a criminal justice system to accommodate the most unlikely eventualities. Prominent, wealthy people tend to refrain from committing murder, not out of fear of the penitentiary but because they are socialized to handle their frustrations and disputes in other ways or because they are deterred by the prospect of losing everything they care most about — their wealth and prominence.

The Worst Nightmare

For restitution advocates, then, the Simpson case represented our worst hypothetical nightmare come to life. For here was an accused murderer who really could write a check to the victim's family and presumably walk away free and clear. And who among us would feel comfortable arguing that this would be a "severe enough" sanction to constitute justice? If there ever was a real case that seemed to call for punishment, Simpson was that case.
With Mr. Simpson's acquittal, however, the situation has been reversed. Now the weaknesses of a criminal justice system based on punishment have come to the fore. With punishment, the cost of error is so severe that, to avoid punishing the innocent, we demand proof beyond a reasonable doubt. With punishment, we refuse to compel defendants to testify, wealthy defendants are willing to pay a fortune a defense lawyers who might help them avoid or delay being punished and we must rely on sometimes less-than-competent government agencies to prosecute the case.

Many people favor punishment because of the "message" it supposedly sends to criminals and to society, but it also increases the chance that the opposite message will be sent. When all these hurdles result in a finding of "not guilty," defendants can claim to have been proven innocent. Some people view Mr. Simpson as having "gotten away with murder," and our system of punishment made it more likely that he would.

In addition, when punishment is being sought, we need to find that a defendant was "culpable," a requirement that permits some, such as John Hinkley or Mark David Chapman, to escape justice by pleading insanity.

While it is true that a wealthy person could make restitution, by the same token a wealthy person can use his or her wealth to avoid being punished. Under the prevailing system, wealthy defendants can claim vindication they would have been denied if they had been compelled to make restitution. And the victims' families receive nothing but additional frustration and humiliation.

So when the system of punishment fails to punish a wealthy defendant accused of murder, what is left? In the case of O.J. Simpson, the families of the victims, still unconvinced, are going to pursue justice by means of civil suits — seeking monetary compensation, otherwise known as restitution.

In this new phase, the burden of proof will be easier to meet — a preponderance of the evidence. Mr. Simpson loses his right to remain silent and must answer the questions we all want answered: the victims' lawyers have far more discretion to exclude prospective jurors than is permitted government prosecutors and probative evidence ruled inadmissible in the criminal trial can be admitted.

As for the defendant's wealth, contingency fees mean that his money will be used to pay the victims' lawyers if he loses. The more he has, therefore, the more can be spent against him. The mere threat of losing these civil suits has already prevented Mr. Simpson from rehabilitating himself on national television. And if he loses, his claim to be innocent, as opposed to "not guilty," will ring less true.

But assuming that Mr. Simpson is made to pay the Brown and Goldman families, has justice been done? Is this enough?

The answer to this is both yes and no. On the one hand, justice to the victims' family, imperfect though it may be, would have been done. Neither restitution nor punishment will bring back the lives of Nicole and Ron, but Mr. Simpson would have been made literally to pay for his crime. Also, by compelling his testimony, he would also have been made literally to answer for his crime. And, having been adjudicated a murderer, he would have a great deal more difficulty proclaiming his innocence and rehabilitating his reputation.

On the other hand, because our legal system is committed to punishing murderers, even if financial restitution is awarded, indicating that in the civil trial he has been found liable, it will always be perceived that Mr. Simpson got away with something.

As a former prosecutor, I can well appreciate the urge to punish severely someone who savagely murdered another human being. Yet how much of this urge is based on the lack of any serious alternative? Does the availability of punishment itself undermine the meaningfulness of restitution? Some would argue that the current system allows for both punishment and restitution by means of civil suits. But typically, in a variant on Gresham's Law, punishment supplants restitution.

Perhaps, then, even the not-so-hypothetical wealthy murderer poses as big a challenge to punishment advocates as he or she does to those who favor restitution.

GRAPHIC: Illustration, no caption, KEVIN PYLE

LOAD-DATE: December 04, 1995