

附帶民事訴訟之檢討

張 明 偉*

要 目

- | | |
|------------------------------|-----------------------------|
| 壹、前 言 | 五、小 結 |
| 貳、附帶民事訴訟法制之法理解析 | 肆、美國法有關於刑事訴訟程序中
附帶民事賠償制度 |
| 一、刑事訴訟程序之真實發現功能 | 一、沿革背景 |
| 二、以處分權主義為基礎之附帶
民事訴訟 | 二、任意性附帶民事賠償 |
| 三、對處分權主義與辯論主義加以
限制之附帶民事訴訟 | 三、強制性附帶民事賠償 |
| 四、以刑事訴訟證據法則為基礎之
附帶民事訴訟 | 四、附帶民事賠償之決定與執行
程序 |
| 五、既判力不明之附帶民事訴訟 | 伍、附帶民事訴訟法制之檢討 |
| 參、其他刑事訴訟程序之附帶民事
損害賠償制度 | 一、法制疑義 |
| 一、免刑判決 | 二、處分權主義之適度緩和 |
| 二、緩起訴處分 | 三、移送民事庭與自為裁判義務 |
| 三、緩刑判決 | 四、於同一刑事訴訟程序作成不同
證明程度之裁判 |
| 四、智慧財產案件審理法之附帶
民事訴訟 | 五、附帶民事賠償決定之既判力與
爭點效 |
| | 陸、結 論 |

DOI : 10.3966/102398202015120143003

*

輔仁大學學士後法律學系副教授，美國舊金山金門大學法學博士。

投稿日期：一〇一年十二月二十八日；接受刊登日期：一〇二年六月十三日

責任校對：吳珮蒨

摘 要

民、刑事訴訟法均自上世紀末開始經歷重大變革，許多法理已異於立法初期，為免新舊法制衝突，有必要重新檢視附帶民事訴訟制度，並自程序法理探討其於當代法制應有之制度功能。在肯認被害人保障亦為憲法訴訟權保障前提下，為有效保護被害人，在刑事訴訟附帶民事賠償制度中，有必要限制處分權主義，並在特定犯罪類型中，強制被告履行民事賠償義務；又為免刑事庭濫行移送民事庭而害及被害人保護，敦促刑事庭於犯罪成立之證據基礎上附帶就民事糾紛一併解決，應刪除移送制度，課予法院就附帶民事糾紛自為裁判之義務；而於刑事庭已為事實認定前提下，為保障被害人有效另訴請求損害賠償，可於附帶民事訴訟增訂禁反言條款，以促進事後之民事訴訟。

關鍵詞：附帶民事訴訟、糾問、被害人、被告、事實認定

壹、前言

刑事訴訟乃確認國家刑罰權存否及其範圍之程序，縱依刑事訴訟法第232條：「犯罪之被害人，得為告訴。」規定，犯罪之被害人有權依法提起告訴，請求國家確認其所申告之被害事實是否該當為刑事實體法之犯罪，惟因犯罪之被害人終非國家確認刑罰權存否及其範圍之對象，故除其依自訴程序於刑事訴訟中擔當追訴者角色外，依刑事訴訟法第3條規定，犯罪之被害人並非刑事訴訟程序之當事人，於刑事訴訟程序中並未取得訴訟主體之地位。

然而，犯罪之本質既為法益侵害，則如社會上發生犯罪事件，該犯罪本身勢必同時該當民事上之侵權行為¹。雖依民法第217條過失相抵之規定，有罪之刑事被告未必於民事上即應對犯罪之被害人負損害賠償責任；然而，由於犯罪被害人往往因刑事犯罪之發生而難於短時間內恢復正常生活，如能於確認國家刑罰權存在之同時，使得犯罪被害人及時得到應有的民事賠償，不但可以填補犯罪之被害人所受之損害，也有助於修復性司法目的²之達成³。為能在刑事訴訟程序進行中一併填補犯罪被害人所受之損害，避免民、刑事裁判兩歧，並滿足被害人民事上之損害賠償請求權，避免不必要的程序耗費以符訴訟經濟⁴，我國刑事訴訟法乃採附帶民事訴訟制度⁵。

¹ 參閱褚劍鴻，刑事訴訟法論下冊，頁877，2001年9月，5次修訂版。

² 關於修復性司法（Restorative Justice）之基本概念與價值，see Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, 1 CONTEMP. JUST. REV. 47, 54 (1998); see also National Institute of Justice, available at <http://www.ojp.usdoj.gov/nij/topics/courts/restorative-justice/fundamental-concepts.htm> (last visited: 2013.07.10).

³ See Lynne N. Henderson, *The Wrongs of Victim Rights*, 37 STAN. L. REV. 937, 1011 (1985).

⁴ 參照最高法院87年度臺附字第38號刑事判決：「查因犯罪而受損害之人，於

雖然附帶民事訴訟制度之立意良善，期民、刑事紛爭之處理能畢其功於一役⁶，以達紛爭解決一次性⁷之目的；惟因民、刑事糾紛之本質並不相同，訴訟法則亦有出入⁸，究竟附帶民事訴訟裁判之性質為何？其對事後之民事訴訟有何影響？是否應生既判力？觀之現行法制並不明確。此外，就犯罪被害人損害填補之目的而言，刑事訴訟法第487條以下之規定，是否有助於民、刑事紛爭解決一次性目的之達成？不無疑問。尤有甚者，現行附帶民事訴訟之規定與近年來增訂之其他刑事法制（緩刑與緩起訴）間，就民事損害賠償是否適用民事程序法之處分權主義⁹，存在截然不同之規範，此種差異是否合理？是否有違憲法上之平等原則？類此疑義，因未見學說與實務有所說明，均有待進一步之澄清。為釐清相關疑義，本文

刑事訴訟程序對於被告及依民法負損害責任之人，得附帶提起民事訴訟請求回復其損害。除為避免民刑事裁判兩歧外，亦在利用刑事訴訟調查所得之訴訟資料，以達訴訟經濟之目的。故僅於第二審言詞辯論終結前，從實體上為事實調查之訴訟程序中始有提起附帶民事訴訟之實益；至於抗告或第三審訴訟程序中既不為實體上之事實調查及言詞辯論，自不得提起附帶民事訴訟。否則審理刑事訴訟之刑事法院勢必單獨專為附帶提起之民事訴訟進行調查、審理及辯論，不惟難達訴訟經濟之目的，且與附帶民事訴訟必以附帶於刑事訴訟之原則不符。此觀乎刑事訴訟法第四百八十七條、第四百八十八條之規定自明。」

5 參閱張劍男，應速修法廢除「附民裁定移送」制度（上），司法周刊，1017期，頁3，2001年2月7日。

6 參閱張劍男，應速修法廢除「附民裁定移送」制度（下），司法周刊，1018期，頁3，2001年2月14日。

7 關於紛爭解決一次性之法理說明，參閱邱聯恭，司法之現代化與程序法，頁242-247，1992年4月。

8 例如：調查原則與證據法則，參閱林鈺雄，刑事訴訟法（下），頁492，2007年9月，5版。

9 關於民事程序法理之說明，參閱邱聯恭，程序制度機能論，頁116-117，1996年8月。

以下先探討我國附帶民事訴訟法制，並在介紹性質相似的美國刑事賠償制度後，比較二者間之差異。期能在比較法的基礎上，針對我國法制疑義，提出相關檢討。

貳、附帶民事訴訟法制之法理解析

一、刑事訴訟程序之真實發現功能

現行刑事訴訟法制定於一九六七年，在大陸法系職權探知主義的傳統下，法院主導著整個刑事訴訟程序之進行，不受當事人舉證之拘束，以期發現實體真實¹⁰。刑事訴訟法第3條之當事人雖為程序主體，但在過去檢察官與自訴人均未實質地「實行公訴與實行自訴」的訴訟實務中，刑事訴訟程序本質上乃法院「糾問」被告之程序，即使犯罪被害人並非刑事被告，卻也往往成為法院糾問的對象。正因在傳統實務上，法院實質上行使著糾問的權限，故不論檢察官或自訴人舉證是否充分，依已廢止之最高法院二十五年上字第三七〇六號判例：「審理事實之法院，對於被告之犯罪證據，應從各方面詳予調查，以期發現真實，苟非調查之途徑已窮，而被告之犯罪嫌疑仍屬不能證明，要難遽為無罪之判斷。」說明，法院均應依職權調查，不得逕為無罪判決。而在刑事訴訟制度改採改良式的當事人進行主義之後，雖法院已無義務蒐集證據，而由檢察官負擔實質舉證責任，以證明構成犯罪之事實存在。不論犯罪被害人是否提起附帶民事訴訟，依糾問模式刑事法院均應依職權調查與犯罪成立有關事證之刑事訴訟傳統實務，或是依改良式當事人進行主義由

¹⁰ 參照已廢止之最高法院61年臺上字第2477號刑事判例：「事實審法院應予調查之證據，不以當事人聲請者為限，凡與待證事實有關之證據，均應依職權詳加調查，方足發現真實。」

檢察官職權進行的證據蒐集，關於犯罪被害人之民事請求權是否成立之事實，似已為法院所詳明，而即使在檢察官已經實質舉證之範圍內，本質上犯罪被害人已無針對民事請求權基礎事實存否再為舉證之必要。

二、以處分權主義為基礎之附帶民事訴訟

即使刑事犯罪往往同時造成民事損害，而有罪判決所為之事實認定亦可作為民事侵權行為損害賠償請求權是否成立之判斷基礎¹¹，鑑於民、刑事訴訟之目的各異，刑事訴訟程序於本質上未必包含填補民事損害之目的。因而，在公共政策之考量下，縱在證據共通之基礎上，欲利用刑事訴訟程序一併達成填補犯罪被害人民事損害之目的，關於損害填補之實現，是否仍應受到以私法自治為基礎的處分權主義拘束，或是得允許刑事法院基於職權進行主義與職權探知主義等法理¹²，依職權逕自決定應否於刑事訴訟程序中填補被害人所遭受之民事損害，於法理上並非必然。

民事上之損害填補，本質上並非刑事犯罪之追訴，現行刑事訴訟法所採行之附帶民事訴訟程序，因其紛爭之本質仍屬民事事件¹³，故於相當程度內乃以民事程序法理為規範基礎。依刑事訴訟法第487條第1項：「因犯罪而受損害之人，於刑事訴訟程序得附帶

¹¹ 不過，民事法院所為之事實認定，卻不生拘束刑事法院事實認定之效力，參照最高法院56年臺上字第118號刑事判例：「刑事訴訟法係採真實發現主義，審理事實之刑事法院，應自行調查證據，以為事實之判斷，並不受民事判決之拘束，如當事人聲明之證據方法，與認定事實有重要關係，仍應予以調查，就其心證而為判斷，不得以民事確定判決所為之判斷，逕援為刑事判決之基礎。」

¹² 參閱邱聯恭，程序利益保護論，頁283，2005年4月。

¹³ 參閱林榮耀，附帶民事訴訟案件的處理，法學叢刊，94期，頁70，1979年4月。

提起民事訴訟，對於被告及依民法負賠償責任之人，請求回復其損害。」規定，關於附帶民事訴訟之提起，係以當事人進行主義為基礎。由於同條第2項：「前項請求之範圍，依民法之規定。」之規定，僅就附帶民事訴訟請求之範圍予以限制¹⁴，因此，關於是否於刑事訴訟程序中行使以及如何行使基於民法而生之請求權，依同法第492條：「（第1項）提起附帶民事訴訟，應提出訴狀於法院為之。（第2項）前項訴狀，準用民事訴訟法之規定。」規定，在處分權主義承認原告有主導權與程序處分權之基礎上，亦由犯罪被害人依民事訴訟法第244條第1項第2款及第3款之規定，表明訴訟標的及訴之聲明¹⁵。

不過，民事上之程序利益保護原則係以當事人進行主義下之原告負舉證責任為前提基礎，依該原則，原告在衡量程序上舉證負擔，並平衡實體利益與程序不利益後，有機會避免因追求實體利益而遭受過度程序上不利益；換言之，程序利益保護原則旨在使原告在考量是否因程序上勞力、時間與費用的過度負擔，而耗盡原本所可能追求的實體利益，避免民事訴訟的提起反而成為另外一種形式的民事損害，進而失去了請求損害填補的實質意義¹⁶。鑑於在刑事訴訟程序中，過去法院負有實體真實發現義務，現在檢察官負有實

¹⁴ 依最高法院31年附字第506號刑事判例與71年度臺抗字第482號民事判決等說明，附帶民事訴訟之提起，其請求裁判之訴訟標的係以因刑事被告犯罪而直接發生者為限，如非因不法行為所生，即不得依附帶民事訴訟程序請求賠償。然而關於犯罪被害人之認定，最高法院72年度臺上字第792號民事判決（排除無照行醫致傷之被害人提起附帶民事訴訟）與69年度臺上字第2525號民事判決（排除收受偽造支票之人提起附帶民事訴訟）等實務見解，卻採取十分狹隘之判斷標準，在刑法想像競合與牽連犯之法理基礎上，值得進一步檢討。

¹⁵ 一般稱此為民事上之程序利益保護原則，參閱邱聯恭，同註12，頁46。

¹⁶ 關於紛爭解決一次性之法理說明，參閱邱聯恭，同註7，頁113、128。

質舉證義務，犯罪被害人於附帶民事訴訟程序中所負的舉證責任，已較單純的民事訴訟程序為輕，因此，附帶民事訴訟程序應否如單純民事訴訟程序，應完全基於當事人進行主義而發動，甚至基於處分權主義特定請求之範圍，因於法理上之必要性不若單純民事訴訟來的強烈，並非沒有檢討的必要¹⁷。

三、對處分權主義與辯論主義加以限制之附帶民事訴訟

由於在糾問模式之刑事訴訟實務傳統上，法院應依職權探知與犯罪成立與否相關的證據資料；而在改良式當事人進行主義的刑事訴訟架構下，檢察官對於構成犯罪之事實，亦應負實質的舉證責任。因此，在刑事訴訟程序已累積一定證據資料的基礎上，民事請求權是否成立所賴以判斷之證據，即不須完全由犯罪被害人提出。以自己責任為出發點¹⁸之民事訴訟證據調查所採行之辯論主義¹⁹，即因於刑事訴訟程序中，檢察官已依職權探知構成犯罪事實所需之證據，而於適用上有加以緩和之必要。依刑事訴訟法第490條：「附帶民事訴訟除本編有特別規定外，準用關於刑事訴訟之規定。但經移送或發回、發交於民事庭後，應適用民事訴訟法。」之規

¹⁷ 至於犯罪被害人是否實現民事上損害填補的請求，本質上乃執行上的問題，而非法制上應否予以救濟之問題，故縱依職權進行主義由國家司法機關主動就民事損害填補予以裁判，對被害人而言乃純受法律上之利益，並無任何不利。

¹⁸ 關於古典辯論主義及其修正，參閱呂太郎，民事訴訟法研究(一)，頁139，1991年7月，修訂版。

¹⁹ 所謂辯論主義，係指在民事訴訟程序中，法院僅應就經當事人於言詞辯論主張之事實，始得採用為判決之基礎。為判斷當事人請求之當否所必要之訴訟資料及證據資料均由當事人提出，參閱駱永家，民事舉證責任論，頁54，1989年11月，6版。又關於民事程序採行辯論主義之法理說明，參閱邱聯恭，同註9，頁120。

定，原則上附帶民事訴訟應依刑事訴訟程序進行。關於程序之進行，並非由具有犯罪被害人身分之民事上原告主導，此為附帶民事訴訟與單純民事訴訟二者最大之差異所在。依同法第491條：「民事訴訟法關於左列事項之規定，於附帶民事訴訟準用之：一、當事人能力及訴訟能力。二、共同訴訟。三、訴訟參加。四、訴訟代理人及輔佐人。五、訴訟程序之停止。六、當事人本人之到場。七、和解。八、本於捨棄之判決。九、訴及上訴或抗告之撤回。一〇、假扣押、假處分及假執行。」之規定，民事訴訟程序於附帶民事訴訟中，並無完全適用的餘地；舉例來說，民事訴訟法第384條有關本於認諾應為當事人敗訴之判決²⁰，以及同法第279條有關訴訟上自認等規定，於附帶民事訴訟程序中並無準用之餘地。在附帶民事訴訟程序進行中，原告不得為訴之變更與追加，被告亦不得提起反訴²¹。換言之，刑事訴訟法第499條：「（第1項）就刑事訴訟所調查之證據，視為就附帶民事訴訟亦經調查。（第2項）前項之調查，附帶民事訴訟當事人或代理人得陳述意見。」與第500條：「附帶民事訴訟之判決，應以刑事訴訟判決所認定之事實為據。但本於捨棄而為判決者，不在此限。」等規定，本質上具有限制處分權主義與辯論主義之規範功能²²。據此，依附帶民事訴訟程序所為之裁判，於本質上即應與依單純民事訴訟程序所為之裁判有所

²⁰ 參照最高法院32年附字第371號刑事判例：「依刑事訴訟法第四百九十五條第八款，關於民事訴訟法第三百八十四條本於當事人捨棄而為該當事人敗訴判決之規定，固得準用於附帶民事訴訟，至本於認諾之判決，則刑事訴訟法內並未定有準用明文，自屬不得一併準用。」

²¹ 此外，刑事訴訟法第487條有關附帶民事訴訟程序之原告適格與被告適格，亦屬對處分權主義之限制，參閱吳明軒，試論提起刑事附帶民事訴訟及移送民事庭之限制，中華法學，5期，頁42-44，1995年4月。

²² 參閱楊智守，刑事附帶民事訴訟實務研究——以訴訟三要素為中心，司法周刊，1638期，頁2，2013年3月29日。

區分。

四、以刑事訴訟證據法則為基礎之附帶民事訴訟

依刑事訴訟法第487條之規定，附帶民事訴訟係以解決「因犯罪而受損害之人」與「被告及依民法負賠償責任之人」間之民事糾紛為目的，然因刑事訴訟法第491條準用民事訴訟法規定之事項，並不包含民事訴訟法第277條至第376條之2等證據法則，因此關於附帶民事訴訟之事實認定，悉應以刑事訴訟所認定之事實為基礎。然而，依改良式當事人進行主義之修法意旨，二〇〇三年之刑事訴訟法修正，已於證據章中增訂證據排除法則與傳聞法則（排除性之證據法則），因此，刑事訴訟程序所肯認之證據能力，其範圍遠較民事訴訟為狹；在刑事訴訟程序中不具證據能力之證據，依民事訴訟法規定並非必然不具證據能力²³。故在因證據排除法則與傳聞法則之適用而無法為有罪事實認定之情形中，甚至在刑事訴訟應諭知免訴或不受理判決之情形中，因依刑事訴訟法第503條第1項前段：「刑事訴訟諭知無罪、免訴或不受理之判決者，應以判決駁回原告之訴。」之規定，法院應以判決駁回原告之訴，蓋因刑事訴訟判決實際上並未為事實認定，不能據以判斷犯罪被害人民事上之請求權是否存在²⁴，前述民事糾紛即無從透過附帶民事訴訟之提起而一併

²³ 值得注意的是，德國實務已宣告，對侵犯基本自由所獲取的證據，不論在民事訴訟或刑事訴訟程序中，原則上不應採納，參閱莫諾·卡佩萊蒂等著，徐昕譯，當事人基本程序保障權與未來的民事訴訟，頁58，2000年8月。

²⁴ 參照最高法院29年附字第233號刑事判例：「刑事訴訟諭知無罪、免訴或不受理之判決者，應以判決駁回原告之訴，刑事訴訟法第五百零七條第一項定有明文，此項規定，係因刑事訴訟之判決並無事實認定，不能據以為原告請求權是否存在之判斷，與同法第五百零六條第一項認原告之訴無理由而駁回之者，其效果迥不相同。」

獲得解決。此外，由於刑事訴訟之證明係以「超越合理懷疑」為標準²⁵，而民事訴訟之舉證則以「證據優勢」為原則²⁶，則在附帶民事訴訟程序中，當某事實之舉證已逾證據優勢之要求，惟尚未達超越合理懷疑之程度，刑事法院亦將因無法為有罪事實認定，而必須以判決駁回附帶民事訴訟原告之訴。按於上述附帶民事訴訟原告因無罪判決而敗訴之情形中，因犯罪受損害之人之所以無法透過刑事訴訟程序一併解決民事糾紛，主要係因刑事訴訟採高度證明標準及嚴格證據法則適用之故，惟此時並不表示因犯罪受損害之人非不能另於民事訴訟程序中，實現其民事上之請求權。

五、既判力不明之附帶民事訴訟

關於民事糾紛所涉及之私權爭執，原則上應隨著判決上訴途徑窮盡、法院不得廢棄變更而確定，故就法院已判斷之事項，當事人與法院均應同受判決拘束；類此當事人不得更行起訴，並與確定判決為相反之主張，法院不得就已判斷之事項再行審判，於他訴訟亦不得為與確定判決相牴觸之裁判，學理上稱為判決之既判力，其作用除在避免裁判之矛盾外，亦在禁止重複起訴²⁷。現行民事訴訟法第400條第1項：「除別有規定外，確定之終局判決就經裁判之訴訟標的，有既判力。」與第401條第1項：「確定判決，除當事人外，

²⁵ 參照最高法院76年臺上字第4986號刑事判例：「認定犯罪事實所憑之證據，雖不以直接證據為限，間接證據亦包括在內；然而無論直接或間接證據，其為訴訟上之證明，須於通常一般之人均不致有所懷疑，而得確信其為真實之程度者，始得據為有罪之認定，倘其證明尚未達到此一程度，而有合理之懷疑存在時，事實審法院復已就其心證上理由予以闡述，敘明其如何無從為有罪之確信，因而為無罪之判決，尚不得任意指為違法。」

²⁶ See STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BROWN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 193 (2000).

²⁷ 參閱楊建華，民事訴訟法要論（上），頁318，1992年9月。

對於訴訟繫屬後為當事人之繼受人者，及為當事人或其繼受人占有請求之標的物者，亦有效力。」等規定，即為民事確定判決客觀及主觀既判力之明文，而為避免重複起訴，同法第253條：「當事人不得就已起訴之事件，於訴訟繫屬中，更行起訴。」之規定，即為貫徹一事不再理與訴訟經濟之要求而設²⁸。

雖刑事訴訟法第502條：「（第1項）法院認為原告之訴不合法或無理由者，應以判決駁回之。（第2項）認為原告之訴有理由者，應依其關於請求之聲明，為被告敗訴之判決。」明文刑事法院關於附帶民事糾紛之裁判義務，不過依該條規定所為之裁判，是否亦產生前述民事訴訟法之效果，鑑於現行刑事訴訟法並未如德國刑事訴訟法第406條第3項明文附帶民事訴訟之裁判亦生民事既判力之規定²⁹，因此解釋上不無疑問³⁰。事實上，在依刑事訴訟法第503條第1項刑事訴訟諭知無罪、免訴或不受理之判決情形中，縱於此時刑事法院未為實體上犯罪事實認定，而依法應逕以判決駁回原告之訴，惟如犯罪被害人已藉由刑事告訴程序提供證據予檢察官，且該證據亦經檢察官於刑事訴訟程序中提出於法院以盡其舉證責任，甚至犯罪被害人已依同法第271條第2項、第494條與第499條第2項到

²⁸ 參閱駱永家，重複起訴之禁止，月旦法學雜誌，57期，頁6，2000年2月。

²⁹ 參閱林淑閔，刑事附帶民事訴訟之研究，刑事法雜誌，38卷3期，頁74，1994年6月。

³⁰ 惟如就民事確定終局判決中所已經裁判之法律關係，更行提起附帶民事訴訟，雖刑事訴訟法第491條未準用民事訴訟法第253條、第400條與第401條等規定，實務上基於一事不再理原則與民事既判力之法理，肯認刑事法院應依刑事訴訟法第502條第1項規定，以訴不合法駁回附帶民事訴訟原告之訴，參照最高法院32年附字第495號刑事判例：「一事不再理，為訴訟法上之大原則，故就確定終局判決中已經裁判之法律關係，提起附帶民事訴訟，其當事人兩造如係確定判決之既判力所及之人，法院應以其訴為不合法而駁回之。」

場陳述意見，卻因刑事訴訟無法舉證超越合理懷疑而導致無罪判決，在此等情形中，實難謂相關之民事紛爭尚未經實體爭執。因此，如因原告聲請，刑事法院將附帶民事訴訟移送管轄法院之民事庭，民事法院此時即應就「已經實體爭執之事項」另予審判；縱原告此時未聲請刑事法院將附帶民事訴訟移送管轄法院之民事庭，而係於駁回原告之訴之判決確定後基於同一犯罪事實另提民事訴訟，民事法院亦應就已經實體爭執之事項另依民事訴訟法予以審判。換言之，已於刑事訴訟程序中實體爭執之民事紛爭，尚可能另於民事訴訟程序中更為爭執，民事法院仍得就已於刑事訴訟程序中判斷之事項再行審判，並得為與刑事確定判決認定事實相牴觸之民事裁判。就此而言，除非被害人於附帶民事訴訟中明示拋棄其餘民事上之請求權，否則刑事法院針對民事爭執所為之附帶民事訴訟裁判，對於民事法院不生既判力。

此外，在刑事訴訟有罪的情形中，雖實務常援引刑事訴訟法第504條第1項前段，以「附帶民事訴訟確係繁雜，非經長久時日不能終結其審判者」為由，將附帶民事訴訟裁定移送該法院之民事庭³¹；惟於刑事法院基於有罪判決自為附帶民事訴訟實體裁判之情形中，縱已為被告敗訴之判決，甚至在判決確定的情形中，是否應基於前述一事不再理與既判力等民事程序法理，一律不許附帶民事訴訟當事人基於同一犯罪事實另再提起民事訴訟？就此非但法無明文，法理上亦不明確。蓋如謂應基於相同民事程序既判力之法理，而認應不許另行提起民事訴訟，則如發生因民、刑事訴訟證據法則歧異而產生不同事實認定，並導致民事請求權存否與範圍之認定有所不同，何以犯罪被害人之民事請求僅因不同事實認定標準而受限制？僅以提起附帶民事訴訟限制犯罪被害人行使財產上權利之憲法

³¹ 參閱林鈺雄，同註8，頁491。

基礎為何？法制上恐難自圓其說。惟如主張前述民事程序既判力之法理於此時不再適用，不啻肯認已於刑事法院為民事實體爭執之紛爭，不受民事訴訟法相關規定之限制。雖關於附帶民事訴訟之既判力存在上述疑義，為保障犯罪被害人行使民事上之請求權，不論附帶民事訴訟原告之聲明有無理由，縱其判決業已確定，因犯罪被害人尚得依民事訴訟法另行起訴，似應承認附帶民事訴訟之裁判並不生民事訴訟法上之既判力較為洽當。

參、其他刑事訴訟程序之附帶民事損害賠償制度

關於在刑事訴訟程序中同時解決相關民事紛爭之理念，除前述附帶民事訴訟程序之規定外，現行法制尚有其他規定，茲說明如下：

一、免刑判決

其實早於一九六七年現行刑事訴訟法制定之際，關於如何利用刑事訴訟程序一併解決犯罪所涉民事糾紛乙事，除前述附帶民事訴訟程序等規定外，亦已於免刑判決部分定有類似之明文。依刑事訴訟法第299條第2項：「依刑法第六十一條規定，為前項免刑判決前，並得斟酌情形經告訴人或自訴人同意，命被告為左列各款事項：一、向被害人道歉。二、立悔過書。三、向被害人支付相當數額之慰撫金。」規定，於法院為免刑判決時，得於依職權取得告訴人或自訴人之同意（不須以告訴人或自訴人主動請求為要件）後，命被告向犯罪被害人支付慰撫金；惟因依同條第4項：「第二項第三款並得為民事強制執行名義。」規定，犯罪被害人得依該刑事判決，強制執行被告之財產，故縱被告違反該免刑判決所載之民事賠償命令，不主動向犯罪被害人支付慰撫金，已確定之免刑判決，其

效力並不受影響。查其增訂理由，主要係參考一九四五年修正之刑事訴訟法第253條相對不起訴處分之規定，為體恤犯罪被害人損失，並求息事寧人，促使被告自新之立法意旨，乃授予法院行使檢察官為相對不起訴處分時之權力。

按民法有關慰撫金之規定，於一九六七年現行刑事訴訟法制定之際，僅有民法第18條：「（第1項）人格權受侵害時，得請求法院除去其侵害；有受侵害之虞時，得請求防止之。（第2項）前項情形，以法律有特別規定者為限，得請求損害賠償或慰撫金。」著有明文。鑑於損害賠償係指財產上之損害賠償，而慰撫金則為非財產上之損害賠償³²，因此，法院於免刑判決時，如因被告之犯罪同時侵害被害人之人格權，本即得命被告向犯罪被害人支付民法第194條與第195條所定之非財產上之損害賠償。又因一九八五年修正民法親屬編時所增訂之民法第1030條之1第1項：「法定財產制關係消滅時，夫或妻現存之婚後財產，扣除婚姻關係存續所負債務後，如有剩餘，其雙方剩餘財產之差額，應平均分配。但下列財產不在此限：一、因繼承或其他無償取得之財產。二、慰撫金。」與一九九九年修正民法債編時增訂民法第227條之1：「債務人因債務不履行，致債權人之人格權受侵害者，準用第一百九十二條至第一百九十五條及第一百九十七條之規定，負損害賠償責任。」等規定，亦有非財產上損害賠償之適用，則如犯罪行為直接導致此類非財產上損害賠償之發生，為達紛爭解決一次性之訴訟經濟要求，並落實刑事訴訟法第299條第2項之立法目的，似應認法院亦得於免刑判決中，一併命被告向犯罪被害人支付民法第1030條之1第1項與民法第

³² 參閱王澤鑑，人格權之保護與非財產損害賠償，載：民法學說與判例研究第一冊，頁43，1990年4月，10版。

227條之1所定之非財產上損害賠償³³。惟因刑事訴訟法第299條第2項第3款僅明文慰撫金，因此關於財產上損害賠償之民事紛爭，尚不得於免刑判決中一併解決。

二、緩起訴處分

按除法院有權於刑事訴訟程序中一併解決犯罪被害人與被告間之民事糾紛外，依二〇〇二年制定之現行刑事訴訟法第253條之2第1項：「檢察官為緩起訴處分者，得命被告於一定期間內遵守或履行下列各款事項：一、向被害人道歉。二、立悔過書。三、向被害人支付相當數額之財產或非財產上之損害賠償。四、向公庫或指定之公益團體、地方自治團體支付一定之金額。五、向指定之公益團體、地方自治團體或社區提供四十小時以上二百四十小時以下之義務勞務。六、完成戒癮治療、精神治療、心理輔導或其他適當之處遇措施。七、保護被害人安全之必要命令。八、預防再犯所為之必要命令。」規定，檢察官亦得於偵查程序終結時，命被告向被害人支付相當數額之財產或非財產上之損害賠償，以解決民事紛爭。雖依其立法理由之說明，緩起訴負擔係為配合增設緩起訴制度所定³⁴，惟就其沿革而論，本條項第3款之內容，主要亦係以一九四五年修正之刑事訴訟法第232條第2項第3款相對不起訴處分之規

³³ 按縱在「法定財產制關係消滅與債務不履行所生之非財產上損害賠償，非因該犯罪直接發生」之情形中，因其非屬最高法院53年臺上字第43號判例「不適用附帶民事訴訟規定」之規範對象，自不應受相關實務見解之拘束。事實上，我國實務於相關民法規定增訂後，尚未曾就此問題有所表示，故無從得知實務之態度。

³⁴ 參照該條立法理由：「二、基於個別預防、鼓勵被告自新及復歸社會之目的，允宜賦予檢察官於緩起訴時，得命被告遵守一定之條件或事項之權力，本條第一項乃增列道歉、悔過、填補損害、義務勞務、適當處遇措施、維護被害人安全及預防再犯等應遵守事項之相關規定。」

定，亦即「命被告向被害人支付相當數額之慰撫金」為基礎，故其規範目的亦為避免犯罪被害人另提民事訴訟之訟累，並維民刑事紛爭判決結果一致性。

由於二〇〇二年之刑事訴訟法修正已將民事損害賠償範圍擴大至包含財產上損害賠償部分，參照立法理由之說明³⁵，刑事訴訟法第253條之2第2項乃明定以經被告同意為支付民事上損害賠償之要件。又鑑於一九四五年修正之刑事訴訟法第232條第2項，以及一九六七年制定之刑事訴訟法第253條第2項等規定，均僅以「經告訴人同意」為要件，應可認檢察官得於依職權取得告訴人與被告同意後，即命被告支付民事上之損害賠償，不以告訴人主動請求為要件。雖現行刑事訴訟法第253條之2第1項已無類似規定，解釋上亦應相同。

三、緩刑判決

刑法之緩刑制度原未慮及民事紛爭之解決，惟為配合刑事訴訟法第253條之2之增訂，刑法第74條第2項：「緩刑宣告，得斟酌情形，命犯罪行為人為下列各款事項：一、向被害人道歉。二、立悔過書。三、向被害人支付相當數額之財產或非財產上之損害賠償。四、向公庫支付一定之金額。五、向指定之公益團體、地方自治團體或社區提供四十小時以上二百四十小時以下之義務勞務。六、完

³⁵ 參照該條立法理由：「三、前開第一項第三款至第六款之各該應遵守事項，因課以被告履行一定負擔之義務，被告必需配合為一定之財產給付、勞務給付或至特定之場所接受處遇，人身自由及財產將遭拘束，且產生未經裁判即終局處理案件之實質效果，自應考慮被告之意願，爰於第二項前段規定應得被告之同意。又檢察官既為緩起訴之處分，則為預防再犯、兼顧公共秩序及被害人權益之維護，就其餘各款所列被告應遵行事項，無庸再得被告同意，檢察官即得命被告為之，附此說明。」

成戒癮治療、精神治療、心理輔導或其他適當之處遇措施。七、保護被害人安全之必要命令。八、預防再犯所為之必要命令。」乃增訂法院命被告向犯罪被害人支付民事上損害賠償之規定，以符規範之一致性³⁶。惟因刑法之緩刑規定並無如刑事訴訟法第253條之2第2項，明定以經被告同意為支付民事上損害賠償之要件，因此是否須經被告同意，立法理由並未說明，鑑於違反此類民事賠償負擔之法律效果並不一致³⁷，於解釋上似有不同之空間。惟不論如何，法院於緩刑宣告時得依職權逕命被告向犯罪被害人支付民事上損害賠償，並不以犯罪被害人之請求為其要件。

四、智慧財產案件審理法之附帶民事訴訟

除上述刑法與刑事訴訟法外，二〇〇七年制定，並於二〇〇八年七月一日施行之智慧財產案件審理法，亦有關於利用刑事訴訟程序解決民事紛爭之規定。由於該法旨在促進智慧財產爭議案件之審理，並統一民事、刑事與行政訴訟之二審管轄於智慧財產法院，藉以達成紛爭解決一次性、防止裁判矛盾與促進訴訟經濟之目的。依該法第27條第2項：「審理第二十三條案件之附帶民事訴訟，除第三審法院依刑事訴訟法第五百零八條至第五百十一條規定裁判者外，應自為裁判，不適用刑事訴訟法第五百零四條第一項、第五百

³⁶ 參照該條之立法理由：「三、第二項係仿刑事訴訟法第二百五十三條之二緩起訴應遵守事項之體例而設，明定法官宣告緩刑時，得斟酌情形，命犯罪行為人向被害人道歉、立悔過書、向被害人支付相當數額、向公庫支付一定之金額、提供四十小時以上二百四十小時以下之義務勞務、完成戒癮治療、精神治療、心理輔導等處遇措施、其他保護被害人安全或預防再犯之必要命令，以相呼應。」

³⁷ 按違反刑事訴訟法第253條之2第1項之法律效果為檢察官得依職權或聲請撤銷原處分，而違反刑法第74條第2項之法律效果為於情節重大時依檢察官聲請撤銷緩刑宣告。

十一條第一項前段之規定。但依刑事訴訟法第四百八十九條第二項規定論知管轄錯誤及移送者，不在此限。」規定，原則上一、二審法院於審理涉及智慧財產爭議之刑事案件時，對於所提起之附帶民事訴訟，不得以「附帶民事訴訟確係繁雜，非經長久時日不能終結其審判」為由，將案件移送該法院民事庭審理，從而法院只能自行審理涉及智慧財產爭議之民事糾紛。同法第29條第1項：「就第二十三條案件行簡易程序時，其附帶民事訴訟應與刑事訴訟同時裁判。但有必要時，得於刑事訴訟裁判後六十日內裁判之。」乃明文特定案件刑事簡易程序附帶民事訴訟之裁判寬限期限，以期該附帶民事訴訟事件能踐行必要的言詞辯論程序。就訴訟權之保障而言，上述智慧財產案件審理法之規定，除再次肯認民事與刑事事件紛爭解決一次性之必要性外，似乎也標誌著傳統上對於民事、刑事與行政訴訟程序於功能上各自獨立之思考，已不足以適當地回應現代社會對於權利侵害應予及時並有效保護之法制需求。

五、小 結

由於前述刑事訴訟法中有關免刑判決、緩起訴處分與緩刑判決之規定，針對民事紛爭之處理，均於相當程度上限制了傳統民事程序法理中有關處分權主義之適用，因此與附帶民事訴訟制度一次性解決民、刑事爭議之理念頗為類似。雖然這三個制度均帶有透過給予被告優惠以換取被告同意填補被害人民事上損失之色彩（特別是緩起訴處分與緩刑判決具有將類似民事和解³⁸條件之履行，作為刑事訴訟程序繼續進行之解除條件），而與附帶民事訴訟制度僅單純

³⁸ 由於法院或檢察官命被告項被害人支付損害賠償或履行一定條件之命令不適用民事訴訟法第380條第1項：「和解成立者，與確定判決有同一之效力。」規定，因此被害人與被告縱有達成合意，亦不屬於民事訴訟法上之和解。

地為了一次性解決民、刑事糾紛之目的不盡相同，然而，有鑑於刑事訴訟法第299條第2項係一九六七年所新增、同法第253條之2第1項係二〇〇二年所新增，而刑法第74條第2項係二〇〇五年所新增，因此，縱認前述命被告向被害人支付慰撫金或損害賠償或履行一定條件之相關規定，與附帶民事訴訟制度之目的有所差異，亦不能僅據此而認定此三種制度與附帶民事訴訟毫無關聯。如果十九世紀所提出之附帶民事訴訟制度發展迄今亦已帶有保護被害者之內涵，則任何與被害者保護有關之法制發展，均不致與附帶民事訴訟有所違背。事實上，透過以下的說明，可以發現前述三種制度之提出與發展，正是被害者保護思潮發展之產物。

肆、美國法有關於刑事訴訟程序中附帶民事賠償制度

一、沿革背景

自古以來，犯罪加害人除應受到刑事制裁外，亦應賠償犯罪被害人所受的民事損害。法制上除允許犯罪被害人另循民事訴訟途徑向犯罪加害人求償外，有些歐洲國家尚承認犯罪被害人得透過刑事訴訟程序之參與，於刑事被告有罪時，一併實現其對被告之民事上請求權³⁹。美國在被害者保護運動的思潮下，也透過國會立法將刑事被告之民事賠償（Restitution），納入量刑事項之中，以填補犯罪被害人之財物損失並協助其走出被害困境⁴⁰。不過就法制沿革來

³⁹ See FRED A. ADLER, GERHARD O. W. MUELLER & WILLIAMS S. LAUFER, CRIMINAL JUSTICE 453 (1994).

⁴⁰ See BARBARA SMITH, ROBERT DAVIS & SUSAN HILLENBRAND, IMPROVING ENFORCEMENT OF COURT-ORDERED RESTITUTION: A STUDY OF AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE VICTIM WITNESS PROJECT 1-5 (1989).

說，民事賠償制度在二十世紀初期之開始是被當作處罰被告之替代方案而提出，旨在避免不必要的自由刑（刑罰之應報效果），並未強調其民事上之損害賠償功能⁴¹。雖然在一九五〇年代左右，美國法院因認民事賠償制度之民事賠償色彩太過強烈而忽略其於刑法上之嚇阻功能⁴²，然因民、刑法制之界限隨著美國戰後法制發展已日趨模糊，學說上不但認為刑法上之犯罪行為即可視為民事上侵權行為之基礎，也普遍承認侵權法上之懲罰性損害賠償制度具有嚇阻不法行為之效果⁴³。在普遍肯認刑法維護社會公共利益之功能並不排除犯罪被害人得藉由刑事被告獲得民事賠償之權利後⁴⁴，於刑事訴訟量刑程序中一併給予犯罪被害人民事賠償，即被認為是促進刑事司法正義的必要手段，甚至更有助於修復性司法目的之達成⁴⁵。在一九六〇年代全美開始關注犯罪被害人保護議題的聲浪中，美國國會終於一九八二年四月開始進行相關立法⁴⁶，在同年十月十二日美國前總統雷根簽署「犯罪被害人及證人保護法」（Victim and Witness Protection Act, VWPA）⁴⁷後，犯罪被害人藉由刑事訴訟程序之進行附帶獲得民事賠償，即有了法源依據。惟VWPA規定的附帶民事賠償，本質上並不生強制適用的效力。

雖然刑事法之目的在於處罰刑事犯罪，惟參照參議院司法委員

⁴¹ See Henderson, *supra* note 3, at 942.

⁴² See David L. Ronald, *Progress in the Victim Reform Movement: No Longer the Forgotten Victim*, 17 PEPP. L. REV. 35, 42 (1989).

⁴³ See Henderson, *supra* note 3, at 937.

⁴⁴ See MARGARET O. HYDE, *THE RIGHTS OF VICTIM* 4 (1983).

⁴⁵ See *People v. Turco*, 515 N.Y.S. 2d 853, 856 (N.Y. App. Div. 1987).

⁴⁶ See Marlene Young & John Stein, *The History of the Crime Victim's Movement in the United States*, available at <http://www.ojp.usdoj.gov/ovc/ncvrvw/2005/pg4c.html> (last visited: 2012.04.10).

⁴⁷ See Pub. L. No. 97-291, 96 Stat. 1248, 1258 (1982).

會於VWPA之立法說明，社會在處罰刑事被告之餘，亦應盡可能地保障犯罪被害人重回到未遭犯罪前之生活狀態，刑事被告本有義務回復（restore）犯罪被害人因其犯罪所受之所有財產上與非財產上損失⁴⁸。由於法院於量刑時應詳細說明不給予犯罪被害人民事賠償或僅給予部分民事賠償之理由，可見VWPA從立法之初即強調民事賠償決定於量刑程序之重要性，優先於刑法之應報目的與被告之矯正目的⁴⁹，以強化被害人之保護⁵⁰。此外，由於許多犯罪被害人於刑事判決確定後，有必要基於已爭執過之同一犯罪事實另提民事訴訟請求損害賠償，為減輕犯罪被害人於民事訴訟程序之舉證責任，VWPA亦以禁反言條款（Collateral Estoppel）禁止刑事被告於嗣後犯罪被害人提起之民事訴訟程序中，否認刑事法院所為之主要犯罪構成要件事實認定⁵¹。換言之，如於刑事訴訟程序中未爭執過之「非主要犯罪構成要件事實」對於民事求償之範圍有影響，刑事法院先前對主要犯罪事實所為之審理，在另案提起之民事訴訟中，即產生類似「爭點效」之禁反言功能⁵²。

在制定VWPA後二年，美國國會在一九八四年制定「犯罪被害

⁴⁸ See Senate Report No. 532, 97th Cong., 2d Sess. 30, reprinted in 1982 U.S. Code Cong. & Admin. News 2536.

⁴⁹ See 18 U.S.C. § 3579(a)(2) (1982).

⁵⁰ See Senate Report No. 532, 97th Cong., 2d Sess. 10, reprinted in 1982 U.S. Code Cong. & Admin. News 2516.

⁵¹ See 18 U.S.C. § 3580(e), which provides: “A conviction of a defendant for an offense involving the Act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.” It is now renumbered 18 U.S.C. § 3664(l) (2002).

⁵² See *Tomlinson v. Lefkowitz*, 334 F.2d 262 (5th Cir. 1964); *Hyman v. Regenstein*, 258 F.2d 502 (5th Cir. 1958).

人法」(Victims of Crime Act, VOCA)，聯邦政府依該法得設置犯罪被害人基金(Crime Victims Fund)，以協助聯邦犯罪與州犯罪之犯罪被害人⁵³。而在一九九〇年通過的「犯罪控制法」(Crime Control Act)所包含的「犯罪被害人權利與補償法」(Victim

⁵³ See 42 U.S.C. § 10601(b), which provides: “Except as limited by subsection (c) of this section, there shall be deposited in the Fund—

- (1) all fines that are collected from persons convicted of offenses against the United States except—
 - (A) fines available for use by the Secretary of the Treasury pursuant to—
 - (i) section 11(d) of the Endangered Species Act (16 U.S.C. 1540(d)); and
 - (ii) section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C. 3375(d)); and
 - (B) fines to be paid into—
 - (i) the railroad unemployment insurance account pursuant to the Railroad Unemployment Insurance Act (45 U.S.C. 351 et seq.);
 - (ii) the Postal Service Fund pursuant to sections 2601(a)(2) and 2003 of title 39 and for the purposes set forth in section 404(a)(7) of title 39;
 - (iii) the navigable waters revolving fund pursuant to section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321); and
 - (iv) county public school funds pursuant to section 3613 of title 18;
- (2) penalty assessments collected under section 3013 of title 18;
- (3) the proceeds of forfeited appearance bonds, bail bonds, and collateral collected under section 3146 of title 18;
- (4) any money ordered to be paid into the Fund under section 3671(c)(2) of title 18; and
- (5) any gifts, bequests, or donations to the Fund from private entities or individuals, which the Director is hereby authorized to accept for deposit into the Fund, except that the Director is not hereby authorized to accept any such gift, bequest, or donation that—
 - (A) attaches conditions inconsistent with applicable laws or regulations; or
 - (B) is conditioned upon or would require the expenditure of appropriated funds that are not available to the Office for Victims of Crime.”

Rights and Restitution Act) ，更將被害人權利⁵⁴與政府應提供之服務⁵⁵予以明文列舉，以資遵循。又為擴大對於犯罪被害人之保護，

⁵⁴ See 42 U.S.C. § 10606, which were subsequently repealed by 18 U.S.C. § 3771(a) providing: “A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.”

⁵⁵ See 42 U.S.C. § 10607(c), which provides:

“(1) A responsible official shall—

- (A) inform a victim of the place where the victim may receive emergency medical and social services;
- (B) inform a victim of any restitution or other relief to which the victim may be entitled under this or any other law and manner in which such relief may be obtained;
- (C) inform a victim of public and private programs that are available to provide counseling, treatment, and other support to the victim; and
- (D) assist a victim in contacting the persons who are responsible for providing the services and relief described in subparagraphs (A), (B), and (C).

(2) A responsible official shall arrange for a victim to receive reasonable protection from a suspected offender and persons acting in concert with or at the behest of the suspected offender.

-
- (3) During the investigation and prosecution of a crime, a responsible official shall provide a victim the earliest possible notice of—
- (A) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;
 - (B) the arrest of a suspected offender;
 - (C) the filing of charges against a suspected offender;
 - (D) the scheduling of each court proceeding that the witness is either required to attend or, under section 10606(b)(4) of this title, is entitled to attend;
 - (E) the release or detention status of an offender or suspected offender;
 - (F) the acceptance of a plea of guilty or nolo contendere or the rendering of a verdict after trial; and
 - (G) the sentence imposed on an offender, including the date on which the offender will be eligible for parole.
- (4) During court proceedings, a responsible official shall ensure that a victim is provided a waiting area removed from and out of the sight and hearing of the defendant and defense witnesses.
- (5) After trial, a responsible official shall provide a victim the earliest possible notice of—
- (A) the scheduling of a parole hearing for the offender;
 - (B) the escape, work release, furlough, or any other form of release from custody of the offender; and
 - (C) the death of the offender, if the offender dies while in custody.
- (6) At all times, a responsible official shall ensure that any property of a victim that is being held for evidentiary purposes be maintained in good condition and returned to the victim as soon as it is no longer needed for evidentiary purposes.
- (7) The Attorney General or the head of another department or agency that conducts an investigation of a sexual assault shall pay, either directly or by reimbursement of payment by the victim, the cost of a physical examination of the victim which an investigating officer determines was necessary or useful for evidentiary purposes. The Attorney General shall provide for the payment of the cost of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission, and the

美國國會更在一九九四年之「婦女暴力防治法」(Violence Against Women Act, VAWA)中，針對性虐待、性剝削、虐待孩童及家庭暴力等犯罪，制定強制民事賠償(mandatory restitution)之規範⁵⁶。由於聯邦民事賠償法制之主要架構在VWPA制定後並未改變，且考量被告實際財力狀況之要求往往導致犯罪被害人無法獲得適當地補償，為使法官在量刑時所判命之附帶民事賠償能「完全」填補犯罪被害人之損失，美國國會乃於一九九六年通過「犯罪被害人強制民事賠償法」(Mandatory Victims Restitution Act, MVRA)，該法以滿足特定犯罪之犯罪被害人求償需求為目的，至於被告現實財力狀況，並不在法院考慮範圍內⁵⁷。自此，關於刑事訴訟程序中之附帶民事賠償，乃可區分為「任意性附帶民事賠償」以及「強制性附帶民事賠償」等二種類型⁵⁸。

cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim as the result of the assault. A victim may waive anonymity and confidentiality of any tests paid for under this section.

(8) A responsible official shall provide the victim with general information regarding the corrections process, including information about work release, furlough, probation, and eligibility for each.”

⁵⁶ See 18 U.S.C. Sections 2248, 2259, 2264, 2327.

⁵⁷ See Matthew Dickman, *Should Crime Pay? A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1688-89 (2009).

⁵⁸ 惟不論何種附帶民事賠償之規定，均不得作為國家責任或是公務員責任之基礎，See 18 U.S.C. § 3664(p), which provides: “Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.”

二、任意性附帶民事賠償

犯罪被害人及證人保護法（VWPA）中有關任意性附帶民事賠償部分，規定在美國聯邦法典第18篇第3663條與第3664條⁵⁹。原則上，法院在對特定犯罪量刑時，得附帶命被告向非共犯之犯罪被害人⁶⁰（如被害人已死亡，則向其繼承人）提出民事賠償。惟於前述案件中，如被告與檢察官達成認罪協議且被告同意時，法院尚得命被告向被害人以外之第三人提出民事賠償⁶¹。而法院在附帶決定此

⁵⁹ 所有的任意性附帶民事賠償，均應依美國聯邦法典第18篇第3664條執行，*See* 18 U.S.C. § 3663(d), which provides: “An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.”

⁶⁰ 本法對被害人一詞亦有定義，*See* 18 U.S.C. § 3663(a)(2), which provides: “For the purposes of this section, the term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, may assume the victim’s rights under this section, but in no event shall the defendant be named as such representative or guardian.”

⁶¹ *See* 18 U.S.C. § 3663(a)(1)(A), which provides: “The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim’s estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the

類任意性民事賠償時，應考量個別犯罪被害人因犯罪所遭受之實際損失、被告的現實財力狀況及其他法院認為適當的因素⁶²。惟如因附帶命被告提出民事賠償所導致量刑程序複雜與延長之負擔，高於附帶命被告對犯罪被害人提出民事賠償之需要，法院得於量刑程序中，拒絕附帶命被告提出民事賠償⁶³。此外，在被告與檢察官達成認罪協議且經被告同意時，法院得就任何犯罪，附帶命被告提出民事賠償⁶⁴。

關於前述民事賠償命令之內容，VWPA亦有明文；如該犯罪導致犯罪被害人財產損害或損失，在返還財產為可能的情形中，法院得附帶命被告將該財產返還予所有人或其所指定之人；惟在返還財產為不能或不適當的情形中，法院得就財產損害發生時與量刑時之財產價值較高者，扣除實際返還財產時之財產價值，附帶命被告以金錢賠償犯罪被害人⁶⁵。又於該犯罪造成犯罪被害人身體上傷害之

victim of the offense.”

⁶² See 18 U.S.C. § 3663(a)(1)(B)(i), which provides: “The court, in determining whether to order restitution under this section, shall consider—

(I) the amount of the loss sustained by each victim as a result of the offense; and
(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant’s dependents, and such other factors as the court deems appropriate.”

⁶³ See 18 U.S.C. § 3663(a)(1)(B)(ii), which provides: “To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.”

⁶⁴ See 18 U.S.C. § 3663(a)(1), which provides: “The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.”

⁶⁵ See 18 U.S.C. § 3663(b), which provides: “The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of prop-

情形中，法院亦得附帶命被告賠償相當於犯罪被害人接受必要之醫療及與物理、精神或心理照顧相關的專業服務或設備費用之金額，包括該領域承認之治療方法所產生之非醫療照顧與處理費用之金額、相當於犯罪被害人接受物理或職業治療或復健必要費用之金額，以及賠償犯罪被害人因該犯罪所致之收入損失⁶⁶。惟如該犯罪同時造成犯罪被害人身體上傷害並導致其死亡時，法院尚得附帶命被告賠償相當於喪葬費與相關費用之金額⁶⁷。此外，在任何情形中，法院均得命被告賠償因該犯罪所致收入損失、必要的小孩照顧

erty of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;”

⁶⁶ See 18 U.S.C. § 3663(b)(2), which provides: “in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense.”

⁶⁷ See 18 U.S.C. § 3663(b)(3), which provides: “in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services.”

費用、交通費用以及其他因參與犯罪調查、追訴或其他與該犯罪有關程序之費用⁶⁸；如經犯罪被害人（犯罪被害人死亡時其繼承人）同意，法院得命被告以服務代替金錢給付，或對被害人或其繼承人指定之個人或機構提出賠償⁶⁹。而在特定犯罪之情形中，法院亦得命被告提出相當於犯罪被害人嘗試補救自己因該犯罪行為所招致實際損害或可能損害，而合理地耗費時間所應得代價之金錢給付，賠償犯罪被害人⁷⁰。

惟如在某些特定犯罪之量刑程序中，無可確認之犯罪被害人，法院亦得命被告依本法提出民事賠償⁷¹，其數額應由法院依美國量刑委員會制定之指南，參照公眾因該犯罪所受損害而決定；而在此種情形中，民事賠償之數額不得超過對該犯罪得判處罰金之上

⁶⁸ See 18 U.S.C. § 3663(b)(4), which provides: “in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”

⁶⁹ See 18 U.S.C. § 3663(b)(5), which provides: “in any case, if the victim (or if the victim is deceased, the victim’s estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.”

⁷⁰ See 18 U.S.C. § 3663(b)(6), which provides: “in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.”

⁷¹ See 18 U.S.C. § 3663(c)(1), which provides: “Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.”

限⁷²，而且被告提出之民事賠償亦應依下列方法分配：65%之金額分配至指定之州機構以處理該州因犯罪發生所需之犯罪被害人協助工作；35%之金額分配至以接受聯邦補助之指定州機構⁷³。又如在無法確認犯罪被害人之情形中，前述民事賠償將有害於依法應沒收之程序，法院即不應為民事賠償命令⁷⁴；此時，法定刑罰評估程序或是罰金刑，亦應先於前述有關民事賠償命令規定之適用⁷⁵。VWPA更規定，聯邦檢察官在所有認罪協議程序中，皆應考量是否附帶要求被告對公眾提出此類民事賠償⁷⁶。又為協助法院決定對公

⁷² See 18 U.S.C. § 3663(c)(2), which provides:

“(A)An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

(B)In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.”

⁷³ See 18 U.S.C. § 3663(c)(3), which provides: “Restitution under this subsection shall be distributed as follows:

(A)65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

(B)35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.”

⁷⁴ See 18 U.S.C. § 3663(c)(4), which provides: “The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).”

⁷⁵ See 18 U.S.C. § 3663(c)(5), which provides: “Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.”

⁷⁶ See 18 U.S.C. § 3663(c)(6), which provides: “Requests for community restitution

眾提出民事賠償之金額，美國量刑委員會應制定相關指南，而在該指南制定前，任何法院均不得命被告對公眾提出此類民事賠償⁷⁷。而除了前述條文外，法院在作成假釋⁷⁸及緩刑⁷⁹決定時，亦得附帶

under this subsection may be considered in all plea agreements negotiated by the United States.”

⁷⁷ See 18 U.S.C. § 3663(c)(7), which provides:

“(A)The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B)No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.”

⁷⁸ See 18 U.S.C. § 3583(d), which provides: “Conditions of supervised release.—

...The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual’s current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available....”

⁷⁹ See 18 U.S.C. § 3563(a)(6)(7) providing that: “Mandatory conditions.—

The court shall provide, as an explicit condition of a sentence of probation—

(6) that the defendant—

(A)make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663,

命被告為民事賠償。

三、強制性附帶民事賠償

鑑於法官依VWPA量刑時，常因被告無資力而裁量拒絕附帶命被告為民事賠償，導致犯罪被害人須另提民事訴訟尋求賠償，美國國會乃認任意性附帶民事賠償並非賠償犯罪被害人損失的適當方法⁸⁰。故為確保犯罪被害人在特定犯罪之量刑程序中獲得全額民事賠償的機會，以填補所有肇因於犯罪之損失，美國國會遂於一九九六年制定犯罪被害人強制民事賠償法（MVRA）。依美國聯邦法典第18篇第3663A條規定，法院於該條(c)項所列犯罪之量刑程序中，即應附帶命被告向犯罪被害人⁸¹（如被害人已死亡，則向其繼承

3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3013;

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments; and 18 U.S.C. § 3563(b)(2) providing that: "Discretionary conditions. —The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

(2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A));"

⁸⁰ See Dickman, *supra* note 57, at 1690.

⁸¹ 與VWPA相同，MVRA對被害人一詞亦有定義，See 18 U.S.C. § 3663A(a)(2), which provides: "For the purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person di-

人) 提出民事賠償⁸²；如在認罪協議中經檢辯雙方同意，法院應附帶命被告向犯罪被害人以外之第三人提出民事賠償⁸³。關於本條規定之強制民事賠償令，適用於所有美國法典第18篇第16條定義之暴力犯罪⁸⁴、物品管制法中之特定財產犯罪以及與商品損害等犯罪有關、並造成特定被害人身體傷害或金錢損失之犯罪等量刑程序⁸⁵，

rectly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian."

⁸² See 18 U.S.C. § 3663A(a)(1), which provides: "Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate."

⁸³ See 18 U.S.C. § 3663A(a)(3), which provides: "The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense."

⁸⁴ See 18 U.S.C. § 16, which provides: "The term 'crime of violence' means—
(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

⁸⁵ See 18 U.S.C. § 3663A(c)(1), which provides: "This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the

其內容與前述任意性民事賠償令相當近似⁸⁶，因此，如該犯罪導致犯罪被害人財產損害或損失，在返還財產為可能的情形中，法院得附帶命被告將該財產返還予所有人或其所指定之人；惟在返還財產為不能或不適當的情形中，法院得就財產損害發生時與量刑時之財產價值較高者，扣除實際返還財產時之財產價值，附帶命被告以金錢賠償犯罪被害人⁸⁷。又於該犯罪造成犯罪被害人身體上傷害之情形中，法院亦得附帶命被告賠償相當於犯罪被害人接受必要之醫療

Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.”

⁸⁶ 事實上，與任意性附帶民事賠償規定最大不同者，乃強制性附帶民事賠償之適用範圍。原則上，MVRA僅適用於涉及所有的強制性附帶民事賠償，亦應依美國聯邦法典第18篇第3664條執行，*See* 18 U.S.C. § 3663A(d), which provides: “An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.”

⁸⁷ *See* 18 U.S.C. § 3663A(b)(1), which provides: “The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned.”

及與物理、精神或心理照顧相關的專業服務或設備費用之金額，包括該領域承認之治療方法所產生之非醫療照顧與處理費用之金額、相當於犯罪被害人接受物理或職業治療或復健必要費用之金額，以及賠償犯罪被害人因該犯罪所致之收入損失⁸⁸。惟如該犯罪同時造成犯罪被害人身體上傷害並導致其死亡時，法院尚得附帶命被告賠償相當於喪葬費與相關費用之金額⁸⁹。不論在任何情形中，法院均得命被告賠償因該犯罪所致收入損失、必要的小孩照顧費用、交通費用以及其他因參與犯罪調查、追訴或其他與該犯罪有關程序之費用⁹⁰。

此外，在涉及美國法典第18篇第16條定義之暴力犯罪、物品管制法中之特定財產犯罪以及與商品損害等犯罪有關、並造成特定被害人身體傷害或金錢損失之認罪程序中，法院亦應基於前述犯罪所

⁸⁸ See 18 U.S.C. § 3663A(b)(2), which provides: “in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense.”

⁸⁹ See 18 U.S.C. § 3663A(b)(3), which provides: “in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services.”

⁹⁰ See 18 U.S.C. § 3663A(b)(4), which provides: “in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”

達成之認罪協議，強制命被告提出附帶民事賠償⁹¹；惟於前述物品管制法中之特定財產犯罪量刑程序中，如果法院認為(A)犯罪被害人數目過多導致無法命被告提出附帶民事賠償、或(B)判斷有關被害人損失之原因或數量等爭議所導致量刑程序複雜與延長之負擔，已高於附帶命被告對犯罪被害人提出民事賠償之需要，法院得於量刑程序中，拒絕適用強制性附帶民事賠償之規定⁹²；然而法院不得僅因被告無力支付民事賠償⁹³或是被告「已經或仍得」向其他負損害賠償責任之人求償為由，拒絕適用強制性附帶民事賠償之規定⁹⁴。又除前述MVRA規定之強制性附帶民事賠償外，在部分涉及

⁹¹ See 18 U.S.C. § 3663A(c)(2), which provides: “In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.”

⁹² See 18 U.S.C. § 3663A(c)(3), which provides: “This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.”

⁹³ 蓋被告於審判後可能有機會無償獲得財產，因此縱於量刑時無資力負擔民事賠償，附帶判命民事賠償亦非全無實益，See 18 U.S.C. § 3664(n), which provides: “If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.”

⁹⁴ See 18 U.S.C. § 3664(f)(1), which provides:

“(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court and without

人口販運（human trafficking）犯罪⁹⁵、性虐待（sexual abuse）犯罪⁹⁶、性剝削（sexual exploitation）犯罪⁹⁷、家庭暴力（domestic

consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.”

⁹⁵ See 18 U.S.C. § 1593, which provides:

“(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

(b) (1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses, as determined by the court under paragraph (3) of this subsection.

(2) An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) As used in this subsection, the term ‘full amount of the victim’s losses’ has the same meaning as provided in section 2259 (b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

(4) The forfeiture of property under this subsection shall be governed by the provisions of section 413 (other than subsection (d) of such section) of the Controlled Substances Act (21 U.S.C. 853).

(c) As used in this section, the term ‘victim’ means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim’s estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.”

⁹⁶ See 18 U.S.C. § 2248, which provides:

-
- “(a) In General.— Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.
- (b) Scope and Nature of Order.—
- (1) Directions.— The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).
- (2) Enforcement.— An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.
- (3) Definition.— For purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for—
- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys’ fees, plus any costs incurred in obtaining a civil protection order; and
- (F) any other losses suffered by the victim as a proximate result of the offense.
- (4) Order mandatory.—
- (A) The issuance of a restitution order under this section is mandatory.
- (B) A court may not decline to issue an order under this section because of—
- (i) the economic circumstances of the defendant; or
- (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.
- (c) Definition.— For purposes of this section, the term ‘victim’ means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such rep-

representative or guardian.”

97 See 18 U.S.C. § 2259, which provides:

“(a) In General.— Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and Nature of Order.—

(1) Directions.— The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.— An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.— For purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys’ fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.— For purposes of this section, the term ‘victim’ means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim’s estate, another family member, or any other person appointed as

violence) 犯罪⁹⁸、電信詐欺 (telemarket fraud) 犯罪⁹⁹ 以及毒品濫

suitable by the court, but in no event shall the defendant be named as such representative or guardian.”

⁹⁸ See 18 U.S.C. § 2264, which provides:

“(a) In General.— Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and Nature of Order.—

(1) Directions.— The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.— An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.— For purposes of this subsection, the term ‘full amount of the victim’s losses’ includes any costs incurred by the victim for—

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys’ fees, plus any costs incurred in obtaining a civil protection order; and
- (F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—

- (A) The issuance of a restitution order under this section is mandatory.
- (B) A court may not decline to issue an order under this section because of—
 - (i) the economic circumstances of the defendant; or
 - (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Victim Defined.— For purposes of this section, the term ‘victim’ means the individual harmed as a result of a commission of a crime under this chapter,

用（drug abuse）犯罪¹⁰⁰等情形中，依其他相關法律規定，強制性

including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.”

⁹⁹ See 18 U.S.C. § 2327, which provides:

“(a) In General.— Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution to all victims of any offense for which an enhanced penalty is provided under section 2326.

(b) Scope and Nature of Order.—

(1) Directions.— The order of restitution under this section shall direct the defendant to pay to the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.— An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.— For purposes of this subsection, the term ‘full amount of the victim's losses’ means all losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Victim Defined.— In this section, the term ‘victim’ has the meaning given that term in section 3663A(a)(2).”

¹⁰⁰ See 21 U.S.C. § 853(q), which provides: “Restitution for cleanup of clandestine laboratory sites—

The court, when sentencing a defendant convicted of an offense under this sub-

附帶民事賠償亦有其適用。

四、附帶民事賠償之決定與執行程序

原則上，VWPA中規定有關附帶民事賠償之決定與執行程序，亦即美國聯邦法典第18篇第3664條，適用於所有任意性與強制性附帶民事賠償事項。依該條規定，在被告被判有罪或與檢察官達成認罪協議後，法院應僅依本條及第227章與刑事訴訟法第32(c)條等規定¹⁰¹，於量刑前即應命觀護人（the probation officer）展開刑前調查（presentence investigation），針對犯罪被害人所遭受之民事損害及被告之經濟條件詳為評估，並提出刑前報告（presentence report）或是賠償報告（restitution report），以為法院作成民事賠償命令之參考；如觀護人不能確定犯罪被害人之人數與身分，或因其他原因無法提出相關報告，應據實通知法院¹⁰²。法院亦應將前述

chapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

- (1) order restitution as provided in sections 3612 and 3664 of title 18;
- (2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and
- (3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18.”

¹⁰¹ See 18 U.S.C. § 3664(c), which provides: “The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.”

¹⁰² See 18 U.S.C. § 3664(a), which provides: “For orders of restitution under this title,

觀護人之調查結果，完整地提供控辯雙方參考¹⁰³。

而在量刑程序開始前六十日（如依觀護人請求得提前），檢察官應將所有經其諮詢過犯罪被害人後所獲得之民事損害清單，提供予觀護人；而觀護人在提出相關報告前，即應通知所有已知的犯罪被害人有關被告之定罪、其所獲得有關賠償數額之資訊、犯罪被害人提出損害數額資料予觀護人之機會、舉行量刑程序的時間地點、扣押被告財產的可行性，以及個別提出與損害總額有關切結書（含切結書格式）予觀護人之機會¹⁰⁴。同時，每位被告也應提出切結

the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.”

¹⁰³ See 18 U.S.C. § 3664(a), which provides: “The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.”

¹⁰⁴ See 18 U.S.C. § 3664(d)(1)(2), which provides:

- “(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.
- (2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—
 - (A) provide notice to all identified victims of—
 - (i) the offense or offenses of which the defendant was convicted;
 - (ii) the amounts subject to restitution submitted to the probation officer;
 - (iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim’s losses;

書予觀護人，並於切結書中完整交待其本身經濟條件，包含被逮捕時本身與受其扶養人之可支配財產狀況、財務需求與獲利能力，以及其他法院認為適當的資訊¹⁰⁵。法院於審查完畢所有觀護人所提供之資料後，於量刑前尚得另行要求觀護人提供其他資料或進行言詞審理¹⁰⁶，以決定犯罪被害人之範圍與因犯罪所造成之損害數額，不過為了保護相關當事人之隱私，所有於量刑程序所獲得之資料均不公開¹⁰⁷。惟如於量刑前十日尚未能確定被害人之損害，檢

-
- (iv) the scheduled date, time, and place of the sentencing hearing;
 - (v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and
 - (vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and
- (B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi)."

¹⁰⁵ See 18 U.S.C. § 3664(d)(3), which provides: "Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate."

¹⁰⁶ 事實上，法院亦得委託其他司法單位（例如治安法官）決定與附帶民事賠償相關之事證，See 18 U.S.C. § 3664(d)(6), which provides: "The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court."

¹⁰⁷ See 18 U.S.C. § 3664(d)(4), which provides: "After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera."

察官或觀護人應據實通知法院，而法院亦應於量刑後九十日內¹⁰⁸，決定犯罪被害人之損失數額；又如犯罪被害人於事後始發現有其他損失，應於發現損失後六十日內釋明未及於前述期間內提出損害之原因，請求法院變更原來的附帶民事賠償令¹⁰⁹。而所有有關犯罪損害數額的事實部分爭議，均應以證據優勢之標準決定，除了被告財務狀況之相關資訊應由被告負舉證責任外，均應由檢察官負舉證責任；其他事項之舉證責任得由法院依事件之性質決定¹¹⁰。鑑於

¹⁰⁸ 惟依聯邦最高法院之說明，此處之90日並不具有強制性，法院仍有權於量刑90日後命被告向犯罪被害人提出民事賠償，*See Dolan v. United States*, 130 S. Ct. 2533, 2540 (2010). (The sentence imposes no time limit on the victim's subsequent discovery of losses. Consequently, a court might award restitution for those losses long after the original sentence was imposed and the 90-day time limit has expired. That fact, along with the Act's main substantive objectives, is why we say that the Act's efforts to secure speedy determination of restitution is primarily designed to help victims of crime secure prompt restitution rather than to provide defendants with certainty as to the amount of their liability.)

¹⁰⁹ *See* 18 U.S.C. § 3664(d)(5), which provides: "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief."

¹¹⁰ *See* 18 U.S.C. § 3664(e), which provides: "Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependants shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party desig-

犯罪被害人依「犯罪被害人權利法」(Crime Victim Rights Act, CVRA)有權主張獲得全額民事損害賠償¹¹¹，因此，在檢察官未能及時舉證之情況下，法院在量刑時亦得依美國聯邦法典第18篇第3664(e)條規定，命犯罪被害人於一定期限內提出與賠償數額有關之證據。不過，法院不得於附帶民事賠償令中，命犯罪被害人負擔任何義務¹¹²。

關於附帶民事賠償之範圍，VWPA亦有明文。不論是任意性或是強制性附帶民事賠償，法院均應在不考慮被告經濟條件之前提下，命被告賠償所有犯罪被害人全額損失，並且不能基於犯罪被害人已經獲得賠償或是可能向其他人請求賠償等事由，作出非全額賠償之決定¹¹³。一旦於量刑程序中已確定犯罪被害人身份與損害之數額，在依法作成附帶民事賠償命令時，法院應在考量被告之財務狀況後，一併決定賠償之時程計畫¹¹⁴，包括賠償之方式、分

nated by the court as justice requires.”

¹¹¹ See 18 U.S.C. § 3771(a)(6).

¹¹² See 18 U.S.C. § 3664(g), which provides:

“(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim’s interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.”

¹¹³ See 18 U.S.C. § 3664(f)(1), which provides:

“(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.”

¹¹⁴ See 18 U.S.C. § 3664(f)(2), which provides: “Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the

期之期間與數額，甚至在被告確無資力賠償時逕作成名義上之定期給付¹¹⁵。如有二人以上應對該犯罪所造成之損害負擔民事賠償責任，法院得就損害全額命其連帶負損害賠償責任，或依個人責任比例命其分別負其責任範圍內之損害賠償責任¹¹⁶。又如有二人以上之犯罪被害人因受損害而請求被告賠償，法院亦得基於個別犯罪被害人之差異，命被告依不同之時程計畫賠償；而在美國（國家）也

restitution is to be paid, in consideration of—

- (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
- (B) projected earnings and other income of the defendant; and
- (C) any financial obligations of the defendant; including obligations to dependents.”

¹¹⁵ See 18 U.S.C. § 3664(f)(3)(4), which provides:

- “(3) (A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.
- (B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.
- (4) An in-kind payment described in paragraph (3) may be in the form of—
 - (A) return of property;
 - (B) replacement of property; or
 - (C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.”

¹¹⁶ See 18 U.S.C. § 3664(h), which provides: “If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant.”

是受害人的情形中，法院應於確保個別犯罪被害人均獲得全額賠償後，才可以命被告賠償美國之損害¹¹⁷。如被告之經濟狀況事後產生足以影響給付賠償之改變，應即通知法院與檢察總長，法院亦得自行政機關或被害人獲得通知，檢察總長應將犯罪被害人已知悉被告經濟狀況改變之事通知法院；法院獲此通知後，得依職權或聲請調整附帶民事賠償之時程計畫，或是命其立即全額賠償¹¹⁸。另就效力而論，附帶民事賠償命令一經法院宣示，原則上即產生執行力¹¹⁹，得由法院依職權執行，亦得經犯罪被害人向裁定法院聲請

¹¹⁷ See 18 U.S.C. § 3664(i), which provides: “If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim’s loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.”

¹¹⁸ See 18 U.S.C. § 3664(k), which provides: “A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay restitution. The court may also accept notification of a material change in the defendant’s economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.”

¹¹⁹ See 18 U.S.C. § 3664(o), which provides: “A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

後，由相關權責機關依法執行¹²⁰。惟如犯罪被害人已由保險公司或他處獲得賠償，法院僅於所有犯罪被害人均獲得賠償後，始得命向原給付者賠償；而犯罪被害人依附帶民事賠償令所獲給付之數額，僅應產生自犯罪被害人事後依聯邦或各州民事訴訟程序所決定之損害賠償數額中扣除之效力¹²¹，刑事法院所為之附帶民事賠償

(D)adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.”

¹²⁰ See 18 U.S.C. § 3664(m), which provides:

“(1) (A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or (ii) by all other available and reasonable means.

(B)At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.”

¹²¹ See 18 U.S.C. § 3664(j), which provides:

“(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A)any Federal civil proceeding; and

命令，不生妨礙另行提起民事訴訟之效力¹²²。

伍、附帶民事訴訟法制之檢討

一、法制疑義

關於是否應於刑事訴訟程序中一併解決因犯罪所衍生之民事糾紛，現行附帶民事訴訟法制，學說上並非毫無批評。由於實際上刑庭法官常因刑事案件結案時，附帶民事訴訟尚有待調查，而以刑事訴訟法第504條為據，將附帶民事訴訟移送民庭審理，而附帶民事訴訟被告亦因不須繳納裁判費而漫天開價，致刑事法院無力審酌其請求是否有理由，因此，在民、刑事訴訟證據法則相異之基礎上，為免降低刑事訴訟之審理效率¹²³，並基於專業化審理以及裁判公正之考量，遂曾有廢除附帶民事訴訟制度之議¹²⁴。惟於犯罪被害人保護思潮之影響下¹²⁵，各國法制莫不以立法承認犯罪被害人之訴訟權保障，為避免被告繼續享受藉由犯罪行為所獲取之不當利益，反倒產生鼓勵犯罪之效果，應可肯認剝奪被告不法獲利以填補犯罪被害人之損害，亦為刑事訴訟之重要目的之一。從而，憲法第

(B)any State civil proceeding, to the extent provided by the law of the State.”

¹²² See Thomas D. Sawaya, *Use of Criminal Convictions in Civil Proceedings—Statutory Collateral Estoppel under Florida and Federal Law*, 62 FLA. B.J. 17, 17 (1988).

¹²³ 參閱黃東熊，刑事訴訟法論，頁710，1991年8月，再版。

¹²⁴ 參閱林淑閔，同註29，頁70。

¹²⁵ 關於犯罪被害人保護，聯合國大會曾於1985年通過「犯罪與權力濫用被害人司法正義基本原則宣言」（Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power），而歐洲會議亦曾於1983年通過「歐洲暴力犯罪被害人補償公約」（European Convention on the Compensation of Victims of Violent Crimes）；美國的發展詳見本文肆、一之說明。

16條所稱之人民訴訟權保障，實應同時包含被告與犯罪被害人之訴訟權保障¹²⁶。鑑於國家有提供犯罪被害人接近使用有效訴訟程序之義務¹²⁷，相較於廢除附帶民事訴訟制度之倡議，自以肯認於刑事訴訟程序中賦予犯罪被害人一併提起民事請求之權利，更符合被害人憲法上訴訟權保障之潮流。

然而，現行附帶民事訴訟制度係以被告受有罪判決為基礎，惟於被告因檢察官舉證僅使法院達證據優勢程度之心證，卻不及超越合理懷疑程度之心證時，附帶民事訴訟之原告並無法透過已進行且可獲民事勝訴裁判之刑事訴訟程序，一併解決相關民事糾紛，此時附帶民事訴訟之度之紛爭解決功能，不免受到規範上之限制。又於被告所為之加害行為已該當廣義犯罪之評價（即構成要件該當且具違法性），僅因罪責阻卻而獲判無罪之情形中，因犯罪之構成要件事實已被證明，犯罪被害人之民事請求權基礎亦已獲確認，此時法院僅得以被告無罪為由駁回附帶民事訴訟原告之訴，是否符合憲法上有效權利救濟之要求¹²⁸，實有深入檢討之必要。

再者，現行附帶民事訴訟程序之開啟，受處分權主義之影響，依法應由犯罪之被害人提起附帶民事訴訟。然而，不論是免刑判決之命付慰撫金、緩刑判決之財產上或非財產上之損害賠償負擔、甚至是緩起訴處分之財產上或非財產上之損害賠償負擔，相關民事賠償之決定，均非以犯罪之被害人主動請求為必要，因此，何以在犯罪情節不重大而得以為緩起訴處分、緩刑宣告甚至免刑判決時，民

¹²⁶ 參閱黃曉玲，犯罪被害人於刑事訴訟上之權利與定位，成功大學法律研究所碩士論文，頁47，2009年6月。

¹²⁷ 參閱廖尉均，犯罪被害人刑事訴訟權利之保護，刑事法雜誌，49卷4期，頁98，2005年8月。

¹²⁸ 參閱黃士元，犯罪被害人財產權保障之救濟——從憲法觀點論附帶民事訴訟之修改方向（下），全國律師，15卷5期，頁62，2011年5月。

事賠償不受處分權主義之拘束，但在犯罪情節重大時，是否適度解決民事糾紛卻反倒完全回歸民事訴訟程序法理，其理由何在？難道在犯罪情節較重大時，犯罪之被害人請求民事損害賠償之必要性，不及於其他情節輕微之犯罪被害人？又何以緩起訴之損害賠償負擔須以被告同意為要件，而緩刑宣告之損害賠償負擔與免刑判決之慰撫金卻無待被告同意，其法制間之差別安排是否合理？亦非沒有予以檢討之必要。

此外，前述寬認刑事法庭得將附帶民事訴訟案件移送民事庭之訴訟實務¹²⁹，因有害於犯罪被害人之權利救濟，雖經司法院迭次道德勸說刑事庭應儘量自行審理附帶民事訴訟案件，以保護當事人權益並妥善運用司法資源¹³⁰，惟其成效不彰，常為人所詬病。鑑於濫行移送之實務已有害於憲法對財產權之有效保障，學說上亦有廢除移送制度之回應¹³¹，從而，在肯認附帶民事訴訟制度必要性之前提下，如何建構一套於犯罪被害人財產權受侵害時，能夠有效達成權利救濟目的之附帶民事訴訟制度，並調和不同時空背景下所訂定之個別附帶民事程序間，所存在之法制齟齬，避免犯罪被害人在民事求償之過程中遭受過度程序上之不利益，適當滿足權利救濟之要求，應已成為落實憲法上人民訴訟權保障之重要課題。

二、處分權主義之適度緩和

雖然依刑事訴訟法第487條、第492條與第493條等規定，我國附帶民事訴訟程序之開啟係以處分權主義為法理基礎，不過在緩起

¹²⁹ 參閱張劍男，刑事附帶民事訴訟之移送，司法周刊，1321期，頁2，2007年1月11日。

¹³⁰ 參閱張劍男，同註5。

¹³¹ 參閱張劍男，同註6。

訴、緩刑以及免刑判決等程序中，卻允許檢察官與法院在犯罪被害人未踐行起訴程式之情況下，逕依職權解決犯罪被害人與被告間之民事紛爭，故就法實證的角度來說，利用刑事訴訟程序一併解決相關民事紛爭乙事，並不一定受限於處分權主義。鑑於民事訴訟程序採用處分權主義之法理係於法國大革命以後，受私法自治與契約自由等因素之影響所致，而在承認訴訟制度具有集團現象的特質之後，現今之民事訴訟哲學已於某種程度揚棄了純粹的自由主義訴訟觀，並漸走向社會的訴訟觀¹³²，則於程序經濟的考量下，關於民事紛爭之解決，並非完全不得緩和處分權主義之適用。實則，民事訴訟法第384條有關本於認諾應為當事人敗訴判決之規定¹³³，以及原告提起訴之變更與追加，被告得提起反訴等程序法理，均不適用於附帶民事訴訟程序，以及刑事訴訟法第499條：「（第1項）就刑事訴訟所調查之證據，視為就附帶民事訴訟亦經調查。（第2項）前項之調查，附帶民事訴訟當事人或代理人得陳述意見。」與第500條：「附帶民事訴訟之判決，應以刑事訴訟判決所認定之事實為據。但本於捨棄而為判決者，不在此限。」等規定，均屬處分權主義之限制。故如利用刑事訴訟程序一併解決相關的民事糾紛，符合訴訟經濟之考量，由法院依職權開啟並進行與犯罪有關之民事事件，亦與憲法保障訴訟權有效實現之目的無違。故在促進訴訟以追求公益之基礎上，立法者就此類紛爭解決之處理，自得不受處分權主義之拘束而享有立法形成之空間。

事實上，關於民、刑事紛爭解決之一次性，立法者已於緩起訴、緩刑與免刑判決等制度中，緩和了處分權主義之適用，而許可檢察官與法院逕依職權一併解決因犯罪所生之民事糾紛，則於規範

¹³² 參閱邱聯恭，同註7，頁134、326。

¹³³ 參照最高法院32年附字第371號刑事判例。

上似可進一步思考，是否於其他刑事案件之附帶民事訴訟程序中，亦緩和處分權主義之限制，而由法院於緩刑與免刑以外之判決時，得依職權一併解決相關之民事糾紛。蓋相關民事紛爭之所以已發生，莫不源自犯罪被害人已因該犯罪招致民事損害，如肯認填補犯罪被害人所受之損害為司法正義所不可或缺，並有助於修復式司法目的之達成，何以僅於緩起訴、緩刑與免刑判決等程序中，承認檢察官與法院有依職權解決該犯罪所致民事紛爭之必要？難道在不得為緩刑或免刑判決之情形中，就沒有由法院在刑事訴訟程序中依職權解決民事紛爭之必要嗎？鑑於填補犯罪被害人所受民事損害為犯罪被害人訴訟權保障之重要事項，參照美國犯罪被害人及證人保護法與犯罪被害人強制民事賠償法等規定，均不以犯罪被害人主動請求民事賠償為法院命附帶民事賠償之限制，法制上似應肯認法院於所有案件之審判程序中，均得依職權一併解決與該犯罪相關的民事糾紛，而不受處分權主義之拘束，以維修復式司法理念之一貫。為能有效保障犯罪被害人之訴訟權，避免程序過度勞費及裁判矛盾，刑事訴訟法中有關附帶民事訴訟之規定，似應為相應之修正，本文以為，如於現行刑事訴訟法第487條第1項中增加但書規定：「但法院於適當時，得依職權命被告回復犯罪被害人所受之損害。」應可適度緩和現行法制中有關處分權主義之限制。

此外，現行法所規定之附帶民事賠償制度，不論是緩起訴、緩刑、免刑或是附帶民事訴訟制度，均未明文強制賠償事項。由於在犯罪被害人亟需損害填補的情形中，僅因處分權主義之拘束而致法律上弱勢者生活陷入困境，實有害於犯罪被害人訴訟權之保障¹³⁴。

¹³⁴ 以2012年年初發生的藝人毆打計程車司機的案例而言，犯罪被害人的家境並不富裕，其本身亦為家中經濟的唯一來源，因此當其遭受犯罪侵害時，不但其個人必須承受身心創傷，其家庭生活亦受到重大影響，如未能及時填補其

因此，法制上或可參考美國聯邦法典第18篇第3663A條規定，於特定犯罪之偵審程序中，課予檢察官或法院逕依職權，於緩起訴處分或所有判決中，命被告向犯罪被害人（如被害人已死亡，則向其繼承人）提出民事賠償之義務。關於強制賠償之範圍，應以維持受害前之正常生活必要者為限，特別於該犯罪造成犯罪被害人身體上傷害之情形中，得參考前述美國法規定，命被告賠償相當於犯罪被害人接受必要之醫療及與物理、精神或心理照顧相關的專業服務或設備費用之金額，包括該領域承認之治療方法所產生之非醫療照顧與處理費用之金額、相當於犯罪被害人接受物理或職業治療或復健必要費用之金額，以及賠償犯罪被害人因該犯罪所致之收入損失；於該犯罪同時造成犯罪被害人身體上傷害並導致其死亡時，命被告賠償相當於喪葬費與相關費用之金額。而在任何強制賠償之情形中，檢察官或法院亦得命被告賠償因該犯罪所致收入損失、必要的小孩照顧費用、交通費用以及其他因參與犯罪調查、追訴或其他與該犯罪有關程序之費用。如增訂類此之相關規定，因關於請求之提起與範圍之特定均非犯罪被害人所決定，亦屬適度緩和民事訴訟程序原所適用處分權主義之體現。

三、移送民事庭與自為裁判義務

雖然附帶民事訴訟旨在使刑事責任與民事責任一併解決，免除程序之重複，避免民刑事裁判互相牴觸¹³⁵，且刑事訴訟法第501條已明文附帶民事訴訟，應與刑事訴訟同時判決，不過實務上於刑事

損害（然於該案中實際上有不少捐款助其度過難關），勢必對其個人健康恢復與家計維持產生不利，甚至導致被害人因弱勢地位而不得不接受加害人之和解條件。

¹³⁵ 參閱張劍男，同註5。

訴訟諭知無罪、免訴、不受理以外之情形中，卻常以附帶民事訴訟確係繁雜，非經長久時日不能終結其審判為由，依同法第504條第1項規定，將該案件移送民事庭審理，而脫免自為裁判之義務。鑑於前述移送制度之流弊實質上已侵蝕附帶民事訴訟制度之功能，學說上乃有建議刪除刑事訴訟法第504條第1項規定以廢除移送制度，並「使辦理刑事訴訟之法官一定要連同附帶民事訴訟併予審理裁判，無斟酌是否移送民事庭之餘地¹³⁶。」依其所見，刑事庭法官在審理刑事案件時，乃有義務就所涉民事紛爭自為本案判決，以符附帶民事訴訟制度紛爭解決一次性之規範目的。

其實，於刑事訴訟立法之初，關於利用刑事訴訟程序一併解決相關民事紛爭之理念，除現行附帶民事訴訟制度外，亦已落實於免刑判決之規範中。按依刑事訴訟法第299條第2項第3款之規定，法院本得依職權於免刑裁判時，逕行（一併）解決有關該犯罪非財產上之損害賠償爭議，而不假民事庭之手。另就理論而言，民事庭與刑事庭僅係法院組織法第14條等相關規定所為之區分，民事訴訟法上所為之法院管轄規定，並未限定民事糾紛應專由法院之民事庭審理，則將民事糾紛委由刑事庭一併審理裁判，並不生違反法定法官原則之疑慮。不過，值得說明者，相較於財產上損害之特定性，非財產上損害（慰撫金）具有較高層度之抽象性，如法院可以在刑事裁判時一併就高度抽象性之慰撫金予以裁判，則就事件本質具較低度抽象性之財產上損害賠償而言，自無更以該爭議確係繁雜，非經長久時日不能終結其審判為由，將該案件移送民事庭審理之必要，因此，刑事訴訟法第299條第2項第3款應修正為：「向被害人支付相當數額之財產或非財產上之損害賠償」，以為法理之一貫，並與同法第253條之2第1項第3款之規定相互呼應。

¹³⁶ 參閱張劍男，同註6。

除前述免刑判決之規定外，於二〇〇一年增訂定之緩起訴制度與二〇〇五年修正之緩刑制度，實際上亦落實了利用刑事訴訟程序一併解決相關民事紛爭之理念。按不論係檢察官之緩起訴負擔或是法院之緩刑負擔，所涉相關民事糾紛之解決，並無因案件確係繁雜，非經長久時日不能終結其審判為由，而將案件移送民事庭處理。鑑於緩起訴與緩刑案件所涉民事糾紛未必較為單純，故如立法者已於緩起訴或緩刑程序中，要求檢察官或刑事庭於必要時，縱係案件繁雜亦應一併處理所涉民事糾紛（紛爭解決一次性），則如果廢除刑事訴訟法第504條第1項之規定，亦不過進一步落實紛爭解決一次性之理念，尚不致引起訴訟制度之重大變革。實則，二〇〇七年制定之智慧財產案件審理法第27條第2項之規定，本質上亦已於智慧財產類型之紛爭處理程序中，實際上「廢除」了刑事訴訟法第504條第1項之規定。鑑於智慧財產案件審理法第27條第2項所欲達成紛爭解決一次性之公益目的，與刑事附帶民事訴訟本來之規範目的並無二致，而且美國犯罪被害人及證人保護法與犯罪被害人強制民事賠償法等規定，亦將相關民事糾紛之解決交由刑事庭一併處理，從而刪除刑事訴訟法第504條第1項之規定，課予刑事庭就所涉民事糾紛自為裁判之義務，非但於比較法上有所依據，亦符合紛爭解決一次性之法理要求，應為法制上可採之方案。

此外，關於刑事庭是否得於刑事訴訟判決後始就民事糾紛另為裁判，因檢察官針對非被告之非犯罪事實並不負舉證責任，故本文以為，縱爭執之民事請求權基礎事實與公訴事實有所關聯，理論上亦因檢察官未加舉證而無從作為刑事庭審理之對象。因此，紛爭解決一次性之範圍，自應以檢察官舉證之犯罪事實為限，而不及於檢察官舉證責任以外之部分。果如此，則就附帶民事訴訟之審理範圍而言，因法院無更依職權蒐集證據之義務，刑事庭即應於犯罪事證明確之檢察官舉證基礎上，依刑事訴訟法第499條第1項：「就刑事

訴訟所調查之證據，視為就附帶民事訴訟亦經調查。」與第500條：「附帶民事訴訟之判決，應以刑事訴訟判決所認定之事實為據。」判斷相關之民事請求權是否成立，並為一併解決民刑事糾紛，而同時裁判。既然附帶民事訴訟之審理範圍已然明確，且程序進行中已不得更為訴之變更與追加，則於刑事庭依刑事訴訟法第496條調查審理後，基於法官知法之法理，似已無於刑事裁判作成後始另為民事法律適用（附帶民事判決）之必要。參照性質類似之證券交易法第171條第6項有關發還與損害賠償等規定，並無得於刑事裁判作成後另為裁判之明文，且緩刑負擔、免刑負擔、甚至是刑法第34條規定之沒收、追徵、追繳或抵償等從刑，亦應於刑事判決時一併宣示，則附帶民事訴訟之裁判自應與刑事判決同時作成，甚至應於同一判決書中分別記載，而無另行裁判之必要。現行附帶民事訴訟獨立於刑事訴訟制作判決書之實務，不但於法無據，更與前述類似事件類型之裁判程式相歧，亦有予以變更之必要。

四、於同一刑事訴訟程序作成不同證明程度之裁判

不論民、刑事訴訟之事實認定，均採自由心證主義，故關於爭執事實之存否，乃由法院依經驗法則與論理法則予以判斷。由於訴訟上之證明與自然科學之證明不同，因此不以自然科學上之必然判斷為證明程度之要求；一般而言，民事訴訟程序之事實認定僅要求依蓋然心證而為蓋然判斷（證據優勢原則），而刑事訴訟程序之事實認定則要求依蓋然之確實心證而為確然之判斷（無合理懷疑原則）¹³⁷。雖然刑事訴訟法第499條第1項：「就刑事訴訟所調查之證據，視為就附帶民事訴訟亦經調查。」已就附帶民事訴訟之證據調查予以明文，且同法第500條：「附帶民事訴訟之判決，應以刑

¹³⁷ 參閱駱永家，同註19，頁8。

事訴訟判決所認定之事實為據。」亦明定附帶民事訴訟裁判之基礎，然因刑事訴訟法並未就附帶民事訴訟事實認定之證明程度有所規定，則於刑事庭依同法第502條第2項判決原告之訴有理由時，是否亦應依刑事訴訟程序對事實認定之證明程度要求，以無合理懷疑原則為相關民事爭議之事實認定基礎？或是得以其他證明程度之標準（例如：證據優勢或是證據明確原則¹³⁸）作為民事爭議事實認定之基礎？鑑於刑事訴訟法第490條已明文附帶民事訴訟應準用刑事訴訟法規定，且同法第491條並未明文證據事項應準用民事訴訟法規定¹³⁹，則雖我國學說與實務尚未慮及此一疑義，惟其於法理上並非無疑¹⁴⁰。

如僅就刑事訴訟程序之事實認定而言，因刑事訴訟程序之進行旨在確認國家刑罰權之存否及其範圍，為免無罪之被告遭受有罪裁判而形成冤獄，在利益衡量下，刑事訴訟程序乃要求檢察官之說服責任應達到無庸置疑（無合理懷疑）之程度¹⁴¹。惟因附帶民事訴訟所涉之相關民事紛爭不致導致冤獄之發生，其事實認定於本質上是否仍要求相同之證明程度，就必要性而言，已非無疑。鑑於刑事訴訟之結果將對人民之生命權或自由權予以限制，而民事上損害賠償之紛爭處理僅生人民財產權限制之結果，則基於不同權利限制間之差異，而於刑事訴訟程序中針對民事事件與刑事事件予以不同的

¹³⁸ 有稱證據優勢為低度的證明度，而稱證據明確為一般的證明度，參閱許士宦，證明妨礙，月旦法學雜誌，76期，頁49，2001年9月。

¹³⁹ 亦即，民事訴訟法第277條至第376條之2等規定，並不在附帶民事訴訟程序準用之範圍內。

¹⁴⁰ 實則，於緩起訴、緩刑判決與免刑判決之情形中，關於財產與非財產上之損害賠償得否依單純民事訴訟程序之證據優勢原則為事實認定？亦存在相同的疑義。

¹⁴¹ 參閱王兆鵬，刑事訴訟講義，頁678，2010年9月，5版。

事實認定（證明程度）標準，本質上應屬合理的差別待遇而不生違反平等原則之疑慮。從而，關於附帶民事訴訟之事實認定，因其本質上僅涉及民事請求權存否之判斷，並無必要達到無合理懷疑之證明程度，法理上自應肯認以證據明確或是證據優勢原則作為相關民事爭議之事實認定標準。雖此為事理之當然，為避免徒生不必要之爭議，即應立法明文附帶民事訴訟與其他附帶民事賠償制度（如緩起訴、緩刑與免刑判決）之事實認定，應以證據明確或是證據優勢原則為判斷標準。基此說明，刑事庭本應基於民、刑事事件對證明程度之不同要求，就同一被訴犯罪事實，同時作成事實範圍各異之刑事判決與附帶民事判決（包含緩刑負擔與免刑負擔部分）。簡言之，由於法院作成無罪裁判時，就被訴事實（亦即民事上之請求權基礎事實）是否已達證據明確或是證據優勢之判斷標準，應已同時形成心證，於此基礎上要求同一法院同時作成民事裁判（不論請求權成立與否），較之由其他法院另案審理與裁判，應更符合訴訟經濟之公益要求。

五、附帶民事賠償決定之既判力與爭點效

關於附帶民事賠償決定之效力，現行刑事訴訟法並未明文，因此犯罪被害人是否得於緩起訴、緩刑、免刑或是附帶民事訴訟予以民事賠償後，另行提起民事訴訟以回復其民事上之損害，法制上即有待釐清。雖然最高法院三十二年附字第四九五號刑事判例：「一事不再理，為訴訟法上之大原則，故就確定終局判決中已經裁判之法律關係，提起附帶民事訴訟，其當事人兩造如係確定判決之既判力所及之人，法院應以其訴為不合法而駁回之。」係以民事訴訟法第400條第1項：「確定之終局判決就經裁判之訴訟標的，有既判力。」為法理基礎，惟因刑事訴訟法並未有類似之明文，故不能逕認緩起訴、緩刑、免刑或是附帶民事訴訟之民事賠償決定亦有既

判力。

由於民事訴訟法上之訴訟標的概念係以原告所為之權利主張為主要內涵，因此判決之既判力主要係指原告之權利主張已不得再透過訴訟另予爭執之效力¹⁴²。雖刑事訴訟程序在確認刑罰權存否及其範圍之過程中，亦曾對當事人間之權利義務關係有所判斷，因受檢察官舉證之限制，與犯罪無關但卻與民事請求權有關之原因事實，往往即非為刑事庭所判斷之對象，從而，刑事庭所為之事實判斷，即未必包含所有與民事請求權存否及其範圍有關之事實全部。在此前提下，如認刑事庭於所有附帶民事賠償程序中所為之權利義務判斷，亦產生民事訴訟法上之既判力，恐將對犯罪被害人之損害賠償請求權造成不必要之過度限制，故應肯認附帶民事賠償程序所為之權利義務判斷不生民事訴訟法之既判力。

然而，縱認附帶民事賠償程序所為之權利義務判斷不生民事訴訟法之既判力，惟因犯罪被害人與被告間之權利義務關係已經刑事庭就被訴犯罪事實予以判斷，即便犯罪被害人事後基於未經提出之事實另行提起民事訴訟請求損害賠償，先前已為判斷之事實部分，既已經法院審理，亦應對另行提起之民事訴訟產生一定效力，以免後訴當事人間因重複舉證而遭受程序上之過度不利益，甚至出現前後裁判就同一事實認定出現矛盾之現象。因此，如犯罪被害人於刑事判決確定後，有以同一被訴犯罪事實為基礎另提民事訴訟請求損害賠償之必要，為減輕犯罪被害人於民事訴訟程序之舉證責任，似宜參照美國聯邦法典第18篇第3664(l)條之規定，於刑事訴訟法中增

¹⁴² 故就已判斷之事項，當事人不得更行起訴，於其他訴訟用作攻擊或防禦方法，不得與確定判決為相反之主張；法院不得就已判斷之事項再行審判，於他訴訟亦不得為與確定判決相牴觸之裁判。其積極作用在避免有先後矛盾之判斷，消極作用在禁止其重行起訴。參閱楊建華，同註27，頁318。

訂禁反言條款，以禁止刑事被告於嗣後之民事訴訟程序中，否認刑事法院所為之主要犯罪構成要件事實認定，以保障犯罪被害人已於附帶民事賠償程序中所獲得之有利地位。事實上，在被告所為之侵害行為該當犯罪構成要件、且具違法性，僅因罪責阻卻而獲判無罪的情形中，禁反言條款將為犯罪被害人訴訟權有效保障之基礎，蓋其有助於犯罪被害人儘快獲得民事上之損害填補。又如肯認刑事庭先前對主要犯罪事實所為之事實認定，足以及在另案提起之民事訴訟中產生類似「爭點效」之禁反言功能，則最高法院四十八年臺上字第七一五號民事判例：「刑事訴訟法第五百零四條所謂，應以刑事判決所認定之事實為據者，係指附帶民事訴訟之判決而言，如附帶民事訴訟經送於民事庭後，即為獨立民事訴訟，其裁判不受刑事判決認定事實之拘束。」關於獨立民事訴訟不受刑事判決認定事實拘束之主張，即應不再援用。

陸、結 論

早於一九二八年制定之刑事訴訟法即已包含附帶民事訴訟制度，雖期間刑事訴訟法已經歷幾次重大修正，惟附帶民事訴訟之基本法制架構迄今並未改變。或因此一制度橫跨民事訴訟與刑事訴訟二大領域，以致於學說上對其研究，寥寥可數¹⁴³，縱或有之，多

¹⁴³ 蓋若於國家圖書館臺灣期刊論文索引系統以「附帶民事訴訟」為關鍵字查詢，形式上僅得17筆結果，若將論文之上下篇合併後計算，則實際上僅有13筆結果。扣除單純整理實務見解與非學術之文章後，真正對刑事附帶民事訴訟制度之內涵予以實質探討者，恐僅有：「張劍男，應速修法廢除「附民裁定移送」制度（上）、（下），同註5、同註6」、「黃士元，犯罪被害人財產權保障之救濟——從憲法觀點論附帶民事訴訟之修改方向（上），全國律師，15卷5期，頁105-118，2011年4月、犯罪被害人財產權保障之救濟——從憲法觀點論附帶民事訴訟之修改方向（下），同註128」、「林淑閔，刑事附

半乃就實務見解加以分析整理，卻少見基於民、刑事程序法理之檢討說明。由於我國民、刑事訴訟法均自上世紀末開始經歷重大變革，許多法理亦已異於立法初期所採之觀點，為免新舊法制相互衝突，自有必要重新檢視制定於近一世紀前之附帶民事訴訟制度，並自程序法理之角度探討其於當代法制應有之制度功能。本文除探討現行附帶民事訴訟制度之法理基礎外，更基於被害人保護之觀點，介紹美國附帶民事賠償法制之相關發展，在比較法之基礎上，檢討現行附帶民事訴訟制度之盲點，並提出本文建議的修正方向。

本文認為，在肯認犯罪被害人保障亦為憲法訴訟權保障重要內涵之前提下，為達犯罪被害人有效保護之目的，在刑事訴訟附帶民事賠償之制度中，應有必要限制處分權主義之適用，甚至在特定犯罪類型之追訴程序中，課予檢察官或法院依職權命被告強制民事賠償之義務；又為免刑事庭將民事糾紛濫行移送民事庭而害及犯罪被害人有效保護之規範目的，如肯認刑事庭僅應於犯罪成立犯斷之證據基礎上附帶就所涉民事糾紛一併解決，似應刪除現行移送制度，課予法院就附帶民事糾紛自為裁判之義務；而於刑事庭已為事實認定之前提下，為保障犯罪被害人有效地提起另訴請求損害賠償，或應考慮於附帶民事訴訟中，增訂類似禁反言條款，禁止民事法院為相反的事實認定，以促進事後提起之民事訴訟。

帶民事訴訟之研究，同註29」等三篇論文。而若於臺灣博碩士論文知識加值系統以「附帶民事訴訟」為關鍵字查詢，形式上僅得11筆結果，扣除非實質探討附帶民事訴訟議題之論文後，真正以刑事附帶民事訴訟制度為核心之學位論文，恐僅有：「陳柏廷，我國刑事訴訟程序中犯罪被害人權能之研究，臺北大學法律研究所碩士論文，2000年7月」、「黃士元，經濟犯罪被害人財產權保障之救濟——從憲法觀點論刑事附帶民事訴訟之修改方向，政治大學法律研究所碩士論文，2011年6月」、「戴珮芸，刑事程序中被害人保護之研究——以訴訟參加為中心，中央警察大學刑事警察研究所碩士論文，2008年6月」等三篇論文。此主題長期乏人問津，其冷門之程度由此可見一斑。

參考文獻

一、中 文

1. 王兆鵬，刑事訴訟講義，5版，2010年9月。
2. 王澤鑑，人格權之保護與非財產損害賠償，載：民法學說與判例研究第一冊，頁31-48，10版，1990年4月。
3. 吳明軒，試論提起刑事附帶民事訴訟及移送民事庭之限制，中華法學，5期，頁41-52，1995年4月。
4. 呂太郎，民事訴訟法研究(一)，修訂版，1991年7月。
5. 林淑閔，刑事附帶民事訴訟之研究，刑事法雜誌，38卷3期，頁67-88，1994年6月。
6. 林鈺雄，刑事訴訟法（下），5版，2007年9月。
7. 林榮耀，附帶民事訴訟案件的處理，法學叢刊，94期，頁70-75，1979年4月。
8. 邱聯恭，司法之現代化與程序法，1992年4月。
9. 邱聯恭，程序制度機能論，1996年8月。
10. 邱聯恭，程序利益保護論，2005年4月。
11. 張劍男，應速修法廢除「附民裁定移送」制度（上），司法周刊，1017期，頁3，2001年2月。
12. 張劍男，應速修法廢除「附民裁定移送」制度（下），司法周刊，1018期，頁3，2001年2月。
13. 張劍男，刑事附帶民事訴訟之移送，司法周刊，1321期，頁2-3，2007年1月。
14. 莫諾·卡佩萊蒂等著，徐昕譯，當事人基本程序保障權與未來的民事訴訟，2000年8月。
15. 許士宦，證明妨礙，月旦法學雜誌，76期，頁41-51，2001年9月。
16. 陳柏廷，我國刑事訴訟程序中犯罪被害人權能之研究，臺北大學法律研究所碩士論文，2000年7月。
17. 黃士元，犯罪被害人財產權保障之救濟——從憲法觀點論附帶民事訴訟之修

改方向（上），全國律師，15卷5期，頁105-118，2011年4月。

18.黃士元，犯罪被害人財產權保障之救濟——從憲法觀點論附帶民事訴訟之修改方向（下），全國律師，15卷5期，頁51-65，2011年5月。

19.黃士元，經濟犯罪被害人財產權保障之救濟——從憲法觀點論刑事附帶民事訴訟之修改方向，政治大學法律研究所碩士論文，2011年6月。

20.黃東熊，刑事訴訟法論，再版，1991年8月。

21.黃曉玲，犯罪被害人於刑事訴訟上之權利與定位，成功大學法律研究所碩士論文，2009年6月。

22.楊建華，民事訴訟法要論（上），1992年9月。

23.楊智守，刑事附帶民事訴訟實務研究——以訴訟三要素為中心，司法周刊，1638期，頁2-3，2013年3月。

24.廖尉均，犯罪被害人刑事訴訟權利之保護，刑事法雜誌，49卷4期，頁95-113，2005年8月。

25.褚劍鴻，刑事訴訟法論下冊，5次修訂版，2001年9月。

26.駱永家，民事舉證責任論，6版，1989年11月。

27.駱永家，重複起訴之禁止，月旦法學雜誌，57期，頁6-7，2000年2月。

28.戴珮芸，刑事程序中被害人保護之研究——以訴訟參加為中心，中央警察大學刑事警察研究所碩士論文，2008年6月。

二、外 文

1. Adler, Freda, Mueller, Gerhard O. W. & Laufer, Williams S. (1994), CRIMINAL JUSTICE, New York, NY: McGraw-Hill.

2. Dickman, Matthew, *Should Crime Pay? A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687 (2009).

3. Henderson, Lynne N., *The Wrongs of Victim Rights*, 37 STAN. L. REV. 937 (1985).

4. Hyde, Margaret O. (1983), THE RIGHTS OF VICTIM, London, UK: Franklin Watts.

5. Ronald, David L., *Progress in the Victim Reform Movement: No Longer the Forgotten Victim*, 17 PEPP. L. REV. 35 (1989).

6. Sawaya, Thomas D., *Use of Criminal Convictions in Civil Proceedings — Statu-*

- tory Collateral Estoppel under Florida and Federal Law*, 62 FLA. B. J. 17 (1988).
7. Smith, Barbara, Davis, Robert & Hillenbrand, Susan (1989), IMPROVING ENFORCEMENT OF COURT-ORDERED RESTITUTION: A STUDY OF AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE VICTIM WITNESS PROJECT, Chicago, IL: The American Bar Association.
8. Subrin, Stephen N., Minow, Martha L., Brown, Mark S. & Main, Thomas O. (2000), CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT, New York, NY: Aspen Publishers.
9. Zehr, Howard & Mika, Harry, *Fundamental Concepts of Restorative Justice*, 1 CONTEMP. JUST. REV. 47 (1998).

A Review on the Incidental Civil Procedure

Ming-Woei Chang^{*}

Abstract

Since the procedural law reforms dramatically began with the end of the 20th century, many legal theories become much different from those adopted by their first drafts. It becomes necessary to reexamine the Incidental Civil Procedure so that any conflicts between the new and old systems could be found. After affirming crime victims' protection is central to the right to fair trial, it seems important to limit the civil procedure theory requiring the plaintiffs to initiate a civil lawsuit while dealing with tort claims during criminal procedure. In some cases, it is mandatory for a public prosecutor or a court to order restitution ex parte so that the crime victims should be protected effectively. With recognition that the criminal court is obliged to concurrently resolve the incidental civil lawsuit based upon criminal investigation only, Article 504 of the ROC CPXC should be abolished. In order to facilitate the crime victims to recover all losses in a latter civil lawsuit, it is favorable to add the estoppels collateral clause in the ROC CPC.

Keywords: Incidental Civil Procedure, Inquisition, Victim, Accused, Fact-Finding

^{*} Associate Professor of Law, Fu-Jen Catholic University, School of Law; S.J.D., Golden Gate University, School of Law.

Received: December 28, 2012; accepted: June 13, 2013