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RESTITUTIVE JUSTICE

A General Survey and Analysis

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Submitted To

National Institute of Law Enforcement
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By

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FOREWORD

The concept of restitutive justice presents alluring prospects. To those concerned with the rehabilitation of offenders it promises some new and undefined stimulus to the development of a sense of social responsibility on the part of those who commit crimes. It opens broader options for those committed to particular correctional avenues, such as community based corrections. The very term, "restitution" offers the possibility of a more comprehensive justice system which would concern itself with the rights and interests of victims of crime. Dimly perceivable, in the eyes of a few, is the possibility that many of the direct dollar costs of crime can be transferred from the taxpayer and the victim, to the offender.

If programs of restitutive justice are to provide meaningful outcomes sought by these various constituencies, they must be structured with clear understanding of the relationship between the interests of these constituencies. Thus, a program designed to rehabilitate offenders should be carefully examined to determine not only whether it will aid offenders sought to be benefited, but also what impact it might have on other offenders, on sectors of the criminal justice system, and on victims of crime. Likewise, a program designed to assist victims must be carefully scrutinized to assess potential harm to rehabilitation objectives and distortion of prosecutive policies.

This report is designed to explore and to highlight major issues, problems and prospects relating to the concept of restitutive justice and its operational implementation. It is based upon both the past and present experiences of justice systems and takes note of relevant literature in the field. It seeks to identify the various constituents and potential beneficiaries of restitution programs and to indicate the dilemmas presented in balancing the needs and concerns of these varying groups.

This report broadly examines restitutive justice from four perspectives: the historical (Section I), the theoretical (Section II), the legal (Section III), and the operational (Sections IV and V). In addition, it has sought to catalog the knowledge we do have while indicating those aspects of the restitution concept with which we have little information or experience. At all times the analysis has attempted to view restitution in the larger societal and criminal justice framework, noting potential dilemmas and payoffs associated with its use.

Specific issues which seem to raise some of the thornier problems with the restitution concept have been set apart in Section VI. Each has been briefly highlighted and analyzed to set forth the dilemma presented and to indicate its potential impact on restitution programs presently operating and/or proposed.

Finally, a research model for future study and for the design of carefully controlled action programs has been

recommended (Section VII). Here the goal has been to recommend research in those areas where our knowledge or experience is most scant and of such a nature as to be most helpful to policy decision-making with regard to restitution programs.

As was noted at the outset, restitution is an alluring and intriguing concept. To derive its promised benefits, however, will require careful research and well developed action programs. This report is designed to be a first step.

SECTION I

HISTORICAL PERSPECTIVES OF RESTITUTION

At the outset it is important that interest in the potential utility of restitution and compensation programs be coupled with the recognition that such programs have long historical (and pre-historical) antecedents.

Examination of these antecedents demonstrates that currently discussed objectives, for such programs, are by no means new. We know that in the past such programs were supported not only to benefit victims (a very modern objective), but for other purposes. The novelty of the current idea that restitution programs may have a role in the rehabilitation of offenders fades somewhat in light of historical evidence that protection of offenders and offenders' social groups, not benefits to victims, was the major objective of such programs in primitive and ancient societies.

The Early Roots of Restitution

The distinction between restitution and compensation has contemporary significance. We think of the term "restitution" as denoting benefits provided to the victim of crime by the offender. Compensation, as a term, commonly refers to benefits paid to the victim of crime by the community, not the offender.

In primitive and ancient communities this distinction was not so clear. Compensation (denoting a communal payment) and restitution (suggesting an individual payment)

were substantially interchangeable--because communal responsibility for individual behavior was an unquestioned aspect of societal organization. As Silving indicates, "(law enforcement) was administered wholly or partially by the tribe or other social unit, of which the individual formed an integral part and with which he was identified in such a manner that his loss was not separable from its loss."[1] Thus tribe-to-tribe compensation had the same character as direct victim to offender restitution. As more settled societies developed, as urban communities emerged, and as individual mobility and transience became more common, this became less true. The individual became more identifiable and personally liable for his wrongful acts.

The oldest known statutory scheme for delivery of benefits to victims of crime may represent an evolutionary step in the process of movement from communal restitution to communal compensation--since the payment of benefits did not depend on identification of the offender as a member of the social group (or community) required to provide the benefits. The Code of Hammurabi, dating circa 2380 B.C., provided that "If a robber has not been caught . . . the city and governor in whose territory and district the robbery was committed, shall replace for him his lost property." The

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[1]Helen Silving, "Compensation for Victims of Criminal Violence: A Round Table," Journal of Public Law, Spring 1959, p. 236.

Code also provided that "if it was a life that was lost, the city and governor shall pay one mina of silver to his heirs."[2] The Code went on to recognize individual liability where the specific wrongdoer was identified and caught.

This ability to detach the individual and his personal liability for his acts, from the community of which he is a part, seems to be one measure of social development. In later ancient societies, there were clearer assignments of individual responsibility (via restitution) and communal responsibility (via compensation by the group).[3]

Mosaic law, for example, incorporated restitutive provisions within its penalty structure. Thus the penalty for highway robbery and larceny was restitution often two, four or five times the value of the goods taken, depending upon the circumstances surrounding the offense. Greek and Roman

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[2]Richard L. Worsnop, "Compensation for Victims of Crime," Editorial Research Reports, Vol. 11, September 22, 1965, p. 693.

[3]The distinction between restitution and compensation, which is less important in the most primitive societies, becomes critical as one moves into the modern era. In this sense, the 19th century arguments confusing restitution and compensation (discussed at pp. 11 ff., infra) are instructive. There is some evidence to suggest that the two concepts are once again blending, but in a fashion different from the ancient one. Thus, while primitive man equated restitution with compensation on the basis of the inseparability of the offender from the group, the modern era tends to merge restitutive and compensation ideals based on the inseparability of the victim from the group. In this way, it becomes possible, e.g., for restitution by the offender to be made to the community rather than to the individual victim.

penal codes also provided for restitutive payments with regard to theft--again equal to more than the actual value of the article(s) stolen. Even an individual's death was (compensable) under such codes, as Homer records in the ninth book of the Iliad. In fact, most ancient societies made provision for "death fines" as a fitting punishment for the murderer.[4]

Primitive penal law, then, was largely a law of torts, and as such, as Worsnop has pointed out "crimes that are punishable today by death or imprisonment were then expiated by transfer of a sum of money or property from the offender to the victim or his survivors."[5] The tort-like nature of such penal codes recognized the private and individual nature of the wrong, but sought to redress it through economic means. Thus the rather elaborate system of composition among Germanic tribes sought to transform private retaliation into a law of injury that compensated the victim or his heirs while requiting the deed of the offender.[6]

Restitution probably reached its most refined development under the seventh century code of King Ethelbert of the Anglo-Saxons. Under Ethelbert's penal law, every part of

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[4]Stephen Schafer, Compensation and Restitution to Victims of Crime, 2nd Ed. (Montclair, N.J.: Patterson Smith, 1970), p. 3.

[5]Worsnop, op. cit., p. 693.

[6]Schafer, op. cit., pp.

the body had a compensable value, with injury payments carefully graded to reflect substantive disabilities which affected the victim's ability to work or fight.[7] In addition, the offender had essentially two restitutive payments to make: the Wer (in case of homicide) or the Bot (in case of injury) made to the victim or his survivors; and an additional Wite (or fine) paid to the king in reparation for having "broken the peace."[8]

Neither the power-consolidation nor the revenue-generating elements in such schemes were lost on medieval kings, however, and as political power became concentrated in centralized authorities, both royal and ecclesiastical, the transfer payments due the injured were themselves transferred entirely to the authority. The power to rule was also the power to punish and where punishment took the form of compensation, it was the ruler who was compensated. Shafer describes the situation as follows: "As the state monopolized the institution of punishment, so the rights of the injured were slowly separated from the penal law: composition, as the obligation to pay damages, became

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[7]It is noteworthy that the more recent victim compensation schemes, e.g. in the State of Washington and several Canadian provinces, are somewhat similar in that they follow the practices of workmen's compensation programs.

[8]Schafer, op. cit., p. 7; see also Worsnop, op. cit., p. 695.

separated from the criminal law and became a special field in civil law."[9]

Indeed, by the 16th and 17th centuries, the custom of composition in German common law had become transformed into the "adhesive procedure" whereby a judge in a criminal case could decide whether the restitutive claims of the victim could properly be included as part of the determination in the case and assigned as part of the criminal adjudication. Thus, the judge could decide whether to recognize the victim's restitutive claims within the criminal proceedings or to obligate the victim to seek civil redress separately. In general, civil claims in such a system are handled in a separate proceeding which must be initiated by the victim, since such claims are felt to unduly burden the criminal proceeding. Restitution does emerge in most nations, however, as a potential mitigating force in sentencing where the contrition of the offender is felt to be demonstrated by his compensating actions.

At any rate, the use of restitutive or compensatory schemes in the criminal law had so dimished by the 19th century, that penal reformers decried the disuse of what they saw as a wise and just remedy. Six International Prison Congresses, from the 1885 Rome Congress to the one in Brussels in 1900, addressed in some way the issue of

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[9]Schafer, op. cit., p. 7.

restitution or compensation to the crime victim. Before these congresses, well-respected authorities as well as representatives of the emerging science of criminology presented plans for the re-institution of the practice on a wide scale.[10] Plans such as those of Bentham, Livingston, Ferri, Garofalo, Marsangy and Prins were all discussed at one or another of these international meetings, but despite the efforts of these individuals no clear statement or operational plan for the application of a restitutive system of justice emerged from the Congresses. Instead, the Christiana Congress in 1891 concluded: 1) that "modern law (did) not sufficiently consider the reparation due to injured parties", 2) that "in the case of petty offenses, time should be given for indemnification", and 3) that "prisoner's earnings in prison might be utilized for this end."[11] The Congress fell short, however, of taking a strong stand on the issue or of endorsing any particular restitutive scheme as most practicable or satisfactory. The 1896 and 1900 Congresses (in Washington and Brussels respectively) also failed to achieve a consensus statement on an operational

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[10]For a good review of the background and nature of the discussions at these international meetings see Evelyn Ruggles-Brise, Prison Reform at Home and Abroad, (London: Macmillan, 1924).

[11]As described in Schafer, op. cit., p. 10.

restitutive plan, calling instead for reform to occur through greater facilitation of and access to civil action for the crime victim.

What was particularly interesting about the restitution issue at these congresses was the context in which it was raised. All of the arguments for a revitalized use of restitutive remedies centered around the plight and rights of the victim of crime. Sponsors of the various measures were in no small way impelled in their cause by what they saw as undue concern for the offender. Thus the Rev. William Barnes, in his Notes on Ancient Britain, made the following observation: "the notion that the end of the law is the reformation of the criminal has often made crime beneficial to the man, and sent eyes to watch almost every pulsation of a criminal's life, and ears to listen for every murmur of his uneasiness; while the wronged man is left unheeded under all his wrong."[12] Barnes was to be favorably quoted in 1900 by William Tallack, a leading proponent of restitution to crime victims, saying: "In all countries one hears far more of the grievances of criminals than of the sufferings or claims of their victims."[13]

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[12]As quoted in William Tallack, Reparation to the Injured and the Rights of the Victim of Crime to Compensation, (London: Wertheimer, Lea & Co., 1900), p. 9.

[13]Tallack, op. cit., p. 10.

Some restitution proponents attempted to consolidate a concern for the victim with desired reforms in prison systems, seeing compensation schemes as a way of not only helping victims but also mitigating the harsh level of many criminal sentences. Such was the approach of Jeremy Bentham who presented a strong moral argument for a state compensation system. "Punishment," asserted Bentham, "which, if it goes beyond the limit of necessity, is a pure evil, has been scattered with a prodigal hand, (while) Satisfaction; which is purely a good, has been dealt out with evident parsimony." As far as Bentham was concerned, such "satisfaction" with regard to the crime victim could be secured from the offender's property, but "if the offender is without property . . . it is right to be furnished out of the public treasury, because it is an object of public good and the security of all is interested in it."[14] Thus, Bentham made the case for public compensation to the crime victim.

Others were not so willing to accept this, however, noting that in such cases the victim was forced, through taxation for such purpose, to compensate himself as well as maintain a penal system for the care and punishment of the offender. Still, all proponents had to confront the reality of the insolvent offender from whom little "satisfaction" could be derived for the victim. Most compensatory schemes failed to meet this dilemma. Some lamely suggested that

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[14]For a discussion of Bentham's position, see Worsnop, op. cit., p. 696.

prison earnings of offenders be attached for restitutive purpose while admitting that such earnings were rarely substantial enough to reimburse the state for the criminal's care, much less to provide the victim with any just compensation for the wrong suffered. With no desire to advocate public victim compensation programs and with no practicable alternatives where the insolvent offender was concerned, the Prison Congresses left largely unresolved the issue of restitution.

In the 1950s the debate opened once again, and it was as if no years had intervened. The issues again centered upon the rights of the crime victim and upon his unfortunate plight. In the intervening years, considerable reform had taken place in correctional systems and in the condition of prisoners, but little movement to ameliorate the situation of the victim had taken place, as commentators were quick to point out. Thus Margery Fry was to look positively to the compensatory approach of primitive penal codes. "It is perhaps worth noting that our barbarian ancestors were wiser and more just than we are today, for they adapted the theory of restitution to the injured, whereas we have abandoned this practice to the detriment of all concerned."[15] Similarly, Shafer was to echo the sentiments of Messers. Barnes and Tallack in his

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[15]Margery Fry, "Justice for Victims," in The Observer, (London: July 7, 1957).

observation: "History suggests that growing interest in the reformation of the criminal is matched by decreasing care for the victim."[16]

The 20th Century advocates of the crime victim, however, were not to be frustrated in their cause as were their 19th century counterparts,[17] even though some of the same thorny problems regarding the insolvent offender remained. The improved conditions of prisoners had not reached the point where prison earnings were yet adequate as a source for compensation purposes, nor had more offenders become suddenly solvent and able to make direct restitution to victims. What had occurred, however, was an increasing acceptance of the concept of public crime victim compensation programs and it was through these media that the most recent debates regarding restitutive justice have found resolution.

In many ways this is exceptionally curious, for public crime victim compensation programs, their rationales and their founding principles bear little relationship to the ancient restitutive penalty in either theory or practice. In fact, a careful investigation of the history of the restitutive process, its rationales and application to criminal acts suggests the existence of a set of conditions

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[16]Schafer, op. cit., p.

[17]A historical review of the conceptual and operational development of 20th century victim compensation programs is to be found in Herbert Edelhertz and Gilbert Geis, Public Compensation to Victims of Crime, (New York: Praeger, 1974).

and concerns much different from those present in victim compensation programs--a set of conditions and concerns that must be addressed in any contemporary consideration of restitutive justice.

The History of Restitution Revisited

One of the most interesting misconceptions regarding the history of restitutive justice is that it was a mechanism grounded in a universally-accepted RIGHT of the crime victim to compensation by the offender. A look at some of the earliest restitution schemes suggests, however, that their inspiration sprang from something other than either a recognition of such a right or a humanitarian concern for the victim. Instead, as Akman has noted, restitution programs seem to have stemmed from three major preoccupations in ancient societies: 1) the desire to prevent the "socially disintegrating effects" of privately wrought restitution (i.e., through blood feuds or vengeance toward the offender); 2) the desire to strengthen central authority, and 3) the fear by wrongdoers "of vengeance and their willingness to submit to some type of communal arbitration rather than to risk their property and often their lives."[18]

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[18]Dogan D. Akman, "Compensation for Victims of Crimes of Personal Violence: Ideas and Realizations," unpublished paper, March 1966, pp. 3-6.

Thus, both Mueller and Worsnop have noted the influence of a desire to consolidate central authority as the major motivation behind Hammurabi's code. In a sense the code's provisions penalized local law enforcement for not doing an adequate job by exacting from the jurisdiction tribute for the victim where wrongdoing occurred. Mueller: "Hammurabi's motives . . . are obscure. It is doubtful whether pity for the victim was his dominant concern. More likely it was punishment for malfeasance."[18a]

Similarly, rather than constituting a recognition of the plight of the victim or of his right to exact restitution, early societies seemed more concerned with modifying the increasingly inappropriate and dysfunctional behavior of victims who pursued private vendettas in response to wrongs perpetrated against them. It was, then, more the victim's behavior that was being called into question than the offender's. Even stronger evidence of the greater preoccupation with the offender is revealed in the evolution of the Wite by the Anglo Saxons and analogous payment to central authorities in other restitutive schemes. The payment of this portion of the compensation to the King constituted, in effect, protection money, as it insured against private retaliation by victims or their families. Apparently experience had shown that some victims were not always satisfied with the arbitrated settlements reached by the community and were taking extra

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[18a] G.O.W. Mueller, "Compensation for Victims of Criminal Violence," Journal of Public Law, Vol. 8, 1959, p. 228.

steps against the offender. To protect the former wrongdoer, then, whose crimes were requited by the restitutive payment, central authorities extended after-the-event protection upon payment of a special levy for that purpose. The general consequence for non-payment of compensatory obligations was outlawry, a situation in which one could be killed with impunity.[19] Those victims who persisted in viewing the wrongdoer as an "outlaw"--despite his satisfaction of the assessed restitution--had to answer to the King once the Wite (or similar fine) was instituted in restitution plans.

Essentially, then, the restitutive process shows an historical evolution concerned most with social solidarity, central power consolidation, and protection of the wrongdoer from dysfunctional activities of the victims after the fact. Nowhere does an ingrained concern for the victim seem to emerge as the central issue being addressed. Indeed, Akman suggests, were the victim's needs the central issue, one would have expected restitutive processes to operate quite differently than they did. "As a matter of fact, (the) needs (of the victim) were not assessed objectively, as class distinctions were manifested in the extent of penance. Penance was carefully graded according to the social status of the evildoer and the wronged party."[20] The elaborate

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[19]Schafer, op. cit., p. 6.

[20]Akman, op. cit., p. 4.

restitutive code of the Anglo-Saxons provides an interesting view of the subjective assessment of compensatory fines.

> "A man who 'lay with a maiden belonging to the King' had to pay 50 shillings, but if she were 'a grinding slave' the compensation was halved. Compensation for lying with a nobleman's serving maid was assessed still lower at 12 shillings."[21]

Even more revealing, however, was the fact that restitutive penalties were never generally nor evenly applied. In the Hammurabian code, for example, compensation occurred only where the robber was not captured; where he was arrested, he was put to death. Ancient societies also met the problem of insolvent offenders straightforwardly. Thus, while the Mosaic code called for the thief to remit to the victim, two, four or five times the value of the good stolen, if he were insolvent, he was sold instead into slavery.[22] A similar dual-penalty structure depending upon the status of the offender is found in the Anglo-Saxon code. "If a freeman raped the slave of a commoner he paid no more than five shillings' compensation, but if a slave raped the same girl he was castrated."[23] Shafer's conclusion, then, that

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[21]Worsnop, op. cit., p. 695.

[22]Ibid., p. 693. For a further discussion of the consequences of wrongdoing in the Hebraic and Hellenic traditions, see Ronald L. Goldfarb and Linda R. Singer, After Conviction: A Review of the American Correctional System, (New York: Simon & Shuster, 1973), pp. 320-321.

[23]Worsnop, op. cit., p. 695.

restitution "was the chief and often only element of punishment" is only partly true. Restitution was the chief and only element of punishment for certain people; others experienced a harsher and more direct system of justice. As Akman concludes: "Although class differentiation affected only the degree of penance at first, it was at the same time one of the principal factors in the evolution of systems of corporal punishment. The inability of lower-class evildoers to pay fines in money led to the substitution of corporal punishment in their case. The penal system (i.e., the application of restitutive or compensatory fines) thus came to be more and more restricted to a minority of the population."[24] Restitutive justice, then, had the implicit requirement of solvency on the part of the wrongdoer. Without it, other, less delicate, penalties were applied.

Conclusions From History

A closer look at the history of restitutive justice reveals a penalty system far more concerned with the offender than with his victim. In effect, it was a system based totally on the offender's attributes, his ability to make monetary payments, as well as concern for his well-being once such payments were made. The victim's major importance was in fixing the monetary value of payment to

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[24]Akman, op. cit., p. 4.

be remitted; and that individual's needs were never assessed objectively, but according to rank and social status. As such, restitution provided an alternative to co-existing corporal systems, but it was an alternative accorded only to those of means in the society.

Certainly the growth of central political authorities influenced the dynamics of the restitutive process as kings increasingly took larger and larger shares of compensatory payments assessed under the procedure. To view these movements as the supplanting of some implicit right recognized and held by the victim is incorrect, however, for such a right appears never to have existed. Instead, the assumption of punitive power by States served to supplant the direct relationship between the offender and his victim and in doing so, to police the behavior of victims whose private punitive activities had become increasingly dysfunctional and inappropriate.

The German evolution of the bifurcation of the criminal and civil processes, referred to above,[25] is most helpful in illustrating the separation of the offender from the victim for punitive purposes. As the state assumed the moral and political power to exact punishment from offenders, direct damages claimed by the victim became less and less appropriate to the penal process. The first

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[25] Supra., p. 5.

accomodation was the institution of the adhesive procedure whereby a determination was made in each case regarding the inclusion of victim claims as part of the criminal trial. Increasingly the decisions were in the negative as the victim's claims were seen as either burdensome and/or prejudicial to the criminal prosecution. The final compromise was to maintain the mechanism by which assets could be transferred from offender to victim but to relegate it to a civil forum where the state assumed a neutral role.[26]

There seems to have been a dual rationale in the civil placement of victim claims. First, the amalgamation of both private and public claims in the same procedure ran the risk of confusing the assignment of punitive power to the detriment of the state. Thus, the infusion of private victim claims in what was the state's prosecutive prerogative could serve to denigrate the sovereign power to punish that had been long in developing.

Second, there was a very real concern that satisfaction of private claims might serve to undermine the state's power to deal with criminal behavior. So explicit was this concern that statutes were adopted to specifically interfere with the resolution of private claims arising out of criminal behavior. In the United States, for example, it is a felony in many

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[26]A good discussion of the role of the state in the victim's civil action is to be found in LeRoy L. Lamborn, "Remedies for the Victims of Crime," Southern California Law Review, Vol. 43, No. 1, 1970, pp. 28-29.

jurisdictions to accept restitution for an agreement not to prosecute.[27] In official terms both rationales were manifested in the insistence not only that victim claims be pursued civilly but also that they follow the criminal procedure. In some ways the latter change was likely to have benefited victims who might use evidence and elements of proof in the criminal trial in behalf of their civil suit. Actually, however, the civil-criminal division sounded the death knell for the direct relationship between victim and offender in favor of the state-offender interaction; and as the criminal offender was increasingly found to be insolvent, whatever process had been designed to make him pay the victim became an empty one.[28]

History suggests that restitution was a penal scheme that existed alongside others, that was applied as a substitute to corporal punishment where the offender was solvent and where the needs of the society were seen to be better served in maintaining the offender in some status close to the one existing prior to his offense. In addition, it was a procedure largely civil in nature and applicable only

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[27]See Richard E. Laster, "Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness," University of Richmond Law Review, Vol. 5, Fall, 1970, p. 86.

[28]Goldfarb and Singer, for example, quote the results of the Osgoode Hall survey in Canada which revealed that only 1.8% of the Canadian victims surveyed" had collected anything from the offenders" responsible for their losses. See Goldfarb and Singer, op. cit., p. 133.

where private wrongs as opposed to social wrongs were recognized or at least believed to take precedence. As such, history does not offer much weight to any argument regarding restitution as an inherent right of the victim, nor as a system to be applied on a general scale. Restitutive systems never "solved" the problem of the insolvent offender, because they never confronted him. For those concerned with the plight of victims, therefore, restitution was never a very useful paradigm. Insolvency was, and still is, a prevalent characteristic among much of the criminal population. Because of this, the concept of compensation has largely taken the place of restitution for those interested in the victim. It is quite possible, however, that interest in the offender may lead to a quite different view of the value of the restitution programs, for it is the offender with whom the procedure was traditionally most concerned. Nevertheless, there is very little that our primitive ancestors can offer us with regard to the application of the restitutive ideal. Their concerns and motivations, after all, were far different from those expressed in a highly developed and widely divergent 20th Century society.

SECTION II

THEORETICAL ISSUES

The 20th Century revival of interest in restitution has led to considerable theoretical discussion of the potential usefulness of this remedy. Indeed, the variety of benefits which have been discussed include offender reform and rehabilitation, restoration of losses suffered by victims, and procedural modification or diversion from criminal proceedings. Although it is unlikely that restitutive justice could serve all of these functions equally, a review of the arguments will help illustrate the potential and limitations of restitutive justice.

Rehabilitation and Responsibility. Restitution has been discussed most often in terms of its possible influence on the reform and rehabilitation of the offender. Garofalo refers to restitution as the principle of enforced reparation ("indemnisation"). He suggests that enforced reparation was less destructive than imprisonment, which acts only to demoralize and debase the offender ". . . by the associations of the prison and . . . by the idleness of its regimen." [29]

Others have also emphasized the potential reformative benefits of restitution. Eglash, for example, advocates the use of what he terms "creative restitution", which is

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[29] Raffaele Garofalo. Criminology, translated by Robert Wyness Millar, (Boston: Little, Brown, 1914), p. 391.

characterized by five essential elements:

(1) ". . . an active, effortful role on part of an offender." [30]

(2) ". . . (the) activity has socially constructive consequences." [31]

(3) ". . . these constructive consequences are related to the offense." [32]

(4) ". . . the relationship between offense and restitution is reparative, restorative." [33]

(5) ". . . the reparation may leave the situation better than before the offense was committed." [34]

From the point of view of offender reform, Eglash suggests that restitution in kind will have a greater rehabilitative impact than monetary repayment to the victim, particularly if the crime is a destructive act. Accordingly, in kind restitution . . . "provides a substitute outlet for the same conscious needs and unconscious emotional conflicts which motivated the offense." It is important to the rehabilitative

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[30] Albert Eglash. Creative Restitution: Some Suggestions For Prison Rehabilitation Programs. American Journal of Correction, November-December, 1958, p. 20.

[31] Ibid

[32] Ibid

[33] Ibid

[34] Ibid

process that the offender determines the form in which creative restitution is to be accomplished since "restitution increase(s) the capacity for choice and this may bring release to an impulse-ridden individual."[35]

Stephen Schafer, although less 'psychological' in his arguments, generally supports the theory of creative restitution because it corresponds with his own theory of responsibility. Schafer supports the concept of what he terms "corrective restitution", wherein the offender is obligated to restore the victim to his pre-crime position. According to this scheme, enforced accountability or culpability has the dual effect of furthering the interests of the victim and performing a rehabilitative function as well. It forces the offender to maintain a relationship with the victim, which Schafer views as beneficial, and, simultaneously, allows the offender to be at liberty.[36]

These authors all assume that there is something basically reformative about the acceptance of personal responsibility to "make good" the consequences of criminal acts. This assumption is consistent with the fundamental premise of criminal law, which holds:

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[35]Albert Eglash. Creative restitution. Journal of Criminal Law, Criminology, and Police Science, March-April, 1958, p. 620.

[36]Stephen Schafer. Victim compensation and responsibility. Southern California Law Review, Vol. 43, 1, 1970, p. 66-67.

> . . . that people are individually responsible for their behavior and even in precipitative, provocative situations there are (sic) more than one way of responding. The person who selects the criminal response should thus be held accountable for the consequences of that response. In this view, restitution would be required in that even if the victim did help to precipitate the crime, the offender could have chosen a variety of other alternative modes of response. The latter solution protects the essential dignity by supporting a view of him as an individual capable of making decisions.[37]

Restoration of Victim Losses. Much of the interest in restitution has been renewed because of the developments and activity in the area of public compensation to victims of violent crime.[38] The rationale for public compensation is that victims should not be required to bear the costs of crimes committed against them. The rationale for offender restitution is similar, although offender obligations usually encompass property loss or damage as well as victim injury.

Although some victims would benefit from restitution, the numbers would be very small. Less than one offender is convicted for every fifty major crimes committed. Since no offender is identified in the majority of crimes, most victims could not receive restitution for their losses. As a consequence, many proponents of restitution suggest that victim assistance

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[37] Burt Galoway and Joe Hudson. Restitution and rehabilitation: Some central issues. Crime and Delinquency, 1972, p. 410.

[38] For a comprehensive analysis of the historical development and current programs of victim compensation, see Edelhertz, Herbert and Gilbert Geis. Public Compensation to Victims of Crime, New York: Praeger Publishers, Inc., 1974).

is only a secondary benefit of restitution which cannot be expected to repay more than a small fraction of victim losses.[39]

Destigmatization and Diversion. It has also been argued that restitution offers an exciting and publicly acceptable means to divert offenders at the prosecutorial or sentencing stages of criminal proceedings. Offenders who were required or offered the opportunity to make restitution prior to prosecution would be saved the "stigma" of a criminal conviction. On the other hand, those offenders who were convicted, but allowed to remain at liberty in order to accomplish restitution, would be saved from imprisonment. In the latter case, it is argued, the taxpayers would also benefit from the reduced costs associated with maintaining a smaller prison population.[40,41]

This argument is based on three assumptions that are subject to considerable debate. First, the "distigmatization" argument is relevant only to offenders who have never been convicted of a prior crime, i.e., the "first-time" offender. It is virtually impossible to "destigmatize" an individual with a previous conviction.

The second assumption concerns the rehabilitative in-

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[39]D. B. Kirkham, "Compensation for Victims of Crime." A paper prepared for The Institute of Law Research and Reform of the Province of Alberta, 1968, p. 22.

[40]Garofalo, op. cit., p. 4.

[41]Schafer, op. cit., p. 67.

fluence of the restitution sanction as an effective tool to ensure compliance without encouraging further criminal acts to make payment. If inability to make restitution payment carries a penalty for noncompliance that is more certain than possible apprehension and adjudication for a new offense, persons may commit additional crimes to repay previous victims.

Finally, it is assumed that restitution would reduce prison populations and, thereby, reduce taxes used to support incarcerated offenders. Such an assumption fails to recognize the costs required to administer and supervise restitution schemes which might be developed on a large scale. Some, or all, of the cost savings would be transferred and consumed at an earlier point in the criminal proceedings.

SECTION III
LEGAL PERSPECTIVES

Any research program aimed at the development of models for effective restitution or compensation programs must face the complex legal issues involved, many of which have constitutional dimensions. Such a program must also consider questions of procedure and policy, which can determine the scope, range, and utility of proposed models.

Some questions to be asked are:

- Can an offender be required to make restitution as a condition of diversion from the criminal justice system? As a condition of probation? As a condition of parole? If answers be in the affirmative, are there standards or criteria which must be met? Would answers differ for juveniles and adult offenders?

- Can an offender be compelled to make restitution as part of a sentence or conviction?

- What policies or procedures would expose a program to challenge based on discrimination with respect to economic status? With respect to race or ethnic origin?

- What compliance procedures would be available to enforce restitution orders? Against offenders in the community? Against those incarcerated or under some form of restraint?

- To what extent can differential restitution requirements be imposed, based upon offenders' economic status or on damage to victims? Before charges filed? Prior to conviction? While incarcerated or under some form of restraint?

- How can restitution procedures be made compatible with the responsibility of prosecutors to exercise their prosecutive discretion?

- Who shall be eligible for restitution or compensation? Only victims? Those in privity with victims, e.g., insurers?

This report is necessarily limited in scope, and therefore does not purport to be an exhaustive examination of the relevant legal issues. It does address these issues, however, to the extent necessary to provide a basis for future research steps.

Conclusions and case citations should be viewed with caution. Restitution programs have nowhere been so well developed, so active, and so pervasive in their involvement in the criminal justice system, as to provoke the breadth and intensity of legal challenges which could be an adequate basis for conclusions as to what is and what is not possible. Further and more exhaustive legal research will undoubtedly be necessary, as a next step, but new and unforeseen problems will clearly flow from program implementation.

The Stages of Restitution

In considering legal issues relevant to restitution, it is essential to keep in mind the point at which restitution is invoked and the nature and character of the parties involved in the restitution agreement or procedure. Different legal issues will apply, based upon these incidents of restitution.

There is often a tendency not to address the issue of private restitution, where the criminal occurrence is never brought to the attention of the police or prosecutive agencies. Two reasons are cited in this regard. First,

there is little which any proposed restitution model can offer with respect to incidents of crime never within its ken; and second, implicit in any such restitution is the possibility of an expressed or implied promise not to bring the crime to the attention of the police because of the restitution, and this in itself, would constitute a compounding violation.[42]

The omission of a consideration of purely private and unofficial restitution settlements unwisely avoids the important and potentially frequent use of the practice. As Laster has suggested:

> ". . . despite all the difficulties involved in implementing a system of . . . restitution, despite all the coercive techniques of the law to prevent a settlement between the victim and his criminal, despite all the platitudes enunciated by the courts establishing the principle that restitution by the criminal is no defense to a later prosecution, today (private) restitution is very much alive in the system of criminal justice . . ."[43]

A careful review of the present uses of restitution in the pre-intake stages of the criminal justice system and the implications of their application, then, seems in order.

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[42] The elements of compounding may be described as (1) an agreement not to prosecute, (2) knowledge of the commission of the original crime, and (3) the receipt of a consideration. See W. LaFave and A. Scott, Handbook on Criminal Law 526, 1972.

[43] Laster, op. cit., p. 83.

At the pre-intake level, for example, it is probable that substantial restitution occurs privately and without the knowledge or intervention of any official agency. Common examples of this form of restitution include parental payment for property damage caused by children and the assumption of costs associated with injuries incurred in minor assaults. This private form of restitution has the advantage of speed and the maintenance of good will between parties. One limitation to this form of restitution is that, in most jurisdictions, it is a felony for a victim to receive restitution in return for an agreement not to prosecute, particularly when the offense in question is a serious crime.[44]

At the police level, diversion in general, and restitution in particular, is often standard procedure for police officers. This is particularly true in cases involving juveniles. Frequently, police officers and investigators "contact" a juvenile suspected of delinquent involvement. Upon agreement to make restitution, return stolen goods or provide services to the victim, the officer may refuse to refer the juvenile to court for case disposition. Another more recent form of police involvement in restitution that has developed is one in which numerous police departments refer offenders who admit guilt to social agencies which then "arbitrate" a restitution settlement between the victim and the alleged offender.[45]

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[44] James Polish. "Rehabilitation of the Victims of Crime: An Overview." UCLA Law Review, Vol. 21, 1, 1973. One of the attractive aspects of increasing the availability of formal restitution remedies is, of course, the possibility that they will encourage crime reporting as an alternative to compounding.

[45] Personal interview with Major Lawrence Watson, Commander of the Juvenile Division, Seattle Police Department.

The advantages of police-level restitution are obvious. This system offers the benefits of quick settlement for the victim and frees the police officer from any subsequent appearances in court. In contrast, there are very real disadvantages. First, this method of crime adjustment allows the police officer discretionary power that may exceed his/her training and experience. In addition, there is an obvious element of potential coercion and violation of the rights of the alleged offender. This is particularly true in those instances where an innocent person might agree to make restitution, rather than suffer an arrest and any subsequent consequences.

Not all private restitution necessarily occurs outside the knowledge of the criminal justice system, however. Restitution may also take place informally, under the umbrella of the criminal justice system, after arrest and arraignment but prior to the filing of formal criminal charges. This is usually done with the knowledge and consent of the prosecutor and is, theoretically, not a factor in exercise of the prosecutor's discretion whether or not to prosecute. Clearly, the theory cannot be equated with reality. A prosecutor is burdened with heavy caseloads and will exercise his discretion not to prosecute many cases in any event. If the prosecutor stands in the way of a restitution arrangement, he may have an unhappy complaining witness, less helpful at trial. The prosecutor will, therefore,

naturally find it easier to exercise that discretion in the absence of a clamoring victim. If this is the case, the offender who has assets, or who has not yet had the opportunity to dispose of illegally obtained money or property, is in a better position to exploit whatever possibilities may exist to have discretion exercised in his favor.

In magistrate's courts, or other intake agencies or facilities, prior to filing of charges, where there is high volume and the courts are faced with numerous minor assault charges,[46] it is not uncommon for magistrates to effect compositions based upon payment of a doctor's bill or a day's lost wages, and dismiss the offender with a sternly phrased warning.

These exercises of discretion have very real value. They free courts and prosecutors for other tasks, e.g., make possible the implementation of priorities. To the extent that they involve restitution, however, economic discrimination should be considered.

After the filing of charges, but before the trial, much of what has been said of the pre-filing period would apply as well. Restitution, under the egis of the prosecutor

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46 In 1967 it was estimated that approximately one half of those arrested have their cases dismissed at such early stages, under circumstances where it is difficult to effectively exercise good prosecutive judgment. The Challenge of Crime in a Free Society, The President's Commission on Law Enforcement and Criminal Justice (Washington, D.C.: Government Printing Office, 1967), p. 133.

or of a court, may still be discriminatory in that it could play a part in the plea bargaining process, or in a decision to permit dismissals of charges. In such instances, the defendant who has or can obtain the means to make restitution is in a better position to bargain, and has on his side the normal and human tendency of prosecutors and courts who want to do something for victims.

Following conviction, on trial or guilty plea, restitution may be a condition of probation. This is so in the federal system,[47] and has been recommended for retention in proposed federal criminal codes.[48] Numerous states make statutory provisions for restitution on sentencing.[49] One report indicates widespread powers to order restitution in juvenile courts,[50] though some jurisdictions cited have powers only minimally related to restitution in the sense in which the subject is discussed here.

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47 18 U.S.C. 3651.

48 Study Draft of a New Federal Criminal Code, the National Commission on Reform of Federal Criminal Laws, (Washington, D.C.: Government Printing Office, 1970), Sec. 3103(2)(e); U.S. Congress, Senate, S.1, 93rd Cong., 1st sess. (1973); Standards Relating to the Administration of Justice, The American Bar Assoc. Project on Standards for Criminal Justice, Part III, 3.2(c)(viii); Model Penal Code, The American Law Institute, Proposed Official Draft, July 31, 1962, Sec. 301(2)(h), pp. 242-43.

49 Among the states which have such statutes are N.Y., Ga., Cal., Ill., Wisc., Pa., Mass., and D.C.

50 Levin & Sarri, Juvenile Delinquency: A Study of Juvenile Codes in the U.S. (Ann Arbor: University of Michigan Press, 1974), p. 54.

Restitution in conjunction with incarceration, or under restraint of some kind, could involve recourse to prison wages or earnings in connection with assignment to community based correction facilities.

Last but not least, reference should be made to forms of restitution which occur outside the parameters of the criminal justice system, but are influenced by the system. For example: (1) where there has been a criminal conviction, the path of civil recourse (where the offender has means to satisfy a judgment) may be smoothed by the res adjudicata effect of the conviction, and (2) where compensation is paid to a victim under a state victim compensation system, many statutory schemes provide for compensation board actions to recover the amount paid by compensation boards to victims.[51]

Constitutional Issues

(a) Equal Protection and Substantive Due Process

A denial of equal protection may be found under the fourteenth amentment to the U.S. Constitution[52] whenever some public agency directoly or indirectly establishes a class or category of persons and treats them more harshly than others, without having a sufficient justification for doing so.

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[51] Little or no recovery has been had under these provisions. Edelhertz and Geis, op. cit., p. 290.

[52] Nor shall any State deprive any person of life, liberty, or property, without due process of law's nor deny to any person within its jurisdiction the equal protection of the laws.

In the discussion of stages of restitution, supra, references were made to potential discriminatory aspects of restitution programs. The key questions, with respect to equal protection, are whether such discriminations as exist are rational and not arbitrary.[53] States are not automatically precluded from treating persons unequally based on rational classifications and have wide discretion in this regard.[54]

Where no racial classification or fundamental right is involved, the federal courts have strained to find reasonableness in state enactments.[55] Where such fundamental rights are involved, the test will be a stricter one.[56]

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53 Whether a due process or equal protection violation is charged, the test is the same for challenges to state action classifying persons, and then according them different treatment. For examples of due process cases, see, e.g., Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937); Provident Savings Institution v. Malone, 221 U.S. 28 (1911). For equal protection cases, see Williams v. Walsh, 222 U.S. 415 (1912); Finley v. Calif., 222 U.S. 28 (1911); Watson v. Maryland, 218 U.S. 173 (1910); Bachtel v. Wilson, 204 U.S. 36 (1907); Fidelity Mut. Life Assn. v. Mettler, 185 U.S. 308, 325-27 (1902).

54 E.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Morey v. Doud, 354 U.S. 457, 465 (1957).

55 Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959); Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357, (1916); Borden's Co. v. Baldwin, 293 U.S. 194, 209 (1934); Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935); New York Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938); rehearing denied 304 U.S. 588. See also Goesaert v. Cleary, 74 F. Supp. (E.D. Mich. 1947) aff'd 335 U.S. 464.

56 See e.g., DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P. 2d 1169 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

Key restitution issues under the equal protection clause would be such as these:

- Can an indigent offender be deprived of the benefits of a restitution program because he/she does not have the means to make restitution?
- Can an indigent offender be required to take a low paying, or menial, or public service job to make restitution, while those able to pay make direct monetary restitution?
- Where a restitution program lacks clear collection procedures, is there unlawful discrimination in favor of the indigent defendant who does not pay, while others do pay?

There is a substantial body of decisions which vest discretion in the courts to provide for disparate treatment in sentencing. A jail sentence based on failure to pay would appear to be within the discretion of judges, and in the present state of the law it is not at all clear that imprisonment for inability to make restitution would violate the equal protection clause.[57] It should be noted, however, that Williams and Tate brought individual, not class actions, and offered no evidence as to the treatment of indigents generally. No one has yet attempted a class action contesting jail terms, or enforced labor for indigents, while others pay fines out of pocket. The issue is not entirely settled.

Whatever the constitutional issue, the policy considerations are important and should be considered. The National

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[57] Williams v. Illinois, 399 U.S. 235 (1970) and Tate v. Short, 401 U.S. 395 (1971) do not settle the issue. These decisions turned on the fact that the sentences imposed exceeded statutory maximums.

Commission on Reform of Federal Criminal Laws recommended that:

> . . . When restitution or reparation is a condition of the sentence, the court shall fix the amount thereof, which shall not exceed the amount the defendant can or will be able to pay. (emphasis supplied) [58]

This policy echoes that expressed by a New York court, which declared:

> . . . if the suspension of the sentence is to be meaningful, the conditions of the defendant's probation must be such as are within the defendant's capacity to meet, in the light of his financial position and average earnings. [59]

The unusual issue of discrimination in favor of the indigent offender was, in fact, raised by the Supreme Court of the United States when it said that to fail to enforce judgments against those unable to pay (a fine) would:

> . . . amount to inverse discrimination, since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction. [60]

One must doubt that this latter issue will surface meaningfully as a challenge to restitution programs; more likely it will be part of any defense to challenges made on grounds of discrimination against indigent offenders.

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[58] Op. cit., supra., Sec. 3103 (2)(e).

[59] People v. Marx, 19 A.D. 2d 577 (Supr. Ct., App. Div., 4th Dept., 1963).

[60] Tate v. Short, supra., p. 399.

(b) Procedural Due Process

The due process clauses of the fifth and fourteenth amendments promise offenders that they will not be deprived of their liberty in the absence of some rudimentary procedures, such as a hearing.

Any restitution program must necessarily employ enforcement mechanisms to ensure that restitution ordered will be paid. One enforcement mechanism, the strongest one available, would be jailing of the offender who defaults. When there is a hearing, such incarceration will be upheld.[61]

Clearly, any restitution program should be designed to provide for a hearing if, after an original sentence which does not provide for incarceration, offender confinement is sought because of default in payment. This would be even more important if the power be delegated to an administrative body.[62]

(c) Involuntary Servitude

Current theory recognizes the reality that a substantial portion of defendants who will be called upon to make restitution will be indigent and unemployed. In the planning of restitution programs, provision is usually made for providing employment for those ordered to make restitution, raising

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[61] Freeman v. U.S., 254 F. 2d 352 (C.A.D.A., 1958).

[62] Morrisey v. Brewer, 408 U.S. 471 (1972).

questions under the thirteenth amendment to the U.S. Constitution which provides that:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

It is doubtful whether the thirteenth amendment can be interpreted as a bar to restitutive labor ordered as part of a criminal sentence. The amendment makes specific exception for involuntary servitude "as a punishment for crime." Cases in which the Supreme Court has frowned upon criminal prosecutions arising out of state statutes intended to coerce workers to honor their employment contracts,[63] would not seem applicable to the enforcement of court restitution orders duly imposed on sentence.[64]

In one case, interpreting the Georgia Constitution, the Court of Appeals of Georgia directly addressed a comparable issue:

> That restitution to the injured party may be a condition imposed for suspending a sentence upon conviction of an offense . . . does not prevent the sentence from being valid and legal, and is not violative of . . . the (Georgia) Constitution of 1945 . . . providing that (t)here shall be no imprisonment for debt. . .[65]

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[63] Bailey v. Alabama, 219 U.S. 219 (1911); Taylor v. Georgia, 315 U.S. 25 (1942); Pollack v. Williams, 322 U.S. 4 (1944).

[64] Freeman v. U.S., supra., at note

[65] Maurier v. State, 144 S.E. 918, 112 Ga. App. 297 (Ct. of Appeals of Georgia, 1965).

The right of courts to order restitution as a condition of probation is clear. Without reasonable enforcement mechanisms, such power would be relatively meaningless. It is difficult to envision effective enforcement, in the last analysis, without the power to jail a defaulting offender. So long as restitution programs are carefully structured to achieve their objectives (rehabilitation of offenders or making victims whole) and not aimed at exploitation of offenders as a cheap labor source, they should not be vulnerable to attack under the thirteenth amendment. If there are reasonable limits to the amount of restitution ordered, so that offenders are not subjected to hopelessly long terms of bondage, the thirteenth amendment should not pose special problems to the operation of such programs.

Other Legal Issues

The limited survey of legal sources examined for this report pointed to a number of specific issues which should be considered in the drafting of restitution statutes and the structuring of restitution programs. It also served to confirm that the existing body of experience and literature dealing with victim compensation programs has substantial relevance to the subject of restitution.

The specific issues, or areas, are the following:

(a) Scope of Restitution Programs

Any restitution program should be based upon standards for allowable limits of restitution which offenders be required to make. This does not mean that there must be specific limits in dollar amounts.

Many existing or proposed restitution statutes or schemes provide general guidelines. Probation conditions, in the proposed new Federal Criminal Code, drafted by The National Commission on Reform of Federal Criminal Laws[27] sets these standards as follows:

(1) Limits restitution to the damage or injury sustained by the victim.[66]

(2) Requires the court to fix a specific amount, which shall not exceed the amount the defendant can or will be able to pay.

(3) Requires the court to fix the manner of performance.

This last standard is intended to ensure that an offender will be certain as to what will be required of him.

A number of other states, including New York and Illinois, similarly enjoin their courts to take into account the offender's ability to pay.

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[66]This precludes punitive damages. Only actual damages are permitted under the existing federal statute, 18 U.S.C. 3651.

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The value of setting such standards was forcefully stated by Chief Judge Roszel C. Thomsen, of the United States District Court in Maryland, at the 1951 Pilot Institute on Sentencing:

> . . . a schedule for making restitution payments can be an important part of the rehabilitation process and can help develop a greater sense of personal responsibility.[67]
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> * * *
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> . . . Restitution on a weekly basis should generally be made a part of the probation program, unless the family situation is such that the probationer will be tempted to rob Peter to pay Paul.[68]

It is commonly provided that restituion be required only for victims' actual damages. While such provisions would clearly exclude punitive damages, they do not answer at least two important questions:

> Should there be restitution for common law damages, such as pain and suffering, or permanent injuries?
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> Should there be payment for losses covered by insurance or other sources, e.g., continuation of wages under employer sick leave or disability plans?[69]

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[67] The Choice Between Probation and Prison, 26 F.R.D. 365,368.

[68] Ibid.

[69] This question is a thorny one. In several jurisdictions courts have held that insurance or surety companies are not "parties aggrieved." Thus, in People v. Grago, 204 N.Y.S. 2d 744 (Oneida County Court, 1960) a surety company claimed to be a "party aggrieved" because it would be compelled to honor its surety bond and make whole a trade union from which the defendant had embezzled funds. The court held that the surety company was not a "party aggrieved." In view of subrogation clauses, as well as some insurance provisions excluding coverage in the event of non-cooperation by insureds, this question may be expected to recur.

Most statutory provisions authorizing restitution apply at the sentencing stage. It is quite common for a prosecutor to charge only part of the total number of criminal incidents which could be the subject of prosecution, and to accept a plea to only one. Should a defendant be required to make compensation going beyond the damage or harm involved in only one of several charges on which he could have been prosecuted? In State v. Scherr[70] the court recognized that a prosecutor will often charge one of a series of acts, and permitted a restitution order which exceeded the $350 theft charged in the information. The court declared:

> . . . When a court in a criminal suit determines the amount of restitution for the purpose of probation, it does so as part of the criminal proceeding. Such proceeding determination is analogous in its nature to a pre-sentence investigation.

Notwithstanding this statement the Wisconsin Supreme Court in Scherr declined to approve restitution for the victim's losses outside the period of time specified in the information, indicating that it was not about to permit sentencing courts to examine "series of acts" which go very far beyond those for which a conviction is obtained. Limited examination of state cases would indicate that Scherr represents a most liberal, victim-oriented view. It certainly is more victim-oriented than the current federal standard, as enacted in 18 U.S.C. 3651 which provides that restitution

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[70] 9 Wisconsin 418, 101 N.W. 2d 77.

can be required on probation only for "actual damage or loss caused by the offense for which conviction was had." (emphasis supplied)

If one assumes that more serious crimes are, as a rule, more likely to result in the filing of criminal charges, and less serious crimes more likely to result in declinations of prosecution - - - there is strong potential for anomalies in the area of restitutive justice. In criminal prosecutions courts are roughly confined to ordering restitution for harm suffered as a result of the crimes for which conviction was had. Where formal or informal restitution is ordered in the course of a diversion program, or under the supervision of a prosecutor considering how he should exercise his discretion to prosecute or not prosecute, there are no such legal restraints to the imposition of restitution requirements.[71] There is no reason to suspect that special arbitrariness is present where restitution takes place prior to disposition by trial or plea, but the possibility makes it very important to set standards for restitution programs which operate independent of criminal prosecution.

(b) Administrative Measures

There are numerous mechanisms available for making restitution awards, and for enforcing compliance with such awards.

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[71] This would also apply to restitution stemming from exercise of discretionary power by police, lower court magistrates, or other functioning of the criminal justice systems.

Following conviction on criminal charges, judges usually make award determinations as conditions of sentencing. This is not always the case. In State v. Scherr, supra, the Wisconsin Supreme Court obviously did not approve the action of the trial court judge, who delegated to a referee the task of setting the amount of required restitution. The appellate court did not give clear reasons for its disapproval, and the trial court judge's idea warrants further consideration. In California restitution awards are set in administrative proceedings under court supervision. Actual proceedings, in the many states which provide for restitution orders, should be carefully studied to determine the range of options for setting awards, as should the procedures of state victim compensation boards.[72]

Problems arising out of enforcing restitution awards were addressed in our discussion of constitutional issues. The entire body of decisional and statutory law dealing with criminal fines should be applicable in this area. Of course, performance in the collecting of fines has not been a clear success. Some restitution can be made.

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[72] See Edelhertz and Geis, op cit. See also pp.80-83, infra, noting the potential trade-offs and conflicts with victim compensation programs as a specific issue in restitution programs.

(c) Relationship of Restitution to Civil Proceedings

The availability of the remedy of restitution does not and should not prevent private action by the victim of crime against the offender.

It would be dangerous, however, to permit perversion of the restitution process for this purpose. As stated by the Wisconsin Supreme Court in State v. Scherr:[73]

> . . . Neither should the criminal process be used to supplement the civil suit or as a threat to coerce the payment of a civil liability and thus reduce the criminal court to a collection agency.

There are some limited benefits which will flow from a criminal conviction, e.g., the res adjudicata effect of the conviction on issues in the criminal case. Beyond this, however, courts or others involved in restitution programs should not attempt to pressure offenders. To do so, on behalf of victims, might result in unwitting harm to other program objectives, e.g., rehabilitation of offenders.

Conversely, the restitution procedure should not be permitted to inhibit or frustrate civil action by victims. Offenders will not be loath to exploit the existence of restitution orders as a defense. In People v. Stacy[74] the offender was ordered to pay $100 per month until $6,000 had been paid. The victim sued for a far higher amount. The offender moved to stay the probation order requiring restitution payments pending outcome of the related civil

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[73] Op cit. in note 70.

[74] 64 Ill. App. 2nd 157 (App. Court of Ill., 1965); 212 N.E. 2d 286.

suit. The court flatly refused to stay its implementation order, holding that it would be unfair to cut off the $100 monthly payment since this would deter and inhibit the victim's undoubted right to pursue his civil remedies.

Problems can also be expected to arise with respect to the rights of subrogation parties,[75] and with respect to issues arising out of double recoveries, e.g., where victims receive both restitution and benefits from some other source for the same damage but no subrogation rights are invoked.

In actual practice one would expect the relationship to civil proceedings to be a rare problem in the management of a restitution program --- though if it occurs it may be momentarily troublesome. More complex will be the (essentially civil) relationship between restitution and victim compensation, which should result in offenders paying victim compensation boards for award payments to victims --- if victim compensation boards are eligible as "parties aggrieved."[76]

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[75] See footnote 69, supra.

[76] Ibid.

SECTION IV

SURVEY OF STATE PLANNING AGENCIES

Despite the many and varied problems raised by the historical, theoretical and legal perspectives on restitution, the research team was aware of the existence of several restitution projects being implemented and run in various places around the country. (The specifics of these programs are discussed in detail in Section VI.) What was not known, however, was the extent of official experience with restitution existing nationally, the nature of that experience or the general manner in which it might be viewed.

In order to achieve some understanding of the present use of restitution nationally, letters were sent to all State Law and Justice Agencies* requesting information in regard to programs involved with offender restitution to victims of crime. All agencies were informed that the purpose of the inquiry was to provide a preliminary overview of operating programs and identify benefits and problems which might be associated. The inquiry was particularly concerned with experiences related to the legal implications of restitutive justice, penalties for failure to comply, offender screening, victim satisfaction, offender willingness/ability to participate, and the effect of restitution on offender recidivism.

A total of thirty-two State Planning Agencies replied to the request for information. Although this represented only

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*Letters of request were also sent to the District of Columbia, Guam, Puerto Rico, the Virgin Islands and American Samoa.

two-thirds of all agencies contacted, the response rate was much greater than anticipated considering the very short time period in which the survey was conducted.

The results of the survey indicated considerable interest in the area of restitutive justice, but few operating programs (See Table I). Most State Planning Agencies indicated that restitution to the victim of a criminal act was sometimes required of the defendant in a criminal action as a condiction to suspended imposition of sentence, or other sentencing alternatives within the discretion of the Court. In most instances, restitution was made a special condition of probation and the probation agency was responsible for the collection of restitution from offenders and the dispersal of monies to victims. Failure to make restitution payments could result in violation of probation.

Perhaps the most significant finding from the survey was the lack of knowledge concerning the innovative programs which have been developed. Although many agencies were aware of the Minnesota Restitution Center, the knowledge appeared superficial. It was clear that restitution programs have not been well publicized or circulated among agencies responsible for the planning of criminal justice innovations.

TABLE I. State Planning Agencies Which Responded to Requests For Information Related to Operational or Proposed Programs of Restitutive Justice.

Agency	Program	Interest
Alaska	No	Unknown
American Samoa	No	No
Arizona	*	*
California	Yes	Yes
Colorado	No	Yes
Delaware	No	Unknown
District of Columbia	No	Yes
Florida	Victim Services	Yes
Hawaii	No	Yes
Illinois	No	Unknown
Iowa	Not identified	Yes
Louisiana	Projected	Projected
Maryland	No	Unknown
Massachusetts	No	No
Michigan	No	Unknown
Missouri	Yes	Yes
Nebraska	No	Unknown
Nevada	No	Unknown
New Hampshire	No	Unknown
Ohio	Yes	Yes
Pennsylvania	No	Unknown
Puerto Rico	No	Yes
South Carolina	Projected	Yes
South Dakota	Victims' Assistance	Yes
Texas	No	Unknown
Utah	No	Unknown
Virginia	No	Yes
Washington	*	Yes
Wisconsin	No	Unknown
Wyoming	No	Unknown

*Planning Agencies did not identify restitution programs known to exist within the state.

Operational and Proposed Restitution Programs

Restitution sanctions have rarely been translated into systematic programs to be implemented by criminal justice agencies. Although courts occasionally require offenders to make restitution to victims, relatively few formal programs have been developed or proposed.

The most widely known program is the Minnesota Restitution Center which is designed to remove adult property offenders from the State prison to a community residential facility. Residents are expected to gain employment and repay victim losses. Unfortunately, the Center has been beset with a series of problems from the outset. Apparently, community resistance to the location of the facility, administrative upheavals and unpopular selection procedures have interfered with the intent of the project. Indeed, during the first year of operation of this $167,000 project, only $1,400 in restitution was paid to victims and an additional "240 hours of symbolic restitution was accomplished."[78]

More recently, the State of Georgia was awarded a discretionary grant by the Law Enforcement Assistance Administration to develop new corrections programs, including a number of restitution centers for offenders required to compensate

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[78] Exemplary Project Field Report: The Minnesota Restitution Center. Submitted to Mary Ann Beck, Technology Transfer Division, National Institute of Law Enforcement and Criminal Justice, L.E.A.A., U.S. Department of Justice, January, 1974.

victims in cash or make restitution in the form of community service. It is anticipated that as many as 600 offenders might be sentenced to such centers in the first years of operation.[79]

The survey of Law and Justice State Planning Agencies (Table I) indicated considerable interest in restitutive justice. With the exception of the Minnesota Center and Georgia proposal, most planning agencies were unaware of other programs currently utilizing some form of restitutive justice. Thus, despite the interest, there has been no effort to summarize the experiences, problems and results of such programs to assist and guide those who develop criminal justice policy.

The program review which follows describes and comments upon a variety of restitution programs which have been implemented. For the purpose of clarity, the programs have been divided into two sections, i.e., juvenile and adult. In addition, each section has been subdivided by that point in the criminal proceedings where the programs intercede. Thus, the juvenile section describes both diversionary and formal probation restitution programs. The adult section focuses upon programs which divert offenders from prosecution, court and prison as well as those that are incorporated into the penal or parole system.

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[79]For a summary of the Georgia proposal, see Corrections Digest, Vol. 5, 14, 1974, pp. 1-3.

Diversion From Juvenile Court - The East Palo Alto Project

The East Palo Alto Community Youth Responsibility Program (CYRP) was probably the first juvenile program of its kind in the nation. Indeed, this project served as a model for the development of numerous juvenile diversion programs in other jurisdictions, some of which have greatly expanded the restitution element developed by CYRP.[80]

The citizens of the East Palo Alto community are predominantly Black. They had experienced the alienation from "White-dominated" institutions (police agencies, courts, probation departments) and sought a method of response to reduce this alienation through a program of neighborhood crime prevention and a mechanism for the resolution of grievances.

Most juveniles who come to CYRP are referred by police agencies or by school authorities for alleged offenses that normally would be referred to juvenile court. Cases are then reviewed by CYRP staff and a Community Panel hearing is set with the juveniles and their parents. The Community

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[80] The Youth Services Bureau in the Mount Baker district of Seattle, Washington, for example, modeled their Community Board Restitution Hearings after those developed by CYRP. The Seattle project, however, expanded the scope of the restitution requirements to include monetary payments to victims of crime as well as 'symbolic restitution' to the community. To avoid parental repayment of victim losses (and legal issues involved in equal protection arguments) a variety of employment opportunities are made available to juveniles. Since the program is voluntary, juveniles who do not wish to participate or fail to make restitution are referred back to the juvenile court for disposition of their cases through the formal channels of the justice system.

Panel is made up of juveniles and adults from the neighborhood who hear the case, stress the voluntary nature of participation, and determine the consequences. The Panel may decide to dismiss the case or to refer to counseling and/or work task involvement.[81]

The work task involvement is the heart of the restitution portion of the program, although the tasks are more 'symbolic' than real. Approximately 25% of the total population served by the program have actually been assigned work tasks. These tasks usually involve assignments to service organizations and activities involved in community maintenance.[82]

A Panel decision which requires a juvenile to make restitution to a victim carries no legal authority.[83] Once CYRP has accepted a case and determined that restitution is appropriate, failure to make restitution carries no penalty other than the possibility of referral of the case to juvenile court.

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[81] The Community Youth Responsibility Program. Program description published by CYRP, 1972.

[82] "Evaluation of the Community Youth Responsibility Program," prepared by Urban and Rural Systems Associates (URSA), 1973, p. 18.

[83] Personal communication with Mr. William Bowser, CYRP investigator, November, 1974. Mr. Bowser described restitution requirements as "a bluff". He states, however, that numerous employment opportunities are made available to youth and that restitution is usually honored by the juveniles.

Despite an excellent evaluation report, the rehabilitative impact of restitution ('symbolic' through community service or through payment to victims) was not examined by URSA.[84] Thus, the influence of restitution on the commission of subsequent crimes remains unknown.

Juvenile Court - The South Dakota Program

The Pennington County Juvenile Court in South Dakota has developed an extensive restitution component within the context of a Victims' Assistance Program. The purpose of the program is to provide various forms of assistance to victims and "to incorporate restitution and work details as therapeutic elements in court supervision of the juvenile offender as an attempt to instill a fair and just sense of practical responsibility for his behavior in relation to the victim and community."[85] Thus, the program is intended to benefit both the victim and the offender.

When a juvenile is referred to court, there are three major areas of disposition. The first is "warn and release" at the level of the probation officer. This type of disposition may also include restitution for any loss or damage suffered by the victim. It may also include the assignment

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[84]URSA Report, pp. 23-24.

[85]Quoted from the initial Victims' Assistance Program funding proposal, 1973, p. 4.

of hours of public service or 'symbolic restitution'. The second form of disposition is informal probation. Again, the offense is discussed and restitution or hours of public service may be part of the disposition. In informal probation, rules are drawn and agreed to by both the parents and the juvenile. The third form of disposition is that of a formal court hearing. Any restitution or public service requirements are issued as a court order and are included as part of formal probation. No matter what form is used, however, the court has no power to extract the restitution ordered or requested. Instead, "the judge and the members of the probation staff can and do use the tools of probation control to encourage the payment."[86]

During the first year of program operation, 291 juveniles were placed on work detail and accomplished 7,400 hours of 'symbolic' restitution. During this same period, 198 juveniles were ordered to make $10,236 in restitution payments of which approximately $4,000 had been collected at the end of one year.[87]

It was interesting to note that many of the larger victim losses were insured. When restitution was collected for insured losses, monies were paid directly to the insurance company.

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[86]Personal communication with Mr. Camden H. Raue, Offender-Victim Coordinator, Victims' Assistance Program, December, 1974.

[87]"Twelve Month Report" of the Victims' Assistance Program, November, 1974.

The Pennington County program will be evaluated on the basis of three important effectiveness criteria: (1) victim satisfaction, (2) service and restitution performed by juveniles, and (3) a comparison of recidivism rates of juveniles for whom restitution was required with a control group of pre-program juvenile offenders for whom no restitution was required. Thus, although the impact of restitution has not been established for either victims or offenders, the program promises data which have not been forthcoming from other restitution programs. The results of this program should assist in guiding juvenile justice policy in other jurisdictions.

Diversion From Prosecution - The Tucson Project

The Adult Diversion Project is sponsored by the Pima County Attorney's Office in Tucson, Arizona. The purpose of the project is primarily the rehabilitation of "situational, temporary, impulse-oriented law violators"[88] who are diverted from formal criminal proceedings at the discretion of the prosecutor. Although not designed exclusively as a restitution program, payments to the victim are required in the event of loss or damage to property during the commission of the crime.

Participation in the program is entirely voluntary. At any point in the program, however, either the prosecutor

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[88]"Evaluation Report: The Adult Diversion Project", prepared in June, 1974, p. 5.

or the defendant may proceed to trial and judgment. Eligibility for the program is limited to Pima County residents who have had no prior felony convictions and who have not been charged with a variety of serious felonies including murder, robbery, forcible sex crimes, all narcotics and dangerous drug offenses, and organized crime offenses.[89]

In addition to meeting the eligibility requirements, all persons who apply for entrance into the program must be approved by the victim and by the arresting officer. If the victim approves, the participant meets with the victim in a face-to-face confrontation to discuss the crime and any restitution obligations. A schedule of repayment is incorporated into more traditional "treatment" programs, which include employment training and counseling.

The length of program participation is not necessarily related to completion of the restitution obligation. Instead, the prosecutor drops all charges when he/she is satisfied that the "short-term treatment for recent behavior problems"[90] has been successful. Failure to meet the requirements of the diversion contract or commission of a new offense, however, results in refiling the original charge.

Evaluation of the rehabilitative effectiveness of this project has been limited to a recital of anecdotal success

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[89] Ibid., p. 6.

[90] Ibid., p. 9.

stories. To date, there has been no attempt to isolate the correctional impact of the restitution component, although the amount of restitution has been carefully monitored.

A note of caution must be introduced at this point. Frequently, diversion projects of this type are designed to rehabilitate only those offenders who are unlikely to commit subsequent criminal acts, i.e., 'low risk' individuals. The Adult Diversion Program is no exception. Indeed, the "referral policies and criteria 'screen out' the criminal."[91] Any success attributed to the rehabilitative influence of restitution is confounded by the unique qualities of the participants. The potential benefits of restitution cannot be generalized to the offender population as a whole.

Diversion From Municipal Court - The Philadelphia 4-A Project

The Philadelphia 4-A Project (appropriately termed Arbitration-As-An-Alternative Project) is not strictly a restitution program, although restitution is an important element. The primary goal of this project is the administrative resolution of private criminal complaints through diversion of such cases from the Municipal Court.

According to the Evaluation Report, the 4-A Project arbitrates cases of a "petty" variety. The most frequent criminal charges include simple assault, property damage,

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[91] Ibid., p. 5.

larceny and harrassment or disorderly conduct. In most instances, the parties are known to one another prior to the offense, either as neighbors or as family members.[92] The actual process begins with the Municipal Court trial commissioner who first hears the private criminal complaints and then:

> "determines whether to send them to trial or, with the consent of the parties, arbitration in the 4-A Project. Informal hearings are held by trained arbitrators, usually attorneys, who explore the underlying dispute in depth and probe for areas of agreement between the parties. A consent award or arbitration award is made, frequently directing the parties to avoid each other or awarding money damages. If either party fails to comply, and efforts of the staff and arbitrator to exact compliance fail, the case is remanded to court for trial or contempt proceedings."[93]

During the period of the evaluation, approximately 20% of the cases were settled through monetary awards in the form of restitution.[94] Restitution was limited to actual losses or out-of-pocket expenses incurred by the victim.

In contrast to other projects discussed subsequently, violation of an arbitrated restitution agreement does not result in the imposition of probation or incarceration. Violation of the agreement can result, however, in the risk of formal criminal prosecution or contempt proceedings.[95]

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[92] Bert H. Hoff and John H. Stein. Interim Evaluation Report: Philadelphia 4-A Project, prepared December 15, 1973.

[93] Ibid., Summary, p. i.

[94] Ibid., p. 21.

[95] Ibid., p. 56.

Although it is not known whether arbitration offers a viable alternative to criminal justice system processing of private criminal complaints, the experience of the project suggests that restitution can often be achieved through the use of a quasi-judicial proceeding. Although the legal issues require examination, arbitrated restitution may be appropriate in a variety of minor misdemeanor and delinquency cases.

Diversion From Prison - The Georgia Proposal

The State of Georgia recently received a substantial government grant to institute new corrections programs for adult offenders. One of the proposed programs involves the development of four restitution shelters to be located in the cities of Atlanta, Columbus, Rome and Savannah. Although the implicit purpose of the shelters is offender rehabilitation, the explicit functions are more concerned with a reduction in the population of incarcerated offenders through diversion or early release from prison. According to the proposal, the shelters are intended to "provide an alternative to incarceration and reduction of the prison population, intensive supervision, assured victim compensation or symbolic restitution through unpaid volunteer work and opportunity for productive adjustment in the community setting."[96]

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[96]Excerpted from the L.E.A.A. Grant # 74-ED-00-0004 (restitution program). Information provided by Bill Read, Grant Manager of the Georgia Citizens Action Program, Department of Offender Rehabilitation, Atlanta, 1974, pp. 68-69.

Apparently, the program is currently designed to reflect many of the program elements of the Minnesota Restitution Center. However, the Georgia shelters will receive probationers who require close surveillance as well as inmates released from prison under parole supervision. Thus, the resident population will include both diverted and recently incarcerated individuals.

The eligibility criteria proposed for the Georgia shelters differs substantially from those required by the Minnesota Center. Minnesota required a random selection of newly imprisoned property offenders who negotiated a restitution contract with the victim and voluntarily entered the center. In contrast, the Georgia proposal intends to receive referrals directly from the local judiciary and from the State Pardon and Parole Board. The offender's participation will be made mandatory as a written condition of the probation/parole decree.[97]

Offenders will be randomly assigned to one of four participation groups.[98]

Group I. Residence in the shelter, probation/parole supervision, and a volunteer supervisor.

Group II. Community residence but required participation in restitution shelter programs, probation/parole supervision, and a volunteer supervisor.

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[97] Ibid., p. 69.

[98] Ibid., p. 70.

Group III. Community residence, no requirement to participate in restitution shelter programs, probation/parole supervision, and volunteer supervisor.

Group IV. Community residence, no requirement to participate in restitution shelter programs, probation/parole supervision, no volunteer supervisor.

It is assumed that the between group differences will be evaluated on the basis of subsequent recidivism and the extent/kind of restitution made by the offenders.

At this stage of development, the proposal is poorly conceptualized. The purpose of the restitution component appears to be more related to narrower criminal justice concerns, i.e., prison overpopulation, than to rehabilitative potential for offenders or the benefits to victims. The referral mechanism is left to the discretion of local judges and Parole Board members without reference to a more rigorous or consistent system of offender selection. Finally, the random assignment of offenders to four participation groups appears unnecessarily complicated. The groups represent three levels of participation in the restitution programs under two kinds of supervision. The different combinations of between-group comparisons would become so numerous that the results would provide little empirical data of scientific value.

Release From Prison - The Minnesota Restitution Center

The Minnesota experiment is the only operational program in the United States which attempted to test the rehabilitative or correctional potential of restitution. The lessons to be learned from the experiences of this project, however, go well beyond the offenders. The problems involved in the development, implementation and operation of this project portend the difficulties of establishing similar programs in other jurisdictions.

The originators of this program posited that restitution was a logical and viable alternative to the more traditional "treatment" models of corrections and offered more rehabilitative potential than imprisonment. This hypothesis was based on the following assumptions:

(1) ". . . the restitution sanction is rationally and logically related to the damages done."[99]

(2) ". . . the restitution sanction is clear and explicit with the offender knowing at all times where he stands in relation to completing goals."[100]

(3) ". . . the restitution sanction requires the active participation of the offender who is not placed in the position of being the passive recipient of either "therapeutic" or "punitive" approaches to changing his behavior."[101]

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[99] Burt Galaway and Joe Hudson, "Issues in Correctional Implementation of Restitution to Victims of Crime." Paper presented at the American Society of Criminology, 1973 Annual Meeting, New York, 1973, p. 2.

[100] Ibid.

[101] Ibid.

(4) ". . . the restitution sanction provides a concrete way in which the offender can atone and make amends for his wrongdoing and should provide a constructive and socially useful method for him to deal with any guilt that may have been generated by his wrongdoing."[102]

(5) ". . . the restitution sanction should result in a more positive response from members of the community toward the offender."[103]

Although the assumptions which underly the rehabilitative potential of restitution could be the subject of considerable debate, the purpose of the project was to test the impact of restitution as a correctional tool.

The Minnesota Restitution Center was designed to provide an opportunity for convicted offenders to gain employment and repay losses incurred from their criminal acts. The Center was sponsored by the Minnesota State Department of Corrections and, thus, it was a program which operated within the formal criminal justice system. Initially, it was anticipated that restitution could serve to divert offenders at the point of judicial sentencing or during the first month of classification at Stillwater State Prison. Adequate selection procedures were not available at these stages, however, and the decision was made that the Center would not receive residents until their fourth month of imprisonment when the parole board held an initial hearing for each inmate.[104]

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[102] Ibid., p. 3.

[103] Ibid.

[104] Exemplary Project Field Report, op. cit., p. 4.

Although the operation of the Center has been substantially modified, it has remained a community based residential facility. Initially, eligibility was limited to adult male property offenders who did not possess a gun or knife during the commission of the crime, without serious detainers for commission of the crime, without serious detainers for other crimes, and with a minimum of five years of community living since a felony conviction for a crime against persons.[105]

The Center required the use of random sampling procedures to select inmates from the pool of new prison admissions who met these criteria. Then, only willing participants were allowed access to the project. In addition, victims were encouraged to participate in the negotiation of a restitution contract with the offender. When the restitution agreement was completed, it was presented to the Parole Board for review. If the Board concurred with the conditions of the restitution contract, the inmate was released to the Center.[106] Since the resident was released under parole status, failure to abide by the conditions of the contract or the regulations of the Center could result in revocation of parole and return to prison.

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[105] Galaway and Hudson, op. cit., p. 3.

[106] Ibid., pp. 3-4.

The operation of the original project is best described by the originators.

> . . . Central to this program is the collaboration of the offender and the victim in the completion of a contractual agreement specifying the amount, form and schedule of restitution to be made. Program staff function as a third party both in helping mediate the restitution negotiations and, following parole, in facilitating completion of the agreement. In addition, staff members are responsible for monitoring the restitution schedule, helping the resident obtain and maintain work, providing the necessary steps in making use of community resources required by the resident, and generally supervising the terms of the parole agreement . . .[107]

By November, 1973, after one year of Center operation, a number of conceptual and practical problems had arisen. The first of these problems concerned the continued involvement between the victim and the offender. It was assumed that maintenance of the victim-offender relationship would increase the recognition of each as meaningful persons and would facilitate a change in attitude and perception of the other as a human being. Unfortunately, not all 'victims' were human. Many of the offenders were convicted of property crimes against business establishments and institutions whose 'victims' were only representatives of the offended organization.[108] Thus, the personalization of the relationship was often lost.

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[107] Galoway and Hudson, op. cit., p. 3.

[108] Ibid., pp. 5-6.

An additional problem arose in relation to offender eligibility in cases of victim unwillingness to negotiate a restitution contract. As an alternative, the Center allowed offenders to make 'symbolic restitution', which consisted of a specified number of hours of community service in lieu of payments to the victim.[109] Although this was a form of restitution to the community, it did not appear consistent with an important initial assumption of the rehabilitative potential of restitution, i.e., that such a sanction was "rationally and logically related to the damages done."[110]

Once the contracting phase was completed, there was a tendency for the victim-offender relationship to become impersonal. Restitution payments were often mailed to the victim. Staff became engrossed in the day-to-day operation of the program and seemed to place little priority on maintenance of personal relationships.[111]

A major problem developed in relation to the determination of the amount of damages and subsequent discharge from parole upon completion of the restitution contract. First, the amount of damages tended to be relatively small (median of one-hundred and thirty-nine dollars and a mean of three hundred and three dollars).

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[109] Ibid., pp. 6-7.

[110] Ibid., p. 2.

[111] Ibid., p. 7.

The small sums involved in the restitution agreements meant that many residents could complete the contract in a short time and would be eligible for discharge from parole.[112] Apparently, however, the Parole Board has been unwilling to discharge residents with lengthy sentences and they have been "retained on parole subsequent to completing the restitution obligation."[113]

A second problem arose in relation to restitution obligations in the absence of criminal convictions. This problem was the product of the plea bargaining process, which sometimes allowed property offenders to plead guilty in exchange for a reduction in the number of criminal charges. Since the formal restitution obligations were limited to those offenses for which a conviction was

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[112] In A Cure For Crime: The Case for the Self-Determinate Sentence, (London: Cox and Wyman, Ltd., 1965), pp. 48-49, Kathleen J. Smith argues this point. She foresaw this difficulty and noted that in her scheme of restitution, ". . . their offenses would be paid for in a matter of weeks. Which fact will cause some to object that the self-determinate sentence would release persistent offenders frequently, thus causing society and the police the nuisance of more petty crimes, and the expense of more detection and trials. But society has no moral right to imprison people for years for the sake of a few pounds' worth of goods and nuisance. However much some offenders may need prison as a haven, and repeatedly return there, we have no right to prejudge their actions and prejudice their future by detaining . . . . (or supervising) . . . them . . . for longer than the actual offenses they have committed."

[113] Galoway and Hudson, op. cit., p. 8.

obtained, the Parole Board was reluctant to accept this position without the addition of an informal 'moral' obligation to make restitution for other presumed offenses.[114]

One of the lessons learned during the first year of operation was that some residents were unable to complete their restitution obligations. This was particularly true of those residents with a long history of criminal offenses or a pattern of chemical dependence. One Center staff member commented that the "major problem is the middle age(d) alcoholic, 35 to 40 years old, who gets drunk, loses his job and just goes away."[115]

Problems of this kind plagued the program from the outset and interfered with the focus upon restitution as the primary rehabilitative tool. The random selection process resulted in a "population of property offenders who generally lack(ed) marketable job skills, residential or family stability and who (had) chemical dependency problems."[116] The focus of attention tended to turn to more traditional "treatment" methods while restitution was placed in a secondary role. As a consequence, Galoway and Hudson concluded that the:

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[114] Ibid., pp. 8-9.

[115] Exemplary Field Report, op. cit., p. 9.

[116] Galoway and Hudson, op. cit., p. 11.

> original intention of restitution as the sole change mechanism appears unrealistic, especially in light of the severe addiction problems experienced by many of the residents. However, the attempt is being made to retain a primary emphasis on restitution; for example, residents are expected to fulfill their restitution obligations at the same time that they may be dealing with other problems in their lives.[117]

Finally, the Minnesota experiment was not free of the research problems which have proved to be the nemisis of countless other innovative projects. Adherence to the research design, an essential necessary to the scientific integrity of any demonstration project, was subverted in two ways. First, although the pool of potential residents was selected on a random basis, some men so selected refused to participate and, therefore, introduced a bias of unknown proportions. Secondly, and perhaps more important, was the influence exerted by the Parole Board on the selection process. The Board retained the perogative to withhold parole to the Center based upon a review of individual criminal records and restitution agreements.

The implications of this perogative were illustrated dramatically in an article which appeared in the Minneapolis Tribune on January 10, 1974. According to the article, Burt Galoway, Director of the Minnesota Restitution Center, was fired from his job the previous day "after resisting an order by superiors in the State

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[117] Ibid., p. 12.

Corrections Department not to seek an early parole for James D. (omitted)."[118]

Galoway was dismissed by (omitted), project coordinator for the center . . ., who, along with Corrections Commissioner (omitted), "had decided that the (selected individual) was not an appropriate candidate for parole because of the notoriety . . ., and possible criticisms of community corrections if he was (sic) allowed to enter the restitution center."[119]

"In a memo sent to Galoway last week, (omitted) ordered that the restitution center not ask the parole board to release (omitted) because of 'factors of political sensitivity, adverse community sentiment, and the nature of his criminal activity.'"[120]

Galoway refused and was fired. Thus, the first systematic attempt to evaluate the rehabilitative potential of restitution was quashed by political and community concerns. It was anticipated that the random selection process would be discontinued and the experimental nature of the project would be abandoned.

The early demise of the experimental portion of this project eliminated the possibility of obtaining meaningful

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[118] Quoted from the Exemplary Field Report, p. 1. Names are intentionally omitted.

[119] Ibid., p. 1.

[120] Ibid., p. 2.

empirical data. The uniqueness of the project was destroyed by unforeseen internal problems and the resistance of the very correctional system that the Center was designed to improve. The lessons to be learned, therefore, relate more to program design and development than to the rehabilitative potential of a restitution scheme.

Prison Wages - The South Carolina Feasibility Study

A current survey of all State Planning agencies revealed that South Carolina is the only state currently studying means to institute a program of offender restitution within the context of the prison system.[121] A recent Correctional Industries Feasibility Study recommended that the South Carolina Department of Corrections develop employment opportunities that provide inmates with fair wages. The study further suggested that a

> pragmatic, workable restitution plan would be a significant advantage . . . . It would make the program more popular for the public and certainly make it more palatable with the State Legislature. But, to date, no realistic restitution concept applicable to this program has been presented.[122]

Although South Carolina has set aside consideration of the incorporation of restitution in the prison environment, the planning has involved the necessary preliminary

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[121] Personal communication with Harry W. Hiott, Jr., Director of Senate Research and Administration for the State of South Carolina, December, 1974.

[122] The Correctional Industries Feasibility Study Market Research Phase: A Summary of Conclusions and Recommendations, South Carolina Department of Corrections, 1974, p. 7.

priorities, i.e., competitive wages for inmate labor to be followed by discussions of the usefulness of restitution as a means to rehabilitate offenders or to repay victim losses.

To date, no state or federal prison pays wages sufficient to develop a restitution scheme similar to the self-determinate sentence proposed by Kathleen Smith.[123] In addition, although most states provide a victim the right to enforce a restitutive claim against a prisoner's earnings, the laws are of little practical value, since incomes are so small.

The overview of programs illustrates the variety of restitution schemes which have been developed. Despite the lessons to be learned from the experiences of others, little information has been forthcoming in relation to the effectiveness of such programs. Since no truly useful empirical data have been developed, the obvious questions remain. Does restitutive justice really benefit victims? Does restitution offer benefits to the offender in terms of a more effective means of rehabilitation? Are restitution programs practical, i.e., do the benefits exceed the social and financial costs of operation? For the moment, these and many other questions are left unanswered.

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[123]Kathleen Smith, op. cit., pp. 13-14.

SECTION V

SPECIFIC ISSUES

In surveying the programs described herein, and the many options available to jurisdictions which might wish to establish such programs, a number of specific issues emerged as subjects which are worthy of particular attention. They are: (1) selection of crimes which are appropriate for restitution; (2) implications of sentencing; (3) interaction between victims and offenders; and (4) implications of victim compensation programs.

Crime Selection for Restitutive Purposes. A major dilemma which must be addressed is a determination of the kinds of crimes for which restitution might be applied and for which rehabilitation of the offender or victim benefits might be expected. This dilemma is particularly apparent in criminal offenses which (1) do not result in property loss or harm to the victim or (2) do not result in permanent loss of property, i.e., stolen property is recovered. In either circumstance, who is to be made whole?

A review of programs discloses that restitution has heretofore been limited almost exclusively to cases involved with property crimes. The Minnesota Restitution Center, for example, accepts only non-violent offenders convicted of property crimes while the Adult Diversion Project in Tucson excludes all persons charged with crimes of violence, or sexual and narcotic offenses. Nowhere, however, does any project develop a logical scheme of crimes for which restitution is appropriate.

Galoway, et. al,[124] suggest a partial resolution based upon classification of offenders into dangerous and non-dangerous categories. Dangerous offenders, defined as "those who have inflicted or attempted to inflict serious bodily harm, seriously endangered the life or safety of another, or engaged in organized criminal activity," should be excluded from making restitution as the sole penalty for criminal acts. Based upon this decision, it is possible to conclude that restitution might be most appropriate for "non-dangerous" offenders, but it leaves unanswered questions in regard to the kinds of crimes for which restitution is most available.

Adequate legal precedent exists which clearly limits restitution to the harm committed, i.e., the victim cannot enrich himself beyond the actual losses incurred as a result of the offense. Property crimes which involve subsequent recovery of the stolen goods, therefore, would seem to be excluded from restitution schemes for which money is paid to victims. Restitution can be made in other ways, however. British Columbia, for example, has developed a Community Work Service Program as a method to ensure restitution to victims. In those cases where stolen goods are recovered (shoplift, auto theft, etc.) the offender might be ordered to work or provide other services to the victim.[125]

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[125] Based upon an account which appeared in the Seattle Times Newspaper, December 18, 1974, B-5.

It is clear, however, that no careful examination has been made of the crimes or offenders for which restitution is most appropriate. Judicial and program decisions have been based upon ad-hoc determinations that offer no evidence of differential effectiveness which might serve as lessons to others.

Sentencing Implications. Restitution often plays an important role at the sentencing stage of the criminal process. In addition to the use of restitution as a court-ordered condition for suspension of sentence or an award of probation, it can affect sentencing in other ways. Almost all legal jurisdictions recognize restitution performed before sentence as a mitigating circumstance.[126,127] While not technically a defense, an attempt to make restitution even after a case is brought to trial "may move a court or jury to be lenient in its verdict or sentence."[128]

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126 Schafer, Stephen, op. cit, p. 613.

127 Such restitution, however, may not extend to damages awarded in subsequent civil proceedings. According to a recent occurrence in a Detroit suburb:

> [A] man who fired 15 bullets into a young newspaper delivery girl . . . because he mistook her for a hired killer, will pay the girl's funeral expenses . . . The Perchman family has accepted his offer to pay for the girl's funeral expenses, with the understanding that [this] will not free Acosta from future civil damage claims, Corrections Digest, September 4, 1974, page 3.

128 Goldfarb and Singer, op. cit, p. 132.

In most instances, this "leniency"[129] is translated into a sentence of probation with additional restitution conditions. This sentence is often considered a 'reward' since many courts consider probation a "privilege rather than a right."[130] The defendant has the alternative of jail if he/she dislikes the restitution conditions.

A myriad of legal issues arise with regard to the use of probation as a sentencing device to secure restitution. First, it is often extremely difficult to determine the actual loss or out-of-pocket expenses incurred by the victim, and there is some question whether the criminal court provides the most appropriate forum for that determination.[131] Secondly, court imposed restitution as a condition of probation raises the possibility that offenders with means will "buy their way out." Less privileged offenders would either be denied probation because of their anticipated inability to make restitution or, if granted probation, they would be unable to fulfill the conditions. This consideration has led some to reject such sentences as denial of equal protection. A final and not unrelated problem concerns the penalties for failure to make restitution. Such a failure can lead to the revocation of probation, and, thus assumes the appearance of imprisonment for debt.[132]

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[129] The National Advisory Commission on Criminal Justice Standards and Goals recommends that "probation be considered a sentence rather than a form of leniency." This is consistent with the view that probation, and attached restitution conditions, should be imposed when such a sentence serves the needs of the offender and society. Volume on Corrections. U.S. Department of Justice, Government Printing Office, 1973, page 160.

[130] Laster, op. cit., p. 91.

[131] Laster, op. cit., p. 95.

[132] Polish, op. cit., p. 324.

Victim-Offender Interaction. When restitution is required as a condition of probation or suspended sentence, the terms of payment are generally set by the court. The court (usually a probation agency) receives payment and forwards monies to the victim. Thus, the formal system of restitution virtually eliminates personal interaction between the victim and offender.

Many of the innovative restitution programs[133] require such interaction, because the personalization of the crime and its consequences is thought to be rehabilitative for the offender and healing to the victim. Rather than the court, the victim and the offender negotiate a "contract" which specifies the amount (or kind) of restitution and the schedule of payment or service to be rendered.

Despite any rehabilitative benefits for offenders, required interaction has potential liabilities for the victim. At a minimum, negotiations require the time and effort of the victim. It seems questionable whether a victim should be twice penalized; first by the crime and then by being asked to assume a burden because he has already been wronged. In addition, however, it may force the victim into a situation which is uncomfortable, or even fear producing. This point is dramatically demonstrated in the 1972 case of a confessed rapist.

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[133]The Minnesota Restitution Center, the Adult Diversion Program, the Community Youth Responsibility Program and the Seattle Youth Service Bureau attempt to maximize victim-offender interaction.

> Watson will be eligible for parole in 15 years, but whenever he is released, said the judge, he must pay 40% of his income for the rest of his life to the two sons of the housewife he killed. (The husband said) the payments could only serve to remind his sons of their mother's murder, and might even put them in physical danger from Watson or his friends. (The husband) was going to be forced into the . . . position of hiring a lawyer to have the payment of reparations removed from the sentence of his wife's killer.[134]

The extent to which extensive victim-offender interaction is rehabilitative is not known. Whatever the potential benefits, however, they should be weighed against the best interests of victims.

Restitution and Victim Compensation. The relationship of victim restitution and victim compensation programs is a close one. They complement each other, but in some instances their operation are likely to need integration.

The greatest proportion of crimes committed are never cleared. Restitution programs potentially provide remedies only for victims of offenders who are apprehended; compensation programs potentially provide remedies to victims of crime whether the offender is apprehended or not. Restitution programs rarely provide specific limits of benefits to victims; compensation programs, except in rare instances, have very specific dollar limits. Restitution programs usually provide potential benefits to all crime victims; compensation programs usually offer benefits only to victims of violent crime --- and sometimes only to those who can show financial need. Victim benefits are payable under compensation programs by the state, not the offender; therefore, the financial ability of the offender does not influence receipt of benefits by the victim. In restitution

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[134] Time Magazine. May 8, 1972, p. 61.

programs, family or personal relationships between offender and victim are no bars to recovery; in victim compensation programs they are usually an absolute bar. Restitution programs are generally concerned with rehabilitation of offenders; offender's future prospects are generally irrelevant to the operation of victim compensation programs.[135] These rough comparisons are set forth for ready reference in Table II below.

TABLE II. Comparison of Remedy Limitations in Victim Compensation and Restitution Programs On Selected Variables.

Limiting Variable	Victim Compensation Remedy	Restitution Remedy
Requirement of offender apprehension	Not necessary	Necessary
Presence of benefit limits	Generally true	Rarely true
Victim eligibility requirements	Generally only victims of violent crimes	Theoretically, no limitations by type of crime
Financial need of victim	Sometimes necessary	Not necessary
Determination of offender financial ability	Not important	Very important
Presence of offender-victim family relationship	Prohibits receiving benefits	No bar to benefits
Concern for offender rehabilitation	Irrelevant	Extremely relevant

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[135]For a general discussion of operation of victim compensation programs, see Edelhertz and Geis, op. cit., footnote 17.

Victim compensation programs are proliferating throughout the United States. By the beginning of 1974, comprehensive programs had already been established by the statutes of Massachusetts, New York, New Jersey, Maryland, Alaska, and Hawaii; less comprehensive or nominal programs had been established or authorized by the legislatures of California, Nevada, and Georgia. During 1974, the California program became a comprehensive program, and new programs were established in Illinois and Louisiana.

Federal legislation, which would provide for compensation in the District of Columbia and seventy-five percent of the costs of state programs (to the extent state benefits are co-extensive with those prescribed for D.C.) retains overwhelming support in the U.S. Senate. In the U.S. House of Representatives, where Senate approved legislation was blocked on several occasions by the House Judiciary Committee, the Chairman of that Committee has evinced interest in such legislation and introduced his own bill. Prospects for enactment of such legislation, with consequent pressure on states to avail themselves of the grant-in-aid benefits, appear favorable.

Existing victim compensation programs already provide a substantial body of experience with respect to the questions

of how damages to victims can be assessed and audited. The Massachusetts program illustrates how this could be done through the courts. Other programs, such as New York's, show how this could be done through administrative agencies. In the new program set up in the State of Washington, the use of workmen's compensation machinery and procedures for this purpose may be examined.

In view of the complexities and difficulties of having courts assess harm, check medical bills, etc., consideration should be given to the potential benefits of references to victim compensation boards to investigate and make assessments for restitution purposes. This would probably not be practical unless there is a substantial increase in the volume of restitution orders, and enabling legislation would be necessary. Since victim compensation programs are likely to be the focal point of victim-oriented concerns within the states, and restitution programs are likely to remain more offender-oriented, the development of these and other relationships between the two types of programs is essential.

Recommendations For The Design and Content Of Future Research

The preceding survey and analysis of past and present experience related to restitutive justice shows the limited extent of knowledge which can be developed on an initial survey. In addition, it illustrates a set of often conflicting objectives, of counterbalancing concerns and of presently unanswered issues and problems. For these reasons, it is quite clear that much careful research (of both an action and conceptual nature) is warranted before the restitutive remedy can be implemented on a wide scale.

Although restitution programs raise a myriad of theoretical and practical issues, there is no evidence to suggest that these issues cannot be resolved if careful study and thoughtful design precede implementation of restitutive programs.
The foregoing analysis has not only raised the issues presented by restitution, it has clearly indicated the directions such research should take to resolve them and to contribute to informed policy decisions with regard to restitutive justice.

Section III (Legal Perspectives) discussed the decision points within the criminal system at which restitution has been implemented. Although model restitution programs could be

instituted at any of these levels, it is recommended that any new action demonstration projects be incorporated into the formal system, i.e., the programs operate under the direction and control of official agencies. This restriction would eliminate (for the purposes of demonstration only) those programs which seek restitutive justice on an informal or pre-charge stage. Despite the fact that these programs may have great merit, present needs dictate tightly controlled projects which are capable of producing useful information and data. Programs which depend upon diversion prior to charge are subject to unsystematic discretion and inadequate methods of participant selection. Thus, it is recommended that model programs be considered only at the levels of post charge (prosecutor), post conviction (court or probation/parole), and post sentence (prison or parole).

These programs should be based upon the setting of standards and criteria governing the following:

- extent of restitution
- parties entitled to restitution
- payment capability of the offender
- measures to minimize impacts of economic discrimination between offenders
- development of appropriate liaison between court officers and staffs of correctional and rehabilitative agencies

Each program should consider and develop procedures to provide employment for indigent offenders. In addition, programs should consider and select options for ensuring compliance with restitution orders, including the utilization of non-judicial agencies.

From Table III it can be seen that the recommended model programs are limited to participants who have been charged, or convicted, or sentenced. Thus, the award makers are limited to prosecutors, judges (or administrative agents), and Parole Boards, which are required to make several important considerations prior to the restitutive judgment.*

Compliance opportunities must also be examined. In cases of in kind or 'symbolic' restitution, the opportunities are generally related to the provision of services. In cases of payment, compliance may require the provision of employment opportunities and associated costs.

Every program must have a collection mechanism (or monitoring mechanism, in cases of 'symbolic' restitution). This mechanism must be an official agency capable of monitoring payments and reporting to the award makers in cases of noncompliance.

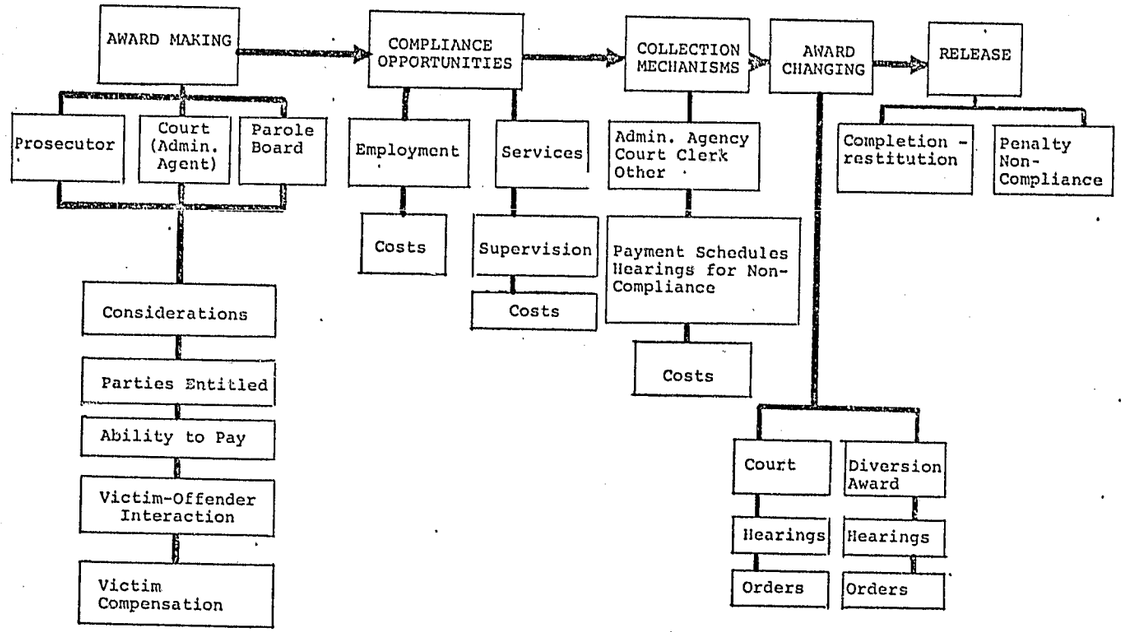
It is not anticipated that awards are static. In many instances, awards may require modification, either through a

*Restitution programs operated within prisons are excluded from consideration for the following reasons: (1) prison wages are so inadequate that restitution requirements would be meaningless, and (2) any such requirements would be hollow without release upon completion of repayment.

formal procedure, such as court, or through some informal proceeding or hearing.

Finally, there must be some standardized "release" mechanism when restitution is completed. This release should occur immediately upon completion of all restitutive requirements.

TABLE III. Flow Chart of Substantive Elements in Model Restitution Programs



Other areas which require research include:

- Detailed study of state and federal statutues bearing on the subject of restitution. The objectives of this study should be to identify and catalog options available, to determine the nature of problems which have arisen in the past with greater specificity than is now possible, and to identify case study material which might shed light on the restitution issues raised in this report. The results of such a study should help develop more sophisticated restitution program plans, and serve as a basis for legislative recommendations.

- Studies of existing victim compensation programs to determine how their operations can be integrated with various proposed restitution programs, e.g., in connection with the determination and verification of victim damage claims, mechanisms for payment to victims, elimination or lowering awards based on contributory fault on the part of victims, etc.

- Cost benefit analyses, to consider comparisons between costs of restitution programs providing different levels of benefits, and other programs intended to aid victims and/or correct offenders. Such studies should take into account possible savings to other social service systems

or parts of the economy, e.g., the degree to which compensation would be set off against Medicare and Medicaid payments, costs of welfare, costs of fringe benefits to employers, and costs of other kinds of correctional programs.

Finally, it is also necessary to anticipate the effects of the victim-offender interaction. The problems associated with this interaction are discussed in a preceding section and it is apparent that this is an important consideration of project design. At a minimum, the following areas should be examined prior to program implementation:

- the purpose of any interaction between offenders and victims
- anticipated benefits and liaibilities of interaction
- method or level of interaction in cases which involve commercial establishments or institutions as "victims"
- role of the court or program in this interaction, i.e., negotiators, agents, "payees", advocates, etc.

All of these areas require attention before projects commence. The legal and humanitarian aspects are of such a nature that they cannot be ignored nor can a "let's wait and see what happens" posture be adopted.

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In order to implement a model restitution program, it is necessary to design a model which will meet four basic criteria. First, the program design should be simple. Only those areas of fundamental interest should be incorporated into the research. Other elements, although interesting, should not be allowed to interfere with or confound the restitutive element of the program. Second, the program requires acceptance and support from the formal system of criminal justice. This requires considerable preparation and education of those persons who would be instrumental in the successful operation of the program. In addition, the program itself must be credible. Program operators, staff and researchers must know, and be able to convince others that they know, the purpose and anticipated benefits of the program. Once credibility is established, criminal justice personnel, offenders and victims should be more willing to cooperate. Finally, there should be some "reward" for completion of all restitution requirements. In the absence of other conditions which might be imposed, completion of restitution should "release" the offender from further obligations to the criminal justice system.[136]

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[136] A related challenge is to avoid specially penalizing an offender because a restitution program is in effect. Care should be taken not to incarcerate offenders for non-payment, who would not have been sentenced to prison for their original offense.

We recommend an action-research model which is designed to satisfy the considerations mentioned above, i.e., simplicity, understanding and acceptance. It should be aimed at the development of a body of empirical data to test the extent to which the objectives of restitutive justice are met. Such a model should meet the following criteria:

A. The purpose of restitution should be clearly specified. It is recommended that the objectives be limited to the following:

(1) offender rehabilitation, i.e., reduction in subsequent criminal arrests or convictions;

(2) victim or community benefits, i.e., recovery of losses or services performed;

(3) criminal justice system benefits, i.e., reduction in prosecutions, in jail or prison populations, cost benefits, reduction of court time, etc.

B. Restitution should be the primary purpose of the program. The energies of the program staff should be directed toward facilitation of the restitution obligations (development of employment opportunities, etc.). The program should resist the temptation to rely or "fall back" on more traditional methods of treatment of offenders.

C. All demonstration projects should incorporate a research design into the program. It is incumbent upon the program to develop empirical data which will determine the effectiveness of restitution. To accomplish this, the research

design should include the following:

(1) clearly specified requirements for program eligibility based upon the characteristics of the offense or characteristics of the offender;

(2) chance or random method of selection from a pool of eligible offenders, i.e., the development of comparable "experimental" and "control" groups;*

(3) written guarantees from appropriate criminal justice personnel that they understand and will support the provisions of (1) and (2) above;

(4) capability to follow the progress of program participants and "controls," i.e., comparisons of subsequent arrests, convictions, revocations, etc.;

(5) capability to monitor amount or kind of restitution completed and victim satisfaction;

(6) capability to conduct a comprehensive cost-benefit analysis based upon criminal justice, program and allied expenditures and savings, including costs of other social programs in the community.

(7) capability to determine and monitor program effects on other elements of the criminal justice system.

D. Finally, the program must have the capability to monitor and evaluate victim-offender and offender-system obligations. Whatever the level of interaction between victims and offenders, the program must be able to measure progress towards fulfillment of the restitution requirements. Upon fulfillment, it will be the responsibility of the program to facilitate the "release" of the offender from any further criminal justice obligations.

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*We recognize that there may be legal or policy considerations which will make this difficult, but these problems may be eased by dealing with groups rather than with individual offenders.

CONCLUSION

Research in the area of offender restitution to victims of crime gives clear promise of benefits to our systems of criminal justice. In the area of corrections, it raises the possibility that new and constructive options for treatment, supervision, and interaction with offenders may be made available. To those concerned with making our criminal justice systems respond more evenhandedly to offenders whether they have means or are indigent, challenging opportunities are presented. To victims, such programs improve the prospects of a criminal justice system which will move toward treating them as subjects of system concern, especially if victim compensation systems are simultaneously in existence. Clearly, however, none of these promised benefits are likely to be realized in the absence of careful research which produces reliable empirical data, and clear delineation of program goals.

Respectfully submitted,

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