

Ball CR sent  
7-15-85

# OFFICE OF POLICY ANALYSIS, RESEARCH & STATISTICAL SERVICES

## NEW YORK STATE DIVISION of CRIMINAL JUSTICE SERVICES

### RESTITUTION: A HISTORICAL AND LEGAL REVIEW

February, 1985

U.S. Department of Justice  
National Institute of Justice

97522

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

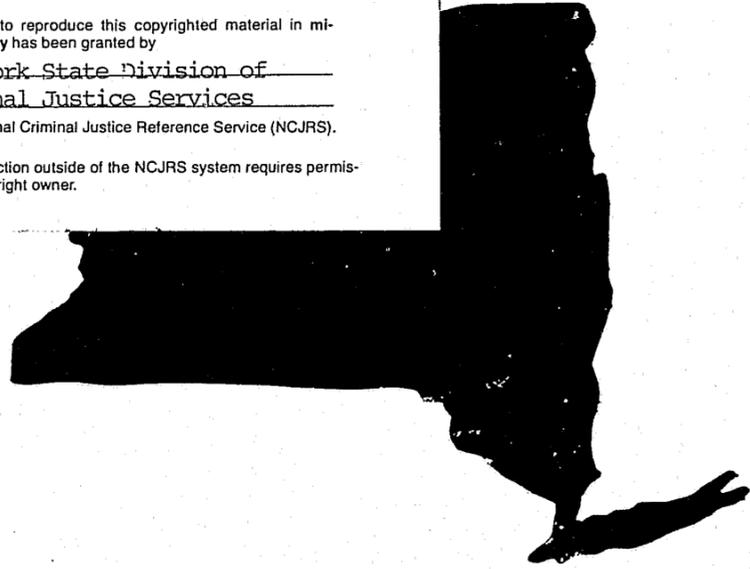
Permission to reproduce this copyrighted material in microfiche only has been granted by

New York State Division of  
Criminal Justice Services

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

97522



97522

NEW YORK STATE  
DIVISION OF CRIMINAL JUSTICE SERVICES  
Richard J. Condon  
Commissioner

OFFICE OF POLICY ANALYSIS, RESEARCH AND STATISTICAL SERVICES  
Sherwood E. Zimmerman  
Deputy Commissioner

RESTITUTION: A HISTORICAL AND LEGAL REVIEW  
March, 1985

Bureau of Program and Policy Analysis

Prepared By:

Steven S. Brown  
Valerie A. Willison

CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
HISTORICAL AND THEORETICAL OVERVIEW.....	2
Historical Background.....	2
Theoretical Considerations.....	6
Systems Issues.....	6
Sociological Issues.....	7
SUMMARY AND POLICY IMPLICATIONS.....	9
LEGAL ISSUES.....	12
Definitional Problems.....	12
Restitution at Various Stages Within the Judicial System.....	13
Private Restitution.....	13
Compromise and Settlement.....	13
Civil Remedies in Criminal Codes.....	13
Civil Remedies and Public Compensation.....	14
Pre-trial Restitution.....	14
Restitution at Sentencing.....	14
Restitution and Incarceration.....	16
Scope and Legal Limitations.....	18
Legally Eligible Recipients.....	18
Offense Limitations.....	18
Recoverable Losses .....	19
Conflicting Issues.....	19
Procedural Safeguards and Regularity	
Involved in Restitution Orders.....	21
Enforcement Provisions.....	22
RESTITUTION IN NEW YORK STATE.....	26
FOOTNOTES.....	31

## INTRODUCTION

The use of restitution as a criminal sanction has drawn interest as alternatives to incarceration are increasingly called for and utilized in this country. Restitution is a noncustodial sanction through which nondangerous or non-violent offenders make payment to their individual victims or society in the form of monetary reimbursement or community service. A sentence to restitution is viewed as benefitting the offender from a rehabilitative standpoint, and victims and/or the community in general, in terms of compensation and enhancement of public confidence in the justice system.

This paper provides an overview of the concept and use of restitution and raises certain policy implications. Included is a review of the historical development of this alternative sanction, an overview of the use of restitution at various stages within the judicial system, and a discussion of the scope and legal limitations of this type of sentence. In addition, recent New York State legislation and existing statutes as well as available data regarding the use of restitution in this state are included.

## HISTORICAL AND THEORETICAL OVERVIEW

### Historical Background

The concept and practice of criminal restitution can be traced historically to ancient societies. It has been theorized that in such societies, ideas of restitutive justice were developed in response to: the desire to prevent the socially disintegrating effects of privately wrought restitution (which took the form of blood feuds or vengeance toward offenders); the trend toward a strengthened central authority; and a growing willingness on the part of offenders to submit to communal arbitration rather than risk the vengeance of their victim(s).<sup>1</sup>

One of the oldest known statutory schemes for the delivery of benefits to victims of crime is found in the Code of Hammurabi, which dates to the period around 2380 B.C. The Code provided that "if a robber has not been caught...the city and the governor in whose territory and district the robbery was committed, shall replace for him (the victim) his lost property."<sup>2</sup> In addition, it provided that "if it was a life that was lost, the city and governor shall pay one mina of silver to his heirs."<sup>3</sup> The payment of benefits did not depend on identification of the offender, but individual liability was recognized in cases in which an offender was identified and caught.

The concept of restitution was refined in later societies and distinctions between individual responsibility through direct restitution and communal responsibility through victim compensation by the group, became more evident. Mosaic law, as well as Greek and Roman penal codes, incorporated provisions for restitutive payments.<sup>4</sup> These penal codes were tort-like in nature and while recognizing the private and individual nature of an offense, they sought to bring about redress through economic means. Germanic tribes, for example, implemented an elaborate system of composition (a combination of compensation, punishment, and settlement) which transformed private retaliation into a formal

law of inquiry that allowed for the compensation of the victim or his heirs and avenged the deed of the offender.<sup>5</sup>

Under the 7th century Anglo-Saxon penal code of King Ethelbert, the concept and practice of restitution reached its zenith. According to that code, every part of the body had a compensable value, and required payments were directly related to disability in terms of the victim's ability to work or fight.<sup>6</sup> The offender was required to make two restitutive payments: in the case of injury, the "wer" which refers to payments made to the victim or his heirs; and the "wite" (or fine) which was paid to the King in reparation for having broken the peace.<sup>7</sup>

The payment of a fine to the King signified the onset of a transformation in the nature of restitution, in which the victim's right to direct restitution was increasingly obscured by the payment of fines to the State. This transformation coincided with the movement toward concentration of political power in centralized authorities.

As the State monopolized the institution of punishment, so the rights of the injured were slowly separated from the penal law: composition (compensation, punishment, and settlement), as the obligation to pay damages, became separated from the criminal law and became a special field in civil law.<sup>8</sup>

Thus, the dynamics of the restitutive process were influenced by the growth of central political authorities. As the State continued to assume increasingly large shares of assessed compensation, the opportunity for victims of crime to claim direct damages became less and less available in the penal process.

During the 16th and 17th centuries, a division between civil and criminal proceedings was further established, signaling the end of a direct legal relationship between victim and offender. In this period, the focus of the restitutive process shifted to a State-offender interaction. The result was a dimin-

ished emphasis on harm to the victim and a reinforcement of the concept of harm to society. This change increased the justification of the State's role in punishing offenders.<sup>9</sup> It became an accepted process for a judge in a criminal case to make the determination as to whether to include the victim's claims as part of the criminal proceedings, or whether to relegate such claims to a civil court. Few decisions to hear victims within criminal proceedings ensued and, ultimately, procedures were developed allowing assets to be transferred from offenders to victims only within a civil forum, with the State assuming an arbitrational role.<sup>10</sup>

By the 19th century the process had come full circle. The decline in the use of restitution and other compensatory schemes caused penal reformers to call for an increase in the use of these sanctions. The issue of restitution/victim compensation was addressed at a series of six International Prison Congresses which took place between 1885 and 1900.<sup>11</sup> Authorities in the emerging field of criminology such as Bentham, Ferri, Garofalo, Livingston, Mansazy, and Prins presented plans that incorporated the concept of restitution. However, despite arguments advocating the revitalized use of the sanction, no clear proposal for a restitutive system of justice was produced by the congresses.

The debate surrounding the use of restitution emerged once again in the 1950's, with a focus on the rights of victims. The systematic increase in use of restitutive sanctions in the United States was linked to the advent of suspended sentences and probation laws. Subsequent to the introduction of probation during the late 1800's, some probation contracts began to make explicit provisions for restitution as a condition of probation.<sup>12</sup> By the late 1920's, specific mention of restitution had been made in the statutes of eleven states as well as those of the Federal jurisdiction.<sup>13</sup> There has been an increase in the statutory authorization and use of restitution since the 1920's. This increase can be attributed to a number of factors, including: the endorsement of restitution by respected authorities in the area of criminal justice; the development of the field of victimology; and, funding support from the federal

government for the development of restitution programs and for research on restitution.<sup>14</sup>

As contemporary restitution programs have developed in the United States, they often include both monetary and community service components. Because of this combination, it is difficult to discuss restitution and community service separately. The use of community service as a type of restitution may be traced to the current correctional emphasis on offender rehabilitation as well as the widespread problem of offender indigency. Thus, the idea of direct monetary victim compensation is not always central.

Four distinct types of restitution exist, although programs may offer one or more of the following options:

- \* monetary restitution to the victim;
- \* monetary restitution to the community, which involves the payment of money by the offender to a substitute victim (a public establishment);
- \* victim service restitution, which requires the offender to perform a useful service for the victim; and
- \* community service restitution, which involves the offender in performing a useful community service.

Restitutive sanctions have been advanced as benefiting offenders, victims, the criminal justice system, and the community at large. Among the major goals of restitution programs which have been suggested are: offender rehabilitation and reduced recidivism; a reduction of the intrusiveness of the offender's experience with the criminal justice system; victim compensation for losses suffered; an increased perception that equity has been restored; relief of the overburdened criminal justice system through a reduction in court cases and probation caseloads; alleviation of overcrowding in correctional institutions; and, a reduction in the costs of processing offenders through the system.<sup>15</sup>

## Theoretical Considerations

### Systems Issues

Some have suggested that restitution is less destructive than imprisonment and is, therefore, a possible influence in the rehabilitation of offenders.<sup>16</sup> Schafer, a leading authority in the area, supports the concept of what he termed "corrective restitution," which emphasizes the offender's obligation to restore the losses suffered by the victim. He argued that this enforced accountability is rehabilitative in that the offender must maintain a relationship with the victim. As a result, the offender faces the reality of his/her criminal act and is reminded of the real damage done.<sup>17</sup> It has also been posited that making restitutive payments is rehabilitative because it leads to an increased sense of self-worth, feelings of accomplishment, reduction of guilt, and, as a result, a reduction in delinquent or criminal behavior.<sup>18</sup> Finally, the offender's acceptance of personal responsibility for the consequences of his/her criminal acts is consistent with the fundamental premise of criminal law:

...people are individually responsible for their behavior, and even in precipitative, provocative situations there is more than one way of responding. The person who selects the criminal response should be held accountable for the consequences of that response...this...solution (restitution) protects the essential dignity (of the offender) by supporting a view of him as an individual capable of making decisions.<sup>19</sup>

The restoration of losses suffered by the victim is an additional goal of restitution programs that is frequently cited. This view suggests that victims should not be required, or expected, to bear the costs of crimes committed against them. However, the operationalization of this goal is flawed by the fact that presently only a small number of offenders are apprehended and convicted for their crimes.<sup>20</sup> Therefore, the number of victims who could benefit from offender restitution is greatly reduced.

It has also been argued that restitution programs can help reduce the overload of the criminal justice system and, at the same time, offer judges a less intrusive sentencing alternative.<sup>21</sup> Restitution offers, in some cases, a publicly acceptable means of diverting offenders at the prosecutorial or sentencing stages of criminal proceedings. Three benefits of this diversion have been suggested: offenders would be saved from the stigma of a criminal conviction and spared the "pains of imprisonment"; pressures on the court would be relieved by filtering out less serious cases, thereby allowing the court to concentrate on more serious cases; and, a reduction in the number of individuals incarcerated which would alleviate prison overcrowding and reduce taxpayer costs.<sup>22</sup>

#### Sociological Issues

Restitution can be supported from the perspective of various sociological theories. For example, according to symbolic interaction theory, behavior is based upon the definition and interpretation of acts among associations. Criminal behavior is supported through association with other criminals and, therefore, continuation of such behavior is dependent upon the continuation of these relationships.<sup>23</sup> Restitution programs place offenders in direct contact with non-criminals. Therefore, criminal behavior would no longer be reinforced, as the offender's definitions and interpretations would more likely become non-criminal in nature as a result of participation in such a program.<sup>24</sup>

Differential association theory suggests that criminal behavior is learned in interaction with other persons within an intimate group when there exists an excess of definitions favorable to violation of the law.<sup>25</sup> Conversely, positive social behavior is also learned and a restitution program could be viewed as a mechanism for supporting non-criminal behavior.

The concept of restitution can also be supported by the delinquency and opportunity theory offered by Cloward and Ohlin.<sup>26</sup> According to this theory, offenders generally have not had the same access to legitimate opportunity

structures that are available to most of the population. In keeping with this view, restitution programs can be viewed as providing offenders with access to legitimate opportunity structures. In addition, participation in the restitutive process would allow for the acquisition of non-criminal patterns of behavior.

## SUMMARY AND POLICY IMPLICATIONS

The use of restitution as a criminal sanction can be traced back to ancient societies and has been advanced as benefiting offenders, victims, the criminal justice system and the community in general. Restitution can be employed as a sanction at various stages of the judicial process: as a private (informal) settlement between the offender and victim; through various avenues of civil redress; as a condition of pre-trial diversion; as a post-conviction sentencing alternative; or, in combination with a sentence of incarceration.

Various legal and procedural issues affect the extent to which restitution is available as a sentencing alternative. Among the issues which have been identified as placing constraints on the statutory and case law of a jurisdiction are: determination of legally eligible recipients; offense limitations; the type and extent of recoverable losses; procedural safeguards; and, enforcement provisions.

In New York State, the use of restitution as a sanction by both juvenile and adult court judges is infrequent when compared to its more extensive use in other states, and few formal programs have been developed. However, a new law (Chapter 290 of the Laws of 1980) which permits the imposition of restitution as a sanction in cases where judges have discretion in determining the type of sentence may serve to increase the use of this sentencing alternative. Prior to the passage of this law, restitution could be used only as a condition of probation or conditional discharge and only if the defendant was sentenced to incarceration for a period of sixty days or less. Since until recently, centralized records were only kept in New York State for those restitution collections which were channeled through probation departments and still do not include other payment procedures and formats (i.e., community service), it is difficult to determine the exact fiscal benefits which accrue from restitution. It is hoped that the newly legislated restitution data collection system will provide more insight into the impact of this sanction in this State.

Restitution cannot be viewed as a panacea for problems currently experienced by the criminal justice system such as overburdened courts, dangerously overcrowded correctional institutions, and fiscal constraints. The realities of opposition to placement of offenders in community-based programs as well as the current political atmosphere which promotes a "get tough" approach to criminal prosecution are impediments to the use of an alternative sanction such as restitution. The emphasis on this approach is manifested by the trend toward concentrating resources on the apprehension, prosecution and incarceration of repeat offenders. Criteria for placement of offenders in restitution programs are such that only those who are considered low risk in terms of community safety are allowed as participants. Therefore, the pool of eligible offenders has, to date, been mainly limited to those convicted of less serious offenses for which they might well not have been incarcerated anyway.

Other factors exist which limit the viability of restitution as a criminal sanction. Of particular importance is the fact that a primary rationale offered for the increased use of restitution is victim compensation. In reality, victim benefit is limited by the low number of offenders who are ever apprehended or convicted for their crimes. Data from the Federal Bureau of Investigation show that the types of offenses for which restitution is most frequently ordered have the lowest rate of clearance by the police (i.e., robbery, burglary, larceny and motor vehicle theft).\*

In addition, victims are often business establishments, individuals whose losses are covered by private insurance, or those who have suffered damages not recoverable through traditional restitution programs (i.e., medical injuries, pain and suffering, etc.). A further problem which limits the potential impact of restitution lies in the fact that a significant number of those offenders who might be eligible candidates for this alternative sanction are likely to be unemployed, underemployed, or juvenile and, as a result, unable to make financial reparation.\* In serious cases in which restitution is ordered in addition

\*Harland, Alan. "Compensating the Victims of Crime," Criminal Law Bulletin, 14 (May/June 1978), pp. 215, 218.

to incarceration, the offender's ability to pay is restricted because of the low wages paid for inmate labor and the general lack of viable prison industries. Restitution to victims of crime, therefore, is limited in the number of victims that can be reached.

## LEGAL ISSUES

### Definitional Problems

In order to understand contemporary restitution it must first be understood that there are diverse definitions of "restitution." There is little consistency among jurisdictions, and even within jurisdictions there are definitional differences in the same statute. For example, the word "compensation" is often used in conjunction or synonymously with restitution or with an implied, but unspecified, independent meaning. Restitution may be in the form of "personal service," monetary or non-monetary compensation, or may be expanded to include the concept of "restitution to society" through performance of service for the community in general. Restitution may also be narrowly defined to mean merely return or restoration of stolen property. The combination of reparation and restitution, though, is by far the most common legislative formula used to identify various forms of recovery and/or repayment for crime related losses or injuries. Again, legislators have infrequently defined or distinguished the two. A common distinction is that made between "restitution of the fruits of the offense" and/or "reparation for the loss or damage caused thereby in an amount the defendant can afford to pay."<sup>27</sup> Further compounding the definitional problem is the frequent use of terms that are presumably synonymous with restitution.

Whatever the terminology employed, there are two central elements in the majority of legislative mandates regarding this process: return of property and/or payment of monetary damages. For purposes of the following discussion, restitution will be used in its broad form encompassing return or repair of stolen or damaged property by the defendant, and provision by the defendant of equivalent value for these and other compensable losses.

### Restitution at Various Stages Within the Judicial System

Restitution can take place at various stages in the judicial system, and even "extra judicially." Seven stages have been identified and are discussed below:

#### Private Restitution

Private restitution takes place outside the scope of the judicial system, a common example being an arrangement between a storekeeper and shoplifter. With this kind of informal arrangement, though, the original victim may be committing the crime of compounding\* if the following elements exist: (a) an agreement not to prosecute; (b) knowledge of the commission of the original crime; and, (c) the receipt of consideration.<sup>28</sup>

#### Compromise and Settlement (civil compromise in penal codes)

This is the earliest time in the judicial process where statutory authorization for restitution exists. Such statutes usually require formal court approval of otherwise informal restitutive settlements between the victim and offender and, with such approval, comes a dismissal of a misdemeanor prosecution.<sup>29</sup>

#### Civil Remedies in Criminal Codes

The range of laws at this stage of the judicial system vary from simply preserving the victim's right to civil action in addition to any criminal prosecution, to actually setting forth a civil remedy.<sup>30</sup>

\* The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute (Black's Law Dictionary).

### Civil Remedies and Public Compensation

This relates basically to state-funded compensation schemes and other victim-related programs. Victim compensation laws often include subrogation clauses that substitute to varying degrees the rights that victims have to secure damages against offenders for the state paying compensation awards.<sup>31</sup>

#### Pre-trial Restitution

Here restitution is authorized as a condition of pre-trial diversion.<sup>32</sup> For example, the Victim Services Agency in New York City has a unit that provides restitution and mediation services. If the District Attorney believes that a case is suitable for either, the case is referred to the Victim Services Agency. Restitution, in this form, is included as a condition of an adjournment in contemplation of dismissal. Some states require a prosecutor to consider restitution in determining whether diversion of a defendant is in the interest of justice and of benefit to the defendant and the community.<sup>33</sup> A New Jersey statute requires prosecutors and program directors to consider the needs and interests of the victim in making a decision to divert a defendant.<sup>34</sup> Closely related are laws allowing a defendant to avoid a conviction record in return for the payment of restitution.

#### Restitution at Sentencing

Post-conviction alternatives available to sentencing judges are quite varied and the restitution sanction exists under a wide variety of statutory options. Restitution as a condition of probation has had a preferred status in legislative enactments, being more frequently available here than in any other dispositional context.<sup>35</sup> It is often included in a general list of conditions which a judge may,<sup>36</sup> shall,<sup>37</sup> or must<sup>38</sup> consider in probation or conditional discharge orders. More recently, a few states have enacted statutes requiring a

judge to make restitution a part of most probation decisions. For example, an Arizona statute prescribes that if a court imposes probation, it shall require restitution after consideration of the victim's loss and the defendant's economic circumstances.<sup>39</sup> Iowa also has a similar law that requires the defendant and the probation officer to prepare a restitution plan.<sup>40</sup> The possibility of discrimination exists in the application of such statutes in that preferential treatment for offenders with substantial financial resources may result. This was recognized and specifically referred to in a Maine statute as not being the intention of the legislature in enacting its probation laws.<sup>41</sup>

Recently, there has been legislation in connection with restitution to the state, often involving attempts to recover monies paid out under state-funded compensation programs. As an alternative to civil subrogation provisions, many states allow victim compensation awards to be recovered from defendants through the criminal sentencing process. One way of doing this is to declare the victim's award to be a "debt" owed by the defendant to the state, the amount of the award being recoverable as a condition of probation.<sup>42</sup>

This process is to be distinguished from laws, such as those in California, where a defendant must pay a fixed fine or a fine commensurate with the probable impact on the victim involved. The funds collected are allocated to the state's victim compensation fund.<sup>43</sup> In addition to being ordered as a condition of probation, restitution is sometimes used as a condition of a suspended sentence<sup>44</sup> or conditional discharge.<sup>45</sup>

Legislative authority also exists in some jurisdictions for courts to require restitution as part of an active sentence.<sup>46</sup> When used as a part of a sentence, as opposed to when used as a condition of probation or suspended sentence, restitution has several important distinguishing characteristics. First, in the event of a default in payment, a contempt proceeding would be the appropriate remedy. If the restitution order were a condition of probation, revocation of probation and imposition of an incarcerative sentence would be the

possible disposition. Secondly, restitution has been upheld without explicit statutory authority as part of a court's general probation powers,<sup>47</sup> but it has been held repeatedly that a sentence of restitution is impermissible absent such explicit statutory authority.<sup>48</sup> The idea that restitution in a probation context is primarily a rehabilitative tool rather than punishment is the rationale advanced to support its use without explicit statutory authorization. Similar reasoning has also been relied upon to eliminate many due process "technicalities" when imposing restitution as a condition of probation.

Restitution may be used in sentencing proceedings as a mitigating factor,<sup>49</sup> although it does not exonerate criminal liability.<sup>50</sup> There are statutory provisions that specifically allow restitution payment to be considered as a mitigating factor in determining punishment.<sup>51</sup> In some instances, restitution is specifically authorized as a factor to be considered in fixing minimum prison terms.<sup>52</sup>

Finally, restitution may also be imposed as a condition of parole, although its use is not nearly as common as with probation sentences. For example, New Mexico criminal law provides that, under certain sentencing options, the court shall require as a condition of probation or parole the preparation of a plan of restitution that includes the specific amount of restitution to be made to each victim and a schedule of payments.<sup>53</sup> In New York State, restitution was statutorily allowed as a condition of parole prior to the repeal of Section 215 of the Correction Law.<sup>54</sup>

#### Restitution and Incarceration

Statutory provisions and case law concerning restitution in conjunction with incarceration are fairly uncommon. Judges often consider restitution and incarceration as mutually exclusive alternatives.<sup>55</sup> More recently, however,

this presumed incompatibility has been questioned. For example, Chesney, Hudson and McLagen,<sup>56</sup> in their review of restitution programs, observed that:

The failure to make restitution programs part of the prison program is a major shortcoming of these programs. The idea that inmates could work in prison at comparable jobs and payment to the free world is an old idea and its advocates include Norval Morris, David Fogel, and others. The notion that inmates could make restitution from such earnings has been endorsed by a host of writers. But we were unable to identify one prison in the country in which the notion has been put into practice. Various state and federal laws restrict the sale of inmate produced goods within state and prohibit shipment in interstate commerce; such laws seriously reduce the viability of prison enterprises. What we need is a new commitment to the idea that prison inmates should be gainfully employed in work situations comparable to the free world, new legislation removing the legal barriers, and the cultivation of industrial projects suitable to work environments in prison.<sup>57</sup>

In response to this type of criticism, several states have passed laws granting extensive authority to pursue restitution through correctional industries,<sup>58</sup> or to establish specialized "restitution industries,"<sup>59</sup> "restitution programs,"<sup>60</sup> and "restitution centers."<sup>61</sup> Even within traditional correctional settings, there often exists specific statutory authorization for restitution to be paid from regular prison-labor income,<sup>62</sup> work release,<sup>63</sup> community corrections<sup>64</sup> and parole earnings.<sup>65</sup> New York State has no statutory provisions specifically creating restitution-oriented prison industries but does, under a recent amendment to the Penal Law, allow judges "to require a defendant to make restitution..." in addition to any other authorized disposition<sup>66</sup>. This relatively new provision greatly expands the potential for the increased use of restitution as an additional sanction when offenders are sentenced to prison terms. In the past, restitution in New York State was basically limited to cases involving probation or conditional discharge.

#### Scope and Legal Limitations

Various substantive and procedural issues affect the extent to which restitution is available as a legal sanction. Such considerations vary in the degree to which they constrain a particular jurisdiction's statutory and case law. Some of these issues are addressed below, with a particular focus on how they relate to the New York State approach to restitution.

#### Legally Eligible Recipients

The issue here is who may legally be recipients of restitution. Specifically, there is often a question of whether a defendant should be required to make payment directly to insurance companies or some other third party. The general lack of definitional precision regarding this issue is typified in New York's Penal Law Section 65.10 (2)(g),<sup>67</sup> in which conditions of probation and of conditional discharge are detailed. This section of the law provides for restitution or reparation without any reference to whom this remedy may be available. For example, a New York county court judge in discussing who was the eligible recipient in a restitution order, stated that "aggrieved party" refers only to "the party whose rights, personal or property, were invaded by the defendant as a result of which criminal proceedings were successfully concluded."<sup>68</sup> In one particular case, the court held that because of this, an insurer of a bank and the bank itself (having repaid funds the defendant deposited after embezzling them) were not aggrieved parties, but, rather, that the union from which the funds were embezzled was entitled to the restitution.

#### Offense Limitations

The question arises as to whether restitution is limited to crimes for which the defendant is convicted, or whether the statutory language is broad enough to encompass offenses disposed of through plea-bargaining or other non-adjudicatory dispositions. Under New York Penal Law Section 65.10 (2)(g) the

court may, as a condition of probation or of conditional discharge, require a defendant to make restitution or reparation for "his offense." This has been interpreted rather narrowly in a number of New York cases,<sup>69</sup> with the court deciding that the words "his offense" refer only to the offense for which a defendant is on trial before the court.<sup>70</sup> This rather restrictive court interpretation has been greatly expanded by recently enacted legislation. Under New York Penal Law Section 60.27(4), the term "offense" is defined to include "the offense for which defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense."<sup>71</sup> The extent to which New York courts will use this broad mandate is yet to be determined and the statutory language leaves it unclear as to whether it is required that the "offense" even be charged in the accusatory instrument.<sup>72</sup>

#### Recoverable Losses

Consideration must be given to the scope of the restitution sanction, and to the type and extent of the recoverable loss. In terms of a court's ability to redress a victim's injuries, limitations placed on recoverable losses in criminal courts most clearly distinguishes them from civil courts. For example, under Article 60 of the New York Penal Law, a restriction exists in Section 60.27(5) which provides that "... the amount of restitution or reparation required by the court shall not exceed five thousand dollars in the case of a conviction for a felony, or one thousand dollars in the case of a conviction for any offense other than a felony."<sup>73</sup> These monetary restrictions obviously limit potential recoverable losses in that damages or losses could exceed the limits set forth. In probation cases, restitution or reparation is imposed as a condition "relating to conduct and rehabilitation."<sup>74</sup> When rehabilitation is a substantial consideration in the imposition of a restitution order, the loss or damage determination becomes secondary. In addition, under New York's probation laws, restitution is allowed as a condition to cover loss or damage caused by the offense with no further explanation or guidance.<sup>75</sup> A particular court's

interpretation of this language and what it encompasses may be a limiting factor in its determination of recoverable losses.

The restitution laws of many states restrict recoverable losses to "actual" damages or "economic" losses and, therefore, exclude recovery for pain, suffering, mental anguish, inconvenience, and other non out-of-pocket type losses.<sup>76</sup> New York laws do not specifically refer to the types of damages recoverable in a criminal action but, because of the fixed dollar restrictions and the consideration of rehabilitation as a factor in making a restitution determination, recovery often will not approach the remedy available in a civil action.

#### Conflicting Issues

The actual amount of restitution imposed may be less than the loss incurred because of a defendant's limited ability to pay or out of a desire to achieve more traditional sentencing aims. For example, the sentencing objectives of incapacitation, retribution, or deterrence may lead to a decision to incarcerate a defendant, thereby functionally excluding the possibility of restitution. New York Penal Law Section 65.10(2)(g)<sup>77</sup> defines the parameters of a restitution condition by stating that the amount must be fixed in terms of what the defendant "...can afford to pay..." This limitation has been reinforced in various cases decided in New York State.<sup>78</sup> Although restitution may be ordered in conjunction with a prison sentence under Penal Law Section 60.27,<sup>79</sup> the lack of meaningful opportunities for offenders to earn adequate wages while incarcerated diminishes the possibility of fulfilling such an order. Under these circumstances it is unlikely that judges will consider ordering restitution, as the means for fulfilling the order do not exist.

### Procedural Safeguards and Regularity Involved in Restitution Orders

These issues relate to authority of courts to delegate responsibility for certain aspects of restitution decision making and the offender's rights in such circumstances. New York statutes require the court to fix the amount to be paid, the manner of performance, and specifically state the date when restitution is to be paid in full.<sup>80</sup> These aspects are, thus, nondelegable; the responsibility remains with the sentencing judge.<sup>81</sup> Subdivisions two and three of Penal Law Section 60.27 state: "...the court must make a finding as to the fruits of the offense or the loss or damage caused by the offense. If the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing upon the issue..."<sup>82</sup> Thus, a question remains as to whether these hearing requirements apply equally to restitution or reparation under Penal Law Section 65.10(2)(g) when restitution is ordered as a condition of probation or conditional discharge. However, the language of subdivision two, "wherever the court requires restitution or reparation to be made," seems to indicate that this fact finding/hearing requirement and procedure applies across the board.<sup>83</sup>

The scope of procedural protections that need be afforded defendants with respect to orders of restitution is uncertain. Generally, a verdict of guilty in criminal court does not include a precise determination of the amount of loss or injury associated with the conviction crime; this is usually unnecessary to a finding of guilt. The restitution order is most often imposed at the sentencing stage of the trial process. As a rule, imposing restitution need not be as formal as, nor in compliance with, all the due process standards associated with a civil liability action on the same fact situation.<sup>84</sup> It has been held that to withstand constitutional attack in a criminal setting only a summary procedural pattern is required. This may be analogous to a presentence investigation.<sup>85</sup> The fact finding/hearing provisions in the New York State statutes would seem to satisfy minimal procedural due process requirements. The United States Supreme Court has stated that a "fundamental requirement of due process is the opportu-

ity to be heard... It is an opportunity which must be granted at a meaningful time and in a meaningful manner."<sup>86</sup> Without the formal procedural protections of a civil trial, the sentencing phase of the criminal trial may be too inherently coercive to be "a meaningful time" for a defendant to strongly object to restitution when to do so may seem to jeopardize one's chances for probation. The possibility of incarceration if one "makes trouble" at the time of sentencing may have a negative effect on the willingness of a defendant "to be heard" on the question of a restitution requirement.<sup>87</sup> New York's formal fact finding/hearing provisions should diminish any successful procedural due process challenges to restitution decision making.

### Enforcement Provisions

In general, there are few provisions in both existing legislation and judicial case law for the collection and disbursement of restitution orders. In addition, there is little guidance for the enforcement actions when such orders are not fulfilled. Questions arise regarding issues such as whether certain types of victims have priority, whether multiple victims should be paid in equal periodic amounts or in amounts prorated according to individual losses incurred, and what procedures should be followed when restitution requirements are not met. Often, the response to such questions is left to the discretion of administrative officials in the courts, to individual probation officers, or to the staff of restitution programs.<sup>88</sup>

Section 420.10 of the Criminal Procedure Law<sup>89</sup> provides that when a court orders restitution or reparation, it must: designate the official to whom payment is to be remitted; direct that notice be given to a person(s) to whom it is to be remitted; determine the amount to be paid; and, specify whether payment is to be made in a lump sum or in installments. Chapter 965 of the Laws of 1984 added a new subdivision to Section 420.10 of the Criminal Procedure Law to formalize administering the restitution process. Under the new statute, the chief elected official in each county and New York City has designated an agency

to collect restitution and to enforce restitution orders. This provision should improve the process and enhance services to victims.

The enforcement of restitution orders raises some difficult issues. If a defendant is not incarcerated and willfully fails to pay, the court may direct that the defendant be imprisoned until the restitution or reparation is satisfied. However, the court must specify the maximum period of imprisonment. The term of confinement cannot exceed one year for a felony, one-third the maximum authorized term of imprisonment for misdemeanor, or fifteen days for a violation. If a sentence of imprisonment is imposed in addition to restitution or reparation, the aggregate of the periods indicated above and the term of the sentence may not exceed the maximum authorized term of imprisonment.<sup>90</sup>

A defendant who is unable to pay the restitution or reparation imposed may at any time apply to the court for resentencing. If the court is satisfied that a defendant is unable to pay, it must: adjust the terms of payment; lower the amount of the...restitution or reparation; where the sentence consists of probation or imprisonment and...restitution or reparation, revoke the portion of the sentence imposed and resentence the defendant. Upon each resentencing, the court may impose any sentence it originally could have imposed, except that the amount of any...restitution or reparation imposed may not be in excess of the amount the defendant is able to pay.<sup>91</sup> Where a defendant seeks relief or resentencing with respect to a restitution or reparation sentence, all persons originally entitled to notice must be renoticed with an opportunity to be heard, particularly the recipients of the restitution or reparation.<sup>92</sup>

Restitution or reparation orders may also be enforced through civil proceedings. Section 420.10 (5) provides that, "(e)ven though the defendant was imprisoned for failure to pay...restitution or reparation, or has served the period of imprisonment...restitution or reparation may be collected in the same manner as a judgment in a civil action. The district attorney may, in his

discretion, and must, upon order of the court, institute proceedings to collect such...restitution or reparation."<sup>93</sup>

By analogy, questions concerning the collection of fines raise potential constitutional issues in the enforcement of restitution orders. The United States Supreme Court in Tate v. Short<sup>94</sup> stated that "the Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits the State from imposing a fine and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."<sup>95</sup>

The automatic conversion of a restitution order into a jail term may face a similar constitutional attack on due process grounds. These challenges are attenuated by the due process protections of notice and a hearing contained in the New York statutes. In addition, the provisions relating to modifying restitution orders based on an inability to pay would seem to provide the defendant with adequate constitutional protection.

A fairly recent response to a defendant's nonpayment or inability to pay restitution has been the conversion of non-incarcerative restitution orders into hours of unpaid community service.<sup>96</sup> This practice may result in a situation in which offenders who can afford to pay buy themselves out of a work assignment, while those without financial resources must submit to the service penalty or be incarcerated.<sup>97</sup> This raises the possibility of a potential violation of the Equal Protection Clause. The United States Supreme Court in Williams v. Illinois<sup>98</sup> held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."<sup>99</sup> Thus, it might be argued that automatic conversion of fines or restitution into community service for indigent offenders unconstitutionally raises the ceiling of punishment for those offenders when the penalty for those who are financially solvent is limited to payment.<sup>100</sup> The valid interest of the State in enforcing fines, restitution and/or community service orders may very well attenuate the

Equal Protection argument. A determination as to the constitutionality of such practices will have to await future court decisions.

#### RESTITUTION IN NEW YORK STATE

It may seem surprising, considering the revival of interest in the use of restitution, that this sanction is used infrequently in both the juvenile and adult courts in New York State as compared with its more extensive and successful use in other states.<sup>101</sup> For example, in 1978 fewer than 4 percent of the juveniles arrested in New York for property offenses paid restitution through the Family Court. In New York City, restitution was ordered for only 4 percent of the juveniles arrested for property offenses. These figures suggest that restitution could be more extensively used, which could, in turn, enhance benefits to victims.<sup>102</sup>

During the 1980 legislative session, a major inroad was made in the availability of the restitution sanction. A new section was added to the Penal Law that authorizes a sentencing judge "to require a defendant to make restitution of the fruits of his offense or reparation for the loss or damage caused thereby", in addition to any other disposition authorized under Article 60 of the Penal Law. Prior to the passage of this legislation, a judge could not sentence a defendant to a term of imprisonment in excess of sixty days and also require restitution. This situation was due to the fact that restitution could only be used as a condition of probation or conditional discharge, and such dispositions could only be ordered if the defendant was sentenced to a term of imprisonment of sixty days or less. The new law permits the imposition of restitution as a sanction in cases where judges have discretion in determining the type of sentence.

Another change resulting from this legislation was a redefinition of the term "offense," which was modified to include, "...the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to any offense." Although this language is somewhat ambiguous, it does expand the potential number and scope of

victims who can benefit by the restitution order. The practices of plea bargaining, combined with the prior limitation on restitution being tied to the conviction offense,<sup>103</sup> led to restitution orders that could not possibly compensate all of the defendant's victims fully. The new subdivision should help alleviate this problem by expanding both the scope of authorized restitution and the number of victims eligible to receive restitution benefits.

The 1980 legislation did, however, contain restrictions in terms of the total amount of restitution or reparation the court may require. Specifically, the amount required by the court was not to exceed five thousand dollars in the case of a conviction for a felony, or one thousand dollars in the case of conviction for any other offense.

During the 1983 legislative session in New York State a few changes in the existing restitution provisions were passed and signed into law. For example, Section 60.27 of the Penal Law was amended to allow the court in its discretion to impose restitution or reparation in excess of the amount established in 1980. As a result of this amendment, the amount of restitution which can now be ordered may include the return of the victim's property, including money or its equivalent value, as well as reimbursement for medical expenses incurred by the victim prior to sentencing as a result of the offense committed by the defendant.

An additional change enacted during the 1983 session was a formal declaration, codified in Chapter 397 of the Session Laws, that it shall be the policy of this State to encourage the use of restitution when a defendant is reasonably able to do so. The new provisions of Chapter 397 provide an affirmative stance regarding the imposition of restitution orders. Upon notification by a victim that he/she seeks restitution, the District Attorney must advise the court at the time of sentencing of the victim's interests, the amount of restitution being sought, and the extent of injury, economic loss or damage to the victim.

In addition to this new legislation, the courts in New York State under Penal Law Section 65.10 have had, and continue to have, the authority to order restitution as a condition of probation or conditional discharge. The section provides that, "when imposing a sentence of probation or of conditional discharge, the court may, as a condition of the sentence, require that the defendant: Make restitution of the fruits of his offense or make reparation, in an amount he can afford to pay, for the loss or damage caused thereby...(T)he court shall fix the amount thereof, the manner of performance, (and) specifically state the date restitution is to be paid in full prior to the expiration of the sentence of probation..."<sup>104</sup> Under Penal Law Section 65.10(h) the court may also require as a condition of probation the performance of services for a profit or not-for-profit corporation, association, institution or agency.<sup>105</sup> This condition may also be imposed upon conviction of a misdemeanor or violation and where the defendant has consented to the amount and conditions of such service.

Under the Family Court Act Section 755 through 759, restitution or services to be performed for the public good may be ordered as an adjunct to or condition of probation, suspended judgment, or placement for juvenile offenders aged ten to sixteen.<sup>106</sup> The maximum amount of restitution which can be ordered was increased in 1976 from five hundred dollars to one thousand dollars, and must be paid from the juvenile's own funds. In conjunction with orders of placement, the court can only recommend restitution. In all situations, the court is free to require services for the public good in conjunction with, or as a condition of, any of its orders.

Although laws exist in New York State authorizing the use of the restitution sanction, the actual dollar amount collected and forwarded to victims has not been very large. A major problem with expanding existing restitution programs and encouraging the implementation of others is obtaining the cooperation of the justice system officials, particularly judges. Educational campaigns may be the key to winning judicial support. Arguments for increasing the use of restitution that may be persuasive to judges include the following: restitution

offers valuable aid to innocent victims; restitution helps in the rehabilitation of offenders; restitution offers a useful addition to a judge's option of sanctions; restitution with increased victim input can provide judges with information that can improve the quality of their decisions; and finally, restitution can aid in the reduction of court caseloads through pre-trial diversion.

Until recently, in New York State centralized records were only kept for those restitution collections that were channeled through probation departments. Record keeping was inconsistent and lacked uniformity. However, Chapter 965 of the Laws of 1984 added a new subdivision to Section 420.10 of the Criminal Procedure Law in order to formalize administering of the restitution process. According to the provisions of this new law, restitution is administered by designated agencies (local probation departments, with the exception of New York City, where the Office of the Criminal Justice Coordinator has been designated). The Division of Criminal Justice Services is now the central repository for restitution data received from the State Division of Probation and New York City and is responsible for reporting the data as requested. As stated in the legislation, this newly implemented data collection and reporting system is intended to promote the use of restitution and encourage its enforcement.

The New York State Division of Probation reports its restitution collections in their Annual Report Statistical Supplements.<sup>107</sup> On a statewide basis, these probation reports show that between 1959 and 1979, restitution collections increased from \$572,505 to \$1,693,773. During the period from 1959 to 1970, restitution collections statewide increased only 21.6 percent, but from 1970 to 1979 they increased by over 114 percent. Since probation department statistics do not include the actual number of offenders statewide paying restitution, it is not possible to determine whether the overall increase in collection is attributable to a rise in the number of restitution orders or whether the orders themselves have become larger. It is likely that this increase is indicative of a combination of these two factors. Restitution collections in 1979 were up over 16 percent from the 1978 figures, while the collections for 1982, totaling \$3,462,861 were 27 percent more than those for 1980 (2,724,070), suggesting a

continuing trend toward increased usage of the restitutive sanction in New York State.

Local courts handling less serious offenses are increasingly using community service as a form of restitution. The amount of savings in local funds and the benefits which accrue from these services to the community are not easily converted into actual dollar figures.

Although New York has shown large percentage increases in restitution monies collected, the total dollar figures have remained small. For example, North Carolina, with a much smaller offender population, collected over four million dollars in restitution in 1980.<sup>108</sup> In that same year, through its probation departments, New York State collected only \$2,724,070 in reported restitution payments.<sup>109</sup>

FOOTNOTES

<sup>1</sup>Akman, Dogan D. "Compensation for Victims of Crimes of Personal Violence: Ideas and Realizations," (unpublished paper, March 1966), pp. 3-6.

<sup>2</sup>Gordon, Cyrus H. Hammurabi's Code: Quaint or Forward Looking?, (New York, 1960), p. 6.

<sup>3</sup>Ibid.

<sup>4</sup>Law and Justice Study Center. "Restitutive Justice: A General Survey and Analysis," (Seattle, Washington, January 1975), p. 5.

<sup>5</sup>Schafer, Stephen. Restitution to Victims of Crimes, (Chicago: Quadrangle Books Inc., 1960), p. 3.

<sup>6</sup>Law and Justice Study Center, op. cit., note 4.

<sup>7</sup>Schafer, op.cit., note 5 at 7.

<sup>8</sup>Ibid.

<sup>9</sup>Laster, Richard E. "Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness," University of Richmond Law Review, 5, No. 1 (1970), p. 79.

<sup>10</sup>Law and Justice Study Center, op. cit., note 4 at 6.

<sup>11</sup>Ruggles-Brise, Evelyn. Prison Reform at Home and Abroad, (London: Macmillan, 1924).

<sup>12</sup>N.Y. Code Crim. Proc. §487(2), 932 (McKinney 1910).

<sup>13</sup>See e.g., statutes cited in "Restitution and the Criminal Law," Columbia Law Review, 39 (1939), p. 1198.

<sup>14</sup>See e.g., Fry, Margery. "Justice for Victims," Journal of Public Law 8 (1959), p. 191, Drapkin, T. and Emilio Viano eds. Victimology: A New Focus (Lexington: D.C. Heath and Company, 1974); Hudson Joe. "Restitution in Criminal Justice," (St. Paul: Minnesota Department of Corrections, 1975); and Galaway, Burt and Joe Hudson, eds. Restitution in Theory and Action, (Lexington: D.C. Heath and Hudson, 1978).

<sup>15</sup>Worrall, Jay. Restitution Programming for Correctional Agencies: A Practical Guide, (College Park, Maryland: The American Correctional Association, August 1981), pp. 3-4.

<sup>16</sup>Garofalo, Raphael. Criminology, (Boston: Little, Brown and Company, 1914), p. 391.

<sup>17</sup>Schafer, Steven. "Victim Compensation and Responsibility," Southern California Law Review, 43, No. 1 (1970), pp. 66-67.

<sup>18</sup>Galaway, Burt and Joe Hudson. "Restitution as a Victim Service," Evaluation and Change, eds. Burt Galaway and Joe Hudson (Lexington: D.C. Heath and Company, 1980).

<sup>19</sup>Galaway, Burt and Joe Hudson. "Restitution and Rehabilitation: Some Central Issues," Crime and Delinquency, (1972), p. 410.

<sup>20</sup>Galaway and Hudson, op. cit., note 18.

<sup>21</sup>Worrall, op. cit., note 15.

<sup>22</sup>Galaway and Hudson, op. cit., note 19.

<sup>23</sup>Blumer, Herbert. Symbolic Interactionism: Perspective and Method, (Englewood Cliffs, New Jersey: Prentice-Hall Inc., 1969), p. 2.

<sup>24</sup>Bridges, James H., et. al. "The Case for Creative Restitution in Corrections," Federal Probation 43, No. 3 (September 1979), p. 34.

<sup>25</sup>Sutherland, Edwin H. and Donald R. Cressey. Principles of Criminology, Seventh Edition, (Philadelphia: J.B. Lippincott Co., 1966), pp. 81-82.

<sup>26</sup>Cloward, Richard A. and Lloyd E. Ohlin. Delinquency and Opportunity: A Theory of Delinquency Gangs, (Illinois: The Free Press of Glencoe, 1960), p. 148.

<sup>27</sup>See e.g., N.Y. Penal Law §§65.05, 65.10 (2) (g) (McKinney 1975) (as amended, McKinney Cum. Supp. 1981-1982); Neb. Rev. Stat. §29-2262(2)(j) (1975).

<sup>28</sup>See e.g., N.Y. Penal Law §215.45 (McKinney, 1975); Lafave, Wayne and Austin Scott. Handbook on Criminal Law, (St. Paul: West Publishing Co., 1972), p. 526.

<sup>29</sup>See e.g., N.Y. Penal Law §215.45 (McKinney, 1975); People v. Anonymous B., 57 Misc. 2d 792, 290 N.Y.S. 2d 507 (1968).

<sup>30</sup>See e.g., N.Y. Penal Law §5.10(3) (McKinney, 1975); N.Y. v. Town of Islip, 288 App. Div. 92, 48 N.Y.S. 2d 749 (1944); 67 Columbia Law Review 1277.

<sup>31</sup>See e.g., N.Y. Exec. Law, Article 22, §§620-635 (McKinney 1972) (as amended, McKinney Cum. Supp. 1972 to 1980).

<sup>32</sup>See e.g., N.Y. Criminal Procedure Law §170.55 (McKinney, 1982).

<sup>33</sup>See e.g., Kan. Crim. Proc. Code Ann. §22-2908 (Vernon Supp. 1978).

<sup>34</sup>N.J. Stat. Ann. §2C:43-12 (West 1979).

<sup>35</sup>See e.g., N.Y. Penal Law §§65.05, 65.10(2)(g) (McKinney, 1975) (as amended, McKinney Cum. Supp. 1981-1982).

<sup>36</sup>Ibid.

<sup>37</sup>Ariz. Rev. Stat. Ann. §13-9-1(A),(F) (1978).

<sup>38</sup>Tex. Code Crim. Proc. Ann. art. 42.13, §5(b)(8) (Vernon 1979)(misdemeanor probation).

<sup>39</sup>Ariz. Rev. Stat. Ann. §13-603(c) (1978).

<sup>40</sup>Iowa Code Ann. §907.12(3) (West Cum. Supp. 1979).

<sup>41</sup>Me. Rev. Stat. tit. 17-A, §1321 (Pam. 1978).

<sup>42</sup>Fla. Stat. Ann. §960.17 (West Cum. Supp. 1979) (debt enforceable as condition of probation or parole); accord Ky. Rev. Stat. Ann. §346.180 (Baldwin 1977); cf. Wash. Rev. Code Ann. §7.68.120 (1978) (debt enforceable as court order, work release or parole condition). Other provisions for recovery of victim compensation awards do not use the term "debt": Cal. Penal Code §§1203, 1203.1 (West 1970) (as amended, West Cum. Supp. 1979) (probation); Mich. Comp. Laws Ann. §17.362 (Supp. Pam. 1978) (probation); Mont. Rev. Codes Ann. §71-2621 (1977) (probation and parole); Neb. Rev. Stat. §81-1828 (inmate wages); Pa. Stat. Ann. tit. 7 §§180-7.13 (Purdon Cum. Supp. 1979) (probation).

<sup>43</sup>Cal. Gov't Code §13967 (West Cum. Supp. 1979).

<sup>44</sup>Ark. Stat. Ann. §§41-1201(1)(d), 1203(2)(h) (1977); Kan. Stat. Ann. §§21-4603(2)(d), 4610(h) (Vernon 1978 Supp.); La. Code Crim. Proc. Ann. art. 894.1(B)(6) (West Cum. Supp. 1979); Mich. Comp. Laws Ann. §18.362 (Special Pam. 1973) (repayment of victim compensation award); Nev. Rev. Stat. §176.189(1) (1977); N.J. Stat. Ann. §2c:45-1(b)(8) (West 1979); N.M. Stat. Ann. §31-17-1 (1978); Okla. Stat. Ann. §991a(1)(a) (West Cum. Supp. 1979); Or. Rev. Stat. §161.675(2) (1977); S.D. Comp. Laws §23A-28-3 (Special Supp. 1978).

<sup>45</sup>Conn. Gen. Stat. Ann. §53a-30(a)(4) (West 1970)(as amended, West Cum. Supp. 1979); Ill. Ann. Stat. ch. 38 §1005-6-3 (10) (Smith-Hurd 1973)(as amended, Smith-Hurd Cum. Supp. 1979); Ky. Rev. Stat. Ann. §533.30(d) (Baldwin 1975); N.Y. Penal Law §65.10(2)(F) (McKinney 1977) (as amended, McKinney Cum. Supp. 1978).

<sup>46</sup>Ariz. Rev. Stat. Ann. §13-807(A) (1978); Fla. Stat. Ann. §775.089(1) (West Cum. Supp. 1979); Haw. Rev. Stat. §706-605 (1)(e) (1976) (as amended, Supp. 1978); Ill. Ann. Stat. ch. 38 §1005-5-3(b)(5), (c)(2), (c)(j)(4) (Smith-Hurd Cum. Supp. 1979); Ky. Rev. Stat. Ann. §431.200 (Baldwin Supp. 1978); Me. Rev. Stat. Ann. §1152(1979), §1252, 1323 (Pam 1978); Minn. Stat. Ann. §244.09 (West Cum. Supp. 1979); Miss. Code Ann. §99-37-3 (1978); Mo. Ann. Stat. §§546.630, 640 (Vernon 1962); N.J. Stat. Ann. §2C:43-3, 44-2 (West 1979); N.Y. Penal Law §60.27 (McKinney Cum. Supp. 1980-81); Ohio Rev. Code §2929.11 (Page Supp. 1978); Or. Rev. Stat. §137.106 (1977); Pa. Stat. Ann. tit. 18, §1106, 1321 (Purdon Cum. Supp. 1979); Wash. Rev. Code Ann. §9A.20.030(1) (1977).

<sup>47</sup>Basile v. United States, 38 A. 2d 620 (D.C. Mun. App. 1944); Commonwealth v. Walton, 397 A. 2d 1179 (Pa. Super. 1979); Commonwealth v. Bushkoff, 1977 Pa. Super. 110 A 2d 834 (1955); State v. Simmington, 235 N.C. 612, 70 S.E. 2d 842 (1952) (while court had no jurisdiction to compel defendant to pay damages on penalty of imprisonment, it could do so on suspension of sentence of imprisonment).

<sup>48</sup>People v. Grago, 24 Misc. 2d 739, 204 N.Y. 2d 774, 775 (County Court 1960); accord, Feldman v. Reeves, 356 N.Y.S. 2d 627, 45 A.D. 2d 90 (1974); Bunting v. State, 361 So. and 810 (Fla. App. 1978).

<sup>49</sup>See e.g., State v. Joseph, 20 Ariz. App. 70, 510 P. 2d 69 (1973); People v. Costello, 107 C.A. 2d 514, 237 P. 2d 281 (1951); People v. Delay, 8 O.C. 52, 22 P. 90 (1889); but see, State v. McKay, 15 Ariz. App. 417, 489 P. 2d 80 (1971) (intended restoration is not to be considered in mitigation if no actual restoration prior to filing of criminal complaint).

<sup>50</sup>See e.g., Savitt v. United States, 59 F. 2d 541 (C.C. A.M.J. 1932) (restitution or attempted restitution does not nullify or excuse previous crime); accord State v. Odom, 86 N.M. 761, 527 P.2d 802 (1974); People v. Porter, 99 C.A. 2d 506, 222 P.2d 151 (1950) (offer of restitution itself is not defense to insufficient funds prosecution); Mueller v. State, 208 Wis. 550, 243 N.W. 411 (1932) (defendant guilty of embezzlement even though funds restored before wrongful conversion discovered); State v. Adams, 144 Wash. 363, 258 P. 23 (1927) (partial or complete restitution is not defense to larceny prosecution); cf. La. Rev. Stat. Ann. §21.24 (West Cum. Supp. 1979) (payment of hotel or restaurant bill after complaint filed is not grounds for dismissal).

<sup>51</sup>Cal. R. Crim. Ct. 423; Ill. Ann. Stat. ch. 38, §1005-5-3.1(a)(6) (Smith-Hurd Cum. Supp. 1979); Ind. Code Ann. §35-4.1-4-7(b)(9) (Burns Cu. Supp. 1979); N.J. Stat. Ann. §2C:44-1(b) (6) (West 1979).

<sup>52</sup>Kan. Crim. Proc. Code Ann. §21-4606(2)(g) (Vernon 1974); cf. Ill. Ann. Stat. Ch. 38, §100-3-2.1(e)(4) (Smith-Hurd Cum. Supp. 1979) (restitution to be considered by Prisoner Review Board in setting inmate's release date). See also Me. Rev. Stat. tit. 17-A, §1252 (3) (Pam. 1978) (whether inmate has complied with court-ordered restitution is to be considered by corrections authority in administrative decisions about inmate).

<sup>53</sup>N.M. Stat. Ann. §31-17-1 (1978).

<sup>54</sup>N.Y. Correction Law ch. 904, §215, (McKinney 1968) (repealed 1978).

<sup>55</sup>See, Commonwealth v. Walton, 397 A. 2d 1179 (1979).

<sup>56</sup>Chesney, Steve, Joe Hudson and John McLagen. "A New Look at Restitution: Recent Legislation, Programs and Research," 61 Judicature (1978), p. 348.

<sup>57</sup>Ibid.

<sup>58</sup>Ariz. Rev. Stat. Ann. §41-1622 (1979); Okla. Stat. Ann. tit. 57, §549(5) (West Cum. Supp. 1979).

<sup>59</sup>La. Rev. Stat. Ann. §15:840.2 (West Cum. Supp. 1979); Tenn. Code Ann. §§41-2401 to 41-2407 (1978).

<sup>60</sup>Colo. Rev. Stat. §17-27-102 (1978); Kan. Stat. §75-522(b)(1) (1978 Supp.); Me. Rev. Stat. tit. 34, §527 (1978); Minn. Stat. Ann. §299 B.13 (West Cum. Supp. 1979); Miss. Code Ann. §99-37-21(b) (1978); Tenn. Code Ann. §41-2309 (1978).

<sup>61</sup>Miss. Code Ann. §99-37-19 (1978); Tenn. Code Ann. §§41-2301 to 41-2309 (1978).

<sup>62</sup>Ariz. Rev. Stat. Ann. §31-254(B)(2) (1979); Fla. Stat. Ann. §944.49(1)(b), 945.091(5)(a) (West Cum. Supp. 1979); Md. Ann. Code art. 27, §645M(a)(3) (1957); Neb. Rev. Stat. §§81-1829(1), (2) (1978) (victim compensation repayment); accord, Tenn. Code Ann. §40-3207 (1978).

<sup>63</sup>Ark. Stat. Ann. §§46,117(c) (1977) (penitentiary and jail, respectively); Ariz. Rev. Stat. Ann. §344(B) (1976); Colo. Rev. Stat. §§16-11-212(2), 17-26-128(5)(a) (1978); Me. Rev. Stat. tit. 17-A, §1223 (Pam. 1978), tit. 34, §§527, 1007 (1978); Md. Ann. Code art. 27, §§645(c), 700A(c)(1957) (jail and prison, respectively); Miss. Code Ann. §§47-5-161(1), (2), 99-37-15 (1978); N.C. Gen. Stat. §§148-33.1(F)(3a), 148-33.2 (1977); N.D. Cent. Code §12-48.1-03 (1976); Vt. Stat. Ann. tit. 28, §755(a)(2)(B) (1978); Wash. Rev. Code Ann. §7.68.120(2) (1978) (victim compensation repayment); Wyo. Stat. §7-378.8(a) (iv) (1975).

<sup>64</sup>Colo. Rev. Stat. §17-27-107(1) (1978) (community corrections facility); Fla. Stat. Ann. §944.49(1)(c), 958.12 (West Cum. Supp. 1979) (community programs for prisoners, and residential facility for youthful offenders).

<sup>65</sup>Ala. Code tit. 15 §§22-29 (1975); Colo. Rev. Stat. §17-2-201(5)(b) (1978); Fla. Stat. Ann. §§947.18, 960.17(3) (victim compensation repayment), 947.181, 947.20 (West Cum. Supp. 1979); Ga. Code Ann. §§77.517 (1973); Ky. Rev. Stat. Ann. §346.180(3) (Baldwin 1977) (victim compensation repayment); Me. Rev. Stat. tit. 17-A, §1223 (Pam. 1978), tit. 34, §1522 (1978); Miss. Code Ann. §99-37-15 (1978); Mont. Rev. Codes Ann. §71-2621(2) (1977) (victim compensation repayment); Nev. Rev. Stat. §213.126(1) (1977); N.J. Stat. Ann. §30:4-123.6 (West 1964); N.M. Stat. Ann. §31-17-1(B) (West 1978); N.C. Gen. Stat. §148-57.1 (1977); Or. Rev. Stat. §144.275 (1977); Tenn. Code Ann. §40-3207 (1978) (victim compensation repayment); Tex. Code Crim. Proc. Ann. art. 42.12, §§15(p), (g) (Vernon 1979) (parole and mandatory supervision condition); Wash. Rev. Code Ann. §7.68.120(s) (1978) (victim compensation repayment).

<sup>66</sup>N.Y. Penal Law §60.27 (McKinney Cum. Supp. 1981-1982).

<sup>67</sup>N.Y. Penal Law §65.10(2)(g) (McKinney 1975) (as amended, McKinney Cum. Supp. 1981-1982).

<sup>68</sup>People v. Grago, 24 Misc. 2d 739, 204 N.Y.S. 2d 774, 777 (1960).

<sup>69</sup>People v. Funk, 117 Misc. 778, 193 N.Y.S. 302 (1921); People v. Lofton, 78 Misc. 2d 202, 356 N.Y.S. 2d 791 (1974); People v. Grago, 204 N.Y.S. 2d 774 (Co. Ct. 1960).

<sup>70</sup>People v. Funk, 117 Misc. 778, 193 N.Y.S. 302, 303 (1921).

<sup>71</sup>N.Y. Penal Law §60.27(4) (McKinney Cum. Supp. 1982-1982).

<sup>72</sup>N.Y. Penal Law §60.27, commentary at 66 (McKinney Cum. Supp. 1981-1982).

<sup>73</sup>N.Y. Penal Law §60.27(5) (McKinney Cum. Supp. 1981-1982).

<sup>74</sup>N.Y. Penal Law §65.10(2) (McKinney 1975) (as amended, McKinney Cum. Supp. 1982-1982).

<sup>75</sup>N.Y. Penal Law §65.10(2)(g) (McKinney 1975) (as amended, McKinney Cum. Supp. 1981-1982).

<sup>76</sup>Alaska Stat. §12.55.100(a)(2)(1972); Ill. Ann. Stat. ch.38, §§1005-5-6(b), 1005-6-3.1(c)(9) (Smith-Hurd Cum. Supp. 1979); Neb. Rev. Stat. §29-2219(2)(j) (1978); N.M. Stat. Ann. §§31-17-1 (A)(4), 31-20-6(B)(1978); Okla. Stat. Ann. tit. 22, §991(F)(3) (West Cum. Supp. 1979).

<sup>77</sup>N.Y. Penal Law §65.10(2)(g) (McKinney 1975) (as amended, McKinney Cum. Supp. 1981-1982).

<sup>78</sup>People v. Lofton, 78 Misc. 2d 202, 356 N.Y.S. 2d 791 (1974); People v. Marx, 19 A.D. 2d 577, 240 N.Y.S. 2d 232 (1963).

<sup>79</sup>N.Y. Penal Law §60.27 (McKinney Cum. Supp. 1981-1982).

<sup>80</sup>N.Y. Penal Law §§65.10(2)(g); 60.27 (McKinney Cum. Supp. 1981-1982).

<sup>81</sup>People v. Julye, 64 A.D. 2d 614, 406 N.Y.S. 2d 529 (1978); People v. Thipen, 60 A.D. 2d 860, N.Y.S. 2d 584 (1978); People v. Fink, 68 N.Y.S. 2d 103(Cty.Ct. 1946).

<sup>82</sup>N.Y. Penal Law §§60.27(2) and (3) (McKinney Cum. Supp. 1981-1982).

<sup>83</sup>N.Y. Penal Law §60.27, commentary at 66 (McKinney Crim. Supp. 1981-1982).

<sup>84</sup>Harland, Alan T. "Restitution in Criminal Law," Research Report #6, National Evaluation of Adult Restitution Programs, Criminal Justice Research Center Albany, N.Y. (1980), p. 99.

<sup>85</sup>Ibid., p. 100.

<sup>86</sup>Armstrong v. Manzo, 380 U.S. 548, 552 (1965).

<sup>87</sup>Harland, op. cit., note 84 at 116-117.

<sup>88</sup>Ibid., p. 124.

<sup>89</sup>N.Y. Crim. Proc. Law §420.10 (McKinney Cum. Supp. 1981-1982).

- 90 N.Y. Crim. Proc. Law §420.10(3) (McKinney Cum. Supp. 1981-1982).
- 91 N.Y. Crim. Proc. Law §§420.10(4)(a)-(d) (McKinney Cum. Supp. 1981-1982).
- 92 N.Y. Crim. Proc. Law §420.10(4)(d), commentary at 90 (McKinney Cum. Supp. 1981-1982).
- 93 N.Y. Crim. Proc. Law §420.10(5) (McKinney Cum. Supp. 1981-1982).
- 94 Tate v. Short, 401 U.S. 395 (1971).
- 95 Ibid., p. 396.
- 96 Harland, op. cit., note 84 at 147.
- 97 Ibid., p. 148.
- 98 Williams v. Illinois, 399 U.S. 235 (1970).
- 99 Ibid., p. 244.
- 100 Harland, op. cit., note 84 at 149.
- 101 New York State Minority Task Force on Criminal Justice, The Criminal Must Pay! Restitution in New York State (February 1980).
- 102 Ibid., p. 2.
- 103 See, People v. Funk, 117 Misc. 778, 193 N.Y.S. 302 (1921); People v. Grago, 204 N.Y.S. 2d 774 (Co. Ct. 1960); People v. Lofton, 78 Misc. 2d 202, 356 N.Y.S. 2d 291 (1974).
- 104 N.Y. Penal Law §65.10 (McKinney 1975) (as amended, McKinney Cum. Supp. 1981-1982).
- 105 N.Y. Penal Law §65.10(h) (McKinney 1975) (as amended, McKinney Cum. Supp. 1981-1982).
- 106 N.Y. Family Court Act §§755-759 (McKinney Supp. Pam. 1981-1982).
- 107 New York State Division of Probation - Statistical Analysis Unit, Annual Report Statistical Supplements (Albany: New York State Division of Probation, 1976-1980).
- 108 National Victim-Witness Support Center, Victim-Witness Support Center News, 1 No.2(April 1981), p. 11.
- 109 New York State Division of Probation, op. cit., note 107.

**END**