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Office of Juvenile Justice and Delinquency Prevention

Liability and Legal Issues in Juvenile Restitution

Restitution Education,
Specialized Training &
Technical Assistance Program

The Restitution Education, Specialized Training, and Technical Assistance Program (RESTTA) is designed to promote the use of restitution in juvenile courts throughout the United States. Supported by the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, RESTTA is a cooperative effort involving the National Center for State Courts, the Pacific Institute for Research and Evaluation, and the Policy Sciences Group of Oklahoma State University. The Juvenile Justice Clearinghouse at the National Criminal Justice Reference Service operates the National Restitution Resource Center in support of the RESTTA program.

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RESTTA

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Robert W. Sweet, Jr.
Administrator

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Foreword

Monetary restitution and unpaid community service provide valuable and increasingly popular alternative dispositions in the juvenile court setting. They enable youth to take responsibility for their actions and to make amends to victims—and to society—thus offering an experience that can have positive effects in their development to maturity.

The Office of Juvenile Justice and Delinquency Prevention fosters the development of restitution programming by providing technical assistance and training to State and local practitioners. Since the launching of the National Juvenile Restitution Initiative and the Restitution Education, Specialized Training, and Technical Assistance Program (RESTTA), we have seen the number of restitution programs grow from just a few in 1978 to more than 400 today.

The experience of these programs has brought to the fore a number of legal and liability issues that have not so far been satisfactorily addressed by statutory or case law in many States. With this monograph, OJJDP seeks to provide the restitution programs, community service agencies, and employers of juveniles with guidance on developing procedures to avoid liability and to enable the programs to be fair and protective of all parties.

The monograph clarifies some definitial questions concerning paid and unpaid work and the responsibilities of the "employer" in each case, drawing on precedents existing in juvenile law and making inferences from relevant adult rulings. Restitution program managers, employers, and their legal advisers should find this monograph a valuable aid to developing, operating, and improving restitution programs.

Robert W. Sweet, Jr., Administrator

Preface

By establishing and funding the Restitution Education, Specialized Training, and Technical Assistance (RESTTA) program, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) seeks to further restitution as a juvenile sanction that helps compensate the victim, rehabilitate the offender, and serve society's broader aim of preventing future delinquency.

We are pleased to present this monograph, which provides a comprehensive guide to the legal boundaries involved in the operation of monetary restitution and community service programs. It covers liability issues of major concern to restitution program managers and practitioners, including liability for possible injuries suffered or caused by the offender while in the program, as well as immunity questions for governments and their employees. In addition, other legal aspects of the operation of restitution programs are analyzed, including due process, equal protection, and involuntary servitude issues.

This monograph was written specifically to assist legal advisers to restitution programs, but it will also help restitution personnel identify potential problems to discuss with their legal advisers. Most important, it provides an analysis of existing laws that apply or could apply to restitution programs. It gives examples from actual programs and offers an array of possible situation-specific solutions to successfully eliminate or limit liability. Finally, this guide can help overcome perceived legal obstacles to implementing a monetary restitution or community service program. The author, Howard Feinman, is an attorney in private practice in Eugene, Oregon. Mr. Feinman has specialized in the legal aspects of restitution for 12 years and is considered one of the Nation's leading experts on the topic.

Peter R. Schneider, Ph.D.
RESTTA National Coordinator
Bethesda, Maryland

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INTRODUCTION

Recent years have seen an increasing trend toward use of restitution and community service orders as alternative dispositions for juvenile offenders. A series of RESTTA-sponsored surveys, climaxed by an intensive effort to reach every juvenile restitution program in the United States, documented the growth of formal restitution programs from 15 in 1977 to more than 400 by 1989.[1] Despite the widespread use of restitution as a juvenile court disposition, legislatures and courts have paid relatively little attention to the liability and legal issues surrounding the implementation of this sanction.

This monograph will identify these issues and show how they can be successfully resolved. It is addressed primarily to legal advisers to restitution programs. A more general overview for the nonlawyer reader is provided in "Legal Issues in the Operation of Juvenile Restitution Programs," by Howard F. Feinman, published in *Guide to Juvenile Restitution*.[2] In addition, an outline of the issues is contained in a curriculum on legal and liability questions in restitution developed by the author for use in training and technical assistance in this area.[3]

The present analysis is based on statutory and case law guidelines. However, particularly in the liability area but to some extent in the legal issues area as well, there has been little statutory or case law guidance specifically applicable to juvenile offenders. In those areas, the monograph analyzes the issues with reference to the general law, which by analogy should apply to juvenile offenders. The analysis of liability issues also deals with matters of workers' compensation, labor, insurance, and tort law, all of which are applicable to both adult and juvenile offenders.

The liability section of the monograph addresses liability for injuries offenders suffer while performing monetary restitution or community service and for injuries these offenders cause to third parties. It analyzes immunity from liability for government entities and government officers and discusses possible solutions to eliminating or limiting liability.

The legal issues section examines due process, equal protection, and involuntary servitude as well as several nonconstitutional legal issues that arise when restitution or community service is ordered or implemented.

Restitution program managers have a responsibility to deal with liability issues at the onset of their programs. By paying attention to theories of liability and past legal problems, they can, with help from their legal advisers, plan their activities to avoid future problems.

LIABILITY

Programs that assume responsibility for placing youths in paid or unpaid positions also assume some responsibility for their safety and behavior at the worksite. A program must consider:

- Injuries sustained by the juvenile in a court-ordered placement.
- Injuries or harm done by the juvenile at the worksite.
- Loss or damages caused by the youth as a result of a crime committed at the workplace.

State workers' compensation legislation and tort law are key elements guiding liability determination for injuries to the youths themselves. Case law, sparse as it is with specific reference to juvenile restitution, can still offer useful precedents to liability for acts committed at the worksite.

LIABILITY FOR YOUTHS' INJURIES

An entity's liability for a youth who is injured while performing unpaid community service is dependent on whether or not the youth is defined as an employee of the entity. If the youth is considered an employee, workers' compensation comes into play.

Every State has adopted a system of workers' compensation. While State systems vary considerably, each has the following basic features:

- Coverage is limited to persons having employee status.
- An employee is automatically entitled to certain benefits when the employee suffers a personal injury by accident arising out of and in the course of employment.
- An employee's contributory fault or freedom from fault is irrelevant in determining an employee's right to compensation.
- In exchange for the rights under the Workers' Compensation Act, an employee gives up the right to sue an employer for damages for injuries suffered.
- Employers are required to pay workers' compensation premiums for all their eligible employees.[4]

Who is an employee?

The key issue, then, is whether a community service worker is an employee for purposes of workers' compensation. Most workers' compensation statutes define employees as "every person in the service of another under any contract of hire, express or implied."[5] This vague definition has caused courts to look to the common law test for determining whether one person is an employee of another. The primary questions that determine employment status under this test are: (1) Does the employer have the right to control the actions of the employee? and (2) Does the employee receive pay for the work?

Because it is difficult to apply the common law definition to a particular situation, several States have passed laws to clarify more specifically whether a person performing unpaid community service can be considered an employee for purposes of workers' compensation.

Some of these laws state that all youths performing unpaid community service for the government or a community service agency are considered employees of the State.[6] Laws in other States say they are *not* employees of the State,[7] and in still other States persons performing community service are not considered employees at all. In these States, however, government and nonprofit agencies may purchase workers' compensation coverage for their community service workers.[8]

Some States have established separate compensation schemes and procedures for persons injured while performing unpaid community service. Although injured offenders may claim compensation, they give up their right to sue.[9]

In States where no statute has been enacted, legal advisers can apply common law principles to determine the employee status of someone performing unpaid community service.

Appellate courts have not directly addressed the workers' compensation eligibility of unpaid community service workers. In several reported cases, adults on work release status have been injured and applied for workers' compensation benefits. The courts have generally found that a person on work release status is not an employee for

purposes of workers' compensation, either because the work release job is not voluntary or because the person is not paid for the work performed.[10] Some examples:

In *Orr v. Industrial Commission*,[11] an inmate volunteered to work on a road-work crew and was paid $2.00 per day. The court held that there was no workers' compensation coverage for an injury suffered by the inmate since there was no "contract of hire, express or implied."

In *Drake v. County of Essex*,[12] a work release inmate who was injured sued the State for injuries. The State alleged that the inmate was precluded from suing since he was an employee covered by workers' compensation, and this was his exclusive remedy. But the court held that there was no voluntary contract of hire; the inmate was therefore not an employee for purposes of workers' compensation coverage and was free to bring a suit against the State.

However, in *Scroggins v. Twin City Fire Insurance Co.*,[13] the court held that there was a question of fact as to whether a work release inmate was an employee for purposes of workers' compensation coverage, and this required the court to remand the case to the trial court. The appeals court noted two factors that affected whether an employment relationship existed: (1) control by the employer and (2) whether the relationship was voluntary. The court noted that the first element of control was clearly present. The appeals court remanded the case to the trial court with a direction to determine whether the relationship between the inmate and the program was voluntary, since the inmate could choose either to work in the program and receive time off the sentence, or not work in the program and serve the full sentence.

In South Carolina, in a case in which a person on work release status was placed on the payroll of a private employer and was injured, the person was considered an employee of the private employer for purposes of workers' compensation coverage.[14] In a similar Florida case, this coverage was found even if the person is paid less than the company's regular employees.[15]

But in New Jersey the attorney general has issued an opinion that persons participating in unpaid community service programs are not entitled to workers' compensation benefits since they are not employees for purposes of that coverage.[16] In addition, the Internal Revenue Service and the U.S. Department of Labor have issued informal rulings indicating that community service workers are not employees for purposes of Federal employment tax[17] and child labor laws.[18] If a youth is paid while performing monetary restitution, generally the youth is treated as an employee of the payer of the salary.

When can the worker sue?

If a worker who is injured while performing unpaid community service is not considered an employee for purposes of workers' compensation, the worker may bring a lawsuit against the organization for which the work was done. To win the suit, the worker must prove that someone was at fault and that this person's fault was the cause of injury. Liability for the injury is determined according to the principles of tort law.

A discussion of the tort system for covering damages for injuries suffered is beyond the scope of this monograph.[19] Basically, however, to maintain a cause of action against another person for negligence, one must show that (1) the defendant had a duty to conform to a certain standard of conduct for the protection of others against unreasonable risks, (2) there was a breach of that duty, (3) there was a reasonably close causal connection between the conduct and the resulting injury (often referred to as "legal cause" or "proximate cause"), and (4) actual loss or damage was suffered.

Thus, in order to recover a claim, a youth would have to prove that the four elements necessary for a claim of negligence exist. Examples of theories of negligence that a youth could allege are negligent placement (such as placement in a dangerous work setting) and negligent maintenance of equipment. However, the theories for recovery based on negligence are limited only by the imagination of the youth and the youth's attorney.

The first defense to a negligence claim is that there was no negligence or, in other words, that one or more of the four

elements listed above does not exist. Other common defenses are that the person making the claim contributed to the injury and therefore is not entitled to recover, or that the person was aware of the risk involved in certain conduct, assumed that risk, and therefore was not entitled to recover for any injuries suffered. The doctrines of contributory negligence and assumption of risk are very complicated and vary from State to State. A discussion of them is therefore beyond the scope of this monograph.[20]

LIABILITY FOR INJURIES CAUSED TO THIRD PARTY

Liability extends beyond injury to the youth performing the community service or monetary restitution. That youth may injure a third party, and the third party may bring a claim against a person or governmental or nonprofit entity to recover for the injury. The plaintiff may cite negligence, failure to warn about dangerous offenders, or failure to supervise dangerous offenders.

Imputed negligence

Generally, a person is liable for negligence if that person breaches a duty of care recognized by society and as a result injury is caused to a third person. However, as in the case of workers' compensation, there are exceptions to the rule that there must be fault for there to be liability. Vicarious liability, often called imputed negligence or respondeat superior, is another exception. This doctrine holds that because of some relationship between A and B, A can be held responsible for B's negligence even though A played no part in B's negligence, had not encouraged B's conduct, and, in fact, did everything possible to prevent B's conduct.[21]

Since one of the oldest and most established rules of vicarious liability is that a master is liable for the torts of servants and employees,[22] the question then hinges on whether a youth performing unpaid community service or monetary restitution is an employee or servant of another for the purpose of vicarious liability. If yes, the employer will be liable for a third person's injury regardless of whether the employer is absolutely free of fault or not.[23]

In determining whether a person is an employee of another for purposes of vicarious liability, the courts examine whether that other person or organization has the right to control the person's conduct.[24] If this element of control is present, courts have found an employment relationship for purposes of vicarious liability. The courts have not been concerned with the factors of compensation or voluntariness that are important in determining employee status for purposes of workers' compensation. Thus, it is possible for a person to be considered an employee of another for purposes of vicarious liability while not being an employee for purposes of workers' compensation.

Scope of employment

Yet even if the element of control is present and a person is determined to be an employee for purposes of vicarious liability, an employer is not liable for the negligence of the employee if the negligence occurred outside the scope of the employment relationship.

This is a factual question that depends on the circumstances of each case. Actions are considered within the scope of employment if "they are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."[25] Another definition is that, "In general, a servant's conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master."[26]

Factors considered in determining whether conduct is within the scope of employment are:

- The time, place, and purpose of the employee's acts.
- The similarity of the acts to ones that have been authorized.
- Whether the actions are ones commonly carried out by servants of employers.
- The extent of departure from normal methods.

- Previous relations between the parties.
- Whether the master had reason to expect that the act would be done.[27]

In summary, for the employer to be held liable for the conduct of the employee even though the employer was blameless: there must be an employment relationship; the employee's acts must be within the scope of employment; the employee's conduct must have been negligent; and the negligent conduct must have been the cause of injury to the third party.

For example, if a youth hired to park cars in a parking garage hits another car while attempting to park one customer's car, the employer will be liable to both customers for the damages caused, even though the employer was not negligent. On the other hand, if the same youth takes a customer's car without permission, drives it 20 miles from the parking lot to visit his girlfriend, and en route hits a pedestrian, the employer will not be liable.

In the first instance cited above, the employer is liable *for another's negligence.* There may be cases, however, in which an organization involved in monetary restitution or community service may be held liable to a third party *for its own negligence.* The most common instances involve cases when there has been negligent hiring, retention, or entrustment, or failure to warn about dangerous offenders.

Negligent hiring

First, an important distinction must be made between employee liability based on the vicarious liability just discussed and employer liability based on negligent hiring and retention. In a claim based on imputed negligence, the employer is held liable for injuries to a third party not because of any fault on the employer's part but because of the *employment relationship.* The injured party must show only that the employee was acting within the scope of employment or in furtherance of the employer's interest at the time of the injury.

On the other hand, in a negligent hiring action, if an employer is found to be negligent in hiring or not firing an incompetent employee, the employer will be held liable, *even if the employee was acting outside the scope of employment at the time the third party was injured.*

The tort of negligent hiring is relatively new. The oldest cases are only 50 years old, and this tort is becoming an area of increasing potential liability for employers.[28] A claim for negligent hiring may be made if:

- There is an employment relationship.
- The employee is incompetent or unfit.
- The employer knew or should have known of the employee's incompetence or unfitness.
- The employee's wrongful act causes an injury to a third party.
- The injury was foreseeable.[29]

There is an employment relationship. If the person performs monetary restitution and is paid by the employer, an employment relationship exists for the purpose of a negligent hiring claim. If a person performs unpaid community service, the person is defined as an employee if the organization has the right to control the person's conduct.[30]

The employee is incompetent or unfit. In this type of claim, an employee's incompetence or unfitness is raised after the employee has injured a third party. For instance, where a bartender has assaulted a tavern patron,[31] or where an employee of a housing complex has assaulted a tenant,[32] or where an employee has committed theft from a third party,[33] the injured party has successfully maintained that the employee was incompetent or unfit. Typically, injured parties will claim that the employee was incompetent or unfit in that the employee has a propensity for violence or for committing thefts.

The employer knew or should have known of the employee's incompetence or unfitness. The employer has a duty to investigate the background of prospective employees.[34] The scope and extent of the employer's investigation depends on the nature of the employment and the potential

risk to third persons. An employer's duty is greater if the employment is dangerous or hazardous or if the employment places third persons at potential risk. Similarly, the duty to investigate is greater if a prospective employee will have access to money or access to the interior of private residences.[35] Where the risk to third persons is minimal and the job is not hazardous, an employer need only obtain and verify background information such as the prospective employee's prior and current addresses, previous work experience, and personal references.

Does an employer have a duty to investigate the prospective employee's criminal background? What obligation does the employer incur on learning that a prospective employee has a prior criminal record?

Courts have generally held that employers do not have a duty to investigate the prior criminal records of prospective employees.[36] However, in most States an employer may inquire about a prospective employee's criminal convictions. If an employer knows the employee's criminal record, the employer may still not be absolutely liable for the employee's injury to a third party. First there must be a showing that the type of injury suffered by the third party was foreseeable based on the employee's prior criminal record. Thus, an employer would probably not be liable for an employee's assault on a third party if the employee's criminal record was for theft, since the employer could not foresee assault, given an offender's prior record for theft.

Moreover, courts have said that society has an obligation to see that former offenders obtain gainful employment. Imposing absolute liability on employers who hire persons with criminal records would impede this effort.

For example, one court has stated:

> To say that an employer can never hire a person with a criminal record at the risk of being held liable for his tortious assault flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray.[37]

Restitution program managers can turn this employer's duty to investigate into an effective means of encouraging business participation in the restitution program. They could point out to employers that the program has already conducted an investigation into the prospective employee's background and that this investigation may protect the employer from potential liability.

Negligent retention

A claim for negligent retention is essentially the same as one for negligent hiring, but the employer is charged with learning of the employee's negligence or incompetence at a later time. An employer who becomes aware of the employee's incompetence or unfitness during the course of employment may be held liable for negligently retaining an incompetent or unfit employee.

Negligent entrustment

A claim for negligent entrustment is made when a third party is injured as a result of an employer's negligence in entrusting an object or piece of equipment to an employee when the employer knew or should have known that the employee was unskilled or incompetent to use the object or equipment. The elements for the third party's claim against an employer are that:

- The employee was incompetent, inexperienced, or reckless.
- The employer knew or had reason to know of the employee's problems.
- The employer entrusted an object or piece of equipment to the employee.
- The employer's negligence in entrusting the employee with the equipment caused the plaintiff's injuries.

The basis of this theory of liability is that employers must take certain precautions against the potential negligence of one of their employees.[38]

Failure to warn about dangerous offenders

In a related series of cases, the third party liability issue has revolved around a government agency's liability for failure

to warn the third party about a potentially dangerous offender or for failure to supervise that offender adequately. The elements of a claim for damages for failure to warn or for failure to supervise an offender are as follows:

- There must be a foreseeable, readily identifiable victim.
- There must be a practical method of warning of danger.
- The liable entity must be involved in placement or referral.
- The responsible person failed to take steps that a reasonably prudent person would take.
- A person was injured and the injury would have been avoidable if adequate warning or adequate supervision had been provided.

Courts have been unwilling to impose liability on a government agency when an offender injures a member of the general public. In *Thompson v. County of Alameda*,[39] the parents of a 5-year-old girl brought a claim against the county after a juvenile killed their daughter within 24 hours of his release from a detention center. The youth had no previous relationship with the victim or her family. The court held that there is no duty to warn if the threat of danger is only to the public at large. However, the court noted where the offender poses a "predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger"[40] there will be liability. Thus, if in this case the youth had told the detention center staff that he intended to kill the 5-year-old girl and the detention staff took no action, there would be liability.

But where a readily identifiable victim exists and a practical method to warn that victim is shown, liability has been found. In *Georgen v. State*,[41] the State was held liable to a woman who was assaulted by a man paroled to work at her remote rural farm. A parole officer had contacted the woman to ask if she would accept a parolee to work on her farm. The court found that the 60-year-old woman relied on the parole board and its employees for "advice and guidance" when they recommended the 20-year-old offender. The court found that the parole board had been negligent in recommending the individual and failing to warn the woman of his prior record, which included violent assaults on older women.

In *Johnson v. State*,[42] the California Youth Authority was held liable to foster parents injured by a youth the California Youth Authority had placed in their home. The 16-year-old boy had homicidal tendencies and a background of violence, but no adequate notice of the youth's background was given to the foster parents.

In *Hicks v. U.S.*,[43] a mental hospital released a patient who had previously assaulted and threatened his wife and made threats to do the same when released. Indeed, the husband did murder his wife upon release. The court held that the defendant was liable to the wife's estate.

In addition to the foreseeability of the injury and identifiability of the victim, the government agency's participation in the placement of the offender is an important factor in determining liability. In *Rieser v. District of Columbia*,[44] a parole officer successfully referred a client to an apartment complex to do maintenance work. Although the offender had a long history of violent sexual assaults, including convictions for rape as an adult and murder as a juvenile, the parole officer's referral cited only the man's prior offense for robbery. After getting the job, the parolee murdered a resident of the complex. The court held that the parole agency was liable for damages to the resident's estate. The parole officer's referral was the key factor in determining liability.

In another case, however, when no such involvement in referral was apparent, the court rejected liability. In *J. A. Meyers & Co. v. Los Angeles County Probation Department*,[45] a probationer who had been convicted of embezzlement obtained a job as an assistant to a business president. The probationer received no assistance from his probation officer in securing the job. The probation officer knew that the probationer had obtained a job but took no steps to warn the employer. After the probationer embezzled a large sum of money from the business, the employer sued the probation department for its failure to provide a warning. The court held there was no liability, relying heavily on the fact that the probation officer did not make the referral to the job.

The court also noted that California law provided a great deal of protection for the confidentiality of criminal records, recognizing the need for rehabilitation in the probation

setting. If probation officers were required to warn all employers in similar situations, then probationers would be substantially hampered in securing employment.

IMMUNITY

Sometimes, even in cases where a duty to warn or to supervise has been found, liability has been defeated because the entity was governmental and therefore immune from liability. The concept of immunity—freedom from suit or liability—is very important in a discussion of liability in this area of the law. Immunity is applied in varying degrees to government entities and to public officials. Thus juvenile restitution programs, which result from a judicial process and are generally administered, sponsored, or regulated by public agencies, need to be aware of governmental immunity concepts and legislation.

Governmental immunity

Governmental or sovereign immunity is derived from the concept that the "king can do no wrong" and therefore the government, as successor to the king, has no liability.[46]

This immunity applies to Federal and State governments. However, the Federal Government and many State governments have passed tort claims acts that allow these government entities to be sued provided certain terms and conditions are met. Although governmental immunity at the State and Federal levels has been limited, it has not been abolished. At the county or municipal level, the majority of States have eliminated governmental or sovereign immunity entirely.[47]

At whatever level, all government entities are immune from liability for policymaking or discretionary actions. For example, if a county chooses a site where community work service will be performed, and if a person is injured as a result of that site selection, the county will be immune from liability for having chosen the site. Similarly, if a county or municipality is charged with responsibility for the conduct of one of its employees under the doctrine of vicarious liability, there will be no liability if the employee was carrying out a policymaking or discretionary function.[48]

Absolute immunity. Some officials have absolute, or total, immunity. In a case where absolute immunity applies, the lawsuit can be defeated at the outset by means of a motion for summary judgment in favor of the person who has been sued. Although absolute immunity applies to both judges and legislators, judicial immunity is absolute only if the judge was acting in a "judicial capacity" and in the scope of the judge's jurisdiction. Thus, in a case where a judge ordered a coffee vendor brought before him in shackles for selling bad coffee, the judge was found not to be acting in a judicial capacity and therefore not entitled to immunity.[49] Or when a juvenile court referee detained a youth in the absence of any authority or due process protections, the court found that the referee exceeded his jurisdiction and was not entitled to immunity.[50]

Unfortunately, the cases do not clearly define when a judge has merely committed an error—for which there is absolute immunity—and when a judge has acted in a nonjudicial capacity or outside the scope of his or her jurisdiction—for which there is not immunity.

The concept of absolute immunity is extended to persons carrying on functions similar to those carried out by judges.[51] Thus, members of boards or commissions, such as parole boards, who engage in judicial-type decisionmaking are granted absolute immunity even though they are members of the executive rather than the judicial branch. Absolute immunity has also been extended to legislators and to prosecuting attorneys and other adjuncts to the judicial process.[52]

Qualified immunity. Public officials, as opposed to judges and legislators, are afforded qualified immunity for their actions. For example, many cases have held that a public officer is immune from liability for "discretionary" acts but not for "ministerial" acts. Unfortunately, again courts have not provided very clear guidelines as to what acts are discretionary and what acts are ministerial. Generally, discretionary acts require deliberation or personal judgment whereas ministerial acts involve only the performance of a duty calling for little significant choice.

It appears, in many situations, that a court first decides if an officer is entitled to immunity and then decides if the official's conduct was discretionary or ministerial. Some courts, at the urging of legal commentators, determine if a government official is entitled to immunity after assessing the nature of the injury suffered, the availability of alternate remedies, the importance of protecting particular kinds of official acts, and other factors.[53]

Even if the government official is found to be entitled to immunity for a discretionary act, the official will lose that immunity if it is determined that he or she acted in bad faith, or with malice, or in a reckless manner.[54] Qualified immunity will also be lost if the official acted beyond the scope of his or her duty or jurisdiction.

Thus, as is the case with the concept of liability, restitution program managers must understand the issue of immunity.

SOLUTIONS TO LIABILITY PROBLEMS

Restitution programs have chosen a variety of ways to solve their liability problems. Some purchase liability insurance, charging each youth a small fee to cover the cost. For many programs waivers offer a solution. The programs ask participants to sign waivers of liability or release forms as a condition of participation. While it is unlikely that a court would enforce such a form if a claim were brought, the forms do tend to deter individuals from bringing claims.

Knowledge of State legislation in the restitution area is an important first step in protection from liability. In many instances, proper State legislation can either eliminate program liability or at least eliminate the uncertainty about potential areas of liability. States have adopted several types of liability legislation:

- Legislation to make clear that a youth performing unpaid community service is an employee and therefore entitled to workers' compensation benefits as the exclusive remedy for any injury suffered. (On the other hand, several States have legislation making it clear that youths performing unpaid community service are *not* employees for purposes of workers' compensation, thus limiting the program's responsibility for paying workers' compensation premiums but also leaving the youth free to bring a claim for any injury suffered.)[55]
- Legislation granting States, counties, municipalities, probation departments, and officials of those organizations immunity from any liability in the operation of a restitution or community service program.[56]
- Legislation requiring either the State attorney general or the county attorney to defend a government officer if a claim is brought against the officer.[57]
- Legislation requiring the State or county government to indemnify any government official who has been assessed damages while performing official functions.[58]

The actual experience in the RESTTA (Restitution Education, Specialized Training, and Technical Assistance) program—based on reports from program directors from Dallas (Texas), Quincy (Massachusetts), and other restitution and community service programs—shows that despite the many thousands of youth participating in restitution and community service programs around the country, very few programs have been subject to claims either for injuries suffered by youth participating in the program or by injured third parties.

Nonetheless, restitution program managers should research the laws in their State and inform the employers and operators of community service agencies with whom they are associated. Such precautions are likely to reduce the burden on businesses and the likelihood of liability suits.

LEGAL ISSUES

Courts must follow procedures mandated by the Constitution and by statutes when ordering and implementing monetary restitution and unpaid community service orders. They must follow due process, provide equal protection of the law, and ensure that the scope and amount of the restitution order are assessed fairly and according to the letter and intent of the law.

The 14th amendment to the United States Constitution provides ". . .nor shall any State deprive any person of life, liberty or property without due process of law . . ."

Since it is clear that monetary restitution is a deprivation of property and that unpaid community service involves a deprivation of liberty, this due process clause applies to the implementation of restitution and community service orders. But what process is required to meet constitutional standards?

Due process in diversion or preadjudication

Prior to adjudication, restitution and community service orders constitute a diversion from the formal juvenile court process.[59] At this stage, a youth agrees to pay monetary restitution or perform unpaid community service and waives his or her right to formally contest the charges pending and the proposed monetary restitution or unpaid community service. In all criminal or juvenile court proceedings, this waiver of rights must be knowing, voluntary, and intelligent to meet constitutional standards.[60] To guarantee this, programs should adopt several procedural protections:

- The case should be screened by the prosecuting attorney, by the defense attorney, or by the person who makes the decision whether or not to file a juvenile court petition to determine that there is "probable cause" to believe an offense has been committed and that the youth has committed it.
- The youth should be advised of all of the rights being forfeited as a result of consenting to participate in restitution or unpaid community service as a diversion to the formal judicial process. Some States provide that the youth has the right to counsel, and to court-appointed counsel if the youth cannot afford counsel. This is to ensure that the youth is adequately informed of all rights being given up.
- The youth and the youth's parent or guardian should sign a waiver of rights and consent to participate in the restitution or community service program. This waiver should clearly state the rights being given up and acknowledge that the youth's participation is voluntary.

Due process in postadjudication

Case law has not clearly defined what procedure courts must follow in ordering restitution at the postadjudication or dispositional stage. The U.S. Supreme Court has indicated that courts must provide for procedures that are fair and that do not permit the courts to receive false information, but the Supreme Court has also said that a formal trial with all of its safeguards is not required at sentencing or disposition.[61] Generally a court is given flexibility to design a procedure that balances the youth's interest in receiving an appropriate restitution or community service order with the State's interest in maintaining a disposition procedure that is not unduly cumbersome.

These procedures should provide for the following:

- *Right to counsel.* A youth is entitled to counsel, and free counsel if indigent. This right attaches at all phases of the formal juvenile court process, including the disposition phase, when monetary restitution and/or unpaid community service are ordered.[62]
- *Notice and opportunity to be heard.* The youth should receive notice of the loss claimed by the victim, the proposed amount of monetary restitution or unpaid community service, and an opportunity to contest the entry of that order, including the opportunity to cross-examine the victim if the amount of loss is disputed.[63]
- *Final decision by the judge.* The final decision on restitution and community service must be made by the judge, and the judge cannot delegate this decision to the probation staff. Of course, the judge can request the probation staff to prepare a report with a recommendation concerning the appropriate amount of monetary restitution or

unpaid community service, but the final order must be made by the judge.[64]

Equal protection

In addition to due process, juveniles are entitled to equal protection of the law. In this regard, courts and legislatures have been particularly sensitive to the treatment of indigents in the juvenile and criminal justice systems. Thus, by statute[65] or by court decision,[66] it has been regularly held that in ordering monetary restitution a court must inquire into the offender's ability to pay. This requirement is based on the view that it would be a violation of the equal protection clause of the U. S. Constitution to treat offenders differently based upon their financial status.

The equal protection clause applies at the preadjudication stage of the proceedings as well. Thus, it has been held improper to file a formal petition against a youth who has been denied the right to participate in a preadjudication diversion program solely because of the youth's inability to pay monetary restitution.[67]

Prior to ordering monetary restitution, the court must make a finding that a youth either can pay or is likely in the near future to be able to pay.[68] If the youth does not have funds to pay restitution, a judge may still order restitution if there is a finding that the youth has the ability to get a job and obtain funds to pay the monetary restitution. In one unusual case, a court reversed the trial judge's order of monetary restitution, finding it unreasonable to expect the youth to get a job when the unemployment rate for youth in the community was 31.5 percent.[69]

Preferably, the inquiry into the ability to pay should be made at the time the order is entered, although some courts have held that it may be made at the time the court attempts to enforce its order.[70]

It is clear that at the time of enforcement, the Constitution prohibits revoking probation and incarcerating an offender for failure to pay monetary restitution unless the court finds that the failure to pay was willful.[71] However, there is nothing improper about using methods other than incarceration to enforce the monetary restitution order. These other methods could include converting the monetary restitution order into a community service order.[72]

In order for a court to find that the failure to pay was willful, the court must find either that the youth had the means to pay restitution and chose not to or that the youth failed to make bona fide efforts to secure employment.[73]

Involuntary service

Does a community work service order violate the constitutional prohibition against involuntary servitude? The 13th amendment of the U.S. Constitution states: "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been convicted, shall exist within the United States or any place subject to their jurisdiction."

A community work service order entered at the dispositional phase of a juvenile court proceeding, after adjudication, is not a violation of the 13th amendment because the amendment allows compulsory work for persons who have been convicted of crimes. The argument has been made, never successfully, that an adjudication order in juvenile court is not a conviction of a crime and therefore this provision does not apply.[74]

If a youth is participating in community service prior to adjudication, there is no 13th amendment violation since the youth is consenting to participate in the diversion program in lieu of the court's filing a formal juvenile court petition. For this to be the case, it is important that the restitution program follow correct procedures in obtaining a valid waiver of rights and consent to participation.[75]

Scope and amount of restitution order

Restitution may be ordered for all offenses for which a youth has been adjudicated.[76] A youth may even be ordered to pay restitution for offenses that have been dismissed provided

the youth admits responsibility for those offenses and agrees to pay restitution for them.[77] Often a prosecutor will not make, and a judge will not accept, a recommendation to dismiss some charges in exchange for a youth admitting others, without an agreement by the youth that restitution may be ordered on all the offenses, both those admitted and those dismissed.[78]

Who is eligible to receive restitution?

Most statutes provide that a youth may be ordered to pay restitution without defining who is eligible to receive the restitution payments. This lack of statutory guidance has caused confusion, generated much litigation, and left the decision to the courts. The courts have held that in order for a victim to be eligible to receive restitution payments, there must be a causal connection between the youth's offense and the victim's loss.[79]

For example, one court has held it improper for a person convicted of leaving the scene of an accident to pay restitution without showing that leaving the scene of the accident caused the victim's damages.[80] Another court held that a State criminal investigation division is not eligible to receive restitution for the costs of investigating the offender's crimes.[81] Nor is a State welfare agency eligible to receive restitution for the medical cost of treating injuries inflicted by the police in apprehending the offender.[82]

Insurance companies. Insurance companies are eligible to receive restitution if they show a connection between the youth's offense and the money they paid their insured (the direct victim of the youth's conduct).[83] However, some States, either by statute or court decision, have held that insurance companies are *not* eligible to receive restitution payments.[84] The rationale for this prohibition is that an insurance company cannot be the "victim" since the company has already been paid by the insured to assume the risk of loss.

Charities. In some cases judges have ordered offenders to pay monetary restitution to a charitable organization that has a worthy purpose but no connection with the offender's criminal activity. The majority of courts have held that such an order, however well-intentioned, is improper.[85] There is, of course, no similar prohibition against an offender performing unpaid community service for the same charitable organization.

Amount of loss

An extensive amount of litigation has taken place over the amount of monetary restitution an offender should be required to pay to the victim. This is primarily because statutes have not always clearly defined the type of losses for which restitution may be ordered.[86]

Where the offense is a property crime, there is generally no difficulty in assessing the loss because value is determined by the cost of repair or replacements, market value, or other reliable measures.[87] But it is much more difficult to measure the amount of loss where the offense is a crime against the person. Typically, restitution for medical expenses and other out-of-pocket expenses is permitted, whereas restituion for pain and suffering and other losses difficult to quantify is not.[88]

Multiple offenders

The doctrine of joint and several liability provides that where two or more persons act in concert, each of those persons is liable for the entire damage caused by their conduct. Thus if four youths commit an offense causing $200 worth of damage, each youth could be ordered to pay $200 restitution. Most States have held that a judge has authority to require youths to be jointly and severally liable for the damage caused by their offenses regardless of their relative degrees of culpability.[89] It is assumed that the victim in such a case would not be entitled to a windfall and that a collection procedure would be instituted to prevent a victim from receiving more than the amount of loss. In some States, however, the juvenile court judge, where there are multiple offenders, must assess the relative degree of culpability and order restitution accordingly.[90]

Postinstitutional restitution

Can a judge order a youth to pay restitution following confinement in the State training school? Permissibility depends on the State statutory framework. If the juvenile dispositional statute provides that a judge may commit the youth to the agency for placement at the State training school, a majority of States hold that unless the statute says otherwise, the judge loses jurisdiction over the case once the youth is placed with the State agency and thus may not order the youth to pay restitution upon release from the training school.[91] The judge also does not have authority to both commit a youth to a training school and order restitution when the statute authorizes restitution only as a "condition of probation."[92] Several States have avoided this problem by specifically providing that a restitution order is valid even if a youth is committed to the State training school.[93]

Parental liability

Almost every State has adopted a statute that makes parents liable for damage intentionally caused by their minor child. Under these statutes, however, a victim must bring a separate civil action against the parent in a different court to obtain a judgment. These statutes also limit the potential liability of parents by setting maximum liability limits. Several States have adopted statutes making both parents and youths liable for monetary restitution as part of the juvenile court proceeding against the youthful offender.[94] Generally, in the absence of such a statute, a parent may not be held liable for restitution to the victim of the youth's offenses as part of the juvenile court proceeding.[95] Moreover, if the parent is to be held liable for restitution, the parent must be provided with notice and an opportunity to be heard and must be given a full and fair opportunity to participate in the dispositional phase of the court hearing.[96]

In any event, even though the parent may be held liable for restitution, it is improper to condition the youth's release from detention upon the parents' payment of restitution.[97]

CONCLUSION

Despite widespread use of monetary restitution and unpaid community service, there is still substantial concern, confusion, and uncertainty about the liability and legal issues surrounding these increasingly popular alternative dispositions. Some States have adopted legislative protection to eliminate or limit the liability of programs and government officers operating them. And some States have passed legislation defining in some detail the method and procedures that must be followed in ordering restitution and community service. But in the many States that have not addressed the liability concerns and legal issues, persons and programs have had to predict how their State courts would interpret a variety of common issues. More legislative direction, both in the liability and legal areas of program operation, would help eliminate much of this uncertainty.

Notes

1. *National Trends in Juvenile Restitution Programming*, Anne Larason Schneider and Jean Shumway Warner, RESTTA, Office of Juvenile Justice and Delinquency Prevention, 1989.

2. *Guide to Juvenile Restitution*, Anne Schneider, ed., RESTTA, July 1985.

3. *Restitution Improvement Curriculum*, H. Ted Rubin, ed., RESTTA, 1988.

4. Larson, Law of Workmen's Compensation § 1.10, Matthew Bender (1985).

5. Larson, supra, at § 43.10.

6. Fla. Stat. Ann. § 39.04(b) (West).

7. Hawaii Rev. Stat. § 706-605(1)(e).

8. Cal. Welf. & Inst. Code § 219 (West); Colo. Rev. Stats. § 19-3-117.1(9); Or. Rev. Stat. § 656.041.

9. Minn. Stat. Ann. § 3-739 (West).

10. *Spikes v. State*, 458 A.2d 672 (R.I. 1983); *Abrams v. Madison County Highway Dept.*, 495 S.W.2d 539 (Tenn. 1973); *Scott v. City of Hobbs*, 366 P.2d 854 (N.M. 1961).

11. 691 P.2d 1145 (Colo. App. 1984).

12. 469 A.2d 512 (N.J. 1983).

13. 656 S.W.2d 213 (Tex. App. 1983).

14. *Hamilton v. Daniel International Corp.*, 257 S.E.2d 157 (S.C. 1979).

15. *Courtesy Construction Corp. v. Derscha*, 431 So.2d 232 (Fla. App. 1983).

16. Op. N.J. Att'y Gen. (Oct. 16, 1985).

17. Op. IRS (Letter to N.C. Community-Based Programs, Jan. 21, 1987).

18. Op. U.S. Dept. of Labor (Letter to "Work and Earn It Program," Winston-Salem, NC, March 12, 1987).

19. See, Prosser & Keeton, *Torts*, (5th ed.), West Publishing Co. (1984); Harper, James & Gray, *Law of Torts*, (2nd ed.), Little, Brown & Co. (1986).

20. See, Prosser & Keeton, supra; Harper, James & Gray, supra.

21. Prosser & Keeton, supra, at 499.

22. Prosser & Keeton, supra, at 500.

23. "Liability of Charitable Organization Under Respondeat Superior Doctrine for Tort of Unpaid Volunteer," 82 A.L.R.3d 1213 (1978); see also Restatement (Second) of Torts § 219 (1979).

24. 82 A.L.R.3d 1213, supra, at 1216, 1221.

25. Prosser & Keeton, supra, at 502.

26. Restatement (Second) of Agency § 228 (1958).

27. Prosser & Keeton, supra, at 502.

28. "Negligent Hiring Announces A Legal Threat to Employers," *Wall Street Journal*, December 23, 1986; "Negligent Hiring Claims Take Off," *ABA Journal*, May 1, 1987.

29. "Cause of Action Against Employer for Negligent Hiring of Employee," 4 Shepard's Causes of Action 285 (1983); Annot., "Employer's Knowledge of Employee's Past Criminal Record As Affecting Liability for Employee's Tortious Conduct," 48 A.L.R.3d 359

(1973); "Responsibility for Employers for the Actions of their Employees: The Negligent Hiring Theory of Liability," 53 Chicago Kent Law Review 717 (1977); Restatement (Second) of Agency § 213 (1958).

30. See footnote 22 and corresponding text.

31. *Evans v. Morsell*, 395 A.2d 480 (Md. 1978).

32. *Cramer v. Housing Opportunities Commission of Montgomery County*, 501 A.2d 35 (Md. 1985); *Williams v. Feather Sound, Inc.*, 386 So.2d 1238 (Fla. App. 1980); *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983); *Kendall v. Gore Properties*, 236 F.2d 673 (D.C. Cir. 1956).

33. *Lucas v. Liggett & Meyers Tobacco Co.*, 442 P.2d 460 (Hawaii 1968); *Welsh Manufacturing, Division of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984); *Pruitt v. Pavelin*, 685 P.2d 1347 (Ariz. App. 1984).

34. Shepard's 4 COA 285, supra at § 7.

35. *Williams v. Feather Sound*, supra; *Kassman v. Busfield Enterprises*, 639 P.2d 353 (Ariz. App. 1982); *Ponticas v. K.M.S.*, supra.

36. *Evans v. Morsell*, supra; *Ponticas v. K.M.S.*, supra.

37. *Williams v. Feather Sound, Inc.*, supra at 1241. See also *Baugher v. A. Hattersley & Sons, Inc.*, 436 N.E.2d 126 (Ind. App. 1982).

38. Prosser & Keeton, supra, at 199.

39. 167 Cal. Rptr. 20 (1982).

40. The distinction between the situation where there is liability because of a special duty to certain victims, and where there is no liability because there is only a general duty to society, has been rejected in some States. In those States, whether or not there is liability is based on the immunity doctrine which is discussed at pp. 17–19. See *Ryan v. State*, 656 P.2d 597 (Ariz. 1982); *Adams v. State*, 555 P.2d 235, (Alas. 1976); *Martinez v. Lakewood*, 655 P.2d 1388, (Colo. 1982); *Commercial Carrier Corp. v. Indian River Cty.*, 371 So.2d 1010 (Fla. 1979); "Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory That Only General, Not Particular, Duty Was Owed Under Circumstances," 38 A.L.R. 4th 1188 (1982); "Liability of Governmental Officer or Entity for Failure to Warn or Notify of Release of Potentially Dangerous Individual from Custody," 12 A.L.R. 4th 722 (1982).

41. 196 N.Y.S.2d 455 (1959).

42. 73 Cal. Rptr. 240 (1968).

43. 511 F.2d 407 (D.C. Cir. 1975).

44. 563 F.2d 462, (D.C. Cir. 1977).

45. 144 Cal. Rptr. 186 (1978).

46. Prosser & Keeton, supra, at 1033; Harper, James & Gray, supra, at ch. XXIX.

47. Restatement (Second) of Torts § 895C (1979); *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

48. *Papenhauser v. Schoen*, 268 N.W. 2d 565 (Minn. 1978); *State v. Stanley*, 506 P.2d 1284 (Alas. 1973).

49. *Zarcone v. Perry*, 572 F.2d 52 (2nd Cir. 1978).

50. *Smith v. Grossman*, 31 Crim. L. Rep. 2201 (D.C. Ohio, April 27, 1981).

51. *Butz v. Economou*, 438 U.S. 478, (1978). But see *Grimm v. Arizona Board of Pardons and Paroles*, 564 P.2d 1227 (Ariz. 1977), where the parole board was given only qualified immunity. Subsequently, in *Ryan v. State*, 656 P.2d 597 (Ariz. 1982), the discretionary versus ministerial distinction was abolished, thus severely curtailing the immunity defense in Arizona.

52. *Imbler v. Pachtman*, 424 U.S. 409, (1976); *Blake v. Rupe*, 651 P.2d 1096 (Wyo. 1981).

53. Prosser & Keeton, supra, at 1062; Restatement (Second) of Torts § 895D, comment f (1979).

54. *Wood v. Strickland*, 420 U.S. 308 (1975); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); Restatement (Second) of Torts § 895D, comment e (1979).

55. Fla. Stat. Ann. § 39.04(a); Colo. Rev. Stat. § 19-3-117.1(9).

56. Md. Code Ann., State Govt., § 12-107(d) 1984; N.M. Stat. Ann. § 41-4-17 (1982).

57. Cal. Govt. Code § 825; N.C. Gen. Stat. § 143-300.3; Kan. Stat. Ann. § 75-6108 (1984).

58. Cal. Govt. Code § 825.2; Colo. Rev. Stat. § 29-10-110(1)(b)(I); Iowa Code Ann. §§ 25A.21, 25A.22.

59. *Guide to Juvenile Restitution*, supra, at 14.

60. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Boykin v. Alabama*, 395 U.S. 283 (1969); *McCarthy v. U.S.*, 394 U.S. 459 (1969).

61. *Townsend v. Burke*, 334 U.S. 736 (1948); *Williams v. New York*, 337 U.S. 241 (1949); *Morrisey v. Brewer*, 408 U.S. 471 (1972).

62. *In re Gault*, 387 U.S. 1 (1927).

63. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *In re James B.*, 458 A.2d 847 (Md. 1983); *E.Y. v. State*, 390 So.2d 776 (Fla. 1980); *Hudson v. State*, 496 So.2d 888 (Fla. 1986); *In re D.G.W.*, 361 A.2d 513 (N.J. 1976); *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 *Harvard Law Review* 931 (1984).

64. *In re D.G.W.*, supra; *People v. Gallagher*, 223 N.W. 2d 92 (Mich. 1974); *Cox v. State*, 445 S.W. 2d 200 (Tex. 1969); *F.R. v. State*, 473 So.2d 785 (Fla. 1985); *Matter of K.M.D.*, 502 N.Y.S.2d 863 (N.Y. 1986); *Richards v. State*, 499 A.2d 965 (Md. 1985); *Morgan v. Wolfford*, 472 F.2d 822, (5th Cir. 1973).

65. Michigan Comp. Laws Ann. § 771.3(5); Ariz. Rev. Stat. Ann. § 8-241(c) (1986 Supp.); Or. Rev. Stat. § 419.507(1)(a)(A); Mo. Rev. Stat. § 211.181(6).

66. *Matter of Maricopa County Juvenile Action*, 708 P.2d 1344 (Ariz. App. 1985); *Tate v. Short*, 401 U.S. 395 (1971); *In re Brian S.*, 181 Cal. Rptr. 778 (1982).

67. *Charles S. v. Sup. Ct.*, 187 Cal. Rptr. 144 (1982); *V.H. v. State*, 498 So.2d 1011 (Fla. 1986); *In re Register*, 352 S.E.2d 889 (N.C. 1987).

68. *Bearden v. Georgia*, 461 U. S. 660, (1983); *State v. Fellers*, 683 P.2d 209 (Wash., 1983); *W.R. v. State*, 462 So.2d 856 (Fla. 1985); *Fox v. State*, 347 S.E. 2d 197, (W.V. 1986); *In re Maricopa County Juvenile Action*, 708 P.2d 1344 (Ariz. 1985); *In re M.H.*, 661 P.2d 1195 (Colo. 1983).

69. *State v. M. D. J.*, 289 S.E.2d 191 (W.Va. 1982).

70. *Morgan v. State*, 491 So.2d 326 (Fla. 1986); *State v. Wilson*, 724 P.2d 1271 (Ariz. 1986); *Pratt v. State*, 34 Crim. L. Rep. 2263 (Del. S. Ct. December 15, 1983).

71. *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, supra.

72. *State v. Martin*, 670 P.2d 1082 (Wash. 1983).

73. *Bearden v. Georgia*, supra, at note 62; *In re Brian S.*, supra at note 60.

74. *M.J.W. v. Georgia*, 210 S.E.2d 842 (Ga. 1974); *Maurier v. State*, 144 S.E.2d 918 (Ga. 1965).

75. See p.10.

76. *State v. Knapp*, 509 A.2d 1010 (Vt. 1986); *W.N. v. State*, 426 So.2d 1206 (Fla. 1983); *State v. Lukens*, 729 P.2d 306 (Ariz. 1986); *In re Jose S.*, 499 A.2d 936

(Md. 1985); *In re Maxwell C.*, 205 Cal. Rptr. 310 (Cal. 1984), which was distinguished from an earlier adult California case, *People v. Richards*, 131 Cal. Rptr. 537 (1976), which allowed restitution to be ordered for offenses for which the defendant had been acquitted.

77. *State v. Elkins*, 489 So.2d 232 (La. 1986); *In re F.D.*, 411 N.E.2d 1200 (Ill App. 1980); *In re Raymond B.*, 175 Cal. Rptr. 359, (1981).

78. *U.S. v. Whitney*, 785 F.2d 824 (9th Cir. 1986); *State v. Pleasant*, 701 P.2d 15 (Ariz. 1985).

79. *People v. Jones*, 701 P.2d 868 (Colo. 1984); *J.S.H. v. State*, 455 So.2d 1143 (Fla. 1984).

80. *State v. Baudoin*, 593 A.2d 1289 (Me. 1986); *People v. Lafantsie*, 224 Cal. Rptr. 13 (Cal. 1986).

81. *People v. Winchell*, 488 N.E. 2d 20 (Ill. 1986).

82. *State v. Dillon*, 637 P.2d 602 (Or. 1981).

83. *In re P.J.N.*, 664 P.2d 245 (Colo. 1983).

84. *People v. Grago*, 204 N.Y.S. 2d 774 (N.Y. 1960); *People v. Daugherty*, 432 N.E. 2d 391 (Ill. 1982); N.C. Gen. Stat. § 15A-2343(6)(d) (1983).

85. *State v. Theroff*, 657 P.2d 800 (Wash. 1983); *U. S. v. Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984); *U.S. v. Haile*, 795 F.2d 489 (5th Cir. 1986). But see *People v. Burleigh*, 727 P.2d 873 (Colo. App. 1986) where such an order was allowed.

86. There are several exceptions to this rule. For example, California law says restitution "means full or partial payment for the value of stolen or damaged property, medical expenses, and wages or profits lost due to injury or to time spent as a witness or in assisting the police or prosecution, which losses were caused by the minor as a result of committing the offense for which he or she was found to be [delinquent]." Cal.. Welf. & Inst. Code § 729.6(d).

87. *In re D.G.W.*, supra; *State v. Smith*, 658 P.2d 1250 (Wash. 1983); *In re Trevora*, 462 A.2d 1245 (Md. 1983); *In re David N.*, 468 N.Y.S.2d 782 (N.Y. 1983).

88. *In re B.S.*, 394 N.W.2d 750 (Wis. 1986); *State v. Jarvis*, 509 A.2d 1005 (Vt. 1986); *C.P. v. State*, 306 S.E.2d 688 (Ga. 1983); *K.M.C. v. State*, 485 So.2d 1296 (Fla. App. 1986); *In re Todd Miller*, 715 P.2d 968 (Idaho 1986); *In re B.S.*, 1394 N.W.2d 750 (Wis., 1986); Ariz. Rev. Stat. Ann. § 8.241(c)(1).

89. *Pollreisz v. State*, 406 So.2d 1297 (Fla. 1981); *People v. Flores*, 17 Cal. Rptr. 382 (1961); *People v. Peterson*, 233 N.W. 2d 250 (Mich. 1975); *State v. Bush*, 659 P.2d 1127 (Wash. 1983).

90. *People v. Allen*, 456 N.E. 2d 336 (Ill. 1983); Tenn. Code Ann. § 37-1-131(7)(B).

91. *State v. Jones*, 724 P.2d 146 (Kan. 1986); *People v. Arnold*, 224 Cal. Rptr. 484, (1986); *In re M.S.*, 429 So.2d 844 (Fla. 1983); *T.D. v. State*, 486 So.2d 40 (Fla. 1986). But other States have upheld orders that both commit a youth to a training school and order restitution even though there is not specific statutory authority for such orders. *In re Randy B.*, 486 A.2d 1071 (R.I. 1985).

92. *State ex rel Juvenile Department v. Kreinberg*, 669 P. 2d 341 (Or. App. 1983).

93. Ga. Code Ann. § 24A-2302(a)(5) (1984).

94. Md. Cts. & Jud. Proc. Code Ann., § 3-829 (1980); Tex. Fam. Code § 54.041(b).

95. *Wilson v. West*, 709 S.W.2d 468 (Ky. 1986).

96. *In re Dan D.*, 470 A.2d 1318 (Md. 1984).

97. *In re Steven J.*, 491 A.2d 125 (Pa. 1985).