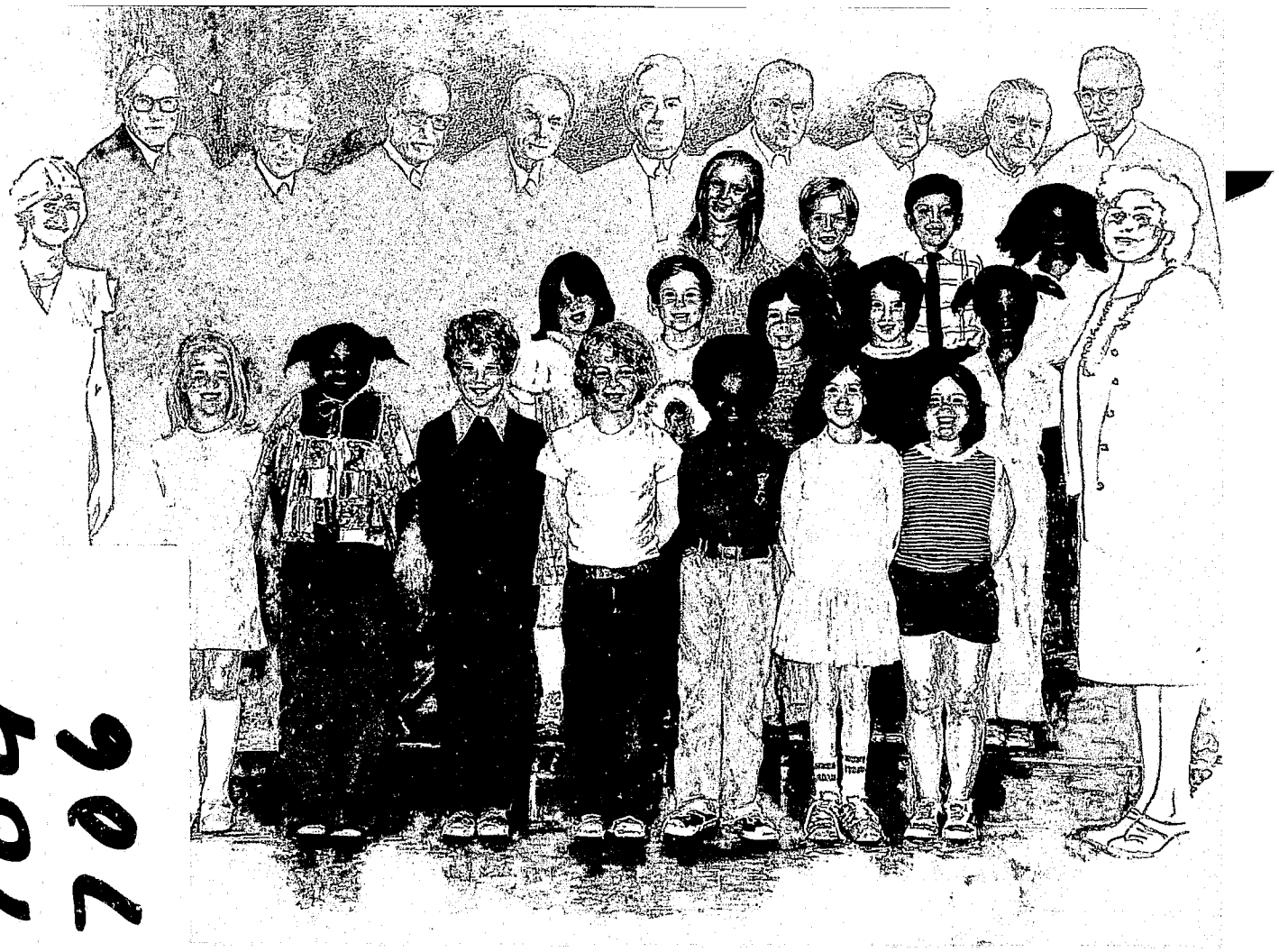
School Safety



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Will the children please approach the bench

By Robert H. Mnookin

No longer are the courts simply enforcing individual rights, they are changing policy. Will test case litigation promote or hinder education reform?

Robert H. Mnookin, professor, Stanford Law School and author of In the Interest of Children: Advocacy Law Reform and Public Policy.

Lawyers and judges have played an increasingly pervasive role in education ever since the landmark desegregation decision in *Brown v. Board of Education* (1954). The current trend is toward even greater roles in education for legal professionals. Much remains to be done to help educators better understand the impact of present and potential legal decisions on schools and the people in them.

One question must be asked: Is litigation a sensible way to improve policies affecting children and youth? Because the U.S. Supreme Court has declared "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," and since *Brown v. Board of Education,* advocates have used test case litigation increasingly, not simply to enforce an individual's rights, but also to change policy.

The book, *In the Interest of Children: Advocacy, Law Reform and Public Policy* introduces the workings of the legal system and its effects on youth policy. Using case studies, it explores the areas of foster care, teen pregnancy and abortion, school discipline, institutions for the mentally retarded and the welfare system. The cases are based on research by the author and contributors, Robert Burt (Yale Law School), David Chambers (University of Michigan), Michael Wald (Stanford University Law School), Rayman Solomon (American Bar Foundation) and Stephen Sugarman and Franklin Zimring (University of California, Berkeley).

The book exposes the often surprising human stories behind the judicial opinions, explores the dilemmas necessarily involved in formulating policies to benefit children and analyzes the strengths and weaknesses of litigation as a means of achieving reform.

The book's Chapter 23, on potential detriments and benefits of litigation involving children, follows.

Some advice for the players

From a reformer's perspective, the choice between going to court and seeking change in some other institution is essentially a strategic one – a choice of weapons. Legitimacy and capacity are still important issues, but only to the extent that they affect the likelihood of achieving better results through some alternative means.

A comparative perspective is thus essential. For a player, the choice of weapons fundamentally turns on the availability of resources – political, economic and legal – necessary to get a favorable decision from various forums. One can understand the comparative advantages of going to court only if one understands the costs and benefits of alternative modes of reform.

To secure legislative reform, it is typically necessary to build some sort of organization or coalition that can lobby over a sustained period of time. Success will often depend both on the political climate and on the opportunities for such coalitions. It will also depend fundamentally on the risk that

organized opposition may develop.

Successful litigation also requires resources. As we have seen, a test case can be both time-consuming and expensive. Moreover, since one must make a legal claim in order to get into court, a critical question is whether one's policy concerns can be framed in terms of existing legal doctrine. And since judges are human, it helps if these policy concerns are personified by engaging plaintiffs. An attractive test case thus has two distinctive traits: it presents the court with sympathetic facts, and it requires no great doctrinal leaps for the court to reach the desired result. Such a case is not always easy to find.

Litigation is said to have three attractions compared with legislation, at least for advocates committed to helping children. The first, and perhaps the most important, involves access. "[C]ourts are open as a matter of right and must at least give ear to a presentation" if the grievance "can be cast in the form of a legal action, and there are few that cannot."[1] A party has a right to appeal an adverse decision. In contrast, the legislature – whether federal, state or municipal – can be a procedural labyrinth. While the legislature need not explain itself, when a court rejects a proposal, it ordinarily is expected to give reasons.

A second attraction is that courts appear – and may in fact be – more receptive to arguments based on principle. Costs are not explicitly considered in most circumstances. What Professor Geoffry Hazard, Jr. said with respect to the poor can be paraphrased to apply to children: "[A] forum in which discourse is conducted in arguments over principle is inevitably predisposed to claims on behalf of the poor, for all propositions for alleviating poverty involve essentially a competition between an ideal of equity and the problem of cost."[2]

The third advantage is that, compared to lobbying, courtroom advocacy may "create fewer immediate ethical and political problems for its professional partisans."[3] In Hazard's words, "The advocate's privilege presupposes that an outcome either way is a matter of no disturbing significance to the social system. It is one of full voice and no responsibility for consequences which may ensue if his argument is heeded. Although the very aim of a test case is to produce significant consequences through change in the law, the advocate in such a case nevertheless retains this privilege . . . he is not held accountable if the measures in question prove unworkable or unpopular."[4]

The cases studied in this book confirm that there is no sharp discontinuity between law and politics. Politics can affect lawsuits, and more importantly, lawsuits can often affect politics. Litigation can be seen as a form of lobbying in which an interested group can take a grievance to another forum. Litigation can be part of a broader strategy; there is no necessity for an either/or choice.

Indeed, a lawsuit can be used to force legislative or administrative action. Similarly, the threat of a lawsuit may serve as an excuse to defer action, thus permitting the officials to duck what would otherwise be a difficult political issue. Conversely, new legislation can often affect the possibility of achieving further reform through litigation. The interaction is substantial and obvious.

A judicial victory can obviously have substantial value to the reformer. It can establish a precedent for similar lawsuits in other parts of the country. A victory in the Supreme Court can obviate the need to seek reform in 50 separate states. But even without a "big win," litigation can have a number of political advantages for a plaintiff seeking reform. Most of these advantages have to do with increased publicity.

"Litigation consists of many visible, dramatic events – the filing of a complaint, the hearing, a judicial opinion, the issuance of judicial orders – any of which can serve as a convenient vehicle for publicizing . . . conditions that might go unnoticed otherwise except by the rare investigative journalist."[5]

By publicizing a problem, a lawsuit may solidify a coalition or help an advocate discover other sympathetic allies. A lawsuit can force some sort of reaction from state agencies. After the complaint is filed, the defendants ordinarily must make some sort of public response. The process of discovery can often let the plaintiffs dig out facts that might not otherwise have been available. A lawsuit can "force the political process to deal with grievances that it otherwise might ignore or deflect with little cost."[6] It can force the government to respond with a single voice because of the necessity of putting together a defense.

In short, from a player's perspective courts are political institutions:

> *They are part of government, they make public policy, and they are an integral part of the law-making and enforcement process which is the central focus of political activity. If legislatures are political and executives are political, then courts must be political since all three are inextricably bound together in a process of making law, and each sometimes performs the functions that each of the others performs at other times.*[7]

I believe that legal child advocates favor litigation over legislative activities. What are the reasons for this preference? The first has to do with power and the risks of opposition. Government policy relating to children may affect the interests of any number of organized groups that may have considered legislative clout. State bureaucracies and law enforcement officials are often an organized presence in the state legislatures.

A policy may also affect the interests of any number of professional groups who deal with children – social workers, doctors or lawyers – as well as other groups such as organized labor, minorities, religious organizations and women. If one or more of these groups oppose a given policy change, they might well have sufficient political power to block legislative action. By casting a policy change in the form of a lawsuit, child advocates may substantially reduce the power of such groups to frustrate action.[8]

A second reason for preferring litigation involves costs and resources. The lawsuit can be a very cost-effective means of achieving reform. It may be less time-consuming than legislative reform; it certainly does not require continuous presence in the state capital.

Given the small number of public in-

terest lawyers and where they live, a tilt towards litigation is hardly surprising. Moreover, recent statutory changes give successful plaintiffs the right to recover fees from the losing government defendant. Legislatures are not in the habit of reimbursing the lobbying expenses of a group that successfully presses for a new bill. Finally, while the Internal Revenue Service limits the ability of charitable foundations to fund lobbying activities, no similar constraints exist with respect to litigation.

The third reason many child advocates favor litigation has to do with the socialization of lawyers. Law schools offer courses in advocacy, not in the arts of compromise and coalition-building. Intellectual activity is emphasized, often at the expense of the personal sensitivity, patience and practicality essential to successful lobbying. As Professor Hazard says,

> *[A]n act of fantasy is required to see the idealized Legal Service Program lawyer – young, principled, intrepid and in a hurry – teasing a complicated statutory package through the legislative convolution.*[9]

It is thus understandable that most public interest law firms concerned with child advocacy devote their resources primarily to litigation. Because test-case litigation is only part of the political process, however, these advocates should not underestimate the need to involve themselves with executive and legislative policymaking. Even the "big win" – a "favorable" Supreme Court ruling – may have little day-to-day impact. Particularly where the solution depends on money, substantial change will often require legislative or executive action.

This is no news to most legal child advocates. Their response would be, "We do what we can." These case studies indicate, however, some limits on what even the best courtroom advocacy can achieve, and insights which may assist future efforts on behalf of children. I offer four suggestions:

1) *Consider alternatives to litigation.* The Children's Defense Fund is an effective presence in Washington. Unfortunately, there is no comparable children's lobby on the state and local level. Public interest law firms, because of their modest resources and the constraints imposed by funding limitations, may be unable to mount a substantial lobbying effort over time. I would hope these limitations can be removed. In the meantime, advocates should nonetheless see the "choice of weapons" as a strategic issue. There will be opportunities to press for administrative or legislative reforms that may in some circumstances be *more* effective than litigation. Going to federal court may sometimes be the best choice – but not always.
2) *Choose your cases carefully.* These studies show that test-case litigation is a slow, time-consuming process. While it may take few resources to file a lawsuit, following through requires a substantial investment, usually over a period of many years. Resources for test-case litigation on behalf of children are very limited. It is therefore terribly important as Chambers and Wald suggest, to choose cases with care. While it is hard not to respond when a sympathetic fact situation arises, especially when the opportunity to "make some law" presents itself, the advocate would often be more effective by establishing priorities in advance.
3) *Build coalitions.* It is widely recognized that effective legislative advocacy requires groups to mute their differences in order to build coalitions. Some suggest that test-case litigation can be used to forge alliances that can operate in other forums. These studies suggest, however, that litigation may divide potential allies as well. In the face of scarce resources, coordination and cooperation would appear to be in order.
4) *Face up to indeterminacy.* While it seems paradoxical, I think advocates must acknowledge both the prediction and value problems. Before going to court – or the state house, for that matter – advocates should do more than simply identify a problem. They should also ask themselves how alternative remedies might affect different groups of children, and the extent to which there is a consensus about the values that should inform policy. This is not an invitation to accept the status quo. Life requires decisions in the face of uncertainty. It is rather a reminder of how much we do not and cannot know, and of the virtues of keeping an open mind and learning from experience.

No easy answers

This study was launched with a seemingly straightforward question: Is test-case litigation a sensible way to make policy on behalf of children? For reasons that should now be clear, a definitive answer would require solving three puzzles, none of which appear to me to be soluble. Moreover, the question of judicial capacity necessarily requires a comparison of judicial, legislative and administrative policymaking . . . .

I feel like the small-town mayor who, when asked which of his town's two restaurants had better food, replied, "The one you don't go to." As we have seen, test-case litigation has many disadvantages as a means of making children's policy. But compared to what? I am confident that a detailed study would reveal many disadvantages to legislative policymaking on behalf of children as well. We just haven't eaten at that restaurant yet. Perhaps one virtue of the American political system is that there is more than one forum for those who wish to defend or change policies.

This study shows going to court will often make a difference, although not necessarily the difference the advocate had in mind. It also suggests the profound difficulties of making policy for children, no matter what the forum. □

Footnotes

1. Hazard, "Law Reforming in the Anti-Proverty Effort," 37 *U. Chi. L. Rev.* 242, 247 (1970).
2. *Id.* at 247.
3. *Id.* at 248.
4. *Id.*
5. See Diver, "The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions," 65 *Va. L. Rev.* 43, 65 (1979).
6. *Id.* at 66.
7. M. Shapiro, "Stability and Change in Judicial Decision-Making: Incrementalism or State Decision?" 2 *Law in Transition Quarterly* 134 (1965).
8. *Id.* See also R. Dahl, "Decision-making in a Democracy: The Supreme Court as a National Policy-Maker," 6 *J. Public Law* 279 (1957).
9. Hazard, *supra* n. 6 at 251-252.

Make juvenile justice fair and consistent, says survey

Juveniles accused of a serious criminal offense should be tried in adult court, according to a majority of those responding to the survey on juvenile justice published in the Fall 1985 issue of *School Safety.*

Most of those returning the surveys within two months of its publication also believe the juvenile court system should provide a jury trial for youth accused of serious crimes and think the courtroom experience is not harmful to juveniles.

The survey is the first in a series of three being conducted by the Rose Institute of State and Local Government at Claremont McKenna College (California) under a grant from the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice. Project staff are using survey data to aid in designing model juvenile justice reform legislation. The model legislation will be submitted to state legislators at a National Conference.

This report analyzes approximately 1500 responses from educators, law enforcers, lawmakers, judges and others interested in America's youth.

Attitudes toward juvenile justice

Respondents were asked their opinions of statements relating to juvenile justice. Replies were made on a six-point scale. One indicated strong disagreement, six expressed strong agreement.

Four of the 20 questionnaire statements received strong support. Acceptance was greatest for the statement, *Some juvenile offenses should require automatic transfer to adult courts* (79.6 percent agree or strongly agree). Three other policies also received strong approval: *The primary function of the juvenile court is to help children* (51.3 percent); *Allow juveniles to request trial by jury in the juvenile court* (50.8 percent); and, *Allow the state to intervene in the lives of children before a crime is committed* (44.8 percent).

Respondents strongly opposed four of the statements. They responded negatively to the statement, *The juvenile court does not sufficiently protect the constitutional rights of juvenile offenders* (74.3 percent disagree or strongly disagree). Respondents also rejected: *The courtroom experience is harmful to juveniles* (54.7 percent disagree); *Parents are raising their children well* (44.2 percent disagree); and, *Social services and counseling are the best responses to juvenile crime* (44.1 percent disagree).

Policy preferences

The questionnaire also asked respondents to rate the relative importance of certain policy alternatives. Establishing secure detention facilities for violent juvenile offenders was judged the most important policy proposal (91.5 percent answering very or critically important). Replies also strongly supported juvenile court jurisdiction over neglected and abused children (82.7 percent), collaborative programs among various agencies (74.6 percent) and increased prevention programs (69.4 percent).

Policies concerning controversial issues and containing technical terminology generated both *very important* and *minimally important* responses. Issues relating to *restitution, sole sanction, status offenders* and *indeterminate sentences* had substantial high and low ratings. Researchers believe that a combination of controversy and lack of knowledge may have contributed to these ratings.

Restitution as a sole sanction for property offenses was *unimportant* or *minimally important* to 35.9 percent of those responding but was *critically important* to 25 percent of the respondents. Similar patterns appeared in the questions of removing status offenders from the juvenile court jurisdiction (39.5 percent minimally important, 28.1 percent very important), eliminating indeterminate sentences (25.2 percent minimally important, 32.2 percent very important), and limiting judges' discretion in sentencing (36.9 percent minimally important, 33.2 percent very important).

The absence of a strong, single direction also may indicate respondents are more certain about what is wrong with the juvenile justice system than they are about specific policies to reform it.

Organizational performances

Questionnaire respondents also were asked to rate the performance of seven organizations connected directly or indirectly with the juvenile justice system. The range was from poor to very good, and the highest approval rating went to police (42.3 percent rating good or very good). Legislatures fell at the other extreme (47.3 percent rated poor or poor/fair, 6.1 percent rated good or very good).

Other organizations received the following approval ratings: schools (28.2 percent); juvenile courts (21.9 percent); youth organizations (18.9 percent); churches (17.9 percent); and social services (13.3 percent).

Open-ended question

Almost 86 percent of those responding answered the open-ended question, *What do you think is the single most important thing that can be done to improve juvenile justice?* Eight suggestions were made most frequently.

More than 35 percent of those replying said punishment should be applied more frequently, consistently or equally. Another 23.3 percent felt juveniles must be held accountable for their behavior, 10.8 percent felt parents should be accountable and 4.4 percent suggested accountability should be shared by parents and juveniles. Other

frequently mentioned key improvements were more programs and funding (8.1 percent), preventive measures (7.4 percent), rehabilitation (6.5 percent), improved families (6.6 percent), more and better trained personnel (4.1 percent) and better educational programs (3.3 percent).

Who responded

Concern for juvenile justice reform came from respondents living in every geographic region of the country. The northcentral states contributed the greatest proportion of responses (36.5 percent). The southern and western regions each contributed 24.4 percent, and the smallest sampling came from the northeast (14.3 percent).

The occupational distribution of respondents is similar to the distribution of *School Safety* readers. Principals and teachers represented 36.3 percent of those replying. Other surveys came from law enforcers (13.8 percent), other school administrators (12.9 percent), judges (12.1 percent), attorneys (9.5 percent), legislators (1.7 percent) and all others (11.1 percent).

An overwhelming majority of the responses (64.5 percent) came from readers in population centers under 50,000. This is almost three times the responses from those in cities with populations between 50,000 and 500,000 (22.8 percent). Only 5.7 percent of the replies came from cities between 500,000 and one million people, while 5.8 percent came from metropolitan areas over one million.

The survey results indicate policymakers face a difficult task. Concerned professionals responding to the survey support juvenile justice that combines consistent, fair punishment, juvenile accountability and help for the nation's youth. It will be a challenge for legislators to address each of these issues.

Prepared by Christopher P. Manfredi, academic coordinator for the Rose Institute of State and Local Government.

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Restitution: new response to juvenile offenders

During the past decade, restitution – the compensation of a crime victim by the offender – increasingly has come into use as an alternative disposition for juvenile offenders. A 1983 survey estimated 52 percent of juvenile courts had formal restitution programs and almost all (97 percent) ordered restitution occasionally. Most states have specific legislation permitting restitution or allow it under the court's authority to order probation.

Monetary restitution, in which the offender repays the victim for all or part of the loss attributable to the crime, is the most common type. In *community service* (also called "work service") *restitution,* the offender makes payment to a symbolic "victim" – usually by working for a public or nonprofit service agency. *Direct victim service,* in which the offender works for the victim, is a third type of restitution.

While restitution is not a cure-all for the problems of the juvenile justice system, virtually all studies have shown that victims who receive restitution are more satisfied than other victims. Studies with adult and juvenile courts conducted in the 1970s showed that restitution usually was better than other dispositions in reducing recidivism (and was never worse than the disposition to which it was being compared).

Given these impressive findings, the concerns of policymakers – about statutory authority, the ability of youths to pay, liability of the court for injuries or subsequent crimes, and so forth – can be met. But the expanding restitution community needs a forum if its message is to spread.

Why RESTTA?

RESTTA – the Restitution Education, Specialized Training and Technical Assistance Program – is an initiative of the Office of Juvenile Justice and Delinquency Prevention (OJJDP), U.S. Department of Justice. As interest in juvenile restitution grows around the nation, RESTTA provides practitioners with information and resources they need to start or expand their own programs. An important part of the RESTTA concept is program design by local agencies, choosing program options that fit their needs – with the help of RESTTA.

RESTTA's mission is to:

- Stimulate interest around the country in restitution as an effective strategy for dealing with juvenile offenders.
- Share information and skills through training and technical assistance – getting "what works" into the hands of juvenile justice practitioners.
- Support local initiatives through an innovative program of small technical assistance vouchers.
- Offer the widest possible range of successful program models to the juvenile justice system – *without* "top-down" federal prescription.

To achieve this mission, RESTTA is building a network of organizations and resources capable of responding to information, training and technical assistance needs across the nation. A new National Restitution Resource Center (NRRC), created within the Juvenile Justice Clearinghouse/NCJRS, serves as the initial contact point for receipt and dissemination of restitution information. Forthcoming publications from RESTTA include a comprehensive *Guide to Juvenile Restitution,* a state-by-state program directory, a bimonthly calendar of upcoming RESTTA training

events and new developments in restitution.

To create opportunities for practitioners to meet and share their skills, RESTTA will sponsor a series of national conferences and mini-seminars for key personnel: judges, probation officers, prosecutors, counselors, administrators of juvenile restitution programs and other service providers. RESTTA-sponsored experts and information specialists will serve as speakers, trainers and workshop leaders at meetings with state and national juvenile justice organizations.

Additionally, six host sites, representing a range of model restitution approaches, have been selected to conduct a number of seminars for small groups. This program will put practitioners in touch with each other in operational settings.

Finally, there is the Technical Assistance Voucher Program, through which interested jurisdictions can purchase the technical and training resources available through RESTTA, including the use of consultants from a RESTTA-maintained pool.

Flexibility is the key to RESTTA's programming. An agency may decide to use all or only some of RESTTA services, depending on its needs. Some agencies may be highly experienced in the restitution field, while others are beginners. For the latter, a good starting point would be attendance at one of four national training seminars, followed by a visit to a host site. The agency staff might then attend one of the mini-seminars and share its experience with other practitioners. In this way a trained and committed restitution network will emerge nationwide, and the "snowball" effect of information sharing will help make that network self-sustaining.

Restitution and the future

In recent years public pressure has sparked a search for alternatives to prison overcrowding, neglect of victims and seemingly endless delays in the court process – conditions that have led to widespread disillusionment with the justice system. Restitution, one of the ancient forms of justice, seems to be an increasingly important part of the future because it promises workable alternatives to these long-term problems. In teaching young people responsibility and accountability, while repaying victims and society for the harm they have suffered, restitution also may help to reduce the cycle that leads to criminal careers.

While RESTTA is a national program aimed at supporting restitution, its philosophy is to let local programs decide what they need, while providing the information to help localities make intelligent choices. RESTTA, through its programs, publications and the National Restitution Resource Center, will help jurisdictions talk to each other, learn from each other and "share the wealth" of restitution experience. In this way, the promise of restitution will take a big step toward becoming reality. □

For additional information on RESTTA and restitution contact: National Restitution Resource Center, Juvenile Justice Clearinghouse, Box 6000, Rockville, MD 20850.

"I've gotta write out a hundred times, 'I must not blow up the school.'"