

Federal Probation

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Community Service Orders in Federal Probation:
Perceptions of Probationers and Host
Agencies *G. Frederick Allen*
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The Presentence Investigation: An Old Saw
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SEPTEMBER 1990

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Federal Probation is formatted and typeset by the Administrative Office's electronic publishing system (Ronald Jackson, electronic publishing editor, Printing, Mail, and Records Management Branch).

Federal Probation (ISSN 0014-9128) is published quarterly in March, June, September, and December. All aspects of corrections and criminal justice come within the fields of interest of *Federal Probation*. The journal wishes to share with its readers all constructively worthwhile points of view and welcomes the contributions of persons—including those from Federal, state, and local organizations, institutions, and agencies—who work with or study juvenile and adult offenders. Authors are invited to submit articles describing experience or significant findings related to the prevention and control of delinquency and crime.

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Postmaster: Please send address changes to the editor at the address below.

FEDERAL PROBATION
Administrative Office of the United States Courts
Washington, DC 20544

Telephone: (202)633-6228

U.S. Department of Justice
National Institute of Justice

126407-
126415

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Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LIV

SEPTEMBER 1990

NUMBER 3

This Issue in Brief

Career Issues for Probation Officers.—Careers offer unique strains and frustrations. This is so for the work of the physician, the teacher—and the probation officer. While a probation officer's work can be interesting and rewarding, it presents a unique set of challenges. The hybrid role of the probation officer—which requires juggling investigative/enforcement tasks with counseling responsibilities—may cause conflict. Author Darrell K. Mills identifies six issues that the probation officer may face during a career. These issues, which have the potential to adversely affect job performance and motivation, require the officer's accommodation or resolution. The author provides strategies for coping with these issues.

Community Service Orders in Federal Probation: Perceptions of Probationers and Host Agencies.—To date, efforts to evaluate community service programs have focused on the views of the operators of these programs. An important element in program evaluation—the offenders' perspective—has been overlooked. Authors G. Frederick Allen and Harvey Treger used the theoretical perspectives of rehabilitation, deterrence, desert, and the justice model as the framework for a semi-structured, open-ended questionnaire for reviewing perceptions. The authors interviewed a sample of 73 probationers and program operators in 38 cooperating agencies. Findings revealed that community service is perceived by probationers and host agency operators as primarily a rehabilitative sanction rather than as the punishment that the courts may have intended.

The Presentence Investigation Report: An Old Saw With New Teeth.—The presentence investigation report has been tradition-bound in purpose and content almost from its inception well over 100 years ago. Designed to facilitate sentencing decision-making, it has also become utilitarian for a host of secondary users. After an

historical review of the construction of the presentence investigation report, authors Alvin W. Cohn and Michael M. Ferriter propose a new PSI model. It is one which facilitates primary and secondary decision-making, reduces labor intensity, and eliminates any debate over long versus short forms. The authors discuss the use of the model in Montana probation and assess its applicability and impact in criminal justice administration.

Considering Victim Impact—The Role of Probation.—Since its inception in a Fresno, California probation department in 1974, the victim

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Offender-Oriented Restitution Bills: Bringing Total Justice for Victims?*

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THE PRACTICE of juvenile restitution through court orders is a relatively recent development in the United States. Restitution is now interwoven into the juvenile justice system, often alongside other court sanctions (e.g., probation). As originally conceived, the purpose of restitutive sentencing has been to restore victims to the conditions existent prior to the offenses against them (Upson, 1987). This is what Friedman (1985) considers to be a sentence that attempts to bring about "total justice" for victims. That is, in addition to punishing those who break the law, victims are provided with an opportunity to achieve equity by being directly compensated by their offenders. The very act of making restitution is assumed to be rehabilitative as well as punitive since the offender is forced to make reparation for the harm caused by his action. Although well received by many, there is a great concern among practitioners and scholars (in the juvenile justice system) as to whether restitutive sentencing can be incorporated into the current offender-oriented juvenile justice system without losing its original purpose. In the face of this concern, the State of Michigan has passed two bills—4240 and 4558 (enacted into law on June 1, 1988)—to bring about changes in juvenile restitution. The purpose of this article is to critically assess the practicality of these two bills in achieving total justice for victims through the use of juvenile restitution.

The contention here is that the liberal sentencing of restitution is already in conflict with the conservative philosophy of the juvenile justice system. To present such argument, first, a brief description of the justice system's lineage and the incorporation of restitution into the juvenile justice system is presented. Then, the restitutive goals for the victims, offenders, and the juvenile justice system are presented to explicate how total justice for victims is considered only after the rights of the offenders and the benefits derived by the juvenile justice system are weighed.

Restitution and the Juvenile Justice System

Walker (1980, p. 5) in his book *Popular Justice* has refuted the "myth of the changeless justice system"; he strongly argued that it has historically been subjected to public pressure. The history of the juvenile justice system supports his contention. However, it indicates that in at least one aspect, the juvenile justice system has remained unchanged. This system has operated under several rationales for the punishment of offenders—such as retribution, deterrence, and rehabilitation. Yet, regardless of the rationales, the primary goal has been, and continues to be, the control of behavior considered to have pernicious effects on the social harmony. Specifically, the justice system has always been concerned with the offender.

A recent development in the juvenile justice system is the introduction of victim rights to the sentencing process. Victim rights advocates argue that victims have rights, just as offenders have rights. Margery Fry (1951), a leading English penologist, who was influential in bringing restitution into the American juvenile justice framework, asserts that victims have the right to financial remuneration for crimes they encounter.

The recent growth of interest in the United States in the use of restitution as a dispositional option for the courts is tied to a number of factors: efforts in the 1960's and 1970's to introduce major reforms in the juvenile justice system; the continuing search for innovative correctional programs; and concern for the plight of victims. The steps to deinstitutionalize and divert adolescent offenders during the 1960's and 1970's represented the emergence of a correctional ideology which was a reaction to the excesses and failures of institutional, custodial care. Furthermore, "the deterministic theories underlying many treatment approaches could be construed to provide a justification for offenders' illegal behavior rather than for holding offenders accountable for their behavior" (Galaway, 1983, p. 11).

The record of treatment failures in the juvenile justice system is extensive (Gibbons, 1986). A number of efforts have been made to create therapeutic milieus in correctional institutions, but to

*This article is based on a paper presented at the annual meeting of the Michigan Academy of Arts, Science, and Letters, Grand Rapids, March 17, 1989.

no avail (Jesness, 1965). The record of various counseling-oriented ventures in the juvenile justice system is a dismal one. Many of these programs have had little or no impact upon youths diverted to these ventures, many of whom ended up in "net widening" which is the opposite of what was intended by such ventures (Decker, 1985; Binder & Geis, 1984; Polk, 1984).

According to Regnery (1986), there is a desperate need for reforming the juvenile justice system. The juvenile justice system has traditionally been most concerned with the offender only, often at the expense of society. Its guiding force, in fact, has been the belief that it is the offender who is the victim and that the court must do something in the best interest of society at large. To a great extent, "the system has been based on the Rousseauian notion that people are born good, but corrupted by institutions" (Regnery, 1986, p. 49). Regnery also contends that this concept has worked in the first two or three decades of this century, but does not any longer.

The criticism of juvenile training schools led to the evolution of a new set of ideas about appropriate treatment of juvenile offenders and favored the use of community-based alternatives as a major alternative to institutionalization. Community-based services are less expensive than institutional services, and since program staff and clients are closer to meaningful community contacts, community-based alternatives are expected to improve the probability of client reintegration. Restitution as alternative sentencing appears to fit well with all these assertions. Restitutive sentencing designed to "emphasize accountability on the part of the offender, and responsibility for one's actions, can have an effect on the offender's behavior" (Regnery, 1986, p. 45). This sentencing also provides the opportunity for potential recovery of losses for victims. In the United States, the President's Task Force (1982) specifically recommended that judges should order restitution to victims in all cases in which the victim has suffered financial loss. In the same year, the Federal government enacted a restitution law—the Victim Witness Protection Act. Also, in just a few years, 30 state legislatures codified laws prescribing the use of restitution as a sentence for certain types of crimes (Upson, 1987).

The inclusion of restitutive sanction in the juvenile justice system might lead the optimistic observer to conclude that the rights of victims are on their way to being well ingrained in the justice process, just as are rights protecting offenders. Certainly, now that this sentence has been

codified into law at both Federal and state levels, chances are better than ever for victims to be recompensed for their losses. However, a more thorough examination leads one to believe that consideration of victim rights is in conflict with the current offender-oriented sentencing process and, as a result, remain secondary to traditional sentencing goals—to punish, to rehabilitate, and to deter.

As mentioned earlier, the State of Michigan has codified bills 4240 and 4558 into law, prescribing the use of restitutive sentencing. According to subsection 44(2) of bill 4240, the court at the dispositional hearing for a juvenile offense may order, in addition to or in lieu of any other disposition authorized by law, that the juvenile make restitution to any victim or victim's estate for the juvenile's course of conduct which gives rise to the disposition. Subsection 18(7) of bill 4558 mandates that if the court finds that a juvenile has violated any municipal ordinance or state or Federal law, and the court has placed the juvenile on probation, the court may, as a condition of probation, require the juvenile to pay restitution to the victim. The juvenile may maintain paid part-time or full-time employment and pay restitution to the victim from the earnings of that employment. Also, subsection 18(12) of bill 4558 stipulates that if a juvenile is unable to pay all of the restitution ordered, after notice to the juvenile's custodial parent and an opportunity for the parent to be heard, the court may order the custodial parent to pay all or part of the unpaid portion of the restitution ordered.

Goals of Restitution

Disappointed with the ostensible failure of the justice system to control crime, the public began questioning criminal sentencing and the use of tax dollars (Armstrong et al., 1983). In an endeavor to improve their images, many states adopted mandatory sentencing laws. Nevertheless, such action resulted in an increased inmate population and concurrent need for tax revenue to build more jail and prison spaces. The public responded to this need with a definitive "no" by renouncing several bond elections (Latessa, 1986). Consequently, the justice system was forced to look for alternatives to incarceration—those that were less expensive, more effective in reducing crime, and result in improved public perception.

The quest for alternatives to incarceration was complicated by the public calling for total justice for victims. Advocates of restitution argued that this sentence would meet the demands of the

public. It would address victims' rights to compensation by their young offenders and reduce the justice system costs associated with incarceration (Conrad, 1984), thereby improving the image of the juvenile justice system. Consequently, restitutive sentencing has been incorporated into the juvenile justice system.

Reparative goal: "The opportunity to claim all relevant losses" incurred through crime (McGillis, 1986, p. 66). Restitutive sentencing responds to the emerging interest in crime victims in one way—there is potential for reimbursement of crime victims. However, the use of restitution is confined to crimes involving identifiable losses. This restriction requires that victims prove financial loss. While this restriction appears to specify the appropriate use of restitution, there are issues left unaddressed, as well as limitations that impede the victim-offender exchange process. For instance, an issue impeding victim reparation is the question of offender status in the juvenile justice system. That is, there is uncertainty as to whether restitution should be limited to "crimes for which the offender is convicted, or whether the statutory language is broad enough to encompass offenses disposed of through plea-bargaining or other nonadjudicatory disposition[s]" (Brown, 1985, p. 19). A case in point comes from the New York Penal Code. Subsection 60.27(4) defines an offense as a criminal conviction, as well as any other offense that is part of the same criminal transaction or contained in any accusatory instrument disposed of by a guilty plea. Brown (1985, p. 19) argues that "the statutory language" of this law makes "it unclear as to whether it is required that the offense even be charged in the accusatory instrument."

While the lack of clarity in the law poses one problem for victims achieving financial equity (justice), law-imposed limitations on the amount of recoverable losses creates another hurdle. An example of this comes from the State of New York. Article 60 mandates that restitution should not exceed \$5,000 in felony convictions and \$1,000 in misdemeanors. Another example comes from subsections 18(12) and 44(17) of State of Michigan bills 4558 and 4240 respectively. Under these subsections, the amount of restitution a juvenile's parent is ordered to pay must not exceed \$2,500. That is, these subsections put a maximum limit for both misdemeanors and felony cases. Although many offenses do not involve such losses (Bureau of Justice Statistics, 1980), it is conceivable that they could.

Beside these, total justice for victims is hin-

dered by the emphasis on the part of the juvenile justice system to achieve traditional goals, despite an order by the court to pay restitution. When this is the case, "the sentencing objectives of incapacitation, retribution or deterrence may lead to a decision to incarcerate [the offender]. . . , thereby functionally excluding the possibility of restitution" (Brown, 1985, p. 20). Clearly, a person serving a prison sentence who is also ordered to pay restitution has blocked opportunities to meet this order (Cohen et al., 1985). Furthermore, when rehabilitation is a significant consideration and probation or parole is ordered in conjunction with restitution, fear of failure due to financial hardship on the part of the offender becomes a primary concern and victim's loss become secondary (Brown, 1985). When financial hardship on the part of the offender turns out to be the primary concern, the court cancels all or part of the restitution ordered. A case in point is subsection 18(8b) of the State of Michigan bill 4558. This subsection mandates that the court must annul all or part of the amount of restitution due if it appears to the court that the payment will impose manifest hardship on the juvenile offender. In addition, bill 4558 is also concerned about the financial resources of the offender's parents. Subsection 18(14) stipulates that a parent who has been ordered to pay restitution under subsection 18(12) may petition the court for a modification of the amount of restitution owed or for a cancellation of any unpaid portion of the restitution. The court should cancel all or part of the amount of restitution due, if it appears to the satisfaction of the court that payment of the amount due will impose a financial hardship on the parent. Clearly, the concern for the offender or his or her parents takes precedence over victim's plights or loss.

Hence, while restitution gives victims the right to recover financial losses due to crime, victims are not guaranteed all that may be entitled to them or even that restitution will be paid within a stipulated time. This led McGillis (1986, p. 36) to stress the importance of "victims understand[ing] at the outset that they are not guaranteed restitution" from their offenders.

Sentencing goal: To promote an increased sense of responsibility and accountability, thereby reducing recidivism (McGillis, 1986; Armstrong et al., 1983). The sentence of restitution offers the juvenile justice system a unique approach in dealing with offenders. It combines conservative and liberal views of sentencing. Finn and Lee (1987) contend that the very act of making restitution payment can be punitive as well as rehabilitative, as

offenders are forced to confront and make reparation for the harm caused by their criminal acts. Likewise, Maloney and associates (1982) and Armstrong et al. (1983) stress that restitution holds offenders accountable and provides them the opportunity to take personal responsibility for their crimes. In addition, restitutive sentencing can serve as a deterrent (Finn & Lee, 1987), since it lowers net gains for committing crimes. Still others posit that the requirements laid out to pay victims actually provide increased opportunity to monitor offenders (Miller, 1981). In other words, the payment schedule provides an objective and tangible criterion to the juvenile justice system for evaluating offender progress. Similarly, it can also serve to increase self-esteem as offenders see their own progress. In the words of Maloney et al. (1982, pp. 4-5):

Juvenile restitution serves as an important tool as a deterrent to repeated offenses. Youths who are held accountable for their actions are given the chance to accept personal responsibility for their lives. To the community, restitution offers a juvenile justice response which makes sense. It is understandable, observable, tangible, logical consequence to unlawful behavior.

However, Upson (1987) points out that although restitution has been codified at both the Federal and state levels, it is not imposed regularly as a form of punishment. In addition, McGillis (1986) asserts that since it is not used regularly, the benefits of restitutive sentencing are mostly speculative and based primarily on theory. Therefore, the impact of this sentence on lowering recidivist crime remains unknown.

Nevertheless, by examining restitutive sentencing, it is doubtful that this sanction will fully meet advocate expectations. The Victim Witness Protection Act of 1982 provides an excellent example. The Act specifically authorizes judges to order restitution for those convicted of robbery, violations of civil rights, etc. However, at the same time, it does not require the ordering of this sentence. Instead, the law indicates that if the sentence is not used, the judge merely needs to specify the reason(s) for not ordering it. The concern primarily centers around how offenders may be adversely affected by this sentence. In fact, the Act discourages imposition of restitutive sentence if it appears that such sentence would unduly complicate the sentencing process and/or prolong contact between the justice system and the offender.

It is interesting to note the language of this sentence at a time when discretionary sentencing is being taken out of the hands of judges. There may be several explanations to account for the

wording of this sentence. First, it may reflect the incompatibility of restitution in an offender-oriented juvenile justice system. Second, it may indicate skepticism on the part of the juvenile justice system that this sentence can rehabilitate offenders. Regardless of the reason(s), it points to the fact that victims remain, at best, a secondary concern in the sentencing process.

An indication that restitutive sentence is incompatible with the current sentencing practices of the juvenile justice system, and that there is little confidence that this sentence can rehabilitate offenders, is the conversion of restitution to other forms of punishment. Typically, if victim reparation is willfully not made, incarceration or unpaid community service immediately follows (Brown, 1985). Under subsections 18(10) and 18(11) of State of Michigan bill 4558, if a juvenile is in intentional default of payment of restitution or refuses to perform the required community service (as part of the restitution sentence), the court may alter the terms and conditions of probation for community service. Consequently, crimes initially defined as committed against an individual are subsequently redefined as crimes committed against the state.

Proponents of restitution recognize that there are those who will refuse to make restitution, but they also point out that there are others who are financially unable to meet the requirements to be sentenced to restitution. According to Thorvaldson (1987), an offender's ability to pay is a major consideration when imposing restitution. Research suggests that the discretion of judges has resulted in sentencing disparity between economic classes. For instance, a study conducted by Hudson and Chesney (1978) revealed that lower income offenders are under-represented among those ordered to make restitution to their victims. These findings have led McGillis (1986) to question the applicability of the Equal Protection Clause of the 14th Amendment, requiring the statutory ceiling period on imprisonment for any substantive offense be the same for all defendants (offenders), regardless of their economic status. This certainly would account for the lack of use of this sentence, since most arrests for property crimes are made against the poor (McGahey, 1986). Addressing the disparity issue, Van den Haag (1975, p. 236) asserts that "The amount [of restitution] should be independent of the offender's ability to pay and dependent on the financial loss suffered [by the victim]. However, ability to pay should determine the rate of pay."

The restitution sentence is supposed to make

the juvenile offender accountable and responsible for his criminal act; accountability and responsibility are, in turn, expected to meet the traditional sentencing goals of punishment, deterrence, and rehabilitation. Van den Haag (1985, p. 86) contends that punishment is essential to rehabilitation, because "without punishment rehabilitation is unlikely to take place." Furthermore, he maintains (1985, p. 91), "all punishment should be mandatory." Likewise, completion of reparative payments on behalf of the offender should be mandatory to make him or her accountable and responsible for criminal behavior. However, in reality, this is not the case. Under subsection 44(18) of bill 4240, a juvenile offender who is required to pay restitution, at any time, during his period of reparation, may petition the court for a cancellation of any unpaid portion of restitution; consequently, the court may oblige the juvenile. When this is the situation, the sentencing goal of restitution is far from reach.

Corrections goal: To find an effective, inexpensive alternative to incarceration (Galaway, 1983; Wilson, 1983). "Restitution has been warmly received by the proponents of the moratorium on prison construction as well as prison abolitionists in the United States who see restitution as providing an alternative to prisons which they consider an unjust punishment for a civilized, enlightened society" (Galaway, 1983, p. 12). Furthermore, as an alternative to incarceration, restitution benefits juvenile offenders by reducing recidivism. "Prisons frequently serve as a breeding ground for more crime, not less, by exposing the naive offender to the more sophisticated and hardened criminal elements" (Friday & Petersen, 1973, p. 61). Hence, the argument is: incarceration contaminates the juvenile and thus impedes any chance of rehabilitation. Also, incarceration carries a severe social stigma that rehabilitation of juvenile offenders is frequently hindered.

Beside these, overcrowding in our nation's jails and prisons is one of the most pressing problems facing the justice system today (Bureau of Justice Statistics, 1988). The primary stimulus invoking this concern is the cost of incarceration (Lattessa, 1986). For instance, estimates range from \$10,000 to \$15,000 per inmate annually (Allen et al., 1986).

Fishbein and her associates (1984) characterize restitution as a creative and effective alternative to traditional sentencing practices. The logic of this contention rests on the premise that those sentenced to restitution would not burden society with the high cost of institutionalization. Further-

more, in contrast to incarceration, offenders sentenced to pay restitution are more likely to be rehabilitated (Armstrong et al., 1983). Hence, they become productive citizens and less likely to recidivate.

The major impediment in the reduction of the juvenile justice system costs is that when restitution is imposed, it is typically not ordered as an alternative to incarceration. Rather, it is ordered usually in conjunction with probation or parole (McGillis, 1986). On the other hand, Miller (1981) and McGillis (1986) argue that even if restitution were used more often as an alternative, expenses would probably increase. Among several areas where increased expenses would be seen, these researchers mention: increased costs incurred by the juvenile court system due to additional revocation hearings and, most of all, increased need and training for additional probation personnel to monitor those sentenced to restitution.

Conclusion

To consider victim rights and reacting to problems in the justice system, the Federal government and most state legislatures have enacted restitution laws. Some proponents of restitution stress that in addition to financially balancing the scales, this sentence can help in the victim adjustment process. Zehr (1985) contends that when victims participate in sentencing their offenders, they feel that justice is being served and gain a better understanding of the situation. In other words, participation in the sentencing process and the compensation (by offenders) for losses caused by crime can help victims regain a sense of control.

The enactment of bills 4240 and 4558 in the State of Michigan is intended to bring about total justice for victims. At face value, it appears that total justice is an attainable goal through the use of juvenile restitution. A number of sections and subsections of bill 4240 spell out the rights of victims during the court processing of the juvenile offender. For instance, under subsection 36(2), if the victim requests, the juvenile court will give him or her advance notice of scheduled court hearings; according to section 39, the victim has the right to be present throughout the entire contested adjudicative hearing; finally, subsection 43(1) mandates that the victim shall have the right to appear and make an oral impact statement at the disposition of the juvenile offender. However, a more careful examination of these bills suggests that restitutive sentencing conflicts with traditional sentencing goals. While on the

surface victims stand a better chance of being recompensed for losses due to crimes than before; they are far from achieving equal emphasis within our justice system. Although the original purpose of restitution has been to bring victims back to the same financial status as before their victimization, laws are vague (Brown, 1985). The Victim Witness Protection Act allows considerable judicial discretion in sentencing restitution. In addition to these problems, the new bills in Michigan place limits on recoverable losses and allow judicial discretion to cancel restitution payments. They are concerned with financial hardship on the part of the juvenile offenders and their parents, let alone offenders' accountability and responsibility and victims' plight. In sum, laws involving restitutive sentencing seem to be written to favor offenders and place their rights above those of victims.

It also appears that there is lack of commitment on the part of the juvenile justice system to make restitution a functional alternative to incarceration or other forms of traditional punishment. A case in point is the practice of converting reparation to victims to unpaid community service when payments are wilfully not made. Evidently, the juvenile justice system wants to use a heavier hand when the state benefits from the sentence than when individual victims benefit.

Overall, it appears that until the juvenile justice system adjusts its orientation and places equal importance on both offenders and victims, no appreciable change in the pursuit of total justice will be seen. At this point, an analogy for restitutive sentencing can be drawn. The current use of this sentencing has a similar symbolic meaning as the wooden horse had to the Trojans. The Trojans were led to believe that possession of the horse would give them the power to control Europe. Likewise, the public is led to believe that with restitutive sentencing victims are destined to achieve equity. As history says, the symbolic meaning of the horse was contrary to its contents; it led to the destruction of Troy. In a similar fashion, the contents and current use of restitutive sentencing are, for the most part, contrary to its symbolic meaning.

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