Is Restitution Practical?

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THE IDEA that wrongdoers should be required to make a payment of money or services to their victims is an ancient concept which may be on the verge of a renaissance in the American criminal justice system. Restitution by the offender to the victim of crime has likely been a part of probation practice since the probation services were developed in the mid- and latter 19th century. Restitution, however, has not been placed in a central role in the American criminal justice system; with the development of psychological and psychiatric approaches to dealing with the offender during the 20th century, restitution has been further discounted and relegated to a peripheral role. Mounting evidence discrediting the effectiveness of coerced therapy in the criminal justice system,[1] increasing costs of imposing traditional criminal justice sanctions, and the tendency of criminal justice officials to ignore the victim of crimes have all contributed during the past few years to a renewed interest in the ancient concept of restitution.

Beginning in the early 1970's a number of pilot restitution programs have been established in the United States and Canada.[2] During 1976 and 1977 the Law Enforcement Assistance Administration has systematically funded a series of pilot adult and juvenile restitution programs to further test the feasibility of using this concept in the criminal justice system. At present there is a critical need for a review and synthesis of the experiences of restitution programming initiated in the 1970's. Unfortunately no one is presently seriously considering such a review. Presently, considerable attention is being given to expanding restitution programming and conceptualizing restitution as a more central component in the criminal justice system. Arguments are being advanced to support the use of restitution as a punishment for crime;[3] a second line of argument has been advanced to define the purpose of the criminal justice processes as insuring that crime victims receive restitution from offenders.[4] Some practical problems at operationalizing the restitution concept must be conceptualized and resolved before either of these offender or victim oriented purposes for the use of restitution can be realized.

Determining the Amount of Restitution

A number of problems are associated with assessing the amount of restitution. These include the problems of victim overestimation of losses, whether the victim should receive restitution for nonmonetary losses such as pain and suffering, whether the offender should be required to make restitution in excess of victim losses, and the appropriate procedures for determining the amount of restitution. Many of the presently operating pilot restitution programs report some concerns that victims may inflate loss claims and, in effect, attempt to victimize the offender. No evidence exists as to the extent to which this occurs and an equally plausible and theoretically sound rival hypothesis is that in many cases offenders may underestimate the extent of damage done.[5] The neutralization strategies hypothesized by Sykes and Matza[6] as well as the justification strategies formulated by the social equity theorists[7] suggest that offenders may frequently deal with their own sense of guilt and distress by minimizing the extent of damages caused to the victim. Additionally, many offenders are unlikely to have an experience base from which to make realistic estimates of repair costs and damages done to property and thus may tend, from their own lack of knowledge and experience, to underestimate the damages resulting from their criminal behavior. Differences between victim and offender estimates of damages resulting from the criminal

[1] ... Robert Martinson, and Judith Wilks, *The Effectiveness of Treatment: A Survey of Treatment Evaluation* ... Praeger Publishers, 1975.
... "The Use of Restitution," *Crime and Delinquency*, ... 57-67; Joe Hudson, Burt Galaway, and Steve ... "When Criminal Repay Their Victims: A Survey of Restitution," ... 60:7 (February 1977), 312-321.
... *Compensation and Restitution to Victims of* ... Patterson Smith, 1970), 117-129; Burt Galaway, ... Integrative Punishment," in Randy E. Barnett and John ... *Assessing the Criminal: Restitution, Retribution,* ... (New York: Ballinger Press, 1977).
[3] Randy Barnett, "Restitution: A New Paradigm of Criminal ..." ... (July 1977), 279-301.
Burt Galaway and William Marsella, "An Exploratory Study of the Perceived Fairness of Restitution as a Sanction for Juvenile Offenders," Paper presented Second International Symposium on ..., Boston, Massachusetts, September 1976.
[5] David Matza and Gresham Sykes, "Techniques of Neutralization: A Theory of Delinquency," *American Sociology Review* 22 (1957), 664-669.
[6] Elaine Walster, Ellen Bersheid, G. William Walster, "New Directions in Equity Research," *Journal of Personality and Social Psychology*, 25 (1973), 151-176.

offenses may be as likely to result from offender underestimation as the victim overestimation of losses.

Most pilot restitution programs have developed workable procedures for resolving this problem. Two clear models, an arbitration and a negotiation process, are presently in use to arrive at the amount of the restitution obligation. In the arbitration model a neutral expert (usually a judge but frequently a probation officer) receives information from victims and offenders and arrives at a restitution amount which is then binding upon the offender (the amount is not necessarily binding upon the victim, however, who does have the resource of civil suit available). The negotiation model is operationalized by the Minnesota Restitution Center[8] and several other projects[9] which bring the victim and offender together with a staff member of the restitution project to negotiate a restitution agreement. Both of these approaches appear to be workable procedures for arriving at a restitution amount. The arbitration model may have the advantage of efficiency and will involve minimal criminal justice staff time at arriving at a restitution decision. The mediation model is more likely to produce a restitution decision which is acceptable and perceived as just by the parties involved due to their own input into the decisionmaking process. This model further has the advantage of bringing the victim and offender into direct communication and should reduce stereotypes which they may have held of each other.

To what extent should victims receive reimbursement for nontangible losses such as pain, suffering, and emotional distress? The predominant pattern among present restitution programs is to limit restitution to out-of-pocket losses sustained by the victims. For the most part, restitution is used with property offenders; with property offenses nontangible losses are sufficiently rare and, if present, extremely difficult to quantify which may account for their omission from present restitution schemes. The future development of restitution programming should build on past experience and not attempt to include pain, suffering, and other nontangible losses in restitution agreements. If victims feel strongly that they should be reimbursed for these damages they should, of course, be free to pursue the matter in civil proceedings.

Another set of questions center around the issues of partial and excessive restitution. Partial and excessive are relative to the damages experienced by the victim. Partial restitution occurs when the offender is required to make less restitution than the damages experienced by the victim and excessive restitution occurs when the offender's restitution obligation exceeds the amount of damages experienced by the victim. The experience of restitution programs today indicates that full restitution can be made in most cases without creating an unjust hardship on the offender. This experience tends further to be confirmed by available data indicating that the losses sustained in most victimizations are sufficiently modest that offenders can reasonably be expected to make full restitution.[10] Unusual situations may, of course, occasionally occur when offenders' actions may result in inordinately high losses to victims. In these rare cases questions may be raised about the appropriateness of requiring full restitution; when this occurs the decisionmaking process used to arrive at the restitution amount (either arbitration or negotiation) would involve a consideration of the extent of the loss in relation to the nature of the crime and might arrive at a less than full restitution obligation. This contingency reaffirms the desirability of using a negotiation rather than an arbitration process. Situations in which the victims have negotiated and accepted a less than full restitution agreement are much more likely to be accepted as fair and just situations than those in which the amount is determined by an arbitrator leaving the victim with only the resources of accepting the amount or attempting a civil suit. Further, laboratory research testing the equity theory formulations suggests that full restitution is more desirable than either partial or excessive restitution because full restitution is more likely to be voluntarily made by the wrongdoer.[11]

Questions around the issue of excessive resti-

[8] Joe Hudson and Burt Galaway, "Undoing the Wrong: The Minnesota Restitution Center," *Social Work*, 19 (May 1974), 313-318; Robert Mowatt, "The Minnesota Restitution Center: Pay or Get Off the Ripped Off," Joe Hudson (ed.) *Restitution in Criminal Justice* (St. Paul: Minnesota Department of Corrections, 1976), 190-215.

[9] Restitution in Probation Experiment, Des Moines, Iowa; Pilot Alberta Restitution Center, Calgary, Alberta; Victim Offender Reconciliation Project, Kitchner, Ontario.

[10] United States Department of Justice, *Crime in the United States, 1974* (Washington: U.S. Government Printing Office, 1975), 29-31; Burt Galaway and Joe Hudson, "Issues in the Correctional Implementation of Restitution to Victims of Crime," in Joe Hudson and Burt Galaway (eds.) *Considering the Victim: Readings in Restitution and Victim Compensation* (Springfield: Charles C. Thomas Publisher, 1975), 351-360; Minnesota Department of Corrections, *Interim Evaluation Results: Minnesota Restitution Center* (St. Paul: Minnesota Department of Corrections, 1976); Roger O. Stegerda and Susan P. Dolphin, *Victim Restitution: Assessment of the Restitution in Probation Experiment* (Des Moines: Polk County, Iowa, Department of Program Evaluation, 1976).

[11] Walster, Berscheid, and Walster, *op. cit., supra* note 7; Ellen Berscheid and Elaine Walster, "When Does a Harm Do Compensate a Victim?," *Journal of Personality and Social Psychology*, 6 (1967), 435-441.

tution are much more complex. Obviously the community incurs considerable costs in solving a crime, apprehending the offender, and arriving at a determination of guilt. Should offenders be reasonably accepted to share in these costs? Unless attempts are made to attach restitution obligations to concepts such as pain, suffering, and mental anguish, many serious crimes may involve considerably minor damages in which restitution for out-of-pocket losses may be a very mild penalty. To a large extent, this problem could be controlled by limiting restitution to property crimes. Further, without the possibility of excessive restitution, major class injustices may occur in which wealthy offenders might easily make restitution whereas poor offenders would find the restitution obligation much more burdensome. This problem has led a number of restitution scholars to accept the notion of excessive restitution. Kathleen Smith proposes that offenders be sentenced to pay restitution as well as a discretionary fine set by the judge and based on the seriousness of the offense; in Smith's scheme all offenders would go to prison, would be provided with work opportunities at prevailing market wages, and would remain in prison until they had worked and earned sufficient money to complete both restitution and discretionary fine obligations.[12] Stephen Schafer, one of the most consistent modern advocates of restitution, thinks that restitution must be combined with other penalties to avoid class injustices.[13] Most presently operating restitution programs do, at least indirectly, require excessive restitution inasmuch as obligations in addition to restitution are imposed upon the offender. Frequently restitution is attached along with other obligations of probation, required residence in a community correction center, mandatory counseling, or other correctional sanctions. Programs in Georgia[14] and Oklahoma,[15] however, are apparently moving away from this pattern and are attempting to demonstrate the use of restitution as a sole sanction. Offenders in these states are technically on probation status while making restitution; they appear, however, to have very few other obligations and will be discharged from probation upon the completion of the restitution requirement. The problem of excessive restitution might well be resolved by beginning to find types of crime (predominantly property crimes) in which restitution might be the sole sanction and identify other more serious crimes (predominantly crimes against person) in which restitution might reasonably be required but in which the offender would also be subject to other criminal justice sanctions. The concept of court costs might also be expanded by establishing a set fee based on the type of crime which all convicted offenders should be required to pay to partially reimburse the community for the costs of their apprehension and conviction. Parenthetically, the converse of this would also be reasonable. Persons who are subjected to criminal charges which are later dismissed or for which they are acquitted should receive compensation from the community for their legal costs and other losses.[16]

The questions of determining the amount of victim damages for which restitution is to be made, assessing whether or not restitution should be made for intangible damages such as pain, suffering, mental anguish, etc., and the issues of partial and excessive restitution are all practical problems which must be resolved; present experience clearly indicates that they are resolvable. Two procedures—arbitration and negotiation—are being employed to resolve these issues on a case-by-case basis. Generally the negotiation procedures hold greater promise for arriving at resolutions which will be accepted as fair by all parties to the victimization.

Enforcing the Obligation

A second set of issues centered around the question of how to enforce restitution requirements. There are two aspects to this problem. One aspect is that of the indigent offender (how-to-get-blood-out-of-a-turnip) and the other is enforcing a restitution sanction against the solvent offender who may be reluctant to give up resources. The problem of the indigent offender may be overstated. The experience to date is that the restitution amounts are quite modest; the vast majority of restitution contracts negotiated by the Minnesota Restitution Center, for example, have been under $200.[17] With the aid of installment payment plan, most offenders will be able

[12] Kathleen Smith, *A Cure for Crime: The Case for the Self-Determinate Sentence* (London: Duckworth, 1965); Kathleen Smith, "Implementing Restitution Within a Penal Setting," in Joe Hudson and Burt Galaway (eds.), *Restitution in Criminal Justice* (Lexington: D.C. Heath Lexington Books, 1977), 131-146.

[13] Schafer, *op. cit., supra* note 3.

[14] Bill Read, "How Restitution Works in Georgia," *Judicature* 60:7 (February 1977), 329-331.

[15] Mark R. Arnold, "Making the Criminal Pay Back His Victim," *National Observer*, April 2, 1977, p. 1.

[16] Richard Moran and Stephen Ziedman, "Victims Without Crimes: Compensation to the Not Guilty," in Israel Drapkin and Emilio Viano (eds.), *Victimology: A New Focus; Volume II Society's Reactions to Victimization* (Lexington: D.C. Heath Lexington Press, 1974), 221-225.

[17] Galaway and Hudson, *op. cit., supra* note 9; Minnesota Department of Corrections, *op. cit., supra* note 9.

to handle their restitution obligations. In some situations other resources may need to be made available to the low income offender. These resources could include assistance with job finding or the use of short-term public service employment by which the offender would be put to some useful public work in order to earn sufficient money to meet the restitution obligations.

One occasionally expressed fear is that indigent offenders will steal in order to make their restitution obligations. While this is certainly a possibility, there is no evidence from current restitution programs that it occurs except in isolated instances. This, admittedly undesirable contingency, could certainly be controlled with even minimal monitoring of the offenders' sources of income as they complete the restitution requirement.

Another alternative is personal service restitution in which the offender completes restitution by working for the victim rather than making a cash payment. Several restitution projects report examples of this type of restitution,[18] although to date there has been no systematic study of the use of personal service restitution. This does appear to be a viable option which might be explored and used with some indigent offenders. If restitution decisions are made through a negotiation process the possibility of personal service restitution could be discussed and considered as one of the alternatives under consideration.

There will be some offenders who will willingly agree to a restitution obligation to avoid harsh outcomes of the criminal process. Some will then attempt to avoid completing the obligation even when they have income and resources to do so. In view of these problems, the criminal justice system must maintain the possibility of imposing a more severe sanction if the offender fails or refuses to meet the restitution obligations. While many offenders will undoubtedly meet their obligation out of a sense of duty, some will be evasive and means must be available to coerce those who wish to evade their responsibility. This, of course, is a current practice when restitution is made a condition of probation; failure to make the restitution obligation can then become grounds for violation of probation or imposing the original penalty.

[18] Galaway, *op. cit., supra* note 2; Patricia Groves, "A Report on Community Service Treatment and Work Programs in British Columbia," *Community Participation in Sentencing* (Ottawa: Law Reform Commission of Canada, 1976), 121-177.
[19] Mowatt, *op. cit., supra* note 8, 203.

Securing compliance with the restitution obligation is not an insurmountable obstacle. Procedures must be developed to monitor the progress of completing the restitution obligations and to be aware of the sources of money being used by the offender to make restitution. Installment payments will undoubtedly be necessary in many circumstances. In a few cases, the offender may require assistance in finding employment or being provided with public service employment. Serious consideration should be given to exploration of the use of personal service restitution. Finally, the criminal justice system must maintain the capability of coercing the restitution requirement through imposing an additional sanction when offenders do not complete their obligations.

The Costs of Restitution

Will the more systematic use of restitution in the criminal justice system increase the costs of administering criminal justice programs? This depends upon the role restitution is to play vis-a-vis other criminal justice sanctions. If restitution is simply added to the present panoply of sanctioning and correctional programs then the cost is likely to increase. If, on the other hand, restitution can be used in lieu of existing criminal justice programs then the cost will be decreased. Less staff time will be necessary to establish a restitution agreement (even using negotiating procedures) and in monitoring the implementation of that agreement than is now being used in probation services to develop presentence evaluations and to carry out probation supervision. Substituting restitution for probation will lower cost; the cost savings will be even greater if restitution can be used as an alternative to incarceration which, of course, is an extremely expensive sanction and effectively penalizes the victim twice—once by the offender and secondly through taxes to support the incarcerated offender. Another alternative which would reduce costs is to use less restrictive incarceration and restitution in lieu of traditional imprisonment. The Minnesota Restitution Center retained offenders (who had previously been in a maximum security prison) in a community corrections center where they completed their restitution obligation at less per diem cost than that required to operate the prison.[19] Likewise the Georgia restitution shelters are providing a degree of incarceration and restitution at considerably less costs to the taxpayers in Georgia than would be incurred if the offenders

in the shelters were placed in a more traditional prison.[20] If restitution can be substituted for the concept of coerced counseling and therapy, sanctioning will become a less labor-intensive—and thus less costly—undertaking. On the other hand, there is considerable danger that restitution will simply be added to the present range of criminal justice treatment-sanctioning activities and, thus, would increase the overall cost. Restitution, to save money, must result in a reduction in other types of correctional programming. This in turn requires an identification of types of offenses for which restitution would be a suitable sole penalty and a systematic exploration of the use of restitution alone without other types of sanctions.

Victim Culpability

An additional practical problem centers around the question of the victims' precipitation of their own victimization. There is an increasing body of evidence to suggest that in many situations crime victims, either actively or through carelessness, engage in behavior which partially precipitates their own victimization.[21] If the victim is partially at fault should the offender be required to make full restitution for the victim's losses? This is an issue which has not been addressed explicitly in most present restitution programs. Most appear to operate on the assumption that the offender was fully responsible for the victim's losses and should, therefore, make full restitution.

There are two directions by which this issue might be resolved. One direction would be to develop a procedure by which the offender could request a reduction in the amount of agreed-upon restitution based on evidence that the victim was partially at fault. This may be similar to the concept of contributory negligence in civil suits. Such a procedure would, of course, involve additional legal costs. A similar process which might accomplish the same ends would be to permit the issue of victim culpability to be considered in either the arbitration or negotiation processes designed to arrive at a restitution amount. The offender might be permitted to try to negotiate a lesser restitution amount based on contentions that the victim contributed to the victimization or, perhaps, the arbitrator might award less than full restitution to the victim on the same bases.

A second approach is to assume that even in situations of high provocation, an individual has more than one alternative way of behaving. Persons who select an alternative which leads to damages to another person, even if provoked, should be held accountable for the damages which flow from their decision. This approach would suggest that so long as noncriminal alternatives are available, offenders should be held accountable for their acts even if provoked. This alternative response to the question of victim culpability has some distinct advantages. First, basic human dignity of the offender is protected because the offender is perceived as a responsible person who has the power and obligation to make decisions. Conversely, an offender is not perceived as a sick or helpless person who, in a deterministic manner, responds criminally in provocative situations. Secondly, the interests of the community are better protected by a policy stance which expects and demands responsible behavior from persons. To permit easy rationalizations is simply to encourage irresponsible behavior.

The problem of victim culpability is also not an insurmountable issue. One direction for resolution is to permit procedures which would result in a reduction in the restitution obligation based on some assessment of a culpability of the victim. A second and preferred alternative is to treat the offender as a responsible person who chooses alternative forms of behavior and who should be held responsible for the damages which flow from such a choice. This latter approach does not deny the reality of the victim precipitation but rather affirms the principle of holding people responsible for their behavior and rejects a policy which permits easy rationalizations for irresponsible behavior.

Conclusions

Restitution programming has been demonstrated in a number of pilot projects over the last few years. Unfortunately the experience of these projects has not yet been fully reported and synthesized. There is a crucial need for a careful review and summarization of the restitution project's experiences to guide further programming in this area. Sufficient experience is available, however, to suggest that many of the practical issues which are frequently raised in regard to restitution programming can be resolved. Fair restitution amounts can be determined. Differences in perceived damages between victims and

[20] Read, *op. cit., supra* note 14, 327.
[21] Lynn A. Curtis, *Criminal Violence* (Lexington: D.C. Heath/Lexington Books, 1974), 81-100.

offenders are resolvable and guidelines are available to deal with the issues of payment for intangible damages, partial restitution, and excessive restitution. There does not appear to be any particular reason to believe the major problems will be encountered in enforcing the restitution obligation so long as installment payments are authorized; implementation of the restitution agreement is monitored; judicious use is made of job finding services, public employment, and personal service restitution; and a more severe sanction can be imposed if the offender refuses to complete the restitution obligation. If restitution can be used as an alternative to present correctional programs, the overall sanctioning costs will be reduced. Attention should be given to defining types of offenses for which restitution might be a sole penalty. Finally, the issue of victim culpability should not deter from the imposition of a restitution requirement; an offender's dignity is much more protected when he is treated as a responsible person who can be held accountable for choosing a criminal alternative even when confronted with a provocative situation.

The practical issues can be resolved on a case-by-case basis using a negotiation procedure by which the victim and offender work with a public official to arrive at a restitution agreement. Once developed, this agreement should be enforced as the major sanction against the offender. Such a program should reduce the need for large correctional bureaucracies and should be actively pursued as a means for dealing with specified types of offenses, especially property crimes.

Legal Assistance to Delinquents

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Although juveniles enjoy certain legal protections in America which are not extended to adults, they also suffer numerous disadvantages and handicaps in their ability to assert and defend their own best interests as they perceive them. The adult who believes himself to be injured by another may bring suit to obtain relief or even damages. The juvenile must await his parent or guardian taking the initiative to institute a similar course of action for him. For the juvenile who has been removed from his own home, who is living with foster parents or staff of a child caring institution, resort to such relief becomes even less likely, particularly if he wishes relief from his custodians.

A part of the problem such youth face in asserting their own interests grows out of the attitude common to many institutions dealing with juveniles. Schools, juvenile courts, welfare agencies, and other agencies—police, correctional agencies—see themselves as the protectors of youth. Confident of their expertise and knowing that their aim is to help youth, it is difficult for these agencies or even the general public to recognize that failures to serve the juveniles' best interests do occur. As Morris and Hawkins point out in generalizing from the situation in Illinois:

> Nobody doubts the benevolence and good will behind the efforts of the juvenile courts and the state youth commissions. Nor is it possible to doubt the great power they wield over the lives of children and their families. What we should have doubts and also anxiety about are the problems which develop when these types of rescue operations become institutionalized. Too often what happens is that the rescue operations ignore the preferences of those who are to be rescued.[1]

This perspective of the position and plight of juveniles in the American institutional system provided the impetus for the development of Legal Assistance to Delinquents (LAD), a legal services program for youth separated from their families by court action and residing in some form of group care, i.e., group homes or institutions.

The program was undertaken by the University of Minnesota with the assistance of funding provided by the Governor's Commission on Crime Prevention and Control.

As an experimental program, LAD sought answers to a number of questions. Do juveniles living away from their families in some form of

[1] Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control*. Chicago: University of Chicago Press, 1969, pp. 167-168.

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