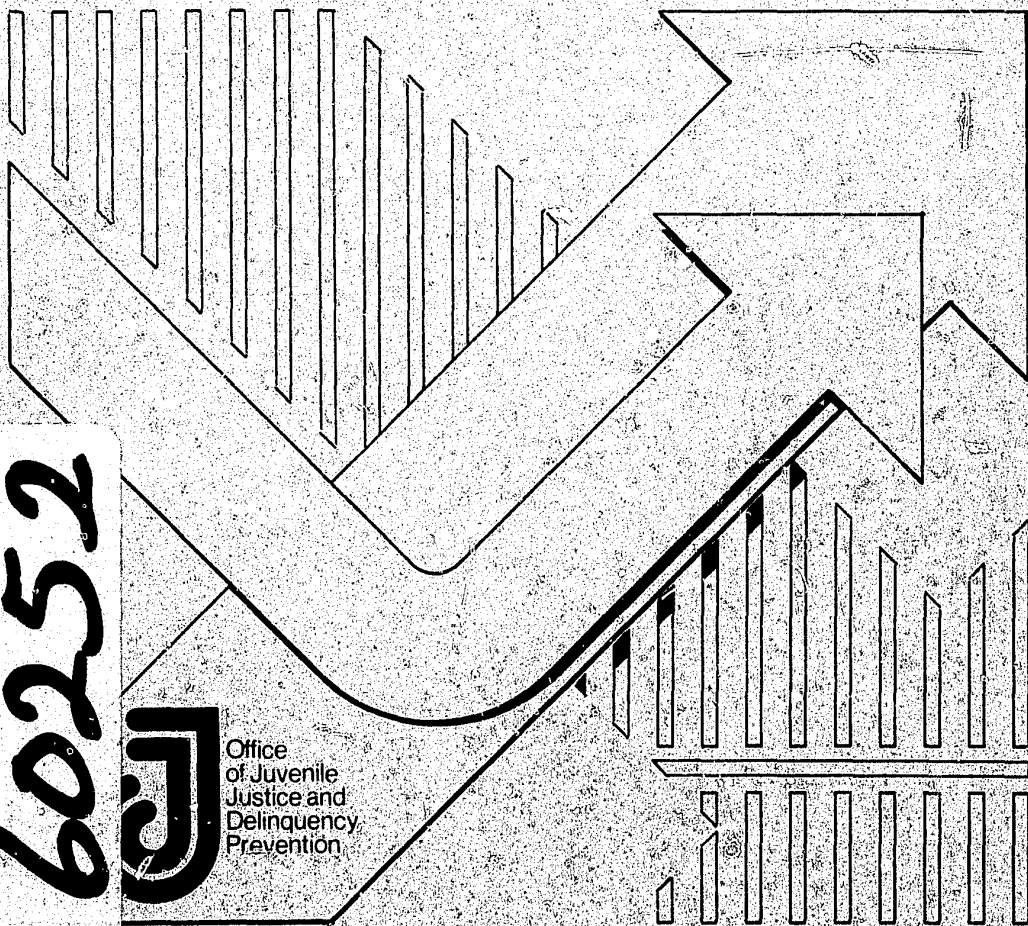


**PROGRAM
ANNOUNCEMENT**

**RESTITUTION
BY JUVENILE OFFENDERS:
AN ALTERNATIVE TO
INCARCERATION**



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U Office
of Juvenile
Justice and
Delinquency
Prevention

LEGAL ISSUES IN THE OPERATION OF RESTITUTION PROGRAMS

Introduction

In recent years there has been a growing trend toward the adoption of restitution programs as a means of sanctioning criminal offenders and providing relief for their victims. A number of researchers and professionals in criminal justice have dealt with the varying definitions of restitution and the purposes of different types of programs.¹ In addition, there exist descriptions of restitution programs that have been implemented on an experimental basis.²

This paper examines the logical and constitutional problems posed by different methods of ordering restitution, and discusses the numerous legal issues that arise in the operation and design of restitution programs. In addition, guidelines will be suggested for the implementation and operation of new restitution programs, with emphasis given to the unique problems presented by ordering restitution in a juvenile court setting.

It should be emphasized that in those states which already have case law on the subject of restitution, persons planning restitution programs should consult that case law first. This paper will explore how states have resolved particular restitution issues and suggest alternative methods for resolving such issues.

Design and Implementation of Restitution Programs

One of the first questions raised in the design and implementation of a restitution program is determining at what stage of the proceedings restitution is to be ordered. Many persons argue that the juvenile court is most effective if it treats youths in an informal setting with a minimum of formal court procedures.³ On the other hand, there are many supporters of the proposition that juveniles can be better treated through a system with more formalized judicial procedures.⁴ There is no consensus at this time as to which approach is the more effective treatment.

An informal stage of the juvenile court process is generally considered to be one which does not involve a judicial officer. For example, a youth may be referred to juvenile court for a particular offense, meet with a probation worker to discuss his offense, and then agree to meet with that worker for treatment purposes. This would be considered an informal procedure, since no judicial officer was involved.

On the other hand, formal procedures involve a judge or other judicial officer. The adjudication and dispositional phases are often separated. At the adjudication phase the court makes a finding as to whether a youth within the court's jurisdiction. Generally a petition is filed alleging that a youth is within the jurisdiction of the juvenile court because of acts allegedly committed. The state then has the burden of proving that the youth committed those acts. The youth can be found within the court's jurisdiction either by admitting the allegations of the petition filed, which is analogous to a guilty plea in adult court, or by the state proving the allegation true at a fact-finding hearing. It is considered a formal court procedure if a judge approves the guilty plea or presides over the fact-finding hearing.

Aside from the merits from a treatment point of view of handling youths informally or formally, where restitution is concerned close attention must be paid to the constitutional rights of the juvenile. A juvenile required to pay restitution is denied his property in that he must pay monies to crime victims or some other third party, and is denied liberty in that the juvenile is required to perform certain acts he otherwise would not have to perform in order to meet the restitution requirement. The Fifth and Fourteenth Amendments of the U.S. Constitution provide that persons can not be denied property or liberty by the Government without due process of law. It seems clear that due process requires a judicial determination of a youth's responsibility for committing certain acts, before that youth is required to meet a restitution requirement. Thus, it may raise serious constitutional problems to require restitution during an informal stage of the proceedings.

Further, questions of involuntary servitude may be raised when a youth is required to work in order to comply with a restitution requirement before there has been a judicial determination of that youth's responsibility for committing an offense. The Thirteenth Amendment to the U.S. Constitution provides:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

The argument could be made that the Thirteenth Amendment prohibits labor ordered as part of restitution when the youth has not been convicted of a crime or found to be legally responsible for committing an offense. However, if restitution is ordered at a post-adjudication stage, this problem should be eliminated, since at that point the youth would be considered to be a ward of the court. In Maurier v. State⁵ the Georgia Court of Appeals held that an order of restitution was not invalidated

under the Thirteenth Amendment since the defendant had already been convicted of a crime. In order to avoid any Thirteenth Amendment challenges, the restitution program should focus on rehabilitating offenders or compensating victims rather than on obtaining a cheap source of labor.

The next question is the extent of judicial involvement necessary to meet constitutional requirements of due process. Clearly it is desirable for a neutral and detached judge to be involved at some stage of the proceedings, before a juvenile is required to comply with a restitution requirement. Where restitution is to be ordered, the court, in the interests of efficient administration, may wish to have the probation department do much of the preliminary investigation concerning the amount, type, and method of restitution payment. How much of this responsibility may a court delegate to the probation department before the rights of the juvenile are violated? The New Jersey Supreme Court, in In the Interest of D.G.W.,⁶ held that the juvenile court judge has ultimate responsibility for ordering the amount and terms of restitution and it cannot delegate this responsibility to the probation department of the court. Prior to this court ruling, the practice in New Jersey was to allow the probation department to investigate the nature and extent of personal and property damage caused by the juvenile acts, prepare a final report, and then make the final decision on the amount of the restitution. The New Jersey Supreme Court stated that it was proper for the trial court to allow the probation department to investigate the situation and make a recommendation for restitution, but improper for the court to delegate its responsibility for making the final order of restitution to the probation department.

Summary

Juvenile court proceedings are generally divided into an adjudicatory or guilt-determining stage whereby a youth is found to be within the court's jurisdiction and a dispositional stage which is analogous to the sentencing phase of adult court. Programs, to be safe from legal attack, should require a finding by a neutral and detached judicial officer that a youth has committed the acts he is alleged to have committed before he is eligible for a court-sponsored restitution program. This finding may either be after a counselled admission of responsibility by the youth or after a fact-finding hearing.

In addition, the court should be the one to make the final order as to the amount, type, and method of meeting the restitution requirement. The court, however, may delegate to the probation department the authority to investigate the circumstances of the juvenile's acts, and the type and amount of damage caused by these acts.

Due Process Rights Which Must Be Afforded at the Stage of Proceedings Where Restitution is Ordered

Once it is determined by whom restitution is to be ordered, the question arises as to what procedures must be followed to assure that a person's constitutional rights are not violated. This analysis is a two-step process: Does the right of due process apply at this proceeding and if so, what procedures must be followed to safeguard these rights?

The Supreme Court has held that rights to due process apply at sentencing proceedings,⁷ as well as at proceedings to revoke probation⁸ or parole.⁹

It is clear that restitution involves a youth's right to property in monies to be paid to comply with the restitution order and his right to liberty in freedom from probationary requirements. Thus the first question, whether the right of due process applies at this stage of the proceedings, must be answered affirmatively.

The next question, what procedures should be followed so that these rights are safeguarded, is more complex. In recent years the courts have held that due process rights apply to a wide variety of proceedings. In each of these cases the Supreme Court has avoided stating specifically what procedures must be followed in order for due process requirements to be met. The general approach in these cases is to balance the state's interest in orderly and efficient administration of justice with the individual's interest in protection of rights to property and liberty.

The New Jersey court, in In the Interest of D.G.W., held that a juvenile and/or the juvenile's attorney are entitled to examine the probation department's restitution report and recommendation. In addition, the juvenile is entitled to present evidence at the sentencing in his own behalf, and may object to statements contained in the probation department's report.

Summary

A restitution order affects an offender's right to property in the monies he will be required to pay to the victim and the offender's right to liberty in his freedom from "probationary" conditions. It seems clear that the youth's rights to due process and right to counsel apply at a stage of the proceedings where a restitution order may be entered.

The extent of rights which must be afforded a juvenile are flexible and involve balancing the state's interest in an orderly restitution program with the offender's interest in protection of his rights. Rights to

which courts have suggested that juveniles are entitled include the right to examine the probation department's report recommending restitution and to object to statements in that report, and the right to present evidence at the hearing at which restitution is ordered.

Method of Determining Amount of Restitution

This section will discuss the factors which courts have suggested should be considered before the amount of restitution is determined. The next section will deal with the complicated question of the amount of victim loss for which the criminal offender should be held responsible.

The restitution award should be determined with consideration for both the offender and the victim. The primary purpose of restitution, however, is to rehabilitate the offender. Thus, the primary consideration in entering a restitution order should be the impact that order will have on the offender. The theory often suggested to support the notion that restitution is a rehabilitative tool is that an offender will be rehabilitated if he is made aware of the loss his criminal acts have caused and if he is made to feel some responsibility for remedying the loss. In People v. Richards¹⁰ the California court suggested that a trial court should consider the following factors when making the restitution order: the offender's characteristics, his prior offenses (if any), the offender's state of mind when the offense was committed, and the extent and nature of loss caused by the offender's acts.

One of the most easily discernable client characteristics is the offender's ability to pay any potential restitution order. Should the ability to pay be considered by a court when it is considering entering a restitution order? States answer this question differently, but the majority say yes.¹¹

The states in the majority reason that it would be improper for a court to revoke probation merely because the offender is unable to pay restitution, since that would be similar to imprisoning a person for inability to pay a fine which is constitutionally impermissible.¹² Thus these states hold that a trial court must determine, after making findings of fact, whether or not an offender can or will pay the amount of restitution ordered.¹³

Other courts have held that the only requirement for a condition of probation is that it be fair and reasonable. If restitution as a condition of probation is otherwise fair and reasonable, the mere inability of the offender to pay will not in and of itself make it unfair and

unreasonable. This question will be discussed further in the section dealing with methods of enforcing the restitution.

Summary

In determining the amount of restitution the court should consider the following factors: the nature of the loss caused by the offender, the prior offenses, if any, of the offender, and whether or not the offender was acting with malice at the time of the offense.

In setting the amount of restitution, the court should consider the offender's ability to pay, because the order may later be subject to attack if there was no finding of fact concerning the offender's ability to pay and subsequently there is an attempt to revoke the offender's probation on these grounds.

Scope and Amount of Restitution Order

By far the most complex issue in the area of restitution and the one which has generated the most litigation is the question of how to determine the scope of the offender's liability for injuries which may have resulted from his criminal activities. The cause of the problem is that restitution affords a civil remedy, i.e., compensation for injuries suffered by victims of crimes, in what is otherwise a criminal proceeding. Crime is traditionally defined as an offense against the public at large for which the state on behalf of the public institutes a proceeding. The purpose of the criminal prosecution is to vindicate the state's interest by proving that a particular defendant is responsible for certain acts. Once that person is convicted, the criminal justice system attempts to punish and/or rehabilitate the offender. A civil personal injury proceeding, on the other hand, is commenced by an injured party and maintained by that party in order to seek compensation for his injuries from the party or parties that caused the injury. If the injured party is successful, he obtains a judgment against the wrongdoer which he may enforce and collect compensation from the defendant.

The theory of restitution is that once a person is convicted of an offense, that person will be rehabilitated or reformed if he is made aware of the loss caused by his criminal acts and if he is held responsible for remedying these acts. In addition, restitution serves to compensate victims of crime. However, a finding by a criminal or juvenile court that a person is guilty of a certain offense is not the same as a civil finding that that person is liable to the person who was injured by those acts. In a civil proceeding, due process requires that a defendant be given notice of the complaint brought against him by the

injured party and the amount of damages the injured party seeks to recover. The defendant in a civil proceeding may assert the defense of contributory negligence; that is, that the plaintiff's acts contributed to his own injury and therefore the defendant is not liable or only partially liable for the plaintiff's injuries.

The issue at a criminal trial is not whether the defendant is responsible for the victim's injuries but rather whether the defendant has committed an offense against the state. If, for instance, a defendant is charged with theft of a car and the car belonged to the victim, the scope and amount of restitution is relatively easy to determine--the court would require the defendant to return the victim's car. If, on the other hand, the defendant is charged with negligent homicide in the death of a woman and her child, what is the appropriate amount of restitution the defendant should be required to pay to the husband who is the survivor of the accident?¹⁴

An initial problem in determining the scope of a restitution order is to decide whether a defendant should be required to pay restitution only for the direct consequences of the particular crime he has committed, or whether the defendant may be held responsible for indirect consequences of his crime or for injuries caused by other crimes he has not yet been tried for. The state courts have not answered this question with any uniformity. Some state courts hold that a defendant may be required by a restitution order to pay for losses which exceed the losses caused by the crime for which he was convicted.¹⁵ These courts reason that the primary purpose of restitution is to rehabilitate the defendant. Thus the purpose of entering a restitution order is not to determine the defendant's liability in a civil sense, but rather to set conditions of probation which are likely to reform the offender. A restitution order in these states would be upheld on appeal if it were shown that the restitution requirement was likely to rehabilitate the offender even if the amount of restitution exceeded the losses caused by the crime for which the defendant was convicted. In People v. Miller,¹⁶ the defendant was convicted of fraudulently obtaining \$821. The defendant was placed on probation upon the condition that the victim be repaid the \$821. Subsequently, the trial court modified the restitution order to include losses suffered by other victims of the defendant's fraudulent acts which were not related to the crime for which the defendant was convicted. This modification was upheld on appeal. The appeals court held that a restitution order which exceeds the losses caused by the crime the defendant was convicted of is valid if it is shown that that order is likely to rehabilitate the defendant. The California courts do not pretend to assess the offender's civil liability to the victim, but determine the amount of restitution according to whether the amount requested is likely to rehabilitate the

offender. Most courts, however, do not take the California approach and limit the offender's restitution order to losses which are direct consequences of the criminal acts for which he has been convicted.¹⁷ These courts reason that it is inappropriate for a restitution order to exceed the losses directly caused by the defendant.

Another question concerns the appropriate victim entitled to restitution. Generally, any person or entity injured by a criminal act is entitled to restitution.¹⁸ If the victim is insured against the loss the financially injured party is the insurance company, and most states permit the insurance company to recover restitution from the offender. However, a recent Oregon case, State v. Getsinger,¹⁹ concluded that insurance companies are not eligible to recover restitution payments. The Oregon court reasoned that the state statute only permitted direct victims of a crime to receive restitution, and held that the insurance company was not a direct victim since it suffered loss only because the injured party, the insured, did.

If a person suffers injuries which are a direct consequence of the offender's crime and that person is considered to be the immediate victim, how extensive should the restitution order be? In People v. Miller²⁰ the first victim who was defrauded of \$821 is clearly entitled to recover that amount as restitution. What if that victim contends that in addition to the direct loss of \$821 he was injured further by the pain and suffering he was made to endure as a result of the defendant's criminal acts? Pain and suffering, loss of wages, etc., are all compensable losses in civil proceedings. Should they be included in a restitution order as well? Most courts in examining this question have ruled that a victim is entitled to restitution only for losses that have a direct and easily measurable dollar value.²¹ These courts reason that the defendant is not given the benefit of a civil trial on the issue of damages and thus a determination of unliquidated damages (damages without easily measurable dollar values) would involve mere guesswork on the part of trial courts. Although courts have indicated an unwillingness to determine unliquidated damages in assessing restitution, they still have had difficulty in determining the value of the victim's loss. For example, if a window is broken and a house burglarized and several items in the house taken, how is a court to determine the amount of loss suffered by the victim? The courts have suggested several methods which should be considered in determining value, among which are the cost to repair or replace the items damaged or taken, the market value of the item taken or destroyed, the difference in value or property before and after the crime took place, etc.²²

Another question which arises is how to assess responsibility for a loss caused by multiple offenders. Again, the states have not uniformly resolved this question. Some courts state that multiple offenders are jointly and individually liable for all injuries which result from their criminal activities.²³ Thus each offender is individually liable for the entire amount of loss and all offenders are jointly liable for the entire loss. Other states have decided that when there are multiple offenders, each offender should be required to pay his pro rata share of the losses.²⁴ Thus, if there are four offenders, each offender would be required to pay one-fourth of the victim's loss. Still other states have indicated that where there are multiple offenders it is appropriate for the trial court to conduct a fact-finding hearing to determine the degree of responsibility each of the offenders must bear for purposes of the restitution order.

The most logical approach is for the trial court to presume that where there are multiple offenders, they are proportionately liable for the losses caused by their criminal acts. This presumption could be rebutted, however, by a showing that one of the offenders was more responsible for the victim's loss than any other offender.

Summary

Many issues are raised when considering the scope and amount of restitution orders. From an examination of the case law it appears that the states have failed to resolve these issues uniformly. In considering this question, it is important to realize the difference between restitution and an award of civil damages. A criminal court determines whether an offender has committed certain acts which violate the public interest. Once an offender is convicted, the court may order restitution in an effort to rehabilitate an offender by making the offender aware of the loss his acts have caused and making the offender feel a sense of responsibility for remedying those acts. This order also serves the function of compensating the victim of the crime for losses he has suffered. However, by ordering restitution the criminal court is not determining the civil liability of the offender to the victim of his crime. That is not the issue of the criminal trial and that is not the purpose of a criminal proceeding.

When a state has case law on the appropriate scope of a restitution order, it would be presumptuous to suggest that a new restitution program adopt regulations other than those required by its state law. The following guidelines are suggested for restitution programs in states with no case law on the subject.

A defendant should only be required to pay restitution for losses which are a direct consequence of his criminal acts. Serious due process problems are raised when a defendant is ordered to pay restitution for losses caused by acts for which he has never been convicted.

A victim who has suffered loss as a result of the defendant's acts should be entitled to restitution if those acts were a direct cause of his loss. When a victim is insured for a loss, the insurance company is the party who actually bears the loss, and thus should be entitled to recover restitution. Restitution serves the purpose of making the offender aware of the loss his acts have caused whether the victim is a person or an insurance company.

Unliquidated damages, e.g., pain and suffering, should not be an appropriate basis of a restitution order unless the defendant admits his liability for this amount. For liquidated damages, i.e., those with a measurable monetary value, any method of valuation of loss commonly used in civil proceedings would be appropriate for determining the amount of restitution, e.g., cost to repair or replace an item which has been broken or stolen.

As far as injured victims are concerned, the best means to recover their losses are in civil rather than criminal proceedings. In civil court, the injured party can obtain a judgment against the offender which then may be enforced by the appropriate civil procedures. When an offender is ordered to pay restitution to a victim by a criminal court, the method of enforcement is to revoke the offender's probation. However, the victim must remember that if the offender is placed on probation with the requirement of restitution, the victim is likely to recover some compensation for his injury. If, on the other hand, the offender is incarcerated, the victim may be able to obtain a judgement in a civil court, but the judgement will be unenforceable at least for the period of time that the offender is incarcerated.

Method and Enforcement of the Order of Restitution

The criminal court generally has the power to revoke probation if it is shown that a probationer has not met any of the conditions of his probation. In Gagnon v. Scarpelli²⁵ the Supreme Court held that a person is entitled to due process at probation revocation proceedings. The requirements necessary to comply with due process at this stage of the proceedings are flexible, requiring a balance of the state's and the individual's interests. The court in Gagnon suggested that the defendant be afforded the following rights: written notice of the alleged probation violations, disclosure of the evidence the state

has against him, an opportunity to be heard in person and to present evidence on his own behalf, the right to confront and cross-examine witnesses, a neutral and detached hearing body, and a written statement of facts stating the evidence relied upon in reaching the decision.²⁶

In addition to the question of procedural due process, there are questions of substantive due process and equal protection when a person's probation is revoked and he is incarcerated on the basis of his inability to pay restitution. The Supreme Court has held that it is unconstitutional to incarcerate an indigent because of his inability to pay a fine.²⁷ The question then is whether it is constitutional to incarcerate a defendant for not meeting a restitution requirement, since there was no showing that the defendant would be able to meet that requirement. In People v. Kay,²⁸ the court held that it was improper to incarcerate a defendant for not meeting a restitution requirement since there was no showing prior to the entry of the order that the defendant would be able to meet the restitution requirement. The court reasoned that ordering restitution when a defendant is unable to meet the requirement, and is likely not to be able to meet it in the future, is the same as imposing a fine, and that it is therefore improper to incarcerate that defendant because of his inability to pay the restitution. Other courts have held that an offender might be incarcerated for failure to comply with a restitution requirement provided that the restitution order can be shown to be fair and reasonable.²⁹

Summary

A defendant's right to liberty is at stake at any probation revocation proceeding, and thus he is entitled to minimal requirements of due process.

In addition, to avoid many of the problems associated with noncompliance with court ordered restitution, courts should consider the offender's ability to pay. Where it is clear that an offender is indigent at the time the order is entered and has no prospects of obtaining employment and funds to meet the restitution requirement it would be unconstitutional for the court to incarcerate that individual because of his inability to pay restitution.³⁰ On the other hand, where the court makes every reasonable effort to accommodate the offender who has the ability to pay restitution, but who fails to do so, the court may constitutionally incarcerate this individual.

FOOTNOTES

- 1 See Burton Galaway, "Issues in the Use of Restitution as a Sanction for Crime," paper presented at the National Institute on Crime and Delinquency, Minneapolis, Minnesota, June 1975.
- 2 See, for example, Joe Hudson (ed.), Restitution in Criminal Justice. Based on papers presented at the First International Symposium on Restitution.
- 3 See Fox, Juvenile Justice Reform: An Historical Perspective, 22, Stanford Law Review, 1187 (1970).
- 4 F. Allen, The Borderland of Criminal Justice, 16 (1964).
- 5 112 Ga. App. 297, 144 SE 2d. 918 (1965).
- 6 70 N.J. 488, 361 A 2d. 513 (1976).
- 7 Memnpa v. Rhay, 389 U.S. 128 (1968).
- 8 Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973).
- 9 Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972).
- 10 131 Cal. Rptr. 537.
- 11 See text pp. 6-7. Illinois and Michigan do not require that a restitution order be predicated upon the offender's ability to pay. People v. Tidwell, 338 N.E. 2d. 13 (Ill. 1975), People v. Gallagher, 223 N.W. 2d. 92. (Mich. 1974). On the other hand, New York and Vermont hold that the order requiring restitution must consider the offender's ability to pay. People v. Olfus, 356 N.Y.S. 2d. 791 (1974); State v. Benoit, 313 A 2d. 387 (Vt. 1973).
- 12 See Tate v. Short, 401 U.S. 395 (1971).
- 13 State v. Benoit, Supra note 11.
- 14 The question of unliquidated damage is discussed in the text at page 11. For further discussion see Dobbs, Remedies, p. 544.

- 15 California is the most noticeable of the states, see People v. Lent, 541 P 2d. 545, 124 Cal. Rptr. 905 (1975), People v. Miller, 64 Cal. Rptr. 20 (1967). See also, People v. Good 282 N.W. 920 (1928).
- 16 64 Cal. Rptr. 20 (1967).
- 17 People v. Becker, 349 Mich. 476, 84 N.W. 2d. 833 (1957); State v. Scherr, 552 P 2d. 829 (1976).
- 18 See New Jersey Statute Annotated 2A: 168-1; California Penal Code Section 1203.1.
- 19 556 P 2d. 147 (1976).
- 20 Supra, note 15.
- 21 People v. Becker, 349 Mich. 476, 84 N.W. 2d. 833 (1957); People v. Mahle, 312 N.E. 2d. 367 (Ill. 1974).
- 22 People v. Gallagher, 223 N.W. 2d. (1974); People v. Tidwell, 338 N.E. 2d. 113 (Ill. 1975).
- 23 People v. Kay, Cal. Rptr. 894 (1973); People v. Flores, 17 Cal. Rptr. 382 (1961); People v. Peterson, 233 N.W. 2d. 250 (1975).
- 24 In the Interest of D.G.W., 361 A 2d. 513 (1976).
- 25 Supra, note 5.
- 26 Gagnon v. Scarpelli, supra note 5, In the Interest of D.G.W., note 23.
- 27
- 27 Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 325 (1967).
- 28 People v. Kay, 111 Cal. Rptr. 894 (1973), See also State v. Benoit, supra note 11.
- 29 People v. Tidwell, 338 N.E. 2nd 113 (1975).
- 30 Tate v. Short and Williams v. Illinois, supra note 27.

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