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# Criminal Justice & the Elderly

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Mr. Skip Duncan  
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1015 20th Street, N.W., Suite 211  
Washington, D.C.

Dear Skip:

Following our telephone conversation today, I am sending nine new reports produced by the CJE program for you to enter into the NCJRS data base. The reports are:

- reading  
HUD  
volume*
- (1) Anti-Crime Programs for the Elderly: A Summary Evaluation Report by Lawrence J. Center
  - (2) Anti-Crime Programs for the Elderly: Combining Community Crime Prevention and Victim Services by John H. Stein
  - (3) Anti-Crime Programs for the Elderly: A Guide to Planning by Lawrence J. Center
  - (4) Anti-Crime Programs for the Elderly: A Guide to Program Activities by Lawrence J. Center
  - (5) Impact Evaluation of the National Elderly Victimization Prevention and Assistance Program: A Final Report by George F. Bishop, William R. Klecka, Robert W. Oldendick and Alfred J. Tuchfarber
  - (6) Anti-Crime Techniques for Elderly Apartment Dwellers: Organizing Strategies and Legal Remedies by Lawrence J. Center
  - (7) Techniques of Victim Involvement in Restitution by Richard Hofrichter
  - (8) Victim Compensation and the Elderly: The Programs in Practice. A Follow-Up Report by Richard Hofrichter
  - (9) Trainer's Manual: Crime Prevention for Senior Citizens by Rita Nitzberg

The first five of these reports were produced under grants from HUD. The first four will be published as a four-volume series by HUD. (They'll be typeset first.) It is this series that I would like NCJRS to consider for announcement via your SNI, when that it appropriate.

The other reports presently have no prospects for publication, but I will continue to pursue that with LEAA. As you know, the office which funds our program has no monies for publication, so the matter would have to go to NILECJ for any approval.

X  
TECHNIQUES OF VICTIM INVOLVEMENT IN RESTITUTION

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NCJRS

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## INTRODUCTION

The rediscovery of crime victims in recent years has generated new policy initiatives and numerous service programs directed toward their needs and toward improving their position within the criminal justice system. Prior to this decade, however, victims of crime were isolated, without organizations or advocates to speak for them. Even with the advent of the Law Enforcement Assistance Administration, victim needs were initially ignored as criminal justice officials focused on the organizational efficiency of their agencies. This focus on the system, along with the view that crime is an offense against society, not against an individual victim, meant that the victim lacked much of a formal status in the criminal justice process. Any effort by victims to establish themselves as a distinct interest group was impeded by a societal view which tended to blame victims for their own undoing, instilling in victims a shared sense of guilt rather than a united search for justice. Thus, most victims lacked any sort of representation during their unpleasant role as the complainant in a criminal case.

Without dwelling at length on the influences which have brought a victims' movement into being over the past five years, we can identify the following developments: the efforts of the women's movement to change the criminal justice response to rape victims and victims of domestic violence; elderly service organizations; consumer and welfare rights groups; the initiators of conflict-resolution projects; the National District Attorneys Association; the

American Bar Association; the National Organization of Victim Assistance; the Law Enforcement Assistance Administration after 1974, and, perhaps the publicity given to rising crime rates over the past decade--all have contributed to a climate of receptivity to the needs of crime victims.

Coinciding with these victim-oriented forces were changes in the management of criminal justice agencies and a growing recognition of the strategic role of the victim in these agencies' work. The application of computers to the prosecution function, in particular, heightened the awareness of the victim's crucial role. For example, the Prosecutor's Management Information Service graphically illustrated the correlation between successful prosecutions and cooperative, effective witnesses.

Social science research on victims has also been expanding. National victimization surveys have been conducted by LEAA since 1973. While studies of the relation between victims and offenders itself is not new, the academic discipline of victimology now exists as a recognized field of study.

An important, parallel development at the state level has been the creation of state victim compensation programs. In 1966, California established the first publicly-financed program in the United States to compensate victims injured as the result of violent crimes who suffer unrecoverable monetary loss. As of late 1979, 27 states were operating such programs. Whatever their shortcomings, they have focused substantial attention on victims and helped a few--

too few, our research has shown--recover from some of the economic harm crime inflicts.<sup>1</sup>

#### RESTITUTION: THE ABSENCE OF A VICTIM FOCUS

During the same time that victim services came into being, one can track an extraordinary growth in formal criminal justice restitution programs, particularly since 1977, when LEAA designated restitution as a major funding priority.\* Given all of this activity, one might expect that the needs of crime victims is a primary motivating element of these formal restitution programs. However, ✓ an examination of the new restitution field clearly shows that this is not the case.<sup>2</sup>

The primary objectives of restitution stress the positive rehabilitative effects on the offender and the virtue of expanding the range of sentencing options available to the court. The intellectual and practical origins of restitution are, in short, found in the ✓ innovative wing of American corrections, not in the victims' movement. Perhaps in consequence, the majority of restitution programs rarely concern themselves very much with making victims whole or attending to their needs, desires, or rights. Nor do they often consider ways in which such attention and encouragement of victim involvement

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\* What distinguishes formalized or institutionalized restitution from informal uses concerns the systematic application of definite procedures for screening cases appropriate for restitution, determining amounts, organizing a restitution plan, and monitoring compliance by a separate administrative staff. Such a staff usually coordinates the restitution process and recommends options to the court. Informal efforts on the other hand, are those in which a judge orders restitution, more or less spontaneously, with little subsequent attention to its compliance.

enhance the success of restitution for offenders.

Indeed, some analysts assume incompatibility between victim and offender needs. Whether by design or inadvertance, in many restitution programs victims lack a choice or even a voice in matters of concern to them. When they manage to receive benefits, it is almost a lucky byproduct of the process. Their involvement is usually sought only to meet the program's need for information or cooperation. Beyond that, it is only the assertive victim who usually does more than submit bills to the restitution program.

But is the exclusion of the victim as a central participant inevitable because victim objectives are incompatible with existing restitution objectives? What kinds of design features and practices might we find in existing restitution programs that could be designated as victim-oriented? What obstacles impede merging victim-and offender-related goals in a single restitution program?

These were among the questions that prompted Criminal Justice and the Elderly to take a critical look at the restitution movement.

#### THE CRIMINAL JUSTICE AND THE ELDERLY PROGRAM RESTITUTION STUDY

The Criminal Justice and the Elderly (CJE) Program of the National Council of Senior Citizens conducts policy-oriented research on a variety of subjects related to improving the plight of victims and the services they receive. The subject of restitution seems particularly



relevant, given LEAA's substantial funding effort expanding the number of formal programs, and the absence of significant restitution research exploring the needs of victims, other than limited surveys of their satisfaction with a restitution program.

The purpose of the CJE restitution study is to identify, from a victim-oriented perspective, features in the design and practice of restitution programs which impede or facilitate meeting victim needs. From these findings, we will make recommendations which we believe would better serve the victim. Most of our recommendations will, by choice, propose changes that do no violence to the philosophy of existing restitution models. We will, however, highlight issues that reflect competing (but not necessarily conflicting) interests between victims and other parties in the criminal justice process. Our hope, in preparing such a report, is to encourage public officials to give victims more attention and opportunities for participation than they now receive.

The methodology for this policy study includes site visits to ten restitution programs and lengthy telephone interviews in eight others. An assumption in our site selection was that all programs visited should engage in restitution as a primary function and employ a staff which administers the program. In order to visit a sufficiently varied group of such programs, our list of sites includes projects that differ from one another in the following ways: some handle only misdemeanor-level cases, others include more serious offenses; some are attached to juvenile courts, others to adult criminal courts; organizational sponsors include at

least one probation department, a victim services agency, a mediation project, and a court system; and some projects initiate restitution very early, others very late, in the criminal justice process. In each program, we have generally sought to interview the project director and staff, assistant district attorneys, judges, court planners and probation officials, among others.

Our basic assumption from the outset has been that nothing in the philosophy, legal doctrine, or practice associated with restitution inherently limits its capacity to be fully responsive to crime victims. For analytic purposes, we have prepared the following standards for assessing whether programs meet victim-related objectives:

- 1) Victim benefits should be available for as broad a range of offenses, offenders, and victims as possible. Every case should be reviewed for its restitution potential; the system should operate equitably for the offender and the victim alike; restitution in all forms should be made as quickly as possible; and restitution orders should be carefully monitored to assure that victims are receiving their full entitlements.
- 2) Victim assistance should be provided both with respect to the mechanics of restitution and in connection with other needs resulting from the victimization.
- 3) Victim involvement should be high, keeping

victims informed about every aspect of the restitution process and case disposition, soliciting and giving regard to victim preferences and ideas, and involving victims in negotiations for restitution where feasible.

Some preliminary findings on the desirability and feasibility of applying the last of these standards to restitution programs are the subject of the discussion to follow. We use the phrase "victim involvement" as the rubric of this part of our overall analysis. To put the present discussion in context, the study also includes two other broad topics--victim benefits and victim assistance--which are not considered here.

## II.

### VICTIM INVOLVEMENT

The traditional role of the victim in the adjudication process has been to appear at the behest of justice system officials, usually as a witness, with little other involvement needed or encouraged. A central tenet of victim-oriented restitution challenges this tradition and supports instead the active involvement of victims in the restitution process. That victim involvement in restitution can be important to a victim's satisfaction with the results seems clear. Steven Chesney, in a study of the use of restitution in Minnesota concludes:

Victims who have been involved with the determination of whether restitution should be ordered or in the determination of its amount and form were more likely to be satisfied with the restitution as ordered by the court. The victims who were least satisfied with the restitution as ordered, regardless of whether it had been completed, were those who were not notified whether restitution was ordered, and those who felt that the police, court, or probation officers had not adequately communicated with them . . . Victim involvement was also positively associated with the successful completion of restitution.<sup>1</sup>

For our purposes, the concept of involvement consists of two basic elements. First, it refers to the assumption of responsibility by a restitution program for informing and educating victims, on a timely basis, about all those aspects of the restitution and criminal justice process which enable them to make rational choices regarding how and whether to proceed. Second, it refers to active victim participation, directly or through advocates, in the restitution process. Participation means providing

the opportunity for victims to express feelings and preferences, ranging from the ventilation of emotions to influencing the decisions of the court or program staff.

Regarding this second point, one finds that a victim can participate in several ways. One way is to communicate in person or in writing with criminal justice officials. A second way to participate is through face-to-face negotiations with offenders, outside of the formal court process, providing the victim a direct and equal role in designing a restitution plan. This second option could be interpreted as simply a more refined version of the first--as a more elaborate and direct means for the victim to express feelings and preferences. Negotiation differs from the first, however, in that it represents an alternative to having a judge or other public official determine the specific character or method of framing a restitution order.

#### INFORMING VICTIMS ABOUT RESTITUTION AND RELATED CRIMINAL JUSTICE PROCESSES

For most victims, involvement with the criminal justice process is a unique experience for which they are almost entirely unprepared. Victims usually enter this complicated arena with a sense of foreboding and a very limited understanding of what is about to occur. This apprehension and lack of understanding apply equally to the restitution process, according to some recent evidence.<sup>2</sup>

The central purpose of informing victims about restitution is to prepare and empower them to express their interests and concerns, make satisfactory decisions in

cooperating with the restitution planners, and generally cope with the complexity of the criminal justice process. Providing information may serve a psychological function, demonstrating concern for the well-being of the victim and lessening the fear that inhibits cooperation. Equally important, though, is the role which adequate information plays in guarding against misguided expectations. discouraging premature complaints and anxieties about whether restitution will be paid. Bryson, for example, quoting the director of a restitution program, described the possible frustrations resulting from inadequate explanations of restitution procedures:

. . . Some victims reacted negatively when the juvenile was not directed to make monetary restitution. By virtue of the fact that they were interviewed regarding their losses or damages, they assumed that they would be reimbursed. When monetary restitution was not considered or ordered, they became aggravated. Therefore, careful attention had to be given to a clear understanding on the part of the victim regarding what could be expected from the juvenile and the court.

The Victim Advocacy Program in San Bernadino, California, for example, explains to victims, at the first opportunity, that offenders may not be required to repay their debts and that judges may not order restitution because of other considerations that enter into a disposition decision. The victim advocate in the Earn-It restitution program in Qunicy, Massachusetts explains the limits of the restitution option and those forces most likely to influence whether juvenile offenders will be asked to

to make financial restitution, particularly the difficulties of finding them employment.

The Content of Explanation. At the outset, victims may need regular contacts about the status of their case--where does it stand? They also must know the timing of crucial decisions which affect the availability, appropriateness, and probability of restitution at different decision stages, e.g., is the case strong or weak? How might the judge react? What options are available?

With respect to explaining the nature of the restitution process itself, programs we examined such as Restitution Alternative, in Portland, Maine, the Community Arbitration Program in Annapolis, Maryland, and The New Bedford Juvenile Restitution Program in Massachusetts emphasized two points. First victims must be told of the rehabilitative objectives of the program, since some victims may mistakenly assume that the sole objective of restitution is reimbursement of their loss. Second, attention to details is essential. Merely outlining the steps in the restitution process appears to be inadequate as a means for satisfying victim needs for information. The Community Arbitration Program, for example, describes not only the procedures in their victim materials but possible outcomes, explaining why each may occur and how the parties might respond.

The receipt of full restitution for victims in most cases is usually an uncertainty, and therefore many programs find it useful, at the start, to inform victims

about the alternative remedies. In the absence of a state victim compensation program, which may be extremely limited in the categories of loss covered, the primary alternative is usually a civil suit. Some of the programs we examined, recognizing the complexity and pitfalls of civil suits, explain the limited chances for success, as well as how to proceed. Victim Advocates in South Dakota's juvenile restitution program warn victims about the costly and time consuming nature of civil actions; the Dorchester Urban Court Program stresses the trauma and aggravation associated with them.

The Restitution Alternative provides each victim with a 28 page booklet, prepared by the Maine Public Interest Research Group, entitled How to Use Small Claims Court. The booklet reviews every aspect of the small claims process and includes sample forms, preparation guidelines, and names and telephone numbers of each court in the state. The booklet is presented to the victim during the first personal visit by a project staff member after a screening decision. If a case-intake worker--the first person to review a case prior to the district attorney--decides not to petition the case, the victim must be notified with a form letter entitled "notice of non-filing." The victim may then call the district attorney to appeal this decision, but very few do.

Both the restitution program of Victim Services Agency in New York and the Victim Advocacy Program in San Bernadino also advise complainants about the details of alternative



remedies and, in addition, provide comprehensive assistance in applying for state victim compensation funds.

The Community Arbitration Program informs victims at the negotiating session, verbally and with written materials, of their right to appeal to the state's attorney. This technique is primarily initiated to motivate offenders to reach an agreement, and it is not clear whether victims understand, at the time, that the chances for a successful appeal are extremely limited.

Procedures for Informing Victims. In devising a strategy for informing victims, many of those interviewed suggested the importance of taking the initiative with victims, without waiting for them to request information or assuming that they only wish to know when they will be paid. This is done to avoid misunderstanding and problems that may arise later in the process.

The restitution program of the Victim Services Agency in New York first advises victims of restitution and all other related services in the complaint room of the court, prior to arraignment. The procedures at this early stage of the adjudication process cannot be very elaborate since, at this point, restitution arrangements occur quickly. Subsequent to having the program explained, the complainant is asked: "Do you want restitution and how much?" The intake staff explains that the offer is a suggestion with a ceiling on the amount.

There is some evidence that the extent to which victims cooperate further with the restitution program after an initial contact may partly depend on whether they sense that the interest expressed in informing them is done for their benefit or simply to assist the courts in making better dispositions. The Community Arbitration Program attempts to ensure that victims are aware that the program is genuinely acting in their behalf with a kind of lay counseling approach. Staff indicate to victims that they recognize their feelings of hostility and confusion--and acknowledge the legitimacy of these feelings. A recent program pamphlet demonstrates the program's approach:

. . . You may be losing a day's pay and have a long wait for your turn to come. While in the hearing you may feel left out and unimportant because everything is, by law, centered on the youth who is charged with the offense. . . . Some of you may have a rather long wait for your name to be called . . . [I]n spite of inconveniences, you came to the hearing when you didn't have to, because, as you said, you felt a responsibility to be there. This is commendable.

According to some program officials, such as the staff of the Victim Services Agency program in New York, responsibility for informing the victim is apparently better accomplished when one person on the restitution staff handles all information functions and tracking of cases, preferably someone whose primary responsibility is meeting victim needs. Other public officials rarely have the time or inclination to educate victims. Prosecutors are mainly interested in ensuring the appearance of witnesses.

Probation officers, with responsibilities to offenders and victims, usually prefer to give more attention to offenders than to victims; they define their role as supervisors rather than social service brokers or information specialists. The Restitution Alternative and Earn-It both employ victim advocates whose primary task is to assist victims, and one of their most important services is providing information.

#### VICTIM PARTICIPATION IN RESTITUTION

The Purpose and Value of Participation. From a victim perspective, we may distinguish two general purposes for participating in the restitution process. The first is "ventilation" in a broad sense. It allows a victim to express feelings about the meaning of the criminal incident, the quality of treatment received, perceptions of the offender, and satisfaction or dissatisfaction with the disposition of the case. Such ventilation may contribute to the larger goals of restitution by enhancing victim satisfaction, on the one hand, and by encouraging the victims to become an active ally of the justice system in meeting its responsibilities for preparing and enforcing a fair restitution order.

The second related purpose is to have some degree of influence or impact on various aspects of the restitution proceedings. The choices over which victims may wish to have an influence include: the decision to order restitution, perhaps in lieu of other sanctions; the determination of the type of restitution (monetary or service); the amount or other aspects of the restitution plan; and the decision

to dismiss the case upon fulfillment of the order. Such influence also increases satisfaction by giving victims a sense of control over their lives. More specifically, victims may choose from among a variety of restitution options tailored directly to meet their individual needs.

Many decision makers are unpersuaded by the claims for involvement. A number of judges we interviewed believed in limiting victim ventilation. For example, judges in Cincinnati and San Bernadino suggested that the only proper role for the victim is as a witness. Two judges, in Massachusetts and Maine, stated they would only accept the expression of the victim's allegations and opinions through pre-sentence reports. Few judges, with the exception of one in Quincy and in Tulsa, would encourage the victim to express feelings in court. A judge in Ohio commented, "I don't want to see victims crying in court." This view was common among those who contend that victim experiences should not enter into case dispositions, as such expression might prejudice a judge whose main function is to serve as an impartial fact finder. A judge in New York, emphasizing offender rehabilitation goals, expressed fear that victims would use the opportunity as a means to extort money from the offender. Generally, the main type of information these judges readily accept from victims are accounts of losses presented in damage reports prepared by the police, district attorney, or probation officer.

On the other hand, staff members in many of the restitution programs such as the D.C. Juvenile Restitution Project, the Restitution Alternative, and Earn-It, believe that victim ventilation is essential. Its purpose is not, as some fear, to transform the criminal justice process into a method of wreaking personal vengeance. Nor, so far as we can tell, does the opportunity to ventilate have that practical effect. Instead, victim expression of opinions or emotions serves primarily to improve the quality of information on which restitution decisions are made. Equally important, it serves a number of important purposes related to victim well-being, such as (1) demonstrating that someone is concerned with their experience, and (2) providing the opportunity to release feelings and anxieties that may cause emotional disturbance at a later time. The victim advocate in the Earn-It program, for example, reports that victims are surprised and delighted by the attention and the opportunity to speak their mind.

With respect to victim influence, most of those with whom we spoke agreed that victims ought to have some impact on the details of the restitution plan, e.g. determining the amount, and the type of service and payment schedule. On the other hand, there is debate even among victim advocates about whether victims ought to influence or have veto power over the offender's being given the option of being placed on probation under a restitution order. In some programs restitution is used as an

alternative to a more severe sentence. Thus, a victim veto, when exercised, would defeat the "deinstitutionalization" objective of the program.

In a survey of nineteen restitution programs in the United States and Canada, Hudson, Galaway and Chesney found only four that allowed victims to veto the admission of offenders into the programs.<sup>4</sup> Few staff members we interviewed believed a victim veto was a meritorious option, particularly if the veto would result in a more severe sentence, not the less-primitive sanction of, say, probation without a restitution order.

In the Pima County pretrial diversion program, victims may veto offender participation in the entire program, except under circumstances where staff determine that the victim's motive was revenge or in some other way was unreasonable. Similarly, the Minnesota Restitution Unit in St. Paul, a parole-based program, allows victims to veto offender participation, in cases where the victim provides a legitimate reason. Rejection by the victim usually means that an offender will not receive parole earlier than the legally prescribed date.

Methods of Participation. The means by which victims communicate their concerns and interests to appropriate public officials may affect both whether they receive attention at all, and the extent to which their views are considered in formal decisions. We have identified six ways in which victims may express preferences and feelings. They differ according to directness, timing, and potential influence.

First, victims may express their views on their own initiative and without a program procedure encouraging it, to a justice system official (other than a judge). An unsolicited telephone call by a victim to a prosecutor or probation officer is an example. Generally, this technique fails to produce effective results because these officials rarely have the time or desire to listen and there is no established procedure available to present victim preferences; the "inappropriateness" of such contacts is all the more likely because the victim is not current on the case status, and so the call is "untimely".

Further, a prosecutor's primary concern is to secure just convictions, independent of victim interests. In many of the programs we examined, prosecutors did not perceive their role as in any way that of an attorney for the victim, or even as a conduit for victim views. In San Bernadino, for example, the District Attorney's office remains unreceptive to involving the victim at the plea-bargaining stage, where restitution may be an option. They rarely speak to victims directly. One exception to this perspective is Project Repay in Oregon, a prosecutor-run restitution program which presents exactly the opposite view, encouraging victim contact.

A second approach, the most common, involves transmitting the victim's views through the pre-sentence investigation report, prepared by the probation department, for review by a judge at the time of sentencing. In the Connecticut Restitution Service, probation department staff interview victims, record their statements, and ask them what they

believe would be a proper disposition. The information is submitted to the judge as an aid in making a final decision.

A third approach involves a proactive solicitation of the victim's views by a third party, such as a victim advocate, who communicates them directly to a judge or the prosecutor, or even to the offender. In Project Repay, assistant prosecutors identify themselves as victim advocates and communicate victim opinions verbally to judges. For example, the assistant district attorney may specifically state to a judge: "The victim wishes me to make the following remarks . . ." At issue, is whether such a second-hand method of reporting accurately and forcefully communicates the victim's views.

In the Victim's Program in Tulsa, the victim advocate solicits information from the victim and sometimes communicates it to the juvenile court judge, in chambers, upon the judge's request.

A fourth possibility permits victims to express their views directly in the courtroom at a sanctioning hearing. Usually, this type of procedure occurs subsequent to entering a plea or conviction, and may include the presentation of supporting documents, as well as the expression of feelings. The victim advocate in the Earn-It program, in juvenile cases, encourages victims to come to court at the disposition stage to talk about the meaning of the loss and their views on disposition. The advocate prepares the victim for the hearing, and the judge explains the sentencing options under the applicable law available to the court, as well as the limitations on what the victim may appropriately



say. Project Repay also encourages certain victims to attend the sentencing or disposition hearing. According to their 1978 report, "Often victims are called to testify upon the exact nature of their losses and verify the dollar amounts of restitution recommended by the project." With a judge's permission, victims may vent their feelings and explain the effect of the crime. (This kind of testimony is called "allocation" and is offered as a privilege at the judge's discretion, not as a victim's right.)

A fifth method, typified by the Dorchester Urban Court Program, involves victim involvement in the formulation of a sentence recommended to the court by trained community representatives who sit on sentencing panels. In these hearings, victims confront defendants with the hardship they experienced and document their losses. The central purpose is to devise a creative, optimum sentencing recommendation (almost always premised on the idea of supervised or unsupervised probation). The sentencing panel, which usually includes the victim or a victim representative, prepares for the judge a package of services and requirements for the offender; in the great majority of cases, the recommended package is adopted by the court.

The sixth and most rapidly growing technique has similarities to others in that it transmits the victim's losses and concerns in writing to the sentencing judge. However, the preparation of so-called "victim impact statements" differs from the same process when done by someone preparing a pre-sentencing report in two ways: the victim impact statement is not usually prepared by a

probation officer who is also reporting on the offender's social background and needs; and the statement methodically reports not only on the financial repercussions of the crime, but on its medical, psychological and social consequences for the victim.

California , for example, has statutorily mandated that a statement on the victim be included in the pre-sentence investigation report to the court prepared by probation. It must include comments of the victim concerning the offense, as well as whether the court should require restitution as a condition of probation.<sup>5</sup> However, the California Probation, Parole, and Correctional Association prepared standards and recommendations to probation departments on the format of what have come to be called "victim impact statements." These standards specify that probation officers must evaluate the financial, medical and psychological impact of the crime on the victim and solicit the victim's opinions.<sup>6</sup>

The Victim Program in Tulsa prepares a victim restitution report which, while primarily describing financial loss, also covers the impact of the crime on the victim and any statement the victim may have expressed. The Earn-It programs plans to test a procedure whereby a separate written report on the victim will be presented to the judge by the victim advocate.

These six approaches to victim participation operate within the differing administrative models of restitution and usually reflect the importance a program places on the principle of victim participation. Perhaps what most

distinguishes the alternative approaches to participation from one another is the program's degree of commitment to having staff listen to victims face-to-face, and the sense of legitimacy which the programs attach to the victim's point of view.

The question of the system's motivations and intentions in dealing with crime victims is an important one. A prosecutor, for example, who makes a fine display of writing down a victim's concerns may seek merely to make the victim a cooperative witness; after the interview, the notes may be thrown away or forgotten. Similarly, the probation officer often seeks to advance the offender's best interest, and a responsibility to record a victim statement may be seen as little more than a bureaucratic chore. Under these circumstances, victim views cannot always receive more than ritualistic attention from regular criminal justice staff when they alone are the victim's contact point.

And even when the victims have their own intermediary, there may be problems. For example, from the victim's point of view, communication through designated victim advocates carries the risk that it will be improperly translated, incompletely expressed, or presented with a change in intended emphasis. Even the most direct form of expression--a victim statement made to the sentencing judge in open court--is limited, not merely in scope, but in the likelihood that it will have a specific influence on the offender's sanction.

In short, even victim-oriented restitution projects are having difficulty finding methods that put into practice an amorphous but important ideal--of giving victims their day in court, of making them feel a part of a process which might thereby vindicate them. One of the more promising approaches to giving victims a sense of rewarding involvement is one that is less concerned with their communications with criminal justice officials and more focused on victim interactions with defendants.

#### NEGOTIATING WITH OFFENDERS

The term negotiation, as used in this paper, refers to a non-judicial but judicially approved system of designing a restitution plan which involves personal interaction between victim and offender, either face-to-face or through advocates, surrogates, or intermediaries. The most common form of negotiation is mediation, whereby a trained third party listens to and guides the interaction, helping the participants strike their own agreement. Negotiation may occur at almost any stage of the criminal justice process, although within restitution programs it occurs most often after a judge has passed sentence, one that includes an order for restitution. Use is normally restricted to non-violent property offenses.

Negotiation may represent the most comprehensive method of victims to communicate their concerns and to exercise influence over the details of a restitution plan. Indeed, this is its basic raison d'etre. But in addition to working as another form of communicating victim interests, it is also an alternative administrative mechanism for

developing a restitution plan. In this, the method of negotiation stands in great contrast to a sentencing hearing, whereby a judge orders restitution and sets the amount, or a voluntary bargain between the offender and the prosecutor in which an offender agreement to pay restitution is rewarded with a lesser sentence or diversion from further court processing. Presently, only a small proportion of restitution programs use negotiating extensively, although there are dozens of mediation programs in which restitution is a central dispositional element.

The Rationale and Implications of Victim Offender Contact. The objectives of negotiation in those few programs we explored range from narrow, fact-finding concerns, such as determining the financial loss and devising a payment schedule, to multi-purpose and complex goals, such as achieving effective dispositions for the offender, enhancing victim satisfaction, locating the source of conflict, and creating understanding between the parties about the meaning and consequences of restitution that are less likely to occur in the formal courtroom setting.

An example of a program which uses negotiation primarily as a fact-finding tool is the parole-based Colorado Crime Victims Restitution Program. Emotional outpourings and discussions about the details of the incident are discouraged. The concept of mediation as a kind of therapy session is specifically rejected.

In contrast, the Restitution Alternative program, while convening a negotiation session only when disagreements arise, is sensitive to possible disagreements outside the issue of the amount owed or the timing of repayments. Once a restitution order is made by a judge, advocates for each party seek to work out the details for implementing the order (e.g. monetary or service, payment schedules), based on police reports and other documents. However, if the victim advocate believes the victim is dissatisfied, even when a victim accepts the decision, or if the offender advocate presses the view that the proposed schedule is somehow unfair or impractical, a mediation session is held.

The staff on the Adult Mediation Restitution Program in Cambridge, Massachusetts, believe that victim-offender contacts can help the victim cope with the reality of the victimization. Mediation, they believe, creates empathy in the victim for the offender and acts to allay anger and fear. The program provides opportunities for victims to report their experience in detail to attentive, sympathetic listeners and to express their anger. Through the negotiation process, victims can regain that sense of control over their lives which was lost because of the crime. This, the staff believes, helps victims feel that justice was accomplished.

The Juvenile Bureau of the District Court of Oklahoma County, in its guidelines, explains the purpose of what they refer to as a "face-to-face meeting" as follows:

The expectation of this endeavor is to make a significant impact on the youth that his delinquent act affected a real person and not just an empty house, as in the instance of a residence burglary or vandalism. On the other hand, it is hoped that the victim will also gain some insight into the fact that the perpetrator of the crime against him was not in fact a hardened criminal, but perhaps a youth possessing some demonstratable qualities of redemption and potential. Above all, by taking away from the juvenile offender something of value to him, i.e., money or time, he begins to understand that crime has some very real consequences.

The Earn-It restitution program in Quincy, Massachusetts believes that victim-offender contact, at least at the juvenile level, is generally a good idea, apart from whether a formal mediation session is needed to resolve the amount of loss. They encourage victim and offender meetings precisely to alleviate fear and to eliminate stereotypes about each other. The victim learns, for example, that the insecure 14-year-old is not a monster and the offender recognizes the harm and inconvenience caused.

The New Bedford Juvenile Restitution Program uses what it refers to as a case conference--a procedure slightly less formal than mediation--as a ritual of enabling victims and offenders to raise questions about the incident, express opinions to each other, and learn about each other, rather than to resolve issues about the amount and payment schedule, which are usually agreed upon in advance.

Informal negotiating sessions in the Tri-County Juvenile Restitution Program in St. Cloud, Minnesota, are

used, among other reasons, to demonstrate to the victim and the offender how the amount and payment schedule were arrived at--which serves to reduce the sense that the process is arbitrary or dependent on rigid formulas.

These descriptions of various approaches to victim participation in negotiated restitution plans suggest that the dynamics of the negotiation process itself are as important as the content of the final agreement. The advantages of negotiation, from a victim perspective, can be characterized in a variety of ways.

First, negotiation may ultimately influence whether payment is made by the offender. The Dorchester Urban Court Program in Boston reports that offenders more willingly accept their obligation when they are allowed to exercise some degree of control over the plan. In fact, extending each party's degree of control over the plan enhances the sense of fairness for both parties. A memo from the Washington, D.C. Juvenile Restitution Project, comments on the importance of each party participating in and influencing the final agreement.

[Mediation is a] consensus building process [which] allows several parties, including the victim and the offender, to participate, increasing their sense of being fairly treated and of 'owning' the contract. . . . Mediation's flexibility permits the facts of each case to emerge and to influence the form of the contract. Sanctions should be more equitable and practical than if they were imposed according to a rigid scheme.



Second, negotiation enables the offender to understand the significance of the damage more directly than if a restitution order were merely imposed by a judge. That is, face-to-face interaction may help to undo a central weakness of restitution--its tendency to quantify, in impersonal dollar terms, a criminal act which is inherently social and personal in character. By examining the circumstances and consequences connected with the incident, the offender may more readily accept personal responsibility, recognize the harm done, and thereby be made to feel accountable.

Third, the victim may come to appreciate some of the background and circumstances which led the offender to commit the offense. Such first-hand knowledge produces psychic benefits by humanizing the situation and alleviating anxieties. The Dorchester Urban Court Program reports that victims often gain a sense of strength in these sessions in which they express their views directly to offenders and hear the offender's point of view.

Fourth, victims have the opportunity to discuss their emotional response to the crime, detailing what the loss meant to them, particularly the disruption and trauma. Restitution program staff report that this opportunity to ventilate feelings directly to the offender can be just as important to the victim as are the restitution payments themselves. Thus, the potential benefits afforded by direct victim-offender interaction suggest that methods of promoting the negotiation concept are worth exploring from the victim's perspective.

However, before considering the obstacles to a negotiation component in restitution programs, based on our interviews, we should indicate a potential danger arguing against its use in certain cases that has not been well-researched. The basic case for negotiation generally proceeds from a rehabilitative perspective in which the primary aim is to impress on the offender the personal consequences of the crime. Although there are, as we have noted, important benefits for the victim, for some victims the victimization experience may produce emotional trauma that would be heightened by the negotiation process. For example, crisis intervention specialists suggest that, with some victims, any mechanism that may serve to have the victim see the offender in a sympathetic light can prove counter-therapeutic.

Our suggestion is that the possibility of causing victims future grief should be taken seriously so that policies which promote negotiation are implemented selectively, on a case-by-case basis. Though the evidence of our own research indicates that victim interests may be best served by negotiation techniques in most cases, those cases which are appropriate and inappropriate have not been precisely determined.

Returning to the advantages of the negotiation approach, we still find that is not included in most restitution programs. There seem to be several features that may be unappealing to some restitution projects

and these have certainly retarded the adoption of negotiation as a program tool. Negotiation may also be unappealing to many victims, at least initially, even among those who ultimately come to praise the negotiation process.

To appreciate the victim's potential threshold dislike for negotiations, one must recognize that most victims have had little prior contact with the justice system and a limited understanding of its procedures. Many find bothersome any activity requiring their appearance in the unfamiliar setting of a court. Thus, involving victims in direct negotiations with offenders often requires extensive coaxing and preparation for the procedure itself. Victims also express hesitation about meeting offenders. They fear retaliation and may not wish further reminders about the incident. All of these anxieties crop up even among victims who wind up finding the negotiation process personally rewarding.

Moreover, the process is often time-consuming for the programs as well, and demands extensive staff planning. As one restitution counselor in Massachusetts commented:

I don't like mediating. I want direct, fast action. There are too many people involved. Even after the mediation, the judge may want a better agreement. In our program we have to return to court after the agreement to have it approved. This can go on for months. Let's get it paid and get it out.

Some program staff members we interviewed believed that the coordination problems associated with negotiation sometimes diminished its usefulness. Staff in the New Bedford and other projects specifically mentioned difficulties in locating victims, and having to begin the proceedings weeks after the event. Without an early start, in their view, offenders (especially juveniles) would forget the details of the incident. (Interestingly, a cardinal feature of the mediation project in Annapolis, Maryland, is that the mediation be held within a week of the juvenile's arrest.)

On the main issue, we reiterate our overall findings which suggest that where face-to-face negotiations occur they generally work well and result in dispositions satisfactory to both parties. Whether they result in better outcomes than other methods and whether they are worth the burden to victims and programs is a question demanding more extensive research.

The Negotiation Process: Preparations. According to many staff members we interviewed in restitution and mediation programs, effective negotiations depend on considerable preparation before and follow-up after the negotiation sessions. First, victims often need support services, including transportation to the session, intervention with employers, and handling of other inconveniences that normally arise with prosecution witnesses generally.

Second, detailed explanations to both parties regarding the purpose, procedures, roles, and rights of participants is

considered crucial. Included in a list of items which each party must understand are: (1) the importance of their active contribution to the discussion; (2) an agreement to put irrelevant issues aside; (3) the obligations of each party subsequent to the agreement; (4) procedures for handling complaints about the implementation of the agreement; and (5) the consequences of a failure to comply with the agreement. The D.C. Juvenile Restitution Project, for one, has carefully built explanations similar to these and other issues into their preparation procedures.

Third, many victims must be encouraged to participate --that is, persuaded that participation is not overous and enhances the likelihood that full restitution will be paid. Victims usually must also understand and accept the idea that the program wants the offender to have an equal role in the negotiation process as a means of obtaining a successful restitution agreement.

The New Bedford Juvenile Restitution Program, for example, explains to victims through a victim coordinator that their cooperation is needed, that someone will support their view during the session, and what the chances are that they will receive restitution as a result.

In the Pima County Adult Diversion Program in Arizona, the procedure for encouraging victims to participate in mediation stresses the importance of the victim's role. Staff prefer victims to request the mediation rather than having them feel they are being dragged into it or accepting it because program officials support the idea.

An important question is whether victims are being manipulated to participate in negotiations when it may not be to their ultimate advantage. Restitution programs vary widely in the proportion of cases in which victims agree to negotiate or which require mediation. In the Pima County Pre-trial Diversion Program, 90% of victims refuse to cooperate, while in New Bedford, nearly 50% refuse. In the latter programs, one suspects that the staff have developed their power of persuasion to a high art.

To what extent should victims be encouraged, notably after they first reject the idea? At what point should a program relent in its attempt to convince a reluctant victim? Earn-It, in its descriptive program materials reports:

Although we encourage this type of interaction [face-to-face negotiation] we in no way pressure a victim into this confrontation. The decision is left entirely up to the victim and [the] decision is final.

Certainly one might expect, at the very least, that programs take care, prior to attempting to sell "negotiation, to evaluate any conditions and offender characteristics that would suggest a serious imposition on the victim. In the Adult Mediation Restitution Program, the decision that a particular case is amenable to mediation depends on a variety of judgments. These judgments include whether the offender possesses any emotionally or physically threatening qualities; the offender's reaction to the program; and the level of anxiety, frustration or desire for vengeance

expressed by the victim. According to the staff, no serious problems have resulted from offender victim interaction. They further comment that attendance at negotiations may be less burdensome than repeated trips to court due to case continuances.

Restitution programs might consider surveying victims in some detail, just on the issue of negotiation, before and after the session, to understand their expectations, how they interpreted the experience, and whether they would accept an offer to negotiate again or recommend it to a friend. The Tri-County Juvenile Restitution Program in St. Cloud, Minnesota, is experimenting with just such a pre-and-post-mediation survey. In our judgment, those kinds of assessments are essential if we are intelligently to differentiate the kinds of cases wherein the negotiation approach is of positive value to victims from those which actually compound the victim's distress.

The Negotiation Process: The Role of the Mediator.

The mediator's role in negotiations can influence whether agreement is reached and whether it is successfully carried out. One basic issue concerns the extent to which mediators should intervene and act affirmatively, in contrast with taking a more passive, unobstrusive stance during the sessions.

Mediators in some programs, for example, actively direct the discussion, organize the issues and preliminarily approve the agreement. In others, they merely moderate the session, letting the parties work out the details of the agreement on their own.

In the latter programs, mediators tend to provide clarification only if requested; they do not advise the parties as much as assist with interpretations. The logic guiding this approach is that an imposed agreement will not succeed because it does not provide the parties with a sense of control. As one program staff member commented, "We don't ask for what people don't request." The Colorado Crime Victims Restitution Program, to take another example, encourages the participants to speak directly to each other, developing eye contact, as a means of enhancing participant control. Earn-It and the Tri-County Juvenile Restitution Program also generally leave victims and offenders to reach their own agreement, providing guidance only to direct the flow of discussion. They see this method as a way of ensuring that both parties interpret the final decision as fair and equitable. In Earn-It, if a stalemate occurs, the program establishes the amount, based on available documentation.

A possible problem arising from this passive style of mediating is ambiguity. Agreements sometimes collapse when arrangements lack precision and clarity. In the Adult Mediation program in Cambridge, mediators carefully attend to the wording of contracts. They stress active assistance to the parties in order to arrive at clear, realistic judgments. Their experience indicates that simply moderating any agreement the parties reach could result in failure because offenders may sign anything in order



to obtain a probationary sentence, while victims tend to inflate losses. Thus, mediators in the Cambridge program do not allow victims and offenders to acquiesce unless the agreement is seen by the staff as fair and capable of being successfully carried out. The parties are also informed that a judge must approve any agreement.

In the Juvenile Restitution Program in Washington, D.C., mediators also seek realistic agreements by active participation in the negotiations, asking questions and playing devil's advocate. If offenders propose a payment plan, mediators ask them about their other financial obligations and their employment skills. However, the mediators remain neutral and do not advocate specific outcomes.

Another closely associated issue concerns whether mediation ought to be (1) conducted by a formally trained mediator whose function is to serve in a thoroughly impartial manner, entering without knowledge of the facts of the case (e.g. the Adult Mediation Restitution Program, and D.C. Juvenile Restitution Program); or (2) conducted by a staff member, or the offender's case worker, in a more informal atmosphere (e.g. Earn-It, Tri-County Juvenile Restitution, Restitution Alternative). From the point of view of the victim, and possibly the offender, the former would appear to offer a greater sense of fairness. On the other hand, offenders may place more trust in the judgments of their caseworker than in an outsider. We have no evidence to support one view over the other.

In some mediation-style programs, many victims either cannot or do not wish to meet with the offender. In some of these cases, the Adult Mediation program in Cambridge provides surrogate victims--usually the mediator who is specially trained to handle those situations--who represents the victim, or surrogate offenders--a representative for the offender if the victim finds the idea of confrontation too traumatic. The value of confrontation may be lost using this method, both because no one can argue their cases as strongly as the actual parties and because in the use of surrogate offenders, the opportunity to increase feelings of accountability to the victim would be lost.

The Restitution Alternative in Maine permits advocates for each party to negotiate if victims are unable or unwilling to attend. In surrogate sessions, victims are kept informed of developments by telephone, and thus have an active influence over the course of events.

These experiences indicate that even if the victim chooses not to mediate, a mediation session of sorts can still be conducted whereby victims feelings and preferences are expressed by an advocate.

#### CONCLUSION

Crime victims are twice victimized, first by the criminal and then by the criminal justice system. The trauma of victimization stems largely from the victims' sense that they have been stripped of independence and autonomy--that they have been rendered powerless. Surely, there is little that law enforcement, prosecution, and the courts do that helps the victims

regain their sense of mastery over their own lives--indeed, the effect of these bureaucracies is often just the opposite.

Our study of restitution, however, has only reinforced our belief that it is good for the victim, good for the system and good for justice if victims are restored to a participatory role in the adjudication of criminal offenses.

More specifically, our preliminary findings indicate that where victims are involved as central participants in the restitution process, the likelihood that they will receive monetary and psychic benefits is enhanced. To the extent that victims are seen as important actors who must be kept informed and available for participation rather than perceived as instruments of other officials, they may experience greater satisfaction and reciprocate by cooperating more fully. There is no reason that we have uncovered that involving the victim will either bias decision-makers or lead to unfair results for offenders. To the contrary, an airing of the victim experience may improve the quality of information which forms the basis of restitution decisions while at the same time assist in evaluating the real significance of the crime for the victim.

If victim involvement is to function as an essential component of restitution programs rather than as a byproduct designed primarily as a mechanical aid to meet the needs of justice system officials, then two conditions must be met. First, formal institutional procedures permitting the victim to play a role at each critical juncture must be built into the structure of a program. Such procedures would require an agent or advocate for the victim to channel information and explain the restitution process. Second, victims must be encouraged to participate and provided with needed

support services, but at the same time not be manipulated into participating when such involvement does not serve their long-term interests.

The most appropriate vehicle for communicating victim views depends on restitution objectives and the conditions under which participation occurs. While we therefore cannot recommend one method over another, (excluding negotiation) our findings suggest several features of an effective system of victim communication.

First, communication should be as direct as possible, eliminating second hand accounts. Second, one person must be responsible for coordinating victim information, preferably someone whose central task is to serve the victim. Third, communication should be as broad as possible and include and make use of victim opinions as well as statements about medical and psychological problems. Fourth, the presentation of victim views to the sanctioning authority should be prepared in a separate report or at the least in a special section of the pre-sentence investigation report. However, communicating solely with justice system officials may not be the optimum level of involvement for some victims.

Where disagreements exist between victims and offenders, where emotional conflicts arise, and might be partly resolved if the consequences of the incident were explained by the victim to the offender, well-planned, face-to-face negotiations appear to offer the most promising form of direct participation. While negotiation poses potential problems of exacerbating victim trauma, and

creating inconvenience or delay, it affords an opportunity to resolve conflicts and ensure benefit payments that less direct forms of participation cannot achieve.

## NOTES - I

1. Richard Hofrichter, Victim Compensation and the Elderly: Policy and Administrative Issues, A Report by the Criminal Justice and the Elderly Program, Legal Research and Services for the Elderly, National Council of Senior Citizens to the Select Committee on Aging, U.S. House of Representatives, 96th Congress 1st session (Washington, D.C., U.S. Government Printing office, 1979).
2. See, for example, Burt Galaway, "Toward the Rational Development of Restitution and Herbert Edelhertz," Legal and Operational Issues in the Implementation of Restitution Within the Criminal Justice System," in Restitution in Criminal Justice, (eds.) Joe Hudson and Burt Galaway (Lexington, Mass.: Lexington Books, 1975); Joe Hudson, Burt Galaway and Stephen Chesney, "When Criminals Repay Their Victims: A Survey of Restitutional Programs," Judicature 60 (1977): 313; Anne L. Schneider and Peter R. Schneider, Issues in Victim-Witness Assistance Programming (Eugene, Oregon: Institute of Policy Analysis, 1977).

For an indication of the federal government's program objectives, see Law Enforcement Assistance Administration, Office of Juvenile Justice and Delinquency Prevention, Restitution By Juvenile Offenders: An Alternative To Incarceration (Washington, D.C., February, 1978).

For a discussion of program objectives emphasizing offender rehabilitation, see descriptions prepared by the following programs: Hamilton County Juvenile Court Restitution Program, Cincinnati, Ohio; Colorado Crime Victims Restitution Program; Restitution Counselors Program, North Carolina Department of Corrections, Raleigh; Community Accountability Program, Seattle Washington; Connecticut Restitution Service, Hartford.

## NOTES - II

1. Steven Chesney, The Assessment of Restitution in the Minnesota Probation Service. Mimeo report prepared for the Minnesota Governor's Commission On Crime Prevention and Control. (St. Paul, 1976), p. 29.
2. Joe Hudson and Steven Chesney, "Research On Restitution: A Review and Assessment," in Offender Restitution in Theory and Action (eds.) Burt Galaway and Joe Hudson (Lexington, Mass.: Lexington Books, 1977), p. 127.
3. J. Bryson, Survey of Juvenile Restitution Programs. (Washington, D.C., Office of Juvenile Justice and Delinquency Prevention, 1976, mimeo), p. 17.

4. "When Criminals Repay Their Victims: A Survey of Restitution Programs," Judicature 60, no. 7 (February, 1977): 313-321, p. 320.
5. California Penal Code, Sec. 1203.
6. Chief Probation Officer James Roland of the Fresno Probation Department essentially invented the concept of the victim impact statement.

**END**