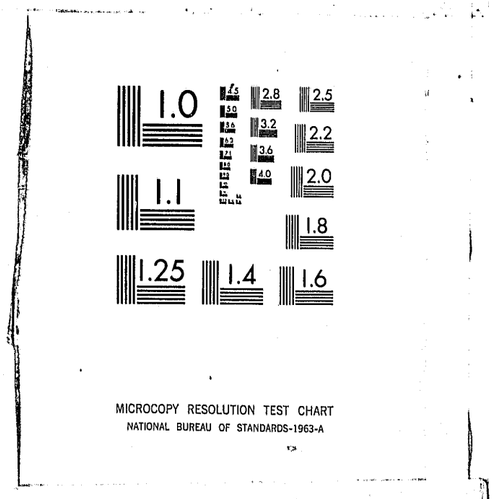

RESTITUTION, AN ANALYSIS OF THE VICTIM-OFFENDER RELATIONSHIP : TOWARDS A WORKING MODEL IN AUSTRALIA

BY

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RESEARCH and INFORMATION SERIES

Western Australian Department of Corrections

72749/A/79-1,000-H/A214

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RESEARCH AND INFORMATION NO. 17

A version of this paper was presented for discussion at the Conference of Ministers in Charge of Prisons, Probation and Parole, Broome 1979.

DEPARTMENT OF CORRECTIONS - WESTERN AUSTRALIA
1004 HAY STREET, PERTH W.A. 6000

August, 1979.

Although this paper was written as a project of the Western Australian Department of Corrections, the views expressed are solely those of the author.

RESTITUTION: AN ANALYSIS OF THE VICTIM-OFFENDER RELATIONSHIP

This Paper is intended as a discussion on one development in the criminal justice system which has some promise in offering an alternative disposition of offenders which could offset many of the complaints about the present system. It briefly traces the history of restitution, its demise and recent formal re-appearance on a limited scale as a model for administering justice. Suggestions are made as to how restitution might be used in the Australian setting to deal with some categories of offence.

INTRODUCTION

In recent years there has been a revival of interest in the concept of restitution. This renewed pre-occupation with what is essentially an ancient - and amongst tribally organised societies widespread - principle of criminal justice, appears to emmanate from a number of sources. One of the most clearly discernable is an increasing disillusionment with both the treatment and deterrence models of justice. Over recent years there has been a growing awareness and admission that both approaches have been highly unsuccessful in achieving their goals, neither mode seeming to have made any inroads into the propensity to commit or recommit crimes. To borrow the terminology of the treatment philosophy, far from being "cured" the "sick" in many cases are being effectively converted into the chronically or terminally ill.

Aside from the realisation that the criminal justice models which characterise most industrial societies fail to cure, rehabilitate or deter offenders, many feel that the most compelling reason for looking seriously at restitution is the abject plight of the victim, who has been almost totally neglected by the present system. William F. McDonald[1], editor of "Criminal Justice and the Victim" expresses these feelings this way; "The victim is being hailed as the forgotten man in the administration of justice. The demeaning, neglectful, and unjust treatment which the victim now receives has suddenly caught the attention of researchers, reformers and public officials". Restitution is thus seen as one inherently fair, and perhaps (natural) way of doing justice, by involving victims as principal figures rather than hapless spectators, and by making their damaged status a prime focus of the determination of the case. Nils Christie,[2] in an intriguing article entitled "Conflicts as Property" argues that not only has the victim for too long had a raw deal, but that the public at large has to its detriment yielded control of its conflicts to "professional thieves" (lawyers). Direct access to one's own conflict situations, Christie maintains, is both personally satisfying and sociologically important.

Besides these fundamental issues, part of the interest in restitution is based on the increasingly relevant question of cost. The present criminal justice system from arrest to trial to incarceration and eventual release, is extremely expensive.[3] At a time when the level of taxation in the community is more and more being brought into question, the cost of administering justice both for the taxpayer at large and those directly concerned in litigation is unavoidably a public issue which encourages a scrutiny of the present system.

Finally, even in present day Western societies, restitution is not a particularly unfamiliar or revolutionary principle of conflict resolution at the informal level. For example, in neighbourhood disputes involving minor damage or theft, particularly where children are responsible, parties frequently negotiate a mutually agreeable plan of restitution.

For these reasons, the concept of restitution as a possible future model of justice and corrections bears closer examination and discussion.

PROBLEMS OF DEFINITION

In reading the literature it becomes apparent that restitution is not always conceptualized, defined or operationalised in the same way. In essence, restitution is a process whereby the offender makes good to his victim by restoring in full his property, or makes up in some way for any injury which he caused the victim to suffer. It differs from compensation, which is a payment to the victim usually made by the State, in recognition of the damage that the former has incurred.

However, as Galaway [4] makes clear, restitution is currently being operationalised in at least four ways -

1. The payment of money by the offender to the victim.
2. The giving of some service to the victim by the offender.
3. The payment of money by the offender to the community.
4. The performance of a service by the offender to the community.

The number of ways in which restitution programmes can operate increases still further when other variables are added, such as whether victims and offenders come into contact or work only through intermediaries, and the extent to which they actually participate in the development of the restitution plan.

It is the view of this paper that the most desirable form of restitution is that which requires the offender to make reparations to the victim in the form of money or equivalent service, with both parties, if willing, meeting and helping to determine the outcome of their own case.

RESTITUTION IN EUROPEAN HISTORY

Such a personalised relationship is almost entirely removed from the present day litigation process in complex societies, and although there are isolated sections of the criminal code which permit restitution to be ordered, the major avenue for victims to pursue recompense is the costly, cumbersome, frequently futile, and for the majority, inaccessible realm of civil law. Yet within the European cultural milieu this

has not always been the case. As Jacobs [5] comments, "It is clear that the origins of modern systems of criminal law are found in the victim's right to reparation for the wrong done to him". Jacobs briefly traces the rise and fall of the principle of restitution in European history. As early nomadic societies began to settle and property acquired an enhanced significance in the lives of the people, personal retaliation or revenge as a legitimate course of action by the victim gave way to a system of restitution which was often highly elaborate.

In Saxon Britain, Jacobs tells us, an offender was required to pay 'bot' to his victim or the victim's kinsmen according to a carefully drawn up set of tariffs, for example, a sum of 8 shillings if he knocked the victim's front teeth out. By the year 870 private revenge was sanctioned only if the offender refused to make restitution to the victim. Restitution is believed to have operated according to similar principles amongst the ancient Babylonians, (the code of Hammurabi) the Hebrews, the Greeks, the Romans and the ancient Germanic tribes.

The demise of restitution in Europe began in the early middle ages when in addition to the 'bot', i.e. the payment to the victim, the offender also had to pay a 'wite'; which was a fee to the King or Landlord who convened the court and assisted in bringing about the reconciliation. In the twelfth century the wite increased at the expense of the bot, until the King or Landlord took the entire sum from the offender, leaving the victim with nothing. The criminal law had now shifted away from the control of the parties directly involved, into the hands of the State.

Only a few vestiges of the restitution concept remained within the criminal law process after the middle ages. Jacobs mentions the practise in pre-Castro Cuba of compensation to victims drawn from prisoners' earnings. Also in some States of the U.S.A. in the early 19th century offenders were required to pay back the victim, sometimes to the tune of two or three times the original value.

Although restitution programmes continued to disappear from the scene until their modest reappearance in recent years, debate on a professional level as to their desirability has continued spasmodically up to the present day. At the International Prison Congress in Stockholm in 1878, both the Chief Justice of New Zealand and a British Penal reformer, William Tallack, advocated a return to the ancient practise that the offender should make restitution to his victim. The issue was raised again at international conferences in 1885, 1891 and in 1900, and by Enrica Ferri in 1927. On all these occasions it was suggested that restitution should be paid from prisoners' wages, which, it was argued, should be substantially raised - an idea shared by the emminent British social philosopher Herbert Spencer. With reference to raising prison wages to a realistic level, Jacobs [6] comments wryly "history teaches us that this would be a monumental accomplishment". It was, in fact a combination of the great depression and successful lobbying by U.S. Businessmen to prohibit competition from prison industries which everywhere put paid to this idea.

THE RENEWAL OF INTEREST IN RESTITUTION

According to both Schafer [7] and Jacobs [8] much of the renewed interest in restitution stems from two sources. In 1951, a British penal reformer Margery Fry, published a book entitled "Arms of the Law" in which she advocated offender restitution to the victims as much for the rehabilitation benefit of the former as for the material advantage of the latter. A few years later, however, Fry was to change course somewhat, in favour of victim compensation, because of the practical difficulties she saw as inherent in the workings of restitution.

The second stimulus to a reconsideration of restitution again came from Britain in the form of a Government White Paper entitled "Penal Practice in a Changing Society". At one point the paper states:

> "It may well be that our penal system would not only provide a more effective deterrent to crime, but would also find a greater moral value if the concept of personal reparation to the victim were added to the concept of deterrence by punishment and of reformation by training" [9].

PRESENT RESTITUTION PROGRAMMES IN OPERATION

At the present time there are a small number of programmes in operation under the rather loose heading of restitution. These include 19 in the U.S.A. and Canada [10], and the Community Service Order in Britain (also operating in Australia). Although all these schemes are referred to as involving restitution they are often quite dissimilar in their philosophical emphasis, stated goals and outcomes. For example, of the 19 programmes noted by Hudson and Galaway, [11] ten operate primarily with the rehabilitation of the offender in mind, four see providing reparations for the victim as the major purpose, three stated that efficiency and economy were the major issues, whilst the remaining two aim first and foremost to change public opinion and effect victim - offender reconciliation. None of the schemes operate from prison, though in some cases hostels similar to work-release facilities are used. Despite their differences in emphasis and aims, these programmes represent a common dissatisfaction with the present system of justice which usually ignores the victim and commits the offender to a meaningless, costly and usually unsuccessful form of punishment.

One type of restitution programme currently popular in Britain and now enjoying limited use in Australia is the Community Service Order. This particular Scheme, which was set up on a pilot-study basis in six areas of Britain, following recommendations of the Wootton Committee [12] in 1972, qualifies as restitution only if one considers that the State, or Crown, is at all times the victim of criminal offences. This is so because the offender, who might otherwise have been sent to prison, is required to perform some useful or practical work for the community, after his normal working hours. Harding [13] gives examples of work typically undertaken as - "painting and decorating flats for the elderly and physically handicapped, making toys and equipment in a workshop base for the handicapped and disabled, and special project work on adventure playgrounds or community centres".

Someone who breaks into a shop may thus spend the hours of his C.S.O. chopping firewood for the elderly. Such a scheme has the merit of diverting the offender from the useless and destructive environment of the prison into activity which is of some community benefit. However, it also diverts him away from the victim, towards people who are not at all relevant to the circumstances of his offence. He does not directly confront the result of what he has done in terms of damage and of course the actual victim (i.e. rather that the State) still obtains no reparations. The scheme can thus be criticised for the fact that the sentence, though worthy, is not relevant to the crime or the victim. Philosophyically in fact, C.S.O. might even be seen as a modern-day version of the 19th century conception of doing charitable works for the deserving poor.

However, Community Service Orders could provide a legitimate alternative to incarceration or heavy fines in the case of victimless crimes. If someone is said to have offended against "society" by, for example, being drunk and disorderly or creating a public nuisance, the performance of some useful service on behalf of the general population, such as working on community beautification projects would seem to be a more purposeful determination than the costly and questionably appropriate alternative of imprisonment.

In North America there are programmes which centre more directly on the offender-victim relationship. In Minnesota, the Department of Corrections opened a Restitution Centre in 1972. The programme is limited to selected property offenders who have been sent to prison. During the fourth month of their sentence they are paroled. On a face-to-face basis with the victim, a restitution programme is worked out which takes account of both the damage suffered by the victim and the costs of the prosecution of the case. By January, 1975, 62 offenders had been through the centre and results have been described as encouraging [14].

At the pre-trial stage, the Pima County District Attorney's Office in Tucson Arizona has also successfully operated a victim-offender restitution programme since 1974, again on a face-to-face basis. Providing the victim consents to the diversion, the process of negotiation takes place, helped in most cases by a third party or facilitator. The authors of "Instead of Prisons" state -

> "Many victims have entered into the process reluctantly, only to find themselves later offering to serve as volunteer probation officers for other offenders. After one years operation, the programme has been successful in all but nine of the 204 cases which it accepted. The project calculates its costs at $304 per case, compared to $1,566 required to process an average felony case" [15].

A similarly successful restitution programme, the Victim Offender Reconciliation Programme (V.O.R.P.), operates in Kitchener Ontario. Once again the aim is to effect recon-

ciliation between the parties by using restitution, either in payment or work-services by the offender to the victim. Other adult pre-trial diversion programmes operate in Massachussetts ('Earn It'), New York and South Dakota. [16]

Evaluations of the other programmes current in North America are less well documented. Hopefully however, more information as to their methods of operation and levels of success will become available in the not too distant future.

PRESENT RESTITUTION PROGRAMMES : DISCUSSION

For a number of reasons, those modes of restitution which encourage a direct, though voluntary, offender - victim relationship resulting in a negotiated restitution plan involving monetary payment and/or services, seem greatly preferable to the Community Service Order type of programme - though as mentioned, the latter could provide a sensible alternative to prison for those who commit victimless minor offences.

In the first place a direct offender-victim restitution makes victims and their need for recompense, a central issue of the proceedings. This is preferable not only to Community Service Orders, which by conceptualizing the State as victim ignores the person at the receiving end of the crime, but also to the orthodox legal process, which all too often remains something of a mystery to lay people and which generally precludes the active involvement of both parties to the offence.

Secondly, direct offender - victim restitution offers a greater opportunity for offenders to feel that they have paid for their crime in the most satisfying and relevant way. It is not uncommon for offenders to express a wish to make reparation to their victim in some way. By the same token many offenders, probably a majority, see their crimes as being against a specific person or item of property, rather than against "society". Community Service Orders are therefore no more effective than the present sentencing system in allowing offenders the satisfaction of making restitution directly to the subject or object of their crime. To the convicted car thief, chopping firewood for the elderly may have little relevance.

Aside from allowing both offender and victim to feel that justice has been well and truly done, schemes such as those in Minnesota, Tucson and Ontario may also possibly contain secondary benefits. McDonald [17], recounts an occasion when "One woman who had been burglarized was able to get her fears under control when she saw the burglar was not the diabolical monster whom she had imagined, but a scrawny teenager who told her he meant her no harm". By the same token some offenders may well begin to see their crime in a different light, if they come face to face with what they have done in personalized human terms. There are perhaps a number of such creative possibilities beyond the act of restitution.

THE PRESENT EXTENT OF RESTITUTION IN AUSTRALIA

At the present time there is little information either on the extent to which restitution is used as a sanction or partial sanction in Australia, or where used, its effectiveness vis a vis other modes of disposition. More generally, there is a distinct lack of research and discussion on this topic by criminologists or those involved in the criminal justice system.

Nevertheless, taking Western Australia as an example, provision does exist for the ordering of restitution under sections 427, 671 717, 718 and 719 of the criminal code. These sections relate to certain indictable property offences dealt with summarily. The court may order restitution of the property, or payment of money to an equivalent value, such an order being either additional to, or instead of any other punishment. Time limits for payment may also be specified. However, there is no record of the frequency with which these sanctions are invoked.

In addition, and in common with similar justice systems, restitution may be ordered as a condition of probation. Between July and September 1978, of the 287 probation orders in Western Australia, 52 or 18% were conditional on restitution being made. [18] It is not clear, however, how many of these conditional orders were successfully fulfilled.

Community Service Orders are also being used. In W.A. in the financial year 1976-77, 108 orders were made resulting in a total of 12,644 hours of work at an average (mean) of 177 per person [19]. There is, however, no equivalent to the Minnesota, Tucson or Kitchener schemes, where direct restitution to the victim is negotiated in settings outside traditional courts.

Bearing in mind the compelling arguments which have been cited in favour of victim-offender restitution procedures for certain categories of offence, it seems appropriate to seriously consider implementing a similar programme in Australia.

VICTIM-OFFENDER RESTITUTION IN AUSTRALIA: A POSSIBLE MODEL

A provisional model of how victim offender restitution might operate in Australia will now be outlined, followed by a discussion of some of the problems and objections which such a proposal inevitably incurs.

It is important to realize that there are several ways in which restitution programmes can operate, depending on such factors as focus, scope, basic philosophy, available funds and manpower. The model outlined below therefore represents <u>one</u> possibility amongst many, though hopefully for those who are interested in the principle of restitution, it will provide a basis for discussion which may lead to the creation of a more refined model.

THE RATIONALE OF THE MODEL

Philosophically, it is based on the belief that restitution, whenever possible, should be the major principle of conflict resolution between parties to an offence, rather than simply a measure which is tacked on to more traditional modes of sentencing as an additional form of punishment. In short, it is viewed as a desirable basic rather than an optional extra. Consequently, it should be a process enacted at the pre-trial or post-hearing stage, rather than post-incarceration or parole measure, as in Minnesota.

INITIAL SCOPE

In common with programmes recently instituted elsewhere, initially only straightforward cases should be dealt with; in other words cases which;

1) involve identifiable victims (individuals or corporate bodies)

2) are relatively minor (and to begin with) property offences such as petty theft, malicious damage, breaking and entering, unlawful use of motor vehicles. If necessary, a dollar figure could be used to define 'relatively minor', for example, theft or damage up to a value of $500,

3) involve defendents who choose to plead guilty in courts.

Where such conditions prevail, restitution should be tried as a first measure in preference to traditional sentences such as heavy fines, imprisonment, or probation.

There are sound reasons why initially a victim - offender restitution programme in Australia should limit its operation to the above conditions. Firstly, it would be unwise to test the viability of a (re)new(ed) concept in impossibly difficult conditions. By deferring the inclusion of complex and difficult cases, the kinds of problems which inevitably accompany the creation of any new system are not exacerbated.

Secondly, and perhaps more importantly, the types of offence listed above as most easily amenable to restitution, make up a significant percentage of all offences which came before the courts. Statistics taken from the W.A. Police Department Annual Report 1977 show that motor vehicle theft, breaking and entering, and theft account for 92% of the major categories of crime. Further, although property crimes are no longer tabulated by value of goods stolen, W.A. Police Department Annual Reports for the four years up to 1976 show that between 74 and 80 percent of the breaking and entering charges involved values of less than $100.

A number of U.S. sources reveal a similar picture. Dodge, Lentzner and Shenk [20] discovered through a major victimization survey that thefts, or attempted thefts of property or cash, accounted for 84% of reported crimes. Economic loss occurred in 80% of personal victimizations and 90% of household victimizations, though typically amounts were small. Seventy percent of personal victimizations and 66% of household victimizations involved losses of less than $US50 in value.

Finally, looking at imprisonment statistics, in Western Australia for example in 1977-78 [21] commitments to prison for the offences of wilful damage and arson, breaking and entering, stealing and receiving, and unlawful use of a motor vehicle were 3,160 or [22] 30% of all commitments. Similarly, in N.S.W. during 1976, 24.9% of all receptions under sentence were property offenders.

Taken together, these figures suggest quite strongly that a high percentage of recorded crime is against property, and that in the great majority of these cases the amount stolen, or value of damage, is rather small. There is therefore a very large number of potential cases which may be amenable to resolution through restitution.

SUGGESTED PROCESSES AND PROCEDURES

The first requirement of the process is that both the offender and the victim should consent to meet together with a third party in order to work out a universally acceptable restitution plan. If either party refuses to participate, the sentence should revert to the normal court process.

Ideally, initial approaches could be made to both the offender and victim prior to the court hearing, in order to establish whether both wish to attempt to negotiate restitution. This would represent a far greater time saving than if such approaches are made at or after the court hearing.

In cases where both parties agree to negotiate restitution, the discussions should be held in a comfortable but relatively informal setting. It is most important that the programme should be seen as a genuine alternative to orthodox court procedures. It is therefore essential that the locus of negotiation is totally unlike the courts, both in appearance and atmosphere.

The form that the restitution payment might take should be left to the victim and the offender, with advice and suggestions from the third party. Reparations could be straight cash payments, a service of equivalent value to the loss sustained, or a mixture of money and services. In addition, offenders should meet any court costs associated with the initial hearing, and pay a small fine as a gesture of recognition that society's rules have been broken.

Example One:

A thief takes $50 from a shop and in so doing breaks a window, the replacement of which is valued at $50. Outcome - the thief pays the victim $100, a small fine, and meets court expenses. Payment might be made over a mutually agreed time span.

Example Two:

A drunken man causes malicious damage to a public building. Outcome - the man should either pay for the damage over an agreed period, or help to repair it by working on weekends, and paying off the costs of building materials. He also pays a fine and any court costs.

If, after a reasonable length of time no agreement on terms can be reached by the parties involved, the case would have to revert to court and a traditional sentence for the offender. It would also be necessary to bring the offenders back to court if they fail to comply with the negotiated restitution agreement, in order to face an alternative mode of sentencing.

Procedurally, a number of options could exist for the courts. One possibility would be the imposition of a suspended prison sentence, conditional probation order or conditional fine on the offender, to be invoked if he or she fails to meet the restitution agreement. Alternatively, prosecution might be deferred altogether whilst the offender is participating in the programme. This means that the charges could be dropped entirely on successful completion. Both procedures have been used in the 'Earn - it' restitution programme in Massachusetts [23].

THE ROLE OF THE THIRD PARTY OR FACILITATOR

The role of the third party should be purely that of a facilitator who can advise or persuade, but not threaten or overrule either party to the negotiations. To give the third party the power of final decision in situations of deadlock would alter the purpose of the procedure, which is for victims and offenders to generate their own acceptable solutions. To create an arbitrator with the power of final decision might be the first step to recreating an orthodox court procedure.

In a paper entitled "Third Party Functions in the Victim-Offender Conflict," Yantzi and Miller [24] of the Kitchener project outline the role and required skills of third parties in some detail. They argue that although the third party cannot align himself with either the victim or the offender -

> "his role is not that of an impartial mediator or judge who is detached and distant from the participants. He is an active participant in the process, functioning in a distinguishable role. He is there to facilitate the interaction of the two principals in a non-coercive manner. While monitoring the interaction, he does not direct the exchange or impose a solution on the principals".

DOCUMENTATION AND ADMINISTRATION

Documentation would consist of a record of the agreed restitution plan signed by both the victim and the offender and witnessed by the third party. Copies would be held by the victim, the offender, the court at which the case was initially heard and the authority responsible for administering the restitution programme. A space would be left on the document to record the outcome (e.g. "successfully completed" and date, or "conditions not met - return to court"). One possibility would be for administration of such programmes to be under the jurisdiction of Probation Services.

Such a programme would represent a limited but valuable beginning to the establishment of restitution as the basis of justice and corrections policies, as an alternative to the present punitive or rehabilitative model. It would be suitable only for clear-cut minor cases in which both parties hold a genuine desire to work out a mutually acceptable solution in preference to an orthodox hearing.

Nevertheless, significant numbers of such crimes are committed each year, most of which leave the victim with little or no recompense and many of which inflict prison sentences which are pointless to the offender and costly to the community.

PROBLEMS

A great deal of the discussion and analysis of restitution in recent years has rightly concerned itself with the complex and difficult problems which can accompany its introduction and implementation. Some of these problems are discussed below.

a) Selection

An issue of considerable importance concerns selection of offenders for restitution programmes. It has been advocated in this paper that to begin with, restitution should be adopted as an alternative only in relatively minor, straightforward property offences, where both parties consent to negotiate this type of conflict resolution. Nevertheless, even within these specified conditions, further questions regarding selection remain.

A review of current North American programmes [25] shows that of 19 restitution schemes reviewed, 11 select adult offenders only, 4 select juveniles, 3 take both adults and juveniles and one admits young adults aged 17-25. Apart from age-status, number of previous offences is also sometimes considered as a selection issue. The 'Earn-it' [26] programme, for example, concentrated on first and second offenders, though recently they have begun to admit others.

It is the view of this paper that ideally, if sufficient manpower is available, all offenders who come within the three initial conditions specified earlier, should be eligible for restitution programmes, because further selection beyond these conditions is likely to undermine the basic philosophy and principles of restitution - that is, that all victims are entitled to reparation just as all offenders should be entitled to make that reparation.

Selection all too often leads to selection for success, which not only fails to test the efficacy of a concept such as restitution, but is also likely to bring further disrepute on a system which is already frequently charged with sentencing unequally, in favour of the capable and economically successful members of society. Restitution must become much more than a desirable alternative for the middle class.

In reality, if victim-offender restitution were introduced into this country, it would at least initially be on a small scale, necessitating selection of offenders. It would be wise, perhaps to make that selection as random as possible in order to avoid the false picture which might emerge from selecting for success. Having said that, a major difficulty then needs to be overcome - that of the unequal ability of offenders to pay.

b) Offender employment and the ability to pay

If restitution is to be a viable and universally fair method of dealing with certain offences, then all offenders willing to make restitution must have the opportunity to do so. At the present time, large numbers of those appearing before the courts are either unemployed, or lose their employment as a result of their offence. To restrict restitution to those who can afford to make it would further emphasise the class bias which many believe presently permeates the justice system.

It would seem therefore that concomitant with the introduction of a restitution programme is the need to find, or have available, temporary or part-time jobs which will enable poor or unemployed offenders to pay back their victim.

One of the most promising, developments in this regard has taken place in the 'Earn-it' programme in Massachusetts . In an outline account of the programme Ciner writes [27] "'Earn-It' differs from most (restitution programmes) in that it matches up an offender with a job, usually with a private employer, and keeps a close watch on his performance."

The programme grew out of a meeting between a judge and members of the local Chamber of Commerce, where 40 businessmen pledged to find hours of work for offenders. Conditions are fair, but realistic. If offenders fail to perform adequately on the job, they are sent back to court to face more traditional measures. Thus, businessmen who volunteer hours of work for the scheme are not in a position of having to put up with sub-standard workers, and this undoubtedly helps to sustain their support. In addition to private business, hours of work are also provided by Government and public enterprises.

In the course of his appraisal, Ciner also discusses some of the common objections to providing employment for offenders. In the first place, the point is made that the jobs being provided are not permanent, but rather hours of work and temporary employment. This has to be born in mind when the common objection is raised that it is unfair, especially in times of high unemployment, to find jobs for offenders. The extension of this argument - that people may deliberately commit a crime in order to obtain a job is regarded as unlikely, not only because the work is only temporary, but also because money earned has to go to the victim of the offence rather than to the person earning it. Committing a crime to obtain one of these jobs is therefore not an attractive proposition.

Providing offenders against property with the opportunity to repay their victims is undoubtedly a major problem associated with restitution programmes. However, the example of 'Earn-It' shows that there are ways of overcoming this difficulty.

Furthermore, it should be noted that even in the present difficult economic climate, Work Release programmes seem to be able to continue operating, (e.g. there are about 50 prisoners on Work Release in W.A. at any one time). It would therefore seem a feasible proposition for a State agency to carry out the same employment finding function in relation to restitution.

c) Insurance

An argument often raised [28] is that victims of property crimes such as home burglary are usually quickly and efficiently reimbursed for their losses by Insurance companies, and that by contrast receiving reparation from an offender is likely to be a much slower and more uncertain process. In such cases, what happens? Is it worth bothering about restitution?

It is the belief of this paper that offenders should still pay for the damage that they have done. In some cases this may mean paying money to insurers rather than directly to the victims. The point still remains that this is the most relevant way for offenders to make up for the harm that they have done.

It may even be that restitution ought to be linked on a universal scale to the speedy reimbursement of victims through a national victim insurance or compensation fund, so that victims receive immediate payment and offenders reimburse the fund. In any event, at the present time the question of insurance need not interfere with the basic principles and desired outcomes of the restitution process, that is that the offender pays for what he has done and the victim is reimbursed for what he has lost.

d) Cost

From a review of current literature on existing schemes, it appears that generally the cost of administering restitution is lower than incarceration. However, some caution is needed here. In the case of fully residential restitution centres, the costs may be only slightly less than those of imprisonment and far greater than probation [29]. Further, where an increased commitment to the treatment ideology creeps back into the picture as reportedly happened in Minnesota [30], costs rise as participants are encouraged to stay longer for 'treatment', and additional members of the 'helping' professions are recruited.

The view expressed by this paper is that not only should treatment as a principal consideration be avoided, but wherever possible participants in restitution programmes should continue to live in their normal home accommodation. This is considered desirable not just from the point of view of holding down costs, but also because it minimizes the disruption to their lives. However, in the case of the homeless or the interstate offenders, it may be necessary to find some hostel accommodation. If the general rule, therefore, were that participants whenever possible continue to live at home, restitution should be an inexpensive as well as an inherently just mode of disposition.

e) Other difficulties

A common objection levelled at the idea of restitution is the argument that many habitual criminals would see the need to repay victims as merely an occupational hazard in a stable career of crime, in other words, that to be caught one time in three and forfeit the profit from theft on that particular occasion would be an attractive proposition. The point that needs to be made here is that such habitual criminals at the present time may equally see gaol as no

more than an occupational hazard. However, their periodic incarceration does nothing positive for their victims, or apparently for themselves, but it is certainly a costly exercise for the community. By implication habitual criminals are people for whom incarceration has little deterrent or treatment effect. It may equally be that restitution has no deterrent effect. However it should be noted that the process of restoring ill-gotten gains is much more painful than disposing of them. In any event restitution is cheaper for the community and more rewarding for the victim.

There is one further difficulty of a more complex nature which merits discussion here. In some cases of theft, the police may already have recovered the victim's property intact. How then can restitution apply? It would be an inequatable system if speed of detection governed the opportunity to make restitution. There is no way of predicting whether such quickly detected offenders would have agreed to return the property, had they first had time to conceal it.

One solution, which would give all such offenders the chance to take part in restitution programmes relates to the process of police investigation of the offence. If on first interviewing suspected offenders the police make it clear to them that the voluntary surrender of stolen property may allow the outcome of the offence to be dealt with through restitution, a choice then rests with the offender. If they immediately agree to surrender the property, they should be eligible to make restitution, given that this is also the course of action that the victim wishes to take. If they refuse to do so and a police search subsequently reveals the property, the offenders forfeit all such rights. If restitution is negotiated they should also have to pay a fine. However, there is a positive way of looking at this problem, i.e. the increased likelihood that stolen property will be returned to the victim. Inherent in the system is a strong incentive for offenders to return property, given that they might otherwise face a sentence of imprisonment. From the victim's point of view, the return of their property may be more satisfactory that monetary reparations, either because of some sentimental value, or the fact that the property is worth more to them than the estimated replacement cost.

THE POSSIBLE EXTENSION OF THE RESTITUTION PRINCIPLE TO MORE COMPLEX AREAS

The extension of restitution to more complex and serious areas of criminal behaviour is considerably more difficult, but nevertheless, should be pursued with every effort, given the dismal record of current correctional and sentencing policies and the public's questionable respect for a system which rarely does justice to the victim.

One possible avenue for implementing restitution in cases of serious damage, injury or theft, is the creation of employment at award wage rates in prison, coupled to State compensation to the victim. This is not a new concept of course. As mentioned earlier, suggestions that such a system should operate, have been made periodically by penal reformers and writers over the centuries.

More recently, Smith [31] has written a paper in which she advocates that offenders should work for award wages in prison in order to compensate victims. (The victims themselves would receive immediate compensation from a State fund, the offenders would then work off their debt to the fund). In addition to victim compensation, the prisoners' award wages should also be used to pay family maintenance and a small sum for their own keep.

Although Smith can be criticised for greatly (over) simplifying a complex issue - she sees no great difficulty in calculating appropriate restitution for all offences and injuries - the latent potential of prison industries should be recognised. If, as in two cases in Sweden [32], prisons were in a position to operate viable industries and to pay award wages, the scope and practice of restitution and victim justice might be greatly expanded.

SUMMARY AND CONCLUSIONS

This paper has attempted to give a brief overview of restitution by discussing its history, re-emergence, present practice and future possibilities - particularly in Australia. It has been argued that justice and correctional systems based on treatment, rehabilitation or deterrence are legitimately being questioned in present day penological and criminological debate. Early indications are that the results from certain offender - victim restitution programmes for selected uncomplicated cases are highly encouraging in terms of successful outcome for the parties involved and in terms of reduced costs per case for the community.

With regard to the particular model of restitution outlined in this paper, it has been argued that initially its scope should be confined to straightforward relatively minor property offences, where offenders choose to plead guilty. A preference has also been expressed for the arbitration or negotiation system where victims and offenders are themselves involved in determining the outcome.

Nevertheless, as indicated earlier, a number of models of restitution are in operation, and it would be wise for those concerned with criminal justice policy to study carefully the available options, before proceeding to implement a particular model. Most systems display impressive features, equally most if not all have a number of problems which remain to be solved.

One of the major aims of this paper therefore has been to stimulate ideas and generate constructive criticism on the concept of victim - offender restitution, the advantages of which have been stated as follows:

1) Victims are fully recompensed for their loss.

2) Offenders have the opportunity to expiate their guilt by "paying their debt to society" in a direct, relevant and constructive manner.

3) The process is relevant to the offence committed.

4) The destructive effects of prison are avoided.

5) Restitution settlements will decrease pressure on the prison population.

6) Victims and offenders have the opportunity to participate in the outcome of their situation rather than being (sometimes mystified) spectators in the Court process.

7) Restitution Settlements can be considerably cheaper per case to administer than orthodox court procedures, particularly where imprisonment is an outcome.

8) Due to the more positive light in which the public might come to view the criminal justice process, cooperation by the public with law enforcement agencies might improve.

It is therefore suggested that there is no compelling reason why Australian States should not move to establish offender - victim restitution programmes for straightforward minor criminal cases. As an alternative to imprisonment particularly, the benefits to be derived are considerable.

NOTES

1. McDonald W.F., (ed), Criminal Justice and the Victim, Beverley Hills, Sage Publications, 1976, p.18.

2. Christie N., Conflicts as Property, British Journal of Criminology 1977, 17(1).

3. Recent estimates in Western Australia put the cost of keeping one prisoner at about $250 per week.

4. Galaway B., Towards the Rational Development of Restitution, in Hudson J. and Galaway B. (eds), Restitution in Criminal Justice, Toronto, Lexington Books, 1975, pp 80 - 81.

5. Jacobs B., Reparation or Restitution by the Criminal Offender to his Victim : Applicability of an Ancient Concept in the Modern Correctional Process, in Drapkin I. and Viamo E. (eds), Victimology, Massachusetts , Lexington Books, 1974, p.216.

6. Jacobs B., The Concept of Restitution : an Historical Overview, in Hudson J. and Galaway B. op cit p.50.

7. Schafer S., The Victim and Correctional Theory : Integrating Victim Reparations with Offender Rehabilitation, in McDonald W.F. (ed), op cit.

8. Ibid.

9. Home Office, Penal Practice in a Changing Society, Mnd No. 645, London, H.M.S.O., 1959.

10. Hudson J. and Galaway B. op cit p.7.

11. Ibid.

12. Report of the Advisory Council of the Penal System, Non-Custodial and Semi-Custodial Penalties, London, H.M.S.O., 1970.

13. Harding J. Community Service Restitution by Offenders, in Hudson J. and Galaway B. (eds) op cit P.104.

14. McDonald W.F. op cit p.39.

15. Prison Research Education Action Project, Instead of Prisons, a Handbook for Abolitionists, Syracuse, New York, 1976, p.120.

16. Hudson J., Galaway B. and Chesney S., When Criminals Repay their Victims : a Survey of Restitution Programmes, Judicature 1977, 60(7), p.319.

17. op cit p.39 - 40.

18. Personal communication from Research Officer, West Australian Department of Probation and Parole.

19. Personal communication from Research Officer, West Australian Department of Probation and Parole.

20. Dodge R.W., Lentzner H., and Shenk F., Crime in the United States : A Report on the National Crime Survey, in Skogan W.A. (ed), Sample Surveys of the Victims of Crime, Cambridge, Mass., Ballinger, 1976.

21. West Australian Department of Corrections Annual Report 1977 - 1978.

22. Department of Corrective Services New South Wales, Annual Report, 1975 - 1976.

23. Ciner J., If You Want a Second Chance, Earn - It, Corrections Magazine, December 1978, 64 - 67.

24. Yantzi M. and Miller E., Third Party Functions in the Victim - Offender Conflict, unpublished personal communication.

25. Hudson J., Galaway B., and Chesney S., op cit.

26. op cit p.66.

27. op cit p.64.

28. Seymour J.A. Restitution and Reparation, Australian Crime Prevention Council Quarterly Journal, 1978, 1(3).

29. Read B. How Restitution Works in Georgia, Judicature 1977, 60(7).

30. Seymour J.A. op cit p.8.

31. Smith K.D., Implementing Restitution within a Penal Setting : The Case for a Self-Determinate Sentence, in Hudson J. and Galaway B. (eds) op cit.

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