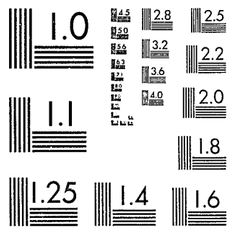

Phyllis Jo Baunach

National Evaluation of Adult Restitution Programs

RESEARCH REPORT #6

RESTITUTION IN CRIMINAL LAW

by

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HISTORICAL OVERVIEW

Notwithstanding older statutory references to restitution[1] and earlier case-law dealing with various forms of restitution[2] and multiple damages[3] in criminal cases, the systematic rise of restitutive sanctions in the United States may be linked to the appearance of suspended sentence and probation laws.[4] In addition to the stimulus provided for the enactment of suspended sentence laws by the well known Supreme Court ruling in the

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[1] 1860 Pa. Laws 382, s. 179 (repealed 1939) provided that in convictions for robbery, burglary, larceny, or receiving stolen goods it may be adjudged that the property taken be restored to the owner and that similar restitution shall be directed in certain cases of forgery and counterfeiting. Commonwealth v. Rouchie, 135 Pa. Super. 594, 7 A.2d 102,108 (1939).

[2] Commonwealth v. Boudrie, 20. R.I. 367, 39 A. 185 (1898) (summary post-conviction restit ion of stolen property); Wooding v. Puget Sound National Bank, 11 Wash. 527, 40 p. 223 (1895) (restoration of fradulently obtained money by sheriff); Huntzinger v. Commonwealth, 97 Pa. 336, A (1886) (judgment of restitution for money or other valuable things in indictment); In re Penny, 1 City H. Rec. 113 (N.Y. 1816) (restoration of stolen goods).

[3] Doughty v. De Amoreel, 22 R.I. 158, 46 A. 838 (1900) (double damages for larceny victim); Barker v. Almy, 20 R.I. 367, 39 A. 185 (1898) (double damages for larceny victim); Smith v. Drew, 5 Mass., A 514 (1809) (treble value of stolen goods); but see Salisbury v. State, 6 Conn. 101 (1826) (court will not order civil treble damages for theft victim in public prosecution upon conviction of defendant).

[4] See generally ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PROBATION 1-39. U.S. Dept. of Justice 1939. [Hereinafter cited as ATT'Y GEN. SURVEY.]

Killits case,[5] reparation has also been suggested as at least a partial justification for their introduction.[6] In the absence of statutory provisions it appears that criminal courts have no power to require restitution.[7] Such power has, however, been read into statutory provisions permitting suspended sentence and probation conditions in broad discretionary terms that do not explicitly mention restitution.[8]

After the appearance of probation in Massachusetts in the latter part of the nineteenth century,[9] several states following that example were

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[5]See C.L. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDONS 12 (3rd ed., Charles C. Thomas, 1975).

[6]Redewill v. Superior Court of Maricopa County, 43 Ariz. 68, 29 P. 2d 475, 479 (1934).

[7]People v. Grago, 24 Misc. 2d 739, 740, 204 N.Y. 2d 774, 775 (County Court 1960); accord Feldman v. Reeves, 356 N.Y.S. 2d 627, 45 A.D. 2d 90 (1974). Pennsylvania courts have also reached this conclusion in numerous cases arising during periods following repeal of old restitution legislation but prior to comparable new laws. See Commonwealth v. Betoni, 385 A. 2d 506 (Pa. Super. 1978); Commonwealth v. Frisoli, 389 A. 2d 136 (Pa. Super. 1978); Commonwealth v. Fral, 375 A. 2d 383 (Pa. Super. 1977); Commonwealth v. Flashburg, 237 Pa. Super. 424.352 A. 2d 185 (1975); Commonwealth v. Jackson, 218 Pa. Super. 357,280 A. 2d 422 (1971); Commonwealth v. Gross, 161 Pa. Super. 613, 56 A. 2d 303 (1948); Commonwealth v. Rouchie, 135 Pa. Super. 594, 7 A.2d 102 (1939); Commonwealth v. Boyle, 108 Pa. Super. 598, 165 A. 521 (1933).

[8]See e.g., Basille v. United States, 38 A. 2d 620 (D.C. Mun. App. 1944); Commonwealth v. Walton, 397 A. 2d 1179 (Pa. Super. 1979); Commonwealth v. Bushkoff, 1977 Pa. Super. 231, 110 A. 2d 834 (1955).

[9]See ATTORNEY GENERAL SURVEY supra note 4 at 21-4 .

quick to incorporate explicit provisions for restitution as a condition of probation.[10] Although many early probation statutes were drafted so as to leave the terms of probation to the courts' discretion, specific mention of restitution or reparation was noted in eleven states and the federal jurisdiction by the late 1930's.[11]

In the last two decades the inclusion of restitution in criminal legislation and its use by judges have received considerable impetus from three notable sources. First, the influence of the endorsement of restitution by various prestigious authorities,[12] is exemplified by the outright adoption in several jurisdictions of the Model Penal Code's provisions for restitution.[13] A second major influential factor has been the remarkable rise in interest in the field of victimology,[14]

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[10]E.g., N.Y. CODE CRIM. PROC. ss. 487(2), 932 (McKinney 1910).

[11]See statutes cited in Note, "Restitution and the Criminal Law," 39 Colum. L. Rev. 1185, 1198 n. 65, 66 (1939).

[12]See Harland "Compensating the Victims of Crime" 14 CRIM. L. BULL. 203, 205, fn. 8 (1978).

[13]See e.g., LA. CODE CRIM. PROC. ANN. art. 895 (West Cum. Supp. 1979), adopting M.P.C. s. 301.1 (P.O.D. 1962); see also State v. Garner 54 Wis. 2d 100, 194 N.W. 2d 649 (1977) (adopting ABA Standards Relating to Probation s. 3.2) (Approved Draft 1970).

[14]See generally VICTIMOLOGY: A NEW FOCUS (Drapkin and Viano eds., Lexington 1974).

and in particular in searching for appropriate ways to provide victims with some form of compensation for their losses.[15]

Beginning in the early 1960's, influenced by the writing of a British social reformer, Margery Fry,[16] New Zealand and Britain implemented programs to provide financial compensation to certain victims of violent crimes.[17] Legislation authorizing similar programs soon followed in the United States,[18] and has subsequently been adopted in more than half of the states.[19] In addition, at the Federal level legislation has been unsuccessfully submitted to Congress every year since 1965.[20] Although some states have incorporated victim compensation programs into workman's compensation or lower court settings, most operate through practically autonomous boards, usually politically appointed. Programs are empowered to make financial compensation awards upon the application of eligible victims of violent crimes. Property crimes are not usually covered, and apprehension of the defendant is not a requirement of award.[21]

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[15] See e.g., Lamborn, "Reparations for Victims of Crime: Developments and Directions" 4 Victimology 214 (1979).

[16] "Justice for Victims," 8 J. Pub. Law 191 (1959).

[17] See generally, EDELHERTZ AND GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME (New York: Praeger 1974); see also Palmer, "Compensation for Persoanl Injury: A Requiem for the Common Law in New Zealand," 21 Am. J. Comparative Law 1 (1972).

[18] EDELHERTZ AND GEIS, supra.

[19] See Harland, "Victim Compensation: Programs and Issues," in PERSPECTIVES ON CRIME VICTIMS (Galaway and Hudson eds., C.V. Mosby Co. 1980).

[20] Id.

[21] See Harland, supra note 12.

More important for present purposes than the actual operation of compensation programs, has been the link frequently drawn between such programs and restitution, in legislation,[22] and more especially in the massive compensation literature.[23] Early in the debate over victim compensation Mueller argued that:

> All avenues of approach to compensate victims must be explored and the social consequences of suggested changes in the status quo should be projected and analyzed.[24]

Similarly, Silving proposed that:

> [B]efore legislative action is taken on the comprehensive problems of compensation to victims of crime, these problems should be made the object of a special study . . . to establish by scientific methods, the probable effects of each of the outlined solutions [including restitution], as well as the various forms of combining these solutions.[25]

For the most part, however, restitution was raised consistently but only as a very ancillary issue in the early compensation literature,[26] and was usually

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[22] Infra, text at notes 103-14.

[23] See generally, Harland, Way, and Scheu, "Victim Compensation and Restitution: Bibliography," (Criminal Justice Research Center, Albany, New York, 1979).

[24] "Compensation for Victims of Crime: Thought Before Action," 50 Minn. L. Rev. 217 (1965).

[25] "Compensating Victims of Criminal Violence," 8 J. Pub. Law 236 (1959).

[26] See e.g., Haas, "An Argument for the Enactment of Criminal Victim Compensation Legislation in Oregon," 10 Willamette L. J. 185 (1974).

dismissed as an impractical alternative method of compensating victims, because so few defendants are known to be caught and even fewer have extensive financial resources.[27]

Nevertheless, even in the earliest discussions of victim compensation in Britain the point was made that restitution "raises more far-reaching issues than [victim compensation] and must be considered in the general context of our methods of dealing with offenders."[28] In this latter context, earlier restitution commentary has been 'rediscovered',[29] and restitution has assumed a more prominent position in more recent literature,[30] establishing itself clearly as an area of interest that may be independent of state-funded compensation in more ways than the two are similar.[31]

[27] See Jacob, "Reparation or Restitution by the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process," 61 J. Crim. L. C. & P. S. 152, 154 (1970).

[28] Remark attributed to R. A. Butler, in Williams, "Compensation for Victims of Criminal Violence," 8 J. Pub. Law 191, 195 (1959).

[29] See e.g., the collection of historical materials reprinted in CONSIDERING THE VICTIM: READINGS IN RESTITUTION AND VICTIM COMPENSATION (Hudson and Galaway eds., Charles C. Thomas; Springfield, Illinois 1975).

[30] Id.; see also RESTITUTION IN THEORY AND ACTION (Galaway and Hudson eds., Lexington 1978).

[31] See Harland, supra note 12.

It is in the area of treatment of offenders rather than victim compensation that the third and possibly most influential factor in the developing interest in restitution arises. Since the beginning of this decade the federal government, through the Law Enforcement Assistance Administration (LEAA), has expended millions of dollars in support of restitution programs, surveys, and evaluation research.[32] In addition LEAA sponsored the first international symposium on restitution in 1975,[33] which, in turn, has prompted two similar meetings in subsequent years, each drawing widespread attention from practitioners, academics and legislators.[34] The availability of federal funds to support restitution programs[35] has been accompanied in several instances by the passage of enabling

[32] Id.

[33] "Restitution in Criminal Justice," (Hudson ed. Minn. Dept. of Corrections, St. Paul 1975).

[34] See RESTITUTION IN THEORY AND ACTION, supra note 30.

[35] See Harland, supra note 12.

legislation,[36] and widespread publicity attending the earliest restitution programs has influenced similar developments in other jurisdictions.[37]

It should not be surprising therefore to discover that legislative and judicial pronouncements about restitution have also increased rapidly in recent years, resulting in an extensive body of statutes, interpretive rules and case-law.

DEFINITIONS

A truly operational definition of restitution requires the integration of a variety of component variables, including delineation of appropriate procedures, purposes, offenses, losses, and recipients; each of these elements must be considered, in turn, in relation to the others and with reference to more general procedural and substantive constraints that operate at each stage of the criminal process.[38] Before turning to each of these definitional elements, however, it is apparent that there is little consistency even at the level of terminology, from one jurisdiction to another, and even from one provision to the next within individual criminal codes.

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[36] E.g., CONN. GEN. STAT. ANN. s. 54-110 (West Cum. Supp. 1979). For discussion of the restitution program based upon this Statute, see Harland and Warren, "National Evaluation of Adult Restitution Programs: A Description of the Project," (Working Paper 5, Criminal Justice Research Center, Albany, New York 1978).

[37] See generally Harland, Warren and Brown, "Evaluation Objectives, Evaluation Methodology and Action Research Report #14," Criminal Justice Research Center.

[38] Infra at 48 ff.

In addition to scores of statutory references explicitly to restitution, there is a bewildering assortment of provisions couched in similar and often synomymous language. The concepts of "restitution or indemnification," for example, are often juxtaposed in statutes creating a defense to compounding, with neither definition of nor distinction between the two terms.[39] Similarly, an Ohio probation law permits "restitution or redress to the victim," without further explanation.[40] The word "compensation" is also used rather obliquely by legislators, whether by itself,[41] in conjunction and synonymously with restitution,[42] or with an implied but unspecified independent meaning.[43] An Alaska statute provides for

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[39] E.g., S.D. COMP. LAWS ANN. s. 22-11-11 (1978); WASH. REV. CODE ANN. s. 9A. 76.100 (1978); cf. UTAH CODE ANN. s. 76-8-308(2) (1977) (restitution or indemnification for loss caused or to be caused by the offense).

[40] OHIO REV. CODE ANN. s. 2905.12(B)(3) (Page 1974).

[41] E.g., ILL. ANN. STAT. ch. 38, s. 1005-5-3.1(b) (Smith-Hurd Cum. Supp. 1979); LA. CODE CRIM. PROC. ANN. art. 894.1 (West Cum. Supp.1979); N.J. STAT. ANN. s. 2C:44-1(b)(6) (West 1979); PA. STAT. ANN. s. 1321(c) (Purdon Cum. Supp. 1979).

[42] LA. CODE CRIM. PROC. ANN. art. 895.1 (West Cum. Supp. 1979); ME. REV. STAT. ANN. tit. 17-19, s. 1325(1) (Pamphlet, 1978).

[43] ALASKA STAT. ANN. s. 11.20.135(c) (1975) (restitution for, or repair any damage, or compensate for property used or consumed); ARK. STAT. ANN. s. 51-1201(1)(d) (1977) (restitution or compensation to victim).

"restitution for, or repair" to damaged property,[44] while a comparable California law appears to subsume repair as merely one form of restitution;[45] this latter approach is undoubtedly reflected as part of provisions that restitution may be in the form of "personal services,"[46] and "monetary or non-monetary."[47] The idea of "service restitution," however, has been expanded well beyond mere repair of damaged property, to include such an all-embracing concept as "restitution to society" by performing services for the community in general.[48]

In contrast, perhaps the narrowest use of restitution by legislators is in the sense of "return or restoration" of stolen property.[49]

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[44] ALASKA STAT. ANN. s. 11.20.135(c) (1975).

[45] CAL. PENAL CODE s. 594.5(b) (West Cum. Supp. 1979) (repair defaced property or otherwise make restitution).

[46] ARK. STAT. ANN. s.41-1203(5) (1977).

[47] FLA. STAT. ANN. s. 775.089(1) (West Cum. Supp. 1979).

[48] MISS. CODE ANN. 47-7-47(1)(4) (1978); for a discussion of community service law, see Harland, "The Law of Court-Ordered Community Service: The Tyranny of Benevolence," paper presented at the Annual Meeting of the American Society of Criminology (Philadelphia 1979).

[49] Restitution in the sense of simply returning stolen items is the common meaning of the term in Great Britain. When such "strict restitution" is not possible and some equivalent payment must be made the British term is "compensation." See Softley, Compensation Orders in Magistrates Courts (London: H.M.S.O., 1977); see also Tarling and Softley, "Compensation Orders in the Crown Court," 1976 Crim. L. Rev. 422 (1976). By contrast in the United States, the latter term is most commonly reserved for state-funded compensation to victims while restitution is used much more loosely to refer to almost any reparative sanction imposed upon the defendant.

A South Carolina law, for example, provides inter alia, that "money, goods and chattels shall be restored to the party so robbed or the owner thereof and the judge . . . shall award, from time to time, writs of restitution for such money, goods and chattels."[50] Statutes authorizing return or restoration of stolen property are usually aimed at goods being held, often as evidence, in the custody of criminal justice agents,[51] and frequently require the victim or owner to pay the costs of preserving such property,[52] and to follow sometimes complex petitioning procedures to secure its recovery.[53] Restoration, however, has not been exempted from the definitional ambiguity with which legislators have invested the other terms discussed so far. In Maryland, for example, restoration is used in a much narrower sense than restitution which is distinguished as payment of the value of any property not restored

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[50] S.C. CODE s. 17-25-120 (1976).

[51] E.g., ARIZ. REV. STAT. ANN. s. 13-3941 (1978) (return of property by court); CAL. PENAL CODE ss. 1408, 1409 (West 1970) (property in custody of magistrate); OR. REV. STAT. ss. 142.010 to 142.070 (1977) (restoration of property in hands of officer or magistrate); VT. STAT. ANN. tit. 13, s. 2506 (1974) (restitution by arresting officer).

[52] Ibid.; NEV. REV. STAT. s. 170.135 (1975) (on paying the reasonable expenses incurred in its preservation).

[53] See, e.g., FLA. STAT. ANN. s. 812.061 (West 1975).

or services for which payment has not been made.[54] Elsewhere, however, the terms restoration and restitution appear to be equated, while still another expression, "reparation in damages" is used to signify other types of repayment.[55]

The combination of reparation and restitution is by far the most common legislative formula used to blanket a variety of forms of recovery and/or payment for crime-related losses or injuries. As with the other terms mentioned, legislators have rarely troubled to define or distinguish the two.[56] A unique attempt to define the relative scope of restitution and reparation may be found in a North Carolina probation law which is more arbitrary than helpful in addressing the pervasive ambiguity that surrounds the terms. After speaking of "restitution or reparation to an aggrieved party or parties"[sic], the statute goes on to define restitution as such "compensation for damages or loss as could ordinarily be recovered by an aggrieved party in a civil action";

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[54]MD. ANN. CODE art. 27., ss. 143(c)(1), (2), 466 (1978 Supp.).

[55]KY. REV. STAT. ANN. s. 431.200 (Baldwin 1978); MO. ANN. STAT. s. 546.630 (Vernon 1962).

[56]See, ALA. CODE tit. 15, ss. 22-52(8), 22-29 (1975); ALASKA STAT. s. 12.55.100(2) (1972); ARK. STAT. ANN. s. 41-1203(2)(h) (1977); COLO. REV. STAT. ss. 16-11-203, 204(2)(e), 17-26-128(5)a) (1978); FLA. STAT. ANN. ss. 945.091(5)(b), 947.181(1), 947.20, 948.03 (West Cum. Supp. 1979); GA. CODE ANN. ss. 77-517 (1973); HAW. REV. STAT. ss. 706-602 (1976), 605(1)(e) (as amended, Supp. 1978); ILL. ANN. STAT. ch. 38, s. 1005-5-1(c)(2) (Smith-Hurd 1973); IND. CODE ANN. s. 35-7-2-1(a)(5) (Burns 1979); KAN. CODE CRIM. PROC. ANN. s. 21-4610(h) (Vernon 1975); KY. REV. STAT. ANN. s. 533.30(2)(d) (Baldwin 1975); LA. CODE CRIM. PROC. ANN. art. 895(A)(7) (West Cum. Supp. 1979);MASS. GEN. LAWS ANN. ch. 276, s. 92 (West 1972); MO. ANN. STAT. s. 546.640 (Vernon 1962); NEB. REV. STAT. 29-2219(2)(j) (1975); OHIO REV. CODE ANN. ss. 2929.12(F), 2951-02(B)(9) (Page Supp., 1978); TEX. CODE CRIM. PROC. ANN. art. 42.12, ss. 6(h), 8(c), 15(F), (g), art. 42.13, ss. 5(b)(8), 6(c) (Vernon 1979); UTAH CODE ANN. s. 77-35-17 (1953); VT. STAT. ANN. tit. 28, s. 252(b)(5) (1978).

reparation is used to "include but not be limited to the performing of community services, volunteer work or doing such other acts or things as shall aid the defendant in his rehabilitation"[57]

The North Carolina definitions contrast with the more common distinction in several statutes between "restitution of the fruits of the offense," and/or "reparation for the loss or damage caused thereby in an amount the defendant can afford to pay."[58] Even this distinction is blurred, however, in a New Jersey law omitting reparation and merely prescribing "restitution of the fruits of his offense, in an amount he can afford to pay, for the loss or damage caused thereby."[59] Similarly an Ohio statute, after authorizing restitution or reparation, expands only upon "restitution for all or part of the value of [stolen property]";[60] reparation is left undefined.

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[57]N.C. GEN. STAT. s. 15A-1343(b)(6), (d) (1977) as amended 1977 N.C. Sess. Laws, ch. 1147, S.B. 986.

[58]See, NEB. REV. STAT. s. 29-2262(2)(j) (1975); N.Y. PENAL LAW ss. 65.05, 65.10(2)(f) (Consol. 1978); PA. STAT. ANN. tit. 18, s. 1354(c)(8) (Purdon 1979).

[59]N.J. STAT. ANN. s. 2C:45-1(b)(8) (West 1979); accord ILL. ANN. STAT. ch. 38, s. 1005-6-3(b)(10) (Smith-Hurd 1979).

[60]OHIO REV. CODE ANN. s. 2951.02(B)(9), (c) (Page Supp. 1978).

In practice, whether the general label applied is indemnification, compensation, redress, reparation, or the currently popular restitution, it is evident that two central elements--return of property and/or payment of monetary damages--represent the dominant emphasis of an overwhelming majority of legislative pronouncements reviewed.[61] The lack of definitional clarity, however, has necessitated several appellate rulings distinguishing restitution from costs,[62] fines,[63] and, most often, reparation.[64] With respect to the latter distinction, the need for linguistic precision has been strongly emphasized in the courts; in the Michigan case of People v. Becker,[65] for example, the court observed that:

> An eye for an eye and a tooth for a tooth may be primitive reparation but it is not restitution. Modern reparation involves a money transfer and we call it damages. It is not restitution unless there has in truth been a restoration of the thing taken or its value. We succeed only in muddling our thinking when we call black white. It must not be thought that these distinctions between "restitution" on the one hand, and "reparation" or "compensation" on the other, are mere verbalisms, lacking in practical difference.[66]

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[61]Provisions for personal services to victims by defendants, and for community service sanctions remain much less common, although legislative and programmatic interest in the latter area is growing rapidly. See Harland, supra note 48; see also Beha, Carlson and Rosenblum, "Sentencing to Community Service by Offenders," (L.E.A.A.: U.S. Dept. of Justice, 1977); Harris, "Community Service by Offenders" (A.B.A.: Washington, D.C. 1979).

[62]E.g., United States v. Weiner, 376 F.2d 42 (3rd Cir. 1967).

[63]E.g., Sprague v. State, 590 P.2d 410, 415 (Alaska 1979) (fine is generally distinct from restitution or reparation to the victim in a criminal case); accord State v. Garner, 115 Ariz. 579, 566 P.2d 1055, 1057 (App. 1977); State v. Gunderson, 74 Wash. 2d 226, 444 P.2d 156 (1968).

[64]Infra text at notes 65-75.

[65]349 Mich. 476, 84 N.W. 2d 833 (1957).

[66]Id. at 84 N.W. 2d 837.

The distinction between reparation in damages and restitution had also been made in an earlier Michigan case, People v. Good:[67]

> Restitution and reparation are both employed in the sense of undoing that which has been done to the injury of another; but the former respects only injuries that affect the property, and reparation those which affect a person in various ways.[68]

Similarly, the interpretation of reparation as a concept broader than restitution or restoration is also voiced in several other jurisdictions; in the Oregon case of State v. Stalheim,[69] for example, the court ruled that:

> We construe the term 'restitution' to mean the return of a sum of money, an object, or the value of an object which a defendant wrongfully obtained in the course of committing

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[67]282 N.W. 920 (Mich. 1938).

[68]Id. 924 (Wiest C.J., concurring).

[69]275 Or. 684, 552 P.2d 829 (1976).

> the crime. 'Reparation' in a somewhat broader term which has been defined as [a] repairing or being repaired; restoration to good condition . . . . This construction would embrace medical expenses, wages actually (not prospectively) lost, and reimbursement for easily measurable property damage.[70]

In concluding rather tenatively that an award of $3,000 for the trauma suffered by a rape victim "would probably be classed as 'reparation' rather than 'restitution,'"[71] the majority in yet another Oregon decision, State v. Sullivan,[72] appears to widen the gap between the two terms:

> While some courts have held the terms "reparation" and "restitution" are synonymous, their use in [Oregon law] in the disjunctive leads us to the conclusion that the legislature considered these words to have different meanings. Accordingly, we believe that "restitution" was intended to mean the act of restoring the aggrieved person to status quo, i.e., reimbursment for the damage or loss sustained. "Reparation," however, is a broader term. It includes "restitution" but is something more. It carries with it the idea of making complete amends for a wrong or injury done.[73]

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[70] Id., at 275 Or. 687, 552 P 2d 831 (cited with approval in State v. Wanrow 566 P. 2d 533, 534 (Or. App. 1977)).

[71] State v. Sullivan, 544 P. 2d 616 (Or. App. 1976).

[72] Id.

[73] Id. at 617 fn. 1.

Further discussion of restitution and reparation, in terms of the types of injuries that criminal courts have deemed compensable, will be pursued below.[74] For now, suffice it to note that the scope of the definition of reparation adopted in Sullivan was addressed very bluntly in a dissenting opinion to that case:

> [T]he majority opinion distinguishes between "restitution" and "reparation." I am not sure I understand the distinction drawn or the value of attempting to draw one. In any event, it seems to me that, as the majority applies [the Oregon law] there is a perfect synonym for both terms - civil damages.[75]

In contrast to the above line of cases in which restitution is construed more narrowly than reparation, a New York court, in People v. Lofton,[76] draws a uniquely different conclusion. In ruling on the familiar statutory formulation of "restitution or reparation," the court declared that the distinction is a "quantitative" one, restitution consisting of the fruits of the offense, and reparation consisting of only an amount the defendant can afford to pay.[77] Presumably, if the

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[74] Infra at 71 ff.

[75] State v. Sullivan, 544 P. 2d 616, 619 (Or. App. 1976).

[76] 78 Misc. 2d 202, 356 N.Y.S. 2d 791 (1974).

[77] Id. at 356 N.Y. 2d 792-93.

defendant can afford to pay the full amount, reparation and restitution become synonymous,[78] as indeed is the conclusion of a District of Columbia municipal court of appeals judge in Basile v. United States.[79] Still a further construction of the terms restitution and reparation may be found in the Pennsylvania case of Commonwealth v. Walton,[80] in which the court stated that:

> [T]he term "restitution" ordinarily refers to compensation required for the wrongful appropriation of money or property, and that "reparation" is the term generally used to refer to compensation required to be paid to a victim who has suffered physical injury as a result of the crime.[81]

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[78]That the definition adopted in Lofton is of dubious logical foundation is suggested by a later reference by the judge to the notion of "full restitution." Id. at 793. If the earlier definition is to be accepted, there can be no other kind.

[79]38 A. 2d 620 (1944) "Restitution in its broad sense is not confined to return of something of which one has been deprived, but is synonymous with reparation." Id. at 622.

[80]397 A.2d 1179 (1979) (Pa. Sup. Ct.).

[81]Id. at 1183, fn. 10. In the same footnote, the court goes on to point out that restitution covers both sorts of compensation under the Pennsylvania laws construed in the case.

Perhaps in recognition of the apparent inability to agree upon acceptable distinctions between the various terms, or perhaps without perceiving a need to do so, legislators in most recent enactments have increasingly dropped alternative language in preference for the single term restitution.[82] In recent Maine Legislation, for example, restitution is simply endowed by definition with all the characteristics of the other concepts discussed above.[83] More typically, restitution is defined as "full or partial payment of damages to a victim,"[84] with occasional variation to include "nominal" payment.[85] Similar definitions include a "sum to be paid by the defendant to the victim of his criminal act to compensate that victim for economic loss,"[86] and, more generally, "the return of the property of the victim or payments in cash or the equivalent thereof."[87]

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[82]"Reparation" was replaced by "restitution" in recent Connecticut Legislation: CONN. GEN. STAT. ANN. s. 53a-30(a)(4) (West 1971) as amended 1978 CONN. PUB. ACTS 78-188, s. 4. A similar revision of an Illinois law deletes reparation from the familiar "restitution or reparation" combination, leaving restitution standing alone, without any apparent intent to alter the scope of the law: ILL. ANN. STAT. ch. 38, s. 1005-6-3(b)(10) (Smith-Hurd 1963) as amended 1977 Ill. Laws 80-711, s. 2.

[83]ME. REV. STAT. ANN. tit. 17-A., ss. 1322(6)(A), (B), (C) (Pamphlet 1978) (restitution means monetary reimbursement, work or service, or any combination to authorized claimants).

[84]IOWA CODE ANN. s. 907.12(1)(d) (West Cum. Supp. 1979); N.M. STAT. ANN. s. 31-17-1(A)(4) (1978); S.D. COMP. LAWS ANN. s. 23A-29-2(4) (Supp. 1978).

[85]MISS. CODE ANN. s. 99-37-1(c) (1978); OR. REV. STAT. s. 137.103(3) (1977).

[86]OKLA. STAT. ANN. tit. 22, ss. 991(a)(1) (West Cum. Supp. 1979).

[87]PA. STAT. ANN. tit. 18, s. 1106(h) (Purdon Cum. Supp. 1979).

Unless otherwise indicated, therefore, restitution will be used hereinafter in the broad form currently popular in the United States, encompassing return or repair of stolen or damaged property by the defendant, or provision by the defendant of monetary value for these and other compensable losses. Further attempts at definition usually involve clarifying the scope of such losses, identifying legally appropriate recipients and establishing other substantive criteria against which to determine the defendant's obligation. Before turning to both the substantive and procedural parameters of restitutive sanctions, however, it is convenient to describe the various contexts in the criminal justice system at which restitution arises.

SYSTEM CONTEXT

Compromise and Settlement: Although instances of informal or 'extra-official' restitution have been reported as commonplace occurrences, especially between shoplifters and storeowners, and thieves and insurance companies,[88] the earliest stage in formal processing at which statutory authorization occurs is in the context of 'compromise and settlement'

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[88] See note, "Restitution and the Criminal Law," supra note 11 at 1191-1205; see also Wolfgang, "Social Responsibility for Violent Behavior," 40 S. Cal. L. Rev. 5 (1970). In Falco Inc. v. Bates, 30 Ill. App. 3d 570, 334 N.E. 2d 169 (1975), the use of police detention to induce an informal settlement by the defendant was strongly disapproved by the appellate court.

of criminal offenses. Such laws typically require formal approval of otherwise informal restitutive settlements between victim and defendant, and are occasionally conceded to be simply a recognition of extensive informal practices for certain offenses, such as passing bad checks or credit cards.[89]

Compromise and settlement, or 'civil compromise' statutes allow dismissal of a case, usually a misdemeanor proseuction,[90] after payment of costs and with the agreement of parties to the offense,[91] the prosecutor and/or the judge.[92] A restitution agreement without such formal sanction may

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[89] OHIO REV. CODE ANN. s. 2921.21(B)(2) (Page 1974) (Committee Comment).

[90] E.g., IDAHO CODE ss. 19-3401 to 19-3403 (1979).

[91] See People v. Strub, 122 Cal. Rptr. 374, 49 C.A. 3d Supp. 1 (1975) (failure to secure acquiescence of injured party to compromise and settlement is grounds for reversing dismissal order); cf. People v. Korn, 217 Mich. 170, 185 N.W. 816 (1921) (state law prohibiting imprisonment of first offender for simple larceny if restitution made is not to be defeated if victim refuses satisfaction; money to be paid into court instead).

[92] E.g., ALASKA STAT. s. 12.45.130 (1972); see also State v. Carr, 160 Wash. 83, 294 P. 1016 (1930) (no abuse of discretion to discontinue prosecution for insufficient funds even though victims agreed to compromise and settle); cf. LA. REV. STAT. ANN. s. 21.24 (West Cum. Supp. 1979) (payment of hotel or restaurant bill after complaint filed is not grounds for dismissal).

itself occasion criminal charges on the separate offense of compounding,[93] if executed in return for a promise not to prosecute or to conceal the original offense.[94] It is an affirmative defense to a charge of compounding in some states, however, if the restitution involved does not exceed an amount reasonably related to the offender's conduct.[95]

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[93]For a discussion of the historical origins of compounding, in the common law crime of "theftbote" (4 BLACKSTONE, COMMENTARIES 133 (Chitty ed., 1826), and its role in asserting priority of interest by the sovereign over the victim in criminal proceedings, see Laster, "Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness," 5 U. Richmond L. Rev. 71 (1970).

[94]E.g., IOWA CODE ANN. s. 720.1 (Special Supp. 1978); cf. People v. Anonymous, 290 N.Y.S. 2d 507 (1968) in which the county court judge was extremely critical of an interrogating detective for holding out to the defendant the false hope that no complaint would be made if any alleged stolen property was returned:

> The making of restitution is a commendable concept in the administration of criminal justice. However, it is to be made subject to and under judicial control and not as part of a bargain to avoid prosecution. Id. at 511.

[95]E.g., S.D. COMP. LAWS ANN. s. 22-11-11 (1978); UTAH CODE ANN. s. 76-8-308 (1977); WASH. REV. CODE ANN. s. 9A.76.100 (1977).

Civil Remedies in Criminal Codes: In addition to the inclusion of civil compromise in penal codes, further merger of the two processes arises in the widespread practice of including provisions concerning a civil remedy in criminal statutes. Laws of this type range in scope, from simply preserving the victim's civil action in addition to the criminal prosecution,[96] to prescribing a civil remedy, either of a particular type[97] or amount,[98] or more usually in the form of multiple damages, costs and attorneys' fees.[99] Civil remedies in penal legislation

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[96]E.g., ALASKA STAT. s. 11.20.600 (1970); IOWA CODE ANN. s. 907.12 (West Cum. Supp. 1979); KY. REV. STAT. ANN. s. 431.200 (Baldwin Supp. 1978); MISS. CODE ANN. s. 99-37-17(1978); TENN. CODE ANN. s. 40-3207 (1978).

[97]E.g., ALASKA STAT. s. 11.40.460 (1970) (trespass action); FLA. STAT. ANN. s. 943.464 (West Cum. Supp. 1979) (punitive damages).

[98]E.g., CAL. PENAL CODE s. 637.2 (West 1970) ($3,000 or treble damages whichever is greater).

[99]Double damages are authorized in: CONN. GEN. STAT. ANN. s. 52-565 (West 1960); IDAHO CODE s. 18-3307 (1979) (in discretion of court); W. VA. CODE ss. 61-3-6 (1977), 61-38-3 (1978). Treble damages appear most frequently: ALASKA STAT. s. 1120.350(9) (1970); ARIZ. REV. STAT. ANN. s. 13-2134 (1978); CAL. PENAL CODE s. 637.2 (West 1970); CONN. GEN. STAT. ANN. s. 52-564 (West 1960); FLA. STAT. ANN. ss. 812.031, 812.035, 943.464 (West Cum. Supp. 1979); GA. CODE ANN. s. 26-1708 (1978); IDAHO CODE s. 56-227B (1978); ILL. ANN. STAT. ch. 38, ss. 28-8, 60-7 (Smith-Hurd 1979); IND. CODE ANN. s. 34-4-30-1 (Burns Cum. Supp. 1979); IOWA CODE ANN. s. 909.4 (1979); MINN. STAT. ANN. s. 609.53 (West Cum. Supp. 1979); S.C. CODE s. 32-1-10 (1976); S.D. COMP. LAWS ANN. s. 22-34-2 (1967); UTAH CODE ANN. s. 76-6-412 (1977); VT. STAT. ANN. tit. 13, s. 3606 (1974); W. VGA. CODE s. 61-3-50 (1977).

are often linked to specific offenses,[100] particularly receiving stolen property.[101] Still other criminal code references to civil remedies deal with the impact of criminal restitution upon civil proceedings.[102]

Civil Remedies and Public Compensation: A number of statutes interweaving both civil and criminal laws that merit particular mention are those authorizing state-funded compensation and related programs for victims of crime.[103] Victim compensation laws commonly include a subrogation clause, such as that found in a Florida statute providing that 'payment of a victim compensation award subrogates to the state the rights of action accruing

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[100] Many statutes of this type are addressed towards white collar or organized crimes: ARIZ. REV. STAT. ANN. s. 13-2134 (1978); FLA. STAT. ANN. s. 943.464 (West Cum. Supp. 1979) (racketeering); CONN. GEN. STAT. ANN. s. 52-565 (West 1960) (forgery, counterfeiting); GA. CODE ANN. s. 26-1708 (Cum. Supp. 1978) (improper solicitation of money by invoice for goods, etc., not ordered); ILL. ANN. STAT. ch. 38, s. 60-7 (Smith-Hurd Cum. Supp. 1979) (antitrust); S.C. CODE s. 32-1-10 (1976) (recovery of gambling losses); W. VGA. CODE s. 61-3-60 (1977) (bootleg recording).

[101] ALASKA STAT. s. 11.20.350(9) (1970); CONN. GEN. STAT. ANN. s. 52.564 (West 1960); FLA. STAT. ANN. s. 812.031 (West Cum. Supp. 1979); MINN. STAT. ANN. s. 609.53 (West Cum. Supp. 1979); UTAH CODE ANN. s.76-6-412 (1977).

[102] E.g., ALASKA STAT. s. 11.20.515 (1977) (criminal restitution does not preclude civil suit, but set off against civil judgment); cf. ME. REV. STAT. tit. 17-A., s. 1327 (Pamphlet 1978) (reasonable value of service restitution by defendant to victim as part of criminal sanction deducted from civil judgment); FLA. STAT. ANN. s. 943.464 (West Cum. Supp. 1979) (final judgment against defendant in criminal action as estoppel for issues decided); MISS. CODE ANN. s. 99-37-17 (Cum. Supp. 1978) (evidence of criminal restitution order not admissible in civil action); cf. S.D. COMP. LAWS ANN. s. 23A-28-9 (Special Supp. 1978) (unless introduced by defendant); cf. MINN. STAT. ANN. s. 299B.14 (West Cum. Supp. 1979) (criminal restitution inadmissible in civil suit, unless state action on victim compensation subrogation).

[103] See Harland, supra note 21.

to the claimant, victim or intervenor resulting from the crime with respect to which the award was made.[104] Amounts recovered in excess of payments by the victim compensation board, minus costs and expenses, are usually payable to the victim.[105] Similar provisions exist in statutes authorizing compensation to 'good samaritans,' persons injured while coming to the aid of crime victims.[106] Further provisions concerning recovery of victim compensation awards directly through criminal sanctions will be discussed below.[107]

One of the most recent ways in which a victim's civil remedy is sought to be preserved and secured through criminal legislation is under the so-called "son-of-Sam" laws.[108] Under these laws, profits that might otherwise go to the accused from the reenactment or popularization of his offense are held in escrow for a fixed period, usually five years;[109] during that time, if the offender is convicted and the victim brings a civil suit, any damages awarded may be paid out of the monies held.[110]

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[104] FLA. STAT. ANN. s. 960.16 (West Cum. Supp. 1979).

[105] E.g., CONN. GEN. STAT. ANN. s. 54-212 (West Cum. Supp. 1979).

[106] E.g., GA. CODE ANN. s. 47-526 (1973); NEV. REV. STAT. s. 217.240 (1977).

[107] Infra at 31-33. See also UTAH CODE ANN. s. 76-3-201(2) (1977) (civil penalty may be included in criminal sentence).

[108] From the name assumed by David Berkowitz, whose crimes were widely known as the Son-of-Sam Killings, and in response to which the New York Law was enacted. N.Y. EXEC. LAW s. 632-9 (Consol. Cum. Supp. 1978).

[109] E.g., IDAHO CODE s. 19-5301 (1979); cf. MASS. GEN. LAWS ANN. ch. 258A, s. 8 (West Cum. Supp. 1979) (three years).

[110] In Florida, the state assumes a lien prior in dignity to all others on the defendant's profits, and the law makes very specific provision for division of the proceeds between the defendant, his dependents, the state, and the victim and his or her dependents. FLA. STAT. ANN. s. 944.512 (West Cum. Supp. 1979).

The laws typically provide for notice to the public of any accounts being held,[111] and the most significant variation among the various statutes is that unexpended proceeds of the account are returned to the offender after the specified period in some states,[112] but forfeited to the general fund[113] or victim compensation fund[114] in others.

Pretrial Restitution: Returning to the more routine processing stages of the criminal justice system, a next level of legislation, after civil compromise, authorizes restitution as a condition of pre-trial diversionary or preadjudicative processing options. In Kansas and Oregon, for example, provisions for restitution are among factors which the prosecutor must consider in determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community.[115]

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[111] In New York, for example, the law calls for publication of a legal notice at least every six months for five years, beginning with the establishment of an account, in counties near the scene of the crime advising victims of the availability of funds to satisfy money judgments.

[112] MASS. GEN. LAWS ANN. ch. 258A, s. 8 (West 1979); N.Y. EXEC. LAW s. 632-9 (Consol. Cum. Supp. 1978).

[113] ARIZ. REV. STAT. ANN. s. 13-4202 (1978).

[114] NEB. REV. STAT. s. 81-1836 (1978).

[115] KAN. CRIM. PROC. CODE ANN. s. 22-2908 (Vernon 1978 Supp.); OR. REV. STAT. s. 135.886 (1977); cf. N.J. STAT. ANN. s. 2C:43-12 (West 1979) (needs and interests of victim to be considered by prosecutors and program directors in decision to divert defendant).

Restitution may be a condition of pre-trial diversion agreements in both states.[116] Similar provision exists in the Pennsylvania Rules of Criminal Procedure governing the conditions of that state's 'accelerated rehabilitation' program,[117] and in Tennessee, where prosecution can be suspended for up to two years upon filing of a 'memorandum of understanding' between the parties.[118]

Closely related to provisions for restitution as a condition of deferred prosecution are laws which allow the defendant to avoid a conviction record in return for payment of restitution. Upon a verdict or plea of guilty, but before entry of judgment, the court under such laws may, with the consent of the defendant, defer further proceedings and place the defendant on probation upon conditions which may include restitution.[119] Successful fulfillment of the conditions of supervision results in expungement of the record,[120] and discharge may follow 'without judgment of conviction, as a final disposition of the matter.'[121]

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[116] KAN. CRIM. PROC. CODE ANN. s. 22-2909 (Vernon 1978 Supp.); OR. REV. STAT. s. 135.891 (1977). For examples of diversion programs using restitution conditions in Michigan and Minnesota, see "An Analysis of Alternatives to Incarceration in Georgia--A Special Research Project," 24 Emory L.J. 1, 153 at n. 417 (1975).

[117] Rule 182 (1972).

[118] TENN. CODE ANN. s. 40-2108 (1978) (no prior felony conviction, and for offenses punishable by confinement of ten years or less).

[119] OKLA. STAT. ANN. tit. 22, s. 991c (West Cum. Supp. 1979); cf. ILL. ANN. STAT. ch. 38 s. 1005-6-3.1 (Smith-Hurd Cum. Supp. 1979) (defendant placed under court supervision and further proceedings deferred).

[120] Ibid.; NEV. REV. STAT. s. 176.225(1)(c) (1977).

[121] MD. ANN. CODE art. 27., s. 641(c) (1978).

Restitution as a condition of probation without verdict has received judicial approval,[122] and has led to an interesting distinction between restitution and other financial dispositions:

> It is our opinion that a monetary fine, penalty or charge payable to the State may only be imposed upon an accused if there is a finding of guilt . . . . This does not mean, however, that the payment of money by way of restitution may not, in proper cases, be imposed as a condition of probation without finding a verdict. Such a requirement is to be distinguished from a fine or penalty payable to the State as punishment for the commission of a crime, and is in the nature of reparations or redress to make whole persons who have been injured by the accused's conduct. As such, it is not punitive, and is not, like a fine, consistent only with a criminal conviction.[123]

Restitution at Sentencing: Following conviction, sentencing courts are empowered to pursue restitution under a wide variety of statutory options. Legislative preference for restitution as a condition of probation is more

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[122] See Stevens v. State, 34 Md. App. 164, 366 A.2d 414 (1976); Commissioner of Motor Vehicles v. Lee, 254 Md. 279, 255 A.2d 44 (1969).

[123] Commissioner of Motor Vehicles v. Lee, supra 255 A.2d at 48. See also VAN DEN HAAG, PUNISHING CRIMINALS 17 (1975) (restitution is independent of punishment and cannot replace it).

pronounced by far than in connection with other dispositional alternatives anywhere in the criminal justice system. Most typically, restitution is included among a general listing of probation conditions from which the judge may,[124] shall,[125] or must[126] include restitution in a probation order. Beyond these provisions among the general conditions of probation, many states have more recently enacted supplementary laws adding emphasis to the power of the court to require restitution in conjunction with a probation order. Although a large majority of these additional probation laws

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[124] 18 U.S.C. s. 3651 (1970); ALA. CODE tit. 15, s. 22-52(8) (1975); ALASKA STAT. s. 12.55.100(a)(2) (1972); ARK. STAT. ANN. s. 41-1203(2)(h) (1977); CAL. PENAL CODE s. 1203.1 (West 1970) (as amended, West Cum. Supp. 1979); COLO. REV. STAT. s. 16-11-204(2)(e) (1978); CONN. GEN. STAT. ANN. s. 53a-30(a)(4) (West 1971, as amended, West Cum. Supp. 1979); GA. CODE ANN. s. 27-2711 (1972); HAW. REV. STAT. s. 706-624(2)(h) (1976); ILL. ANN. STAT. ch. 38 s. 1005-6-3(b)(10) (Smith-Hurd Cum. Supp. 1979); IND. CODE ANN. s. 35-7-2-1(a)(5) (Burns 1979); KAN. CRIM. PROC. CODE ANN. s. 21-4610(h), (n) (Vernon 1978 Supp.);KEY. REV. STAT. ANN. s.533.30(2)(d) (Baldwin 1975); LA. CODE CRIM. PRO. ANN. art. 895(A)(7) (West Cum. Supp. 1979); ME. REV. STAT. tit. 17-A s. 1204(2)(B) (Pamphlet 1978);MD. ANN. CODE art. 27, s. 641(a)(1) (1978); MICH. COMP. LAWS ANN. s. 771.3(3) (1970) (as amended, 1978 Mich. Pub. Acts., P.A.77); MINN. STAT. ANN. s. 609.135(1) (West 1979); NEB. REV. STAT. ss. 22-219(j) (1978) (municipal court), 22-2262(j) (1975); NEV. REV. STAT. s. 176.185(3) (1977); N.J. STAT. ANN. s. 2C:45-1(b)(8) (West 1979); N.M. STAT. ANN. s. 31-20-6 (1978); N.Y. PENAL LAW s. 65.10(2)(f) (Consol. 1977) (as amended, Consol. Cum. Supp. 1978); N.C. GEN. STAT. s. 15A-1343(b)(6)(d) (1977) (as amended 1977 N.C. Sess. Laws, ch. 1147, S.B. 986); N.D. CENT. CODE s. 12.1-32-07 (1976); OHIO REV. CODE ANN. s. 2951.02(c) (Page 1974); OKLA. STAT. ANN. tit. 22, s. 991a(1)(a) (West Cum. Supp. 1979); OR. REV. STAT. s. 137.109(1)(j) (1977); PA. STAT. ANN. tit. 18 s. 1354(c)(8) (Purdon Cum. Supp. 1979-80); TEX. CODE CRIM. PROC. ANN. art. 42.12, s. 6(h) (Vernon, 1979); UTAH CODE ANN. s. 77-35-17 (1953); VT. STAT. ANN. tit. 28 s. 252(b)(5) (1978); VA. CODE s. 19.2-305 (1978); WASH. REV. CODE ANN. s. 9.95.210(2) (1977) (as amended 1979 Wash. Legis. Serv., ch. 29, S.B. 2417); W. VA. CODE s. 62-12-9(i) (1977).

[125] ARIZ. REV. STAT. ANN. s. 13-9-1(A), (F) (1978).

[126] TEX. CODE CRIM. PROC. ANN. art. 42.13, s. 5(b)(8) (Vernon 1979) (misdemeanor probation).

simply state or restate the court's discretionary power to order restitution,[127] usually as a preliminary to procedural refinements,[128] some are more emphatic in requiring that the judge "shall" order restitution under certain circumstances.[129] Further provisions exist which make restitution or the likelihood of restitution a criterion to be weighed in the decision whether to grant probation at all.[130] Recognizing the potentially discriminatory results of the latter type of decision-process, a recent Maine statute specifically states that: "The Legislature does not intend the use of restitution to result in preferential treatment

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[127] ARK. STAT. ANN. s. 43-2331 (1977); FLA. STAT. ANN. s. 775.089(1) (West Cum. Supp. 1979); KAN. CRIM. PROC. CODE ANN. s. 21-4603(2)(c) (Vernon 1978); LA. CODE CRIM. PROC. ANN. art. 895.1 (West Cum. Supp. 1979); ME. REV. STAT. tit. 17-A., s. 1152 (1979), ss. 1204(B), 1323 (Pamphet 1978); MISS. CODE ANN. ss. 47-7-47(1)(4), 99-37-5(2) (1978); NEV. REV. STAT. s. 176.189(1) (1977); N.J. STAT. ANN. s. 2C:43-2(b)(4) (West 1979); OR. REV. STAT. s. 161.675(2) (1977); PA. STAT. ANN. tit. 18 s. 1106(b) (Purdon Cum. Supp. 1979); S.D. COMP. LAWS ANN. ss. 23A-28-3.7 (Special Supp. 1978); VA. CODE s. 19.2-305.1(B) (1978).

[128] See 'Imposition Procedures' and 'Enforcement Provisions' infra at 90 ff.

[129] ARIZ. REV. STAT. ANN. s. 13-603(c) (1978) (if court imposes probation it shall require restitution after consideration of victim's loss and defendant's economic circumstances); IOWA CODE ANN. s. 907.12(3) (West Cum. Supp. 1979) (court shall require as condition of probation that defendant and probation officer prepare restitution plan).

[130] ARK. STAT. ANN. s. 41-1201(1)(d), (2) (1977); CALIF. CRIM. CT. R. 414; COL. REV. STAT. s. 16-11-203 (1978); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(6) (West Cum. Supp. 1979); OHIO REV. CODE ANN. s. 2951.02(B)(9) (Page Supp. 1978); PA. STAT. ANN. tit. 18 s. 1322(6) (Purdon Cum. Supp. 1979); S.C. CODE s. 17-25-125 (1978); cf. Garski v. State, 75 Wis. 2d 62, 248 N.W. 2d 425 (1977) (restitution, as it may relate to rehabilitation, is a proper consideration in reaching decision to impose probation).

for offenders with substantial financial resources."[131]

A specialized way in which the union of probation and restitution has been authorized most recently has been in connection with restitution to the state. Although isolated instances appear of 'restitution' to society,[132] a county,[133] or the court,[134] and more general provisions exist to cover situations in which the state is itself a victim of, for example, welfare fraud,[135] the most systematic approach in recent years involves attempts to recover monies paid out by the state as victim compensation awards. In addition to the civil subrogation provisions already mentioned, many states also allow recovery of victim compensation awards from the defendant through the criminal sanctioning process. One approach has been to declare any compensation paid to the victim to

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[131] ME. REV. STAT. tit. 17-A., s. 1321 (Pamphlet 1978).

[132] MISS. CODE ANN. s. 47-7-47(1)(4) (1978) (performance of work for community).

[133] ME. REV. STAT. tit. 17-A., s. 1204(B) (Pamphlet 1978) (if victim not found or refuses restitution).

[134] LA. CODE CRIM. PROC. ANN. art. 895.1 (West Cum. Supp. 1979) (restitution to defray cost of court operation).

[135] Restitution of welfare payments is usually included in separate welfare codes; see, e.g., ARIZ. REV. STAT. ANN. s. 46-213 (1979); but cf. MD. ANN. CODE art. 27, s. 230c (1978) (restitution in criminal sentence for medicaid fraud).

be a "debt" owed to the state by the defendant, the amount of the award being usually recoverable as a condition of probation.[136]

Statutory provisions for repayment of actual compensation awards to the state are readily distinguishable from other measures requiring defendants, in general, to pay a fine, 'tax,' forfeiture, or surcharge into the state's victim compensation or indemnity account.[137] Penalties of this latter type range from a fixed fine to an amount based on a percentage of fines,[138] and include laws such as a Delaware provision for a fine 'commensurate with the malice or harm to the victim.'[139] A particularly

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[136] FLA. STAT. ANN. s. 960.17 (West Cum. Supp. 1979) (debt enforceable as condition of probation or parole); accord KY. REV. STAT. ANN. s. 346.180 (Baldwin 1977); cf. WASH. REV. CODE ANN. s. 7.68.120 (1978) (debt enforceable as court order, work release or parole condition). Other provisions for recovery of victim compensation awards do not use the term "debt": CAL. PENAL CODE ss. 1203, 1203.1 (West 1970)(as amended, West Cum. Supp. 1979)(probation); MICH. COMP. LAWS ANN. s. 17.362 (Supp. Pamphlet 1978) (probation); MONT. REV. CODES ANN. s. 71-2621 (1977) (probation and parole); NEB. REV. STAT. s. 81-1828 (inmate wages); PA. STAT. ANN. tit. 71 s. 180-7.13 (Purdon Cum. Supp. 1979) (probation).

[137] CAL. GOV'T CODE s. 13967 (West Cum. Supp. 1979) (see infra 33, text at note 140); DEL. CODE ANN. tit. 11, ss. 9011, 9014 (1978) (10% of fines or fine commensurate with malice or harm to victim); FLA. STAT. ANN. s. 775.0835 (West Cum. Supp. 1979) (fine plus 5% surcharge); MD. ANN. CODE art. 26A., s. 17 (1978) ($10 fine, to general fund); OHIO REV. CODE ANN. s. 2743.72 (Page Supp. 1978) ($3 fine, excluding traffic offenses); TENN. CODE ANN. s. 40-3207 (1978) ($21 tax on conviction or 10% of prison or parole earnings), s. 41-2406 (remainder of inmate earnings after other deductions); VA. CODE s. 192-368.18 (1978) ($10 for specified offenses); WASH. REV. CODE ANN. s. 7.68.035 (1978) ($25 penalty or bail forfeiture, or 10% of any other penalty or fine, whichever greater).

[138] Id.; cf. IND. CODE ANN. s. 35-9-3-1 (Burns 1979) ($5 fine to humane society for cruelty to animals conviction).

[139] DEL. CODE ANN. tit. 11, s. 9014 (1978).

interesting example of this latter approach is a California law requiring fines to the victim fund of $5 for a misdemeanor, $10 for a felony, and allowing fines up to $10,000 for violent crimes with injury, commensurate with the offense and the probable impact on the victim.[140] An Oklahoma law further provides for a processing fee to be imposed upon defendants ordered to pay restitution.[141]

In addition to the statutes reviewed thus far authorizing restitution in connection with probation and/or victim compensation laws, restitution provisions exist less commonly among the general conditions of a suspended sentence[142] or conditional discharge.[143] More specific

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[140] CAL. GOV'T CODE s. 13967 (West Cum. Supp. 1979).

[141] OKLA. STAT. ANN. tit. 22 s. 991(d) (West Cum. Supp. 1979) ($1 fee if restitution ordered, and $10 probation fee to state probation and parole fund).

[142] ARK. STAT. ANN. ss. 41-1201(1)(d), 1203(2)(h) (1977); KAN. STAT. ANN. ss. 21-4603(2)(d), 4610(h) (Vernon 1978 Supp.); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(6) (West Cum. Supp. 1979); MICH. COMP. LAWS ANN. s. 18.362 (Special Pamphlet 1978) (repayment of victim compensation award); NEV. REV. STAT. s. 176.189(1) (1977); N.J. STAT. ANN. s. 2C:45-1(b)(8) (West 1979); N.M. STAT. ANN. s. 31-17-1 (1978); OKLA. STAT. ANN. s. 991a(1)(a) (West Cum. Supp. 1979); OR. REV. STAT. s. 161.675(2) (1977); S.D. COMP. LAWS s. 23A-28-3 (Special Supp. 1978).

[143] CONN. GEN. STAT. ANN. s. 53a-30(a)(4) (West Cum. Supp. 1979); ILL. ANN. STAT. ch. 38 s. 1005-6-3(10) (Smith-Hurd Cum. Supp. 1979); KY. REV. STAT. ANN. s. 533.30(d) (Baldwin 1975); N.Y. PENAL LAW s. 65.10(2)(F) (Consol. Cum. Supp. 1978).

provisions allow or require the court to impose restitution for particular types of offense or harm.[144] Further explicit power is granted to judges to require restitution simply as part of an active sentence, either in lieu of a fine,[145] or, more often in addition to a fine and/or

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[144]ALASKA STAT. s. 11.20.135(e) (1970) (suspended sentence condition for unauthorized use of property), s. 11.20.515(a) (1977) (added to penalty for malicious mischief and property destruction), s. 11.20.575 (1977) (added to penalty for malicious destruction of property by tenant), s. 11.30.215(b) (1978) (added to penalty for false report to peace officer), s. 11.45.050(b) (1970) (added to penalty for false alarm to fire fighting or ambulance operators); CAL. PENAL CODE s. 594.5(b) (West Cum. Supp. 1979) (probation condition for defacing property), s. 1202.5(a) (West Cum. Supp. 1979) (required probation condition for pecuniary loss due to vehicle theft); KY. REV. STAT. ANN. s. 431.200 (Baldwin Supp. 1978) (added to penalty for taking, injuring, or destroying property); LA. REV. STAT. ANN. s. 14:71 (West Cum. Supp. 1979) (added to penalty for worthless check offense); ME. REV. STAT. tit. 17, s. 3853-B (1979) (added to fine for trespass of animals); MD. ANN. CODE art. 27, s. 29 (1957) (added to incarceration for burglary or accessory before fact), ss. 33,33A (1957) (added to penalty for breaking into specified premises), s. 143(c)(1), (1957)(2) (added to penalty for passing bad check), ss. 340, 341 (1978) (required in addition to penalty for larceny), s. 342(F((1) (1978) (required in addition to penalty for theft over $300), s. 466 (1978) (added to penalty for receiving stolen goods); MINN. STAT. ANN. s. 609.535 (West Cum. Supp. 1979) (added to penalty for passing worthless check); N.J. STAT. ANN. s. 214:93-5.1 (West Cum. Supp. 1979) (added to fine for bribery or corruption); PA. STAT. ANN. tit. 62 s. 481 (Purdon Cum. Supp. 1979) (added to penalty for welfare fraud), tit. 73, s. 201-4.1 (Purdon Cum. Supp. 1979) (added to penalty for consumer fraud); S.C. CODE s. 22-3-800 (1978) (required condition of suspended sentence for check fraud); TENN. CODE ANN. s. 40-2716 (1975) (required sentence for stealing, receiving, defrauding).

[145]WASH. REV. CODE ANN. s. 9A.20.030(1) (1977).

incarceration.[146] In Arizona, all or any portions of any fine may itself be allocated as restitution to the victim,[147] and several states give statutory priority to restitution over fines.[148]

The distinction between restitution as a sentence as opposed to a condition of probation or suspended sentence is important in several respects. First the alternatives in the event of default in payment are quite different, consisting of contempt proceedings in the former and revocation and imposition of sentence under the latter types of disposition.[149]

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[146]ARIZ. REV. STAT. ANN. s. 13-807(A) (1978); FLA. STAT. ANN. s. 775.089(1) (West Cum. Supp. 1979); HAW. REV. STAT. s. 706-605(1)(e) (1976) as amended Supp. 1978; ILL. ANN. STAT. ch. 38 ss. 1005-5-3(b)(6), (c)(2), (c)(j)(c) (Smith-Hurd Cum. Supp. 1979); KY. REV. STAT. ANN. s. 431.200 (Baldwin Supp. 1978); ME. REV. STAT. ANN. s. 1152 (1979), ss. 1252, 1323 (Pamphlet 1978); MINN. STAT. ANN. s. 244.09 (West Cum. Supp. 1979); MISS. CODE ANN. s. 99-37-3 (1978); MO. ANN. STAT. ss. 546.630, 640 (Vernon 1962); N.J. STAT. ANN. ss. 2C:43-3, 44-2 (West 1979) OHIO REV. CODE s. 2929.11 (Page Supp. 1978); OR. REV. STAT. s. 137.106 (1977); PA. STAT. ANN. tit. 18, ss. 1106, 1321 (Purdon Cum. Supp. 1979).

[147]ARIZ. REV. STAT. ANN. s. 14-903(A) (1978).

[148]Ibid.; HAW. REV. STAT. s. 706.641(1) (1978); ILL. ANN. STAT. ch. 38, s. 1005-9-1(c)(2) (Smith-Hurd 1973); KY. REV. STAT. ANN. s. 534.030(1)(c) (Baldwin 1975); N.J. STAT. ANN. s. 2C:44-2(b) (West 1979); OHIO REV. CODE ANN. ss. 2929.12(F) (Page 1974) as amended, Page Supp. 1978; see also standards set by Model Penal Code and other 'model' standards supra note 12.

[149]Further discussion of enforcement provisions in general is presented infra at 124 ff.

Second, although restitution has been upheld without explicit statutory authorization, under the general probation powers of the court,[150] it has repeatedly been ruled that a sentence of restitution is impermissible in the absence of such authority.[151]

Thus, in the case of Garski v. State,[152] the Supreme Court of Wisconsin ruled that where the defendant was sentenced to prison on three charges and placed on probation for a fourth, the trial court had no authority to impose as a condition of the probation that he make restitution for the imprisonment offenses:

> [W]hen the legislature specifically sets forth the penalty for a given offense, trial courts will not be allowed to exceed that penalty by placing any further added conditions on it. The trial court, upon a defendant's conviction, has to decide whether to sentence the defendant or place him on probation . . . . If probation is not imposed for a given offense, there can be no conditions requiring restitution.[153]

Similarly, in an earlier Wisconsin case, Spannuth v. State,[154]

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[150] See cases cited supra note 8; cf. State v. Simmington, 235 N.C. 612, 70 S.E.2d 842 (1952) (while court had no jurisdiction to compel defendant to pay damages on penalty of imprisonment, it could do so on suspension of sentence of imprisonment).

[151] See cases supra note 7. See also Bunting v. State, 361 So.2d 810 (Fla. App. 1978).

[152] 75 Wis.2d 62, 248 N.W.2d 425 (1977).

[153] Id. at 248 N.W.2d 432.

[154] 70 Wis.2d 362,234 N.W.2d 79 (1975).

in striking down a restitution order added to an eight year prison term, the court ruled that:

> No statute, however, allows the trial court to impose any other conditions, no matter how 'reasonable and appropriate' they appear, when the statutory penalty rather than probation is chosen. The evident purpose of the legislature is that each defined crime would have a proscribed maximum punishment, which may not be exceeded by the courts of this state. It is a well established proposition in our system of separate branches of government that the authority to punish is a matter for the legislature.[155]

The reasoning in both the Spannuth and Garski decisions can be limited to the narrow finding that explicit statutory authority existed for restitution as a condition of probation but not as a condition of sentence.[156] A much broader line of argument to support the different power to order restitution as a sentence as opposed to a condition of probation, however, is illustrated in a recent case from Pennsylvania, Commonwealth v. Walton:[157]

> Although we have indicated that an order placing a defendant on probation must be regarded as punishment for double jeopardy purposes, there is, in our view, a significant distinction between restitution required in addition to a statutory punishment, such as imprisonment, and restitution required in lieu of such punishment. While such an order must be strictly scrutinized in conjunction with a primarily punitive sentence, conditions of probation, though significant restrictions on the offender's freedom, are primarily aimed at effecting, as a constructive alternative to imprisonment, his rehabilitation

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[155] Id. at 234 N.W.2d 81 (emphasis added).

[156] But see note 160 infra.

[157] 397 A.2d 1179 (Pa. 1979).

> and reintegration into society as a law abiding citizen; courts therefore are traditionally and properly invested with a broader measure of discretion in fashioning conditions of probation . . . .[158]

The idea that restitution in a probation context is a primarily rehabilitative approach is often relied upon to support its use without explicit statutory authority,[159] not only for offenses of which the defendant is convicted but also for offenses for which charges have been dismissed or never filed, and even for charges of which the defendant has been acquitted;[160] similar reasoning is also frequently relied upon by judges to dispense with many due process "technicalities" when imposing restitution as a condition of probation.[161] The notion that a defendant is avoiding the usual penalty for his crime by paying restitution, moreover, is given particular credence by many courts.[162]

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[158] Id. at 1184; cf. People v. Verdich, 44 Ill. App. 3d 737, 358 N.E. 920 (1976) (rule that restitution only permissible as condition of probation or conditional discharge, not in addition to sentence of imprisonment for misdemeanor, applies equally in case of sentence to pay fine). See also People v. Ondrey, 32 Ill. App. 3d 73, 335 N.E. 2d 531 (1975) (restitution may not be ordered in addition to sentence of imprisonment for misdemeanor).

[159] See cases cited supra notes 8 and 157.

[160] The court in Garski, for example, saw no logical inconsistency in permitting restitution for dismissed charges, while denying it for offenses for which the defendant was sentenced. Supra note 153. For further discussion of restitution for non-conviction offenses, see infra at 55 ff.

[161] See the discussion of restitution and rehabilitation, infra 151 ff.

[162] Commonwealth v. Walton, 397 A.2d 1179 (Pa. 1979); People v. Williams, 57 Mich. App. 439, 225 N.W.2d 798 (1975); State v. Simmington, 235 N.C. 612, 70 S.E.2d 842 (1952).

Consequently, it clearly represents an important empirical question to identify what the 'usual penalty' is in any given jurisdiction, and especially whether restitution is or is not 'a constructive alternative to imprisonment.'[163] Parenthetically it may be noted that restitution has met with judicial approval in conjunction with a primarily punitive sanction, jail, when ordered as part of a split sentence of jail as a condition of probation, followed by a period of more usual probation supervision in the community.[164]

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[163] Providing just such a constructive alternative to incarceration has been the stated goal of many advocates of restitution, and forms the primary motivating factor behind LEAA's large investment in restitution programming. Infra 151 ff.

[164] People v. McCue, 48 Ill. App. 3d 41, 362 N.E. 2d 760 (1977); see also statutes cited infra at note 174; see also People v. Ondrey, 32 Ill. App. 3d 73, 335 N.E. 2d 531 (1975).

One last way in which restitution has been introduced into criminal sentencing proceedings is as a factor to be considered in possible mitigation of punishment. Although it is well established in a long line of cases that restitution will not exonerate a defendant from criminal liability,[165] courts have usually considered such action as a factor in mitigation of sentence.[166] Several statutory provisions explicitly approve the general practice of allowing mitigation of punishment, if the defendant has made or will make restitution;[167]

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[165] See, e.g., Savitt v. United States, 59 F.2d 541 (C.C.A.N.J. 1932) (restitution or attempted restitution does not nullify or excuse previous crime); accord State v. Odom, 86 N.M. 761, 527 P.2d 802 (1974); People v. Porter, 99 C.A.2d 506, 222 P.2d 151 (1950) (offer of restitution or restitution itself is not defense to insufficient funds prosecution); Mueller v. State, 208 Wis. 550, 243 N.W. 411 (1932) (defendant guilty of embezzlement even though funds restored before wrongful conversion discovered); State v. Adams, 144 Wash. 363, 258 P. 23 (1927) (partial or complete restitution is not defense to larceny prosecution); cf. LA. REV. STAT. ANN. s. 21.24 (West Cum. Supp. 1979) (payment of hotel or restaurant bill after complaint filed is not grounds for dismissal).

[166] See e.g., State v. Joseph, 20 Ariz. App. 70, 510 P.2d 69 (1973); People v. Costello, 107 C.A.2d 514, 237 P.2d 281 (1951); People v. Delay, 8 O.C. 52, 22 P. 90 (1889); but see State v. McKay, 15 Ariz. App. 417, 489 P.2d 80 (1971) (intended restoration is not to be considered in mitigation if no actual restoration prior to filing of criminal complaint).

[167] CAL. R. CRIM. CT. 423; ILL. ANN. STAT. ch. 38, s. 1005-5-3.1(a)(6) (Smith-Hurd Cum. Supp. 1979); IND. CODE ANN. s. 35-4.1-4-7(b)(9) (Burns Cum. Supp. 1979); N.J. STAT. ANN. s. 2C:44-1(b)(6) (West 1979).

others apply only to specific offenses, such as embezzlements in which restitution is made before charges are brought or an information is filed.[168] In Florida, the court may consider any degree of restitution as a mitigating factor, but only when sentencing for an offense which does not involve injury or opportunity for injury to persons.[169]

In addition to legislative provisions making restitution a general consideration in mitigation of sentence, it is sometimes considered a factor specifically to be weighed in fixing minimum prison terms.[170]

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[168] CAL. PENAL CODE ss. 512, 513 (West 1970); accord IDAHO CODE ss. 18-2411, 2412 (1979); S.D. COMP. LAWS ANN. s. 22-30A-10.1 (1978).

[169] FLA. STAT. ANN. s. 921.185 (West Cum. Supp. 1979).

[170] KAN. CRIM. PROC. CODE ANN. s. 21-4606(2)(g) (Vernon 1974); cf. ILL. ANN. STAT. ch. 38, s. 100-3-2.1(e)(4) (Smith-Hurd Cum. Supp. 1979) (restitution to be considered by Prisoner Review Board in setting inmate's release date). See also ME. REV. STAT. tit. 17-A., s. 1252(3) (Pamphlet 1978) (whether inmate has complied with court-ordered restitution is to be considered by corrections authority in administrative decisions about inmate).

In Massachusetts, moreover, for a first offense of buying or receiving stolen goods, restitution acts as an absolute bar to an otherwise permissible sentence of up to five years imprisonment.[171] The idea that restitution may mitigate a sentence so much as to induce a judge to refrain from incarcerating a particular defendant, however, is encountered much less frequently in either law or practice than in the general literature on restitution.[172]

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[171] MASS. GEN. LAWS ANN. ch. 266, s. 361 (West 1970); cf. People v. Korn, 217 Mich. 170, 185 N.W. 817 (1921) (first offender receiving stolen property where larceny is simply, not aggravated, shall not be imprisoned if he shall make restitution to the party injured). But cf. Hill v. State, 89 Tex. Crim. 450, 230 S.W. 1005 (1921) (defendant caught in possession of stolen property is not within state law limiting fine to $1,000 if property returned within reasonable time before commencement of prosecution).

[172] But see statutes discussed supra at 30, text at note 130, making restitution a factor to be considered in whether or not to suspend sentence and place a defendant on probation. See also the review of restitution in Harland, Warren and Brown, supra note 37. Extended discussion of restitution as an alternative to incarceration is taken up infra at 151 in the broader context of the various rationales that have been suggested in support of restitutive sanctions.

Restitution and Incarceration: Statutory provisions and case-law dealing with the imposition of restitution in conjunction with incarceration are far less common than those applying when the defendant remains under the jurisdiction of the courts. The combination of restitution and confinement has been restricted by less widespread statutory authorization for courts to sentence defendants to both sanctions,[173] other than as a probation condition of a split sentence as noted earlier.[174] Lack of legislative authority was noted, for example, in a recent New Jersey case, State v. Wright:[175]

> While restitution of monies unlawfully obtained is specifically authorized as a condition of probation . . . we know of no comparable authority whereby this requirement may be imposed as part of a custodial sentence. The design of penalities for crime is a legislative and not a judicial function and authority to impose punishment must be found in statutory law.[176]

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[173] See cases cited supra, notes 7, 151-160; see also State v. Wright, infra text at note 175.

[174] Supra, text at note 164. Explicit statutory authorization for restitution as a condition of split-sentence probation is contained in MISS. CODE ANN. ss. 47-7-47(1), (4) (1978); accord VA. CODE s. 19.2-305.1(B) (1978); cf. COLO. REV. STAT. s. 16-11-212 (1978) (restitution as condition of probation in work release facility); TEX. CODE CRIM. PROC. ANN. art. 52.03, s. 5(b) (Vernon 1979) (restitution as condition of periodic incarceration during off-work hours and weekends). For description of a program employing community service as restitution in this latter context in Florida, see Macri, "Off Days Sentencing Program," in OFFENDER RESTITUTION IN THEORY AND ACTION, supra note 30.

[175] 156 N.J. Super. 559, 384 A.2d 199 (1978).

[176] Id. 384 A.2d at 201. Compare the cases discussed supra text at notes 151-160.

Similarly, the extent to which judges have considered restitution and incapacitation as mutually exclusive alternatives is suggested in a dissenting opinion to Commonwealth v. Walton:[177]

> Trial judges should realize that jail serves a function of putting a criminal in a position of not being able to do violence to the free citizens of this Commonwealth. As to the trial judge's attempted "rehabilitation" and "slight atonement" [through probation and restitution] . . . I will opt for the citizen's safety.[178]

In recent years, however, the de facto incompatibility of restitution and imprisonment[179] has been the subject of growing criticism and demands for change. In their review of restitution programs, for example, Chesney, Hudson and McLagen[180] observe that:

> The failure to make restitution programs part of the prison program is a major shortcoming of these programs. The idea that inmates could work in prison at comparable

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[177] 397 A.2d 1179 (1979).

[178] Id. at 1186.

[179] Statutory recognition of the minimal earning opportunities for prison inmates appears in a Mississippi law providing that an order of restitution is not enforceable during the period of imprisonment unless the court finds that the defendant has sufficient assets at the time of sentencing. MISS. CODE ANN. s. 99-37-5(1) (1978); accord OR. REV. STAT. s. 161.675(1) (1977); cf. FLA. STAT. ANN. s. 944.485(1)(a), (b) (West Cum. Supp. 1979) inmates must declare outside income and assets prior to parole eligibility, to contribute to subsistence costs in amount based on ability to pay and obligation to victim).

[180] "A New Look at Restitution: Recent Legislation, Programs and Research," 61 Judicature 348 (1978).

> jobs and payment to the free world is an old idea and its advocates include Norval Morris, David Fogel and others. The notion that inmates could make restitution from such earnings has been endorsed by a host of writers.
>
> But we were unable to identify one prison in the country in which the notion has been put into practice. Various state and federal laws restrict the sale of inmate produced goods within state and prohibit shipment in interstate commerce; such laws seriously reduce the viability of prison enterprises. What we need is a new commitment to the idea that prison inmates should be gainfully employed in work situations comparable to the free world, new legislation removing the legal barriers, and the cultivation of industrial projects suitable to work environments in prisons.[181]

Similarly, Barnett[182] has proposed a scheme akin to one advocated in 1965 by Smith,[183] whereby the length of time an offender would be imprisoned could be assessed according to success in paying restitution to the victim.

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[181] Id. at 354 (footnotes omitted).

[182] ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS (R. Barnett and J. Hagel eds. 1977).

[183] KATHLEEN J. SMITH, A CURE FOR CRIME: THE CASE FOR THE SELF-DETERMINATE PRISON SENTENCE (Duckworth & Co. Ltd.: London 1965). Smith's proposal was, in turn, foreshadowed by the writings of Herbert Spencer; see "Prison Ethics," in his "Essays: Scientific, Political, and Speculative," Vol. 3, 165-171, 178-189 (1892), reprinted in Hudson and Galaway (eds.), CONSIDERING THE VICTIM, supra note 29 at 71.

In response to exhortations such as these, and undoubtedly influenced by the widespread favorable publicity attracted by early experiments with restitution in correctional settings,[184] several states have passed laws in the last few years, granting extensive authority to courts and correctional authorities to pursue restitution through correctional industries[185] or to establish specialized 'restitution industries,'[186] 'restitution programs,'[187] and 'restitution centers.'[188]

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[184] See discussion of the Minnesota and Georgia restitution centers, in Harland, Warren and Brown, supra note 172.

[185] ARIZ. REV. STAT. ANN. s. 41-1622 (1979); OKLA. STAT. ANN. tit. 57, s. 549(5) (West Cum. Supp. 1979).

[186] LA. REV. STAT. ANN. s. 15:840.2 (West Cum. Supp. 1979); TENN. CODE ANN. ss. 41-2401 to 41-2407 (1978).

[187] COLO. REV. STAT. s. 17-27-102 (1978); KAN. STAT. s. 75-522(b)(1) ((1978 Supp.); ME. REV. STAT. tit. 34, s. 527 (1978); MINN. STAT. ANN. s. 299 B.13 (West Cum. Supp. 1979); MISS. CODE ANN. s. 99-37-21(b) (1978); TENN. CODE ANN. s. 41-2309 (1978).

[188] MISS. CODE ANN. s. 99-37-19 (1978); TENN. CODE ANN. ss. 41-2301 to 41-2309 (1978). Neither provision provides a definition of what is meant by a restitution center; although the Tennessee law specifies that it may be within or outside the prison bounds in an existing facility. It seems likely that the lack of further explanation is due to the well-publicized community residential restitution center in Minnesota and the restitution shelters in Georgia which in all probability strongly influenced the Mississippi and Tennessee legislators. For discussion of both the Minnesota and Georgia experiences, see Harland, Warren and Brown, supra note 172.

In more routine and familiar correctional settings restitution is authorized from regular prison-labor income,[189] work release[190] and parole[191] earnings, and in conjunction with community correctional placements[192] other than the centers just mentioned. Lastly, provision is made in Utah legislation so that inmates may be held accountable in restitution for any damages caused by them during their period of confinement.[193]

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[189] ARIZ. REV. STAT. ANN. s. 31-254(B)(2) (1979); FLA. STAT. ANN. ss. 944.49(1)(b), 945.091(5)(a) (West Cum. Supp. 1979); MD. ANN. CODE art. 27, s. 645M(a)(3) (1957); NEB. REV. STAT. s. 81-1829(1),(2) (1978) (victim compensation repayment); accord TENN. CODE ANN. s. 40-3207 (1978).

[190] ARK. STAT. ANN. ss. 46-117(c), 46-423(c) (1977) (penitentiary and jail, respectively); ARIZ. REV. STAT. ANN. s. 334(B) (1976); COLO. REV. STAT. ss. 16-11-212(2), 17-26-128(5)(a) (1978); ME. REV. STAT. tit. 17-A., s. 1223 (Pamphlet 1978), tit. 34, ss. 527, 1007 (1978); MD. ANN. CODE art. 27, ss. 645W(c), 700A(c), (1957) (jail and prison, respectively); MISS. CODE ANN. ss. 47-5-161(1), (2), 99-37-15 (1978); N.C. GEN. STAT. ss. 148-33.1(F)(3a), 148-33.2 (1977); N.D. CENT. CODE s. 12-48.1-03 (1976); VT. STAT. ANN. tit. 28, s. 755(a)(2)(B) (1978); WASH. REV. CODE ANN. s. 7.68.120(2) (1978) (victim compensation repayment); WYO. STAT. s. 7-378.8(a)(iv) (1975).

[191] ALA. CODE tit. 15 s. 22-29 (1975); COLO. REV. STAT. s. 17-2-201(5)(b) (1978); FLA. STAT. ANN. ss. 947.18, 960.17(3) (victim compensation repayment), 947.181, 947.20 (West Cum. Supp. 1979); GA. CODE ANN. ss. 77.517 (1973); KY. REV. STAT. ANN. s. 346.180(3) (Baldwin 1977) (victim compensation repayment); ME. REV. STAT. tit. 17-A., s. 1223 (Pamphlet 1978), tit. 34, s. 1522 (1978); MISS. CODE ANN. s. 99-37-15 (1978); MONT. REV. CODES ANN. s. 71-2621(2) (1977) (victim compensation repayment); NEV. REV. STAT. s. 213.126(1) (1977); N.J. STAT. ANN. s. 30:4-123.6 (West 1964); N.M. STAT. ANN. s. 31-17-1(B) (West 1978); N.C. GEN. STAT. s. 148-57.1 (1977); OR. REV. STAT. s. 144.275 (1977); TENN. CODE ANN. s. 40-3207 (1978) (victim compensation repayment); TEX. CODE CRIM. PROC. ANN. art. 42.12, ss. 15(P), (g) (Vernon 1979) (parole and mandatory supervision condition); WASH. REV. CODE ANN. s. 7.68.120(s) (1978) (victim compensation repayment).

[192] COLO. REV. STAT. s. 17-27-107(1) (1978) (community corrections facility); FLA. STAT. ANN. ss. 944.49(1)(c), 958.12 (West Cum. Supp. 1979) (community programs for prisoners, and residential facility for youthful offenders).

[193] UTAH CODE ANN. s. 64-13-16 (1977) (expenses incurred by prison officials as result of institutional rule-violations); cf. VT. STAT. ANN. tit. 28, s. 755(a)(2)(E) (1978) (work release restitution following disciplinary hearing for damage to state property).

SUBSTANTIVE AND PROCEDURAL PARAMETERS

From analysis of the obviously expansive judicial and legislative treatment of the concept of restitution <u>across</u> every aspect of criminal justice, it is possible to ascertain its meaning and scope <u>within</u> particular stages of the process, particularly in its most frequent manifestation at sentencing. What are the substantive and procedural constraints under which restitutive sanctions must be applied?; and what are the rationales advanced in support of its use as a criminal sanction? As one prolific writer on the subject of restitution has noted:

> Unfortunately, the extent of this practice is not known, [and] its rationale is not clearly articulated . . . .
>
> More adequate reporting of the nature of restitution and the extent of its use is badly needed.[194]

<u>Legally Eligible Recipients:</u> The degree of specificity in legislative directives concerning who may be the recipients of restitution is extremely varied. On occasion specific types of victim or 'aggrieved party' are listed, in statutes such as a North Carolina law including "individuals, firms, corporations, associations, or other organizations and governmental agencies whether federal, state or local."[195] Similarly, some states have

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[194] Galaway, "The Use of Restitution," 23 Crime & Delinquency 57, 58, 67 (1977).

[195] N.C. GEN. STAT. s. 15A-1343(6)(d) (1977) as amended 1977 N.C. Sess. Laws, ch. 1167, S.B. 986.

singled out particular types of victim, such as the elderly, as deserving special consideration for restitution,[196] while declaring others, such as accomplices or coparticipants in the defendant's crime to be ineligible.[197]

The extreme in lack of precision in defining eligible recipients is typified by a New York probation law which provides for restitution or reparation, without any reference whatsoever as to whom each remedy might be available.[198] Only slightly more instructive is the common provision for restitution to otherwise undefined "aggrieved parties."[199] Faced with such potential for ambiguity, appellate courts have approved restitution towards the cost of a criminal investigation, on the ground that the public is an aggrieved party bearing ultimately the expense of the investigation.[200]

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[196] OHIO REV. CODE ANN. s. 2929.11(D) (Page Supp. 1978) (court to favor restitution if victim is over 65 or permanently and totally disabled at time of offense); <u>but cf.</u>, OHIO REV. CODE ANN. s. 2951.02(D)(4) (Page Supp. 1978) (factor against probation if victim over 65 or disabled). Under Florida law the Bureau of Criminal Justice Assistance of the Department of Administration was recently mandated to consider and evaluate the potential for new or improved programs to reduce, <u>inter alia</u>, the economic and physical consequences of crime against the elderly. FLA. STAT. ANN. s. 943.405(3)(e) (West Cum. Supp. 1979).

[197] ME. REV. STAT. tit. 17-A., s. 1325(2)(B) (Pamphlet 1978); MISS. CODE ANN. s. 99-37-1(d) (1978); OR. REV. STAT. s. 137.103(4) (1977); PA. STAT. ANN. tit. 18, s. 1106(h) (Purdon Cum. Supp. 1979).

[198] N.Y. PENAL LAW s. 65.10(2)(f) (Consol. 1977).

[199] ARK. STAT. ANN. s. 41-1203(2)(h) (1977); FLA. STAT. ANN. ss. 945.091 (5)(a), 947.181(1) (West Cum. Supp. 1979); KAN. CRIM. PROC. CODE ANN. s. 21-4610(h) (Vernon 1978 Supp.); KY. REV. STAT. ANN. s. 533.30(d) (Baldwin 1975); LA. CODE CRIM. PROC. ANN. art. 895 (West Cum. Supp. 1979); NEB. REV. STAT. s. 29-2219(j) (1978); UTAH CODE ANN. s. 77-35-17 (1953).

[200] <u>Cuba v. State</u>, 362 So.2d 29 (Fla. App. 1978); <u>cf.</u> <u>People v. Labarbera</u>, 201 P.2d 584 (Cal. App. 1949) (in general sense "reparation" means reimbursement to the complainant or to a prosecuting governmental agency); <u>but see People v. Baker</u>, 113 Cal. Rptr. 248, 39 C.A. 3d 550 (1974) (reparation does not include general cost of prosecuting and rehabilitating criminals).

They have not allowed, on the other hand, restitution to a humane society by an Oregon defendant convicted of cruelty to animals,[201] nor "restitution and reparation to the community at large" through an alcoholism organization following a conviction for violations of the Sherman Antitrust Act;[202] in neither case was the proposed recipient ruled to be an aggrieved party under the respective statutes construed.[203]

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[201] State v. Garrett, 29 Or. App. 505, 564 P.2d 726 (1977).

[202] United States v. Clovis Retail Liquor Dealers Trade Association, 540 F.2d 1389 (10th Cir. 1976).

[203] Paradoxically, imaginative use of restitution, linking the recipient in some fashion to the harm caused or threatened by the defendant's crime has found favor in much of the literature on restitution as possibly a beneficial way of making the defendant assume responsibility for his criminal conduct. In a recent LEAA report on prosecution of economic crime, for example, the following exemplary case is reported: "A general merchandise store was prosecuted for violating the state flammable fabrics act. The store was convicted and required to donate $5,000 to a children's burn center." U.S. Department of Justice, "Exemplary Projects: Prosecution of Economic Crime" 7 (LEAA, NILE & CJ 1977); cf. People v. Mandell, 377 N.Y.S. 2d 563, 50 A.D.2d (1975) (court without authority to require defendant to provide volunteer services for charitable foundation as condition of probation).

A major ambiguity in statutes failing to be more precise in their definition of eligible recipients stems from the question of whether a defendant may be required to make payment to insurers of crime victims or other third parties. In North Carolina, for example, the legislature has explicitly stated that "no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant."[204] In the case of United States v. Follette,[205] by comparison, the District Court for the Eastern District of Pennsylvania ruled that a surety upon a fidelity bond, given by a defendant to protect against his criminal acts, is an "aggrieved party" for the purposes of restitution within the meaning of the Federal Probation Act.[206]

In People v. Grago,[207] a New York county court defined 'aggrieved party' as referring only "to the party whose rights, personal or property, were invaded by the defendant as a result of which criminal proceedings were successfully concluded."[208] The court held that the term did not include

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[204] N.C. GEN. STAT. s. 15A-1343(6)(d) (1977) as amended 1977 N.C. Sess. Laws, ch. 1167, S.B. 986.

[205] 32 F. Supp. 953 (1940).

[206] Id. at 955.

[207] 24 Misc. 2d 739, 204 N.Y.S. 2d 774 (1960).

[208] Id. 204 N.Y.S. 2d at 777.

the insurer of a bank nor the bank itself that had repaid funds the defendant had deposited after embezzling them, but did include the union from which the funds were embezzled. In the case of State v. Getsinger,[209] an Oregon appeals court struck down a condition of probation that the defendant in a prosecution for unauthorized use of a motor vehicle pay restitution to the insurer of the damaged vehicle. The court construed "aggrieved party" under the then applicable state law[210] to refer only to the direct victim:

> While the insurer in the instant case might be considered a "victim" since it did "suffer loss," the phrase "direct victim" suggests limiting the reparation to the one who initially suffers loss. Here the insurer only suffered loss because the owner did: it was the owner who suffered the loss initially; . . . he alone is the direct victim, or the "aggrieved party . . . ."[211]

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[209] 270 Or. App. 339, 556 P.2d 147 (1976); but see People v. Alexander, 6 Cal. Reptr. 153, 182 C.A. 2d 281 (1960) (court approved condition of $139,000 to be paid by defendant convicted of arson, which represented amounts paid by various fire insurance companies).

[210] OR. REV. STAT. s. 137.540(1). Conditions of probation may include that the probationer shall:

> "(10) Make reparation or restitution to the aggrieved party for the damage or loss caused by the offense . . . ."

Since Getsinger, Oregon law has been amended to expand the definition of victim to include insurance companies and other third parties suffering loss. OR. REV. STAT. s. 137.103(4) (1977).

[211] 556 P. 2d 148; cf. State v. Calderilla, 34 Or. App. 1007, 580 P. 2d 578 (1978) (where bank did not charge defendant's former employer's account for forged check, bank was "direct victim" for purposes of restitution).

In a postscript to its opinion, however, the court in Getsinger essentially nullified the impact of its own ruling by declaring that:

> Our holding does not preclude the trial court from requiring the defendant to make reparation to the owner for the full amount of the damage to the motor vehicle, even though the owner might be contractually bound to give such sums to the insurer. The reparation statute is a rehabilitative tool of the criminal law; its applicability should not be affected by the happenstance of whether the owner carries insurance.[212]

Similar controversy over the concept of "aggrieved party" has arisen in a line of cases growing mainly out of automobile accidents, in which the victim has died. In State v. Stalheim,[213] for example, an Oregon appeals court concluded that 'aggrieved party' under the applicable state law[214] did not encompass family members of homicide victims because they were not direct victims.[215] The Stalheim decision, however, is contrary to

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[212] Ibid. The court's desire to vitiate its own ruling, under the umbrella of rehabilitative concerns, results in conflict with the more usual judicial and legislative preference for limiting restitution for any particular victim to only unrecovered losses; in this case the unrecovered loss would have included only any deductible paid by the victim under the terms of the insurance agreement. See discussion of recoverable losses, infra at 71 ff.

[213] 275 Or. 683, 552 P. 2d 829 (1976).

[214] OR. REV. STAT. s. 137.103(4) (1977).

[215] 552 P. 2d at 832. In State v. Wanrow, 30 Or. App. 75, 566 P. 2d 533 (1977) the court did not reach the state's proposition that the victim's estate was a direct victim in a homicide prosecution, as opposed to the victim's relatives.

a more common preference for a wider definition in other states, that would allow restitution to surviving relatives.[216]

Following the Getsinger and Stalheim decisions, Oregon law was revised to allow restitution for any person who has suffered pecuniary damages as a result of the defendant's criminal activities.[217] Similarly wide provision is made in Mississippi[218] and New Mexico.[219] In Iowa and South Dakota this latter definition is qualified to the extent that an "insurer shall be regarded as the victim only if the insurer has no right of subrogation and the insured has no duty to pay the proceeds of restitution to the insurer."[220] Finally, in line with this recent trend towards expanding the definition of eligible recipients, a 1978 Maine law provides that restitution may be authorized not only to the victim of the defendant's criminal activities but also to the dependents of deceased

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[216] See State v. Green, 29 N.C. App. 574, 225 S.E. 2d 170 (1976) (parents of homicide victim are certainly persons insured by defendant's act, therefore restitution to parents is permissible); Shenah v. Henderson, 106 Ariz. 399, 476 P. 2d 854 (1970) (restitution approved to parents of girl killed in car accident); accord State v. Gunderson, 74 Wash. 2d 226, 444 P. 2d 156 (1968); cf. FLA. STAT. ANN. s. 944.512(2)(b) (West Cum. Supp. 1979) (damages to victim or victim's dependents from proceeds of defendant's account of his crime). See also State v. Summers, 375 P.2d 143 (Wash. Supreme Ct. 1962) (restitution permissible for funeral expenses of manslaughter victim).

[217] OR. REV. STAT. s. 137.103(4) (1977).

[218] MISS. CODE ANN. s. 99-37-1(d) (1978).

[219] N.M. STAT. ANN. s. 31-17-1(A)(1) (1978).

[220] IOWA CODE ANN. s. 907.12(1)(a) (West Cum. Supp. 1979); S.D. COMP. LAWS ANN. s. 23A-28-2(1) (Special Supp. 1978).

victims, to the county if the victim refuses restitution or is not located, to a wide variety of collateral sources if they have provided recovery to the victim, and to any person authorized to act on the victim's behalf.[221]

Offense Limitations: Attempts to determine the meaning of 'aggrieved party' or 'victim' of the defendant's criminal activities are further complicated by varying interpretations of what 'criminal activities' means, in terms of fixing a defendant's restitutive obligations. Many provisions for restitution cover only specified types[222] or degrees[223] of crime; others exclude particular offenses such as traffic[224] or petty[225] offenses. Even within categories such as these, however, a significant area of disagreement between and within jurisdictions remains the issue of whether restitution is restricted to crimes for which the defendant is convicted, or whether "criminal activities" and similar expressions are broad enough to encompass plea-bargained or other behavior which may never be adjudicated or even formally charged.

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[221] ME. REV. STAT. tit. 17-A, ss. 1322, 1324 (Pamphlet 1978).

[222] See statutes cited supra note 144.

[223] S.D. COMP. LAWS ANN. s. 23A-17-18 (Special Supp. 1978) (misdemeanor or first felony conviction).

[224] ARIZ. REV. STAT. ANN. s. 13-803(D) (1978); VA. CODE s. 19.2-305.1(A) (1978) (driving while intoxicated).

[225] S.D. COMP. LAWS ANN. s. 23A-28-2(3) (Special Supp. 1978).

A majority of statutory provisions do not explicitly address the issue, relying instead upon general terms such as restitution to the victims of the defendant's "criminal acts,"[226] "criminal conduct,"[227] "crime,"[228] or "offense."[229] Where the question has been faced squarely, the legislative and judicial response has been divided. The Federal Probation Act, for example, authorizes restitution or reparation only for "the offense for which conviction was had."[230] In the case of United States v. Follette,[231] the defendant entered a guilty plea to a charge of embezzlement and conversion of $203.99 of U.S. postal funds, a Pennsylvania district court ruled, on motion for extension of probation that:

> A conviction for embezzlement and conversion for a greater sum could not have been had on this indictment. I conclude, therefore, that the condition for restitution [of $466.28] in this case must be modified so as to relate to the embezzlement of $203.99 only.[232]

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[226] MINN. STAT. ANN. s. 299B.13 (West Cum. Supp. 1979); OKLA. STAT. ANN. tit. 22, s. 991(F)(1) (West Cum. Supp. 1979).

[227] COLO. REV. STAT. s. 17-2-201(5)(b) (1978); KAN. CRIM. PROC. CODE ANN. s. 21-4606(2)(g) (Vernon 1978 Supp.); N.J. STAT. ANN. s. 2C:44-1(b)(6) (West 1979).

[228] N.J. STAT. ANN. s. 30:4-123.6 (West Cum. Supp. 1979); WASH. REV. CODE ANN. ss. 9.92.060, 9.95.210 (1977).

[229] FLA. STAT. ANN. s. 945.091(5)(a) (West Cum. Supp. 1979) (offense of the inmate); ILL. ANN. STAT. ch. 38, s. 1005-3-2(a)(3) (Smith-Hurd Cum. Supp. 1979) (offense committed); accord IND. CODE ANN. s. 35-50-5-2 (Burns 1979); KY. REV. STAT. ANN. s. 533.30(2)(d) (Baldwin 1975) (defendant's offense); accord MASS. GEN. LAWS ANN. ch. 276, s. 92 (West 1972); N.J. STAT. ANN. ss. 2C:45-1(b)(8); N.Y. PENAL LAW s. 65.05 (Consol. 1977); OHIO REV. CODE ANN. ss. 2905.12(B)(3), 2951.02(B)(9) (Page Supp. 1978).

[230] 18 U.S.C. s. 3651 (1974).

[231] 32 F. Supp. 953 (D.C. Pa 1940); accord U.S. v. Buechler, 557 F.2d 1002 (3rd Cir. 1977) (district court lacked authority to order restitution of $1,989.35 from defendant pleading guilty to embezzling $262.12).

The statutory limitation of restitution to only the conviction offense is illustrated more dramatically in the later case of Karrell v. United States.[233] In Karrell, the defendant was charged upon a seventeen count indictment in connection with a veterans' housing loan scheme; each count represented a different veteran-victim. Although nine counts were dismissed and the defendant was acquitted on two others, probation was conditioned upon restitution to each of the seventeen victims and an additional veteran not on the indictment at all. On appeal, the restitution was ruled to be in error as to losses sustained by any veteran other than those directly concerned in the six conviction counts.[234]

The limiting view of the language of the Federal Probation Act in the Follette and Karrell decisions, appears to be at odds with a more recent case, United States v. Landay.[235] The Fifth Circuit in Landay

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[232] Id. at 955. The additional $262.29 was imposed when it came to the attention of the sentencing judge as an additional amount thought to have been embezzled by the defendant. Id. at 954.

[233] 181 F.2d 981 (9th Cir.) cert. denied, 340 U.S. 891 (1950); accord United States v. Taylor, 305 F.2d 183 (4th Cir. 1962).

[234] Id. at 181 F.2d 986-87.

[235] 513 F.2d 306 (5th Cir. 1975).

upheld a restitution order based upon a civil consent judgment against the defendant, in an amount which exceeded what was involved in the offenses for which he was convicted. Unfortunately, the court in Landay did not comment on the source of the trial court's power to impose a restitution order for more than the amounts involved in the conviction charges, although the court did emphasize Landay's formal agreement in the consent judgment as to the amount of loss caused by his crimes.[236] Whether the defendant's consent to restitution beyond the conviction offenses may expand the federal courts' powers was also raised in United States v. Buechler.[237] The case was decided on other grounds, however, and explicitly left open the question whether restitution in an amount exceeding that involved in the count to which a guilty plea is entered may be imposed as a condition of probation,where the defendant explicitly agrees to it as one of the terms of a plea bargain in a multiple count indictment.[238]

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[236] Id. at 308, see also the discussion of Landay in United States v. Buechler, 557 F.2d 1002, 1008 n.10 (3rd Cir. 1977).

[237] Supra.

[238] Id. at 557 F.2d 1007, n.10.

Statutes in several states employ the same limiting provision as the Federal Probation Act,[239] and similar constraints exist in statutes allowing restitution for "the offense to which the defendant has pleaded guilty or for which conviction was had,"[240] or "the offense for which the defendant was imprisoned."[241] Even in the absence of such restriction, however, a number of state courts have taken positions similar to Follette and Karrell. In State v. Barnett,[242] for example, although the court was empowered to impose probation "upon such conditions as it may prescribe," it was held that restitution must be limited to the particular crime of which the defendant was convicted.[243]

In People v. Funk,[244] a New York County Court judge ruled that, although the court was statutorily authorized to order restitution for the

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[239] ALASKA STAT. s. 12.55.100(2) (1972); ARK. STAT. ANN. s. 43-2331(b) (1977); N.M. STAT. ANN. s. 31-20-6(B) (1978); N.C. GEN. STAT. s. 15A-1343(6) (d) (1977) as amended 1977 N.C. Sess. Laws, ch. 1147, S.B. 986; VA. CODE s. 19.2-305 (1978); W.VA. CODE s. 62-12-9(1) (1977).

[240] UTAH CODE ANN. s. 77-35-17 (1953); State v. Reedecker, 534 P.2d 1240 (Utah 1975).

[241] FLA. STAT. ANN. s. 947.181(1) (West Cum. Supp. 1979); cf. FLA. STAT. ANN. s. 921.143(2) (West Cum. Supp. 1979) (victim's loss statement must relate only to crime for which defendant is being sentenced).

[242] 110 Vt. 231, 3 A.2d 521 (1939).

[243] Id. at 3 A.2d 525.

[244] 117 Misc. 778, 193 N.Y.S. 302 (1921).

actual losses or damages caused by the defendant's offense:

> I take it that the words "his offense" mean only the offense for which the defendant is on trial before the court, and cannot be stretched to cover similar offenses committed by the defendant against the same party or various parties.[245]

Similarly, in People v. Lofton,[246] the words "his offense" in the New York Statute were held not to encompass restitution for acts similar to the defendant's conviction offense, but for which prosecution was barred by reason of the statute of limitations.[247]

Even a seemingly broad Texas Statute, authorizing restitution as a probation condition "in any sum that the court shall determine,"[248] has been interpreted, in dissent, to preclude restitution for any injury or damages not arising out of the offense for which the defendant has been convicted.[249] The conviction offense limitation,

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[245] Id. at 193 N.Y.S. 303; accord People v. Grago, 204 N.Y.S. 2d 774 (Co. Ct. 1960).

[246] 78 Misc. 2d 202, 356 N.Y.S. 2d 791 (1974).

[247] Id. at 356 N.Y.S. 2d 793.

[248] TEX. CODE CRIM. PROC. ANN. art. 42.12, s. 6(h).

[249] Flores v. State, 513 S.W. 2d 66, 70-71 (Tex. Crim. App. 1974) (dissenting opinions); cf. Bradley v. State, 478 S.W. 2d 527, 531 (Tex. Crim. App. 1972) (concurring opinion) (when probation is granted by jury).

moreover, has been argued in Texas,[250] and other states,[251] to prohibit a sentencing court from ordering restitution by a defendant charged with leaving the scene of an accident, if the injuries for which restitution is sought were caused by the accident itself and not strictly by the defendant's criminal offense of leaving the scene.

The principle espoused in the above line of cases, limiting restitution orders by sentencing courts to a strict interpretation of the conviction offense only, clearly can cause special practical difficulties in prosecution for forgery or other offenses involving a series of separate incidents.[252] The prolific tendencies of many check-passers, for example, are usually underrepresented in typical prosecution practices of charging only one or two counts in exchange for a negotiated guilty plea. Indeed, in at least one state it has been observed that:

> [I]t has been a common practice in Wisconsin for a prosecutor to charge a defendant with the commission of only one offense of a series. This is especially true involving the issuance of worthless checks. Some trial judges have discouraged

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[250] Thompson v. State, 557 S.W. 2d 521 (Tex. Crim. App. 1977). The power of the court to order restitution for injuries unrelated to the conviction offense was not actually reached in this case, because the court found that the victim's injuries were actually caused by the defendant's car dragging the victim as the defendant was leaving the scene of an accident. Id. at 524.

[251] Fresneda v. State, 347 So. 2d 1021 (Fla. 1977) (damage or loss caused by auto accident itself, not by defendant's criminal offense of leaving scene); People v. Becker, 349 Mich. 476, 84 N.W. 2d 833 (1957) (restitution can be ordered only for loss caused by very offense for which defendant was tried and convicted).

[252] See United States v. Buechler, 557 F.2d 1002 (3d Cir. 1977) (embezzlement); People v. Mahle, 57 Ill. 2d 279, 312 N.E. 2d 267 (1974) (forgers).

> prosecutors from charging defendants with several counts in order to cover all the offenses.[253]

Paradoxically, the easiest case to prosecute will normally be the last in a series of forgeries, when the defendant is caught in the act and no loss is sustained by the check-recipient or owner.

Combining the practice of minimal charging and limiting restitution to the conviction offense leads to obvious results. In an Illinois case, People v. Mahle,[254] for example, the court found that:

> It appears from the informations in this case that the total monies wrongfully obtained were approximately $387. The balance of the restitution [of $1,138.86] was for other alleged bad checks written by the defendant. We do not believe that the conditions of restitution may extend to matters unrelated to charges before the court. The trial court was not empowered to order restitution of sums extraneous to the informations before it.[255]

In contrast, however, the more typical practice seems to be that expressed in State v. Scherr:[256]

> Trial courts [in Wisconsin] have often required as a condition of probation that the defendant make restitution of all bad checks which have been brought to its attention, although the defendant has been convicted or pleaded only as to one of

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[253] State v. Scherr, 9 Wis. 2d 418, 101 N.W. 2d 77, 80 (1960). The classic work in the area of plea bargaining, generally remains. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (Remington ed. 1966).

[254] 57 Ill. 2d 279, 312 N.E. 2d 267 (1974).

[255] Id. at 312 N.E. 2d 271.

[256] 9 Wis. 2d 418, 101 N.W. 2d 77 (1960).

> them. In these situations when the amount of the bad checks is determined on the face of the record or by admission of the defendant, no problem arises as to the amount of restitution which can be made a condition of probation.[257]

Admission to non-conviction acts by the defendant in plea bargaining, sometimes formalized by "reading in" such charges on the record,[258] forms the approved basis for ordering restitution in numerous cases.[259] Indeed, the possible consequences of failing to strike such a bargain are clearly illustrated in the following opinion in People v. Gallagher:[260]

> Every trial judge accepts plea-agreement convictions to lesser offenses, often "attempts," and hears the defendants admit the greater or completed conduct. Crime should not be profitable. An attempt connotes no loss. If a judge cannot require restitution of a loss he knows has occurred, he may decide against probation.[261]

In formal recognition of such practices, an apparent trend in several recent statutes is toward expanding the scope of restitution by explicitly authorizing it not only for conviction offenses, as in the federal statute,

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[257] Id. at 101 N.W. 2d 80 (emphasis added); cf. Cooper v. State, 356 So. 2d 911, 912 (Fla. App. 1978) (record supports finding of trial judge with regard to reasonable amount necessary for restitution even though greater than amount formally charged).

[258] Garski v. State, 75 Wis. 2d 62, 248 N.W. 2d 425 (1977); State v. Gerard, 57 Wis. 2d 611, 205 N.W. 2d 374 (1973).

[259] See, e.g., State v. McIntyre, 235 S.E. 2d 920 (N.C. App. 1977); People v. James, 25 Ill. App. 3d 533, 323 N.E. 2d 424 (1975).

[260] 55 Mich. App. 613, 223 N.W. 2d 92 (1974).

[261] Id. at 223 N.W. 2d 95.

but also for "any other conduct admitted by the defendant"[262] or any other crime which is "admitted or not contested by the defendant."[263]

In addition to the expansion of restitution through plea bargaining and/or the defendant's admissions, courts in several states have chosen not to follow the federal conviction-limitation at all;[264] instead they have simply ordered restitution for non-conviction acts in addition to the sanctions imposed for the offense of which the defendant is convicted. One way in which this apparent stretching of the law occurs is in the practice of ordering restitution in amounts greater than the amounts specified in the charging instrument or offense-definition. In Cooper v. State,[265] for example, the defendant was convicted of malicious destruction of property in an amount less than $200, but was ordered, as a condition of probation, to pay restitution of $350. In upholding the larger amount, the Florida appeals court noted only that the "record supports the

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[262] MISS. CODE ANN. s. 99-37-1(a) (1978); OR. REV. STAT. s. 137.103(1) (1977); cf. State v. Cox, 35 Or. App. 169, 581 P. 2d 104 (1978) (defendant cannot be ordered to make restitution for property she has not admitted, or been convicted of taking).

[263] IOWA CODE ANN. s. 907.12(1)(c) (West Cum. Supp. 1979); N.M. STAT. ANN. s. 31-17-1(A)(3) (1978); S.D. COMP. LAWS ANN. s. 23A-28-2(3) (Special Supp. 1978); cf. Taylor v. State, 419 S.W. 2d 647 (Tex. Crim. App. 1967) (restitution condition of probation upheld where defendant had talked with probation officer, who had explained terms and conditions at plea hearing and had stated that he could abide by same if he was granted probation).

[264] People v. Gallagher, 55 Mich. App. 613, 223 N.W. 2d 92, 95 (1974) (Michigan chose not to follow Federal approach).

[265] 356 So. 2d 911 (Fla. App. 1978).

finding of the trial judge with regard to the reasonable amount necessary for restitution."[266]

In the case of State v. Foltz,[267] the court combined the practice of exceeding the charged amount in its restitution order with a further apparent incongruity of ordering restitution of stolen goods when the defendant was only convicted of attempted theft. Under an Oregon law allowing restitution "for the damage or loss caused by [defendant's] offense," the state appeals court judge concluded only that "the fact that defendant's conviction is for an attempt would not preclude the court from conditioning probation upon restitution of the amount actually taken, even though a larger amount."[268]

On very much the same logic of sentencing the defendant on the basis of what he "actually" did, rather than what he was convicted of doing,[269]

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[266] Id. at 912; cf. Warden v. Gaines, 522 P.2d 1009 (Nev. 1974) (defendant convicted of embezzling $700 paid $2,864.10 restitution in first two years of probation). See also People v. Gallagher, infra note 272.

[267] 513 P.2d 1208 (Or. App. 1973).

[268] Id. at 1210; cf. People v. James, 25 Ill. App. 3d 533, 323 N.E.2d 424 (1975) (restitution of $800 ordered on defendant's negotiated plea of guilty to reduced charge of theft under $150).

[269] It is widely recognized that correctional authorities such as parole boards also frequently make decisions about a defendant on the basis of his actual offense behavior rather than the offense for which he was committed.

courts in several jurisdictions have ordered restitution for acts, attributed to the defendant, of a similar nature to those for which he was convicted of an offense. In Illinois, for example, a defendant convicted of obtaining money and goods by means of a confidence game was imprisoned for failing to meet a probation condition of restitution "not only to the original complainants but also to those subsequently discovered."[270] In the Michigan case of People v. Nawrocki,[271] an order of probation was upheld which required the defendant, who had been convicted of uttering and publishing a forged check, to make restitution for several other checks allegedly forged, uttered and published by him. Similarly, in another Michigan case, People v. Gallagher,[272] in ordering restitution of the whole value of stolen property of which the defendant was convicted of receiving only part, the appeals court reasoned that restitution was permissible for "the whole loss caused by a course of criminal conduct upon conviction of a crime arising out of that conduct."[273]

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[270] People v. Dawes, 132 Ill. App.2d 435, 270 N.E. 2d 214 (1971), aff'd. 52 Ill. 2d 121, 284 N.E. 2d 629 (1972).

[271] 8 Mich. App. 225, 154 N.W.2d 45 (1967).

[272] 55 Mich. App. 613, 223 N.W.2d 92 (1974) (restitution of $6,277.84 on conviction of receiving stolen property worth $1,500).

[273] Id. at 223 N.W.2d 95. The relevant statutory language in Gallagher reads: "The court may impose . . . restitution in whole or in part to the person or persons injured or defrauded, as the circumstances of the case may require or warrant, or as in its judgment may be meet and proper." Ibid.

Perhaps the most notable extensions of judicial power to order restitution beyond the defendant's conviction offense have occurred in California.[274] In People v. Miller,[275] for example, the defendant, a building contractor, was convicted on one count of grand theft and ordered to pay restitution to two victims, the Keefes, from whom he had accepted $821 as an advance for home-remodelling work which he failed to perform. Eight months after the original probation order, on the basis of summary review of a memorandum by a probation officer, the court raised the restitution for the Keefes to $2,000 and added a further $6,600 to other customers of the defendant's "borderline operations."[276]

Although the district attorney in Miller testified that there was considerable evidence in the criminal trial that the defendant had cheated persons other than the original two victims,[277] the appellate court concluded that "there is no indication that any of the claims other than those of the Keefes were based on criminal conduct, nor is there any showing that they were based on fraudulent representations to the claimants of the sort made to the Keefes, resulting in defendant's conviction."[278]

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[274] See generally "Note: Use of Restitution in the Criminal Process: People v. Miller," 16 UCLA L. Rev. 456 (1969) [hereinafter cited as "Note: Use of Restitution "].

[275] 256 Cal. App.2d 348, 64 Cal. Rptr. 20 (1967). No hearing was held at the time the restitution was increased. "Note: Use of Restitution," supra, at 459.

[276] Id. at 356, 64 Cal. Rptr. at 25.

[277] Id. at 352, 64 Cal. Rptr. at 23.

[278] Id. at 355, 64 Cal. Rptr. at 25.

Nevertheless, the amended restitution order was upheld on the grounds that:

> Probation is granted in hope of rehabilitating the defendant and must be conditioned on the realities of the situation without all of the technical limitations determining the scope of the offense of which defendant was convicted.[279]

In so ruling, it has been said that the court "merely pays lip service to the [statutory] requirement that the injury serving as a basis for the restitution must "result from" the criminal act, by casually noting that the rehabilitative value of the condition of probation involved "belies the remoteness" of the injury from the criminal conduct of which Miller was convicted."[280]

The "remoteness" test "belied" in Miller had been applied in an earlier California case, People v. Williams.[281] The defendant in that case was convicted of assault and battery upon a store owner who refused to accept a Diner's Club credit card. Because the defendant had $3,500 in outstanding charges on the card, the trial court in the assault and battery case ordered Williams to pay that amount as a condition of probation. In striking down the condition, the appellate court reasoned that the obligation to Diner's Club was merely collateral to the conviction charge, and too remote to justify the restitution order.[282] Arguably, both the

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[279] Id. at 356, 64 Cal. Rptr. at 25.

[280] "Note: Use of Restitution," supra note 274 at 462.

[281] 247 Cal. App.2d 394, 55 Cal. Rptr. 550 (1966).

[282] Id. at 409, 55 Cal. Rptr. at 560.

Miller and Williams restitution orders would fail to meet a later standard announced in People v. Dominguez, in which the court declared that "[a] condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid."[283]

One final, and possibly the broadest, way in which California courts have extended the use of criminal restitution beyond the conviction offense, has been to require it for offenses of which the defendant has been acquitted. In People v. Richards,[284] the court stated that "[w]e hold here that absent extraordinary circumstances probation for a defendant may not be conditioned on restitution of sums involved in a purported crime of which he was acquitted."[285] As an illustration of such extraordinary circumstances, the Richards court points with approval to an earlier decision by the same court in People v. Lent.[286]

In the Lent case, the defendant was convicted of one count of defrauding a victim of $500, but acquitted on another count charging him with theft of $1,278 from the same woman. As a condition of probation,

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[283] 256 Cal. App.2d 623, 627, 64 Cal. Rptr. 290, 293 (1967).

[284] 131 Cal. Rptr. 537, 552 P.2d 97 (1976).

[285] Id. at 552 P.2f 98.

[286] 15 Cal.3d 481, 124 Cal. Rptr. 905, 541 P.2d 545 (1975).

however, the defendant was ordered to pay the victim the $1,278 as well as the $500 in restitution. In upholding the condition, the appellate court noted that whereas acquittal would ordinarily preclude the larger restitution amount, "additional circumstances were developed in the unusually prolonged probation hearing conducted by the meticulous trial judge. Unlike the typical abbreviated probation and sentence proceeding, this matter occupied nearly two court days; the People presented seven witnesses and the defendant two on that issue alone."[287] In a separate concurring opinion, moreover, one of the appellate justices would have dispensed with the need for such a hearing if "the preponderance of the evidence produced at the trial itself supports such an order."[288]

For the purposes of restitution, therefore, the trial judge in Lent was allowed effectively to overrule the jury verdict of acquittal, because he was convinced "that Mr. Lent in his testimony before the jury perjured himself as respects the disposition of the proceeds of this $1,278 check," and that the total "culpability of Mr. Lent is not displayed in the setting of this case but is reflected further in the evidence [produced] at the formal probation hearing."[289] As the court in Richards observed, "we held the $1,278 restitution order justified because the defendant had

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[287] Id. at 541 P.2d 545.

[288] Ibid (Justice Clark, concurring).

[289] Ibid.

shown the same type of dishonesty in regard to the disposition of those funds as he had demonstrated in the proved theft of the $500."[290]

Recoverable Losses: Once it is resolved whether restitution may be required following a plea agreement, conviction or an aquittal, and once the permissible recipients are identified, further refinement of the scope of the sanction requires consideration of the type and extent of loss for which criminal courts may impose a restitutive disposition. It is in this area more than any other that criminal and civil courts differ in their ability to redress victims' injuries.

Obviously, to speak of restitution for loss or damage "arising out of the offense"[291] or "caused by the offense"[292] offers little guidance in the way of substantive limitation of the powers of the court. Reliance upon restrictions familiar to civil law, moreover, such as requiring that a victim's injury be a "direct result"[293] of or "proximately caused"[294] by the offense can be as misleading as it is illuminating,

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[290] 552 P.2d 97 at 103.

[291] N. C. GEN. STAT. s. 15A-1343(6)(d) (Cum. Supp. 1977) as amended 1977 N.C. Sess. Laws ch. 1147, S.B. 986.

[292] CONN. GEN. STAT. ANN. s. 53a-30(a)(4) (West Cum. Supp. 1979); KAN. CRIM. PROC. CODE ANN. s. 21-4610(h) (Vernon Supp. 1978); LA. CODE CRIM. PROC. ANN. art. 895(7) (West Cum. Supp. 1979); N.Y. PENAL LAW s. 65.10 (Consol. Cum. Supp. 1978). See also MODEL PENAL CODE s. 301.1 (P.O.D. 1962).

[293] ALASKA STAT. ss. 11.30.215(b), 11.45.050(b) (1978); PA. STAT. ANN. tit. 18, s. 1106(b) (Purdon Cum. Supp. 1979); TEX. CODE CRIM. PROC. ANN. art. 42.12, s. 6 (Vernon 1979); cf. FLA. STAT. ANN. s. 921.143(2) (West Cum. Supp. 1979) (victim's statement to court limited to losses directly resulting from the crime).

[294] ILL. ANN. STAT. ch. 38, s. 1005-5-6(b) (Smith-Hurd Cum. Supp. 1979).

to the extent that it implies congruity between the rules of civil procedure and the assessment of restitution in criminal courts. With the major exception of the law of homicide,[295] issues of proximity and causality in general are more common in the area of tort remedies than in the criminal law,[296] and neither the full principles nor procedures of determining damages in civil proceedings have generally been transferred to the criminal process.[297]

With few exceptions,[298] criminal liability for restitution has usually been considered to be less complete than its civil counterparts. In People v. Heil,[299] for example, a Michigan Court of Appeals concluded that:

> Criminal and civil liability are not synonymous. A criminal conviction does not necessarily establish the existence of civil liability. Civil liability need not be established as a prerequsite to the requirement of restitution as a probation condition; such restitution for personal injury, therefore, generally should be more limited in scope than civil damages.[300]

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[295] See e.g. KADISH AND PAULSEN. CRIMINAL LAW AND ITS PROCESSES. (3rd ed. 1975).

[296] See e.g. PROSSER. THE LAW OF TORTS. (West 1971).

[297] For procedural comparisons between civil and criminal damage assessments, see "Imposition Procedures," infra at 90 ff.

[298] Infra text at notes 315-331.

[299] 79 Mich. App. 739, 262 N.W.2d 895 (1977).

[300] Id. at 262 N.W.2d 900. Occasionally, the fact that civil liability is not a prerequisite to criminal restitution can expand the offender's liability. In Gross v. United States, 228 F.2d 612 (1956) the Court of Appeals for the 8th Circuit ruled that the defendant could be required to pay restitution upon conviction of fraudulently failing to account for certain products received in interstate commerce, even though he was absolved of personal liability in a subsequent civil suit against him; civil liability was established only against the corporation of which the defendant was an incorporator, stockholder and president. Id at 614.

The degree to which limitations upon the type of criminal restitution have been imposed, and the ways in which they are defined, however, vary considerably across jurisdictions.

The Federal Probation Act[301] and several state statutes[302] authorize restitution for only what is termed "actual" loss or damage. In answer to the obvious question "actual vs. what?," courts have given quite different answers. In Sprague v. State,[303] the term "actual damages or loss" was viewed by the Supreme Court of Alaska as precluding the trial court's imposition of punitive damages in a burglary case.[304] In Oregon, on the other hand, in State v. Stalheim,[305] reparation was construed to embrace, inter alia, "wages actually (not prospectively) lost."[306]

A recent Oklahoma statute, restricting restitution to the victim's "economic loss," apparently combines the limitations in Sprague and Stahlheim,

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[301] 18 U.S.C. s. 3651 (1970).

[302] ALASKA STAT. s. 12.55.100(a)(2) (1972); ILL. ANN. STAT. ch. 38, ss. 1005-5-6(b), 1005-6-3.1(c)(9) (Smith-Hurd Cum. Supp. 1979); NEB. REV. STAT. s. 29-2219(2)(j) (1978); N.M. STAT. ANN. ss. 31-17-1(A)(4), 31-20-6(B) (1978); OKLA. STAT. ANN. tit. 22, s. 991(F)(3) (West Cum. Supp. 1979).

[303] 590 P.2d 410 (Alaska 1979).

[304] But see State v. Morgan, 8 Wash. App. 189, 504 P.2d 1195 (1973). (infra, text at note 320.)

[305] 275 Or. 684, 552 P.2d 829 (1976).

[306] Id. at 275 Or. 687, 552 P.2d 831 (emphasis added); but cf. State v. O'Connor, 77 Wis.2d 261, 252 N.W.2d 671 (1977) (where loss is not clear at sentencing and later is much greater than contemplated, trial judge should reconsider restitution). See also OKLA. STAT. ANN. tit. 22, s. 991a(1)(a) (West Cum. Supp. 1979) (court may, at time of sentence, or at any time during suspended sentence order restitution to the victim).

and expands upon the requirement of "actual" loss or damage:

> "Economic loss" means actual economic detriment suffered by the victim consisting of medical expenses actually incurred, damage to real and personal property and any other out-of-pocket expenses reasonably incurred as the direct result of the criminal act of the defendant. No other elements of damage shall be included."[307]

A similar Maine statute also limits the type of loss for which criminal restitution might be required to "economic losses," and adds the more explicit exclusion of "noneconomic detriment [consisting of] pain, suffering, inconvenience, physical impairment and other nonpecuniary damage."[308]

In a slight variation on the Oklahoma and Maine laws, statutes in Iowa, New Mexico, and South Dakota authorize restitution for all damages recoverable civilly except "punitive damages, pain and suffering, mental anguish and loss of consortium."[309] Likewise, statutes in Oregon and Mississippi allow restitution for all special, but not general, damages recoverable civilly, including the money equivalent of property and losses

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[307] OKLA. STAT. ANN. tit. 22, s. 991(f)(3) (West Cum. Supp. 1979).

[308] ME. REV. STAT. tit. 17-A, s. 1322(3) (Pamphlet 1978).

[309] IOWA CODE ANN. s. 907.12(1)(b) (West Cum. Supp. 1979); N.M. STAT. ANN. s. 31-17-1(A)(2) (1978); S.D. COMP. LAWS ANN. s. 23A-28-2 (Special Supp. 1978).

such as medical expenses.[310] The focus upon special damages is restated in numerous other statutes that simply allow recovery of "economic,"[311] "monetary,"[312] "pecuniary,"[313] or "out-of-pocket"[314] losses, or restitution for specific types of injury such as "loss of earnings."[314a]

Although a majority of the sources reviewed favor the restriction to economic loss, there are a number of notable exceptions in which the scope of restitution in criminal courts more closely approximates the complete dimensions of civil liability. A recent North Carolina law, for example, authorizes restitution for such damages or loss as could

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[310] MISS. CODE ANN. s. 99-37-1(c) (1978); OR. REV. STAT. s. 137.103(2) (1977). The Oregon statute appears to run counter to State v. Sullivan, 544 P.2d 616 (1976) in which the Oregon Court of Appeals upheld an award of $3,000 to a rape victim for "physical and mental anguish" and "trauma." Id. at 618. Cf. State v. Usher, 552 P.2d 1345 (1976) ($3,000 restitution to attempted sodomy victim was beyond authority of court where $3,000 represented a sum greater than any expenses involved). See also PA. STAT. ANN. tit. 18, s. 1106(h) (Purdon Cum. Supp. 1979) (restitution for bodily harm including pregnancy).

[311] ARIZ. REV. STAT. ANN. s. 13-603(c) (1978); ME. REV. STAT. tit. 17-A., s. 1322(6)(a), (B) (Pamphlet 1978).

[312] S.C. CODE s. 17-25-125 (1978).

[313] CAL. PENAL CODE s. 1202.5(a) (West Cum. Supp. 1979); ILL. ANN. STAT. ch. 38, s. 1005-6-3.1(c)(9) (Smith-Hurd Cum. Supp. 1979); IOWA CODE ANN. s. 907.12(1)(d) (West Cum. Supp. 1979); OR. REV. STAT. s. 137.103(3) (1977); S.D. CODE LAWS ANN. s. 23A-28-2(4) (Special Supp. 1978).

[314] ILL. ANN. STAT. ch. 38, s. 1005-5-6(b) (Smith-Hurd Cum. Supp. 1979).

[314a] FLA. STAT. ANN. s. 921.143(2) (West Cum. Supp. 1979).

ordinarily be recovered by an aggrieved party in a civil action.[315] Similarly, courts have conditioned probation upon payment of restitution of damages awarded in actual civil proceedings against the defendant.[316]

In addition, unlike the usual limitation to "actual" or "economic" loss, or to what a New Jersey statute defines as "the amount of money or value of property separated from the victim,"[317] the State of Washington allows the sentencing court to impose restitution of twice the amount of the victim's loss or the offender's gain.[318] Also in Washington, a more common type of statutory formulation, "restitution to any person or persons who may have suffered loss or damage," has been interpreted to include an award for pain and suffering.[319] In State v. Morgan,[320] a Washington appeals court upheld such an order for $1,500 to the victim of an assault.

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[315] N.C. GEN. STAT. s. 15A-1343(6)(d) (Cum. Supp. 1977) as amended 1977 N.C. Sess. Laws ch. 1147, S.B. 986.

[316] Gross v. United States, 228 F.2d 612 (8th Cir. 1956); People v. McLean, 279 P.2d 87 (Cal. Dist. Ct. App. 1955); People v. D'Elia, 167 P.2d 253 (Cal. Dist. Ct. App. 1946).

[317] N.J. STAT. ANN. s. 2A:93-5.1 (West Cum. Supp. 1979). It is unclear from this type of provision what should be done in a case in which the defendant's gain is significantly greater than the victim's loss.

[318] WASH. REV. CODE ANN. s. 9A.20.030(1) (1977).

[319] State v. Morgan, 8 Wash. App. 189, 504 P.2d 1195 (1973).

[320] Id.

Other examples of departures from the general limitation to special damages include a Louisiana statute authorizing restitution to the victim in an amount to compensate for his "loss and inconvenience."[321] Relying upon this provision, the State's Supreme Court has ruled that restitution need not be limited to the precise value of the victim's lost property in a forgery case.[322] In State v. Garner,[323] an Arizona Court of Appeals concluded that "reparations are not necessarily confined to 'liquidated,' 'special,' or 'easily measurable' damages."[324] The victim in Garner suffered a gun-shot wound in the neck, and because the bullet could not be removed safely he was "significantly incapacitated." The only monetary damage referred to in the record before the appellate court was for $2,600 paid by an insurance company to the victim for medical expenses; a pre-sentence probation report recommended that the defendant pay $1,800 to the insurance company.[325] Expressing a belief that a trial court must use greater caution if reparations as a condition of probation are to include elements beyond mere "special damages", the court nevertheless upheld an order for restitution of $6,000 to the victim.[326]

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[321] LA. CODE CRIM. PROC. ANN. art. 895.1 (West Cum. Supp. 1979).

[322] State v. Sandifer, 359 So.2d 990 (La. 1978).

[323] 115 Ariz. 579, 566 P.2d 1055 (1977).

[324] Id. at 566 P.2d 1057.

[325] Id. at 1056.

[326] Id. at 1057.

One final exception to the usual proscription of general damages in criminal restitution involves incidents in which the victim dies, and restitution is awarded to surviving relatives or to the victim's estate.[327] In addition to allowing restitution to cover fixed liabilities such as funeral expenses,[328] courts have also awarded sizeable amounts as general damages. In State v. Gunderson,[329] for example, general damages of $7,500 were awarded to the parents of a negligent homicide victim, as a condition of release under a Washington State law allowing deferment of the defendant's sentence.[330] Similarly, criminal restitution statutes in several states authorize damages for wrongful death without limitation.[331]

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[327]Surviving relatives have not always been ruled to be eligible recipients of restitution; see cases cited supra notes 213, 215.

[328]State v. Summers, 60 Wash. 2d 702, 375 P.2d 143 (1962); cf. Shenah v. Henderson, 106 Ariz. 399, 476 P.2d 854 (1970 ($2,500 in reparations to parents of girl killed in manslaughter automobile accident "to help defray the expenses of their loss").

[329]74 Wash. 2d 226, 444 P.2d 156 (1968).

[330]WASH. REV. CODE ANN. s. 9.95.210 (2).

[331]IOWA CODE ANN. s. 907.12(1)(b) (West Cum. Supp. 1979); N.M. STAT. ANN. s. 31-17-1(A)(2) (1978); OHIO REV. CODE ANN. s. 2929.02(D) (Page 1974); S.D. COMP. LAWS ANN. s. 23A-28-2 (Special Supp. 1978).

Competing Factors: Arriving at an amount of restitution to which the victim, ceteris paribus, might be entitled, does not of course translate automatically into what the court may require. The actual amount of restitution imposed may be mitigated by consideration of a defendant's limited payment ability, or by compromising the victim's interest in recovery in order to attempt to achieve more traditional aims of sentencing. In Maine, for example, restitution is declared by statute to be only an ancillary remedy, to be offered only when other purposes of sentencing can be appropriately served.[332] The most dramatic example of the latter conflict arises when incapacitative, retributive or deterrent considerations lead to a decision to incarcerate the defendant; such an outcome will more often than not exclude the possibility of restitution, either de facto due to the low earnings of inmates,[333] or because there is no legal authority to require both imprisonment and restitution.[334]

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[332]ME. REV. STAT. tit. 17-A, s. 1321 (Pamphlet 1978).

[333]Although the operational incompatibility of restitution and incarceration may diminish as more use is made of the split sentence, restitution centers and restitution industries within custodial settings, there remains a significant gap between legislative appearance and physical reality. Despite extensive restitution provisions in the Maine criminal laws (supra notes 187, 190, 191), for example, actual restitution programs in correctional settings remain virtually nonexistent. (Correspondence with D. Gilboa - Director, Maine Juvenile Restitution Program, Portland, Maine.)

[334]See, e.g., State v. Wright, 156 N.B. 559, 384 A.2d 1988 (1978) (while restitution authorized as probation condition, no authority to impose it as part of custodial sentence); See also, cases and statutes cited supra, notes 146, 151-157; cf. State v. Calderilla, 34 Or. App. 1007, 580 P.2d 578 (1978) (restitution not enforceable during period of imprisonment unless court expressly finds defendant has assets to pay all or part of amounts ordered at time of sentencing).

The need to balance the offender's economic circumstances, the victim's interest in recovery, and the punitive and reformative goals of the system is acknowledged repeatedly in statutory enactments and case-law. Several jurisdictions, for example, explicitly authorize dispositions requiring "partial" or "nominal" restitution.[335] In addition, statutory provisions for restitution are commonly qualified by grants of discretion to the court or other decision-makers, to impose only "reasonable"[336] restitution, where it is "feasible,"[337] "practicable,"[338] and "appropriate,"[339] "as the circumstances of the case may require and warrant."[340]

When restitution statutes are silent as to the standard to be applied, courts have supplied a variety of general and specific tests. An Illinois

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[335] ARK. STAT. ANN. s. 41-1203(5) (1977); IOWA CODE ANN. s. 907.12(1)(d) (West Cum. Supp. 1979); KAN. CRIM. PROC. CODE ANN. s. 21-4603(2)(c) (Vernon, 1978); MISS. CODE ANN. s. 99-37-1(c) (1978); N.M. STAT. ANN. s. 31-17-1(A)(4) (1978); N.C. GEN. STAT. s. 15A-1343 (1977) as amended 1977 N.C. Sess. Laws, ch. 1147, S.B. 986; OHIO REV. CODE ANN. s. 2929.11(D) (Page Supp. 1978); OR. REV. STAT. s. 137.103(3) (1977); S.D. COMP. LAWS ANN. s. 23A-29-2(4) (Supp. 1978).

[336] ARK. STAT. ANN. s. 46-117(c) (1977); LA. CODE CRIM. PROC. ANN. art. 895 (West Cum. Supp. 1979); VT. STAT. ANN. tit. 13, s. 2578(a) (1978); VA. CODE s. 19.2-305.1(B) (1978).

[337] COLO. REV. STAT. s. 17-28-101(2) (1978); VA. CODE s. 19.2-305.1(B) (1978); WASH. REV. CODE ANN. s. 9A.20030 (1977) as amended 1979 Wash. Legis. Serv., ch. 29; p. 123, S.B. No. 2417.

[338] MINN. STAT. ANN. s. 609.135(1) (West Cum. Supp. 1979); VA. CODE s. 19.2-305.1(B) (1978).

[339] PA. STAT. ANN. tit. 17, s. 1106(n) (Purdon Cum. Supp. 1979); WASH. REV. CODE ANN. s. 9A. 20-030 (1977) as amended 1979 Wash. Legis. Serv., ch. 29; p. 123, S.B. No. 2417.

[340] MICH. COMP. LAWS ANN. s. 771.3(3) (1970) as amended 1978 Mich. Pub. Acts., P.A. 77.

Court, for example, in People v. Tidwell,[341] ruled that in fixing an award as a condition of probation the court's discretion should be "subject to the parameter of reasonableness," and the restitution should be "reasonable and just."[342] In deciding what is reasonable, however, two schools of thought may be discerned.

A first approach is to consider inability to pay as a problem to be faced more when enforcing restitution,[343] rather than when imposing it. In the Tidwell case, for example, the court rejected a defendant's objection to the imposition of restitution on the grounds that he could not pay, because: "Unlike statutes that have been adopted in other jurisdictions, the provisions of our criminal code do not require that restitution or reparation be predicated on the prospective probationer's ability to pay . . . . Conceivably, during the term of his probation, the defendant's health, employment and finances may improve."[344] Similarly, in another restitution case, People v. Gallagher,[345] a Michigan Court of Appeals observed that : "In deciding what is reasonable, the court should be optimistic that probation and the defendant will both work."[346]

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[341] 33 Ill. App. 3d 232, 338 N.E. 2d 113 (1975).

[342] Id. at 338 N.E. 2d 117, 118; accord State v. Harris, 70 N.J. 586, 362 A.2d 32 (1976).

[343] For discussion of the limitations upon the court's powers to enforce restitution against an offender who cannot afford to pay, see "Enforcement Provisions," infra at 124 ff.

[344] 338 N.E. 2d 118.

[345] 55 Mich. App. 613, 223 N.W. 2d 92 (1974).

[346] Id. at 223 N.W. 2d 95.

There is no clear indication in the Tidwell and Gallagher cases as to how "optimistic" a judge is entitled to be, or how inconveivable it must be that the offender will be able to pay, before the imposition of restitution becomes unreasonable and an abuse of judicial discretion. In Tidwell the amount in question was only $200,[347] and although in Gallagher the restitution was over $6,000, the defendant owned and operated his own business and the probation period over which payments might be spread was five years.[348] What is clear, however, is that some consideration of the offender's ability to pay must be given at the time of sentencing, and a policy of full restitution in all cases, perhaps under the theory that even a totally destitute offender might win the state lottery in the future, would be unreasonable. Indeed, the second school of thought mentioned suggests that there is a need for as much precision as possible in setting the amount of restitution in accordance with the offender's likely ability to pay.

In People v. Lofton,[349] for example, a New York City Criminal Court ruled in a public assistance fraud case that to condition probation upon more reparation than the offender can afford "would be unreasonable, since it would pretend to offer probation on a condition impossible to satisfy."[350]

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[347] 338 N.E. 2d 113 at 115.

[348] 223 N.W. 2d 92 at 94.

[349] 78 Misc. 2d 202, 356 N.Y.S. 2d 791 (1974).

[350] Id. at 356 N.Y.S. 2d 793.

Similarly, in another New York case, before the Appellate Division of the Supreme Court,[351] the court noted that "if the suspension of the [defendant's] sentence is to be meaningful, the conditions of the defendant's probation must be such as are within the defendant's capacity to meet, in the light of his financial position and average earnings."[352]

A standard lower than the "impossibility" required in Lofton may be inferred from a more recent Arizona case, State v. Garner,[353] in which a State Court of Appeals ruled that: "An order requiring payment of reparations should be within the means of the convicted person . . . If reparations were beyond the probationer's means, they could not have a salutory rehabilitative effect, as well as a punitive effect."[354] The reasoning in Garner was followed by the Supreme Court of Wisconsin in the case of Huggett v. State.[355] Pointing out that at the rate established at conviction, apparently $20 per month, it would have taken Huggett twenty-seven years to repay the sum ordered as restitution for theft of public assistance funds, the court added that "conditioning probation on the satisfaction of requirements which are beyond the probationer's control undermines the probationer's sense of responsibility."[356]

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[351] People v. Marx, 19 A.D. 2d 577, 240 N.Y.S. 2d 232 (1963).

[352] Id. at 240 N.Y.S. 2d at 234 (emphasis added).

[353] 115 Ariz. 579, 566 P.2d 1055 (1977).

[354] Id. at 566 P.2d 1057.

[355] 83 Wis. 2d 790, 266 N.W. 2d 403 (1978).

[356] Id. at 266 N.W. 2d 407.

The potentially negative effect that an overly burdensome or impossible restitution order might have upon an offender's rehabilitation[357] is recognized in several recent restitution statutes. In Iowa, for example, before approving a plan of restitution the court is required to consider:

> [T]he physical and mental health and condition of the defendant, the defendant's age, the defendant's education, the defendant's employment circumstances, the defendant's potential for employment and vocational training, the defendant's family circumstances, the defendant's financial condition, the number of victims, the pecuniary damages of each victim, what plan of restitution will most effectively aid the rehabilitation of the defendant, and such other factors as shall be appropriate.[358]

New Mexico judges are instructed to consider an equally undifferentiated and ambiguous set of factors[359] (How is the age of the defendant to be considered? Too young for restitution? Too old? Too middle-aged?), and a South Dakota statute is framed in similar language.[360]

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[357]Ironically, it seems likely that the greatest hardship from an excessive restitution order might be felt by a defendant with an already developed sense of responsibility, who might go to great lengths to repay his debt. For a classic literary treatment of the potentially ruinous effects of an individual's desire to 'wipe the state clean' without regard to personal and family hardship, see the short story "The Pearl Necklace" by Guy de Maupassant THE ODD NUMBER: THIRTEEN TALES BY BUY DE MAUPASSANT (Sturges ed. Harper and Bros. 1889).

[358]IOWA CODE ANN. s. 907.12(2) (West Cum. Supp. 1979).

[359]N.M. STAT. ANN. s. 31-17-1(D) (1978).

[360]S.D. COMP. LAWS ANN. s. 23A-28-5 (Special Supp. 1978).

In the State of Washington, once restitution is imposed courts are explicitly empowered by statute to adjust it, downwards or otherwise, if to do so would be in the best interests of the offender's rehabilitation.[361] Trial courts elsewhere have been cautioned that "if payment is impossible or would constitute an undue hardhsip, those [restitution] conditions should be modified or withdrawn."[362] For the sentencing court to fail to do so when notified of the defendant's financial situation has been held to constitute an abuse of discretion.[363]

Consideration of the defendant's means,[364] capabilities,[365] economic circumstances,[366] financial resources[367] or capacity to make restitution[368] is one of the most common themes running through statutory provisions dealing with the imposition of restitution.[369]

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[361]WASH. REV. CODE ANN. s. 7.68.120(3) (Supp. 1978).

[362]People v. LaPine, 63 Mich. App. 554, 558, 234 N.W. 2d 700, 702 (1975).

[363]People v. Lemon, 83 Mich. App. 737, 265 N.W. 2d 31 (1978).

[364]ARK. STAT. ANN. s. 51-1201(1)(d) (1977).

[365]TENN. CODE ANN. s. 51-2108(4) (1978).

[366]ARIZ. REV. STAT. ANN. s. 13-603(c) (1978).

[367]FLA. STAT. ANN. s. 775.089(2) (West Cum. Supp. 1979); N.J. STAT. ANN. 2C:44-2(c) (West Cum. Supp. 1979).

[368]HAW. REV. STAT. s. 706-602 (1976).

[369]For discussion of the constraints operating at the stage of enforcing payment, see "Enforcement Provisions," infra at 124 ff.

Criminal justice decision-makers are instructed repeatedly to order restitution only to the extent that the defendant is reasonably[370] or financially[371] able, in such amounts as the defendant can afford to pay.[372] In deciding whether the defendant is able or will be able[373] to pay, legislatures have required consideration of the burden that restitution might impose on the defendant,[374] prohibiting restitution that might cause unreasonable,[375] excessive,[376] or manifest[377] hardship to the defendant.

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[370] IOWA CODE ANN. s. 907.12(2) (West Cum. Supp. 1979); N.M. STAT. ANN. s. 31-17-1(A) (1978); S.D. COMP. LAWS ANN. ss. 23A-28-1, 4 (1978).

[371] CAL. CRIM. CT. R. 414; ME. REV. STAT. tit. 17-A., s. 1325(1)(C) (Pamphlet 1978).

[372] ARK. STAT. ANN. s. 41-1203(2)(h) (1977); CONN. GEN. STAT. ANN. s. 53a-30(a)(4) (West Cum. Supp. 1979); HAW. REV. STAT. ss. 706-605(1)(e), 706-624(2)(h) (1976); N.J. STAT. ANN. s. 2C:45-1(b)(8) (West Cum. Supp. 1979); N.Y. FENAL LAW s. 65.10(2)(P) (Consol. 1977); PA. STAT. ANN. tit. 18, s. 1354(c)(8) (Purdon Cum. Supp. 1979).

[373] COLO. REV. STAT. s. 16-11-204(2) (1978); FLA. STAT. ANN. s. 775.089 (i) (West Cum. Supp. 1979); IND. CODE ANN. s. 35-7-2-1(a)(5) (Burns Cum. Supp. 1979); N.J. STAT. ANN. s. 2C:44-2(c) (West Cum. Supp. 1979); VT. STAT. ANN. tit. 28, s. 252(b)(5) (1978).

[374] FLA. STAT. ANN. s. 775.089(2) (West Cum. Supp. 1979); N.J. STAT. ANN. s. 2C:44-2(c) (West Cum. Supp. 1979).

[375] ARK. STAT. ANN. s. 41-1201(1(d) (1977).

[376] ME. REV. STAT. tit. 17-A., s. 1325(2)(D) (Pamphlet 1978).

[377] OKLA. STAT. ANN. tit. 22, s. 991(a)(i)(a) (West Cum. Supp. 1979).

In addition to the attention that legislators and judges have given the general issue of ability to pay and the hardship on excessive restitution-order might cause the defendant, its importance is also suggested in the Model Penal Code,[378] and in Standards Relating to Probation promulgated by the American Bar Association.[379] Interest has also focused, moreover, on a variety of more specific demands upon an offender's resources, that must be taken into account when imposing restitution. Both appellate court[380] and legislative[381] concern has been voiced over the potential impact that a restitution requirement might have upon the offender's dependents. In Maine and Oklahoma statutes, for example, restitution is explicitly to be weighed against the avoidance of hardship to dependents.[382] In California, a defendant's compensation obligation must be limited to an amount that will not cause dependents to go on welfare.[383]

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[378] Sections 301.1(1), (2) (P.O.D. 1962).

[379] Section 3.2(d) (Approved Draft 1970).

[380] See e.g., Huggett v. State, 83 Wis. 2d 790, 266 N.W. 2d 403 (1978).

[381] ME. REV. STAT. tit. 17-A., s. 1325(2)(D) (Pamphlet 1978); OKLA. STAT. ANN. tit. 22, s. 991a(1)(a) (West Cum. Supp. 1979) (immediate family).

[382] Id.

[383] CAL. GOV'T. CODE s. 13867 (West Cum. Supp. 1979) (payment into state's victim indemnity fund).

Other criteria included as statutory guides to assessing potential hardship and ability to pay include the defendant's standard of living,[384] or the usual living expenses of the defendant and his dependents,[385] any special needs such as travel expenses too and from work,[386] and the defendant's ability to pay in installments.[387] In each case, the courts have usually required that the defendant bear the burden of proof at the time of sentencing to raise and demonstrate his inability to pay the amount proposed by the court.[388]

Finally, further legislative attention has been directed towards defining the place of restitution in a hierarchy of other explicit financial obligations the offender may have. Several statutes, for example, give restitution priority over fines and court costs.[389] Under a North Dakota

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[384] KAN. CRIM. PROC. CODE ANN. s. 21-4610 (Vernon Supp. 1978).

[385] ME. REV. STAT. tit. 17-A., s. 1325(D)(s) (Pamphlet 1978).

[386] Id.

[387] MISS. CODE ANN. s. 99-37-1(2)(b) (1978); OR. REV. STAT. s. 137.106 (2)(b) (1977). See also State v. Buelna, 25 Ariz. App. 414, 544 P.2d 238 (1976) (unreasonable to demand restitution within seven months; payments extended over full three year probation period).

[388] See e.g. State v. Garner, 115 Ariz. 579, 566 P.2d 1055 (1977); but cf. State v. Benoit, 313 A.2d 387 (Vt. 1973) (necessary for trial court to determine whether or not the defendant can or will be able to pay).

[389] See statutes cited supra note 148.

correctional law, by comparison, restitution is assigned only fourth priority behind payment of room and board, costs and fines.[390] In the same statute, however, restitution is granted priority over support of dependents.[391] In Colorado[392] and in Tennessee[393] restitution appears at the head of the list of allowable expenditures from an inmate's income, with priority, inter alia, over support of dependents and room and board. In Maryland and Wyoming laws, on the other hand, priority is given to room and board, job related expenses, and support of dependents, over restitution.[394] Similar restrictions on restitution are imposed by statutes allowing only a certain percentage of the defendant's institutional[395] or parole[396] earnings to be used for restitution, or by requiring that part of such income be reserved for other purposes, such as the inmate's savings account.[397]

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[390] N.D. CENT. CODE s. 12-48.1-03 (1975).

[391] Id.

[392] COLO. REV. STAT. s. 16-11-212(2) (1978).

[393] TENN. CODE ANN. s. 41-2306 (1978). See also Huggett v. State, 83 Wis. 2d 790, 266 N.W.2d 403 (1978): "[I]t is more reasonable to have the public assist the defendant through welfare and have the victim of the crime reimbursed through restitution on the premise that the defendant's funds are more appropriate for his or his dependent's support." Id. at 266 N.W. 2d 411 (Callow J. dissenting).

[394] MD. ANN. CODE art. 27, s. 645W(c) (1978); WYO. STAT. s. 7-378.8 (1975).

[395] ARIZ. REV. STAT. ANN. s. 31-254(1)(B)(2) (1978) (not more than 30 percent); LA. REV. STAT. ANN. s. 15:8402(d)(2) (West Cum. Supp. 1979) (30 percent); MISS. CODE ANN. s. 47-5-161(2) (1978) (not more than 25 percent); NEB. REV. STAT. ss. 81-1828(1), (2) (1978) (one-third to victim compensation fund, or total wages if defendant has no dependents); TENN. CODE ANN. s. 41-2406(a) (1978) (20 percent minimum). Restitution to victims assumes priority over payment to Tennessee's victim compensation fund, infra note 396.

[396] TENN. CODE ANN. s. 40-3207(c) (1978) (not more than 10 percent to victim compensation fund).

[397] OKLA. STAT. ANN. tit. 57, s. 549(5) (West Cum. Supp. 1979) (not less than 20 percent).

Imposition Procedures: The substantive limitations discussed so far, whether related to the types of recipient, offense, loss, or factors that might compete or conflict with restitution, all may have relatively little effect on the way restitution is actually used, unless adequate procedural safeguards exist to assure that they are adhered to by the courts. As has been shown to be the case for each of the substantive restrictions, however, there is considerable variation in legislation and case-law from one jurisdiction to the next as to what those procedural safeguards must be.[398] One exception is that there has been a quite uniform response to the question of whether the court may delegate responsibility for setting restitution to correctional authorities, usually probation officers.

Except under the relatively few statutes reviewed in which restitution is authorized primarily within a correctional setting,[399] appellate courts have generally insisted that both the extent (amount) and terms

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[398] Surprisingly, there has been very little attention to the issue of procedural regularity in most of the literature on restitution. Most writers have focused upon procedures that would facilitate the more widespread use of restitution (see generally CONSIDERING THE VICTIM, Hudson and Galaway eds., supra note 29). For a dated discussion of the safeguards surrounding modification of probation conditions, including restitution, see "Note: Use of Restitution in the Criminal Process: People v. Miller," supra note 274.

[399] See statutes cited supra notes 185-193. Provisions of this type range in scope from very broad grants of discretion to a parole board to set general rules and regulations for restitution in conjunction with parole (N.J. STAT. ANN. s. 30:4-123.6 (West 1964)) to very detailed requirements that new prison-commitment forms be designed to accommodate a record of court-ordered restitution (N.C. GEN. STAT. s. 14-332(c) (1977). Legislative reluctance to proceed with restitution beyond judicial control, however, is illustrated in a Tennessee restitution center statute that requires not only that correctional authorities screen inmates carefully, but that "the committing courts shall be consulted before an inmate is placed in the restitution program (TENN. CODE ANN. s. 41-2309 (1978)); cf. People v. Anonymous, 56 Misc. 2d 792, 290 N.Y.S. 2d 507 (1968) (restitution to be made subject to and under judicial control, not as part of bargain to avoid prosecution).

(schedule) of restitution payments be set by the trial court, and not delegated to the probation department. In State v. Harris,[400] for example, the Supreme Court of New Jersey criticized a trial judge's order that "restitution will be in such amounts [per periodic payment] as the probation officer will determine."[401] Referring to an earlier holding in State in the Interest of D.G.W.,[402] the Harris court ruled that "it is the nondelegable responsibility of the judge to fix the extent and terms of restitution."[403] A Supreme Court ruling in the State of Washington reached the same conclusion in State v. Summers:[404] "It is an unlawful delegation of judicial authority to authorize the probation officer to fix the amount of the payments."[405]

Ruling against a trial court's instruction similar to the defective direction in Harris, that restitution of $8,584.86 be paid "in such manner as shall be determined by the . . . Probation Department,"[406] a New York appellate court has also affirmed that a restitution sentence must

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[400] 70 N.J. 586, 362 A.2d 32 (1976).

[401] Id. at 362 A.2d 34 fn.1.

[402] 70 N.J. 488, 361 A.2d 513 (1976).

[403] 362 A.2d 34 fn.1.

[404] 375 P.2d 143 (Wash. 1962).

[405] Id. at 146.

[406] People v. Julye, 64 A.D.2d 614, 406 N.Y.S. 2d 529 (1978).

prescribe the amount and manner of performance.[407] More specifically, in an earlier New York case, People v. Frink,[408] a County Court judge vacated the lower court's restitution order in which no total amount was fixed, on the grounds that: "This leaves the defendants at the mercy of the [victim] upon the question of amount of damage done . . . ."[409] Objections in other jurisdictions stem from a variety of similar concerns.

In Texas, for example, trial court orders for offenders to "make restitution as and when directed by the probation officer" have been struck down as being vague and uncertain and an unauthorized delegation of judicial authority.[410] Vagueness objections to the Texas-style restitution provision have also been raised in the federal jurisdiction; in United States v. Shelby,[411] a Seventh Circuit Court of Appeals declared that: "We consider that provision to be vague in that there is no maximum limitation corresponding to the actual loss caused by the offense for which conviction was had."[412] Similarly, a Fifth Circuit Court of

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[407] Id.; follows People v. Thigpen, 60 A.D.2d 860, 400 N.Y.S. 2d 584 (1978); cf. Commission Staff Notes to N.Y. PENAL LAW s. 65.10 f (Consol. 1977) (amount and manner of performance are essential elements of any direction to make restitution or reparation and should be determined by the court and imposed along with the basic direction to pay).

[408] 68 N.Y.S. 2d 103 (Cty. Ct. 1947).

[409] Id. at 104.

[410] Cox v. State, 445 S.W. 2d 200 (Tex. Crim. App. 1969); Dossey v. State, 445 S.W. 2d 203 (Tex. Crim. App. 1969).

[411] 573 F.2d 971 (1978).

[412] Id. at 976; cf. Shore v. Edmisten, 290 N.C. 628, 227 S.E. 2d 553 (1976) (aggrieved party must be named in judgment order).

Appeals has ruled that a restitution requirement must be "clear and unequivocal," and that the better practice is that the amount and manner of performance be in the court order rather than delegated to the probation officer.[413]

As a standard to combat vagueness, an Oregon Court of Appeals has ruled that a restitution order must be "sufficiently specific that the defendant knows what is required of him, and when it is required."[414] Going one step further, a Supreme Court of Michigan decision, in People v. Good,[415] invalidated a probation order of restitution of $385 "payable as determined by the probation department;"[416] the court ruled that:

> The order is invalid also because it permits the probation department to determine how restitution of the $385 shall be made by the defendant. [State law] permits the court to impose the conditions of probation including restitution, etc., and contains no authorization for a delegation of this duty, in whole or in part to the probation department. The probation department may act in this matter in, at most, advisory capacity.

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[413] United States v. Mancuso, 444 F.2d 691, 695 (1971).

[414] State v. Calderilla, 34 Or. App. 1007, 580 P2d 578, 579 (1978).

[415] 287 Mich. 110, 282 N.W. 920 (1938).

[416] Id. at 282 N.W. 922.

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> The court should in any event include within its order the specific purpose, terms and conditions of the payment of money by a defendant if such payment is made a condition of probation.[417]

An argument advanced in favor of requiring judges to address themselves to questions of the amount and schedule of restitution payments was made in Vermont Supreme Court case, State v. Benoit:[418]

> Such questions present factual matters for determination. It was necessary for the trial court to determine whether or not the defendant can or will be able to pay the amount of restitution ordered. Such decision can only be made upon the presentation of evidence before the court. It also seems self evident that the manner of performance is also dependent upon the evidence presented to the sentencing court. Such manner of performance might be an order to pay the total sum of the restitution ordered, forthwith. On the other hand, depending on the facts of the case, such order might allow a defendant to pay restitution in certain specific payments, over a period of time, or possibly, that such payment should be made at some time in the future. The trial court, being the trier of facts, must hear the evidence and make findings of fact upon both of these statutory requirements.[419]

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[417] Id. at 923-24. The state law cited by the court was MICH. STAT. ANN. s. 28.1133 which provides in part:

> "The court may impose such other lawful conditions of probation, including restitution in whole or in part to the person or persons injured or defrauded, as the circumstances of the case may warrant, or as in its judgment may be meet and proper" Id. at 923.

Although the Michigan statute is typical in the seuse that it does not explicitly authorize delegation of restitution matters, relatively few statutes explicitly require the court to fix the amount and schedule. But see CAL. PENAL CODE s. 1202.5(a)(1) (West Cum. Supp. 1979) (if restitution is ordered as condition of probation for auto theft the court shall establish a reimbursement schedule not to exceed ten years).

[418] 313 A.2d 383 (1973).

[419] Id. at 389.

The potential impact and pervasiveness of the practice of delegation of judicial authority over restitution, however, are demonstrated vividly in a Georgia case, Morgan v. Wofford,[420] decided by the United States Court of Appeals for the Fifth Circuit.

According to the testimony of the chief probation officer in Morgan, it was a normal sentencing practice to leave the amount of restitution open in the court's probation order, and to allow the victim to certify his losses to the probation office at a later date. From the record before it, moreover, the Court of Appeals inferred that the probation officer filled in the amount, in this case $7,000, without further judicial scrutiny. When the offender learned of the amount several months later he and his public lawyer met with the judge and probation officer in the judge's chambers to complain about it. Judge Wofford said at that time, and at a subsequent meeting with a second attorney, that the matter of restitution "was closed" and "not open to question," adding that Morgan had the choice of paying or going to jail.[421]

Citing the United States Supreme Court ruling in Fuentes v. Shevin[422] for the proposition "that due process requires as [sic] opportunity for a hearing before deprivation of property takes effect,"[423] the Court of appeals in Morgan reasoned that:

> A fortiori, prior notice and an opportunity to be heard are prerequisite where $7,000 is ordered by a court of law

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[420] 472 F.2d 822 (1973).

[421] Id. at 824-25.

[422] 407 U.S. 67, 88 (1971).

[423] 472 F.2d 827.

> to be paid out of appellant's weekly salary and the penalty for failure to pay is imprisonment . . . .
> Few procedures, we think, are more likely to encourage . . . miscarriages [of justice] than this one; a unilateral statement taken from one party that another party owes him money is accepted as a true and enforceable obligation, and that other party is never allowed to challenge the accuracy of the amount claimed.[424]

The successfully challenged delegation of authority in Morgan v. Wofford is perhaps especially indicative of how widespread similar practices may be elsewhere, under statutes granting sentencing judges more open-ended discretion than is the case in Georgia; for the summary extra-judicial process in Morgan occurred "flatly in the face of the statute"[425] which authorizes restitution "in an amount to be determined by the court, provided, however, that no reparation or restitution . . . shall be made if the amount is in dispute unless the same has been adjudicated."[426]

Insistence that authority over assessing and/or scheduling restitution should not be delegated by the court has not been without exception. Statutes authorizing restitution in conjunction with custodial dispositions frequently provide for court-ordered restitution to be scheduled and enforced by correctional officials. This is most commonly the case where split-sentences or work-release arrangements are contemplated.[427]

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[424] Id.

[425] Id. at 828.

[426] GA. CODE ANN. s. 27-2711 (emphasis added).

[427] See statutes cited supra notes 174, 190.

Less commonly, a department of corrections or parole and probation commission is authorized to set both the amount and schedule of restitution, usually as a condition of parole.[428] A Florida law of this latter type, however, explicitly reserves ultimate authority for the court, by providing that inmates may petition the circuit court to amend any amount set or revise the payment schedule.[429]

Other deviations from the non-delegation norm include another Florida statute in which the probation and parole commission is authorized to set the actual level of restitution to be paid, within a maximum amount fixed by the court.[430] A similar practice was also approved by a California District Court of Appeal in People v. Marin;[431] the trial court in Marin granted probation on condition that the defendant serve 6[illegible]ays in the county jail for welfare fraud, and make restitution or reimbursement to the county in the sum of $544, or "in such amount as the probation officer determines."[432] Upholding the order, the appellate court stated that: "It was the purpose and intent of the trial judge, as gleaned from the record, that this amount would

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[428] See statutes cited supra notes 191, 192; cf. N.C. GEN. STAT. s. 148-57.1 (1977) (parole commission may require restitution as condition of parole if recommended by sentencing court, and must impose restitution if it is ordered by the court pursuant to a plea bargain). See, State v. Killian, 245 S.E. 2d 812, 816 (N.C. App. 1978) (parole commission may but is not required to implement court's recommendation).

[429] FLA. STAT. ANN. s. 945.091(5)(b) (West Cum. Supp. 1979).

[430] FLA. STAT. ANN. s. 947.181(1) (West Cum. Supp. 1979).

[431] 305 P.2d 659 (1957).

[432] Id. at 660.

be the maximum, and if defendant could convince the probation officer that a lesser amount was due, this sum might be reduced accordingly. Under these circumstances, no prejudicial error resulted."[433] A different type of delegation was permitted by an Illinois court in People v. Tidwell.[434] In Tidwell the trial court fixed restitution at $200, leaving to the probation department the power to decide how payment should be made, with the instruction only that it be at least $20 each month, so that the entire sum would be paid within the probation period.[435] Without explanation the appellate court ruled that this was not an improper delegation of authority.[436]

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[433] Id.

[434] 33 Ill. App. 3d 232, 338 N.E. 2d 113.

[435] Id. at 338 N.E. 2d 115, 118.

[436] Id. at 118. One wonders what might have been the result had the probation officer required significantly larger installments, and later initiated revocation proceedings against the offender for willful nonpayment or even under-payment at the lower level suggested by the court. The weight of cases cited above from other jurisdictions would suggest a finding of unlawful delegation of judicial authority as to any amount beyond $20.

When the court does exercise control over establishing restitutive conditions of the offender's dispostion, there exists considerable uncertainty over the scope of procedural protections to which the offender is entitled. If the basis of liability included in a restitution order was adjudicated in the criminal trial, the offender would be afforded greater procedural guarantees than in a civil proceeding, including trial by jury on a higher standard of proof.[437] In fact, a verdict of guilt in criminal court is rarely efficacious in settling the amount of loss or injury in the crime, since precision in determining the amount involved is usually unnecessary to a finding of guilt.[438] Consequently, attention must usually focus upon procedural standards surrounding the sentencing stage of the criminal process.

Although a criminal court's power to order restitution has been held to exceed the jurisdictional limits imposed by statute if the same court were sitting in a civil capacity,[439] it has generally been found that requiring restitution in a criminal proceeding is not and need not be as formal nor in compliance with all of the due process standards associated with a civil liability action on the same fact situation.

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[437] See "Note: Use of Restitution, supra note 274 at 457 n. 7.

[438] See, for example, the following trial court's charge to the jury in a welfare fraud case:

> "It is not essential that you find the specific amounts actually received as long as you find that some amount was received by the defendant from the Welfare Board that she was not entitled to receive." State v. Harris, 70 N.J. 586, 362 A.2d 32, 33 (1976).

[439] State v. Scherr, 9 Wis. 2d 418, 101 N.W. 2d 77 (1960); but cf. PA. STAT. ANN. tit. 18, s. 1106(a) (Purdon Cum. Supp. 1979) (restitution ordered by district justice not exceed civil jurisdictional limit if amount disputed).

In contrast to the plenary trial involving only formal evidence in a civil suit for damages, it has been held that all that is required to pass constitutional muster in a criminal setting is a "summary procedural pattern,"[440] that may be "analogous to a presentence investigation."[441]

Not surprisingly, therefore, the utility of the presentence investigation as a potential source of restitution information[442] is acknowledged in legislation requiring probation officers to include restitution plans and recommendations in their reports.[443] Partly in deference to already overburdened probation departments, however, other jurisdictions have created special, independent investigative units to meet the task. Connecticut Legislation, for example, creates such a unit within the state's judicial department, to provide restitution services to the court before and after sentencing.[444] The Connecticut

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[440] State v. Harris, 70 N.J. 586, 362 A.2d 32, 37 (1976).

[441] State v. Scherr, 9 Wis. 2d 418, 101 N.W. 2d 77, 80 (1960); accord Biddy v. State, 138 Ga. App. 4, 225 S.E. 2d 448, 451 (1976).

[442] "[T]he presentence report . . . is perhaps the best device for acquainting the court with factors of victimology." Schultz, "The Victim-Offender Relationship" 14 Crime & Delinquency 135 (1968).

[443] CAL. PENAL CODE s. 1203 (West 1970); HAW. REV. STAT. s. 706-602 (1976).

[444] CONN. GEN. STAT. ANN. s. 54-110 (West Cum. Supp. 1979). A similar unit also operates without explicit statutory authorization in the Albuquerque District Court in New Mexico (correspondence with Jane Foraker-Thompson, Director, N.M. Restitution Program, Santa Fe, New Mexico).

unit may also provide limited pre-conviction restitution assessments with the agreement of the prosecutor and defense counsel.[445] More general statutory provisions require that the presentence report show the effects of the crime on the victim(s)[446] or the harm caused to others or the community.[447]

To encourage and assist judges to impose restitution, several states also provide for recommendations and information about restitution to be brought to the court's attention in a number of ways other than the presentence report. In Florida, for example, victims are granted the right to make a statement themselves to the court, relating to the extent of their injuries, financial losses, and loss of earnings directly resulting from the crime for which the offender is being sentenced.[448]

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[445] Ibid.

[446] ILL. ANN. STAT. ch. 38, s. 1005-3-2 (Smith-Hurd Com. Supp. 1979); cf. IND. CODE ANN. s. 35-8-1A-10 (Burns Cum. Supp. 1979) (presentence report to contain statements of victim to prosecutor or probation officer).

[447] MINN. STAT. ANN. s. 609.115 (West Cum. Supp. 1979).

[448] FLA. STAT. ANN. s. 921.143 (West Cum. Supp. 1979). Research in the United Kingdom shows this practice to be very infrequent, but potentially highly effective in securing a restitution award at sentencing. See Softley, Compensation Orders in Magistrates' Courts 11 (H.M.S.O.: London 1977). For a review of the British research on restitution, see Victim involvement in the criminal prosecution is widely accepted in several foreign jurisdictions, most notably in the French courts' use of the partie civile. See C. PRO. PEN. art. 63 (48e ed. Dalloz 1956); C. Pen. art. 51 (53e ed. Dalloz 1956).

In the State of Washington, the prosecutor is placed under a statutory duty to investigate and recommend restitution where appropriate and feasible.[449] South Dakota law, by comparison, specifically rejects such an obligation on the part of the prosecutor, either to investigate restitution or to petition the court for its imposition.[450]

There is some evidence in the cases and statutes reviewed to suggest that the issue of restitution may frequently be resolved in large part at the prosecution stage of criminal proceedings.[451] In North Carolina, for example, provision is made for restitution to be brought before the court as part of a plea negotiation between the prosecution and the defense, as well as in the usual presentence report.[452] Where a plea bargain involving restitution is struck and accepted by the court, moreover, the North Dakota Supreme Court has held that a statutorily specified restitution or reparation hearing is then

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[449] WASH. REV. CODE ANN. s. 9A.20.030 (1977).

[450] S.D. COMP. LAWS ANN. s. 23A-28-10 (Special Supp. 1978).

[451] See e.g. State v. McIntyre, 235 S.E. 2d 920, 923 (N.C. App. 1977) (restitution may be valid condition for acceptance of plea bargain); but cf. People v. Anonymous, 56 Misc. 2d 792, 290 N.Y.S. 2d 507 (1968) (supra note 399).

[452] N.C. GEN. STAT. s. 15A-1021(1)(d) (1977), as amended 1977 N.C. Sess. Laws ch. 1147, S.B. 986; cf. IND. CODE ANN. s. 35-5-6-4 (Burns Cum. Supp. 1979) (any plea agreement to be shown to victim, who has opportunity to present opinion to prosecutor).

"a useless gesture" and an "idle act," even though the bargain does not indicate the specific amount in dollars and cents:[453] "When a defendant agrees to pay for the damage he caused and has a general idea of the amount . . . which is to be determined later, he cannot later claim in the absence of fraud, that he was not made aware of the amount or that he did not agree to the amount."[454]

Whether or not restitution is part of a plea bargain, a defendant's failure to object to its imposition at the time of sentencing has been held to foreclose later challenge founded in procedural due process. In Commonwealth v. Walton,[455] for example, the defendant was ordered to pay $25.00 a week for nineteen years to the victim of his shotgun attack, who suffered the loss of sight in both eyes.[456] In rejecting the argument that the amount was arbitrary and in violation of due process, the Supreme Court of Pennsylvania ruled simply that: "Walton at his sentencing hearing failed to object to the amount of the order or the appropriateness of the procedure used to ascertain it, although he had

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[453] State v. Thorstad, 261 N.W. 2d 899, 901 (N.D. Supreme Court 1978).

[454] Id. If the offender actually appeals the judge's order, payment will usually be stayed pending the outcome of that appeal. See e.g. ARIZ. R. CRIM. PROC. 31.6; see also ME. REV. STAT. ANN. tit. 17-A, s. 1328(2) (Pamphlet 1978) (any restitution paid by defendant to be returned to him if conviction overturned).

[455] 397 A.2d 1179 (Pa. Supreme Court 1979).

[456] Id. at 1180-81; cf. Biddy v. State, 138 Ga. App. 4, 225 S.E. 2d 448 (1976) ($12,000 restitution to assault victim sustained only by reason of fact that the amount was not contested at sentencing).

an opportunity to do so. Thus, in our view, he has waived these issues."[457] Virtually identical reasoning was used by an Arizona Court of Appeals in State v. Garner[458] to support a $6,000 restitution award to an assault victim, even though the only monetary damage on the record was $2,600 in medical expenses paid by the victim's insurance, and even though the probation report recommended that only $1,800 be repaid to the insurance company.[459]

The reasoning in Walton and Garner incorporates another common holding that the burden of proof at the sentencing hearing lies with the offender,[460] to raise at least a prima facie challenge to the reasonableness of the restitution order.[461] Such a conclusion, however, by no means necessarily implies that a defendant's silence or even compliance with the restitution order must be construed as barring later review; courts in several jurisdictions have required that the way in which restitution was determined be shown to be reasonable on the record of the trial court, and have recognized that the offender's burden will be more difficult to discharge in general damage and negligence cases.

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[457] Id. at 1185.

[458] 115 Ariz. 579, 566 P.2d 1055 (1977).

[459] Id. at 566 P.2d 1056, 1058.

[460] See e.g., Commonwealth v. Walton, 397 A.2d 1179 (Pa. Supreme Court 1979); State v. Garner, 115 Ariz. 579, 566 P.2d 1055 (1977); Shenah v. Henderson, 106 Ariz. 399, 476 P.2d 854 (1970); People v. Sattler, 20 Mich. App. 665, N.W. 2d 605 (1969); see also note 388 supra.

[461] Morgan v. Wofford, 472 F.2d 822 (5th Cir. 1973).

In People v. Heil,[462] for example, the offender was convicted of manslaughter growing out of an automobile collision; he was ordered, as a condition of probation, to pay $3,000 within 90 days, and one half of his income throughout the five-year probation period, to the fiduciary of the victim's estate or to the wife of the victim.[463] In striking down the condition, the Court of Appeals of Michigan declared:

> We note, however, that defendant does argue in his brief that the damages have never been measured and that the record does not provide a factual basis for the amounts of restitution ordered here. We agree. The reparational amounts ordered paid as a condition of probation in the instant case are essentially arbitrary. In such a case we will not impose a burden on the defendant of showing the inaccuracy of the amounts . . . .[464]

The appellate court in the Heil case noted an earlier ruling in People v. Good[465] that: "The court should in any event include within its order the specific purpose, terms and conditions of the payment of money by a defendant if such payment is made a condition of probation."[466] Expanding upon this observation, the court in Heil stated that: "Since the record in the instant case does not disclose the purpose of the payments, nor the manner in which they were determined, we are unable to conclude that they constitute lawful restitution."[467]

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[462] 79 Mich. App. 739, 262 N.W. 2d 295 (1977).

[463] Id. at 262 N.W. 2d 896.

[464] Id. at 900.

[465] 287 Mich. 110, 282 N.W. 920 (1938).

[466] Id. at 287 Mich. 117, 282 N.W. 923.

[467] 262 N.W. 2d 900.

A more explicit procedural requirement through which the reasonableness of a trial court's restitution order might be assessed on review was suggested by the Supreme Court of New Jersey, in State v. Harris.[468] In an opinion that was very favorably disposed to the use of restitution in criminal justice, the Harris court, nevertheless, struck down an order that a welfare fraud defendant repay $1,012, declaring that such a condition of probation "lacked warrant in the record."[469] For the guidance of sentencing courts, the unanimous seven-man court pointed out that the justification for a restitution condition should include, inter alia, one of the key elements of due process announced by the United States Supreme Court in Morrissey v. Brewer,[470] "a written statement by the factfinders as to evidence relied on and reasons [for acting]."[471] "That statement," the Harris court observed, "will aid appellate determination of compliance with the 'reasonableness' standard."[472]

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[468] 70 N.J. 586, 362A.2d 32 (1976).

[469] Id. at 362 A.2d 37.

[470] 408 U.S. 471 (1972).

[471] Id. at 488-89.

[472] 362 A.2d 39. Many of the most recent restitution statutes show more concern for reasons if restitution is not ordered than if it is required. See N.C. GEN. STAT. ss. 148-57.1(a), (b) (1977) (parole commission to provide court with written reasons if court-ordered restitution or recommendation cannot be implemented); cf. OR. REV. STAT. s. 144.275 (1977) (parole board to provide sentencing court with copy of restitution schedule and any modifications); accord MISS. CODE ANN. s. 99-37-15 (1978). See also IOWA CODE ANN. s. 907.12(4) (West Cum. Supp. 1979); N.M. STAT. ANN. s. 31-17-1(A)(4) (1978) (court to give written reasons if full payment of actual damages to all victims is not ordered); accord MISS. CODE ANN. s. 99-37-3(4) (1978); cf. ARIZ. REV. STAT. ANN. s. 13-901(G) (1978) (when granting probation, court to set on record factual and legal reasons in support). Under the Iowa statute (s. 907.12(6)) the court clerk must mail a copy of the court's order to the victim, including the court's reasons, if necessary, for not ordering full restitution.

In the absence of such an explicit statement of reasons, there is considerable disparity in judging whether the record in a particular case discloses the manner in which restitution was determined and whether the result is reasonable. In State v. Sullivan,[473] for example, the defendant was placed on five years probation for rape and sodomy, on condition that he pay $3,000 in restitution to the victim at $75 per month. On appeal, the defendant argued, inter alia, that the condition was not supported by the evidence or record of the case, was an arbitrary abuse of judicial discretion, and a deprivation of property without due process of law.[474] In ruling that the amount was not without basis, however, the appellate court pointed to the fact that "the trial court had before it the presentence report," and "had the opportunity to observe the victim and hear her testimony concerning the perpetration of the crimes."[475]

The presentence report in Sullivan, however, recommended only $500 damages to the victim, a fine of $1,500, and 80 hours of community service. Similarly, there is no indication that the victim's testimony related to any out-of-pocket expenses that she may have suffered. Nevertheless, after noting how "exceedingly difficult" it is to fix

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[473] 544 P.2d 616 (Or. App. 1976).

[474] Id. at 617. The defendant also argued, unsuccessfully, that the $3,000 was "a penal fine under the guise of restitution." Ibid.

[475] Id. at 618.

reparation in cases of physical and mental anguish, and that the amount fixed must be "reasonable and have a rational basis and must not be the product of arbitrariness or capriciousness," the court declared that: "We do not believe that . . . the trial court was required to arrive at its determination of the amount of reparation by the taking of more specific evidence concerning the trauma suffered by the victim."[476]

In contrast to the very liberal interpretation in Sullivan, of how restitution may be determined, is a Michigan hit-and-run case, People v. Becker.[477] The defendant in Becker was actually convicted of leaving the scene of an accident, and ordered as a condition of probation to pay $1,244.48 restitution in one year to parties injured in the accident; the record suggests how the judge arrived at such an amount: "Before I sentenced this boy, I talked to these people who were injured . . . . The people who were injured spent $1,244.00 in doctor's and hospital bills."[478] Holding that the restitution condition was without authority of law,[479] the appellate court observed that:

> In the case before us the court makes a condition of probation that the defendant pay the hospital and medical

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[476] Ibid.; but see note 310 supra, suggesting that recent legislation in Oregon may have nullified the impact of Sullivan.

[477] 349 Mich. 476, 84 N.W. 2d 833 (1957).

[478] Id. at 84 N.W. 2d 834.

[479] Id. at 840.

> expenses of the pedestrians injured in the automobile accident. The liability therefore, as well as the amount thereof, is fixed by the court. How? Is it by a trial in open court, upon pleadings defining the claims and issues, with the taking of testimony under oath, confrontation of witnesses, cross-examination, and assertion of defenses, including that of contributory negligence? Clearly not? It was determined, says the court, "from my investigation."[480]

A major distinguishing point of the Becker case was that the defendant disputed liability for injury to the victims and was not prosecuted for hit-and-run.[481] To the extent, however, that the judge's "investigation" was inadequate as to the amount of restitution, the appellate court seems to have applied a stricter standard than the Sullivan court to the issue of whether the manner of its determination was shown in the record.

An early restitution case that well exemplifies the continuing uncertainty of many courts over the standards to be applied in gauging the reasonableness of a restitution order is a 1938 decision by the Supreme Court of Michigan, People v. Good.[482] Although striking down a $385 restitution order in a vehicular homicide case, because the record failed to show its "purpose, terms and conditions," the court

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[480] Id. at 839 (emphasis added).

[481] For discussion of restitution for offenses other than the conviction offense, see generally, "Offense Limitations" supra, text at notes 250, 251.

[482] 287 Mich. 110, 282 N.W. 920 (1938).

rejected the defendant's argument that the state's restitution law[483] violated the due process clauses of both Federal and State Constitutions; the defendant had argued that the law "does not provide for a hearing on the question of damages to be assessed, nor does it give a defendant an opportunity to interpose the defenses, such as the contributory negligence of a decedent, which are available to him in civil proceedings; also that the notice of a criminal prosecution is 'not appropriate to a proceeding in which civil damages may be assessed.'"[484]

In ruling that "it was not a deprivation of due process of law to deny defendant a hearing on the question of the amount of 'damages' to be imposed as a condition of probation," and that the restitution statute "is ample notice of the possibility that such a condition might be imposed," the Michigan court reasoned that:

> The arguments of appellant are based upon the erroneous assumption that damages are "assessed" by the court when restitution is made a condition of probation. Such is not the case. No judgment is rendered for, nor could a writ of execution issue to enforce the collection of, the sum specified. A defendant in such instance is merely given the alternative of abiding by the conditions imposed or else suffering the imposition and execution of a sentence which ordinarily follows a verdict of guilty. This defendant was not deprived of any of his rights without due process; rather he was given the additional privilege of avoiding the usual penalty of his crime by the payment of a sum of money and the observance of the other conditions attached to his probation.[485]

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[483] MICH. STAT. ANN. s. 28.1133.

[484] 282 N.W. 920 at 923.

[485] Id.

Although the no-judgment/no-execution/no-hearing reasoning in Good has been roundly criticized in more recent cases,[486] courts in other jurisdictions frequently echo the notion that "when a defendant is given probation, he is not deprived of any of his rights without due process, but rather he is given the privilege of avoiding the usual penalty of his crime . . . ."[487] The "privilege" or "act of grace" view of probation has long been used to rationalize the restricted rights granted to defendant in probation and parole proceedings.[488] In Goldberg v. Kelly,[489] however, the United States Supreme Court noted that a constitutional challenge to procedures preceding a state's withdrawal

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[486] In declining to follow the precedent of Good, the Michigan Supreme Court in People v. Becker, 349 Mich. 476, 84 N.W. 2d 833 (1957), declared that:

> It is true, of course, that no judgment is rendered for the sum specified. But that is exactly why the defendant is complaining. He wants a hearing as to his civil liability, with all his constitutional safeguards, and he demands that a judgment be rendered thereon as a prerequisite to a court's compelling his payment of moneys to another. As for writs of execution, we agree that, clearly, none could issue upon a non-existent judgment, but the relevance of the circumstance to the issue before us is not equally clear. The defendant either pays up or he serves time. This is a situation where a judgment creditor's inability to obtain a writ of execution in aid of a money judgment has no real significance. If defendant has the resources he will pay. If he has not the writ of execution will not create them. Id. at 84 N.W. 2d 836.

See also the discussion of "Enforcement Provisions," infra 124 ff.

[487] People v. Williams, 57 Mich. App. 439, 225 N.W. 2d 798 (1975); accord Commonwealth v. Walton, 397 A.2d 1179 (Pa. 1979); People v. Heil, 79 Mich. App. 739, 262 N.W. 2d 895 (1977).

[488] Escroe v. Zerbst, 295 U.S. 490, 492-93 (1935).

[489] 397 U.S. 254 (1970).

of welfare benefits "cannot be answered by an argument that public assistance benefits are a 'privilege and not a right.'"[490] More germanely, in Morrissey v. Brewer,[491] the Supreme Court, in ruling that a parolee must be granted a hearing before parole is revoked, stated that:

> It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.[492]

In the context of setting restitution at sentencing, especially if the order goes beyond the offense for which the defendant is convicted, or if restitution takes the form of general damages, it has repeatedly been observed that a defendant may be in particular need of such protection.

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[490] Id. at 262; quoted in "Note: Rehabilitation of the Victims of Crime: An Overview," 21 U.C.L.A. L. Rev. 317 (1973) at 328 n. 50.

[491] 408 U.S. 471 (1972)

[492] Id. at 482. For a critical analysis of the rights-privilege doctrine, see generally Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 Harv. L. Rev. 1439 (1968).

In People v. Richards,[493] for example, the Supreme Court of California stated that:

> Disposing of civil liability cannot be a function of restitution in a criminal case. To begin with, the criminal justice system is essentially incapable of determining that a defendant is in fact civilly liable, and if so, to what extent. A judge may infer from a jury verdict of guilt in a theft case that a defendant is liable to the crime victim. But a trial court cannot properly conclude that the defendant owes money to a third party for other unproved or disproved crimes or conduct. A party sued civilly has important due process rights, including appropriate pleadings, discovery, and a right to a trial by jury on the specific issues of liability and damages. The judge in the criminal trial should not be permitted to emasculate those rights by simply declaring his belief that the defendant owes a sum of money.[494]

Elsewhere, criminal courts have been thought to be so unsuitable for settling complex issues of quantum that it has been considered preferable to restrict restitution only to "liquidated or easily measurable damages."[495]

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[493] 131 Cal. Rptr. 537, 552 P.2d 97 (1976).

[494] Id. at 552 P.2d 101.

[495] State v. Stalheim, 275 Or. 683, 552 P.2d 829 (1976); contra State v. Garner, 115 Ariz. 579, 566 P.2d 1055 (1977). As a possible indication of future direction, however, an early draft of the New Federal Criminal Code, that would have limited restitution to "readily measurable" damages, has now been revised to drop the limiting phrase. See CRIM. CODE REVISION ACT, 1929 s. 3102(5) (Working Draft of the House Subcommittee on Criminal Justice, Aug. 24, 1979).

Even where a broader view of restitution has been adopted, it has been with some trepidation. In State v.Garner,[496] for example, even though a $6,000 restitution order was upheld on the basis of a record that appears to reveal no specific foundation for such a figure, the Arizona Court of Appeals warned that:

> If reparations as a condition of probation are to include elements beyond mere "special damages" we believe a trial court must use great caution. The sentencing phase of a criminal case is not the ideal forum for the disposition of a negligence case. Both parties are deprived of a jury; the defendant may be limited in showing causation or developing a defense of contributory negligence or assumption of risk. As a practical problem a criminal defendant's testimony is somewhat diluted when weighed against that of the victim.[497]

In addition, the potentially vulnerable situation of the defendant, whose inclination to oppose or contest a restitution determination may be suppressed by fear of incurring a custodial sentence, has been noted on several occasions.[498] In his dissent to State v. Sullivan,[499] for example,

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[496] Supra.

[497] Id. at 566 P.2d 1057.

[498] See e.g., "Note: Use of Restitution" supra note 274: "In fact when faced with alternative of imprisonment, the criminal is likely to accept any condition of probation, no matter how unconscionable its terms." Id at 468 n. 51.

[499] 544 P.2d 616 (Or. App. 1976).

Chief Judge Schwab declared that:

> The defendant is being deprived of property without an opportunity to be heard . . . . [T]he majority approves joinder of questions of criminal liability with questions of liability for civil damages for trial, but then does not allow a trial on civil liability. . . . I find the reasoning . . .--that this type of sentence presents no constitutional problem because the defendant has the "choice" of refusing probation subject to unacceptable conditions and going to prison--to be singularly unpersuasive.[500]

Similarly, in another dissenting opinion, in a Vermont Supreme Court case, State v. Barnet,[501] Justice Sherburne observed that:

> Granted that restitution may be made a condition of probation, the practice of exacting the payment of unliquidated damages claimed to have been sustained by the negligence of the respondent should be indulged in with extreme caution. There may well be criminal, but not civil liability. No matter what fault may attach to the respondent, the injured party may be barred from recovery by his contributory negligence, or for some other legal reason. Therefore, to force a settlement by the threat of imprisonment, if such condition is not met, may be to deprive the respondent of the right to present his defense and have its sufficiency passed upon in a civil court in an action between the parties concerned. The consent of the respondent is not conclusive of the fact of his liability, for

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[500] Id. at 619-20 (emphasis added). The language of restitution at sentencing is usually couched in terms that do not impart a sense of choice (e.g., restitution order, court may require). But compare the following statutes dealing with restitution in correctional settings: COLO. REV. STAT. s. 17-27-107(1) (1978) (sentence, assignment or transfer to community residential facility conditional upon restitution agreement or contract); LA. REV. STAT. ANN. s. 15:840.2(D)(2) (West Cum. Supp. 1979) (written agreement or judgment as to victim's loss as prerequisite to voluntary participation in restitution industries); TENN. CODE ANN. ss. 41-2302, 2406 (1978) (agreement to pay restitution as condition of participation in correctional program); TEX. CODE CRIM. PROC. ANN. art. 42.12(15)(g) (Vernon Cum. Supp. 1979) (acceptance of contract which may include restitution or reparation shall be precondition to release on parole).

[501] 3 A.2d 521 (Vt. Supreme Court 1939) (emphasis added).

> who would not consent under such circumstances? He is, however, bound thereby. There is force in the contention that such procedure amounts to the employment of the criminal process of the State as the means of the collection of a civil claim, so it should be rarely employed, and, when used, great care should be exercised to see that the respondent freely consents and to ascertain that he is solely at fault.[502]

From the foregoing, it might be argued that to order restitution after only a summary proceeding would violate due process. The United States Supreme Court has declared that: "A fundamental requirement of due process is 'the opportunity to be heard.' . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner."[503] Without the formal procedural protections of a civil proceeding, it might be argued, for example, that the sentencing phase of the criminal process is too inherently coercive to be "a meaningful time" for a defendant to object strenously to restitution, when to do so

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[502] Id. at 527 (emphasis added); cf. ME. REV. STAT. tit. 17-A., s. 1325(1)(19) (Pamphlet 1978) (contributory misconduct of victim to be considered by court in setting restitution). Whether defendant is "solely at fault" raises two issues. The first relates to the possibility of contributory negligence mentioned by the Barnett court and in the Maine statute. A second question that arises involves the liability of co-defendants for all or some part of the victim's loss. In this situation criminal courts have adopted the civil mechanism of joint-and-several liability, under which all co-defendants are responsible for the full amount until the victim is compensated. See e.g., People v. Peterson, 62 Mich. App. 258, 233 N.W. 2d 250 (1975).

[503] Armstrong v. Manzo, 380 U.S. 548, 552 (1965).

may seem to jeopardize the chances for probation.[504] At a minimum, a better practice than a summary opportunity for the defendant to speak at sentencing might be a bifurcated hearing, the first part to determine the type of sentence[505] (incarceration vs. a community disposition such as probation) and the second to assess conditions, such as restitution.[506]

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[504] The perception that "if I make trouble at sentencing, I may be sent to jail" is probably particularly strong among defendants inexperienced with the system, and seems, therefore, likely to chill their desire to complain about restitution more than in the case of a repeat offender. In State v. Harris, 70 N.J. 586, 362 A.2d 32 (1976), the amount of restitution for welfare fraud was substantially in dispute, and the defendant was a first offender with a very positive presentence report; nevertheless, as the New Jersey Supreme Court noted: "Believing herself facing the specter of jail, the defendant threw herself on the mercy of the court . . . [declaring,] 'If I've committed a crime, I'll pay every dime back . . . . Please don't take me away from my babies.'" Id. at 362 A.2d 37.

[505] Such a procedure presupposes that the custody or probation decision is made before considering restitution. This, of course, is an empirical question. Occasionally, judges have noted that they would withhold probation if restitution could not be required in a particular case. See e.g., Huggett v. State, 83 Wis. 2d 790, 266 N.W. 2d 403 (1978) "The judge who concludes that restitution is improbable will therefore deny probation." Id at 266 N.W. 2d 410 (allow J. dissenting); but cf. People v. Richards, 131 Cal. Rptr. 537, 552 P. 2d 97 (1976): "The order admitting defendant to probation on condition that he make restitution. . .is reversed. As the court has already determined that defendant is a proper candidate for probation, the case is remanded with directions to grant probation on reasonable conditions." Id. at 522 P.2d 103.

[506] Statutory provisions to set the amount and/or schedule after sentencing usually require the court to consider restitution promptly (N.M. STAT. ANN. s. 31-17-1(c) (1978) (court shall promptly enter order on defendant's restitution plan)) or within specified time (KY. REV. STAT. ANN. s. 431.200 (Baldwin Supp. 1978) (90 days)). In Oklahoma, however, the state's suspended sentence law provides that: "The court may, at the time of sentence or at any time during the suspended sentence . . . order restitution to the victim . . ." (OKLA. STAT. ANN. tit. 22, s. 991a(1)(a) (West Cum. Supp. 1979)).

For the most part, however, neither legislatures nor appellate courts have shown much inclination to abolish the procedural differences between civil trials and sentencing proceedings in which restitution is fixed.[507] Instead, numerous alternative procedures have been fashioned by which criminal restitution might be established.

In a much repeated formulation, for example, a Michigan Court of Appeals in People v. Gallagher[508] has stated that:

> It seems desirable to have the defendant and his lawyer participate in the restitution decision. The matter might be discussed at the time of a plea of guilty. The recommended

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[507] In probation and parole proceedings in particular, the nature and scope of a defendant's rights may be restrained by what the Supreme Court has recongized to be a great interest on the part of the state in maintaining informality and giving judges broad discretion. Morrissey v. Brewer, 408 U.S. 471, 480, 483-85, 490 (1972); "Note: Rehabilitation of Crime Victims: An Overview," supra note 88 at 328 n. 50. In the landmark juvenile case, In re Gault, 387 U.S. 1 (1967), however, Mr. Justice Fortas, writing for the majority, observed that:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure . . . . Departives from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness. Id at 18-19.

[508] 55 Mich. App. 613, 223 N.W. 2d 92 (1974); accord State v. Garner, 115 Ariz. 579, 566 P.2d 1055 (1977).

> amount of restitution or reparation and the manner of its payment should be included in the presentence report and disclosed. The court might tell the defendant at the time of conviction that if probation is granted, restitution may be required, and suggest that he and his lawyer propose a plan for restitution to the presentence investigator. In any event, the court could invite comment from defendant about the restitution the court is considering before it is imposed as a part of the sentence.[509]

A similar summary procedure was also outlined by the Supreme Court of New Jersey in State in the Interest of D.G.W.,[510] and expanded in State v. Harris[511] to include "notice, hearing and the other elements [of due process] described in Morrissey v. Brewer."[512]

A defendant's opportunity to be heard on the matter of restitution has been included in a wide variety of statutory procedural provisions. In Arkansas, for example, the concurrence of the defendant, the victim, and the prosecuting authority are required to establish the amount of restitution that might be ordered as a condition of suspended sentence

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[509] Id. at 55 Mich. App. 620, 223 N. W. 2d 96.

[510] 70 N.J. 488, 361 A.2d 513 (1976).

[511] 70 N.J. 586, 362 A.2d 32 (1976).

[512] Id. at 362 A.2d 38. The Morrissey due process requirements as quoted by the court in Harris were: (a) written notice of the claimed violations [relevant facts] . . .; (b) disclosure . . . of evidence . . .; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a "neutral and detached" hearing body . . .; and (f) a written statement by the factfinders as to evidence relied on and reasons [for acting]. Ibid n. 3.

or probation.[513] Other jurisdictions authorize submission to the court of restitution plans by court specialists[514] or probation officers,[515] prepared in conjunction with the defendant after sentence has been pronounced. Similarly, a Virginia statute provides for offenders themselves to submit a restitution plan for the court's consideration at or prior to the time of sentencing.[516] Provisions in other states allow the defendant to include in any court-ordered plan his or her reasons why he should not be required to make restitution.[517]

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[513] ARK. STAT. ANN. s. 51-1203(5) (1977); but cf. People v. Korn, 217 Mich. 170, 185 N.W. 817 (1921) (where statute provides for mitigation of sentence if offender makes satisfaction, purpose of statute cannot be defeated by victim's refusal to accept).

[514] S.D. COMP. LAWS ANN. ss. 23A-28-4, 5 (Special Supp. 1978).

[515] IOWA CODE ANN. s. 907.12 (West Cum. Supp. 1979); N.M. STAT. ANN. s. 31-17-1(B) (1978).

[516] VA. CODE ss. 19.2-305, 305.1(A) (1978).

[517] IOWA CODE ANN. s. 907.12(3) (West Cum. Supp. 1979); N.M. STAT. ANN. s. 31-17-1(B) (1978); accord S.D. COMP. LAWS ANN. s. 23A-28-3 (Special Supp. 1978).

A hearing to establish restitutive obligations is authorized by a Maryland probation law, providing that before the court orders restitution the defendant is entitled to notice and to a hearing to determine the amount of restitution, what payments will be required, and how payment will be made.[518] Similar provisions for notice and an opportunity to be heard are included in a North Carolina parole law.[519] In Illinois, if restitution is part of the court's disposition, the legislature provides that a presentencing hearing shall be held to assess the financial capacity of the defendant to make restitution as well as to determine the amount and conditions of payment at the court's discretion.[520] Courts in Arizona, New Jersey, and Washington are also authorized to conduct hearings to determine restitution, if the record does not contain sufficient information to support a finding as to the correct amount;[521] and, probably representing the most typical practice, statutes in Mississippi and Oregon allow the defendant to be heard on the issue of restitution at the time of sentencing.[522]

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[518] MD. ANN. CODE art. 27, s. 641 (1978); accord N.D. CENT. CODE s. 12.1-32-08 (1976).

[519] N.C. GEN. STAT. s. 148-57.1(d) (1977).

[520] ILL. ANN. STAT. ch. 38, s. 1005-5-6(a) (Smith-Hurd Cum. Supp. 1979); cf. MINN. STAT. ANN. s. 609.115(4) (West Cum. Supp. 1979) (summary hearing in chambers on request of prosecutor or defense attorney to discuss issues in presentence investigation.)

[521] ARIZ. REV. STAT. ANN. ss. 13-8-3(B), 13-901(F) (1978); N.J. STAT. ANN. s. 2C:43-3(e) (West Cum. Supp. 1979); WASH. REV. CODE ANN. s. 9A.20.030(1) (1977).

[522] MISS. CODE ANN. s. 99-37-3(3) (1978); OR. REV. STAT. s. 137.106(3) (1977).

Among the most extensive procedural safeguards afforded defendants are those required in recently enacted restitution laws in Kentucky and Missouri.[523] Courts in these two jurisdictions are authorized under virtually identical laws to cause the defendant to be brought into court, if applied to by verified petitition within a specified period, and to demand of him if he has any defense to make to the court's restitution motion; if the defendant contests the restitution,, further provision is made for a jury to be impaneled to try the facts, ascertain the amount and value of property, and/or assess damages.[524]

More typically, however, the defendant's opportunity to be heard is endowed with considerably less formality than would be the case in a civil court. It has been ruled, for example, that the amount of restitution "need not be proved by a preponderance of the evidence, qua evidence,"[525] and that the court should not be encumbered by "technical limitations" when fixing probation conditions.[526] Similarly, it has been

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[523]KY. REV. STAT. ANN. s. 431.200 (Baldwin Supp. 1978); MO. ANN. STAT. ss. 546.630, 640 (Vernon 1962); cf. TENN. CODE ANN. ss. 40-2716, 2717 (1975) (jury to ascertain value or damages on conviction of felonious taking or damaging property).

[524]Id.

[525]State v. Harris, 70 N.J. 586, 362 A.2d 32, 38 (1976).

[526]People v. Miller, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967).

held that "the question of damages relate[s] only to the court's exercise of its power to place defendant on probation . . . . And in such proceeding, it is generally said that strict rules of evidence do not apply . . . . [S]uch a proceeding is subject to the parameter of reasonableness; not technical rules of evidence."[527] Thus, under an Oklahoma statute, the court may override the offender's objection to restitution, if it is of the opinion that he is able to pay without hardship to himself or his immediate family, and "if the extent of the damage to the victim is determinable with reasonable certainty."[528] Similarly general evidentiary standards also apply in other jurisdictions, described variously as "sufficient facts," "competent evidence," what is "reasonable and just," or what is determined on a "factual basis," a common foundation for which appears to be the presentence report.[529]

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[527]People v. Tidwell, 33 Ill. App. 3d 232, 338 N.E. 2d 113, 117 (1975).

[528]OKLA. STAT. ANN. tit. 22, s. 991a(1)(a) (West Cum. Supp. 1979).

[529]State v. Harris, 70 N.J. 586, 362 A.2d 32, 38-9 (1976), citing R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE 106 (1969).

Enforcement Provisions: Despite the fact that extremely large sums of money may be collected in restitution each year,[530] detailed provisions for collection and disbursement of such funds are visible in neither legislative nor judicial pronouncements. Similarly lacking in those sources are any precise accounting procedures and policies to cover questions such as whether certain types of recipient have priority over others, or whether multiple victims should be paid in equal periodic amounts or in amounts pro-rated according to each's total loss.[531] Such matters seem to be left to administrative officials in the courts and corrections, or to individual probation officers or restitution program staff members.[532]

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[530] In 1967, before the current explosion of interest in restitution, the President's Commission on Law Enforcement and Administration of Justice, in its Task Force Report on Corrections, reported that: "It is not uncommon for a large probation agency to supervise the collection of millions of dollars in restitution for crime victims each year." Id. at 35 (Washington D.C. U.S. Government Printing Office).

[531] Other questions of a similar nature include whether the offender's payments are forwarded to the victim directly or kept until full payment is possible. In this latter instance there arises the potential for whoever handles the restitution funds in the interim to accumulate sizeable interest amounts and the corresponding question of what should be done with such monies.

[532] In Connecticut, for example, the restitution service authorized under CONN. GEN. STAT. ANN. s. 54-110 (West Cum. Supp. 1979) provides the State's courts with a centralized accounting mechanism for restitution payments. Similar services are provided in Multnomah County, Oregon by the circuit court administrator's office. See Harland, supra note 12.

What little legislative concern is shown for accounting issues, for example, is reflected only in general directions that "records" be kept,[533] or, more specifically, that the probation officer shall give receipts to the defendant, keep records of all payments, collect receipts from victims, and notify the clerk of court when restitution is paid.[534] In addition to dispensing restitution payments to victims, clerks of court in New Mexico and South Dakota are also required by statute to mail to victims copies of the court's order approving or modifying the defendant's restitution plan.[535] Other statutes call for payments to be made through the clerk of court,[536] a probation clerk,[537] the probation officer,[538] the probation department,[539] or

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[533] PA. STAT. ANN. tit. 18, s. 1106(e) (Purdon Cum. Supp. 1979-80).

[534] MASS. GEN. LAWS ANN. ch. 276, s. 92 (West 1972).

[535] N.M. STAT. ANN. s. 31-17-1(E) (1978); S.D. COMP. LAWS ANN. s. 23A-28-6 (Special Supp. 1978).

[536] ARIZ. REV. STAT. ANN. s. 13-806(A) (1978); FLA. STAT. ANN. s. 775.089(f) (West Cum. Supp. 1979); IOWA CODE ANN. s. 907.12(4) (West Cum. Supp. 1979-80); N.M. STAT. ANN. s. 31-17-1(c) (1978); S.D. COMP. LAWS ANN. s. 23A-28-7 (Special Supp. 1978); TEX. CODE CRIM. PROC. ANN. art. 42.03, s. 5(b) (Vernon 1979); VA. CODE s. 19.2-305.1(C) (Cum. Supp. 1978).

[537] IND. CODE ANN. s. 35-7-1-1 (Burns 1979).

[538] CAL. PENAL CODE s. 1202.5(a)(2) (West Cum. Supp. 1979); COLO. REV. STAT. s. 16-11-212(2) (1978); MASS. GEN. LAWS ANN. ch. 276, s. 92 (West 1972); cf. N.J. STAT. ANN. ss. 2C:46-1, 46-2 (West 1979) (payment to officer entitled by law to collect it).

[539] PA. STAT. ANN. tit. 18, s. 1106(e) (Purdon Cum. Supp. 1979-80).

through a district court justice.[540] In Colorado, responsibility for collection and disbursement of restitution from work-release income is divided; state law requires a defendant's work-release income to be paid to a probation officer, who, in turn, must deposit it in the court registry, from which restitution disbursement is made by order of the court.[541]

In corrections, in addition to the routine control of inmate earnings by institutional administrators, special restitution laws such as a recent Oklahoma statute make the department of corrections responsible for monitoring and administering restitution programs, and for ensuring that payments are forwarded to victims.[542] More specific direction is given in an Arkansas statute which empowers the department of corrections to collect restitution from the inmate's work-release earnings and to disburse it to victims on a list of names and addresses to be provided by the court.[543] More typical, however, is a broad mandate such as that embodied in a Vermont Statute which simply provides that restitution is to be "supervised" by the department of corrections.[544]

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[540] Id.

[541] COLO. REV. STAT. s. 17-27-107 (1978).

[542] OKLA. STAT. ANN. tit. 22, s. 991(a)(2) (West Cum. Supp. 1978-79).

[543] ARK. STAT. ANN. s. 46-117(c) (1977).

[544] VT. STAT. ANN. tit. 13, s. 2578(c) (Cum. Supp. 1978).

In contrast to the minimal attention paid by legislatures and courts to the routine administrative details of collecting and disbursing restitution, there is a sizeable body of statutory provisions and case-law defining a range of responses in the event of noncompliance. It is at the point of revocation of probation or suspended sentence that the vast majority of appellate court intervention is sought by offenders, rather than at the time of the original restitutive sentencing disposition. It is rare, however, that a defendant contests revocation on the grounds that default has not been showing; instead, it is argued in most cases that a defect existed in the original order, or that the defendant was unable to pay.[545]

One situation in which offenders have successfully disputed allegations of default arises in cases in which no specific payment schedule has been set by the sentencing court. In United States v. Reed,[546]

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[545] The fact that very few defendants in appellate court cases dispute their noncompliance, per se, is probably due to a reluctance on the part of most criminal justice practitioners to seek revocation for nonpayment, except in cases of the most blatant default or repeated failure to adhere to restitution schedule. The facts described in almost all of the cases mentioned throughout the present discussion support this view,

[546] 573 F.2d 1020 (1978).

for example, an Eigth Circuit Court of Appeals ruled that no substantive violation of probation had occurred, even though the defendant had not made a payment for over a year prior to the revocation hearing: "The sentence . . . required restitution 'during the period of probation,' which was to last five years. Because the probation period has not ended, Reed's failure to make full restitution does not constitute a violation of the conditions of probation."[547] A similar conclusion was reached by a Texas Court of Criminal Appeals in Campbell v. State,[548] in which it was ruled that where restitution had been ordered to be paid "on or before" a specified date nonpayment prior to that time was not cause for revocation.[549]

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[547] Id. at 1023; cf. State v. Calderilla, 34 Or. App. 1007, 580 P.2d 578, 579 (1978) (restitution order must be sufficiently specific that defendant knows what is required and when, so he will know when he is in default).

[548] 420 S.W. 2d 715 (1967).

[549] Id. at 716-17; but see State v. Hutson, 35 N.C. App. 738, 241 S.E. 2d 388 (1978) (where monthly schedule and specified completion date are ordered by court, revocation is proper prior to final date if defendant fails to adhere to schedule). See also N.J. STAT. ANN. s. 2C:46-1 (West Cum. Supp. 1979) (restitution authorized by specified date).

In noting that the record did not reflect any modification of the sentence to include monthly payments, as would have been authorized by Texas law,[550] the appellate court in Campbell ruled that:

> The probation officer had no authority to alter the conditions of probation. The very purpose of the requirement that the clerk of the court furnish the probationer a copy of the terms and conditions of probation . . . is to insure that the probationer may know what those conditions are, and upon revocation there can be little question about the same.[551]

Likewise, in Cox v. State,[552] the Texas Criminal Appeal Court, citing Campbell with approval, declared that: "Only the court having jurisdiction of the case shall determine, fix, alter or modify the conditions of probation."[553]

Numerous other states have enacted laws allowing modification of the restitution amount or schedule if the original disposition by the sentencing court is no longer appropriate. Such provisions vary widely according to both the party and the event prompting the alteration.

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[550] TEX. CODE CRIM. PROC. ANN. art. 42.12.

[551] 420 S.W. 2d 717.

[552] 445 S.W. 2d 200 (Tex. Cr. App. 1969).

[553] Id. at 202.

In Iowa, for example, the defendant may request a hearing on any matter relating to restitution at any time during the probation period.[554] In Oklahoma, defendants are statutorily empowered to petition the sentencing court for remission of restitution,[555] and Maine defendants may do so by showing that the circumstances which warranted the imposition of restitution have changed, or that it would otherwise be unjust to require payment.[556] The comparable standard for petitioning for remission of restitutive obligations in Florida is one of undue hardship,[557] while in Washington restitution may be adjusted downwards or otherwise, if to do so would be in the interests of the defendant's rehabilitation.[558]

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[554] IOWA CODE ANN. s. 907.12(7) (West Cum. Supp. 1979-80).

[555] OKLA. STAT. ANN. tit. 22, s. 991(b) (West Cum. Supp. 1978-79); cf. FLA. STAT. ANN. s. 945.091(5)(b) (West Cum. Supp. 1979) (inmates required to make restitution by department of corrections or parole or probation commission may petition court to amend amount or schedule).

[556] ME. REV. STAT. tit. 17-A., s. 1328(1) (Pamphlet 1978).

[557] FLA. STAT. ANN. s. 775.089(3) (West Cum. Supp. 1979).

[558] WASH. REV. CODE ANN. s. 7.68.120(3) (Supp. 1978); cf. People v. Lemon, 83 Mich. App. 737, 265 N.W. 2d 31 (1978) (supra text at note 363).

In New Mexico, either the defendant or the victim may request a hearing about restitution during the probation period.[559] In addition to such formal provision for victims to seek enforcement of a restitution order, it appears that many others, especially corporate or business victims apply considerable informal pressure upon restitution program staffs and court officials to take action against recalcitrant offenders.[560] In United States v. Landay,[561] for example, a Fifth Circuit Court of Appeals noted that the Government's move to revoke the defendant's probation in that case came about "under immediate pressure form [the victim,] First National [Bank]."[562] In a South Dakota statute, by comparison, although clerks of court must notify victims of any modification of the defendant's restitution plan,[563] it is explicitly provided that if the victim is dissatisfied with the plan or any modification, the sole and exclusive remedy is a civil action.[564]

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[559] N.M. STAT. ANN. s. 31-17-1(F) (1978).

[560] See especially the opinions of trial judges interviews in connection with the present study. See Harland, "The Use of Criminal Restitution: Views of Practitioners" (on file at Criminal Justice Research Center, Albany, New York).

[561] 513 F.2d 306 (1975).

[562] Id. at 307; cf. State v. Barnett, 3 A.2d 521, 522 (Vt. Supreme Court 1939) (restitution condition of probation brought about in conformity with letter to judge from accident victim in a case of leaving the scene of an accident).

[563] S.D. COMP. LAWS ANN. s. 23A-28-6 (Special Supp. 1978); accord N.M. STAT. ANN. s. 31-17-1(E) (1978).

[564] S.D. COMP. LAWS ANN. s. 23A-28-10 (Special Supp. 1978).

One notable feature of many recent statutory restitution provisions is the central role assigned to prosecuting attorneys in default proceedings. In Arizona, for example, the clerk of court is required to provide both the court and the prosecuting attorney with notice of default, ten days after giving similar notice to the defendant.[565] Similarly, probation officers in the State of Washington are statutorily required to notify the prosecuting attorney if payment has not been made, not less than three months prior to termination of a suspended sentence.[566] In Oklahoma, responsibility for notifying the prosecutor rests with the department of corrections.[567] Further statutory authorization exists in several states for initiating restitution default proceedings at the motion or petition of the prosecutor.[568]

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[565] ARIZ. REV. STAT. ANN. s. 13-806(A) (1978).

[566] WASH. REV. CODE ANN. ss. 9.92.060, 9.95.210 (1977) as amended 1979 Wash. Legis. Serv., ch. 29, S.B. 2417; cf. PA. STAT. ANN. tit. 18, s. 1106(f) (Purdon Cum. Supp. 1978-79) (notification by probation officer to court only, within 21 days of default).

[567] OKLA. STAT. ANN. tit. 22, s. 991(b) (West Cum. Supp. 1978-79).

[568] ARIZ. REV. STAT. ANN. s. 13-806(A) (1978); MISS. CODE ANN. s. 99-37-7(1) (1978); N.J. STAT. ANN. s. 2C:46-2(a) (West Cum. Supp. 1979); OKLA. STAT. ANN. tit. 22, s. 991(b) (West Cum. Supp. 1978-79); OR. REV. STAT. s. 161.685(1) (1977); cf. N.J. STAT. ANN. s. 46-2(a) (West Cum. Supp. 1979) (revocation on motion of person authorized by law to collect restitution).

Default proceedings for nonpayment are the most common situation in which modification of restitution is authorized. In Oklahoma, for example, if the court at a revocation hearing finds that payment inflicts a manifest hardship on the defendant or his family, payments may be cancelled or modified.[569] Similarly, provisions in other states allow that after a hearing in which the defendant can show cause why his default should not be treated as contempt, all or part of the restitution amount or any installment thereof may be revoked.[570] In addition to the criterion of manifest hardship, legislatures have also provided that nonpayment will not be considered a violation of the conditions of sentence or parole if caused by economic hardship,[571] or if due to an

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[569] OKLA. STAT. ANN. tit. 22, s. 991b (West Cum. Supp. 1978-79).

[570] ARIZ. REV. STAT. ANN. s. 13-806(D) (1978) (court may revoke or reduce restitution or modify method of payment if default not in contempt); accord FLA. STAT. ANN. ss. 775.089(3), (5) (court), 947.18 (parole board) (West Cum. Supp. 1979); IOWA CODE ANN. ss. 907.12(4)(7) (West Cum. Supp. 1979-80) (court); KY. REV. STAT. ANN. s. 346.180(2) (Baldwin 1977) (parole board); ME. REV. STAT. tit. 17-A., s. 1328(1) (Pamphlet 1978) (court); MISS. CODE ANN. s. 99-37-11 (West Cum. Supp. 1979) (court); MONT. REV. CODES ANN. s. 71-2621 (1977) (court and parole board); N.M. STAT. ANN. s. 31-17-1(G) (1978) (court); N.J. STAT. ANN. s. 2C:46-2(a) (West Cum. Supp. 1979) (court); OR. REV. STAT. s. 161.685(5) (1977) (court); S.D. COMP. LAWS ANN. s. 23A-28-4 (Special Supp. 1978) (court); WASH. REV. CODE ANN. s. 7.68.120(3) (Supp. 1978) (court or parole board); W. VA. CODE s. 62-12-9 (1977) (court).

[571] NEV. REV. STAT. ss. 176.189(2), 213.126(2) (1977).

inability to pay.[572] In Texas, the latter justification is made an affirmative defense in default proceedings, if demonstrated by the defendant on a preponderance of the evidence.[573]

Over and above statutory proscriptions of revocation if the defendant is unable to pay, courts have imposed similar limitations as a matter of constitutional imperative. In People v. Gallagher,[574] for example, a Michigan Court of Appeals stated that:

> If restitution is not paid because the defendant has been unable to pay it, he should not have probation revoked or be imprisoned. The principle involved is the same as that involved in imprisonment for failure to pay a fine that cannot be paid.[575]

The court in Gallagher based its opinion on this point upon the Supreme Court's decision in Tate v. Short[576] that: "[T]he Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits the State from imposing a fine and then automatically converting it into a jail term solely because the defendant is indigent

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[572] CAL. PENAL CODE s. 1202.5(b) (West Cum. Supp. 1979); TEX. CODE CRIM. PROC. ANN. art. 42.12, s. 8(c), art. 42.13, s. 6(c) (Vernon 1979).

[573] TEX. CODE CRIM. PROC. ANN. supra; see also Cox v. State, 445 S.W. 2d 200 (Tex. Cr. App. 1969): "[W]hen dealing with alleged violations of probationary conditions relating to restitution and court costs, it should be borne in mind that there must be a showing of the probationer's ability to make payments and that failure to pay was intentional." Id. at 202.

[574] 55 Mich. App. 613, 223 N.W. 2d 92 (1974).

[575] Id. 223 N.W. 2d at 96 (citations omitted).

[576] 401 U.S. 395 (1971).

and cannot forthwith pay the fine in full."[577] Similarly, in People v. Lemon,[578] a Michigan Court of Appeals ruled that revocation for default of a defendant who is unable to pay restitution "constitutes a denial of the defendant's constitutional right to equal protection as his imprisonment constitutes discrimination on the basis of economic status."[579]

Although the defendant's ability to pay has repeatedly been declared a necessary condition of revocation for failure to meet restitutive conditions, it has also been emphasized that it is not sufficient, absent a showing that default was intentional,[580] willful,[581]

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[577] Id. at 396. Indigency for purposes of appointing counsel, however, has not always been held to prohibit the court from requiring large amounts of restitution within a short period of time. In State v. Ledder, 31 Or. App. 487, 570 P.2d 994, 995 (1977), for example, an order of $18,000 within 90 days was upheld because the trial court believed defendant had retained proceeds from sale of antique automobile obtained through theft by deception; but cf. People v. Lemon, 80 Mich. App. 737, 265 N.W. 2d 31 (1978) (judge may not base restitution or revocation on assumed ability to pay based on unverified assumption that defendant was still in possession of embezzeled funds).

[578] Supra.

[579] Id. at 265 N.W. 2d 34. Both the Gallagher and Lemon decisions exceed the precise ruling in Tate (discussed infra at 148-150).

[580] ARIZ. REV. STAT. ANN. s. 13-8-6)A) (1978); MISS. CODE ANN. s. 99-37-7(2) (Cum. Supp. 1978); OR. REV. STAT. s. 161.185(2) (1977); Whitehead v. State, 556 S.W. 2d 802 (Tex. Crim. App. 1977); People v. Gallagher, 55 Mich. App. 613, 223 N.W. 2d 92 (1974); Cox v. State, 445 S.W. 2d 200 (Tex. Cr. App. 1969).

[581] ILL. ANN. STAT. ch. 38, s. 1005-6-4 (Smith-Hurd Cum. Supp. 1979); PA. STAT. ANN. tit. 62, s. 481(b) (Purdon Cum. Supp. 1979-80).

unreasonable,[582] reckless, knowing or intentional,[583] or that nonpayment demonstrated the defendant's lack of good faith effort to comply.[584] In each case, revocation for nonpayment must, of course, be accompanied by the due process protections of notice and a hearing spelled out by the United States Supreme Court in Morrissey v. Brewer[585] and Gagnon v. Scarpelli.[586]

Incarceration following default in restitution payments has received appellate approval if the offender has made no showing of an ability to pay,[587] especially if the defendant's offers to pay at the time of sentencing are subsequently viewed as fraudulent misrepresentations;[588] sentencing courts have been instructed, however, to consider a wide variety of factors, other than the fact of nonpayment, before making the decision to revoke. In People v. Baumgarten,[589] for example,

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[582] VA. CODE s. 19.2-305.1(D) (1978).

[583] IND. CODE ANN. s. 35-7-2-2(e) (Burns 1979).

[584] ARIZ. REV. STAT. ANN. s. 13-806(A) (1978); MISS. CODE ANN. s. 99-37-7(2) (1978); OR. REV. STAT. s. 161.185(2) (1977); Hensley v. United States, 257 F.2d 681 (5th Cir. 1958).

[585] 408 U.S. 471 (1972).

[586] 411 U.S. 778 (1973).

[587] See e.g. State v. Hulon, 16 Ariz. App. 429, 493 P.2d 1234 (1972).

[588] Commonwealth v. Meyer, 169 Pa. Super. 40, 82 A.2d 298 (1951).

[589] 13 Ill. App. 3d 189, 300 N.E. 2d 561 (1973).

an Illinois Appellate Court reversed a probation revocation order because, inter alia:

> [W]e believe (1) that inasmuch as more than three years have elapsed since [the defendant's] plea of guilty was entered there is little likelihood defendant will commit another offense, (2) that in view of defendant's record of past payments, it would appear to be in the interest of the public, particularly the persons offended, that she be allowed to continue in her efforts to obtain funds so that future payments could be made, and (3) that her prospects for successful rehabilitation would be better served by continuation of her probation with temporary suspension of payments, rather than by incarceration at this time.[590]

In addition to the temporary suspension of restitution suggested by the court in Baumgarten, another common response to nonpayment is to extend the period of time over which payment must be made. Occasionally, extension of a payment schedule may be accomplished within the term of the original disposition, spreading payments, for example, over the full probation period.[591] Frequently, however, the length of the initial sentence has been increased to permit restitution to be paid,[592] and several states have set statutory limits upon the amount of time

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[590] Id. 300 N.E. 2d at 563.

[591] State v. Buelna, 25 Ariz. App. 414, 544 P.2d 238 (1976).

[592] See e.g. United States v. Squillante, 235 F.2d 46 (2d Cir. 1956); People v. Marks, 340 Mich. 495, 65 N.W. 2d 698 (1954).

by which such an extension may be made.[593]

Procedurally, it has been pointed out that: "There is no difference relevant to the guarantee of due process between the revocation of parole or probation and the extension thereof."[594] A question that is often raised in this context, however, is whether extension is appropriate at all if the defendant's failure to comply with the restitution order during the original term of the court's sentence is due to an inability to pay. In United States v. Follette,[595] the District Court for the Eastern District of Pennsylvania approved a three-year extension of an initial two-year probation term to permit restitution, even though: "The chief probation officer . . . reported that, in his opinion, the

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[593]ARIZ. REV. STAT. ANN. s.13-902(B) (1978) (not more than 3 years extension of probation for felon, 1 year for misdemeanant); ILL. ANN. STAT. ch. 38, s. 1005-5-6 (Smith-Hurd Cum. Supp. 1979) (not more than 2 years: restitution to be only condition of probation during extension); IOWA CODE ANN. s. 907.12(8) (West Cum. Supp. 1979-80) (not beyond statutorily prescribed maximum probation period); accord N.M. STAT. ANN. s. 31-17-1(G) (1978); N.Y. PENAL LAW. s. 65.05 (Consol. 1977) (not more than 2 years extension of probation); S.D. COMP. LAWS ANN. s. 23A-28-8 (Special Supp. 1978) (not beyond maximum probation period); cf. ILL. ANN. STAT. ch. 38, s. 1005-5-6 (Smith-Hurd Cum. Supp. 1979) (court can enlarge conditions of probation at any time).

[594]Warden v. Gaines, 522 P.2d 1009, 1010 (Nev. Supreme Court 1974) (citing Morrissey v. Brewer, 408 U.S. 471 (1972)); but cf. People v. Blackorby, 583 P.2d 949, 951 (Colo. App. 1978) (although statute requires notice, hearing, and showing of good cause before increasing supervisory period, such provisions are not applicable where extension granted at defendant's request).

[595]32 F. Supp. 953 (1940).

defendant had earnestly endeavored, to the full extent of her ability, to meet the [restitution] condition imposed upon her . . . ."[596] Similarly, in People v. Holzapple,[597] the Supreme Court of Illinois approved a one year extension of a one year probation term, because a few weeks prior to expiration of the original term: "[T]he trial court was notified by the probation officer that due to sickness and death in his family [probationer] was unable to make restitution . . . ."[598]

Under Nevada law, by comparison, at the time of consideration for honorable discharge from probation, if the defendant has not made restitution because of verified economic hardship, the case against him may nevertheless be dismissed.[599] In Huggett v. State,[600] moreover, the Supreme Court of Wisconsin, ruling on a state statute permitting extension of probation "for cause," declared that: "If the probationer lacks the capacity to pay and has demonstrated a good faith effort during probation, failure to make restitution cannot be 'cause' for

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[596]Id. at 954.

[597]9 Ill. 2d 22, 136 N.E. 2d 793 (1956).

[598]Id. 136 N.E. 2d at 794.

[599]NEV. REV. STAT. s. 176.225(1)(c) (1977). Under the Nevada statute, however, any amount owed at discharge from probation becomes a civil debt. Id. Compare Warden v. Gaines 522 P.2d 1009, 1010 (Nev. Supreme Court 1974) (before extension, defendant must have opportunity to show he comes within statute reducing restitution to a civil liability).

[600]83 Wis. 2d 790, 266 N.W. 2d 403 (1978).

extending probation."[601] In addition, a Colorado Court of Appeals has recently said of a state statute requiring good cause before extending a supervisory period that: "Revocation of the supervisory period, like revocation of probation for failure to pay restitution, is only proper where the trial court finds that the defendant had the ability to pay restitution."[602] Unfortunately, in neither the Wisconsin nor the Colorado decisions was the basis for the above dicta made clear.[603]

Although judges have frequently voiced the opinion that criminal courts should not assume the role of collection agencies,[604] the practice of extending supervision periods to permit payment of restitution appears not to be limited to actions in the event of default; "extended"

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[601] Id. at 266 N.W. 2d 409. According to the dissenting opinion in Huggett: "The majority implies the probation condition requiring restitution should be withdrawn and restitution forgiven if the defendant is found to be unable to make restitution during the original term of probation." Id. at 410. The Huggett majority was of the opinion, however, that extension might be possible "if there is a basis for believing that additional restitution would effectuate the objectives of probation and that Huggett could make more than negligible payments during the extended period." Id. at 409.

[602] People v. Blackorby, 583 P.2d 949 (1978).

[603] In Blackorby, the court rejected, as being without merit on the record, the defendant's argument that the extension constituted invidious discrimination because it was granted due to his inability to pay. Id. at 951. In Huggett, although the defendant argued that extension on the basis of indigency contravenes "federal and state guarantees of equal protection," the case was decided on other grounds. 266 N.W. 2d 407-409.

[604] See e.g., State v. Garner, 115 Ariz. 579, 566 P.2d 1055, 1057 (1977); People v. Moore, 43 Mich. App. 633, 204 N.W. 2d 737, 739 (1972); State v. Scherr, 9 Wis. 2d 418, 101 N.W. 2d 77,80 (1960).

sentences have also been imposed outright at the time of sentencing, almost certainly with restitution enforcement in mind. In Commonwealth v. Walton,[605] for example, a Pennsylvania court placed the defendant on nineteen years probation, with a condition that he pay $25.00 per week in restitution during the entire period.[606] Also, in State v. Barnett,[607] the Supreme Court of Vermont concluded, in a case involving revocation of probation imposed for leaving the scene of an accident, that: "From the findings it clearly appears that the main reason for placing the respondent on probation and continuing the term thereof for so long a time, nearly nine years, was to collect money for [the victim] by aid of the court order."[608]

If revocation proceedings are initiated and the defendant's default is found to be inexcusable and not to merit extension of supervision, then the statutorily prescribed consequences obviously vary according to the manner in which the case was originally processed. Where the

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[605] 397 A.2d 1179 (Pa. Supreme Court 1979).

[606] Id. at 1191. The total of nineteen years was arrived at by aggregating the maximum terms for the defendants offenses of aggravated assault, reckless endangerment, and two weapons offenses; cf. McKnight v. State, 409 S.W. 2d 858 (Tex. Crim. App. 1966) (probationer revoked for nonpayment in ninth year of ten year probation after paying nearly $10,000 of a $22,000 order).

[607] 3 A.2d 521 (1939).

[608] Id. at 526.

defendant's restitution is part of a deferred-judgment probation order, for example, default may result in the court entering judgment and proceedings with disposition as if the defendant had not been placed on probation.[609] If restitution is imposed as a condition of a suspended sentence, probation, or parole, revocation to the original sentence or term of incarceration is prescribed for default in payment.[610]

In cases in which restitution is imposed as part of an active sentence, for which an alternative disposition has not been or cannot[611] be set in advance of default, the defendant who fails to pay restitution may be held in contempt of court. Legislative provisions dealing with contempt in restitution cases generally provide for incarceration until the debt is paid, within time limits based either upon a rate-per-dollar-owed, or for a period fixed by the court or legislature, which ever is shorter.[612] The period of incarceration may be credited in several jurisdictions against the restitution owed, at a rate specified in the court's order committing the defendant to custody.[613]

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609 MD. ANN. CODE art. 27, s. 641(2)(b) (1978).

610 See, e.g., CAL. PENAL CODE s. 1202.5(a)(2)(b) (West Cum. Supp. 1979) (probation revocation); FLA. STAT. ANN. s. 947.181(2) (West Cum. Supp. 1979) (parole revocation); S.C. CODE s. 17-25-125 (1978) (suspended sentence revocation).

611 N.J. STAT. ANN. s. 2C:44-2(d) (West Cum. Supp. 1979) (court not to impose alternative sentence at time of imposing restitution; response of court to default to be determined only after nonpayment).

612 ARIZ. REV. STAT. ANN. s. 13-806 (1978) (not more than 1 day per $10 owed or 30 days for misdemeanor, and 6 months for felony); MISS. CODE ANN. s. 99-37-9 (1978) (not more than 1 day per $25 owed or 30 days for violation or misdemeanor, or 1 year in any other case); accord OR. REV. STAT. s. 161.685 (1977); N.J. STAT. ANN. s. 2C;46-2(a) (West Cum. Supp. 1979) (not more than 1 day per $20 owed or 1 year); cf. PA. STAT. ANN. tit. 62, s. 481 (Purdon Cum. Supp. 1979-80) (60 days).

613 ARIZ., MISS., OR., supra.

Imprisonment for nonpayment of restitution frequently raises the issue of imprisonment for debt, and the prohibition of that practice in several state constitutions.[614] In general, courts have found no constitutional objection on these grounds,[615] although the merit of such an argument under certain circumstances has been suggested by a number of courts. In State v. Garner,[616] for example, an Arizona Court of Appeals declared that: "Great constitutional problems develop if the amount of reparations is an amount larger than the defendant can pay. When this occurs, and the defendant is later incarcerated for his failure to pay, we have what may be an imprisonment for debt problem."[617] Similarly, in a recent case appearing before the Texas Court of Criminal Appeals, involving restitution as a condition of probation for assault with intent to commit murder, a dissenting judge asked rhetorically: "[I]f the appellant is unable to make the required restitution payments,

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614 See cases cited infra notes 515-522.

615 Maurier v. State, 112 Ga. App. 297, 144 S.E. 2d 918 (1965) (restitution as condition of suspended sentence is not violative of state constitution providing that there shall be no imprisonment for debt); cf. People v. Mosesson, 78 Misc. 2d 217, 356 N.Y.S. 2d 483, 484 (1974) (restitution condition of probation does not create a debt nor a debtor/creditor relationship between persons making and receiving restitution).

616 115 Ariz. 579, 566 P.2d 1055 (1977).

617 Id. at 566 P.2d 1057.

and as a result his probation is revoked, will he not have been imprisoned for debt, contrary to the prohibition of Art. 1, Section 18, Texas Constitution?"[618]

Courts elsewhere would limit the issue rather differently. In State v. Caudle,[619] for example, it was declared that a probation condition that used the criminal process for forced payment of civil debts was unconstitutional under the following circumstance: "To suspend a sentence of imprisonment for a criminal act, however just the sentence may be per se, on condition that the defendant pay obligations unrelated to such criminal act, however justly owing is a use of the criminal process to enforce the payment of a civil obligation . . . ."[620] Similarly, in the case of Ex parte Trombley,[621] the California Supreme Court stated that: "Although by its terms the prohibition is directed to imprisonment in civil actions, it has been held to apply in a criminal proceeding . . . . The courts will not permit the purposes of the constitutional provision prohibiting imprisonment for debt to be circumvented by mere form . . . ."[622]

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[618] Flores v. State, 513 S.W. 2d 66, 71 (1974).

[619] 276 N.C. 550, 173 S.E. 2d 778 (1970).

[620] Id. (emphasis added); quoted with approval in State v. Green, 29 N.C. App. 574, 225 S.E. 2d 170, 173 (1976).

[621] 193 P.2d 734.

[622] Id. at 737.

Whether or not criminal courts are using the threat of imprisonment to enforce civil obligations is, of course, an empirical question to be addressed in relation to the courts' purposes for ordering restitution,[623] as well as in relation to the attitudes and intentions of probation officers, prosecutors, and judges at the time of revocation for nonpayment.[624] In passing, however, it may be noted that courts have included as conditions of probation the satisfaction of a civil judgment[625] and the execution of a confession of judgment[626] by the defendant. Similarly, use of the criminal court as a more powerful enforcer than its civil counterpart is manifest in language such as the following, from People v. Becker:[627]

> The people who were injured [by defendant] spent $1,244.00 in doctors' and hospital bills. They, as well as I, recognized that there was little likelihood of being able to collect a judgment against this boy if they got one to compensate them for their damages, so I put him on probation and ordered him to pay these people the $1,244.00 within a year.[628]

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[623] Infra 151 ff.

[624] See Harland supra note 560.

[625] People v. McLean, 279 P.2d 87 (Cal. Dist. Ct. App. 1955); see also cases cited supra note 316.

[626] People v. Thigpen, 60 A.D. 2d 860, 400 N.Y.S. 2d 585 (1978).

[627] 349 Mich. 476, 84 N.W. 2d 833 (1957).

[628] Id. at 84 N.W. 2d 834 (emphasis added).

Obviously, incarceration of the defendant for nonpayment does little per se to satisfy the victim's claim to recovery. Several states have made very specific provision, however, for other methods of enforcing payment. In both Kentucky and Missouri, for example, the victim is granted a lien against the defendant's estate from the time of arrest, and enforcement is authorized by execution or other process.[629] State statutes elsewhere permit levy of execution in any way approved for the collection of an unpaid civil judgment against the defendant in an action for debt.[630] The levy of execution will not usually discharge a defendant incarcerated for nonpayment until the amount of restitution in question has actually been collected.[631] In addition to statutory enforcement of this type, sentencing courts have also fashioned their

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[629] KY. REV. STAT. ANN. s. 431.200 (Baldwin 1978); MO. ANN. STAT. ss. 546.630, 640 (Vernon 1962); cf. MD. ANN. CODE art. 27, s. 636 (1957) (payment of restitution and reparation to the party injured, from real and personal estate of person sentenced to penitentiary or to be executed).

[630] ARIZ. REV. STAT. ANN. s. 13-1806 (1978); accord FLA. STAT. ANN. s. 775.078(6) (West Cum. Supp. 1979); MISS. CODE ANN. s. 99-37-13 (1978); N.J. STAT. ANN. s. 2C:46-2(b) (West Cum. Supp. 1979); OR. REV. STAT. s. 161.685 (1979); see also State v. Calderilla, 34 Or. App. 1007, 580 P.2d 578 (1978) (state may levy execution to enforce collection of restitution or require defendant to show cause why he should not be held in contempt of court by reason of his failure to pay).

[631] See the Arizona, Mississippi and Oregon laws cited supra. The relevance of writs of execution has been seriously questioned by the Supreme Court of Michigan: "The defendant either pays up or he serves time. This is a situation where a judgment creditor's inability to obtain a writ of execution in aid of a money judgment has no real significance. If defendant has the resources he will pay. If he has not, the writ of execution will not create them." People v. Becker, 349 Mich. 476, 84 N.W. 2d 833, 837 (1957); cf. People v. Good, 287 Mich. 110, 272 N.W. 920 (1938) (writ of execution could not issue to enforce restitution as a condition of probation).

own measures to secure payment. In United States v. Landay,[632] for example, the defendant in a check kiting scheme was required as a condition of probation "to execute immediately documents necessary to transfer to the [victim] all assets and property he now owns."[633] Less drastically, a Texas Statute permits the sentencing judge to require the defendant to send a letter to his or her employer, authorizing deductions from salary to be paid into court in amounts directed by the courts; compliance on the part of the employer, however, is voluntary.[634]

Finally, an increasingly common response to a defendant's nonpayment of restitution in recent years has been to convert the amount owed into a corresponding number of hours of unpaid community service.[635]

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[632] 513 F.2d 306 (5th Cir. 1975).

[633] Id. at 307; cf. ARK. STAT. ANN. s. 1203(5) (1977) (court shall consider defendant's assets in decision to order full or partial restitution).

[634] TEX. CODE CRIM. PROC. ANN. art. 42.03, s. 5(b) (Vernon Cum. Supp. 1979); cf. MISS. CODE ANN. s. 47-5-161 (1978) (work release employer pays defendant's wages directly to commissioner of corrections to be paid, inter alia, into any court which has ordered restitution).

[635] The conversion is most often calculated by dividing the amount owed by the prevailing minimum age to arrive at the number of hours required. See generally, Harland, The Law of Court Ordered Community Service. (NILE&CJ U.S. Dept. of Justice Washington D.C. 1980). Similar practices are authorized for costs and fines. E.g. DEL. CODE ANN. tit. 11, ss. 4105(b), (c) (Cum. Supp. 1979).

This option has gained particular popularity in cases in which there is an inability to pay restitution, whether determined at the time of sentencing or after default in payment. Under a recent Kansas Statute, for example, the court may include among the conditions of probation or suspension of sentence that the defendant shall perform services under a system of day-fines whereby the defendant is required to satisfy monetary fines, costs, reparation, or restitution, by performing services for a period of days determined by the court on the basis of ability to pay, standard of living, support obligations, and other factors.[636] Such a practice, of course, gives rise to a situation in which offenders who can afford to pay may buy themselves out of a work assignment, while those without financial resources must submit to the service penalty or be incarcerated. Whether such a result violates the Equal Protection Clause of the Fourteenth Amendment rests upon one's reading of the Supreme Court's decisions in Tate v. Short[637] and Williams v. Illinois.[638]

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[636] KAN. STAT. ANN. s. 21-4610(3)(a) (1978).

[637] 401 U.S. 395 (1971).

[638] 399 U.S. 235 (1970).

In Tate the Supreme Court adopted the view announced in an earlier case[639] that: "[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."[640] The premise of this conclusion was stated in Williams to be that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[641] Consequently, it might be argued that automatic conversion of fines (or restitution) into community service for indigent offenders unconstitutionally raises the ceiling of punishment for those offenders when the penalty for others who are financially solvent is limited to payment. Several points raised by Justice Brennan's opinion for the Court in Tate, however, might be construed to attenuate the Equal Protection argument.

In striking down the automatic conversion of fines to imprisonment for indigent offenders, Justice Brennan observed that "numerous alternatives" exist to which legislators and judges may constitutionally

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[639] Morris v. Schoonfield, 399 U.S. 508 (1970).

[640] Id. at 509.

[641] 399 U.S. at 244.

resort, to serve the State's valid interest in enforcing payment of fines.[642] Similarly, in Williams, the Court had noted that:

> "The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.[643]

In addition, even if the practice of converting fines or restitution to service at the time of sentencing proves to be an unconstitutional alternative on the authority of Tate, it may be more difficult to press similar arguments if the conversion is made only after a suitable period of time has lapsed, during which an offender is given the option of paying. For, as Justice Brennan stated in Tate:

> We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.[644]

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[642] 401 U.S. at 671.

[643] 399 U.S. at 244.

[644] 401 U.S. at 672.

RATIONALES

As the foregoing presentation of the substantive and procedural parameters of restitution clearly demonstrates, the question of how the sanction should be administered has been the subject of extensive, if often unreflecting, discussion. In contrast, the question of why restitution should be enforced through the criminal process has gone largely unaddressed.[645] Since the time of Plato the concepts of compensation and punishment have been distinguished,[646] and the prevailing modern wisdom is that restitution is not a punishment, but is independent of and cannot replace punishment.[647] Nevertheless, the idea that restitutive sanctions should be woven into the fabric of the penal system is virtually unopposed in recent debate.[648]

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[645] The logically prior question of why restitution should be enforced at all is, of course, as fundamental as the question of why we punish criminals. Like the question of punishment, restitution has been justified by appeal to principles of both Natural Law and Legal Positivism. It has been said, for example that "the natural law requires that each should . . . repair the injury which he occasioned by his tort" (POTHIER, TREATISE ON OBLIGATIONS 76 (trans. 1802)). Austin, on the other hand, emphasized the utilitarian end of redress, being one of prevention (LECTURES ON JURISPRUDENCE 520-21(Campbell, 4th ed. 1879)). More recent writers have also pointed to the admonitory aspect of tort judgments, and the pacificatory function of money judgments in the prevention of private revenge (Morris, "Punitive Damages in Tort Cases" 44 HARV. L. REV. 1173, 1198 (1931)).

[646] LAWS, Bk. IX, 445.

[647] See e.g. VAN DEN HAAG, PUNISHING CRIMINALS supra note 123 at 17; cf. Commissioner of Motor Vehicles v. Lee, 255 A.2d 44, 48 (Md. App. 1969) (restitution is not punitive); contra Bunting v. State, 361 So. 2d 810, 811 (Fla. App. 1978); Redewill v. Superior Court of Maricopa County, 29 P.2d 475, 479 (Ariz. Supreme Ct. 1934). See also Spannuth v. State, supra text at note 155.

[648] But see ADVISORY COUNCIL ON THE PENAL SYSTEM, REPARATION BY THE OFFENDER 11 (H.M.S.O. 1970) (there are grounds for removing all power to award restitution from the criminal courts).

The apparent incongruity of enforcing avowedly non-punitive sanctions through the mechanism of criminal sentencing has led to confusion in practice. In his study of restitution in the magistrates' courts, in Britain, Softley noted that "the courts were troubled by the philosophy behind the principle of reparation . . . . Conflicting views as to the importance and purpose of reparation possibly reflect the incongruity of harnessing to criminal proceedings a procedure for compensating the victim or loser."[649] Similarly, although restitution may be encouraged wherever possible by criminal statutes in some jurisdictions,[650] restitution continues to be excluded from "the central objectives of the criminal law" in others.[651] In recent statutes, restitution is declared to be an ancillary remedy,[652] not a punishment,[653] to be applied only when other purposes of sentencing can be appropriately served.[654]

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[649] Supra note 49 at 29-30.

[650] COLO. REV. STAT. s. 17-28-101 (1978); IOWA CODE ANN. s. 907.12 (West Cum. Supp. 1979); ME. REV. STAT. tit. 17-A., s. 1151 (Pamphlet 1978); N.M. STAT. ANN. s. 31-17-1A (1978); S.D. COMP. LAWS ANN. s. 23A-28-2 (Special Supp. 1978).

[651] ME. REV. STAT. tit. 17-A., s. 1321 (Pamphlet 1978).

[652] Id.; accord N.C. GEN. STAT. s. 15A-1343(d) (1977) as amended 1977 N.C. Sess. Laws ch. 1147, S.B. 986.

[653] N.C. GEN. STAT. supra; cf. ILL. ANN. STAT. ch. 38, s. 1005-9-1 (Smith-Hurd 1973) (restitution contrasted with primitive fines in commentary on statute).

[654] ME. REV. STAT. tit. 17-A., s. 1321 (Pamphlet 1978).

Exactly why interest has grown so rapidly in recent years in solidifying restitution's role in the criminal system is a question rarely asked in the literature, and almost never addressed in legislation or case law. While a recent Colorado statute, for example, proclaims that criminals "should be under a moral and legal obligation to make adequate restitution,"[655] it does not say why those obligations should be enforced in criminal courts rather then in the more usual civil forum. The most consistently recurring answer to this question perhaps also goes some way towards explaining why criminal justice practitioners might feel "troubled" by the civil-criminal fusion; for rather than being based upon any profound reconsideration of the fundamental purposes of civil vs. criminal courts or tort-crime differences,[656] and the relationship of restitution to each, the current swing towards endowing criminal courts with greater restitutive responsibilities appears inescapably to be grounded largely in considerations of practicality and convenience.

As noted earlier, the British Advisory Council on the Penal System, with a candor rarely found in the American restitution literature, has noted that "there is little to be done to eliminate the remaining obstacles to securing reparation by the civil process . . . [and] if any advance is to

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[655] COLO. REV. STAT. s. 17-28-101(1)(c) (1978).

[656] See generally Hall, "Interrelation of Criminal Law and Torts: I," 43 Colum. L. Rev. 753 (1943).

be made it is to the criminal court that one most look."[657] Less directly, Van Den Haag has argued that:

> Monetary restitution, finally, is a debt the offender owes the victim of his offense. It is quite unnecessarily neglected in our present legal practices . . . . [V]ictims may recover by separate tort action. In practice such actions are made futile by the law, which puts the burden of undertaking then on the victim and makes civil judgments against offenders very hard to enforce. It would be quite feasible to impose restitution on the offender during the penal proceedings . . . .[658]

Although the 'convenience rationale' has also been acknowledged occasionally from the bench,[659] by far the more typical judicial (and legislative) posture has been to disavow any intent to usurp the authority of civil courts.[660] Even though the actions of numerous criminal courts have been unmistakably influenced by a desire to spare victims the trouble

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[657] REPARATION BY TITE OFFENDER 56 (H.M.S.O.: London 1970).

[658] PUNISHING CRIMINALS, supra note 123 at 17.

[659] See e.g., Hugget v. State, 83 Wis. 2d 790, 266 N.W. 2d 403 (1978): "The old saw "crime does not pay" should become a legal reality wherever possible . . . . The implication of the majority opinion is that the victim should commence a civil suit against the defendant for recovery of the loss resulting from the defendant's criminal act. This is a burden and an expense which should not be thrust upon the innocent victim of the crime." Id. at 266 N.W. 2d 410 (Callow J. dissenting).

[660] See e.g., Exparte Galbreath, 24 N.D. 582, 583, 139 N.W. 1050, 1051 (1913).

and expense of a civil suit,[661] opinions are often written with what appears to be an almost ritualistic disclaimer of any intent to substitute for civil proceedings.[662] Instead, a variety of other reasons have been given for pursuing restitution in criminal courts, without any consideration as to why the same reasons would not apply with equal force if restitution

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[661] See e.g., People v. Becker, supra 145, text at note 628; see also cases cited supra notes 316, 625-26. In People v. Mylander, 3 Ill. App. 3d 252, 278 N.E. 2d 492 (1971) an Illinois appellate court observed that: "In the case at bar probation was granted solely to allow restitution. It was the court's concern for the victims that motivated the granting of probation." Id. at 278 N.E. 2d 495 (emphasis added); cf. People v. Lippner, 219 Cal. 395, 26 P.2d 457 (1933) (only purpose of granting probation was to give defendant opportunity to reimburse victims).

[662] See e.g. People v. Grago, 25 Misc. 2d 739, 204 N.Y.S. 2d 774, 777 (1960); State v. Scherr, 9 Wis. 2d 418, 101 N.W. 2d 77, 80 (1960. The disclaimer is made so often and so profusely in the face of such obvious attempts to bypass the need for a civil suit that even the most midly skeptical reader might conclude that the court "doth protest too much methinks" (Hamlet act III). Compare, for example the following language from Ray v. State, 149 S.E. 64, 65 (Ga. App. 1929):

> However equitable it may seem that the victim of the transaction should be paid the money which he was induced to part with by fraudulent representations, there is no provision in the law of our state for hanging over the head of a convicted criminal the threatened enforcement of an imposed sentence for the purpose of coercing him to pay a debt.

with:

> On granting probation, the judge said to the defendants: "I think that the threat of jail should be held over their heads, and that is what the court tends [sic] to do . . .; give these people value received or you are going to be brought in here as probation violators and possibly be sent to the penitentiary" People v. McLean, 279 P.2d 87 (Cal. App. 1955) at 88-9.

were required in a civil setting.[663]

In the New York Supreme Court case, Feldman v. Reeves,[664] for example, the court declared that: "Restitution is not a means to recover damages in a criminal action. It is a procedure whereby, in a proper case, the court has discretion to place a defendant on probation and at the same time not allow him to profit by his criminal act."[665] Depriving a wrongdoer of profit and avoidance of "unjust enrichment," however, are, of course, central to the civil law of restitution.[666]

A very common rationale advanced to support the use of criminal restitution, in both statutes and case law, as well as in the speculative literature, is that is may serve rehabilitative purposes. Statutes in several states require the court to consider the rehabilitative effect that a restitutive disposition might have.[667] Other jurisdictions simply

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[663]Indeed, it is interesting to speculate whether the current trend towards restitution in criminal courts might be so strong if the millions of dollars invested by LEAA in the area had been earmarked instead for improvement of existing civil avenues of redress.

[664]45 A.2d 90, 356 N.Y.S. 2d 627 (1974).

[665]Id. at 356 N.Y.S. 2d 629; accord People v. Grago, 24 Misc. 2d 739, 204 N.Y.S. 2d 774 (1960).

[666]Nemo debet locupletari ex aliena jactura. See generally DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION (Allen Smith Co. 1977).

[667]ARK. STAT. ANN. s. 41-1201 (1977); IOWA STAT. ANN. s. 907.12(2) (West Cum. Supp. 1979); MISS. CODE ANN. s. 99-37-3(2) (1978); N.M. STAT. ANN. s. 31-17-1(D) (1978); OR. REV. STAT. s. 137.106(2) (1977); S.D. COMP. LAWS ANN. s. 23A-28-5 (Special Supp. 1978); cf. People v. Baumgarten supra text at note 590 (prospects for rehabilitation better with suspension of restitution payments).

permit restitution "in the interest of rehabilitation"[668] or list restitution among probation conditions considered reasonably related to rehabilitation[669] or designed to prevent recidivism and promote rehabilitation.[670] A more emphatic position is taken in a recent Maine statute: "The Legislature . . . finds that repayment, in whole or in part, by the offender to the victim of his crime can operate to rehabilitate the offender in certain circumstances."[671] Almost identical language is used in a recent Colorado statute,[672] and rehabilitative programs including restitution are authorized in both states.[673]

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[668]OHIO REV. CODE ANN. s. 2951.02(c) (Page Supp. 1978); cf. N.C. GEN. STAT. s. 148-33.2(a) (1977) (restitution as rehabilitative measure as condition of work-release); see also WASH. REV. CODE ANN. s. 7.68.120(3) (Supp. 1978).

[669]LA. REV. STAT. ANN. art. 895(A)(7) (West Cum. Supp. 1979).

[670]TEX. CODE CRIM. PROC. ANN. art. 42.13, s. 5(b)(8) (Vernon Cum. Supp. 1979).

[671]ME. REV. STAT. tit. 17-A., s. 1321 (Pamphlet 1978) (emphasis added).

[672]COLO. REV. STAT. s. 17-28-101(1)(d) (1978).

[673]COLO. REV. STAT. s. 17-28-102 (1978); ME. REV. STAT. tit. 34, s. 527 (1978); accord MINN. STAT. ANN. s. 299B.13 (West Cum. Supp. 1979).

If one looks beyond general statutory reliance upon the professed rehabilitative qualities of restitution, there are very few more specific indications of the theory behind such hopes or "findings" that restitution is either correctional[674] or a benefit to the defendant.[675] Provisions in Arizona[676] and Maine[677] emphasize the role that restitution has frequently been suggested to perform in assisting defendants to accept responsibility for their acts. The same Maine statute also supposes that restitution offers the defendant an opportunity to pay his debt to the victim and to society in a constructive manner.[678] In Colorado legislation, restitution is viewed as an aid to the reintegration of the defendant as a productive member of society.[679] And in Ohio restitution may be ordered in the interests of insuring, in an unspecified manner, the defendant's good behavior.[680]

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[674] N.J. CODE CRIM. PROC. ANN. s. 2C:44-2(2) (West Cum. Supp. 1979).

[675] KAN. STAT. s. 22-29-8(a) (Vernon 1978 Supp.).

[676] ARIZ. REV. STAT. ANN. s. 41-1622 (1978).

[677] ME. REV. STAT. tit. 17-A., s. 1321 (Pamphlet 1978).

[678] Id.

[679] COLO. REV. STAT. s. 17-28-101(2) (1978).

[680] OHIO REV. CODE ANN. s. 2951.02(c) (Page Supp. 1978). Insuring the defendant's good behavior may denote a sort of incapacitative rather than rehabilitative effect of restitution, if based upon the assumption that while he is working to pay restitution he has less time to commit crime; cf. Garski v. State 76 Wis. 2d 62, 248 N.W. 2d 425, 431 (1977) (complete restitution is consistent with desire to induce financial responsibility as means of assisting defendant to lead law-abiding life).

In State v. Harris,[681] the New Jersey Supreme Court announced two 'coalescing reasons' for its preference "in the ordinary case, where feasible, to provide for restitution within the probation context," rather than a civil action:

> One may be termed the "justice" factor. The court which orders restitution acts in the interest of repairing the harm done the aggrieved party. In meting out substantial justice in this fashion, the court is even more importantly motivated by another reason, which may be termed the "rehabilitation" factor--the predominant rehabilitative aspect of probationary restitution.[682]

The court in Harris quotes Dressler for the proposition that: "Restitution may have a positive casework connotation. It offers the individual something within reason that he can do here and now, within the limits of his ability to demonstrate to himself that he is changing."[683] The court also pointed to Rubin's assessment that: "Restitution serves the purposes of rehabilitation, if used to support a healthy attitude by the offender . . . . When reparation is a condition of probation, it is part of the defendant's rehabilitative effort, not a sentence."[684]

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[681] 70 N.J. 586, 362 A.2d 32 (1976).

[682] Id. at 362 A.2d 34.

[683] Ibid.; DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 176-77 (1959) (emphasis in original). In Harris, however, the court ruled that, for a first offender convicted of welfare fraud, still on welfare, who received a favorable pre-sentence report as a responsible parent and a hard-working, conscientious woman: "The condition of restitution here, in the aspect of rehabilitation, is quite meaningless." 362 A.2d 37.

[684] Ibid.; S. RUBIN, THE LAW OF CRIMINAL CORRECTION 200-01 (1963) (footnotes omitted).

Reasoning similar to that relied upon by the Harris court was used in a more recent decision by the Supreme Court of Wisconsin:

> Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. The probationer may learn to consider more carefully the consequences of his or her actions. One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life.[685]

More particularly in a dissent to the latter case, the following opinion was advanced:

> The defendant must be made aware of the impact of the crime upon the victim. The personalization of the crime that occurs when the victim and the defendant meet in a court or a probation department conference to determine the value of the property lost by the victim has a significant impact on the defendant and is an important rehabilitative tool . . . . Pride in accomplishing restitution will help the defendant to regain self-respect and an improved self-image.[686]

Restitution has elsewhere been called a constructive tool in the criminal jurisprudence,[687] designed ideally to redirect the conscious or unconscious thoughts, emotions, or conflicts which motivated the crime, and to encourage the defendant to accept his social responsibility.[688]

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[685] Huggett v. State, 83 Wis. 2d 790, 266 N.W. 2d 403, 407 (1978).

[686] Id. at 411; cf. State v. Rogers, 251 N.W. 2d 239, 244 (Iowa Supreme Ct. 1977) (trial court may have reasonably concluded reimbursement of attorney fees would enhance defendant's self-esteem and self-confidence in his community and thus contribute to his rehabilitation).

[687] State v. Garner, 115 Ariz. 579, 566 P.2d 1055, 1057 (1977).

[688] People v. Richards, 131 Cal. Rptr. 537, 552 P.2d 97, 102 (1976), quoting Schafer, "Restitution to Victims of Crime--An Old Correctional Aim Modernized" 50 MINN. LAW. REV.243, 250 (1965).

By way of limitation on this latter assumption the Supreme Court of California has observed that:

> If a restitution order is to redirect a defendant to acceptance of responsibility for the crime he has committed, the order must be directly related to that crime. It is obvious that unless the act for which the defendant is ordered to make restitution was committed with the same state of mind as the offense of which he was convicted, this salutory rehabilitative effect cannot take place. No rehabilitative purpose can be served by forcing a person to confront tendencies which differ from those which induced his crime.[689]

In the federal courts restitution has been viewed as an "expiatory act," and possibly "just the catharsis that a youthful offender needs in order to gain the self-respect--or respect for others--that will enable him to respect the law henceforth."[690] In United States v. Buechler,[691] based upon what it considered "substantial scholarly support for the propostion that restitution may be rehabilitative in certain cases," the Third Circuit Court of Appeals upheld the use of restitution under the rehabilitative conditions of the Federal Youth Corrections Act:[692] "In any event, the youth will have learned the first lesson

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[689] Id. at 522 P.2d 102.

[690] United States v. Buechler, 557 F.2d 1002, 1007 (4d Cir. 1977).

[691] Id.

[692] Ibid. The use of restitution under the FYCA has subsequently been approved by the Supreme Court in Durst v. United States, __ U.S. ___ (1978).

that society--in its effort to rehabilitate all offenders--tries to teach: society, whenever it can help it, will not allow crime to pay."[693]

The "scholarly support" relied upon by the Buechler court included speculation by two of restitution's strongest advocates, Eglash[694] and Schafer.[695] These writers have argued repeatedly that considerable psychological benefit may accrue to the defendant who makes restitution,[696] and that restitution may be a correctional instrument through which the defendant can feel and understand his social responsibility and alleviate guilt feelings.[697] Other writers have noted that "the merits of reparation as a means of rehabilitating the offender have received little discussion . . .,"[698] but that "full restitution, not as a forced imposition, but as a goal in rehabilitation, merits our attention."[699]

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[693] 557 F.2d 1007.

[694] "Creative Restitution: Some Suggestions for Prison Rehabilitation Programs" 28 Am. J. Corrections 20 (1958).

[695] "Compensation of Victims of Criminal Offenses" 10 Crim. L. Bull. 605 (1974).

[696] Eglash, "Creative Restitution" 48 J. Crim. L. C.&P.S. 619 (1958).

[697] Schafer, supra note 688 at 250; see also SCHAFER, THE VICTIM AND HIS CRIMINAL (1968).

[698] Note: Compensation for Victims of Crime," 33 U. Chi. L. Rev. 541,535 (1966).

[699] Cohen "The Integration of Restitution in the Probation Services," 34 J. Crim. L.C.&P.S. 315, 317 (1944).

Despite the relatively "little discussion" of restitution's rehabilitaitve effects, and the almost total lack of research results supporting any of the rehabilitative assumptions mentioned above, advocates remain unwavering that "repayment is the best first step toward reformation that a dishonest person can take. It is often the ideal solution."[700] Indeed, the Supreme Court of California has declared that: "There can be no real reformation of a wrongdoer, unless there is at least a willingness on his part to right the wrong committed. The effect of such an act upon the individual is of inestimable value, and to a large extent determines whether there has been any real reformation."[701]

Quite a different type of rehabilitative argument is made to support the use of criminal restitution by those who maintain that it may induce the sentencing judge to impose a less intrusive disposition than might otherwise be used. Under this reasoning, restitution per se is not necessarily the rehabilitative factor; rather the less intrusive penalty is thought to hold more promise for rehabilitation than the alternative.[702] In most cases the alternative in question is thought

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[700] FRY, ARMS OF THE LAW 126 (London 1951).

[701] People v. Lippner, 219 Cal. 395, 26 P.2d 457, 458 (1933).

[702] But see MURRAY and COX, BEYOND PROBATION (Sage 1979).

to be incarceration,[703] as in the following statement in the Buechler case:

> In our view, restitution is certainly not inconsistent with rehabilitative aims. On the most mundane level, if the availability of restitution prompts the sentencing judge to forego sentencing a youth to commitment, then all the evils attendant upon prolonged confinement in the company of other wrongdoers may be avoided.[704]

Although the view of restitution as an alternative to incarceration is widely held,[705] it is usually unclear whether the defendant in such a case is to be spared imprisonment because restitution mitigates culpability, or whether it is simply a regrettable trade of incapacitation, deterrence or desert against rehabilitative hopes or concern for recovery by the victim. For some, imprisonment is simply overused, and a community disposition involving restitution would be a sufficiently severe penalty.[706] For others, restitution "would be a means of prevention [deterrence] much more potent than the menace of brief terms of imprisonment."[707]

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[703] But see Stevens v. State, 34 Md. App. 164, 366 A.2d 414 (1976) (restitution as condition of probation before verdict to avoid placing stigma of conviction upon the accused).

[704] United States v. Buechler, 557 F.2d 1002, 1007 (3d Cir. 1977).

[705] See cases cited supra notes 162, 260-61; see also statutes cited supra note 130. In People v. Richards, 131 Cal. Rptr. 537, 552 P.2d 97 (1976), the trial judge, in ordering the defendant to make restitution, declared: "I would be disposed to giving him a little less time in jail for that." Id. at 552 P.2d 100.

[706] See e.g. Newton, "Alternatives to Imprisonment. Day Fines, Community Service Orders, and Restitution" 8 C+D hit. 109 (1976).

[707] GAROFALO, CRIMINOLOGY 419 (1914): More recently the possible deterrent capabilities of restitution have received legislative recognition. N.J. CODE CRIM. PROC. ANN. s. 2C:44-2(a)(2) (West Cum. Supp. 1979).

Several writers have viewed restitution as being an integral part of, if not synomymous with, desert or retribution. As a practical matter, Cohen has noted that: "As a condition of probation, restitution is readily acceptable to the community inasmuch as it can be regarded as a sublimation of society's unconscious 'lex talionis,' with money as the symbol of retaliation."[708] Similarly, Schafer points to the symbolic representation of restitution in the "payment of one's debt to society."[709]

The conceptual fusion of restitution and deserts can be seen even more clearly in the following passage by Kerper (1972:62):

> Restitution means returning to the victim what he has lost. In the case of personal injury or death, this is almost impossible to do. How do you repay a man for the loss of an eye? . . . Revenge then becomes the only means of restitution--the only way to 'even things up,' or obtain something for recompense.[710]

Finally, Mueller adds that:

> [T]he eye-for-an-eye idea in itself bears the germ of compensatory thinking, [and whereas] in the past we have measured this 'harm' much more in emotional-retributive terms, than in terms of compensable injury . . . might it not be permissible . . . to reinterpret the harm yardstick, to translate it, so to speak, from a retributive value (without giving up the retributive idea entirely) into a compensation value?[711]

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[708] Supra note 699 at 316.

[709] COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 17 (1970).

[710] INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 62 (West 1972).

[711] "Compensation for Victims of Criminal Violence" 8 J. PUBLIC LAW 191 (1959).

SUMMARY AND CONCLUSIONS

In summary, therefore, restitution as a criminal sanction has been endorsed at almost every stage of the process. Its use has been surrounded with a wide variety of both substantive and procedural constraints. These include limitations upon who may be considered a victim for restitutive purposes, especially with respect to insurers and other third parties affected by the crime in question. Other restrictions stem from defining the offense behavior for which restitution may be ordered, and whether it includes conviction, bargained or even acquittal charges.

Similar constraints exist upon the types of loss for which restitution may be ordered, being limited for the most part to out-of-pocket expenses, to the exclusion of punitive and general damage awards. Where general or unliquidated damages have been ordered, courts have cautioned that special care must be exercised. In addition, the imposition of restitution must be balanced with the defendant's ability to pay, and, more specifically, with other factors that may be in competition for his resources, such as support of dependents, or payment of criminal justice expenses such as fines or costs.

Procedurally, fixing the amount and conditions of a restitutive sanction in a criminal justice setting usually occurs with considerably less formality than in a civil tribunal. Standards of 'reasonableness' are favored over strict rules of evidence and preponderance standards of evidence. Summary procedures appear to be most common, placing the burden upon the defendant to contest restitution at the sentencing hearing.

And, whereas delegation of authority to probation officers to fix either the amount or schedule of restitution is generally frowned upon, loss assessments and recommendations by presentence investigators or staffs of specially created restitution programs appear to be the most usual source relied upon by sentencing judges.

Although some courts have ruled that a defendant's failure to object to restitution at sentencing precludes later challenge, the more widespread practice seems to be not to rely on the defendant's consent but to ask whether the restitution is shown to be reasonable on the lower court's record. Considerable disparity exists, however, in the amount of actuarial detail required to demonstrate reasonableness. And, especially in cases involving damages that are not easily measurable, courts have recognized the weak position of the defendant to object to the restitution order at the time of sentencing. While the scope of restitution in criminal courts seems to be expanding, however, there is little sign of a corresponding growth in procedural mechanisms towards the full panoply of protections offered a respondent in a civil suit for damages.

At the stage of enforcing restitution orders, very little legislative or appellate court attention has been paid to the policies and procedures for routine collection and disbursement of monies. In contrast, a great deal of activity has been directed towards responding to noncompliance by the defendant. Failure of the sentencing court to establish a periodic payment schedule, for example, has led in several instances to an inability to revoke for nonpayment prior to the last date on which payment is due. In addition, however, numerous statutory provisions explicitly

authorize modification of the restitution order by the court, whether on its own instigation or at the request of the defendant, victim, prosecutor or probation officer.

Modification of a restitution order is most commonly authorized in connection with default proceedings for nonpayment. Although imprisonment for nonpayment will not usually be considered imprisonment for debt, revocation has not been permitted if the defendant can demonstrate an inability to pay. Instead, courts have resorted to temporary suspension or modification of the restitution. Courts are divided over the issue of whether the total period of supervision may be extended to permit payment if the defendant has made a reasonable effort to pay during the original sentence period, but united in the opinion that criminal courts should not be used as collection agencies.

Courts are empowered by statute in many states to pursue a variety of enforcement strategies such as the use of liens against the defendant's property, attachment of earnings, and levying execution or other process. And, lastly, interest appears to be growing in the conversion of restitution amounts into a corresponding period of community service to be "worked off" by the defendant.

Although rarely acknowledged explicitly, an important motivation behind the growing reliance upon restitution in criminal courts appears to be that they are simply a more practical and convenient mechanism for compensating crime victims than the civil courts. Whereas a wide variety of rationales have been suggested for the use of restitution in criminal law, ranging from its deterrent capabilities to its appeal to the principle of lex talionis, it is most commonly said to be a rehabilitative mechanism and/or an alternative to incarceration.

The assumption that restitution is a "creative alternative" to imprisonment and/or a rehabilitative tool has been relied upon in numerous instances to expand the substantive scope of criminal restitution while restricting the level of procedural formality involved in its imposition and enforcement. The rehabilitative value of restitution has been used to justify its use as a condition of probation without explicit statutory authority,[712] as well as to justify effectively expanding the definition of an eligible victim beyond statutory limitations.[713] Rehabilitative reasoning has also been used to permit restitution beyond the offense for which the defendant was convicted.[714] Similarly, the assumption that restitution is a creative alternative to incarceration has been used to justify a lower level of appellate scrutiny then would be paid to a 'punitive' sentence.[715]

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[712] Supra note 159.

[713] See e.g. State v. Getzinger, supra text at notes 209-12.

[714] See e.g. People v. Miller, supra text at notes 279-80; cf. State v. Reedecker, 534 P.2d 1240, 1242 (Utah Supreme Ct. 1975) (encouraging statutory amendment to allow wider discretion for trial judge to order restitution beyond conviction charge).

[715] See e.g. Commonwealth v. Walton, supra text at notes 157-58.

Since punishment of criminals and redress for victims of crime was affected by the ancient classification of crimes and civil wrongs,[716] a distinction which Weber states "was certainly unknown in primitive administration of Justice,"[717] jurisprudential commentators have continued to debate the significance and wisdom of the division. In contrast to Lord Mansfield's famous dictum that

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[716]Historical severance of victim's remedies into today's criminal and tort proceedings is usually fixed in the English law of the twelfth century, attributed to the growth of governmental administration of criminal justice at that time, and the greed of feudal barons exacting fines and forfeitures from the offender as a major source of revenue at the victim's expense. Bernstein, "A Study of the Evolution of the Concept of Restitution and Recently Enacted Victim Compensation Laws in New York State and other Jurisdictions," 1-45 (Ph.D. Diss. 1972); Jacob, "Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process," 61 J. CRIM. L. C. & P. S. 152, 154-55 (1970); SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 3-12 (2nd ed. 1970). Likewise, evidence of earlier historical precedence of the victim's claim has been noted, by almost every writer on the subject, to exist in such ancient sources as the Code of Hammurabi and in Mosaic Law: see, for example, the remarks of Mr. Justice Goldberg and Stephen Schafer in "Symposium, Governmental Compensation for Victims of Violence," 43 S. CAL. L. REV. 1, 2, 55 (1970). For a convincingly critical analysis of both of the above interpretations of history, see Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Deaths and the Western Notion of Sovereignty," 46 TEMPLE L. Q. 169 (1973).

[717]MAX WEBER ON LAW IN ECONOMY AND SOCIETY 50 (M. Rheinstein ed. 1965); Mueller, "Tort, Crime and the Primitive," 46 J. CRIM. L. C. & P. S. 303 (1955).

"there is no distinction better known, than the distinction between civil and criminal law,"[718] such eminent Utilitarians as Bentham and Austin considered both civil and penal sanctions to be merely related 'evils.'[719] For Bentham, it was "most manifest" that "no settled line can be drawn between the civil branch and the penal;"[720] similarly, Austin contended that "the difference between civil injuries and crimes can harly be found in any difference between the ends or purposes of the corresponding sanctions."[721]

The essential homogeneity of the two branches of law has subsequently received its most prominent exposition in the United States through the writings of Holmes, who likewise concluded that "the general principles of criminal and civil liability are the same."[722] A similar conclusion was also reached by the Italian Positivist, Ferri, who, with his contemporary, Garafalo,[723] was a staunch proponent of restitution to victims through the criminal process.[724]

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[718]Atcheson v. Everitt, 1 Comp. 391 (1775).

[719]Hall, supra note 656 at 759.

[720]J. BENTHAM, LIMITS OF JURISPRUDENCE DEFINED 298 (C. Everett ed. 1945).

[721]AUSTIN, LECTURES ON JURISPRUDENCE 520 (R. Campbell ed., 4th ed. 1873)

[722]HOLMES, THE COMMON LAW 44 (1881). In rejecting traditional distinctions based upon different ends of redress and punishment, and especially as suggested by Blackstone (4 COMMENTARIES 6, 7), Austin's focus upon the common preventive or deterrent goal of each sanction not only foreshadowed Holmes' work, but also finds relevance in modern commentary upon the proper role of punitive damages in the law of tort; see generally Morris, "Punitive Damages in Tort Cases," 44 HARV. L. REV. 1173 (1931).

[723]R. GARAFALO, CRIMINOLOGY 419-35 (R. Miller Trans. 1914).

[724]E. FERRI, CRIMINAL SOCIOLOGY (J. Kelly Trans. 1917).

Ferri considered the separation of criminal and civil law to be "illogical," there being "no essential difference" between the two branches.[725]

Protestations in the above vein, together with very forceful rebuttals in more recent commentaries,[726] have long been accompanied by debate over the narrower procedural question of whether punishment and redress for injuries caused by crimes (*qua* intentional torts) should be treated together in the criminal justice system,[727] Such an amalgamation was advocated strongly by several reknowned criminologists at a series of international prison conferences in the late nineteenth and early twentieth centuries,[728] only to result in a resolution that better procedures be developed for securing civil remedies.[729] More recently, however, a British report by the Advisory Council on the Penal System has argued that "there is little to be done to eliminate

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[725] Id. at 413, 411-12.

[726] See Hall, supra note 719; see also Hall, "Interrelation of Criminal Law and Torts: II," 43 COLUM. L. REV. 967 (1943); Epstein, "Crime and Tort: Old Wine in Old Bottles," in ASSESSING THE CRIMINAL" RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS (R. Barnett and J. Hagel eds. 1977) at 231-57.

[727] Klein, "Revitalizing Restitution: Flogging a Horse that may have been Killed for Just Cause," 20 CRIM. L. Q. 383 (1978); Epstein, supra note 726 at 255; Hitchels, "Crimes and Civil Injuries," 39 DICK. L. REV. 23 (1934); Forte, "Joinder of Civil and Criminal Relief in Indiana," 7 NOTRE DAME LAW, 499 (1932). For discussion of comparable practices in foreign jurisdictions see Covy, "Alternatives to a Compensation Plan for Victims of Physical Violence." 69 DICK. L. REV. 391 (1965); Note, Compensating Victims of Crime: Individual Responsibility and Governmental Compensation Plans" 26 MNE. L. REV. 125 (1976); Howard, Compensation in French Criminal Procedure 21 MODERN L. R. 387 (1958).

[728] See N. TEETERS, DELIBERATIONS OF THE INTERNATIONAL PENAL AND PENITENTIARY CONGRESSES (Philadelphia, 1949).

[729] S. BARROWS, REPORT ON THE SIXTH INTERNATIONAL PRISON CONGRESS, BRUSSELS, 1900 at 26 (1903); Jacob, supra note 716.

the remaining obstacles to securing reparation by the civil process,"[730] concluding that "if any advance is to be made it is to the criminal court that one must look."[731] Similarly, the Law Reform Commission of Canada has suggested that restitution should assume a central role in criminal sentencing.[732] Neither the British nor Canadian proposal has gone uncontroverted,[733] and the British Law Society has gone so far as to express the view that there are "grounds for removing from the criminal courts all power to award compensation."[734]

The continuing lack of consensus among commentators about tort-crime distinctions, and the appropriate role of criminal courts in the now traditionally civil area of victim's remedies, is visible also among criminal justice practitioners in the United States. The formal position expounded from the bench, for example has long been that:

> We must remember that a criminal offense is an offense against the sovereign state, and not against an individual, and that no individual, not even the complaining witness, has the power or authority to control the action of his sovereign, whose dignity alone, is sought to be vindicated.[735]

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[730] ADVISORY COUNCIL ON THE PENAL SYSTEM, REPARATION BY THE OFFENDER, supra note 648 at 56.

[731] Id.

[732] LAW REFORM COMMISSION OF CANADA, RESTITUTION AND COMPENSATION 8 (Working Paper 5, 1974).

[733] A suggestion before the British Advisory Council that would preserve the integrity of existing tort proceedings would create a new class of "nil contribution" civil legal aide to facilitate the institution of civil proceedings by the victim. ADVISORY COUNCIL, supra note 730 at 11. For harsh criticism of the Canadian report, see Klein, supra note 727.

[734] ADVISORY COUNCIL ON THE PENAL SYSTEM, REPARATION BY THE OFFENDER, supra note 648 at 11.

[735] Ex parte Galbreath, 24 N.D. 582, 583, 139 N.W. 1050, 1051 (1913) (emphasis added) cf. Doughty v. de Amoreel, 22 R. I. 158, 46A 838. (1900) (control of criminal procedure by the state is not to be limited for purpose of allowing a plaintiff to recover double damages).

> Our criminal laws cannot be invoked to enforce the payment of debts. The trial judge in a criminal case has no legal right to impose a sentence in terrorem.[727]

Similarly, in a 1939 Attorney General's survey of release procedures, including probation, it was concluded emphatically that:

> Classically, criminal justice has always been assumed to be administered for the protection of the whole society and its concern with individuals injured by the criminal acts of others is said to be merely incidental. A process which attempts to utilize criminal procedures for the reparation of civil damages will meet with severe criticism.[728]

More recently, observations such as the following pervade judicial opinions in cases which questions of victim redress are raised:

> Disposing of civil liability cannot be a function of restitution in a criminal case.[729]
>
> If one makes use of the criminal law for some collateral or private purpose, such as to compel the delivery of property or payment of a debt rather than to vindicate the law, he is guilty of a misuse of process, and a fraud upon the law.[730]

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[727] Ray v. State, 40 Ga. App. 145, 149 S.W. 64, 65 (1929).

[728] ATT'Y GEN. SURVEY, supra note 4 at 238.

[729] People v. Richards, 131 Cal. Rptr. 537, 522 P.2d 97, 101 (1976).

[730] People v. Moore, 43 Mich. App. 693, 204 N.W. 2d 737, 739 (1972).

> Neither should the criminal process be used to supplement a civil suit or as a threat to coerce the payment of a civil liability and thus reduce the criminal court to a collection agency.[731]

In contrast to the above disclaimers, however, writers have pointed out for many years that "interference of the criminal courts in the 'civil' aspects of cases occurs in a variety of circumstances."[732] On occasion this inclination on the part of some courts has been recognized openly from the bench:

> The old saw "crime does not pay" should become a legal reality whenever possible. Society and the law should require that the "criminal shall repay." In order to accommodate such a result every reasonable effort should be made to require the defendant to make restitution and to recognize that victims should not suffer financial loss. The implication of the majority opinion is that the victim could commence a civil suit against the defendant for recovery of the loss resulting from the defendant's criminal act. This is a burden and an expense which should not be thrust upon the innocent victim of the crime.[733]
>
> [W]e regard it as preferable [to a civil action] in the ordinary case, where feasible, to provide for restitution within the probation context.[734]

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[731] State v. Scherr, 9 Wis. 2d 418, 101 N.W. 2d 77, 80 (1960); accord People v. Grago, 204 N.Y.S. 2d 774, 778 (1960). Similar opinions are voiced by judges in the juvenile justice system. See e.g., In Interest of Frey, 375 A.2d 118 (Pa. Super. 1977) (not the function of Juvenile Court to determine civil liability or enforce satisfaction of civil damages).

[732] Note, "Restitution and the Criminal Law," 39 COLUM. L. REV. 1185, 1197 (1939); see also Wolfgang, "Victim Compensation in Crimes of Personal Violence," 50 MINN. L. REV. 223 (1965).

[733] Huggett v. State, 83 Wis. 2d 790, 266 N.W. 2d 403, 410 (1978) (Callow J., dissenting).

[734] State v. Harris, 70 N.J. 586, 362 A.2d 32, 34 (1976).

Judicial preferences for restitution within a variety of criminal justice contexts find support in the Model Penal Code,[735] the Model Sentencing Act[736] and several other prestigious sentencing proposals.[737] The Task Force on Corrections of the 1967 President's Commission also advocated the inclusion of restitution in the criminal justice system,[738] and it is declared to be one of the "purposes of sentencing" in a recent draft of the proposed new Federal Criminal Code.[739] In addition, although explicit criminal code provisions for some form of restitution are not quite universal,[740] we have seen that legislation authorizing or requiring its use does exist in almost every jurisdiction in the United States. In particular, several states in the last few years have passed broad-ranging criminal legislation in which

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[735]Section 301(2)(h) (P.O.D., 1962).

[736]Section 9 (N.C.C.D., 1972 Revision).

[737]American Bar Association: Standards Relating to Probation, ss. 3.2(c), (viii) (Approved Draft 1970); National Advisory Commission on Criminal Justice Standards and Goals: Standards on Probation and Parole, ss. 5.4(2), 5.5(3) (1973).

[738]President's Commission on Law Enforcement and Administration of Justice: Task Force on Corrections 35 (1967).

[739]CRIM. CODE REVISION ACT, 1979 s. 3102(5) (Working Draft of the House Subcommittee on Criminal Justice, Aug. 24, 1979).

[740]In Missouri, for example, the recently enacted criminal code deliberately excludes a listing of standard probation conditions such as restitution, in an attempt to avoid inducing courts to impose such conditions without carefully considering the needs of a particular defendant. MO. ANN. STAT. s. 559.021 (Vernon 1979 Special Pamphlet) (Comments of Committee to Draft a Modern Criminal Code, Proposed Criminal Code of State of Missouri, October, 1973 at 953).

restitution is advocated, wherever feasible, as a formally declared state-policy.[741]

Legislative and judicial interest in pursuing restitution through the criminal process[742] has been paralleled in this decade by a rapidly growing number of restitution programs, operated by every type of agency in the system, from police to parole authorities.[743] Similarly, the idea of criminal restitution has received widespread academic attention,[744] and the significance of current systematic emphasis upon restitution is interpreted by one author to be so momentous as to constitute an entirely "new paradigm" in criminal justice."[745]

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[741]COLO. REV. STAT. s. 17-28-101 (1978); IOWA CODE ANN. s. 907.12(3) (West 1979); ME. REV. STAT. TIT. 17-A., s. 1151 (Pamphlet 1978); N.M. STAT. ANN. s. 31-17-1A (1978); S.D. COMP. LAWS ANN. s. 23A-28-2 (Special Supp. 1978); but cf. ME. REV. STAT. tit. 17-A, s. 1321 (Pamphlet 1978):

> The legislature recognizes that a crime is an offense against society as a whole, not only against the victim of the crime, and that restitution for victims is there ancillary to the central objectives of the criminal law. It intends restitution to be applied only when other purposes of sentencing can be appropriately served.

[742]For an exhaustive treatment of the civil law of restitution, see Palmer, THE LAW OF RESTITUTION, (Little, Brown and Company 1979) (4 vols.).

[743]See generally, OFFENDER RESTITUTION IN THEORY AND ACTION, supra note 30.

[744]Id.

[745]Barnett, Restitution: A New Paradigm of Criminal Justice, 87 ETHICS 279 (1977); Barnett and Hagel, supra note 726; Victims of Crime Compensation: Hearings on H.R. 7010 and Related Bills Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary 95th Congress, 1st Session 227 (1979) (statement of Randy Barnett).

Against a historical and continuing background of divergent views concerning the soundness of civil-criminal distinctions, therefore, and in the face of strenuous denials of the propriety of enforcing civil liability through the criminal process, the use of restitutive sanctions has found growing support among legislators, commentators, judges and criminal justice practitioners.[746] The intent of the present study has been to attempt to assess the basis for that support in theory and in law, and to document the operational constraints placed upon the use of criminal restitution by courts and legislatures.

In addition this analysis of both primary and secondary materials on the topic of providing financial remedies to victims through the criminal process should serve to highlight the need for further study along a number of related dimensions. A useful starting point in expanding our understanding, for example, might be a cross-jurisdictional, state of the art survey, to identify significant administrative and procedural variation in restitution programs, as well as the cost of operating them, and their primary goals and objectives.[747]

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[746] The "assault on the law of tort" has not only proceeded in a criminal justice forum, but has also developed more extensively in the shape of administrative law. See Veitch and Meirs, "Assault on the Law of Tort," 38 MODERN L. REV. 139 (1975).

[747] A major study of this type is currently being undertaken by Joe Hudson and Burt Galaway, with funding from the National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, Washington D.C. An earlier, much more limited survey was also conducted for the National Institute by Edelhertz, "Restitutive Justice: A General Survey and Analysis" (January 1976).

Are, for example, any of the utilitarian assumptions about restitution in the literature, statutes and appellate rulings shared by front-line pratitioners such as prosecution and defense attorneys, probation and parole officials, and trial judges?

A second type of research would seek to provide more in-depth descriptive accounts of practices and procedures in different jurisdictions, including empirical analyses of the decisionmaking process by which restitution is or is not imposed. What types of offenders are being ordered to pay restitution?; for what types of offense?; and to what types of victim? Are restitution recipients predominantly the brutalized individuals so routinely depicted in media coverage of crime?; or are they more often corporate or other organizational entities such as banks, credit card businesses, and insurance companies? To what extent are the substantive and procedural limitations discussed in this study adhered to in practice? And what is their impact? What, for example, is the effect in dollars and cents of limiting restitution to conviction vs. bargained offenses or to probationers vs. inmates of penal institutions, and to actual victims vs. insurance companies and other third parties? What impact does the issue of ability to pay have in practice? Is it ignored at sentencing? Are longer probation terms given to accommodate drawn-out payment schedules? Is restitution used as a mitigating factor in sentencing? Does it induce judges to impose non-incarcerative dispositions? Or is it used as a sanction in addition to traditional probation? And what are the opinions of criminal justice practitioners at the trial level concerning constraints imposed by legislators and appellate judges?

Finally, long-term follow-up evaluations are obviously needed to measure that impact of imposing restitutive sanctions. What are the factors associated with successful and unsuccessful termination of restitutive obligations? Are rehabilitative assumptions about restitution reflected in lower recidivism rates or greater job stability among offenders ordered to pay, as opposed to similarly situated offenders who are not? Or are offenders faced with restitution payments recidivating at a higher rate because of crimes committed to secure money with which to make payments.[748]

Obviously, the data generated by studies such as those sketched very briefly above could only illuminate many of the issues central to the debate over the propriety of and mechanisms for securing financial restitution through the criminal courts. Coupled with the information compiled in the present study, the above results should present a solid foundation upon which to develop policies towards restitution as well as to refine procedures by which to secure its imposition and collection.

To do so, would be to satisfy a need that has been recognized since the turn of the century:

> [Restitution] will be one of the problems which the Twentieth Century may perhaps work out to a more complete extent. And, if so, a service of much importance to cosmopolitan and international jurisprudence will have been wrought.[749]

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[748]Studies of this type are currently underway in both adult and juvenile jurisdictions. See Harland, Warren, and Brown, supra note 37. For information about the juvenile evaluation study contact Anne and Peter Schneider, Institute for Policy Analysis, 777 High Street, Suite 222, Eugene, Oregon 97401.

[749]Tallack, "Reparation to the Injured; and the Rights of the Victims of Crime to Compensation," Paper for the Quinquennial International Prison Congress, Brussels, 1900 (Wertheimer, Lea & Co. 1900).

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