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Richard E. Laster

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CRIMINAL RESTITUTION:  
A SURVEY OF ITS PAST HISTORY AND AN ANALYSIS OF  
ITS PRESENT USEFULNESS

*Richard E. Laster\**

In the complex structure often inappropriately designated the system of criminal justice,<sup>a</sup> there are few visible signs of consideration for the party who suffers most from criminal activity—the victim. Yet, historically, this was not always the situation, nor is it necessarily true today in countries other than the United States. Even in the United States compensation plans for victims of crime have been passed by a few state legislatures, and most state statutes on probation allow restitution by the criminal to his victim as a condition thereof. In addition, at the less visible levels of the criminal legal process, restitution is an accepted and pervasive practice, but little is known and less is written about that practice. This article is an attempt to make visible the pervasiveness of the practice of criminal restitution in the United States. In so doing, it traces the historical roots of criminal restitution to the period of community composition, and then explores the contemporary use of restitution in the present administration of criminal justice.

I. EARLY HISTORY OF CRIMINAL RESTITUTION

At an early era in the history of mankind, it would have been difficult to distinguish victim from criminal because a person injured by a violent attack would take personal revenge against his attacker, and their original positions would then be reversed.<sup>1</sup> This personal revenge, satisfaction, or blood-feud is what Stephen Schafer calls the earliest form of compensation to the victim, and he labels it aggressive retaliation.<sup>2</sup> Aggressive retaliation was not an early form of community punishment, however; it simply mirrored man's struggle for

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\* Member of the Virginia Bar. B.A., Virginia, 1966; LL.B., Richmond, 1969; LL.M., Harvard, 1970.

<sup>a</sup> It has been more appropriately designated "the non-system of criminal injustice" by Professor James Vorenberg of the Harvard Law School.

<sup>1</sup> S. SCHAFFER, *THE VICTIM & HIS CRIMINAL* 8 (1968).

<sup>2</sup> *Id.* at 10.

survival in a violent environment.<sup>3</sup> Revenge was a personal or familiar matter, and not until societal attempts were made to limit its harmful effects did the concept of order in a structured community commence.<sup>4</sup> In complimentary fashion, as the community developed, the need for order became increasingly important, so that personal revenge was replaced by community settlement to limit blood-feuds<sup>5</sup> and promote interaction among the familial groups who made up the community.<sup>6</sup>

Later as the community became structured and its leadership more centralized, codes of law were enacted<sup>7</sup> to serve as guidelines for acceptable interactive behavior.<sup>8</sup> Quite unlike the laws found today in most "civilized"<sup>9</sup> communities, the laws of primitive societies contained monetary evaluations for most offenses as compensation to the victim, not as punishment of the criminal.<sup>10</sup> Schafer correlates the victim's demand for monetary compensation rather than personal revenge with man's growing desire for the acquisition of private property.<sup>11</sup> Whatever the reason, graduated scales of compensation to victims of crime are to be found among the codes of a number of early societies, including the Torah,<sup>12</sup> the celebrated Code of Hammurabi,<sup>13</sup> and the early English codes.<sup>14</sup>

<sup>3</sup> *Id.* at 8.

<sup>4</sup> M. FRY, *ARMS OF THE LAW* 27 (1951).

<sup>5</sup> 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 35 (1909); S. SCHAFFER, *RESTITUTION TO VICTIMS OF CRIME* 5 (1960).

<sup>6</sup> A. DIAMOND, *PRIMITIVE LAW* 187-89 (2d ed. 1950).

<sup>7</sup> H. MAINE, *ANCIENT LAW* 14 (16th ed. 1897).

<sup>8</sup> A. DIAMOND, *supra* note 6, at 31.

<sup>9</sup> Civilized as used here means highly developed as contrasted with primitive, meaning less developed. Civilization is a slippery word. *Compare* "The use of imprisonment as a punishment . . . is a sign of advancing civilization." 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 514 (1895), *with*, "It is perhaps worth noting that our barbarian ancestors were wiser and more just than we are today, for they adopted the theory of restitution to the injured, whereas we have abandoned this practice, to the detriment of all concerned." H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 401 (1943).

<sup>10</sup> *See* M. FRY, *supra* note 4, at 26-31; T. HOLLAND, *ELEMENTS OF JURISPRUDENCE* 378-79 (1916); S. SCHAFFER, *supra* note 5, at 3-5; W. TALLACK, *REPARATION TO THE INJURED* 6-7 (1900). "Compensation to victims of crime is as old as civilization." Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U.L. REV. 444 (1964).

<sup>11</sup> S. SCHAFFER, *supra* note 1, at 4-5.

<sup>12</sup> A. DIAMOND, *supra* note 6, at 102-25; S. SCHAFFER, *supra* note 5, at 4.

<sup>13</sup> A. DIAMOND, *supra* note 6, at 20-32; S. SCHAFFER, *supra* note 5, at 4; Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 224-25 (1965).

<sup>14</sup> A. DIAMOND, *supra* note 6, at 62-70; M. FRY, *supra* note 4, at 28-29; 2 F. POLLACK &

An additional characteristic that distinguishes early codes of law from their modern counterparts is that primitive codes were addressed to the judges to serve as guidelines for decision making, not as positive rules, which, if disobeyed, would result in a specific form of punishment.<sup>15</sup> Consequently, these codes encouraged settlement or composition between the parties for harmful acts as serious as homicide, personal injury less than homicide, rape, adultery, and theft.<sup>16</sup> Crimes, *i.e.*, acts which invariably resulted in community punishment in primitive societies and in Anglo-Saxon England, were incest, witchcraft, bestiality,<sup>17</sup> and a few sacril offenses.<sup>18</sup> These were necessarily crimes or sins because restitution to a single individual was not possible.<sup>19</sup> Of significance and closely paralleling this list of early crimes or sins were those offenses punished by the community in East Africa before the relatively recent introduction of an English legal system.<sup>20</sup>

One theory has been advanced to explain the system of restitution in East Africa as a necessary solution to the fear of witchcraft in that area of the world.<sup>21</sup> There was fear that if an injured party sought punishment of the criminal who might be a witch, the victim would

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F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 449 (1895); W. TALLACK, *supra* note 10, at 8-9.

<sup>15</sup> A. DIAMOND, *supra* note 6, at 31. The Hebrew word Torah is from the root word "Yarah," which means to point or show the way. *Id.* at 86. This flexibility in the enforcement of laws granted broad discretion in the judge or king and may have often had a negative effect on the legal process. See 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 459.

<sup>16</sup> See A. DIAMOND, *supra* note 6, at 304-30; H. MAINE, *supra* note 7, at 370; 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 455; Wolfgang, *supra* note 13, at 226.

<sup>17</sup> See A. DIAMOND, *supra* note 6, at 280.

<sup>18</sup> See H. MAINE, *supra* note 7, at 371. Treason and cowardice were also crimes in Anglo-Saxon England. See 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 460.

<sup>19</sup> See A. DIAMOND, *supra* note 6, at 279. As certain violent acts involving personal injury became unemendable in England, they became crimes. 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 457.

An analogous concept appears among the Barotse of Northern Rhodesia. Compensation was allowed for an injury committed by a member of one tribe or familial group on another, but compensation was not allowed for an intragroup killing. Therefore, the latter act was a crime or sin in that community; punishment was meted out unless the miscreant fled. See M. GLUCKMAN, *IDEAS IN BAROTSE JURISPRUDENCE* 206 (1965).

<sup>20</sup> Katende, *Why Were Punishments In Pre-European East Africa Mainly Compensative Rather Than Punitive?*, 2 DAR ES SALAAM L.J. 122, 129 (1967). Cf. T. ELIAS, *LA NATURE DU DROIT COUTUMIER AFRICAIN* 147 (1961). See also Read, *Crime and Punishment in East Africa: The Twilight of Customary Law*, 10 HOW. L.J. 164 (1964).

<sup>21</sup> Katende, *supra* note 20.

subject himself to possible retaliation through sorcery.<sup>22</sup> Therefore, the tribal council refused to punish one party; instead it attempted to reconcile the two parties to prevent retaliation or fear thereof.<sup>23</sup> The same theory, however, cannot be transported across the ocean to explain the existence of a system of composition which existed in early societies and up until the end of the Anglo-Saxon period in England. A plausible explanation for early communal composition in western and African culture, advocated by Stephen Schafer and Lon Fuller, is that settlement is a highly purposive act.<sup>24</sup> There are benefits to the community in reduction of tension, benefits to the victim in monetary satisfaction, and benefits to the criminal in retrieving his lost security.<sup>25</sup> Lending credence to this theory advanced by Schafer and Fuller is the pervasiveness of community composition across cultural and geographical lines for serious, intentional wrongs to individuals;<sup>26</sup> acts which today in western countries are treated as crimes.<sup>27</sup> One could deduce from the pervasiveness of the practice of community composition that nothing logically compels the criminalization of intentional harmful acts. Yet if this be true one might well ask why the settlement of these acts by community composition in England gave way to punishment, and what led to the growth of a separate body of Anglo-American criminal law.

There is a conflict among historians as to the exact reasons for a divergence of the common law into today's civil and criminal components. Most historians recognize that there was no distinction between public and private wrongs for acts involving personal injury until the end of the Anglo-Saxon period in English history.<sup>28</sup> At that

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<sup>22</sup> *Id.* at 127.

<sup>23</sup> *Id.* at 126. Mr. Katende's theory, although interesting, oversimplifies the case for composition in African societies. Max Gluckman contends that composition between different groups was needed to balance the blood equilibrium that was upset by a violent act. M. GLUCKMAN, *supra* note 19, at 205-06.

<sup>24</sup> Fuller, *The Law's Precarious Hold on Life*, 3 GA. L. REV. 530, 539 (1969); Letter from Stephen Schafer to Senator Joseph Tydings, December 10, 1969.

<sup>25</sup> Letter from Stephen Schafer, *supra* note 24, at 3, 4.

<sup>26</sup> There are a number of books on this topic. See, e.g., E. HOEBEL, *THE LAW OF PRIMITIVE MAN* (1954); S. SCHAFFER, *RESTITUTION TO VICTIMS OF CRIME* (1960). For specific procedural examples, see M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 163-223 (1955).

<sup>27</sup> Naturally this statement must be qualified because in western culture crimes vary from country to country. See the interesting discussion by T. ELIAS, *supra* note 20, at 142-43.

<sup>28</sup> M. FRY, *supra* note 4, at 31; 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 33

time, some scholars argue, the introduction of feudalism strengthened the authority of the king and enabled him to create a structured court system, where certain intentionally harmful acts were defined as offenses against the king's peace.<sup>29</sup> Other historians maintain that the growth in the strength of the Church and the reintroduction of Roman law into England around the twelfth century, together laid the philosophical foundation for the acceptability of punishment as an aim of the law.<sup>30</sup> Still other historians contend that the king's taking a share of the victim's compensation as a fine or *wite* in certain cases involving harms led to the creation and justification for a specifically criminal law.<sup>31</sup> Yet these approaches are mutually compatible because without the rise of kingship, a structured court system, and the acceptability of punishment as an aim of the law, a system of fines payable to a centralized authority might never have been instituted. Recognizing the compatibility of these historical positions, yet keeping within the framework of a discussion of criminal restitution, emphasis will be placed here on the introduction of the system of fines payable to the Crown as a contributing factor in separating the law into its present civil and criminal components, by effectively destroying the system of community composition.

In primitive law when the community or tribe set the amount of compensation owed a victim by his criminal, the aim of that primitive legal process was primarily to make the victim whole and secondarily to minimize private revenge.<sup>32</sup> There was no "criminal" or "civil" law, and any penalty for the miscreant was merely incidental to the proceedings and took the form of a monetary loss.<sup>33</sup> When the king or overlord began to take their share of the victim's compensation, however, the focus of the proceedings shifted from the victim to the

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(1909); 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 446-57; S. SCHAFER, *supra* note 5, at 6, 7.

<sup>29</sup> 2 W. HOLDSWORTH, *supra* note 28, at 11.

<sup>30</sup> 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 460.

<sup>31</sup> M. FRY, *supra* note 4, at 31; S. SCHAFER, *supra* note 5, at 8. The *bot* represented a compensative payment and the *wite* a fine to the king or overlord. S. SCHAFER, *supra* note 1, at 18.

<sup>32</sup> "It was an era where there was no room for societal or other considerations in the criminal procedure; the procedure was exclusively aimed at the private compensation of the victim." Letter from Stephen Schafer to Senator Joseph Tydings, *supra* note 24, at 4.

<sup>33</sup> See H. MAINE, *supra* note 7, at 369-71. Maine does add, however, that there were "sins" punished by the Roman community and certain serious wrongs to the state punished by special law. *Id.* at 672-74.

criminal. The next step was for the king to take the entire compensative payment<sup>34</sup> and thus effectively destroy the process of community composition and raise punishment to the level of satisfaction.

The victim was necessarily reluctant to give up his previously favored position to the state, but he was forced into compliance by a slowly evolving carrot and stick philosophy. The common law developed so as to prevent the victim from receiving restitution until he did everything in his power to get the wrongdoer to justice. The decisional law created the crime of "theftbote," making it a misdemeanor for the injured party to take his goods back or make other arrangements with the felon on an agreement not to prosecute.<sup>35</sup> Felonies suspended the civil remedies of the injured party, with the statutory exception of bankers, until the felon was acquitted or convicted.<sup>36</sup> If the owner of stolen goods gave evidence against the felon, he was entitled to get his goods back;<sup>37</sup> and statutory law imposed a fine on those advertisers and printers who advertised a reward for the return of stolen goods without more.<sup>38</sup>

As the common law grew, and the gulf between civil and criminal law grew wider, penalties for the victim increased as his monetary satisfaction diminished, so that while compounding a felony was a misdemeanor at common law,<sup>39</sup> today in the United States, most jurisdictions treat it as a felony.<sup>40</sup> Similarly, an agreement not to prosecute for a misdemeanor was simply unenforceable at common law,<sup>41</sup> but today such an agreement is itself a misdemeanor in most states.<sup>42</sup> Legal philosophers complemented the coercive scheme of the common law, by contending that victims were satisfied just by being a part of a proceeding which protected the state.<sup>43</sup> This philosophy tended to push the victim farther into the background of the criminal legal process, so that today in the United States, the state may prosecute on the vic-

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<sup>34</sup> S. SCHAFER, *supra* note 1, at 19; W. TALLACK, *supra* note 10, at 11; Wolfgang, *supra* note 13, at 228.

<sup>35</sup> 4 W. BLACKSTONE, COMMENTARIES 133 (Chitty ed. 1826).

<sup>36</sup> 3 W. BLACKSTONE, COMMENTARIES 119 (Chitty ed. 1826).

<sup>37</sup> *Id.*

<sup>38</sup> 4 W. BLACKSTONE, *supra* note 35, at 133.

<sup>39</sup> R. PERKINS, CRIMINAL LAW 445 (1957).

<sup>40</sup> See p. 96 and notes 101-02 *infra*.

<sup>41</sup> R. PERKINS, *supra* note 39, at 445.

<sup>42</sup> See p. 96 and notes 101-02 *infra*.

<sup>43</sup> See 4 W. BLACKSTONE, *supra* note 35, at 6.

tim's behalf with or without his consent.<sup>44</sup> Furthermore, the state collects fines from the criminal and exacts his punishment, while the victim is left to ineffectual civil remedies against the criminal.<sup>45</sup>

Thus the system of fines paid to the Crown gave impetus to the separate growth of a criminal law for acts involving harm to individuals because it involved the state in the dispositional stage of a legal proceeding in its own behalf.<sup>46</sup> From this minor intrusion, the role of the state eventually changed from that of an arbitrating or mediating force to a punishing one. The change in the role of the state had immediate procedural consequences in the form of a new dispositional result, and a more long range effect in facilitating a separate punitive law for criminals. It will also be seen from the following discussion that the *wite* payable to the king or overlord had a significant effect on the philosophical development of modern criminal law and its concept of harm.

The process of community composition, which replaced familial blood-feuds, aimed at maximizing human interdependence by making order out of chaos. The community, in mediating a dispute between criminal and victim acted as a controlling force, and the interests of both victim and criminal were taken into consideration in settling their dispute and in calming the community. The king's *wite* was also taken with a view toward maintaining order and stability,<sup>47</sup> but unlike community settlement, the result was a destructive rather than a constructive one. Instead of restoring the victim to his original position, the payment of a fine to the king was aimed at punishing the criminal and increasing the wealth of the state.<sup>48</sup> One philosophical tenet on which the *wite* was justified was the preservation of order,<sup>49</sup> but there is no historical evidence that punishment served better to stabilize the

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<sup>44</sup> See E. SCHUR, *OUR CRIMINAL SOCIETY* 196 (1969); J. WILSON, *VARIETIES IN POLICE BEHAVIOR* 85 (1968); J. Goldstein, *Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 573-74 (1960).

<sup>45</sup> S. SCHAFER, *supra* note 1, at 26; *Compensation for Victims of Crime*, 33 *U. CHI. L. REV.* 531, 534 (1966).

<sup>46</sup> Cf. T. HOLLAND, *ELEMENTS OF JURISPRUDENCE* 366 (12th ed. 1916).

<sup>47</sup> W. HOLDSWORTH, *supra* note 5, at 38. "The increasing claim of the state to the exclusive right to inflict retributory punishments was made in the interest of peace, but not necessarily of justice." Wolfgang, *supra* note 13, at 228.

<sup>48</sup> See 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 451. "A fine is purely a deterrent punishment, a little tainted by revenge." M. FRY, *supra* note 4, at 121.

<sup>49</sup> See 2 W. HOLDSWORTH, *supra* note 5, at 38.



community than composition or settlement.<sup>50</sup> Later legal philosophers attempted to justify the need for a separate criminal law because of its deterrent capabilities and its ability to remove dangerous persons from society.<sup>51</sup> Whatever the attempted justification, one must recognize that the modern criminal legal process is an inherently destructive one because its aim is not to restore the injured party but to punish the guilty one.

Aside from the inherently destructive nature of the criminal legal process, there exists a further anomaly in the present criminal law's concept of harm, which has roots in the English king's system of fines. The essential aim of the present system of criminal law is the protection of society by a theory of deterrence, removal, and rehabilitation. To carry out this theory, the state administers a system of criminal justice composed of policemen, prosecutors, judges, and custodians, whose major concern is the prevention of harm to society and not, as one might expect, with harm to individual members of that society.<sup>52</sup> If an overview of the present system of criminal justice does not reinforce that contention,<sup>53</sup> then,

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<sup>50</sup> Stephen Schafer argues that the fine to the king and the compensative payment to the victim were necessary because ". . . the twofold payment enabled the offender to buy back the security that he had lost." S. SCHAFFER, *supra* note 1, at 19. But on the preceding page, Schafer notes that in earlier times (prior to the exaction of a fine), if the criminal did not compensate the victim ". . . he lost the protection provided by his community." *Id.* at 18. If the effect of non-payment were the same, why the need for a *wite*? Maine argues more convincingly that the money paid to the Roman State was for its time and trouble in settling a dispute. H. MAINE, *supra* note 7, at 378. But this could be true only up until the time that the fine completely replaced the compensative payment.

Pollack and Maitland further point out that the system of composition, including the *bot* and the *wite* may have been "delusive if not hypocritical." 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 458. "It outwardly reconciled the stern facts of a rough justice with Christian reluctance to shed blood; it demanded money instead of life, but so much that few were likely to pay it." *Id.* So they argue that the system was aristocratic. It helped to preserve the distinction between classes because only the rich could pay the fine; the poor were outlawed or sold as slaves. *Id.* It is an interesting theory, not commented upon by other writers, but it seems to indicate that the penalties set out in the early codes were not fixed. Using the penalty as a maximum, the body settling the dispute could work out a proper compensative payment. This is what Diamond means when he says that the early codes were plastic. A. DIAMOND, *supra* note 6, at 306.

<sup>51</sup> See 4 W. BLACKSTONE, *supra* note 35, at 5, 6; SALMOND ON JURISPRUDENCE 115 (G. Williams ed. 1957). Cf. Goldstein, *supra* note 44, at 545 (1960).

<sup>52</sup> 43% of the reported crimes are victimless. THE CHALLENGE OF CRIME IN A FREE SOCIETY 20 (1967).

<sup>53</sup> See J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966).

for further proof, one need only look at the number of victimless crimes enacted by legislators and "enforced" by police.<sup>54</sup> Some noted jurisprudential scholars argue that harm to society is a valid standard for legislative action and a justification for victimless crimes.<sup>55</sup> Without commenting on the merits of their arguments, and keeping within the framework of the present study on criminal restitution, an attack will be made on the concept "harm to society" by placing it in its proper historical perspective.

Initial compensative payments paid to the king were made for the deaths of foreigners in England under a theory that the king "stood for" foreigners and was entitled to compensation for their deaths.<sup>56</sup> Later the idea of "standing for" the injured party was carried over to certain violent, premeditated acts such as murder, hamsocn, and ambush.<sup>57</sup> Apparently it was felt that violent acts breached the king's peace; therefore, the king was as much an injured party as the victim and entitled to a share of the victim's compensation.<sup>58</sup> The extension of this philosophy to cover more and more intentional wrongs to individuals laid the foundation for the acceptance of harm to the state as a justification for what later became criminal law.

Gradually the king's compensative share increased as the victim's diminished, until the entire payment went to the state.<sup>59</sup> Once the state replaced the victim as the recipient of the criminal's compensative payment, it was a logical next step for the state to replace the victim as the prosecuting party. This move further deemphasized harm to the victim and necessarily reinforced the concept of harm to society, the state's philosophical justification for punishing the criminal. Tying all of these arguments together, one can see that

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<sup>54</sup> See H.L.A. HART, *LAW, LIBERTY & MORALITY* 25-27 (1963); SCHUR, *supra* note 44 at 195-225; *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 2, 20 (1967).

<sup>55</sup> See P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *supra* note 54. Hart does not argue that harm to society is a valid standard to justify victimless crimes but that for some crimes, the law should take a paternalistic approach. *Id.* at 33. The result is the same, however. See the excellent discussion of Hart's and Devlin's concept of harm in *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A.L. REV. 581 (1967).

<sup>56</sup> M. GLUCKMAN, *supra* note 19, at 216; 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 462.

<sup>57</sup> See A. DIAMOND, *supra* note 6, at 296-97; M. GLUCKMAN, *supra* note 19, at 216; 2 F. POLLACK & F. MAITLAND, *supra* 14, at 462.

<sup>58</sup> W. HOLDSWORTH, *supra* note 5, at 38; 2 F. POLLACK & F. MAITLAND, *supra* note 14, at 461.

<sup>59</sup> S. SCHAFER, *supra* note 1, at 19; Wolfgang, *supra* note 13, at 228.

as the system of fines narrowed the scope of community composition and squeezed the victim out of certain proceedings deemed criminal, the focus of those proceedings shifted to the criminal and his act and away from harm to the individual. This shift in focus may have resulted in monetary benefits for the king, but it reduced the economic lot of the victim, shifted the aim of the law away from any constructive policy of restitution, and reinforced the concept of harm to society to justify the criminalization of certain "harmful" acts to individuals.

## II. CRIMINAL RESTITUTION TODAY

The panacea for the ills of the criminal justice system is not the re-creation of a system of restitution to victims of crime, but a well developed system of restitution which will offer some positive benefits that the criminal legal process now lacks. It should first be pointed out that the concept of restitution as used here differs from the term "compensation to victims of crime." Restitution by the criminal to his victim implies a making whole of the victim, as much as possible, by the direct action of the criminal.<sup>60</sup> Compensation to the victims of crime involves a monetary payment by the state to those persons injured by criminal attacks.<sup>61</sup> The difference between the two is that compensation is "an indication of the responsibility of society" to the victim,<sup>62</sup> whereas restitution, while restoring the victim, is also therapeutic and aids in the rehabilitation of the criminal.<sup>63</sup>

Those who advocate restitution to victims of crime note the impersonal basis for all criminal justice today and the total lack of remorse on the part of the criminal for what he has done to his victim.<sup>64</sup> A system of restitution, if properly handled, could serve to keep the criminal-victim relationship alive long after the original offense so as to impress upon the mind of the criminal that he has injured a human being, not some impersonal entity known as the state.<sup>65</sup> A system of restitution in that sense will have as its goal to do something *for*, not *to*, the criminal. In the past with the emphasis of the system of criminal justice on

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<sup>60</sup> See Eglash, *Creative Restitution*, 48 J. CRIM. L. C. & P. S. 619 (1958).

<sup>61</sup> S. SCHAFER, *supra* note 1, at 112.

<sup>62</sup> Letter from Stephen Schafer, *supra* note 24, at 10.

<sup>63</sup> E. SUTHERLAND & D. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 278 (5th ed. 1955); S. SCHAFER, *supra* note 5, at 125-26.

<sup>64</sup> See S. SCHAFER, *supra* note 5, at 250.

<sup>65</sup> S. SCHAFER, *supra* note 1, at 127.

punishment, there was no real attempt at rehabilitation.<sup>66</sup> Today, although those administering the dispositional phase of the system of criminal justice are pushing toward a goal of rehabilitation, they find themselves frustrated by the present penal system.<sup>67</sup> Custody conflicts with rehabilitation, if for no other reason than that the former forces a man to adjust to prison society while the latter encourages him to learn to adjust to a different "normal" society.<sup>68</sup> One benefit of a meaningful system of restitution is that it would keep the criminal within the normal society and thus prevent him from having to adjust to prison society. At the same time, it would allow the offender to support himself and his family. Furthermore, if the criminal were able to continue working, restitutionary payments to the victim would be more of a reality than the victim's present civil suit for damages.

Albert Eglash advocates the use not only of restitution, but creative restitution, where the position of both victim and criminal is not the same, but better than before the offense was committed.<sup>69</sup> Eglash recognizes those situations where restitution in kind would be far more therapeutic than a monetary payment to the victim, if the restitutionary act is related to the destructive act.<sup>70</sup> In psychological terms, Eglash thinks that "[b]y being in kind, restitution provides a substitute outlet for the same conscious needs and unconscious emotional conflicts which motivated the offense."<sup>71</sup> For creative restitution to work effectively, the offender must participate in determining an appropriate step to take, the beginning of a growth process for the offender.<sup>72</sup> "While punishment can increase fear-motivation, guidance and restitution increase the capacity for choice and this may bring release to an impulse-ridden individual."<sup>73</sup>

Stephen Schafer, the leading advocate of criminal restitution, supports Eglash's theory of creative restitution because it corresponds with his own theory of responsibility. Schafer views punishment as the en-

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<sup>66</sup> See Seliger, *Toward a Realistic Reorganization of the Penitentiaries*, 60 J. CRIM. L.C. & P.S. 47, 48 (1969).

<sup>67</sup> See McCleery, *The Governmental Process & Informal Social Control*, in *THE PRISON—STUDIES IN INSTITUTIONAL ORGANIZATION & CHANGE* (D. Cressey ed. 1961); Seliger, *supra* note 66, at 48.

<sup>68</sup> See G. SYKES, *THE SOCIETY OF CAPTIVES* (1965).

<sup>69</sup> Eglash, *supra* note 60, at 620.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 622.

forcement of responsibility,<sup>74</sup> with responsibility defined here as answerability or culpability. Punishment is one-sided; it holds the criminal responsible for violating the rules of society, but it does not hold those responsible who fail to teach the criminal respect for the legal threat of punishment, nor does punishment hold the criminal responsible to the victim.<sup>75</sup> Schafer argues that restitution will have a dual effect on responsibility. The ". . . criminal is called to account not only for violating the rules of his own societal responsibility, but also that he may restore his victim's potential functional responsibility."<sup>76</sup>

All that has been said up to this point has been about the positive benefits of a system of criminal restitution to the offender. The benefits to the victim are obvious. Except in those states that have compensation plans for victims of crime,<sup>77</sup> the victim continues to suffer to expedite justice for the criminal.<sup>78</sup> The victim may never receive compensation for his injury, for he is thought to derive a vicarious thrill from seeing the criminal punished.<sup>79</sup> If the stolen property is a necessary exhibit for the prosecution, the victim will not have the use of his goods until the proceedings are over. And, of course, to prevent the victim from attempting to circumvent the system of criminal justice, statutes have been passed to prevent him from compounding a crime.<sup>80</sup> Criminal restitution, in focusing on both the needs of the criminal and the victim, would go a long way toward balancing the scales of justice.

While the theoretical underpinnings of a system of restitution are appealing, there are practical considerations involved in the implementation of such a program that must be considered. First of all, there are manpower considerations, especially for people to supervise restitutionary payments in kind. Not only will this involve numerous people, but they must be highly qualified if the program is to have any meaning. If the person supervising the criminal becomes vindictive, then the

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<sup>74</sup> S. SCHAFFER, *THEORIES IN CRIMINOLOGY* 292 (1969).

<sup>75</sup> *Id.* at 6, 7.

<sup>76</sup> S. SCHAFFER, *supra* note 1, at 152.

<sup>77</sup> CAL. WELF. & INST. CODE § 11211 (West 1966); MASS. GEN. LAWS ANN. ch. 258A, § 1-7 (1967); N.Y. EXEC. CODE § 620-35 (McKinney 1967).

<sup>78</sup> S. SCHAFFER, *supra* note 5, at 117.

<sup>79</sup> "In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual, the satisfaction to the community being so very great." W. BLACKSTONE, *supra* note 35, at 6. S. Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 244 (1965).

<sup>80</sup> See p. 96 & notes 101-02 *infra*.

system will be little better than the work gangs now in operation in some parts of the country. Secondly, in those situations where the criminal is to make a monetary payment to the victim, what is to prevent the criminal from leaving the jurisdiction and effectively thwarting the scheme of creative restitution? Thirdly, is restitution an appropriate remedy in serious offenses? Fourthly, do the criminal courts have the manpower and the time to make a determination of payment? There are no easy answers to any of these questions, and for this reason, legislatures find it more expedient to establish a system of victim compensation and leave the theory of restitution to sociological and jurisprudential debate.

Yet despite all the difficulties involved in implementing a system of creative restitution, despite all the coercive techniques of the law to prevent a settlement between the victim and his criminal, despite all the platitudes enunciated by the courts establishing the principle that restitution by the criminal is no defense to a later prosecution,<sup>81</sup> today restitution is very much alive in the system of criminal justice at the administrative and adjudicatory levels. This article will explore the present system of restitution in the United States, discuss its implementation, and expose its weaknesses and strengths.

#### *A. Pre-Administrative Level*

Research disclosed few studies of restitution at the pre-administrative level, *i.e.*, prior to police intervention, but it is generally recognized that restitution occurs most often at this stage.<sup>82</sup> It is not uncommon for parents to pay for damage wrought by their children on a neighbor's house, car, children, etc. It is also not uncommon for some store owners to allow small children to take items from their shelves and then call the parents and bill them for the item.<sup>83</sup> This leaves the parent with the responsibility of punishing the child, and it also helps in maintaining goodwill for the store. These everyday occurrences are not considered crimes, however, either because children are involved, or more likely, because the parties are friendly and can settle their disputes without resorting to the courts. There are advantages to pre-administrative

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<sup>81</sup> *E.g.*, *State v. Baxter*, 89 Ohio St. 209, 104 N.E. 331 (1914); *Meadowcroft v. People*, 163 Ill. 56, 45 N.E. 991 (1896).

<sup>82</sup> E. SUTHERLAND & D. CRESSEY, *supra* note 63, at 278; Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1, 2, 3 (1927).

<sup>83</sup> Personal experience.

restitution because it is quick and does not tie the courts or the parties up over a minor dispute. There may be disadvantages, however, if the child thinks his parents can buy off a neighbor or store owner, or if the parent fails to admonish the child for his illegal activity.

Research did disclose that a type of restitution has been a common practice in cases involving stolen goods which are insured; the most common examples involve theft from banks and jewelry businesses.<sup>84</sup> The practice is for the criminal to "sell" the stolen property to the insurance company for a small sum.<sup>85</sup> He does this because if he sold it to a "fence," he would receive relatively little for it; and, by selling it to the insurance company, the criminal does not fear prosecution.<sup>86</sup> The insurance company recognizes that their loss might be substantial if the goods are not returned, so they encourage the criminal to return the goods in return for a small payment and a refusal to prosecute.<sup>87</sup> This practice is actually not restitution in the true sense,<sup>88</sup> and despite its practical application, its harmful consequences are obvious—encouragement rather than discouragement of illegal activity.

### *B. Administrative Level*

At the administrative level, restitution is sanctioned by private detectives, police officers, intake clerks, and prosecutors. Most large department stores have a number of plain clothes detectives who find it less time-consuming to force shoplifters to return the goods within the confines of the store than to take the shoplifters to court.<sup>89</sup> One of these private agencies has a policy of taking the shoplifter's name and giving him a severe reprimand.<sup>90</sup> These names are kept on file, and if the shoplifter later attempts to get a job in a store protected by the detective agency, he will find no position available for him.<sup>91</sup> The ad-

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<sup>84</sup> Note, *Restitution & The Criminal Law*, 39 COLUM. L. REV. 1185, 1200 (1939).

<sup>85</sup> *Id.* at 1202.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Because the goods are not returned to the injured party. Yet the insurance company is an "aggrieved party" under 18 U.S.C.A. § 3651 (1964).

<sup>89</sup> Interview with Lt. Lawrence Quinlan, Commanding Juvenile Aid Section, Boston Police Dep't. in Boston, Mass., November 12, 1969. This is not the policy of the Retail Trade Board, however. Interview with William L. Phipps, Executive Secretary, Retail Trade Board of Boston, in Boston, Mass., March 9, 1970.

<sup>90</sup> Interview with Charles Johnson, Chief of Security Detectives for Zayre's Cambridge, in Cambridge, Mass., February 2, 1970.

<sup>91</sup> *Id.* This may be the practice of a single store. Interview with William L. Phipps. *supra* note 89.

vantages of a speedy return of the goods at this level are outweighed by the disadvantages to the shoplifter. If a young person is caught shoplifting, a reprimand and a return of the goods would not be a sufficient penalty. His parents should be informed because they may know nothing of the youth's activities, and this may force them to take more of an interest in their child. Furthermore, the taking of names and their later use as a job blacklist introduces legal problems of a constitutional nature.

At the police level, restitution is a routine part of the policeman's job. When a policeman gets notice of a recent burglary, he may go to several pawn shops to look for the stolen items and put a stop order on their sale to effectuate a later restoration of the property.<sup>92</sup> The police officer also acts as a mediator in minor disputes between parties, but he will never collect money from one party and pay it to another.<sup>93</sup> Sometimes the officer reports that restitution has been made and the complaint dismissed. This is rare, however, and usually a notation of restitution on an arrest report appears after a hearing has been held before the intake clerk. At this level, restitution can be made for serious offenses, as the following on a juvenile's arrest sheet shows: "D punched R in the face, knocking out one tooth and loosening two others that had to be removed. Hearing in W.R. Court. Clerk did not issue a complaint upon agreement of D to pay medical costs for partial plate—\$70. Complainant then withdrew charge and agreed to \$50 restitution."

The advantages of a scheme of restitution at the police level include the benefits of immediate payment to the victim and practical benefits to the police force. In Boston, 5,906 complaints involving juveniles were processed by the Juvenile Aid Section of the Boston Police Department, but only 2,951 persons were arrested.<sup>94</sup> If the police did not employ a system of restitution, much more of their time would be spent in court for trials involving minor offenses. The disadvantages of restitution at the police level pertain to the entire system of criminal justice. Allowing a policeman to mediate a dispute places too much discretion in untrained hands. There are no criteria to guide the policeman in determining when or what kind of restitution should be ordered, nor is there an adversary proceeding to determine the exact amount of the victim's loss. Without proper training and necessary criteria, the

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<sup>92</sup> Note, *Restitution & The Criminal Law*, *supra* note 84, at 1188.

<sup>93</sup> Interview with Lt. Lawrence Quinlan, *supra* note 89.

<sup>94</sup> Juvenile Aid Section, Boston Police Dep't, Annual Report—1968.



police officer is a poor substitute for most judges, and the officer may find himself dispensing justice only to those who can afford it. Despite these disadvantages, and despite the criticism of police settlement by those at the court level,<sup>95</sup> restitution at the police level will continue as a practice while the present system of criminal justice is in operation because it is a practical necessity and because the average person finds it an acceptable and purposive practice.<sup>96</sup>

In Boston, Massachusetts, the clerk of court holds an informal hearing after the criminal's arrest to determine if the person should be held for trial.<sup>97</sup> If at this stage all the parties are present, the clerk may order restitution to be made to the injured party.<sup>98</sup> There are advantages to restitution at this level because all the parties are present; the clerk's actions will tend to be more uniform than the policeman on the beat; and the settlement is quick and removes some of the case load off the courts. At the prosecution level, restitution is practiced,<sup>99</sup> but probably to a lesser degree than at any other administrative level. Generally, prosecutors who are extremely busy are susceptible to plea bargains, and restitution will therefore play a part in the dismissal of minor offenses, especially if there is court approval.<sup>100</sup> Restitution at the prosecutorial level should not be encouraged, however, for expediency is no substitute for uniformity of treatment.

### C. Adjudicatory Level

In practically every jurisdiction in the United States, if a serious crime has been committed, it is a felony for one party to receive anything of value from another on an agreement not to prosecute such crime. Some states do not distinguish between serious and non-serious offenses;<sup>101</sup> others reduce the penalty for compounding a non-serious of-

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<sup>95</sup> Interview with Louis G. Maglio, Chief Probation Officer, Boston Juvenile Court, in Boston, November 14, 1969; Interview with Francis G. Poittrast, Chief Judge, Boston Juvenile Court, in Boston, November 12, 1969.

<sup>96</sup> See Fuller, *supra* note 24, at 339.

<sup>97</sup> Interview with Judge Francis G. Poittrast, *supra* note 95.

<sup>98</sup> *Id.*

<sup>99</sup> See S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 1068 (2d ed. 1969); Note, *Restitution & the Criminal Law*, *supra* note 84, at 1189-90.

<sup>100</sup> The compromise of misdemeanors is allowed by statute in some jurisdictions. See note 103, *infra*.

<sup>101</sup> ARK. STATS. ANN. § 41-2813 (1964); LA. REV. STATS. § 14:131 (1968); N.J. STATS.

fense,<sup>102</sup> and still others allow the compromise of misdemeanors under court supervision,<sup>103</sup> or allow the injured party to get his goods back.<sup>104</sup> The crime of seduction is unique because, although most statutes are not explicit on this point, a subsequent marriage of the victim to the criminal is a bar to criminal proceedings for seduction, even if the marriage only lasts for a day.<sup>105</sup> This is not because the marriage is a restitutionary act, but rather because it fulfills the criminal's seductive promise and removes one of the common law elements of the offense.<sup>106</sup> On the other hand, marriage of the victim to the criminal is no defense to a statutory rape proceeding,<sup>107</sup> with some exceptions,<sup>108</sup> but the courts do take the marriage into consideration in sentencing the defendant.<sup>109</sup> Aside from the crime of seduction, restitution is rarely considered a bar to a criminal prosecution, but there are interesting exceptions to this general rule.

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ANN. § 2A:97-1 (1952); N.M. STATS. ANN. § 40A-22-6 (1953); R.I. GEN. LAWS § 11-1-5 (1956); W. VA. CODE ANN § 615-19 (1966).

<sup>102</sup> ALA. CODE § 14-98 (1958); ALASKA CODE CRIM. PROC. § 11.30.190 (1962); ARIZ. REV. STATS. ANN. § 13-321 (1956); CAL. PENAL CODE § 7-153 (West 1966); FLA. STATS. ANN. § 44-843.14 (1965); IDAHO GEN. LAWS ANN. § 18-1601 (1947); IND. REV. STATS. ANN. § 10-1001 (1965); IOWA CODE ANN. §§ 722.1, 722.2 (1969); KANSAS STATS. ANN. §§ 21-714, 715 (1964); MICH. COMP. LAWS ANN. § 740.149 (1967); MISS. CODE ANN. §§ 2033, 34 (1942); MONT. REV. CODE § 94-3535 (1947); NEV. REV. STATS. § 199.290 (1967); N.D. CENT. CODE § 12-17-11 (1960); OKLA. STATS. ANN. § 21-543 (1951); ORE. REV. STATS. § 462.310 (1968); S.D. COMP. LAWS § 22-3-6 (1967); TENN. CODE ANN. §§ 39-3101 to -3103 (1955); UTAH CODE ANN. § 76-28-58 (1953); VA. CODE ANN. § 18.1-303 (1960); WASH. REV. CODE § 9.69.090 (1961); WYO. STATS. ANN. § 6-158-59 (1957).

<sup>103</sup> ARIZ. REV. STATS. ANN. § 13-1591 (1956); CAL. PENAL CODE § 1377-79 (West 1966); IDAHO GEN. LAWS ANN. § 19-3401 (1947); KY. REV. STATS. § 432.200 (1962); MASS. GEN. LAWS ch. 276 § 55 (1932); MICH. COMP. LAWS ANN. § 28.937-40 (1967); MONT. REV. CODE § 94-9401 (1947); N.D. CENT. CODE §§ 29-01-16, 29-01-07 (1960); OKLA. STATS. ANN. § 22-1291 (1951); ORE. REV. STATS. § 134-010 (1968); S.D. COMP. LAWS § 23-33-1 (1967); VA. CODE ANN. § 19.1-18 (1960); WASH. REV. CODE § 10.22.018 (1964).

<sup>104</sup> COLO. REV. STATS. § 40-7-34 (1963); NEB. REV. STATS. § 28-709 (1943); N.Y. PENAL CODE § 215.45 (McKinney 1967); OHIO REV. CODE ANN. § 2917.36 (1968); WIS. STATS. ANN. § 946.67 (1957).

<sup>105</sup> *People v. Gould*, 70 Mich. 240, 93 N.W. 338 (1888).

<sup>106</sup> *Id.* at 245, 93 N.W. at 342.

<sup>107</sup> *See State v. DeJean*, 159 La. 900, 106 So. 374 (1925); *Commonwealth v. Slattery*, 147 Mass. 423, 18 N.E. 399 (1888).

<sup>108</sup> *See D. NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 64 (1966).

<sup>109</sup> *See State v. Newcomer*, 59 Kan. 668, 54 P. 685 (1898); *Huckaby v. State*, 94 Okla. Crim. 29, 229 P.2d 235 (1951).

### D. Restitution Not as a Condition of Probation

In *Holsey v. State*,<sup>110</sup> the defendant, a stable hand, borrowed one of the stable owner's horses without permission. When the defendant returned with the horse, the owner confronted him with the choice of receiving a whipping or paying for the horse. In the words of the court, "[t]he defendant chose the latter horn of the dilemma and bought the horse on satisfactory terms."<sup>111</sup> The defendant then had this prosecution brought against him for violating a statute making it a crime to ride another's horse without his permission. The Georgia Supreme Court held that when anyone violates the statute in question, and the owner later consents to the act prior to the institution of criminal proceedings, no prosecution will lie. The court's reasoning ignored the usual arguments against compromising offenses and held that where one party interferes with the property of another, the injured party can waive the wrong and treat the taker as a purchaser.<sup>112</sup>

Although the *Holsey* case makes interesting reading, it may be the only case allowing restitution as a bar to a later criminal proceeding where there is no statute allowing for the compromise of misdemeanors. Yet courts do order restitution to victims of crimes as part of the dispositional proceedings of a criminal trial under broad probation statutes or specific provisions in those statutes allowing restitution or reparation to injured parties.<sup>113</sup> Judicial attempts to fine the defendant and allocate the money to aid the victim have not met with success.<sup>114</sup>

### E. Restitution in Juvenile Probation

Restitution as a condition of probation involves either a monetary payment or a payment in kind, *i.e.*, services. Payments in kind, an idea closely akin to Eglash's concept of creative restitution, occur most frequently in juvenile courts.<sup>115</sup> Some juvenile court judges use the tech-

<sup>110</sup> 4 Ga. App. 453, 61 S.E. 836 (1908).

<sup>111</sup> *Id.* at 454, 61 S.E. at 837.

<sup>112</sup> *Id.*

<sup>113</sup> See statutes cited notes 127-29 *infra*.

<sup>114</sup> See *Lancaster v. State*, 83 Ga. App. 746, 64 S.E.2d 902 (1951); *Smith v. Barrow*, 21 Ga. App. 650, 94 S.E. 860 (1918).

<sup>115</sup> Most State statutes providing for juvenile probation give broad discretionary power to the juvenile court judge to define the conditions of probation. ALASKA WELF. & INST. STATS. ANN. § 47.10-080 (1962); ARIZ. REV. STATS. ANN. § 8-231(2)(b) (1956); CAL. WELF. & INST. CODE tit. 7 § 725 (1966); GA. CODE ANN. § 24-2421 (1958); IDAHO GEN. LAWS ANN. § 16-1814 (1947); ILL. ANN. STATS. ch. 37 § 705-2 (1934);

nique far more than others, and it is apparently a more approved type of penalty than monetary restitution, in the eyes of the social work staff attached to the juvenile court.<sup>116</sup> It is often used for minor offenses, for example, if a youth is convicted of ringing a false alarm, he may be told to clean fire equipment on weekends. Restitution in kind may also be an alternative to monetary payment, but this generally fails in its purpose because the youth's parents will usually pay the amount claimed rather than see their child work off his penalty.<sup>117</sup> One of the reasons why juvenile court judges hesitate to order restitution in kind is due to the criticism they receive from the public, not because child labor is involved, but because some state employees are deprived of work.<sup>118</sup> Despite this criticism, restitution in kind is an accepted part of the sentencing procedure in juvenile courts, not only in the United States, but in other countries as well.

Both in England and Germany, restitution is often ordered as a condition of probation in the juvenile courts.<sup>119</sup> The German Juvenile Court system is well known for its use of "role reversal" as a sentencing device.<sup>120</sup> The device was pioneered by Dr. Karl Holzschuch who attempted to place the offender as much as possible in the shoes of the victim.<sup>121</sup> Holzschuch used this method for all types of offenses, whereas in the United States, restitution in kind is rare and limited to minor offenses.<sup>122</sup> Monetary restitution is used far more frequently by juvenile court judges in the United States, and for serious offenses.

In juvenile proceedings, where the actor is often tried as well as his act, restitution as a condition of probation seems a necessary part of that court's structure. The machinery is there to implement a reconciliation between the parties because the proceedings are somewhat

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IND. STATS. ANN. § 9-3215 (BURNS 1965); IOWA CODE ANN. § 232.34 (1969); KY. REV. STATS. § 208.200 (1962); LA. REV. STATS. § 13:1580 (1968); MD. CODE ANN. § 70-24 (1957); MONT. REV. CODE § 10-611 (1947); NEV. REV. STATS. § 62.200 (1967); N.H. REV. STATS. § 169:14 (1955); N.J. STATS. ANN. § 2A:4-37 (1952); N.C. GEN. STATS. § 110-32 (1965); OKLA. STATS. ANN. tit. 10 § 1116 (1951); R.I. GEN. LAWS § 14-1-33 (1956); S.C. CODE § 15-1151 (1962); WIS. REV. STATS. ANN. § 57.01 (1957).

<sup>116</sup> Interview with Louis G. Maglio, *supra* note 95.

<sup>117</sup> Interview with Judge Francis G. Poitras, *supra* note 95.

<sup>118</sup> *Id.*

<sup>119</sup> See Overland & Newhouse, *Juvenile Criminal Law in the Federal Republic of Germany & in England*, 4 CALIF. W.L. REV. 35 (1968).

<sup>120</sup> *Id.* at 39.

<sup>121</sup> *Id.*

<sup>122</sup> Interview with Judge Francis G. Poitras, *supra* note 95; Interview with Max O. Laster, Judge, Juvenile & Domestic Relations Court of Richmond, Virginia.

more informal than in adult court, and the philosophy of the juvenile court staff, from police officer to judge, is one designed to help the juvenile, not to punish him.<sup>123</sup> Yet within the mechanism of the juvenile court, there is no provision for a type of creative restitution that will keep the criminal-victim relationship alive. Monetary restitution, if paid, is collected by the probation officer, usually from the juvenile's parents.<sup>124</sup> Restitution in kind usually involves a service performed by the juvenile for the state—a totally impersonal act. In short, the juvenile court, with its social work staff, judges, police officers and attorneys dedicated to rehabilitation, has failed to test the theory of creative restitution in an atmosphere that would lend itself to such a test.<sup>125</sup> Possibly the court fears being labelled a super-parent, but it has acceded to that status anyway in its attempts to handle stubborn children, runaways, and truants. There are probably innumerable reasons why a dynamic program of creative restitution has not been implemented, but if the juvenile court is dedicated to a goal of rehabilitation, serious consideration should be given to such a program.

#### *F. Restitution in Adult Probation*

Probation as a relatively recent addition to the system of criminal justice advances the concept of rehabilitation over punishment.<sup>126</sup> Most state statutes providing for probation fall in three categories as to the conditions thereof. Some statutes simply give the court the power to place the defendant on probation on conditions specified by the court, presumably for the best interest of the criminal.<sup>127</sup> Other statutes specifically set out certain conditions, not necessarily exclusive nor clearly defined, to guide the court in formulating a probation decree.<sup>128</sup> A third

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<sup>123</sup> Interview with Lt. Lawrence Quinlan, *supra* note 89; Interview with Judge Francis G. Poitras, *supra* note 95.

<sup>124</sup> Interview with Louis G. Maglio, *supra* note 95.

<sup>125</sup> See K. MENNINGER, *THE CRIME OF PUNISHMENT* 230 (1968).

<sup>126</sup> Massachusetts had the first probation statute. MASS. ACTS ch. 198 (1878).

<sup>127</sup> ALA. CODE § 42-22 (1958); ALASKA STATS. ANN. § 12.55.100(2) (1962); ARIZ. REV. STATS. ANN. § 13-1657 (1956); DEL. CODE ANN. § 11-4321 (1953); MISS. CODE ANN. § 4004-221 (1942); MONT. REV. CODE § 94-9830 (1947); NEV. REV. STATS. § 176.185 (1967); N.H. REV. STATS. § 504.1 (1953); N.D. CENT. CODE § 12-53-13 (1960); OHIO REV. CODE ANN. § 2951.02 (1968); S.D. COMP. LAWS § 23-57-4 (1962); UTAH CODE ANN. § 77-35-17 (1953).

<sup>128</sup> CAL. WELF. & INST. CODE § 1203.1 (West 1966); COLO. REV. STATS. § 39-16-7 (1963); GA. CODE ANN. § 27-2711 (1933); KY. REV. STATS. § 439.290 (1962); MASS. GEN. LAWS ANN. § 92 (1959); MICH. COMP. LAWS ANN. § 771.3 (1967); N.J. STATS. ANN. § 2A:168-2 (1952); N.M. STATS. ANN. § 41-17-36 (1953); N.Y. EXEC. CODE § 15-199

and smaller group of statutes lists appropriate conditions of probation and defines the outer limits of the probation decree.<sup>129</sup> In general, courts consider probation a privilege rather than a right, and once they have made this nebulous distinction, they usually uphold any restitutionary condition placed on the defendant.<sup>130</sup> The defendant naturally has the alternative of going to jail if he dislikes the conditions of his probation. Aside from this questionable judicial logic, there are a number of cases involving restitution as a condition of probation where the court's decisions raise serious questions as to the use of probation as a vehicle for restitution to victims of crime. Some of these cases will be set out here to define three problem areas in the use of the present system of probation as a restitutionary device.

Early cases in which lower court judges ordered restitution as a condition of probation clearly depict an initial problem in the use of restitution as a compensatory device totally unrelated to the act for which the defendant was convicted. In an early case in New York,<sup>131</sup> a defendant who failed to support his wife was adjudged a disorderly person, placed on probation and ordered to make weekly support payments to his wife. In Georgia, a defendant, who was convicted of fornication and sentenced to hard labor, was told that he could serve this sentence outside of the chain gang if he paid \$400 quarterly for support of the baby.<sup>132</sup> In a recent case in California,<sup>133</sup> the defendant was convicted of grand theft because he was living with a welfare recipient and concealed his presence from the welfare authorities. As a condition of probation, the defendant and the welfare recipient were ordered to restore \$1,685 to the State treasury, and the defendant was ordered to assume financial support of the welfare recipient's child.<sup>134</sup>

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(McKinney 1967); OREGON REV. STATS. § 137.540 (1968); S.C. CODE § 55-593 (1962); VA. CODE ANN. § 53-274 (1967); WASH. REV. CODE § 9.92.060 (1961); W. VA. CODE ANN. § 62-12-9 (1966); WYO. STATS. ANN. § 7-315 (1957).

<sup>129</sup> ARK. STATS. ANN. § 43-2331 (1969); FLA. STATS. ANN. § 46-948.04 (1965); IND. STATS. ANN. § 9-2210 (BUTTS 1965); KAN. STATS. ANN. § 62-2241 (1964); MD. ANN. CODE § 71A (1957); R.I. GEN. LAWS § 12-19-8 (1956); WIS. REV. STATS. ANN. § 57.01 (1957).

<sup>130</sup> See *People v. Good*, 287 Mich. 110, 282 N.W. 920 (1938); *Conditions of Probation Imposed on Wisconsin Felons: Costs of Prosecution & Restitution*, 1962 WIS. L. REV. 672.

<sup>131</sup> *City of New York v. Kriegel*, 124 Misc. 67, 207 N.Y.S. 640 (1924).

<sup>132</sup> *Swanson v. State*, 38 Ga. App. 386, 144 S.E. 49 (1928).

<sup>133</sup> *People v. Flores*, 197 Cal. App. 2d 611, 17 Cal. Rptr. 382 (1961).

<sup>134</sup> *Id.* at 613, 17 Cal. Rptr. at 385.

In spite of California's restrictive statute on probation,<sup>135</sup> the California court, more than any other, has attempted to extend the outer limits of restitution as a condition of probation. In *People v. Williams*,<sup>136</sup> the defendant Williams entered the victim's store and attempted to make some purchases with a Diners' Club card. The victim, after checking the number on the card, kept it and refused to extend credit to Williams. Whereupon the defendant retrieved the card by threatening the victim with a pair of scissors. Williams was convicted of assault with a deadly weapon and was ordered to make \$3,000 restitution to the Diners' Club for a debt he owed them. On appeal, the California court held the condition void because it was too far removed from the offense for which Williams was convicted.

Following *Williams* the California court was faced with a more unusual case in *People v. Miller*.<sup>137</sup> The defendant Miller operated a construction company and he was convicted of unlawfully taking \$820 from the Keefe family. As a condition of probation, Miller was ordered to make restitution to the Keefes, and the court hoped he would also make restitution to other parties he had defrauded. During the criminal prosecution, Miller was adjudicated a bankrupt, and a list of creditors from the bankruptcy proceedings was submitted to the lower court on a memorandum prepared by Miller's probation officer, with a request that the defendant pay \$8,600 in restitution. The court, without a hearing, accepted the memorandum, and a hearing was held on the probation officer's request to extend probation. During the hearing Miller argued against extension contending that he had made restitution of \$1,575, but the court extended the probation period. The Supreme Court of California held that the order of restitution was proper, even though it was not limited to the direct consequences of the acts for which Miller had been convicted. Since payment of all of Miller's customers can help his rehabilitation, argued the court, and since the harm to all the customers was similar to that suffered by the Keefes, the condition of restitution did not have that element of remoteness found in the *Williams* case.<sup>138</sup>

In *Miller*, the California court equated reparation with restitution, as a proper condition of probation. Some writers view this as an ap-

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<sup>135</sup> CAL. WELF. & INST. CODE tit. 7, § 1203.1 (West 1966).

<sup>136</sup> 247 Cal. App. 2d 394, 55 Cal. Rptr. 550 (1966).

<sup>137</sup> 256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967), noted in 16 U.C.L.A. REV. 456 (1969).

<sup>138</sup> 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967).

propriate use of the probation system,<sup>139</sup> but most courts disagree. In *People v. Good*,<sup>140</sup> the Michigan court reversed the lower court's order of restitution, but split on the issue of compensation. The lower court found the defendant guilty of felonious homicide when his negligent driving resulted in the death of a pedestrian. As a condition of probation, restitution of \$385 was ordered by the court. The defendant refused to pay, claiming that the order violated the Due Process clause of the Federal and State Constitutions because he did not have a hearing on damages, nor is a criminal proceeding an appropriate forum for a hearing on damages. On appeal, the Supreme Court of Michigan held that there was no violation of the defendant's constitutional rights because an order of restitution is not an assessment of damages.<sup>141</sup> The court further noted that the defendant was not deprived of any rights, ". . . rather he was given the additional privilege of avoiding the usual penalty of his crime by the payment of a sum of money. . . ." <sup>142</sup> Judge Wiest, concurring, raised no constitutional objections, but he felt that the order to pay money for someone's death went beyond the Michigan statutory provision providing for restitution not reparation.<sup>143</sup>

Almost twenty years later, Judge Wiest's distinction between restitution and reparation surfaced in *People v. Becker*.<sup>144</sup> In *Becker*, the Supreme Court of Michigan was faced with a lower court conviction for leaving the scene of an accident and an order of restitution amounting to \$1,244 for payment of hospital costs to the parties injured in the collision. Here the court vacated the order because it violated the Due Process clause of both the Michigan and United States Constitutions. In distinguishing this case from their earlier decision in *Good*, the court drew a theoretical distinction between restitution and reparation and a factual distinction between leaving the scene and felonious homicide. By definition, the court argued, restitution means a return of something taken, and reparation, the undoing of something done.<sup>145</sup> Assuming, however, said the court, that a restitution order for unliquidated damages

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<sup>139</sup> Mueller, *Criminal Law & Administration*, 34 N.Y.U.L. REV. 82, 111 (1958); *Use of Restitution in the Criminal Process: People v. Miller*, 16 U.C.L.A.L. REV. 456, 465 (1969).

<sup>140</sup> 287 Mich. 110, 282 N.W. 920 (1938).

<sup>141</sup> *Id.* at 115, 282 N.W. at 923.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 119, 282 N.W. at 927.

<sup>144</sup> 349 Mich. 476, 84 N.W.2d 833 (1957).

<sup>145</sup> *Id.* at 483, 84 N.W.2d at 840.



might be a valid condition of probation, an order of restitution may "... be imposed only for loss caused by the very offense for which the defendant was tried and convicted."<sup>146</sup> In the case of felonious homicide the restitutionary order related to the conviction because payment was for the death of a pedestrian and death resulted from the offense. Here, however, the charge was leaving the scene of an accident, and the damages resulted from hitting the pedestrian, not leaving the scene.

The *Becker* opinion clearly limits a decree of restitution to the harm committed, but it fails to establish criteria to determine the proper restitutionary amount where unliquidated damages are alleged in a criminal proceeding. To resolve this dilemma, most federal courts require that the order of restitution be limited to actual damages or loss suffered. Three federal circuit courts have overruled orders for the payment of restitution where the order encompassed offenses listed in the indictment but not proved in court. In a case before the ninth circuit,<sup>147</sup> the defendant was charged with seventeen offenses for forging certain papers needed for veterans' home loan guaranty benefits, and he was found guilty of six offenses. As a condition of probation, the defendant was ordered to make restitution to the seventeen veterans named in the indictment and one veteran not named. On appeal, the court held that the order of restitution to pay those other than the six whom the defendant was found guilty of defrauding was void. To the same effect was a case decided by the Fourth Circuit Court of Appeals,<sup>148</sup> where the defendant was ordered to pay \$32,000 in back income taxes, yet there were not enough facts in the record to determine the exact amount the defendant owed. The court remanded.

State courts which have been faced with a similar problem, without a statutory guide, have generally held that statutes providing for restitution can apply only to the amount which the defendant admits to, or for which he was convicted. A good example of this is a Wisconsin case<sup>149</sup> where the defendant was convicted of defrauding a company of 350 dollars and was ordered to pay 11,700 dollars in restitution. On appeal, the court remanded for a new determination because it was unclear from the record as to what the defendant had admitted.<sup>150</sup>

The preceding cases define two interrelated problem areas in the

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<sup>146</sup> *Id.* at 486, 84 N.W.2d at 842.

<sup>147</sup> *Karrell v. United States*, 181 F.2d 981 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950).

<sup>148</sup> *United States v. Taylor*, 305 F.2d 183 (4th Cir. 1962).

<sup>149</sup> *State v. Scherr*, 9 Wis. 2d 418, 101 N.W.2d 77 (1960).

<sup>150</sup> *Id.* at 427-28, 101 N.W.2d at 80.

use of probation as a restitutionary device. First, by what standard does one measure the relationship of the order of restitution: the harm committed or the conviction obtained? Second, is the present criminal proceeding an appropriate forum to determine the amount of restitution to be paid by the criminal to his victim? The second question is extremely difficult and has not been satisfactorily answered by the courts. The first question has been dealt with, and at least certain criteria have been established to guide the lower court judge in ordering restitution. One of the earliest cases requiring a link between the conviction obtained and the order of restitution is *State v. Barnett*.<sup>151</sup> In 1929, Barnett was convicted of leaving the scene of an accident, and placed on probation with the condition that he pay 1,500 dollars as restitution to the injured parties. In 1931, the defendant had paid 1,080 dollars and asked that he be discharged. In 1937, the court ordered the defendant to pay the remaining 440 dollars owed, and Barnett refused. With the money unpaid in 1938, Barnett's probation was revoked for non-payment and drunkenness, and he was sentenced to two years in prison. On appeal, the defendant claimed that continuing probation for nine years for the offense of leaving the scene of an accident was contrary to the rehabilitative aims of the statute on probation.<sup>152</sup> Without deciding this issue, the Supreme Court of Vermont ordered the restitutionary condition vacated because a conviction for leaving the scene cannot give rise to an order to pay restitution for injuries arising out of an accident.<sup>153</sup>

The Vermont court was obviously swayed by the length of probation served by the defendant for a minor offense, yet it pointedly refused to come to grips with this issue. A case from Michigan<sup>154</sup> clearly shows the importance of setting a maximum time period for a probation decree. The Michigan defendant was convicted of felonious operation of an automobile and placed on probation for three years. The two injured parties later obtained a civil judgment against the defendant for 21,000 dollars, which judgment was not satisfied three and a half years after the conviction. At that time, the defendant's probation officer petitioned the court to extend probation an additional two years. The court acquiesced and the defendant paid 5,000 dollars in restitution to

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<sup>151</sup> 110 Vt. 221, 3 A.2d 521 (1939).

<sup>152</sup> *Id.* at 227, 3 A.2d at 524.

<sup>153</sup> *Id.* at 232, 3 A.2d at 526.

<sup>154</sup> *People v. Marks*, 340 Mich. 485, 65 N.W.2d 698 (1954).

the victims. On appeal, the action of extending the period of probation was held not an abuse of discretion.<sup>155</sup>

In reviewing the cases requiring restitution as a condition of probation, one can easily recognize that the machinery set up is very flexible and aimed more towards compensating the injured party than in rehabilitating the criminal. This is a meritorious ideal, but it does not follow from this that the present criminal legal process, with all of its inequities, must be the procedure used to achieve it. Under a thriving system of creative restitution as advocated by Eglash and Schafer,<sup>156</sup> there would be little objection voiced by this writer if the probation procedures now used were adopted in carrying out a decree of restitution. Yet the dispositional stage of a criminal proceeding is still part of a basically punitive scheme, and, therefore, some procedural safeguards must be established to protect the rights of one convicted of a crime.

### III. RECOMMENDED SAFEGUARDS

One writer has suggested the following standard:

Restitution as a condition of probation is proper if it requires the payment of fixed liabilities: (1) incurred as the proximate result of the criminal act for which the probationer was convicted, or (2) incurred as the result of conduct which is substantially related in kind, including the state of mind of the actor, to the breach for which the individual was criminally convicted.<sup>157</sup>

This is in substance the test used by the California court in *People v. Miller*, *supra*, but under the present system of criminal justice it is too broad. For liquidated damages, the order of restitution must be limited to a return of the items taken or the actual out-of-pocket expenses incurred by the injured party.<sup>158</sup> Unliquidated damages must be admitted by the defendant or documented during the criminal proceeding as evidence of the harm suffered by the victim.<sup>159</sup> Furthermore, the injury must be causally connected to the crime for which the defendant is

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<sup>155</sup> *Id.* at 501, 65 N.W.2d at 703.

<sup>156</sup> See discussion p. 81 & 82 *supra*.

<sup>157</sup> *Use of Restitution in the Criminal Process*, *supra* note 139, at 474.

<sup>158</sup> Note, *Restitution & the Criminal Law*, *supra* note 84, at 1197.

<sup>159</sup> The necessity for this safeguard should be obvious. The present criminal procedure is not the proper forum for a hearing on damages. If, on the other hand, there is no hearing but a judge-made decision, based on a probation officer's report, then there are due process considerations. See Hink, *The Application of Constitutional Standards of Protection to Proration*, 29 U. CHI. L. REV. 483 (1962).

convicted, not "substantially related in kind." Finally, a maximum period of time must be set for the service of probation to promote a rehabilitative end and to prevent any attempt to use the criminal process to effectuate a civil remedy, where the only bar to civil liability is the statute of limitations.<sup>160</sup>

#### IV. CONCLUSION

One of the aims of this article has been to trace, historically, the diminishing role of the victim in the Anglo-American criminal process. Although the victim's present position is a shadow compared to his primitive forefathers, consideration for the harm suffered by the victim is still a part of the present system of criminal justice at the pre-administrative, administrative and judicial levels. An attempt has also been made to show that the demise of community composition and the gradual criminalization of certain harmful acts was a result of the intervention of the state in the dispositional stage of a legal proceeding in its own behalf. In addition, the advantages and disadvantages of a system of creative restitution have been described, and the inequities of the present use of restitution as a condition of probation have been brought to light. One further point to be explored is that the probation machinery as presently set up could serve to implement a program of creative restitution, but a minor change in procedure and a major change in attitude will have to first occur.

The minor change in procedure is an answer to one jurisprudential writer, who sees an initial roadblock to a rehabilitative ideal in the very nature of the criminal process. In the words of Professor Lon Fuller:

The familiar penal or retributive theory looks to the act and seeks to make the miscreant pay for his misdeed; the rehabilitative theory on the other hand, sees the purpose of the law as recreating the person, or improving the criminal himself so that any impulses toward misconduct will be eliminated or brought under internal control. Despite the humane appeal of the rehabilitative theory, the actual processes of criminal trials remain under the domination of the view that we must try the act, and not the man; any departure from this conception, it is feared, would sacrifice justice to a policy of paternalistic intervention in the life of the individual.<sup>161</sup>

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<sup>160</sup> See *Conditions of Probation Imposed on Wisconsin Felons*, *supra* note 130, at 683.

<sup>161</sup> Fuller, *Two Principles of Human Association* 17-8, in 11 *NOMOS, VOLUNTARY ASSOCIATIONS* (1969).

Yet a possible solution to Professor Fuller's dilemma would be the introduction of a split proceeding into adult criminal trials. First, a formalized hearing to determine whether an act was committed by the particular defendant charged. Then, if such a finding be made, a second informal hearing with the defendant actively participating, to determine a meaningful type of restitutionary penalty to be performed. This would provide a factual determination of guilt<sup>162</sup> and an individualized procedure for rehabilitation.

The major change in attitude involves not a recognition of injustice done to criminal and victim, but of the injustice done to the legal process by the present system of criminal justice. The very nature of modern criminal law promotes the idea that punishment is a proper legal objective, and, in so doing, it ignores the purposive nature of the legal process. If law is viewed as a constructive process promoting interaction among individuals,<sup>163</sup> then the criminal legal process in its present form must be dismantled. In a creative process, while there will be room for penalties to compensate injured parties, there will be no place for punishment, a purely destructive and purposeless activity.<sup>164</sup> Yet, recognizing that a proposal to dismantle the entire administration of criminal justice is not likely to be implemented in the foreseeable future, a minor step in the same positive direction would be the slow development of a plan of creative restitution within the present system of probation machinery. Such a plan may appear today to be an insignificant thread in the complex fabric called the system of criminal justice, but it could serve as an initial stage in redesigning that fabric to remove its destructive and denigrating characteristics.

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<sup>162</sup> The word "guilt" is used inappropriately here. The finding is not whether the party is actually guilty of the offense, but (1) whether an act was in fact committed (2) by this defendant. No value judgment would be made of the defendant's conduct.

<sup>163</sup> L. FULLER, *THE MORALITY OF LAW* 210, 221 (1964).

<sup>164</sup> There is a distinction between a penalty and punishment. One is a recognition of harm with accompanying payment; the other recognizes harm but inflicts harm in return. "The idea of punishment as the law interprets it seems to be that inasmuch as a man has offended society, society must officially offend him." K. MENNINGER, *supra* note 125, at 71.