PAROLE RESTITUTION:

DEVELOPING GUIDELINES FOR THE

NEW JERSEY STATE PAROLE BOARD

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Prepared by

Alvin W. Cohn, D.Crim.

Edward Rhine, Ph.D.

Harold Atkinson

Submitted to

Christopher Dietz
Chairman
New Jersey State Parole Board

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The contents of this document reflect the views of the principal author, Dr. Alvin W. Cohn, and do not necessarily reflect the official views or policy of the National Institute of Corrections, or the New Jersey State Parole Board.

PREFACE

Paroling authorities face tremendous hurdles today. Criticized by the right and left, by victims as well as offenders, they operate in a public arena that demands ever higher levels of responsibility and accountability. Many parole boards have risen to this challenge and are finding both imaginative as well as creative solutions to problems many of which are not of their making.

Where there is an understanding of the parole process, there is also a sense of purpose and vision. As a consequence, parole today is better administered and better serves the needs of its constituencies than ever in its history.

The possibility of introducing restitution as a special condition of parole reflects a vision of what parole can and, perhaps, should do. It suggests that paroling authorities, while mandated to be concerned primarily with offenders, can also direct their attention to victims' rights and needs. Further, it indicates that parole boards are indeed capable of change in constructive and positive directions and in ways responsive to community needs and values.

While the principal author assumes primary responsibility for the contents of this report, the project could not possibly have been completed without the able assistance of a number of other persons. Christopher Dietz, Chairman of the New Jersey State Parole Board, provided the original impetus for the project. It was he who had the vision that parole can do more than it has been doing and so suggested exploring the possibility of using restitution as a routine condition of parole. He asked for and received assistance from the National Institute of Corrections for financial support of the project.

The Advisory Committee, composed of former New Jersey Governor Richard J. Hughes, Superior Court Judge Betty Lester, and Mrs. Christine Whitman, Freeholder Director, provided insightful comments and advice during the drafting of the final report. For philosophical as well as pragmatic reasons, the members of the Advisory Committee concurred that it is not feasible to attach restitution as a condition of parole. They thus disagree with the recommendations discussed in Chapter 7 on "Rethinking Restitution."

Edward Rhine, Ph.D., Executive Assistant, New Jersey State Parole Board, provided invaluable support and assistance. He helped to arrange logistical and administrative support and otherwise served as the Board's liaison to the project. Additionally, he is the principal author of Chapter 6 entitled "The Offender Population and Parole Restitution."

Dr. William Smith and Elizabeth Zupko, Sociology Department, Rutgers University, provided generous assistance in developing a codebook and setting up an SPSSX computer file for conducting data analysis. Coding of the data was done by T. Paul Bernard, Karn Mackavananagh, Donna Carol, Jennifer Dubois, and Tony Iannitelli.

Kenneth Steider, Director, Division of Field Services, New Jersey State Parole Board, ably supervised the completion of questionnaires by the institutional field staff.

Harold Atkinson, Project Consultant, provided on-going assistance and input. He was most involved in surveying and interviewing criminal justice authorities in New Jersey about their views on restitution.

Jeff Allison served as a research assistant to the principal author and significantly contributed to the section of the report covering the conceptual overview of restitution.

Finally, special thanks are extended to the various parole authorities in the United States and Canada who took the time to complete a questionnaire on their attitudes and experiences with restitution in parole.

Alvin W. Cohn, D.Crim.
Administration of Justice Services, Inc.
Rockville, Maryland

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CHAPTER ONE

CONCEPTUAL OVERVIEW

Definition and Use

In a broad sense, restitution can be defined as the payment of money or services by an offender to his or her crime victim.[1] Although it has never completely vanished, restitution has submerged and re-emerged at different points of time in history. The cyclical manner in which restitution has been a focal response to wrongdoing at one moment but only an ancillary tool at others seems to be linked to frustration or contentment with other kinds of interventions. Also, such linkage has been related to shifts in pre-eminence of the state, citizen, or offender as the victim.

One aspect of restitution that has unfolded over time is its complexity. The earliest recorded form of restitution typically involved the offender going directly to the victim or victim's family with some kind of peace offering. This was designed to prevent bloodshed or to prevent ongoing vengeance.

As societies became more mobile, organized, and legalistic, the permanency and authority of the state increasingly was perceived in the resolution of conflicts between citizens. While the possible trade-offs of this relationship begs interpretation and debate, restitution, in the forseeable future in the United States, is likely to include the state as a primary instrument for ensuring the repayment of losses sustained by victims, regardless of the identity of the victim. The growing development of victim compensation boards ensures such a governmental approach and continuing involvement.

The complexity of restitution as a modern criminal justice management issue is made apparent by the multitude of decisions that must be made prior to, during, and following program design and implementation. Miringoff provides useful guidelines for making these decisions in the setting where they are to be carried-out.[2] In brief, he holds that decisions need to be based primarily on the actual capabilities of the organization, with values (internal and external to the organization) used to guide that capability toward specific ends. Further, in this interaction is the political element, which, ideally, provides a means by which capability can be realized.

To produce effective outcomes, human service decision-making must reflect congruence between these elements, according to Miringoff. That is, what should be accomplished (values) and what can be accomplished (capability) must be clarified before decisions are made and then implemented with public and criminal justice system support (politicality). To the extent that congruence fails to exist between these elements, it can reasonably be predicted that outcomes will be diminished.[3]

If we accept Miringoff's postulates as guidelines, it is appropriate to examine some of the critical values, capability, and political issues that evolve as restitution is programmed. Although value issues

consistently crop up in almost all decisions, it may be helpful to start with questions of what should be examined and why. As Harland points out, it is the definition of primary purpose that influences subsequent expectations, policies, and procedures for the restitution program.[4]

Beyond simply saying that the mobility and legalistic nature of modern society creates a legitimate need for government intervention when citizens are in conflict, Carrow identifies several philosophical bases which justify state involvement in ensuring offender repayments to victims.[5] The Torts Theory argues that the state has an obligation, first to protect its citizens from crime and then, having failed in that, an obligation to assist those who have been victimized.

The Welfare Theory takes an oppositional posture. It posits that assistance to crime victims by the state is not an obligation, but a matter of social conscience. Further, there are the self-explanatory notions of "shared risk" (between citizen and state) and "grace of government."

Finally, there are three ideologies that can actually be taken as one: there may be public support for the state demanding and enforcing the repayment of victims by their offenders; there is a need to reduce citizen alienation from the criminal justice system; and, crime prevention efforts can be enhanced as citizens reduce their fear of involvement in the criminal justice system.

If attention is given to any philosophical base, which is doubtful, the choice is likely to be determined to a large extent by the thinking and beliefs of the prominent policy-makers in a given jurisdiction at a given time, and within the context of the political climate. Deciding on a final rationale or combination of rationales is not merely an academic issue. It has critical significance in the development, sustenance, and permanence for restitution programming.

Another major value decision that must be made is that of determining on whom the program will focus. The issue of restoration, that is, who is to be restored and to what status, is a recurring item in the restitution literature. It is a significant issue because each possible focus - victim, offender, and/or criminal justice system/public - gives rise to the possibility of conflicting demands.

As an example, as was noted earlier, the number of states which has established victim compensation boards has increased markedly in recent years. The services provided by these agencies were the focus of a recent conference held by the National Organization for Victim Assistance (NOVA).[6] Two topics of interest which were covered at this meeting were the extension of victim compensation benefits to reimburse crime victims for mental health counseling subsequent to trauma, and methods for reducing or preventing "the second injury," viz, the stress of criminal justice involvement.

While a great deal of empirical evidence is not yet available, it may be a logical prediction, under the Miringoff model, that such compensation boards and other similarly situated programs, because they are focused, provide highly effective services for crime victims. A second

intended consequence would be the reduction of citizen alienation from the criminal justice system. By design, however, concern for the restoration of offenders has not been and is not today a primary purpose of such programs. In fact, victim compensation boards have been increasing in numbers, in part, as the result of perceptions of inequity insofar as the manner in which victims have been handled vis-a-vis offenders. At the present time, too, diminished resources together with increased concern for victims, ironically, may serve to reduce funding for offender-based restitution programming. It is not uncommon in the network of criminal justice services that organizations with competing goals frequently are in competition for the same dollar.

This is not to say that restitution programs do not benefit crime victims. The Restitution Education, Specialized Training and Technical Assistance Program (RESTTA) sponsored by the Office of Juvenile Justice and Delinquency Prevention promotes specific victim benefits.[7] However, as pointed out by Hudson, et al., "The restitution programs that are actually established invariably focus on correction or rehabilitation of offenders. No restitution program has come to my attention that had the delivery of benefits to victims as its primary or even very important operational goal."[8]

The offender focus of most restitution programs is quite evident in operational decisions. As an example, when an offender misses payments to the victim, does concern for the victim usually win-out and result in increased demands on the offender, or is the offender's payment schedule adjusted to avoid a program failure and reincarceration?

The rhetorical question is not an attack on offender-focused programs. However, it is a challenge to consider carefully and honestly the primary purpose and capabilities of a program before implementation so that services in the focal area are maximally effective and responsive to polity values.

With regard to the criminal justice system itself, Conrad illustrates how the state of Alabama was able to use restitution in conjunction with other sanctions to reduce prison crowding in the aftermath of Pugh v. Locke.[9]

Alabama's program entitled - "SIR" (Supervised Intensive Restitution), provided for the early release of nonviolent offenders to a type of residential, community detention that also involved restitution payments. With federal court and state legislative support, the program served 1,051 offenders in 1983 with a 66 percent "success" rate. These 685 adult offenders, through SIR, helped to reduce the overcrowded situation in two correctional facilities as a result of their removal to the restitution centers. Simultaneously, they helped to redress the financial wrongs to a considerable number of their crime victims.

The consequence of the above discussion centers on the fact that the value base and purpose of any restitution program must be clarified up-front; that is, at the initiation of any project. Once the general purpose of what should be accomplished is determined, it is possible to explore specific issues regarding capability (what realistically can be

accomplished) and the political elements that will impact the actual programming (how stable the program can be).

Restitution in Focus

An analysis of precedents for and application of the restitution concept, as well as theoretical links with criminal justice system goals, may be a helpful point of departure. By doing so, it is possible to explore many of the theoretical and practical decisions that must be made in developing and implementing a restitution program.

From an historical perspective, precedents for the use of restitution, as has been noted earlier, date back to ancient societies, including 7th Century Anglo-Saxon Codes.[10] Many of the earliest penal codes in the United States included restitution provisions[11] and in 1913, the United States Supreme Court, in Bradford v United States,[12] sanctioned restitution as a condition of a pardon.

Martin's analysis of trends in restitution finds that during the past decade support for restitution programs has developed among numerous state legislatures; federal, state and local criminal justice agencies; and national standard setting bodies. These include the National Advisory Commission on Criminal Justice Standards and Goals, the National Council on Crime and Delinquency, and the American Bar Association.[13]

Using a model developed by Hudson and Galaway, Martin describes four types of restitution employed in the United States today. Type I restitution programs require monetary payments by an offender to the victim(s) of the crime, although payment may pass through an intermediary. Type II programs involve monetary payments by an offender to a third party, such as an insurance company or community agency. This may occur under several circumstances, including when the victim cannot be found, the victim refuses to participate, or the victim's losses have been passed on to another party.

Type III programs require the offender to make payments in the form of personal services to the victim; while Type IV involves service to the community rather than directly to the victim.[14] While each type is distinct, they obviously are not mutually exclusive. A restitution program large enough to provide for highly individualized offender planning conceivably could use all four types. However, the capabilities of most programs limit them to one or two of the above applications.

While programs involving personal services to the victim or to the community can be found on occasion, Types I and II are the more popular kinds of restitution programs, especially where adult offenders are concerned. This may be true, as several authors suggest, for they are more likely to receive theoretical support as a result of their ability, in part, to meet the broad criminal justice system goals of retribution, deterrence, and rehabilitation simultaneously.

Of the various forms of retribution discussed by McAnany,[15] three are of particular relevance. "Expressive retribution" describes a system

in which the basic justification for punishment lies in its denunciatory value, especially since it expresses societal rejection of the wrong done by the offender who needs to be punished.[16] "Desert retribution" justifies the infliction of "pain" on offenders as their just deserts.[17] "Requital retribution" is punishment in which the basic justice to be accomplished is replacement of the morally wrongful act by a morally rightful act.[18]

Given these simple theoretical forms, McAnany finds retribution and restitution to be compatible. However, at the point of application, the primary interest of restitution remains the offender, not the victim or society. Using this line of reasoning, restitution can still lay claim to retributive effects, but 'forte' it probably is not.

Another theoretical link between retribution and restitution is "Equity Theory," which argues that when one party (victim) feels relatively powerless in relationship to another party (offender), both experience distress. From a retributive point of view, restitution, therefore, may serve to empower the victim and thus reduce his or her distress.[19]

If it is true that there usually are trade-offs in most situations, there is a clear possibility that any retributive framework may have a negative trade-off. In this case, when the retribution exacted on the offender is perceived as inordinate or unfair by the offender, given the seriousness of the crime, a point of diminishing return may be reached quickly. As an example, if the restitution order creates a gross hardship on the offender's family, the retribution aim may be reversed with a great deal of offender resentment the result.[20]

General deterrence, another broad criminal justice system goal, also may be achieved, at least partially, through restitution. Through a means of attempting to persuade potential law violators not to break the law, restitution may serve as a reminder to citizens that rules are important and that they are to be followed in a civilized society. By having to compensate victims of their crimes, offenders are reminded that the rules apply to everyone.

Preventive insulation is another concept of deterrence that may be served by restitution, especially where limits on the offender's freedom supplement the restitution order and thereby reduce the offender's contacts with others who might by negatively influenced. Additionally, if the first two forms of deterrence have the desired effect and law-abiding behavior is promoted, the repetition of this prosocial behavior may develop into a positive pattern.[21] Yet, while deterrence and restitution may be compatible theoretically, there is little empirical evidence that restitution orders alone or in conjunction with other sanctions, serve to deter law violations.[22]

In terms of rehabilitation, at least one set of authors found that offenders who participated in one described restitution program had lower recidivism rates than those whose incarceration served as a sole sanction.[23] Another author suggests that restitution may have valuable

rehabilitative effects if it is administered properly and in goal-oriented ways.[24]

One possible explanation for the rehabilitative effects of restitution may be found in the "Equity Theory." Just as victims may experience a reduction in distress by empowering and returning them to a position of relative parity with the offender, so, too, the offender may benefit from a normalization of relations with the victim.[25] Obviously, other factors such as opportunities to develop marketable skills, counseling, and other correctional interventions may have some impact on rehabilitative outcomes, when they, in fact, occur. However, the use of restitution as a rehabilitative gesture may itself have some impact on the reversal of continuing violative behavior on the part of the offender.

Practical Applications of Restitution

The illumination of capability, value, and political elements in restitution decision-making is only partially served by our examination of precedents, trends and theoretical links to broad criminal justice system goals. It is the practical application that reflects real decision-making and the values of the principal actors involved in restitution programming. As examples, the Minnesota Restitution Center and its offspring, the Minnesota Restitution Unit, the Oregon Restitution Center, and the results of a survey of parole-based restitution participants (offenders and victims) collectively can be used to identify some of the issues that need to be addressed by program planners and administrators.

The Minnesota Restitution Center was created by the Minnesota Department of Corrections in 1972 and served as one of the first organized restitution programs in corrections in the United States. The Center was a residential program for adult, male felons who had been imprisoned and then released to parole to the program four months after entering the prison. The program involved a restitution contract negotiation phase with direct involvement of the victim. This occurred at the state prison and was followed by a restitution implementation phase, which transpired when the offender was released to the Center."[26]

Additional offender eligibility criteria included:

1. Sentenced from the St. Paul-Minneapolis Metropolitan Area.
2. Property Offense.
3. No felony convictions for crimes against persons during the preceding five years of community living.
4. The current offense did not involve use of a gun or knife.
5. No detainers in file.
6. Most recent prison admission was not for parole violation (although the new offense sentenced for may in fact have occurred while on parole thus constituting a violation).

The Minnesota DOC Report[27] emphasizes the fact that the payment of restitution was the primary, not sole treatment approach used at the Center. In examining the results, the Center utilized an experimental

design with 69 controls, who remained in prison, and a final total of 62 experimentals. The mean number of years to be served was 4.1 and the average number of previous felony convictions was 1.46.

More than 60 percent of the offenders were between 21-30 years of age with an average of 10.68 years of education. In over one half of the cases, the restitution order involved amounts between $1 - $200. Of the participating victims, 35 percent were individuals and 65 percent were corporations or other third parties.

The immediate program outcomes saw 56 percent of the experimentals fulfilling their restitution orders. Of the remaining 44 percent, over one half of the participants were unable to fulfill the restitution order. An 18 month follow-up of the entire study population indicates that while experimentals did spend less time in prison, they actually wound up with more time in state custody or under supervision than the controls.

At the time of the follow-up, 21 experimentals remained in the program, nine had been discharged without further court involvement, and two had died. Further, six of the experimentals were sent back to prison as new commitments (lower than rate for controls), 22 were sent back to prison for technical violation of parole (higher than control rate), and two escaped and were still at large (lower than control rate).

In 1976, The Center was closed because the number of referrals by the DOC to the program was insufficient to keep the Center functioning on a cost-efficient manner. "With the closing of the Minnesota Restitution Center, the focus on restitution within the Department changed. The number of restitution program staff were reduced and their responsibilities changed from one of developing restitution agreements and supervising the offender on parole to an emphasis on the development of restitution agreements with responsibilities for parole supervision left to the assigned parole officer."[28]

In essence, the restitution unit served as a clearinghouse for the collection and dissemination of information about restitution programs. The focus and nature of restitution within the Minnesota DOC changed to include property offenders from anywhere in the state, but without victim-offender contact and without early release to a residential placement. Instead, offenders are released at a standard parole date on conventional parole without a requirement to reside in a community facility for a specified length of time.

In 1976, the Minnesota Corrections Board adopted a matrix for guiding sentencing decisions. The length of sentence under the matrix system is dependent on the severity of the offense plus different combinations of the following predictive factors:

1. Prior conviction for the same offense.
2. Age 19 or younger at the time of the first felony conviction.
3. Three or more felony convictions including the current offense.
4. One or more prior adult commitments to a state facility.
5. Two or more prior probation or parole failures as an adult.

6. The current sentence includes one or more burglary convictions.

The system was designed to eliminate (or at least reduce) inconsistencies in paroling decisions. The Minnesota Restitution Unit report elucidates some of the guiding values behind the matrix: "Since Restitution (sic) releases are appropriate only for those with no recent histories of violent crime, only some of those in the first three levels of the Matrix Severity of Offense are eligible for consideration for release with Restitution (sic) after the appropriate minimum sentences are served."[29]

In Oregon, post-incarceration restitution initially consisted of a 20 person work release center funded in 1976 through an L.E.A.A. grant to the Corrections Division of the Oregon Department of Human Resources.[30] Eligibility included any convicted felon incarcerated in one of the three state penal institutions with a restitution obligation. The Salem Community Corrections Center, which was similar to the other eight CCC's in the state, served as the site for the restitution program. A key ingredient of the program was that staff negotiated a restitution amount between the victim and offender based on the original court order. If a mutually agreeable amount could not be decided, the victim was encouraged to pursue civil remedies.

Several problems confronted the program, the first of which was citizen and governmental opposition to using the Salem area as a site for the work release center. This opposition delayed start-up for six months. Legal questions also arose. The state's Attorney General ruled that amounts could be established by program staff only in cases of voluntary restitution. If the restitution obligation was court ordered, the court would have to establish the amount. Also, restitution payments to insurance companies were disallowed.

A third difficulty was the fact that there was only one work release center in the state and it only served males. This created obvious impediments for female offenders and male offenders who wanted to settle in areas other than Salem. The answer was to change the conditions of the grant to allow for work release components at the other eight Community Correctional Centers in the state, including the Portland CCC, which served females.

The final hurdle was to educate judges who were used to ordering restitution as a condition of probation. Many judges feared not having an avenue to collect restitution if it were ordered in conjunction with incarceration. This situation was remedied through individual contacts with judges and use of the mass media to explain the program.

Although a great deal of data about the program is not available, several evaluation methods have been described. These include quarterly, internal reports and accountability audits by an external consultant. In 1978, the state picked up funding for the program.

Heinz, Galaway, and Hudson,[31] through their review of a number of restitution programs, shed further light on critical issues that influence decision-making. Their study examined 36 programs in parole. Of

particular relevance were four findings that address administrative, victim, and offender perceptions. Fifty-eight percent of the responding program directors indicated that successful completions in their programs ran at a rate of 80 percent or higher.

Satisfaction with the programs was fairly balanced between offenders and victims. For offenders, a total of 33 percent were either satisfied or very satisfied with the program. The remainder was not satisfied. Forty-three percent of victims were satisfied or very satisfied with 57 percent expressing some degree of dissatisfication.

However, on one indicator of perceived fairness, the results were somewhat different. Given only one choice, victims and offenders were asked to identify the sanction they thought was fairest. The findings were as follows:

	Offenders (%)	Victims (%)
Monetary Restitution	29	61
Personal Service Restitution	3	1
Community Service	37	9
Probation	28	6
Jail/prison	3	23

One last measure, which was logically related to the fairness issue, was that of preference for contact between offender and victim to determine restitution program requirements. Seventy-two percent of offenders compared with 46 percent of victims indicated they wanted direct contact. Of the offenders, 24 percent said they wanted no contact, while 36 percent of the victims expressed the same belief. Three percent of the offenders and 18 percent of the victims expressed no response.

This survey, together with the three programs discussed, yielded a variety of performance measurements. From specific outcomes, such as program completion, to less direct products, such as victim perception of satisfaction, the clearest point that can be made was that restitution was not a clear, unequivocal issue. This appears to be true whether the approach taken was theoretical or practical.

Critical Dilemmas

Each theory and each practical application associated with restitution suggests, at a minimum, certain choices. These choices are manageable within such decision-making frameworks as capability, values, and politicality. Moreover, regardless of the setting, some choices or decisions take on special significance because of their potential impact, which can be described as "critical dilemmas." At least six can be garnered from the literature on restitution.

The first is that of decision-making authority. Who can order restitution, and in what amounts? This becomes a critical area of concern for restitution may be prescribed legislatively, judicially, or by an agency within the executive branch of government.

The experience in Oregon, for example, involved the Attorney General's declaration that once restitution was ordered by the courts, it was the responsibility of the court to set the amount. The Attorney General also stated that only in cases of voluntary restitution could the Department of Corrections help negotiate the bottom line.

The 1976 New Jersey Supreme Court case, In re: D.G.W., found that a probation department could conduct investigations and recommend restitution, but the final restitution order must be made by the sentencing court.[32]

The twin questions of who can order restitution and how much obviously involve turf issues and legal empowerment. This is true notwithstanding what some might consider more important issues, namely those of efficiency and effectiveness, as well as capability.

Another focal area is the victim. Specifically, who is eligible or ineligible to receive restitution? Carrow indicates that in the case of victim compensation programs, many extend payments to service providers such as hospitals and physicians in addition to payments made directly to victims. Yet, there is debate over whether dependents of victims, police and firefighters, and victims related to the offender should be eligible. Other salient issues are victim contribution to injury and victim cooperation with the police.[33]

Still another question is that of the process of notifying victims. Should this be accomplished through general public awareness campaigns, elective outreach (victims of major felonies), or through individualized identification and notification? Also, who bears the responsibility for such notification?

What loss assessment style should be used? Harland[34] identifies three possible models: The Convenience Model, which relies on information available through the criminal justice process, e.g., official reports, victim statements, offender statements, etc.; the Insurance Model (most common), which involves program staff conducting an investigation that includes contact with the victim, relevant third parties, and consulting various reference materials; and the Negotiation Model, where victim and offender, either directly or through a third party, reach a settlement.

While not exhausting all possible victim considerations, a final issue here is compensable losses. Carrow cites examples of losses that might be compensated, including: medical expenses, rehabilitation expenses, physical disability, loss of the services of a family member, loss of support for dependents, funeral costs, loss of future earnings, mental impairment, and property loss and damage.

It should be pointed out that Carrow, for the most part, is concerned primarily with victim compensation programs wherein violent offenses are the concern.[35] Most restitution programs, on the other hand, have been concerned with property offenses.

Numerous issues arise under the third focal area, namely, that of offenders. In addition to questions of relevance already discussed, such as voluntary versus involuntary restitution and who will be responsible for plan formulation, Harland discusses the importance of eligibility criteria.[36] Beyond the obvious justification of minimizing arbitrary decisions, eligibility criteria can help conserve resources by admitting only the most "important" cases. In the same report, Harland argues for setting priorities where multiple sanctions exist. Similarly, priorities may have to be set where multiple victims exist.

Clearly, a major decision to be made is the level and nature of services to be provided for the offender, for which Martin summarizes some general guidelines. "Some (Eglash 1958; Keve 1978) assert that in addition to guilt reduction, 'creative restitution' provides positive psychological rewards for the offender and is rehabilitative when the conditions of a restitution sentence: a) require the offender to give of him or herself to benefit another; b) provide a clear task, which c) relates to the harm caused; and, d) produce visible rewards for the other."[37]

According to Galaway and Hudson, there is a clear caveat in order. Their experience with the Minnesota Restitution Center suggests that a major issue for that program was to maintain a focus on restitution instead of getting caught up in behavior management dilemmas or treatment approaches where the emphasis becomes counseling instead of work.[38]

While this is clearly a value element it may be congruent with capability elements such as cost containment. Nevertheless, it is the latter that serves as a proper base or starting point in deciding the level and nature of service.

Insofar as the work focus is concerned, another dilemma may be the ability of offenders to secure meaningful jobs in order to pay their restitution orders. In an unpublished report by Evans and Longfellow, offenders placed in the Residential Restitution/Diversion Center, within the Georgia Department of Offender Rehabilitation, are described as earning an average of $3.25 per hour, with some who have skills earning as much as $6.00 per hour. The issue of meaningful employment is also connected to the issues of site location and the establishment of attainable restitution amounts - issues which have impact on the likelihood of success of any offender-based work program.

Two related issues, when to violate and expanding social control, receive attention in the restitution literature. Harland[39] suggests a range of actions to be taken in the event of default. From least to most restrictive, these include:

- Increase supportive services to the offender.

- Plan modification, e.g., extend the supervision period, increase supervision conditions, modify payment arrangements, etc.
- Release from the obligation, or
- Retract incentives, e.g., no early release from supervision, or
- Revoke parole.

The response to be taken obviously is affected by the reasons for default, vis., refusal to pay versus inability to pay. In either event, where return to prison is possible, consideration should always be given to due process requirements, as stated in Morrissey v. Brewer (1972)[40] and Gagnon v. Scarpelli (1973).[41]

In the former case, the United States Supreme Court found that not all situations calling for procedural safeguards call for the same kind of procedure. The famous litmus test is the balancing of the state's interest in orderly and efficient administration against the offender's interests, which may include conditions being placed on him or her.

The Court, in Gagnon, enumerated several basic rights to be afforded offenders whose probation was being revoked. These include written notice of the alleged violation and a neutral and detached hearing body, among others. One author asserts that revocation is the point where appellate intervention occurs most frequently, that default is denied rarely, and, rather, the original restitution order is challenged.[42]

The companion issue of expanded social control through extension of the supervision period is also addressed. If the offender is extended but unable to pay the full amount ordered, 14th amendment questions are raised. For instance, is the offender being treated unequally on the basis of economic status?[43] Additionally, as others have suggested, a fairness issue is invoked, for if a hearing authority revokes for inability (rather than refusal) to pay restitution, have we then reinstituted a debtors prison? Appellate courts in Pennsylvania, Alabama, and the United States, as examples, have declared that ability to pay must be considered in setting restitution amounts, which need not be directly related to actual victim costs or expenses. However, once an amount is established fairly, revocation can proceed if there is refusal to pay.

In an interesting sidelight to the above issue, the United States Court of Appeals, Fourth Circuit, in 1984, ruled that a restitution order is not abated as a result of the death of the offender, which, in effect, states that restitution "survives the grave," regardless of whether the creditor is a person or a government. This legitimates turning a criminal sanction into a civil matter.

The fourth focal area can be referred to as support from significant others, particularly from those who sit in positions of authority. As has been discussed earlier, the lack of support from the Department of Corrections in Minnesota helped to disestablish the Restitution Center. In Alabama the Attorney General helped to kill the SIR program.

In Oregon, the public became another key player. Using a telephone survey of 500 households in Columbia, South Carolina (pop. 250,000), Gandy and Galaway discovered another telling barometer of public sentiments. The researchers found considerable support for restitution sanctions alone or in conjunction with counseling and probation for some property offenders, particularly those without prior arrests. However, community service as a form of restitution generally received little support.[44]

Yet, there was support for personal service restitution when it was accompanied by other sanctions. In addition, most of the respondents indicated that they would participate if victimized. Of considerable importance was the lack of support for any restitutive sanctions for offenders who committed crimes against persons.

Insofar as the topic of program evaluation is concerned, one author recites three very familiar reasons for conducting program assessments: 1) to assess the extent to which program goals are being achieved; 2) to provide feedback upon which program modifications can be based; and 3) to provide a measure of accountability, particularly for external audiences and especially during times of fiscal retrenchment.

Notwithstanding the desirability of conducting program evaluations, a crucial question is that of the type to be utilized. Hudson, et al.,[46] suggest a distinction between process and outcome measures. The former includes social (case processing) and general (financial) accountability audits, as well as output measures, e.g., numbers served. Evaluation of outcomes, on the other hand, considers important factors like successful completions by offenders and recidivism rates. Both evaluation forms, process and outcome, have attendant problems (not the least of which is cost) and deficiencies. Each also has contributions to make toward meeting the three objectives for doing evaluations in the first place.

The final area of concern is project liability. Hudson, et al., discuss this concern as it is related to community service projects, but their discussion is equally applicable to monetary restitution projects as well. According to the authors, the two major, generic issues are: injury to the offender while at work and injury to others caused by the offender. Workman's Compensation may or may not address the former concern and general governmental immunity may or may not be adequate insurance against offender-caused injuries to others.

Conclusion

Restitution can be viewed both as a concept and as a program. Conceptually, it is concerned with the redress of wrongs against innocent persons. As a program, it deals with practical concerns related to the needs of the state, victims, and offenders. Regardless of approach and notwithstanding ideological differences and concerns, restitution as a practice has been receiving increased attention in the lay and criminal justice communities.

The development and implementation of restitution programs must be concerned with choices and decisions. Those who make public policy are the persons responsible for these choices, which, obviously, are best addressed during early planning phases. Yet, as has been discussed earlier, no choice and no decision is without some king of tradeoff - tradeoffs which have intended and unintended consequences, reversibility of consequences, and impact on non-targeted interests.

In terms of increasing importance, establishing goals and objectives for restitution programs, making basic decisions, and analyzing the tradeoffs of those decisions invariably will be influenced by values - what individuals and societies think should be accomplished. Once clarified, it is appropriate for those values to guide decision-making.

Having clarifed and made explicit these values, establishing specific goals and objectives, and making specific decisions about program alternatives and their tradeoffs must be based on capability - what we think we can do. For example, are resources available to accomplish the declared mission? Is the program feasible? Is the setting conducive and management supportive to sustain the program, especially when unanticipated consequences arise?

No matter how the program is designed, it will always be necessary to build a political vehicle, both governmental and public, to help realize capability. Correctional superiors are answerable to governmental superordinates, who, in a very real and practical sense, control the destinies of such human service organizations. Political support can never be taken for granted. Correctional policy is not necessarily synonymous with public policy - they frequently have to be massaged, manipulated, and sometimes even coerced to mesh. No matter how sound the correctional policy may be, if it is not supported by those who make public policy, no program can endure for long.

In the final analysis, capability must be guided by values and with political means available to realize that capability.

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CHAPTER TWO

HISTORICAL OVERVIEW

The Historical Context of Restitution

For centuries, restitution has been both an accepted concept of justice and an operational reality. In primitive societies, the victim of a crime punished the offender through retaliation and revenge. As society became more organized, the pattern of revenge became known as "blood feuds" or "blood revenge." Eventually, certain rules of retaliation became recognized as customary and proper.

As societies became more civilized and economically sophisticated, the harshness of the blood feud gradually gave way to a system of compensation. Revenge, which had been unregulated, tended to be replaced by a system of negotiation between families of the offender and victim. Eventually, indemnification to the victim through payments of goods or money became commonplace. This new process became known as "compensation".

Although archival documentation is not available, in Europe and the United States, familial group response to crime was replaced by the sovereign or government. In matters of criminal law, the interests of the state gradually overshadowed and supplanted those of the victim. The connection between restitution and punishment thus became severed and it came to play an increasingly smaller role in the administration of justice. The rights of the victim and the concepts of compensation and restitution were separated from the criminal law and instead became incorporated into the civil law of torts.

In the Anglo-American legal system, there is a strict separation of the criminal law from the civil law. In the case of a crime, which gives rise to both a criminal action by the state and a potential, but not often utilized action by the victim, the two actions traditionally have been kept completely separate. In theory, victims of crime have had available to them the right of redress through civil action. In practice, however, this action has been of little value. The offender is often unknown, and where he or she is known, the victim often cannot afford the expense, in terms of time and money, of bringing a tort action against the offender. Perpetrators of crimes frequently are indigent; thus, a civil judgement is no more than a hollow victory for the victim. Furthermore, observation reveals that many victims do not want "blood" money; they, in fact, want as much distance from the offender as is possible to obtain.

As efforts to control crime and delinquency moved from a Classical orientation, where the offender was thought to have free will, to that of a Positivistic orientation, where the offender was thought to be deterministically influenced, the practice of restitution was relegated to an even more insignificant role. For both courts and corrections, treatment of the offender and efforts at rehabilitation became paramount. Concern for the victim received nothing more than empathic and passing interest.

Punishment was translated into a sentence and restitution for the victim was rarely imposed by the courts. It appeared until recently that restitution, either as a concept of justice or as an obligation on the part of the offender, had no role in our system of criminal justice.

During the last two decades there has developed throughout the world an increased interest in legislation to provide monetary indemnification to victims of crime. This concern for the plight of the victim may be due, in part, to changing philosophies about punishment, protocols for controlling crime, and efforts to deter predatory behavior. In the United States, particularly, efforts to extract more accountability from the offender have been increasing. Further, through the efforts of Margery Fry, an English penal reformer, there was advocacy that the state assume responsibility for dealing directly with victims and compensate them as a matter of social welfare policy.

Fry not only returned the concept of restitution to the consciousness of penologists, she helped to refine the distinction between compensation and restitution. The former has become a system whereby the state pays victims for losses as a result of crime; the latter continues to be a process whereby the offender indemnifies the victim for losses. In the United States today, both schemes have become popular. According to the Bureau of Justice Statistics (U.S. Department of Justice) at least 38 states have enacted legislation creating crime compensation boards. Many of these states, which are only concerned with victimization as a result of violent crime, fund their programs from general revenues. A few programs, however, are supported in whole or in part from offender assessments or restitution.

While judicial authority to order restitution has existed explicitly in many states and is generally thought to be inherent in the sentencing power of criminal courts, specific legislation encouraging or mandating restitution is being enacted more and more throughout the country. Many of its proponents argue that restitution not only deals with victims more humanely and rightly, it also offers a number of advantages over present methods of trying to change offenders. For one thing, reparative payments can help to defray such costs as medical bills and wage losses incurred as a result of victimization. For another, the process of restitution can create within the offender a sense of the true extent of the harm inflicted on another human being. Fiscal atonement, according to the proponents, can produce in the offender a feeling of having been cleansed, a kind of redemptive process, which, hopefully, will inhibit further wrongdoing.

The closer attachment of the penalty to the offense, and the criminal to the victim, have also been said by many to represent a method for bringing about justice superior to the present procedure in which the offender may pay a fine which goes to the state, or may serve time in prison, where he or she will work for minimal or no wages or simply idle away time.

For some, a considerable portion of the appeal of restitution programs for dealing with criminal offenders lies in what is now generally regarded as the almost total bankruptcy of current criminal

justice approaches. Imprisonment particularly has come to be seen as a counterproductive process, unable in general to deter subsequent criminal acts either in regard to the offender or those for whom he or she might serve as an object lesson. Treatment regimens for criminal offenders also have come under severe attack, much of which is founded upon evaluations of their negative impact on criminal recidivism. Such findings, however, have not deterred policy-makers from increasing sentences in order to incapacitate, a policy which has been receiving increasing attention in recent years.

Parole, rooted just as firmly in an historical context as restitution, is under attack for its apparent inability to correct, change, or otherwise control criminal offenders. Abolished in a few states, parole critics charge that it is time to return to basic sentencing - a responsibility of the courts in a judicial proceeding, not that of an administrative body, the parole board. The complaint has also been voiced that parole boards, so far removed from the commission of the offense, cannot help but minimize the needs of victims in favor of the needs of offenders.

That legislation creating parole deals almost exclusively with offenders and not victims does not deter the critics of parole. Yet, the extent to which such charges are true almost is a moot issue, for what is perceived as real is real in the minds of observers. Yet, critics of parole have been most silent in face of the increasing rate of parole board utilization of victim impact statements in their deliberative processes. Also, many boards today invite victims to participate indirectly in parole decision-making when they are asked to comment on the possible release of offenders.

As a noted authority has stated, restitution is clearly an idea that merits a serious test in terms of its ability to alleviate some of the severe problems that beset efforts to deal with crime and criminals in the United States today. It may bring about better feelings in citizens about the quality of justice in the country; it may prove of value to victims; and it may help criminals better appreciate the nature of the harm they inflict on others. It may also help to alleviate an offender's alienation from a law-abiding existence. Even if its advocates do not view restitution as a panacea, it may contribute to a constructive and potential ameliorative approach.

For many, including those in parole, restitution appears to offer some hope that an element of empathy for the victim, long ignored, might be reintroduced into the business of criminal justice administration. It seems that the failure of the offender to identify his or her interests with those of the victim represents the worst horror of predatory, criminal activity and its worst threat to a decent way of life. Thus, restitution, both as a concept and a practice, may relate to the perceived need of a healthy society to close the distance between its peoples; to create feelings of relationship and common purpose, so that one group does not consider itself free to exploit another.

Within the framework of the administration of justice in the United States, it may very well be that it is the parole board, the last

administrative body within the network of services and programs, which can salvage the remnants of justice by caring for the victim while simultaneously trying to change the offender. Restitution, as a carefully constructed process, might offer this hope and demonstrate to an eager society and hopefully a concerned system of criminal justice that it indeed can be done.

Community Service

Very much related to the concept of restitution is that of community service. For many years offenders have been required to perform some type of work or useful service as a means of "paying" the state for their crimes. Such penalties, usually imposed at the time of sentencing or when placed on parole, have been based on the belief that the entire community suffers from the crime committed and that some recompense is needed to mend a damaged society. They have also reflected the view that the penalty imposed on the offender might as well help others.

Regardless of what lawful authority imposes community service, it is viewed as a program that places offenders in unpaid positions, usually with nonprofit, tax supported, or government agencies, to perform a specified number of work or service hours and within a specified period of time. The administrators of such programs are responsible for making appropriate placements, verifying offender progress toward completion of service, issuing reminders or warnings, arranging for placement changes or other modifications, and submitting reports to the ordering authority.

For many advocates, the primary purpose of community service, as a form of restitution, is to provide offenders with an opportunity to repay the community for damages incurred. Thus, community service orders are viewed as a response to criminal acts that recognizes the responsibility of the individual offenders. Community service requires the offenders' active participation in constructive acts and, therefore, according to some, helps to bring the offender into more realistic citizenship - the ultimate goal of correctional intervention.

Moreover, advocates argue, community service programs provide an opportunity for many offenders to develop work experiences, occupational skills, and special training - all commendable goals in efforts to reshape the lives of persons who otherwise have demonstrated their inability to live peacefully and constructively in society. Many supporters believe that one of the best outcomes is that of sensitizing offenders to the needs of others while simultaneously teaching them that they can do something positive to fulfill those needs. Yet, the notion of punishment is not lost even among liberal advocates, especially since any performance of service or work without pay has to be recognized as an imposition on the time and liberty of the offender.

CHAPTER THREE

PAROLING AUTHORITIES AND RESTITUTION: A NATIONWIDE SURVEY

In order to determine the degree to which restitution is utilized in the parole setting throughout the United States, a questionnaire was sent to all adult parole authorities. They were asked to indicate if they ever utilized restitution as a condition of parole and, if so, what mechanics of implementation had been developed. Further, they were asked to indicate if they would consider the utilization of such a condition in the future if they were not currently imposing this condition.

Twenty-seven states responded to the questionnaire. All but eight indicated that restitution as a condition of parole was occasionally utilized by their respective boards. Five states indicated that they would not consider its use in the future. They also suggested that the law, or a court, or an attorney general's opinion precluded such a condition.

Although 70 percent of the respondents indicated the use of restitution as a condition of parole, the findings are more ambiguous than they appear. In only three instances did the respondents indicate that the parole board initiated such a condition. When such a condition is imposed, it is done primarily to enhance "rehabilitation" of the offender. In almost every other case where such a condition is utilized, it flows from an original order by the sentencing court. That is, most boards recognize the legitimacy of the original restitution order, include it as a condition of parole when full payment has not been made at the time of release to parole, and enforce the collection of appropriate payments. However, almost no board assumes the responsibility for declaring such a condition when it was not imposed in the original sentence.

A number of respondents indicate that the boards assume responsibility for changing amounts to be collected when there is clear and ample evidence that the parolee is unable to pay restitution or if the amount is beyond the parolee's means. No one indicated that a new court hearing was needed to modify the original order or even if the sentencing court is notified of such modifications.

According to several respondents, discretion is utilized in making modifications when any one or more of the following conditions apply:

1. If employment by the parolee is limited.
2. If the parolee cannot pay the full amount.
3. If the victim cannot be found or no longer wants restitution.
4. If there is a problem in determining the appropriate amount of restitution.
5. If there are third-party payments to the victim which reduce compensable losses.

For the responding boards which state that they probably would not voluntarily utilize restitution as a condition of parole, the following reasons are cited:

1. The use of restitution as a condition of parole would produce confusion on the part of the parole officer, who could become more of a collection agent than a counselor.
2. There are too many administrative problems associated with collections.
3. There are administrative problems associated with making payments to victims, many of whom cannot be found.
4. It brings the victim and the offender in closer contact than most victims desire.
5. The initiation of restitution at the time of the offender's release from prison comes much too late after the offense and losses.
6. Any attempt to determine actual, appropriate, and compensable losses sustained by a victim would impose a staffing and administrative burden on the board and the parole staff.
7. There are too many problems associated with determining a parolee's ability to pay and his or her changing income status.
8. Any order for restitution should come from the sentencing judge; that is, it should be a judicial decision.
9. In most cases, the ability by the board to impose such a condition would require legislative authorization.
10. If money is to be collected, those persons involved would have to be bonded.
11. Additional staff would be needed for administrative purposes.

In the final analysis, restitution as a condition of parole is rarely utilized if a distinction is made between court imposed and parole board orders. According to the respondents, court ordered restitution is always recognized and collections are required, even if boards occasionally make modifications in the amounts to be paid. For the very few states which impose restitution as a condition of parole, it is done under the rubric of rehabilitation of the offender. In these states, it is pointed out, a board's right to impose a restitution condition is usually statutorily authorized.

CHAPTER FOUR

THE NEW JERSEY STATE PAROLE BOARD AND RESTITUTION

Powers and Duties of the Board

The Parole Act of 1979 (N.J.S.A. 30:4-123.45, et. seq.) is administered through the rules and regulations adopted by the Board (N.J.A.C. 10A:71-1, et. seq.).

The law establishing the New Jersey Parole system provides for an autonomous authority housed for logistical purposes only within the Department of Corrections. The Board is exclusively charged with the responsibility for administering a parole system for all persons sentenced to any state training school, correctional facility, state prison, and for county correctional facility inmates serving terms greater than 60 days. It is vested with the power to issue warrants for the return to custody of parolees violating the trust of parole and the authority to command before it any information relevant to its proceedings. The Act specifically provides that parole eligibility dates for inmates sentenced under the 2A Penal Code (repeat offenders and offenders serving a term of life imprisonment) are governed by the former parole statute (N.J.S.A. 30:4-123.1, et. seq.), which is continued in effect for that purpose.

The Board has the continuing responsibility to impose and modify conditions of parole to reduce the risk of failure and to support successful community reintegration.

The Board may also recognize the exceptional adjustment of inmates via reports to the sentencing court as well as issue Certificates of Good Conduct. When appropriate, it may discharge parolees from supervision prior to the expiration of their maximum sentence.

The Board is further delegated by the Governor the responsibility of receiving and investigating applications for executive clemency and formally advising him in the exercise of this power.

The significant discretionary authority vested by law in the Board is continuously scrutinized to assure adherence to due process and to provide for community protection. Concern for the victims of crime is expressed in the Board's effort to involve judges, prosecutors, and victims in the parole release decision process. In addition, victims now have an opportunity to have their statements or testimony considered at the parole release hearing. This active involvement of victims has the potential of providing one of the most important refinements to the parole process in the past decade.

Restitution As A Special Condition of Parole

The New Jersey State Parole Board in recent years has recognized the potential of restitution as a condition of parole that can help to (1) provide redress for victims, and (2) assist the offender in his or her

efforts at rehabilitation. In 1980, it approved the release to parole of a Thomas Trantino, a convicted murderer, provided that certain, appropriate conditions were met.

One of these conditions was that Trantino pay restitution to the families of the slain victims. According to New Jersey law, only the sentencing judge has the authority to set the amount of a restitution order or condition. In this case, the judge refused to do so on the grounds that he could not establish an equitable dollar value for the lives that were lost.

For a number of reasons, the issue went before the courts and in a 1982 decision, the Supreme Court of New Jersey held:

1. The Parole Board may consider the imposition of restitution as a condition of parole for an inmate convicted of homicide.
2. The Parole Board is required and authorized to reconsider and redetermine Trantino's fitness for parole.
3. The Parole Board must determine if the punitive aspects of Trantino's sentence have been satisfied such that he is truly rehabilitated and is not likely to commit crimes in the future.

The Supreme Court went on to state that compensatory payments in the nature of reparations (restitution) are authorized by New Jersey's Parole Act, provided that they are imposed in a manner that will reduce the likelihood of the recurrence of criminal behavior. It also stated that restitution could be used to pay a victim or an injured third party for actual loss or damage, but that the Board could limit damages to medical expenses and costs, funeral expenses, specific personal property losses, limited lost wages, and certain other clearly provable losses. The Court also dictated that restitution had to be limited realistically to a parolee's ability to pay and integrated into a plan that would not jeopardize rehabilitation.

Further, the Court went on to say: "Inmates serving sentences under the new Code of Criminal Justice (in New Jersey) will have presumptively satisfied all punitive aspects of their sentences at the time they become eligible for parole because parole eligibility is now a decision of the sentencing judge, who can fix a mandatory minimum term before parole eligibility."

The New Jersey Parole Act of 1979, incidentally, gives specific approval to the Parole Board to attach restitution as a condition of parole to the victim of an offense perpetrated by the potential parolee. The specific language of the Act is as follows:

> ...based on the prior history of the parolee, the member of the board panel certifying parole release...may impose any other specific conditions of parole deemed reasonable in order to reduce the likelihood of recurrence of criminal behavior. Such special conditions may include, among other things, a requirement that the parolee make full or partial restitution, the amount of which restitution shall be set by the sentencing court upon request of the board.

The consequences of the above are that (1) the Parole Board has the right to order restitution as a condition of parole, even in cases involving homicide, (2) an inmate cannot be released to parole unless the punitive aspects of the case have been satisfied, (3) an inmate cannot be released to parole unless the Board is reasonably certain that the offender is truly rehabilitated and not likely to commit crimes in the future, (4) the Board is not empowered to set the amount of restitution - only the sentencing court can legally set the amount, (5) the Board is responsible for developing and setting guidelines for use by sentencing courts, (6) restitution can be paid directly to victims of crimes or injured third parties by the perpetrators of such crimes essentially only for provable losses, (7) restitution must be realistically limited and related to the parolee's ability to pay, (8) restitution must be integrated into an overall plan of rehabilitation, and (9) the Parole Board does not have to order restitution as a condition of parole if it chooses not to do so.

The Violent Crimes Compensation Board

The New Jersey legislature passed the "Criminal Injuries Compensation Act of 1971," which created a Violent Crimes Compensation Board. This agency, which is responsible for setting application guidelines and processes for hearings, is empowered to provide compensation to victims of violent crimes. The act also states:

> In any case in which a person is injured or killed by any act or omission of any other person which is within the description of (specified, violent)...offense...the board may, upon application and the concurrence of a majority of the (board)..., order the payment of compensation...:
>
> a. to or on behalf of the victim,
> b. in the case of the personal injury of the victim, where the compensation is for pecuniary loss suffered or expenses incurred by any person responsible for the maintenance of the victim, to that person, or
> c. in the case of the death of the victim, to or for the benefit of the dependents of the deceased victim, or any one or more of such dependents.

The act also states that such compensation may be awarded to a victim whether or not any person is prosecuted or convicted of any offense. It may order payment of compensation to victims for:

1. expenses actually and reasonably incurred as a result of the personal injury or death of the victim.
2. loss of earning power as a result of total or partial incapacity of such victim.
3. pecuniary loss to the dependents of the deceased victim, and
4. any other pecuniary loss resulting from the personal injury or death of the victim which the board determines to be reasonable.

All requests for compensation must be submitted within two years after the date of the personal injury or death. The offense must have been reported to the police within three months of its occurrence. Out-of-pocket expenses must exceed $100, but compensation may not exceed $25,000. Further:

> Whenever an order for the payment of compensation is or has been made for personal injury or death resulting from an act or omission constituting an offense...the board shall, upon payment of the amount of the order, be subrogated to the cause of action of the applicant against the person or persons responsible for such personal injury or death and shall be entitled to bring an action against such person or persons for the amount of the damage sustained by the applicant and in the event that more is recovered and collected in any such action than the amount paid by reason of the order for payment of compensation, the board shall pay the balance to the applicant.

Recent Legislation

In 1985, the New Jersey legislature passed several bills, signed by the governor, which relate to restitution in the state. One, an act establishing a crime victim's bill of rights, seeks to obtain greater cooperation from crime victims and witnesses in the criminal justice process through greater levels of communication and coordination by criminal justice agencies. It also declares that victims have a right "...to be informed about available remedies, financial assistance and social services," as well as a right "...to be compensated for their loss whenever possible."

Existing legislation was amended which mandates the payment of no less than $25 and up to $10,000 by an offender to the VCCB for each conviction. The revised law now permits state and county correctional officials to deduct up to one-third of any income received by an offender as a result of labor performed at an institution or for any type of work release program to satisfy any unpaid assessment, fine, or restitution. The revised law also provides that if any person fails to pay court ordered penalties, the (sentencing) court may suspend the person's driving privileges or prohibit the person from obtaining a license.

Finally, and most significantly in terms of this report, the New Jersey Assembly passed a bill (No. 2804) requiring mandatory restitution for all offenders convicted of violent crimes and/or property offenses. This bill places restitution under the judiciary. As it states:

> [in] property cases, mandatory restitution shall be limited to the value of the property unlawfully taken or damaged. In cases involving injury to a person, mandatory restitution shall include such items as medical expenses and related costs, reasonable funeral and burial expenses and lost income up to any definite date ascertainable at the time of sentencing. . .The amount of restitution due the victim under this section shall be the actual amount of compensable loss caused by the defendant's actions and shall not be limited by a reduction in charges pursuant to a plea agreement.

Under this bill, the sentencing court is responsible for determining the amount of restitution. The amounts may range up to $100,000 for conviction for a first or second degree crime, $7,500 upon conviction for a third or fourth degree crime, $1,000 for a disorderly persons conviction, and finally, $500 for a conviction for a petty disorderly offense.

Although the above legislation has not yet been signed into law, its passage is likely in the very near future.

CHAPTER FIVE

THE CRIMINAL JUSTICE SYSTEM IN NEW JERSEY: A SURVEY OF VIEWS ON RESTITUTION

Although the field of parole occupies a unique position within the administration of justice in any state, it is impacted by and influences other criminal justice agencies. Whether the concern is that of law enforcement, the courts, or other agencies within the network of corrections, decisions made by parole authorities about clients within criminal justice do not necessarily stand alone.

Further, as we have come to discover within recent years, concerns for and rights associated with victims have been increasing significantly. Thus, the decision to release an inmate from incarceration to parole, while important for the inmate, is viewed with just as much concern by victims, judges, prosecutors, defense counsel, law enforcement, and correctional authorities.

In order to obtain some measure of the political climate for the increased use of restitution as a condition of parole by the New Jersey State Parole Board, a survey instrument was constructed and mailed on a purposive sample basis to selected criminal justice officials in New Jersey. These persons included judges, prosecutors, public defenders, sheriffs, wardens, and chief probation officers. Twenty-six respondents returned completed instruments via the mail.

In response to the question: "Do you believe restitution should be utilized as a condition of parole?" 81 percent of the respondents answered in the affirmative. Only some public defenders were against the idea. Those in favor suggested that a restitution condition should be considered in appropriate cases where there were demonstrable and computable losses sustained by a victim, where the parolee had sufficient resources to make such payments, and where the courts had not already ordered restitution at the time of sentencing.

The criminal justice authorities were also asked: "Do you believe this (restitution) program should be related in any way to the program of the Violent Crimes Compensation Board (VCCB)?" Here, the respondents were divided, for only 54 percent were in agreement. Some expressed the opinion that the VCCB already has statutory authority to make payments in selected cases which, in many ways, remains different from that which would be programmed by the Parole Board. Further, some stated that the VCCB is only concerned with restitution in violent crime cases, which would be too narrow a focus for the Parole Board. Still others reasoned that the administration of restitution by the Parole Board in conjunction with the VCCB would be cumbersome insofar as accountability and enforcement are concerned.

When asked to indicate the kinds of crimes for which restitution as a condition of parole should be imposed, the respondents suggested that such consideration should be given in all cases where proven, victim losses occurred. One authority stated that it should be imposed whenever

the perpetrator profited from the crime. Still another voiced the opinion that restitution as a condition of parole should never be a means for buying out of prison.

In view of the "Trantino" decision by the New Jersey State Supreme Court, which requires that the sentencing judge set the dollar amounts when restitution is being ordered, the authorities were asked if and how this requirement should be implemented. In every instance but one, where there was an expression of agreement, the respondents stated that if restitution is to be imposed at a time other than at the original sentencing, (1) the Parole Board would have to establish guidelines for judges, (2) a hearing would have to be scheduled, and (3) due process would have to prevail.

Several suggested that this procedure would be difficult administratively, would clog court dockets if there were many cases each year, and would necessarily involve not only prosecution and defense, but a non-existing staff (other than probation) who would be responsible for determining actual, compensable losses sustained by the victim.

Several respondents indicated that if restitution had to be approved by the sentencing judge, but at a time significantly distant from the trial and original sentencing, there would be too many pitfalls in the way of effectiveness. They cited the unavailability of victims, witnesses, and documents, and the potential added expenses of counsel for the inmate, as well as overloads for the courts and the prosecutors. However, in a somewhat contradictory position, when asked if the prosecutor should have any involvement in the process of restitution as a condition of parole, almost all of the respondents, including prosecutors, said "no."

In response to the question of whether or not any other agency or program within the network of criminal justice services, other than the courts and prosecution, should be involved in a parole-based restitution program, the respondents cited none.

While a preponderance of respondents indicated a willingness to support restitution as a condition of parole, there were several comments of advice and caution. Several suggested that such a program could never be successful without a supporting education program for the public as well as criminal justice system. As one stated, (such education is needed)". . .to ameliorate negative reactions to parole and underscore the state's concern for the rights and needs of victims."

Other issues that were cited in commentaries relate to court docket clogging; administrative problems associated with restitution hearings (if at a time different from sentencing); due process hearings; the desirability of keeping offenders separated from their victims; time lags in payments if victims have to wait until offenders are released to parole from prison; time limits for actual payments; and the possibility that the same sentencing judge will no longer be available for a restitution hearing after the original trial.

One additional comment that was made concerns parole revocation. The respondent suggested that a difference had to be made between a parolee who refused to make restitution payments from one who was unable to pay or to pay the amount ordered. In the former instance, the respondent indicated that a revocation hearing, which would be handled administratively by the Parole Board in a usual manner, would be appropriate, for it would be no different from any other technical violation. In the latter instance, it was suggested that if such a revocation proceeded, the state of New Jersey would wind up with a new form of a debtor's prison. The respondent argued that this should not occur. In either case, it was argued, any change in a restitution order probably would involve a new hearing, which would produce many of the problems in administration as cited above.

CHAPTER SIX

THE OFFENDER POPULATION AND PAROLE RESTITUTION

Introduction

As indicated in an earlier chapter, the Board is authorized to attach restitution as a condition of parole. In In Re Parole Application of Thomas Trantino, 82 N.J.347 (1982), the New Jersey Supreme Court affirmed the Board's authority to impose restitution in cases involving crimes of physical violence and homicide. Moreover, the court held that: a) the amount of restitution payments must be realistically limited; b) restitution payments in the homicide context must be made to the persons most directly affected by the parolee's criminal acts, c) restitution must be related to the parolee's ability to pay; and d) the amount of restitution must be directly related to the offense and the attitude of the offender. According to the Court, restitution payments must be designed to act as a continuing reminder to the offender of his offense and to provide an incentive for rehabilitation.

Research Design and Data Collection

In light of the criteria cited in Trantino, a decision was made to select a sample of offenders committed to the New Jersey Department of Corrections for crimes of violence. The research goals were to develop a comprehensive profile of this sample of offenders, as well as to generate a data base from which to develop projections on how many of these offenders at the time of parole eligibility might, in accordance with Trantino, represent suitable candidates for restitution.

In cooperation with the Division of Systems and Communications of the Department of Law and Public Safety, a sample was drawn consisting of 2723 offenders.[1] Although this figure was subsequently reduced for purposes of data analysis to 2717 cases, the initial total broke down into the categories noted below[2]:

TABLE 1

Sample of Offenders Committed for a Crime of Violence as of March, 1985

Murder 2A	697
Murder 2C	611
Murder 2A with Qualifier	2
Murder 2C with Qualifier	91
Violent Crimes - 2A	1028
Violent Crimes - 2C	294
TOTAL	2723

Following the selection of the sample, information was collected on each inmate from two sources: (1) the Board's Parole Eligibility Monitoring System (PEMS) files, and (2) via staff completed questionnaires designed to collect data not included in the PEMS files.

With respect to the first, the Board's Data Systems Unit maintains an extensive recordkeeping system on the parole eligibility status of each inmate. Specific items collected from the PEMS system included each inmate's institutional location, his or her actual parole eligibility date, sex, ethnicity, age, offense(s) convicted for (up to four separate indictments are coded), length of sentence, maximum sentence, statute sentenced under, and the county of conviction.

The above information-though essential to developing a demographic and sentencing profile of the sampled population-did not generate data directly relevant to restitution. The latter were collected through a questionnaire that was completed by the Board's institutional field staff. Specific items gathered from the questionnaire provided data on injury to the victim, the victim's relationship to the offender, type of counsel-representation, whether restitution was ordered at the time of sentencing, the offender's income level and employment status at the time of arrest, and his or her prospects for employment upon release.

Coding of the aforementioned data, as well as the development of a program for conducting data analysis was completed through Rutgers University. However, the actual analysis of data was done by the project manager and the consultants. The results of this analysis are provided below.

A Profile of the Offender Population

Recall that the final sample of inmates upon which analysis was conducted totalled 2717. Of these, 39.2% (N=1064) were confined at Trenton State Prison while 21.1% (N=573) and 14.1% (N=382) were housed at Rahway State Prison and Leesburg State Prison, respectively. As Table 2 shows, three institutional locations accounted for nearly three-quarters of the sampled population.

TABLE 2

Offender Population by
Institutional Location

INSTITUTION	FREQUENCY	PERCENT	CUMULATIVE
Trenton	1064	39.2	39.2
Rahway	573	21.1	60.3
Leesburg	382	14.1	74.4
Mid-State	23	0.8	75.3
Southern State	107	3.9	79.2
Clinton	83	3.1	82.3
Yardville	137	5.0	87.3
Bordentown	128	4.7	92.0
Annandale	72	2.6	94.7
Avenel	34	1.3	95.9
Other	110	4.0	100.0
TOTAL	2713	100.0	

With respect to the offender's sex, 97.3% (N=2541) were male, while 2.7% (N=70) were females.[3] In terms of ethnic identification, the percentages for black, white and hispanic offenders totalled 65% (N=1670), 25.6% (N=658), and 19.4% (N=242), respectively.[4] Finally, in terms of age, most of the offenders were in their late twenties through their mid-thirties. Specifically, 22.3% (N=574) were 18-26 years of age, 51.7% (N=1330) were in the age range of 27-36, while 26% (N=670) were thirty-seven years of age and older.[5]

Further analysis was conducted bearing on sentencing and parole eligibility. With regard to the change in 1979 in New Jersey's Criminal Code from Title 2A to Title 2C, the data show that 47.6% (N=1277) of the offenders were convicted under Title 2A, 32.1% (N=860) were sentenced under Title 2C, and 20.4% (N=546) are serving time for convictions handed down under both sentencing statutes.

Although up to four indictments with three counts were coded for each inmate, Table 3 provides data on the most serious offense for which he or she was convicted.

TABLE 3

Offenders by Most Serious Offense

MOST SERIOUS OFFENSE	FREQUENCY	PERCENT
Murder	1312	48.7
Rape	236	8.8
Robbery	781	29.0
Assault	167	6.2
Arson	84	3.1
Weapons	6	0.2
Burglary	21	0.8
Larceny	12	0.4
Other	71	2.6
Unknown	4	0.1
TOTAL	2694	100.0

As Table 3 shows, 48.7% (N=1312) of the offenders were convicted for murder, while the figures for rape, robbery, and assault are 8.8% (N=236), 29% (N=781) and 6.2% (N=167), respectively. Though two property crimes (burglary and larceny) are listed in the table, this means only that they were determinative of the maximum sentence length in these cases. The sample as a whole includes only offenders committed for violent crimes.

Table 4 offers data on the maximum length of sentence that was received by each offender. As is shown below, 51.8% (N=1400) of the sample are serving life-sentences, or a sentence of twenty-five years or more. Only 11.5% (N=311) of the offenders are doing time with sentences under ten years.

TABLE 4

Offenders by Length of Sentence

LENGTH OF SENTENCE	FREQUENCY	PERCENT
0-4 Years	49	1.8
5-9 Years	262	9.7
10-14 Years	360	13.3
15-19 Years	312	11.5
20-24 Years	307	11.3
25+ Years	767	28.4
Life Term	633	23.4
Death Penalty	15	0.6
TOTAL	2705	100.0

In terms of actual parole eligibility, Table 5 illustrates that 4.5% (N=111) are presently eligible for consideration for release on parole.[6] Another 43.9% (N=1080) will not be eligible for parole until 1990, and in most cases, beyond. However, 51.6% (N=1269) of the sample are either just eligible for parole or will become eligible for such consideration by 1989.

TABLE 5

Offenders By Year of Actual Parole Eligibility

YEAR OF ACTUAL PAROLE ELIGIBILITY	FREQUENCY	PAROLE
1972-1984	111	4.5
1985-1989	1269	51.6
1990-1994	497	20.2
1995-1999	266	10.8
2000-2066	317	12.9
TOTAL	2460	100.0

Thus far, the data show nearly 40% of the sampled population are housed at Trenton State Prison, all but 3% are male, the racial/ethnic breakdown approximates that of the larger adult prison population,[7] just over 50% are between 27-36 year of age, just under 50% are serving time under Title 2C of the Criminal Code and close to half the sample are confined for murder. In addition, 52% of the offenders are serving life-sentences or sentences totalling 25 years or more. Finally, just over half the sample are eligible or will become eligible for parole in less than five years.

The above profile highlights significant sentencing and demographic data. However, its main value becomes apparent only when it is combined with the data on potential restitution provided by the questionnaire. The integration of the questionnaire data and the offender profile provides information relevant to the most salient criteria cited in Trantino: the parolee's ability to make restitution payments.

At the time of sentencing, defendants may be assessed a fine and/or ordered to pay restitution. Moreover, under Title C they are now required to pay a further penalty to the Violent Crimes Compensation Board (VCCB). The imposition of one or more of these financial obligations has a direct bearing on a parolee's ability to comply with an additional order for restitution attached as a special condition of parole.

Somewhat surprisingly, less than 2% of the offenders received a fine at the time of sentencing, or were ordered to pay restitution. Moreover, as Table 6 illustrates, 49% (N=1330) of the sample were not required to make a payment to VCCB. Nonetheless, over half of the offenders must make such a payment. Within this group, 34.7% (N=940) must make payments ranging from $25 to $250.[8]

TABLE 6

Offenders Ordered to Pay a Penalty
to the Violent Crimes Compensation Board

AMOUNT OF PENALTY	FREQUENCY	PERCENT
None	1330	49.0
$1 to $75	658	24.3
$76 to $250	282	10.4
$251 to $500	94	3.5
Greater than $500	348	12.8
TOTAL	2712	100.0

The data on the offender's financial status place such payments in a more meaningful context. At the time of sentencing approximately 60% (N=1528) of the sample were represented by a public defender.[9] With respect to employment status, 63.2% (N=1335) were unemployed when arrested.[10] Of those who were employed, 69.9% (N=829) had annual incomes of less than $5000.[11]

One of the questionnaire items evaluated the offender's prospects for future employment. The categories ranged from "highly employable" to "employable" to "marginal to poor". Although 54.6% (N=1162) of the sample fell into the first two categories, 45.4% (N=966) were rated as having marginal to poor prospects for employment upon release.[12]

A summary of the above reveals that while over half of the sampled population must already make payments to VCCB, a majority could not afford to hire a private attorney to represent them, most were unemployed at the time of arrest, over two-thirds had incomes of less than $5000, and just under one-half have prospects for future employment that are rated as marginal to poor.

The analysis developed herein supports the conclusion that the sampled population is on the whole all-equipped to comply with restitution imposed as a special condition of parole. Nonetheless, if restitution were to be ordered, it is important to project where in the immediate future its impact would be most keenly felt.

Clearly, the variables that are most relevant to such a projection include the offender's parole eligibility date, age, the most serious offense for which he or she was convicted, and those variables pertaining to the offender's financial status: income, employment status and employability, and the imposition of any court ordered penalties.

As was discussed previously, over 55% (N=1380) of the sample are either eligible for parole consideration at present or will be before the end of the decade. When actual parole eligibility is compared by the most serious offense (see Table 7), it is clear that three offense categories-murder, rape, robbery-account for most of the offenders who might receive restitution as a special condition of parole between now and 1989. Specifically, through 1989, 493 sampled offenders whose most serious crime is murder are eligible for parole, while the numbers for rape and robbery total 145, and 535, respectively.[13] These offenders (N=1173) represent 48.2% of the sample shown below.

TABLE 7

Actual Parole Eligibility by Most Serious Offense

YEAR OF ACTUAL PAROLE ELIGIBILITY DATE	MURDER	RAPE	ROBBERY	ASSAULT	ARSON	WEAPONS	BURGLARY	LARCENY	OTHER	UNKNOWN	TOTAL
1972-1984	21 0.9	14 0.6	56 2.3	14 0.6	1 0.0	-	-	-	2 0.1	1 0.0	109 4.5
1985-1989	472 19.4	131 5.4	479 19.6	113 4.6	13 0.5	5 0.2	12 0.5	6 0.2	28 1.1	1 0.0	1260 51.7
1990-1994	338 13.9	35 1.4	75 3.1	8 0.3	12 0.5	1 0.0	5 0.2	1 0.0	21 0.9	-	496 20.3
1995-1999	189 7.7	8 0.3	35 1.4	7 0.3	20 0.8	-	1 0.0	1 0.0	4 0.2	1 0.0	266 10.9
2000-2066	217 8.9	9 0.4	34 1.4	4 0.2	34 1.4	-	2 0.1	1 0.0	6 0.2	1 0.0	308 12.6
COLUMN TOTAL	1237 50.7	197 8.1	679 27.8	146 6.0	80 3.3	6 0.2	20 0.8	9 0.4	61 2.5	4 0.2	2439 100.0

In terms of age, the available data indicate that of those offenders who are or will be eligible for parole consideration through 1989 (N=1352), 79% (N=1064) are presently twenty-seven years of age or older.[14] Though this group appears to have many years of prospective employment and earning power ahead of it, when parole eligibility through 1989 is compared to other employment related variables, including income, employment status, and employability, the results reinforce the previous discussion. Of those offenders who are or will be given parole consideration by the end of the decade, nearly 90% had incomes under $10,000 at the time of their arrest, 63% were not employed at the time of their arrest, and the level of future employability for 45% was rated as marginal to poor.[15]

Summary

This chapter began by noting that of the restitution criteria cited in Trantino, the most salient referred to the parolee's ability to pay. However, the court also stressed that the use of restitution as a special condition of parole must serve a rehabilitative purpose. While restitution satisfies other goals, its use at the point of parole is justifiable mainly to the extent that it assists the offender in the difficult task of community reintegration. Yet, it is on this very issue that the imposition of restitution as a special condition of parole appears problematic.

The offender profile developed herein clearly indicates that the widespread use of restitution may result in financial hardship, and thus frustrate a parolee's effort to bridge successfully the transition from confinement to the community. Aside from the administrative, legal, and fiscal difficulties in developing a parole restitution mechanism, most offenders sentenced to long prison terms for violent crimes will not have the financial ability to pay large or even moderate amounts of restitution following their release. Nor can they be expected to develop the financial resources upon release that will enable them to earn a reasonable and steady income to support themselves and their families, and in addition, make regular restitution payments. Though the analysis shows that a small number of the sampled population might represent suitable candidates with respect to such an order, the overwhelming percentage of offenders eligible for parole consideration through 1989 do not have the resources to make restitution payments.

Footnotes

1. According to the Department of Corrections, as of March 14, 1985, there were 10,710 offenders housed throughout the correctional system. Sixty-three percent of these offenders (N=6764) were serving sentences for violent crimes; crimes which represented their most serious offense at the time of their admission. (Source: Offenders In New Jersey's Correctional Institutions Annual Report) The sample for this study was drawn from this same population, albeit through the Board's Parole Eligibility Monitoring System files.

2. The sample includes offenders sentenced under the former and present criminal code (Titles 2A and 2C, respectively). Murder with a qualifier includes attempted murder, conspiracy to commit murder, complicity to commit murder (2C only), criminal attempted murder, and violation of probation/murder. Violent crimes include, but are not limited to, such offenses as manslaughter, rape, robbery, kidnapping, aggravated assault and arson.

3. Since missing cases are excluded from the percentages discussed in this chapter, they will be cited whenever they might have a bearing on the interpretation. Specifically, in terms of sex, 106 cases were missing from the final total. It is likely that most of these cases were male.

4. There were 146 missing cases for this variable.

5. One-hundred and forty-three cases were missing from the final results.

6. Actual parole eligibility refers to consideration for parole release only. Moreover, "APED's" may be reduced by work credits, and reduced custody credits. There were 257 missing cases for this variable.

7. The percentages reported herein closely reflect those of the larger offender population. Figures from the Department of Corrections show that 59% of the offenders were black, 28% were white, and 12% were hispanic. See note 2.

8. Although four cases were ordered to pay less than $25 to VCCB, most of this group (N=768) had to pay a penalty ranging from $25 to $100.00. Only five cases were missing from this variable.

9. There were 146 missing cases, though it is likely that most of these were represented by a public defender.

10. There were 605 missing cases from this variable. Information on most of these cases was not available from the inmate's pre-sentence investigation report.

11. One-thousand five-hundred and thirty-one cases were missing, again, due to the absence of information in the pre-sentence investigation report.

12. This variable required that the Board's institutional field staff evaluate each inmate's prospects for employment upon release. There were 589 missing cases.

13. The percentages in this table represent total percentages. That is, they are based on 2439 cases. Two-hundred seventy-eight cases were missing.

14. For this variable there were 295 missing cases.

15. The number of missing cases for income, employment, and employability when compared with APED totals 1650, 766 and 758, respectively,

CHAPTER SEVEN

RETHINKING RESTITUTION

Summary

As the preceeding chapters indicate, the development and administration of a restitution program is fraught with considerable difficulties. There are social welfare questions, which relate to the degree to which one has an obligation to care for another. There are political questions, such as the kind of support needed even to initiate such a program. There are economic issues, not only related to victim needs and an offender's ability to pay, but the administrative costs necessary to operate such a program.

Additionally, there are questions which relate to public policy, namely, the extent to which the state should become even more involved in punishment, retribution, and correctional practices. And, finally, there are questions pertaining to criminal justice administration effectiveness, particularly its role in improving the quality of life in society.

The pendulum swing in recent years from an almost exclusive concern for the rights, needs, welfare, and rehabilitation of the offender to the current heightened concern for the rights and needs of the victims has helped to usher in a more balanced perspective. One should not have to debate which is more important, which concern deserves greater attention. Obviously, as citizens have tended to agree, concern for the welfare of victims and concern for attempts to change perpetrators are both important. Further, what we have finally come to realize is that any appropriate opportunity to redress wrongs should be given a fair hearing.

Although restitution, which is both an old idea and an ancient practice, has taken different forms over the years, it currently has been given new life. It has been resurrected not only because it makes sense in terms of current values, especially for the victim, but because it offers a constructive and meaningful opportunity for someone who has harmed another to understand what he or she has done. Further, if only in a small way, it offers that person a chance to correct that wrong. Restitution, then, appears to be good for society as a whole, and for victims, offenders, and criminal justice administration as well.

The New Jersey State Parole Board clearly has recognized a concern for victims as well as offenders. In the recent past, it initiated a program to solicit and obtain impact statements from victims about crimes committed against them. Routinely, the Board asks for and receives input and testimony from victims on the continuing impact of the crime, input which is factored into the parole release hearing process. At this time, the Board is considering taking another step in improving the administration of justice, a step few parole authorities in the country have taken: ordering restitution as a special condition of parole.

The development of such a program necessarily must be placed in the context of what parole is and should be. It must be remembered at the

outset that the primary mandate of a parole board is that of making conditional release decisions about offenders. In doing so, various frames of reference may be utilized and different philosophies about punishment may be considered by the decision-makers.

Concerns about society, retribution, citizen and political values, and offender rehabilitation are assessed to one degree or another. In the final analysis, the basic question to be addressed by the board is that of the appropriateness and timeliness of the release of a particular offender.

Obviously, such decision-making necessarily involves a number of issues, including community safety, offender propensity for continued criminal behavior, and the likelihood of constructive change. Yet, none of these issues is so discrete that one can be considered without examining the others. To the extent that guidelines, laws, and/or other tools are utilized to assist board members, objective, parole decision-making and risk-assessment has in recent years been improved. These aids tend to be better than more intuitive processes. Yet, these current tools can provide no more than aggregate, actuarial-based mechanisms; they do not provide the answer to the question of what to do with a particular offender.

The immediate concern, then, is whether or not restitution as a condition of parole can be helpful in controlling or changing offender behavior. If it is utilized merely to redress wrongs and thereby assist a crime victim in his or her own recovery, its use can be justified. If it is utilized to assuage the community's need for additional retribution against an offender, while lamentable, its use can be justified. However, since a parole board is mandated primarily to make specific decisions about particular offenders, the use of restitution as a condition of parole can also be justified as an important vehicle for changing offender behavior. However, as the analysis in Chapter Six reveals, unless restitution is used very selectively, it may impede the process of successful community reintegration.

With the above in mind, but in what will appear to be a statement of contradiction, RESTITUTION AS A CONDITION OF PAROLE CANNOT REASONABLY BE IMPLEMENTED IN NEW JERSEY AT THIS TIME. That is, restitution as it is commonly and traditionally utilized simply will not work. However, the basic intent of restitution and the impact normally obtained can be achieved through the development of a special if not unique approach at implementation. In short, restitution in and of itself will not work, but a variation on a theme can be implemented.

In order to understand the proposal developed below, a number of issues relevant to the current situation in New Jersey need to be explored. These include general, philosophical, as well as practical matters. They deal with conceptual and ideological concerns as well as administrative and procedural issues. In short, they help to set a context.

A critical issue raised both by criminal justice practitioners in New Jersey and parole authorities in the rest of the country is that of

timeliness in ordering restitution. These persons suggest that a victim of a crime who has demonstrable losses should not have to wait until the perpetrator is released from prison to receive restitution. They argue that forcing the victim to wait what could be many years after the offender is sentenced violates fairness and basic human rights. If there are compensable losses, compensation should be arranged as quickly as possible. This position also flows from recent legislation enacted in the state which guarantees victims fairness, due process, and basic rights.

If the development of restitution as a condition of parole were to be implemented, the likelihood of victims actually receiving payment, many argue, would diminish over time. This would occur as a result of being unable to locate actual victims many years after the crime as well as being unable to provide necessary documentation about actual losses.

If restitution is ordered by the parole board and the amount must be approved by the sentencing judge, as New Jersey law requires, the process will demand arrangements for a hearing and appropriate attention to due process. Since the restitution amount must be related to documented losses, the potential for challenge increases. Consequently, additional hearings (unless waived) undoubtedly will increase the already clogged dockets and heavy workloads of judges and prosecutors. Furthermore, if a substantial number of inmates require public defenders, the heavy caseloads of the latter may impede an effective defense.

Notwithstanding the fact that the parole board must recommend guidelines for use by sentencing judges, board staff members would be responsible for determining victim losses. This process of documentation unquestionably would be labor intensive, costly, and could not be accomplished fairly or reasonably by existing staff. Further, as indicated above, the process would be further complicated by the passage of considerable time between the offense and the inmate's release to parole - a period which would diminish the likelihood of making a complete and reasonable study of the facts.

In addition to the need to document victim losses, board staff would have to evaluate the parolee's ability to pay - a requirement set forth in the Trantino decision. This, of course, would necessitate even more time and staff than currently are available to the parole board and/or field services. And, as was clearly illustrated in Chapter Six, many offenders who might be considered suitable candidates for restitution as a special condition of parole are ill-equipped financially to afford such payments. Further, decisions would have to be made and policies created with regard to third-party payments to victims (e.g., insurance claims). If such payments were made, what would be the role of subrogation? Who would be responsible for investigating such payments and how complicated would this be years after such payments were made?

Numerous studies of restitution indicate that victims occasionally turn down restitution because they want absolutely nothing to do with the perpetrator of the offenses against them. Restitution, however structured, necessarily brings offender and victim into a relationship that many see as undesirable. Should the parole board initiate

restitution as a special condition, the arms length relationship is violated - years after the offense when the victim healing process may have been completed.

Many observers of restitution view it as an extension of the punishment process insofar as the offender is concerned. As both New Jersey law stipulates and the state Supreme Court has re-affirmed, the decision to release an offender to parole must occur after punishment has been completed. In other words, the parole board is mandated to develop conditions exclusively that are concerned with rehabilitation; it may not order any condition that is perceived to be additional punishment.

If restitution as a condition of parole were to be routinized in New Jersey, some critics would equate such a development to a "buying out of prison" scheme. Those inmates with independent resources and/or those who are likely to be gainfully employed are most likely the offenders who would receive the most favorable consideration for release. This, together with pressure on the board from some victims to have offenders released so that they could pay restitution, could lead to an impression of possible impropriety and/or compromise on the part of board members. Even if decision-making remains honest and objective, the appearance of wrong-doing would only fuel the fires of parole critics.

Insofar as the current situation in New Jersey is concerned, a number of respondents in the criminal justice survey noted that the Violent Crimes Compensation Board (VCCB) already exists and receives funds from convicted offenders at the time of sentencing. They argue that the VCCB is empowered to provide compensation, at least to the victims of violent crimes. Further, VCCB staff has expertise in documenting losses. Its process, incidentally, does not involve the offender in any way, a fact which helps to maintain appropriate distance between offender and victim, nor does it involve matters of due process insofar as the offender is concerned.

Additionally, as has been pointed out, legislation mandates that sentencing judges assess a penalty of no less than $25 for each conviction, which funds are to be collected and given to the VCCB. Also, the data show that some judges order specific restitution at the time of sentencing. In such cases, if fines and/or restitution are not paid by the time an offender is released to parole, it is the responsibility of the Bureau of Parole within the Department of Corrections to arrange for collection. In these cases, however, the parole board does not set the amount of restitution, it only re-affirms that it has been assessed and that it remains to be collected by the Bureau. It is the payment of fines/restitution which becomes the condition of parole, not the initiation of restitution as a special condition.

One of the problems that developed in the course of the Trantino litigation was the requirement that the parole board establish the factors used in calculating the amount of restitution for sentencing judges if it desires to order restitution as a condition of parole. These factors, in effect, would result in specific amounts for specific cases.

Even though the Supreme Court stated that an order for restitution may deal only with compensable losses that could be documented (particularly out-of-pocket), there is no way that such documentation could be developed and an amount determined in a reasonable period of time or in a way that would be perceived as fair and right by victims. The parole board undoubtedly would suffer from negative publicity no matter how well-intentioned and reasonable it tried to be. The final restitution amounts could never be static; that is, they would constantly have to be changed to reflect changing social values and economic conditions. Further, whatever factors are developed, they potentially could be challenged by offenders as well as victims.

If restitution is ordered by the parole board and the sentencing judge must approve the amount, as a practical matter, it may be difficult to do so if the actual judge is no longer available. This will mean that policies will have to be developed for referring the matter to another sitting judge. Even the original judge would have difficulty remembering the case years after it was tried; a new judge would have no context in which to make an appropriate decision.

Ordering Restitution As A Special Condition of Parole: An Alternative Proposal

Although restitution is viewed as an effort to redress criminal wrongs perpetrated by offenders against specific victims, we must not forget that criminal behavior, regardless of its form, is viewed as a wrong against the state. In fact, unlike civil wrongs, it is the state which prosecutes the offender and it is in the name of the state that punishment is exacted.

The discussion of the current situation in New Jersey suggests that the initiation of restitution (as it is commonly implemented) as a condition of parole is simply not workable nor realistic. The reasons need not be enumerated again. The parole board does have the authority to order such a condition, provided it is so ordered for rehabilitation purposes - it may not do so for punitive purposes.

As a consequence, provided that appropriate legislation is enacted, it is proposed that the parole board routinize the levying of a "fine" on all parolees not otherwise ordered to pay restitution at the time of their original sentence. The "fine" would be ordered to help the offender better understand the wrongs he or she committed against society (the state) and thereby (as restitution attempts to do) help him or her appreciate not only the wrongfulness of the criminal act, but what must be done to better appreciate appropriate, responsible, and constructive "citizenship." In short, it would be a tool as are all other parole conditions to help the offender in the rehabilitative process.

In order to assist victims in their quest to be reimbursed for losses, the parole board would encourage them to apply directly to the VCCB for such compensation. VCCB staff, trained in determining compensation losses, would investigate all claims and make appropriate

decisions without regard to offender rights, needs, and/or ability to pay. However, in order to continue the legislative thrust to assure victims of their rights, legislation should be enacted that would provide the potential for compensation to all victims, regardless of the nature of the offense. That is, the VCCB should no longer be restricted to compensating only victims of violent crimes.

Parole officers, under the Bureau of Parole, already responsible for the collection of all penalties, fines, and restitution would also collect these "fines". However, in fairness to the field agency, additional staff and resources should be provided in order to cover both the time and administrative demands such additional collections undoubtedly would cause.

All monies collected from parolees who have been so "fined" by the parole board would be turned over to the VCCB as an additional and potentially sizable source of revenues. This increase in funding, provided by the perpetrators of crimes, would help to provide compensation to deserving victims without additional cost to the state. Since the amounts levied against parolees and according to a declared set of guidelines would reflect both the nature of the offense and their ability to pay, the potential for actual collection of such "fines" could be significant. Those parolees who are able to work now must have gainful employment as a condition of parole. Therefore, ability to pay the new assessment would be realistic, not a fanciful dream that would result in heavy "accounts receivable". The ability to collect "user fees" in other jurisdiction substantiates the fact that monies indeed are collectible from probationers as well as parolees. The results in New Jersey should be no less than those successfully occurring elsewhere.

By ordering such fines or assessments, the parole board can address all of the limitations of restitution programs discussed earlier in this report, and help provide a valuable service to the state, to victims, and to offenders. Due process issues would not be a heavy consideration for the amounts levied would not in any way be related to actual and provable victim losses. Just as other conditions of parole are not particularly challengeable, the fine also would not be. However, if there are concerns about the appropriateness of the amount, the offender should be given an opportunity for challenge at a hearing.

The utilization of this process would mean that documentation of actual losses to the victim would not have to be proved by the parole board; appropriate arms length relationships between victims and offenders could be maintained; assessments would be based on internal parole board guidelines and on the parolee's ability to pay; the state's role as an aggrieved party could be further legitimated; more victims would receive compensation from the VCCB without the state having to provide significant, additional funds; and the courts and other criminal justice authorities would not be plagued with additional hearings and administrative procedures.

Just as parolees are not always violated when they are unable to meet specified conditions of parole, so, too, they would not always be violated for inability to pay this special fine. However, in the event

of willful refusal to pay, violations would be appropriate, just as occurs when there is such willful disregard of other conditions of parole. This, then, deals with the issue of "debtors prisons," as discussed earlier. Where indicated, the parole board has the authority to modify any of its special conditions, as would be the case if a parolee's situation changes and he or she is no longer able to pay the assessment. In fact, parole boards generally have authority to modify court-ordered restitution, if the offender is unable to make such payments.

The relationship between restitution and community service has been discussed in the introductory materials. Insofar as this proposal is concerned, the parole board should consider community service as a condition of parole in all cases where the proposed "fine" or assessment is not practical or appropriate. In this manner, every parolee, as a matter of policy: (1) will pay restitution to a victim if so ordered by the court, (2) will pay a "fine" directly to the VCCB if restitution was not so ordered - since the state is being considered the victim, or (3) will be ordered to engage in specified numbers of hours of community service if restitution was not ordered or if the payment of a fine is impractical. In all cases, convicted offenders will also pay court-ordered assessments to the VCCB.

If this proposal is acceptable in principle to the parole board and the state, in addition to facilitating legislation, appropriate administrative procedures, internal parole board policies and guidelines, and field service processes will have to be developed. Consequently, it is recommended that a special task force be established to deal with these issues and make appropriate recommendations where indicated. The composition of the task force should include representatives of the parole board, Department of Corrections (Bureau of Parole), VCCB, prosecutors, and public defender. Together, they can deal with all of the issues, principles, and practical applications of the proposed project.

Once the program is established, it is also recommended that appropriate evaluation procedures be put in place so that the project can be assessed. The findings which will accrue undoubtedly would be of help to other parole authorities who might contemplate the initiation of a similar project.

No program, however creative and imaginative, could be developed in any state without the endorsement and support of key political and legislative officials. Further, since the program is concerned with victims and their rights, not only they but citizens generally will need to be informed about its design, intent, and purposes. Therefore, it is recommended that such groups be involved in planning wherever possible and appropriate. Finally, once the program is legislatively and administratively designed and ready for implementation, together the New Jersey State Parole Board and the VCCB should develop an educational and public relations program to win support for the program.

Conclusion

While restitution as a condition of parole cannot be implemented routinely in New Jersey due to the various factors, forces, and conditions enumerated above, the likelihood of introducing a "variation on a theme" which, essentially, can produce the same, intended results, hopefully, has been shown to be both practical and appropriate. The introduction of a "fine" or assessment by the parole board as a condition of parole on selected offenders - a creative approach to the problem - can accomplish the same objectives as restitution, but without creating serious levels of administrative and legal difficulties. Particularly, offenders' rehabilitative processes can be enhanced and victims' rights and needs (including the state's) can be attended to in more complete and appropriate ways.

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