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THE INTEGRATION OF RESTITUTION IN THE PROBATION SERVICES

Irving E. Cohen¹

A search through the literature on probation produces little on the subject of restitution as an element in probation services. The implication would seem to be that restitution is of insufficient importance to merit attention, and is merely incidental to the probation services. Assuming that this implication exists in fact, it is the writer's opinion that workers in this field are losing sight of a factor in probation which can be employed much more constructively than it now is.

In the tortuous history of man's punishment of man, restitution has had an established position. It is an ancient institution. In Biblical times, the offender against society paid for his crimes in a quantitative sense, "an eye for an eye, a tooth for a tooth." But the Teutonic laws offered the injured party monetary satisfaction, and often compelled him to accept it. The crimes were met by restitution, so that the penal law of ancient communities was not a law of crimes; it was a law of torts. The person injured proceeded against the wrongdoer by an ordinary civil action and was compensated in money. Every sort of injury which one freeman might inflict on another could be atoned for by "bot"—a money restitution paid to the injured man or his relations. The extent of this restitution depended, firstly, upon the nature and degree of the damage done and, secondly, upon the rank and importance of the person injured. Every man had his class and value, and every form of aggression against a freeman, from a wound to a blow which deprived him of a single tooth, as well as the theft of anything he possessed, had its designated amount of restitution. The amount varied with the different tribes, but the main principle of restitution extended through all groups. Frequently, restitution could not be paid in lump sum, and thus developed a system of payments, the rules of which arose more out of fear of retaliation than from broad humane concepts. If restitution were not paid, vengeance would be sought and blood spilled.¹ The Saxons could be cruel enough when bot was not made. How barbarous these people could be may be gleaned from the words of one monarch, "If there be no bot, then his hands be cut off, or his feet, or both, according as the deed may be; and if then he have wrought yet greater wrong, then let his eyes be put out, or his nose and his ears and the upper lip be cut off; or let him be scalped, so that punishment be inflicted and the soul preserved."²

¹ Probation Department, Court of General Sessions, N. Y. City.

¹ Pollack and Maitland: History of English Law.

² Thoree: Laws of Cnut.

In Henry III's reign, the wrongdoer rarely was sent to prison. At the plea roll, the custodiatur which sent him to jail was followed at once by "Finem fecit per unam markam" (or whatever the sum might be) and then came the names of those who acted as guarantors for such payments. The judges did not wish to keep the convicted offender in prison; they wished to make him pay restitution.³ The first stirrings of the common law origins of probation can be detected in these times. But it is interesting to note that this legal device of withholding imprisonment *followed* the concept of restitution, although it was destined to give the latter its greatest impetus. For, although restitution is an ancient institution, its modern practice was stimulated to a large degree by the development of the suspended sentence and probation.

Grounded as it is in the history of the handling of the convicted offender, restitution is nevertheless regarded by many workers in the field of probation as having no relation to it. They believe that it belongs in the Sheriff's or Marshall's office, or in some collection agency. They fail to see that, having endured through the centuries, it must possess an inherent worth to society, or it would have been discarded along with other archaic ideas. It has endured because it lends a constructive aspect to the probation process. As a condition of probation, it is readily acceptable to the community, inasmuch as it can be regarded as a sublimation of society's unconscious "lex talionis," with money as the symbol of retaliation. It is a departure from the retaliation through physical punishment of the past era, and is therefore in consonance with those humanizing processes which inhibit the expression of primitive emotions of revenge and ostracism, and channelize them instead into controlled sublimations. However, it imposes a form of "mea culpa" on the offender on probation without the degradation and hurt that so often embitters a man against society and fixes him in criminal behavior. This has been the philosophy behind the emergence of restitution in probation, and it is fast becoming a more accepted method of treatment where probation, and not institutionalization, is indicated. It is a philosophy which is articulated by the community's demand for the probationer "to make good what he had stolen," or, as the formal report to the court expresses it, "The complainant will be in accord with the court's efforts to establish terms of restitution."

The very wording of the probation report, that the community in the person of the complainant will be "in accord with the court's terms of restitution," signifies the social aspects of restitution. It is an authorization in duality: (1) To impress upon the offender society's punitive power, and (2) to temper such power with com-

³ Pollock and Maitland: History of English Law.

passion. Society's disapproval of the social deviate thus becomes articulated, and, at the same time, society does not lose one of its members. How much more civilized and advanced our thinking has become is clearly evident when we recall that not so long ago we were maiming individuals for those very infractions of the law for which we now ask restitution in money.

Although frequently restitution is a burden to the probation worker, there are elements inherent in it that can be of definite value to both the probationer and the probation worker. To the probationer, the police and court experiences are usually traumatic to a degree. He undergoes marked emotional strain and anxiety. He can barely reconstruct the situation in the confusion and oppressive feelings of personal degradation and social ostracism. He has a presentiment of punishment by imprisonment, the stigma attached to it, and the worries over family distress. Probation with restitution as a condition is a relief. At that point, probation and restitution can best be interpreted, and the role of the probation worker in relation to them can most readily relate itself. Where the probationer has been helped to achieve an acceptance of his responsibilities for restitution, there is a concurrent imposition of self-discipline which is more valuable than an imposed discipline. It is carried over to his other responsibilities under probation, and lightens the task of supervising him. Attempts, therefore, to win him over to an acceptance of full restitution, not as a forced imposition, but as a goal in rehabilitation, merits our attention.

The benefits resulting therefrom are (1) a better relationship with the probation worker, (2) a greater awareness of the meaning to him of probation, (3) a resolution of his inner conflicts, arising from the forces within him rejecting restitution, (4) the satisfaction he ultimately derives in a job well done, and (5) decrease of tension and anxiety. It is a discipline society expects us all to acquire—the payment of a just debt. Instead of becoming a barren and vindictive form of punishment or a discipline imposed, it can be employed to foster self-help. For, as Judge Perkins of the Boston Juvenile Court remarked, "The central controlling fact in the correction of people is that correction is self-correction, and that they have the final decision as to whether they will or will not make the necessary effort. *They* decide whether they will or they won't. We don't—To accomplish our purpose we must *get them to do something, not merely do something for them*; for if they are to correct their faults, they must do it by self-discipline, and that involves systematic and persistent effort *by them.*"⁴ It is a common experience of practitioners to observe the keen pleasure expressed by probationers on liquidating their res-

⁴ Journal Criminal Law and Criminology—July 1942, Vol. 33, No. 2.

titution account—the sense of squaring themselves with society, the satisfaction they derive in the respect given to them by the probation department, court and community; the relief from anxiety.

The following case may serve to illustrate the point:

S. E., 53 years old, was placed on probation for 2½ years, following his conviction of Attempted Grand Larceny, 2nd Degree. By means of two forged promissory notes, he and a co-defendant obtained a large sum of money from a firm with which he had done business for several years. His participation in the offense was related to his efforts to preserve his business during a period of reverses. A condition of his probation was that he make restitution "in accordance with terms established by the Probation Department." On the day he was placed on probation, he was a sad spectacle—depressed, bewildered and at a loss as to how to set about making restitution of a sum of several thousand dollars. The probation worker attempted to meet these basic realities with him: probation for 2½ years, full restitution, no further conflict with the law. After a full discussion of his financial capacities as a commercial agent, an attempt was made to bring him to participate in plans around the terms of his restitution payments. The nature of these discussions, his participation in working out a plan satisfactory to him, tended to reduce his anxieties. It was thus possible, through restitution, to establish a good relationship with the probationer, free him from tension, and help him to face reality.

Some time later, but early in his probation, he fell into arrears, and was assailed by panic. Two months arrears brought him threats of imprisonment from the complainant's attorney. When S. E. received a letter from the Probation Department, requesting him to appear on a day other than his usual reporting day, he said a tearful goodbye to his family, and appeared at the office expecting to be sent to prison. When he realized that efforts were being made to assist him, tension snapped and he burst into tears. When it was explained to him that the terms of restitution could be re-adjusted to his income, he was relieved.

Thereafter, he was less tense and anxious about his restitution. There is little question as to his liquidation of it. It would seem that, in this case, restitution was used as a constructive tool, individualized to meet his particular needs—releasing him from the enervating effects of his anxieties, which immobilized him.

An example of how restitution can become a destructive force and impede progress on probation is the case of E. K., age 55, who had been convicted of conspiracy involving a public utility where he had been employed for many years. He was placed on probation for three years, and ordered to make restitution of \$1,000. Faced

with permanent rejection by bonding companies, he felt stigmatized by probation, ashamed for his family and generally bitter. The probation worker took the court order literally, and exerted pressure to make him meet the restitution obligations. E. K. became increasingly antagonistic, and developed marked persecutory trends, until he burst all restraints, became hysterical, and accused the probation worker of "railroading him to prison." He continued payments, but never completed them.

From a restitution point of view, the case may be termed a partial success, but restitution was employed in a vacuum. It could have been used as an opening wedge in establishing a relationship of trust, confidence and security. Actually, it was unconstructive, both for the probationer and the worker. It forced the former to retire into a state of inadequacy and the latter into an authoritarian role.

In another respect, restitution can be a helpful factor in probation. While the probationer is working out the terms of his restitution with the probation officer, the latter has an opportunity to enter into the question of budgeting, an area not as yet fully exploited in probation services. It is common to a great many cases that the offender has come into conflict with the law because of his inability to live within his means. As he makes restitution, the necessity for this may be woven into a budgetary practice, so that the probationer acquires a clearer picture of income and expenditure. The careless dribbling away of surplus without realization is replaced by a more methodical, systematic attempt to live within one's means. The self-discipline developed by regular restitution payments is carried over to the problem of living within a budget. The combination of satisfying emotions around the knowledge of being able to conform to the restitutorial obligations; the ability to plan one's expenditures and accumulate some savings, all tend to give the probationer a sense of self-worth and self-rehabilitation that is really enduring. Add to this the benefits to the probationer's family life when economic pressures are reduced, and we observe that the advantages flow to the members of the probationer's family as well as to him.

The case of C. M. would seem to illustrate these points. Age 28, the father of two children, he was one of the co-defendants in the public utility offense. Undisciplined and impulsive, C. M. was constantly running into arrears in his restitution and rationalizing his inadequacies by blaming his wife for the dissipation of funds. Several questions had to be answered: (1) Was he resisting restitution as a condition of his probation, (2) What was the real extent of his earnings, (3) What was the wife's place in the situation, (4) Were there any other factors which might account for the dissipation of funds.

The first two questions answered themselves in that C. M. had been making efforts at restitution for some time and had a comparatively small balance outstanding; that, as a skilled mechanic employed in a war production plant, he was earning a very adequate wage. The third and fourth questions were answered when both C. M. and his wife were invited for a discussion of the problem. C. M. expressed his belief in the masculine prerogative of handing out varying sums of money to his wife from day to day, retaining the balance. When C. M. finished work for the day, and stopped for a beer with his fellow-workers, he would feel "rich" with his excess funds and would treat others to drinks. It became apparent that the problem called for the planning of a budget and the setting aside of a definite amount for restitution payments. C. M. and his wife were encouraged to jointly fix a budget, which they agreed to try. The fact that the probationer thereafter liquidated his restitution and Mrs. M. stopped complaining seemed to prove that it was the proper step. The final proof was Mrs. M.'s ability to live within her means when she received an assigned portion of his wages, after C. M. joined the merchant marine. Restitution in this case was the wedge by means of which the family was oriented to a planned financial basis.

Emphasizing the restitutorial aspects of probation for its constructive elements, and thereby bringing about an integration of both, would bring the cry that probation would be made a collection agency. On this ground, too many workers fail to see the important use to which restitution can be put to win the cooperation of the community. Even ignoring the probationer's welfare, which is a basic consideration and, next to the protection of society, the *raison d'être* of our work—probation itself derives a benefit therefrom, even at the risk of being labelled a collection agency. The community finds it difficult to understand probation theories and subtleties. To gain its support we must give concrete evidence of accomplishment. The recovery of \$594,811.11 to the community in criminal cases, as reported by one department⁵ in ten years—most of them depression years, and the recovery to the community in 1942 of \$15,079.54 by another department⁶ is easily understood by the public. Probation thereby acquires a lustre that no amount of theorizing can achieve for it. The average person is unfamiliar with probation and is coldly objective. Even after hearing about the sympathetic understanding, guidance, etc., that probation brings to the probationer, he may still feel that the expenditures made for the maintenance of this service are unjustified. He becomes an easy prey to demagogic appeal. One sure method of

⁵ Probation Department—Court of General Sessions, New York—Jan. 1927-Dec. 1936.

⁶ Probation Department—Supreme Bench of Baltimore City.

immunization is to be able to present to the public concrete evidence of the per capita cost of institutionalization as against the per capita cost of probation or parole, and more effective is the actual financial recovery through restitution. In the last analysis, it is the complainant and others like him who constitute the community to whom we look for support.

A case in point is J. F. He is 39 years old and was placed on probation for three years, following his plea of guilty to charges that he had fraudulently obtained money from a check-cashing service. He was intent on not making restitution if he could possibly avoid it by neglect, alibis and appeals to the complainant, whom he induced to waive restitution. He was not a disciplinary problem in any other respect. While he acknowledged his debt, he would embark on superficial discussions and then proceed to ignore payments. When it was definitely established that he was well able to make restitutional payments, and persuasions were futile, two alternatives had to be faced: (1) To refuse to become a collection agency for the complainant, and (2) to arraign J. F. as a probation violator, with possible imprisonment for him, since, in this case, there were no mitigating circumstances. He had merely attempted to convince the complainant of his inability to make restitution, and the community in this instance, in the person of the complainant, came first and needed protection. The probationer was cited for violation of probation and given a deadline for complete restitution. This had the desired effect. He liquidated his account. Probation came to mean something real to the complainant. The court received letters of his deep appreciation.

One might consider the possible extension of the concept of restitution. It is not entirely visionary to contemplate the time when prospective parolees will be required to make restitution as a condition of parole, particularly where large sums of money were involved in the offense. There is no real reason why society should not impose a post-release restitutional obligation on offenders who succeed in mulcting the public of large sums of money and manage to hide their ill gotten gains from seizure until such time when they are able to live a life of ease. They merely trade imprisonment for a period of time in a gamble with constituted authority against the discovery of their cache. They are released assured that their wealth will be undisturbed and that they have discharged their debt to society. But the real point is that they retain the advantages they first sought. Restitution may be a remedy.

It should be a part of a case work program, not a "hit and miss" method of collections unrelated to the broader possibilities.