Restitution, Retribution, and The Constitution

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I. Introduction

Restitution is one of many subjects in the criminal law that has been favored with considerable attention but little rational thought. This may be the result of its connection with the emotionally-charged debate between those who believe offenders should be punished and those who believe they should be cured. The former view, eloquently stated in 1895, expresses the position of the victims' rights advocates:

The guilty man lodged, fed, clothed, warmed, lighted, entertained, at the expense of the State in a model cell, issued from it with a sum of money lawfully earned, has paid his debt to society; he can set his victims at defiance; but the victim has his consolation; he can think that by taxes he pays to the Treasury, he has contributed towards the paternal care, which has guarded the criminal during his stay in prison.1

The alternative view, however, has found equally articulate adherents:

[The criminal] is, at the expiration of his sentence, flung out of the prison into the streets to earn his living in a labor market where nobody will employ an ex-prisoner . . . He seeks the only company in which he is welcome: the society of criminals; and sooner or later, according to his luck, he finds himself in prison again . . . . The criminal, far from being deterred from crime, is forced into it; and the citizen whom his punishment was meant to protect suffers from his depredations.2

Many have strong opinions on the subject of restitution, but few seem to have a clear notion of what it is, how it works or to whom it applies. For that reason, and because of the potentially dramatic effects of restitution upon the lives of both criminal defendants and victims of crime, it is important to assess the present state of the law of restitution and, even more important, to identify critical areas that are

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yet to be settled. This article is an attempt to accomplish those two ends.

II. THE PRESENT STATE OF ALASKA'S LAW

The legislative history that underlies Alaska's statutory provisions relating to restitution presents a curious problem. In the course of its ambitious revision of Alaska's criminal code, the Criminal Law Revision Subcommission devoted a significant amount of attention to the subject of restitution. Its detailed draft statutes are accompanied by extensive commentary, addressing many of the problems that have arisen in other jurisdictions. The final version, in contrast, is cursory. Whereas the drafts had provided guidance as to the mechanics of how and how much restitution was to be paid, the statute as enacted was virtually silent on those subjects. The legislative intent underlying the modification of the detailed proposal into the vague final product is unclear. There is a curious absence of any legislative history that might shed light on the problem. The magnitude of the change can only be appreciated after comparison of the two provisions.

The proposed statutory scheme consisted of three separate provisions. The first provided for restitution either during imprisonment or as a condition of probation or suspended imposition of sentence. It required, in addition, that "the financial resources of the defendant and the nature of the burden that its payment will impose" be taken into account by the court imposing sentence. The accompanying commentary made clear that restitution was to be "available in all cases, not just those in which probation was granted." The commentary contemplated payment being taken from prison industry earnings, but cautioned that "undue financial burdens" should not be imposed on defendants or their dependents. It set forth the following rationale for the proposed scheme:

[B]ecause restitution is the one sanction which has the potential for making a victim "whole," or nearly so, and because the victim is the most frequently ignored party in the justice system, the Subcommission felt that restitution should be given more extended treatment as a complementary sanction in the Revised Code.

3. See CRIMINAL CODE REVISION SUBCOMM'N, ALASKA CRIM. CODE REVISION TENTATIVE DRAFT, Part 6 at 52-56 (1978) [hereinafter ALASKA CRIM. CODE REVISION].

4. See ALASKA STAT. § 12.55.045 (1990); S. JOURNAL SUPP. No. 47, at 151 (June 12, 1978).

5. ALASKA CRIM. CODE REVISION, supra note 3, at 52.

6. Id. at 54 (emphasis in original).

7. Id.

8. Id.
The second provision authorized restitution "for the harm caused by the offense."
Reimbursable damages included replacement value of lost or damaged property less salvage value, medical expenses "less any reimbursement from another source, collateral or otherwise" and lost wages less reimbursement. This section also required notice to the victim prior to imposition of a restitution order and limited the effective duration of such an order to five years. Again, the text was accompanied by clear commentary indicating that "victims should not 'profit' from their misfortunes" and that restitution should "simply make the victim financially 'whole,' not better off, whenever possible." The five-year limit was based on the Subcommission's view that a restitution obligation should not be "interminable."

Finally, the third provision authorized the court to modify or terminate a restitution obligation if the defendant's conduct or circumstances warranted it. The proposed commentary was once again quite explicit:

The Subcommission was not anxious to create sanctions which could become counterproductive to the purposes of sentencing and recognized that where obligations, especially those of a financial nature, are imposed upon a defendant care must be taken to insure that those obligations do not contribute to further anti-social actions by the defendant.

These proposals hardly sound earth-shaking. They do, however, take clear positions on most of the fundamental issues surrounding restitution, and they constitute a solid policy platform from which to infer legislative intent as to issues that are not directly addressed. Most notably, the proposals provided answers to many of the questions that have already arisen in the appellate courts and others that will necessarily arise as the law in this area continues to evolve.

This groundwork inexplicably disappeared in the process of enactment. In final form, the Subcommission's work was reduced to a single statute:

Sec. 12.55.045. Restitution. (a) The court may order a defendant convicted of an offense to make restitution as provided in this section or as otherwise authorized by law. In determining the amount and method of payment of restitution, the court shall take into account the financial resources of the defendant and the nature of the burden its payment will impose.

9. Id. at 52.
10. Id. at 52-53.
11. Id. at 53.
12. Id. at 55.
13. Id. at 56.
14. Id. at 53.
15. Id. at 56.
An order of restitution under this section does not limit any civil liability of the defendant arising from the defendant's conduct.

If a defendant is sentenced to pay restitution, the court may grant permission for the payment to be made within a specified period of time or in specified installments.16

The official commentary provides, in full, as follows:


Subsection (a) requires the court to consider the defendant's financial resources in setting restitution.

Subsection (b) requires the victim be notified before restitution is ordered; this implies that a victim may refuse restitution. For example, if the victim does not wish to be reminded of the crime by receiving monthly payments from the defendant, the court should accommodate the victim's wishes. This section also provides that payment of restitution does not affect the civil liability of the defendant for his conduct.

Subsection (c) allows the court to order the defendant to make restitution in periodic payments or within a specified period of time.17

The courts have yet to address the question of what this means. A solution is suggested, however, by the Alaska Court of Appeals' analysis of a similar problem in State v. Rastopsoff.18 That case required interpretation of the phrase "previously convicted" as used in the presumptive sentencing statutes.19 Neither the statutes themselves nor the official commentary provided sufficient guidance to allow the court to choose between the competing interpretations that were proffered.20 But the commentary of the Criminal Code Revision Subcommission was clear.21 The presumptive sentencing commentary, like the commentary on restitution, disappeared during the legislative process without explanation; and the statutes themselves were similarly

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17. S. JOURNAL SUPP. No. 47, at 151-52 (June 12, 1978).
19. Id. at 634.
20. Id. at 636-38.
21. Id. at 639.
altered, retaining their draft form only in certain narrow areas.22 The court deemed it appropriate to rely heavily upon the Subcommission's commentary as an interpretive aid.23 In addition to the "well-settled" principle "that the report of a commission on a revision of statutory law provides evidence of legislative intent,"24 the court relied on three "forceful indicators" that the legislature intended to adopt the Subcommission's interpretation: the clarity of the Subcommission's commentary, the similarity between certain portions of the draft and the final versions, and, significantly, "the lack of any discussion — in either house of the legislature — to indicate rejection of the Subcommission's interpretation."25

The first and third of these indicators apply with equal force to the restitution context. The second is more problematic in that most of what emerged in the enacted version of the restitution statute appears essentially verbatim in the draft. While the final version omits language, it never actually contradicts the draft. The second criterion also seems to apply in essentially the same way as it did to the issue presented in Rastopsoff. It thus seems fairly clear that the Subcommission's commentary should provide critical help in resolving ambiguities that appear in the statutory law. The commentary has not, however, received any significant attention to date.

Appellate litigation in the area of restitution has addressed only a few of the issues considered by the Subcommission. In Brezenoff v. State,26 the Alaska Court of Appeals held that the trial court, at the time of sentencing, is obligated to identify the persons who are entitled to restitution and determine the extent of their losses, and that the trial court cannot delegate this obligation to the probation officer.27 Reasoning that it is the defendant's "ability to pay restitution after she is released which is material to the inquiry contemplated by [Alaska Statutes section] 12.55.045(a)," the court also ruled that it was appropriate to defer consideration of that question until after completion of any period of incarceration imposed.28 These principles were reiterated twice29 before the Alaska Supreme Court accepted a petition for review in Karr v. State.30

22. Id. at 639 n.9.
23. Id. at 639 (citing 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 48.09 (4th ed. 1973)).
24. Id.
25. Id.
27. Id. at 1363-64.
28. Id. at 1364.
When the court finally spoke, it spoke decisively:

There are policy considerations that militate against the approach adopted by the Court of Appeals in Brezenoff. Restitution should not only compensate the victim for the harm inflicted by the offender, but should further the rehabilitation of the offender. If restitution is ordered in an amount that is clearly impossible for the offender to pay, the offender's rehabilitation will be inhibited and not furthered. If the offender is haled into court for nonpayment of restitution under [section] 12.55.051(a), or if the offender petitions the court under [Alaska Statutes section] 12.55.051(c) to avoid this sanction, his reintegration into society will be disrupted. Also, an offender might simply give up and make no payments at all if the restitution ordered is clearly impossible to pay. This could result in the offender's incarceration under [section] 12.55.051(a), or in his fleeing the jurisdiction to avoid this sanction, neither of which would further the dual goals behind restitution.31

Relying on that rationale, in addition to language appearing in the statute and accompanying commentary, the supreme court overruled Brezenoff, imposing the requirement that a defendant's ability to pay be determined at the time of sentencing.32 The court of appeals has restated this requirement, without comment, in several subsequent opinions.33

Only four appellate cases address issues unrelated to the Karr/Brezenoff line of authority. Kimbrell v. State establishes the narrow rule that a defendant can be compelled to pay restitution on a dismissed charge if the court specifically finds that:

(1) the amount of loss suffered by an identifiable aggrieved party is certain; (2) the defendant admits, and there is no factual question as

31. Id. at 1197.
32. Id. at 1196-97.
33. Monroe v. State, 752 P.2d 1017, 1022 (Alaska Ct. App. 1988) (Failure to consider defendant's earning capacity at the time a fine or restitution is imposed "requires automatic reversal."); Ashton v. State, 737 P.2d 1365, 1366 (Alaska Ct. App. 1987) ("The trial court is under a mandatory duty to consider a defendant's earning capacity in connection with any imposition of a fine or restitution."); Toovak v. State, 736 P.2d 355, 355 (Alaska Ct. App. 1987) ("To comply with [Alaska Statutes section 12.55.045(a)], the sentencing court must first determine what the accused's future earning capacity is likely to be; it must then fix the amount and terms of restitution to fall within the realistic limits of that capacity."); Kramer v. State, 735 P.2d 754, 756 (Alaska Ct. App. 1987) ("In this case, the trial court has never made express findings of fact regarding Kramer's ability to pay restitution once he obtains his freedom. The case must therefore be remanded for that purpose."); Ahkivgak v. State, 730 P.2d 168, 171 (Alaska Ct. App. 1986) ([Alaska Statutes section] 12.55.045(a) authorizes the trial court to order restitution, but requires that the court consider defendant's financial resources and the burden restitution will impose before setting the amount."); Zimmerman v. State, 706 P.2d 343, 344 (Alaska Ct. App. 1985) ("The trial court could not make a valid restitution order without determining Zimmerman's future earning capacity.").
to whether, the defendant caused or was responsible for the aggrieved party's loss; and (3) the defendant consents, freely and voluntarily, to make full restitution. . . .\textsuperscript{34}

In restating the Karr rule, Lawrence v. State held that in awarding restitution for "anticipated future expenses," the court must at least require that these expenses be "firmly established."\textsuperscript{35} Notably, Lawrence did not address the more serious issue raised by the appellant: whether restitution can be awarded to persons other than the victim who may have suffered harm from defendant's conduct.\textsuperscript{36} Kramer v. State contains the following cryptic dicta:

It is important to stress that restitution and civil damages are totally independent under Alaska law. [Alaska Statutes section] 12.55.045(b) provides that an order of restitution under this section does not limit any civil liability of the defendant arising from the defendant's conduct. Thus a restitutonary award has no effect on the victim's ability to recover damages in a civil action.\textsuperscript{37}

Finally, Dorris v. State holds without elaboration that "the collateral source rule prevents [a defendant] from benefiting from his victim's insurance."\textsuperscript{38}

Of these four cases, Dorris is the most interesting and potentially the most important. Although the rule it states is a narrow one, and not particularly significant in itself, its implication is far-reaching: the Dorris rule is in direct conflict with the tentative draft and accompanying commentary, both of which explicitly excluded "reimbursement from another source, collateral or otherwise" from the set damages recoverable in the restitution context.\textsuperscript{39} This suggests that, Rastopsoff notwithstanding, the court of appeals will not look to the Subcommission's draft or commentary for guidance when interpreting the restitution statutes. If Kramer does authorize a double recovery for restitution recipients who subsequently sue in civil court, it carries the same implication.\textsuperscript{40} These cases would appear to constitute strong authority against applying the Rastopsoff principles of statutory interpretation in the restitution context.

\textsuperscript{36} See id.
\textsuperscript{37} 735 P.2d 754, 756 n.2 (Alaska Ct. App. 1987).
\textsuperscript{38} 656 P.2d 578, 583 (Alaska Ct. App. 1982).
\textsuperscript{39} ALASKA CRIM. CODE REVISION, supra note 3, at 52-53.
\textsuperscript{40} Compare id. at 55 ("[T]he Subcommission . . . concluded that victims should not 'profit' from their misfortunes . . . . The intent was to simply make the victim financially 'whole,' not better off, whenever possible.") with Kramer, 735 P.2d at 756 n.2 ("[A]n order of restitution . . . does not limit any civil liability of the defendant arising from the defendant's conduct. Thus a restitutionary award has no effect on the victim's ability to recover damages in a civil action.").
Consideration of this whole body of legislative history, statutory law, and case law together reveals several rather obvious facts about the law of criminal restitution in Alaska. First, and most obvious, it is at best in an extreme state of flux. Practitioners cannot guess what role the tentative draft and commentary might play in interpreting present statutory provisions. Specifically, with regard to the collateral source rule and the question of double liability, they cannot be sure whether the legislative history, interpreted under Rastopsoff, or contrary statements in Dorris and Kramer will ultimately hold sway. Generally, it is not at all clear whether the tentative draft and commentary have been rejected sub silentio by Dorris and Kramer or, if not, what the status of those materials will be with regard to litigation of other issues that have yet to be considered at the appellate level.

What is known about restitution in Alaska can be summed up succinctly. It is intended to serve the dual purposes of compensating the victim and rehabilitating the offender. A trial court can order restitution only after a careful inquiry into the defendant’s ability to pay. A restitution award based on anticipated future expenses can be entered only if such expenses are “firmly established.” Finally, a court can require a defendant to pay restitution on dismissed counts only with his consent. What we do not know is the subject of the next section of this article.

Before proceeding to that subject, however, it is important to make one crucial point relating to the reason for the dearth of appellate law in this area. Defendants, with good reason, typically perceive that a willingness to undertake a large restitution obligation will result in a shorter stay in custody. It is obvious to all that the best way to demonstrate “rehabilitative potential,” and therefore minimize jail time, is to accept responsibility and show remorse for one’s crime — and that the easiest and most convincing way to do so is to assume the obligation to compensate victims fully for the losses they have suffered. Conversely, it is equally obvious that squabbling about restitution at the time of sentencing demonstrates a lack of rehabilitative potential and promises to result in a longer stay in jail. As a result, it is extremely rare for a defendant to raise any question at all as to the victim’s request for restitution, especially in view of two facts. First,

41. Karr, 686 P.2d at 1197.
42. Id.
43. Lawrence, 764 P.2d at 322.
44. Kimbrell, 666 P.2d at 455.
he cannot be sanctioned for subsequent nonpayment unless it is "attributable to an intentional refusal or failure to make a good faith effort to pay." 45 Second, Rule 35(b) of the Alaska Rules of Criminal Procedure authorizes the court to modify the original award "at any time" upon a showing of "changed circumstances." 46 The context of criminal sentencing is, in other words, so inherently coercive that it is extremely rare for a defendant to do anything but acquiesce in the state's demands with regard to restitution.47 This is another subject that will be addressed at greater length below. For present purposes, it is sufficient to point out that there is a very good reason for the appellate courts' relative silence on restitution issues: defendants rarely raise them at the trial court level and appeal them even more rarely. Given the infrequency with which these issues are even presented for review, it is hardly the fault of the court that we have only the most vestigial sort of law in this area. But that fact provides little solace to defendants and defense counsel who would like to make sense of these issues.

III. UNSETTLED ISSUES

The unsettled areas of Alaska restitution law fall neatly into two categories: those that are the subject of conflicting statements by the courts and the legislature and those that have yet to be addressed by either. The issues in the first category are implicit in the survey of Alaska law presented above. Because courts have begun to address these problems, it is likely that they will be solved soon and fairly straightforwardly. This is not the case with the much larger category of problems that have yet to receive any attention at all.

A. Conflicts in Existing Law

The difficulties presented by conflicts in existing law relate largely, but not entirely, to the ambiguous role the tentative draft and commentary will play in the development of law in this area. The problems raised in Kramer and Dorris are the most obvious of these and thus will be the easiest to resolve.

As suggested, the Alaska Court of Appeals could simply state that it has sub silentio rejected all legislative history that conflicts with the Kramer dicta and the Dorris collateral source holding. Clearly,

46. ALASKA R. CRIM. P. § 35(b).
47. A particularly striking example of this phenomenon appears in State v. Harris, 362 A.2d 32, 37 (N.J. 1976): "Believing herself facing the specter of jail, the defendant threw herself on the mercy of the court: . . . . 'If I've committed a crime, I'll pay every dime back. . . . Please don't take me away from my babies.' "
however, this easy solution would create more problems than it would solve. The multiple recovery suggested in Kramer not only runs counter to legislative history, but violates the fundamental premises of restitution identified in Karr. It is difficult to see how compelling a defendant to pay restitution in an amount exceeding actual loss could “rehabilitate” the offender. The same flaw is evident to a lesser extent in Dorris. Once the victim has recovered his loss through insurance, it is not at all clear that payment to an insurance company — which is in the business of contracting to cover such losses — will have the anticipated rehabilitative effect. There are, in other words, sound policy reasons for adopting the rule that insurance companies are not “aggrieved parties” within the meaning of Fee v. State, and are thus not entitled to restitution.

While one can finesse the Kramer problem by interpreting section 12.55.045(b) to mean only that a restitution award does not preclude a civil suit for the difference between the actual loss and the amount recovered as restitution, the issue raised by Dorris will not be so simple. It seems clear that the court must either retrench on the collateral source rule or reject the legislative history outright — with concomitant violence to the policy rationales set out in Karr.

Other inconsistencies in the law are somewhat subtler. The distinction between restitution as an element of a sentence or as a condition of probation is a mystery. If, as in the federal system, the former provision is simply intended to create a residual category for cases in which the court does not order probation, it is sensible but of very limited utility: it would apply only to defendants supervised by the parole board during their period of “mandatory good time release,” and would have the same practical effect as a condition of probation. If, on the other hand, this provision is meant to create an alternative procedure for enforcing restitution orders, its meaning is completely unclear. It would accomplish nothing more than replacement of probation revocation sanctions with much weaker contempt sanctions, and would place responsibility for enforcement with a judge rather than a probation officer employed for that purpose. There is not, and cannot be, any reason to believe that an order entered pursuant to Alaska Statutes section 12.55.045(a) is somehow more enforceable than one entered in accordance with section

50. See id. § 12.55.100(a)(2).
12.55.100(a)(2).\textsuperscript{54} Nor is there any reason to believe that either provision authorizes creation of an obligation that survives the termination of parole or probation.\textsuperscript{55}

Examination of the implications of ordering imprisonment in lieu of restitution pursuant to section 12.55.051(a)\textsuperscript{56} reveals further difficulties. Most obviously, whether the defendant's failure to pay is "intentional" or not, putting him in prison will hardly serve to compensate the victim. Nor is it likely to "rehabilitate the offender." Anyone who is able to pay restitution but feels so strongly against it that even the threat of jail fails to make an impression will only be embittered by further imprisonment. It seems clear that neither of the Karr interests\textsuperscript{57} can be served by this provision. Furthermore, what happens if the victim chooses to enforce the restitution order by execution while the defendant is in prison for his willful failure to pay? It appears that a defendant can be simultaneously forced to pay and imprisoned for his refusal to do so voluntarily. In fact, since imprisonment must be premised on ability to pay, it appears that this double

\begin{itemize}
\item \textsuperscript{54} Alaska Statutes section 12.55.100(a)(2) provides:
\begin{quote}
(a) While on probation and among the conditions of probation, the defendant may be required
\end{quote}
\begin{quote}
\begin{itemize}
\item[(2)] to make restitution or reparation to aggrieved parties for actual damages or loss caused by the crime for which conviction was had . . . .
\end{itemize}
\end{quote}
\item \textsuperscript{55} Trial court judges have occasionally attempted to convert restitution orders to civil judgments at the time probation expires. At least one federal case suggests that this procedure would violate constitutional guarantees of the right to trial by jury. \textit{See infra} note 69 and accompanying text.
\item \textsuperscript{56} Alaska Statutes section 12.55.051(a) provides:
\begin{quote}
If the defendant defaults in the payment of a fine or any installment or of restitution or any installment, the court may order the defendant to show cause why the defendant should not be sentenced to imprisonment for non-payment. If the state presents evidence of the defendant's failure to pay restitution, the court may presume that the defendant has intentionally refused to pay the fine or restitution or has not made a good faith effort to pay the fine or restitution unless the defendant presents some evidence that the defendant's failure to pay the fine or restitution was not intentional or that the defendant has made a good faith effort to pay the fine or restitution. If the court finds by a preponderance of the evidence that the default was attributable to an intentional refusal or failure to make a good faith effort to pay the fine or restitution, the court may order the defendant imprisoned until the order of the court is satisfied. A term of imprisonment imposed under this section may not exceed one day for each $50 of the unpaid portion of the fine or restitution or one year, whichever is shorter. Credit shall be given toward satisfaction of the order of the court for every day a person is incarcerated for nonpayment of a fine or restitution.
\end{quote}
\textit{Alaska Stat.} § 12.55.051(a) (1990).
\item \textsuperscript{57} \textit{See supra} note 30 and accompanying text.
\end{itemize}
liability must always be the case. Otherwise, one or the other of these provisions would necessarily be superfluous.

None of these inconsistencies has been the subject of appellate litigation, yet they are painfully obvious when one examines the fairly meager body of law from which they arise. The explanation for this odd state of affairs appears to be twofold. First, defendants and defense counsel are powerfully motivated to take the meekest possible approach to restitution. The second reason is less obvious but more important: the internal inconsistencies in the law of restitution reflect the conceptual and constitutional problems inherent in the subject.

B. Extrinsic Problems

In many ways, the most fundamental question about restitution in criminal law concerns its relationship to civil remedies. To the extent that it seeks to “compensate the victim,” restitution mirrors the civil system, seeking to approximate the result of full-scale civil litigation. Unhappily, the consequences of this simple and undeniable observation are even more problematic than the issues already discussed.

The Model Sentencing and Corrections Act contains the following innocent-sounding provision:

The court may provide for payment to the victim up to but not in excess of the pecuniary loss caused by the offense. The defendant is entitled to assert any defense that he could raise in a civil action for the loss sought to be compensated by the restitution order.58

Assuming that restitution should make victims “financially ‘whole’” without permitting them to “profit” from an award, this provision must be implicit in Alaska law as well.

This principle necessarily imports the concept of proximate cause from the law of torts,59 which requires attention to two areas that have been largely ignored in Alaska: the causal relationship between the crime charged and the victim’s loss,60 and the causal relationship between the defendant’s behavior and the victim’s loss.61 It must certainly provide for the same contributory fault setoff to which civil

58. MODEL SENTENCING AND CORRECTIONS ACT § 3-601(d), 10 U.L.A. 104 (Special Pamphlet 1987).
59. Alaska Statutes section 12.55.100(a)(2) authorizes restitution for “actual damages . . . caused by the crime for which conviction was had . . . .” ALASKA STAT. § 12.55.100(a)(2) (1990).
60. Restitution for damages on the basis of a “leaving the scene” conviction would be inappropriate for the reason that the damages resulting from the accident would not be causally related to “the crime for which conviction was had.” See id. § 12.55.100(a)(2) (1990). Damages resulting from defendant’s failure to render assistance, on the other hand, could be awarded.
61. This issue was raised in a recent Fairbanks case. Defendant was convicted of driving while intoxicated after colliding with a street light. When the owner of the
defendants are entitled. It would seem equally certain that criminal defendants are entitled to the benefits of the "tort reform" package enacted as a result of Alaska's 1988 election, including the end of routine joint and several liability orders in cases involving codefendants. But what about counterclaims or permissive counterclaims? To the extent that the existing restitution statutes deprive criminal defendants of these benefits and treat them differently from their civil counterparts, "victims" gain financial advantages over civil plaintiffs — and "'profit' from their misfortunes." At the same time, though, criminal defendants can obtain these benefits only by converting the otherwise summary restitution hearing into something approximating a full-scale civil trial.

This comparison between civil and criminal defendants, implicit in the concept of restitution, can and must be taken much further. First, it suggests a fairly obvious equal protection issue. To the extent that criminal defendants are deprived of the benefits discussed above, they are systematically treated differently from their civil counterparts. Even if those problems are eliminated, several others remain. Unlike defendants in civil actions, criminal defendants have no right to a jury trial on liability and damage issues. They lack the benefit of the rules of evidence and, above and beyond the inherently coercive nature of their situation, they face opponents who enjoy legal assistance provided at state expense and who do not even have to appear in court to recover a large award. It is very difficult to see how the state's interest in compensating victims and rehabilitating offenders can outweigh the criminal defendant's interest in equitable treatment. This question has yet to be raised before either of Alaska's appellate courts.

vehicle — who had loaned it to defendant — sought restitution, defendant successfully claimed that it was the owner's negligent maintenance of the brakes, not the defendant's intoxication, that caused the accident.

63. See id. § 09.17.080.
64. Suppose, for example, that the owner of the vehicle described in note 61, supra, had recovered restitution. Could defendant seek a setoff in the amount of his own medical bills on the basis of the owner's negligence? See generally ALASKA R. CIV. P. 13.
65. A defendant in a recent forgery case claimed that the victim had wrongfully withheld past wages in an amount nearly equal to his own wrongful gain. Although the judge rejected this argument, the issue will not be resolved on appeal for the usual reason: defendant's inability to pay mooted that other related questions.
66. See supra note 12 and accompanying text.
A subsidiary constitutional issue is equally troubling: Alaska's constitution guarantees the right to a jury trial in civil actions involving more than $250.\textsuperscript{68} Why is a criminal defendant ineligible to assert this right in response to a restitution claim? Courts responding to the parallel federal argument have provided interesting answers. In \textit{United States v. Brown},\textsuperscript{69} for example, the Second Circuit held that "[s]o long as [restitution] is a permissible form of punishment, it is not subject to civil requirements simply because it also achieves some of the purposes of a civil judgment." In Alaska, however, restitution is not a "form of punishment" — it is rehabilitative. The Second Circuit's rationale does not satisfy the state constitutional requirements. In \textit{United States v. Florence},\textsuperscript{70} the Eighth Circuit responded to the same argument with the simple pronouncement that a restitution order is not a civil judgment and therefore does not implicate the seventh amendment. In Alaska, at least, it is not at all clear that civil judgments and restitution orders differ in any meaningful way,\textsuperscript{71} and this rationale is apparently precluded. Federal law rejecting the seventh amendment claim would appear to present no obstacle to the parallel state claim, which has yet to be asserted before either Alaska appellate court.

Finally, and most obviously, a restitution order involves a deprivation of property — which must be preceded by "the opportunity to be heard at a meaningful time and in a meaningful manner."\textsuperscript{72} Given the universal assumptions that acceptance of responsibility for one's crime and willingness to compensate one's victim reflect well on rehabilitative potential (and result in less jail time) it is arguable that sentencing can never be a "meaningful time" to determine a defendant's liability to an injured party. Defendants, if properly prepared, appear at these hearings powerfully motivated to be as sorry as possible and to acquiesce in any demand the victim might make. At the least, it would appear that due process must require that a defendant have the right to be heard in a manner that preserves the rights that could be asserted by a civil litigant and insures that his liability does not exceed the amount recoverable in parallel civil litigation. Again, no Alaska appellant has urged any argument related to these issues.

\textsuperscript{68} ALASKA CONST. art. I, § 16.
\textsuperscript{69} 744 F.2d 905, 909 (2d Cir. 1984). \textit{See also} United States v. Satterfield, 743 F.2d 827, 836-37 (11th Cir. 1984).
\textsuperscript{70} 741 F.2d 1066, 1067 (8th Cir. 1984).
\textsuperscript{71} Given that Alaska Statutes section 12.55.051(d) provides that a "restitution recipient may enforce payment of a restitution order . . . as if the order were a civil judgment," the only practical difference would appear to be the period of time during which execution is available. \textit{ALASKA STAT.} § 12.55.051(d) (1990); \textit{see id.} § 09.35.020 (1983).
\textsuperscript{72} Armstrong \textit{v.} Manzo, 380 U.S. 545, 552 (1965).
It is not difficult to understand why these apparently important issues receive so little attention. The real issue for most criminal defendants, best intentions notwithstanding, is ability to pay. This fact typically moots any legal issue the case might otherwise have presented. For those few defendants who have the resources to pay significant restitution, actual civil litigation would generally tend to moot those same issues and consume such legal resources as are available to the exclusion of the restitution issues. It is not surprising that there has been so little appellate litigation in this area. It is, in fact, unlikely that these questions will ever be resolved through appellate argument.

IV. RECOMMENDATIONS

If these problems are inherent in the nature of criminal restitution, it is tempting to recommend its abolition. Nevertheless, this solution should be resisted for two reasons. First, restitution does in fact serve a meaningful purpose: it compensates victims who, for whatever reason, do not seek compensation through civil litigation. At the same time, restitution may have a rehabilitative effect on an offender, by forcing him to consciously address the consequences of his actions. Although these considerations are not unimportant, the second reason for retaining restitution is far more significant: restitution has such strong public support that its elimination is not practically or politically feasible. Restitution will be part of criminal justice whether the legal community likes it or not, so we would be well advised to make the best of the situation. In order to do so, we must articulate, as clearly as possible, just what restitution seeks to accomplish. Alaska has yet to do so, and that failure is largely to blame for the chaotic state of the law at present.

One strand of legal doctrine suggests that the purposes of restitution are to compensate victims and rehabilitate offenders. If those are really to be the goals, we need to strive for a more reliable and less coercive way to determine fault and liability. The ability to rehabilitate offenders through restitution depends on an impression of fair and rational treatment. This impression probably cannot be achieved while restitution remains part of the sentencing process — at least as long as defendants are in a position to reduce jail terms by maximizing restitution obligations. As for the goal of compensating victims, the civil system has spent centuries refining that concept. There is no reason to view the compensation function as anything other than a desire to approximate civil damages within the streamlined format of sentencing. Most of the problems raised by restitution could be eliminated by simply bifurcating the sentencing process. During the first phase, all sentencing issues other than restitution could be resolved,
and all terms and conditions but those relating to restitution could be imposed. The prosecution could then request a second phase, relating only to restitution. This procedure would eliminate the coercion inherent in the present system. It would allow the defendant, assuming he contests any restitution issues, to require proof of fault, causation and damages by a preponderance of the evidence as in civil litigation. In addition, it would enable the victim who is unable to pursue civil remedies to seek compensation with only a minimal investment of time and no investment of money. The second phase would, of course, be unnecessary if the prosecution declines to seek restitution, if the defendant concedes liability, or if the victim initiates a civil action.

A separate strand of doctrine suggests, less openly but quite forcefully, that the true goals of restitution lie elsewhere. If one thinks of restitution in terms of societal condemnation and deterrence, rather than compensation and rehabilitation, one reaches quite different conclusions. Under this view, restitution becomes essentially a fine payable to the victim and has the punitive effect of a fine on the offender. Viewed in this light, restitution would be procedurally simple: it would require attention only to those issues considered when fines are imposed and would quite literally be “totally independent” from civil damages. There does not appear to be any obstacle — conceptual, constitutional or otherwise — to this view of restitution.

The problem with the law in this area lies not so much with one or the other of these alternative views as with their uneasy coexistence. Most, if not all, of the inconsistencies are attributable to the fact that neither the legislature nor the courts have made it clear which view they are endorsing. A firm statement of the purpose of restitution would go a long way towards resolving those inconsistencies and solving the many practical problems the trial courts confront on a daily basis.

Finally, practitioners must recognize that it is unlikely that this firm statement will be forthcoming, and that they must carry on as well as present circumstances allow. For the defense bar, this means continuing to prepare clients to be as remorseful, and as willing to pay whatever the victim demands, as possible, until the sentence is imposed. In a case that raises true restitution issues, however, that is only the beginning; such issues can virtually always be raised either in

73. Cf. Thibedeau v. State, 617 P.2d 759 (Alaska 1980) (holding that the imposition of a fine payable to the state did not increase defendant’s sentence in violation of the double jeopardy provision of the constitution).

74. See supra note 37 and accompanying text.

75. Although Karr contains just such a statement of purpose, see supra note 37 and accompanying text, subsequent legislative and appellate court pronouncements cast doubt on its continuing vitality.
a motion to modify sentence\textsuperscript{76} or a motion to correct an illegal sentence,\textsuperscript{77} thereby accomplishing much of what the bifurcated sentencing format has to offer. Prosecuting attorneys will best serve victims' interests by urging the second of the alternatives discussed above. To the extent that prosecutors can persuade judges to rely on the "restitution as fine" paradigm, they will succeed in heading off defense arguments analogizing restitution to civil litigation. The best advice to litigants is, in short, to argue at cross purposes. Both sides are fully justified in proceeding from antithetical premises, and both can find adequate support in the law for doing so.

Not surprisingly, the best advice for practitioners working within the system is not at all like the recommendations one would make to those who are responsible for molding that system. Members of the first group need to be aware of the inconsistencies so as to be able to exploit them. As long as the law can be read to justify either of the competing views, there is little to be gained by revealing its flaws (and therefore the other side's strongest arguments). Legislators and appellate judges are in a different position. If the law of restitution is to function in a coherent manner, it is essential that they clarify what restitution is intended to accomplish and formulate at least general procedures to be applied in working toward that end. Such a statement of purpose will have fairly dramatic consequences, in that it will result in the excision of one half of existing law or the other, but it is a necessary precondition to achieving a rational and equitable resolution of the many problems this body of law now presents.

V. CONCLUSION

Alaska's law of criminal restitution comprises two dramatically opposed perceptions of what restitution is and should be. These opposing strands of legal doctrine are manifested in numerous unresolvable conflicts among the cases, the statutes, and the legislative history. As things now stand, trial courts have little in the way of a coherent body of law from which to work and consequently resolve restitution issues in inconsistent and idiosyncratic ways.

The first step towards a solution of this problem must be the formulation of a clear and definitive statement of what restitution is and what it should accomplish. If that statement takes the form of an analogy to civil damages, it will be a fairly simple matter to generate procedural rules to compensate victims and rehabilitate offenders. If, on the other hand, fines are to be the paradigm, implementation will

\textsuperscript{76} ALASKA R. CRIM. P. 35(b).
\textsuperscript{77} ALASKA R. CRIM. P. 35(a), 35.1(a)(1).
be equally simple: the new rule need only state that the goals of restitution are punitive and that victims will receive funds that would otherwise be remitted to the state.

For policy reasons, it is the author's contention that the former view is preferable. As the original drafters of Alaska's criminal code indicated, fairness would seem to preclude victims from profiting from restitution and would seem to suggest that a rational system of compensation for wrongs is likely to further an offender's rehabilitation. There are, at the same time, factors that might support the alternative view. Victims rarely receive full compensation and seldom file civil actions. This fact, coupled with a preference for punishment rather than rehabilitation of the offender, suggests that a streamlined procedure that does not preclude recovery in excess of a victim's loss would be appropriate. Neither view does violence to any settled constitutional principle and either could easily constitute the conceptual underpinning for a rational system of restitution for victims of crime. But they cannot coexist. Alaska's present mixture of rules representing both views is unsatisfactory and badly needs attention.