

met at church, that he was affectionate, caring, kind to her children, that he was not an abuser of drugs or alcohol, and that it was inconsistent with his character to have committed the murders. Payne's parents testified that he was a good son, and a clinical psychologist testified that Payne was an extremely polite prisoner and suffered from a low IQ. None of this testimony was related to the circumstances of Payne's brutal crimes. In contrast, the only evidence of the impact of Payne's offenses during the sentencing phase was Nicholas' grandmother's description—in response to a single question—that the child misses his mother and baby sister. Payne argues that the Eighth Amendment commands that the jury's death sentence must be set aside because the jury heard this testimony. But the testimony illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the

mitigating evidence introduced by the defendant.

....

We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

....

We accordingly affirm the judgment of the Supreme Court of Tennessee.

Affirmed.

79. Restitution: A New Paradigm of Criminal Justice

RANDY E. BARNETT

Outline of a New Paradigm

The idea of restitution is actually quite simple. It views crimes as an offense by one individual against the rights of another. The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused. It calls for a complete refocusing of our image of crime. Kuhn would call it a "shift of worldview." Where we once saw an offense against society, we now see an offense against an individual victim. In a way, it is a common sense

view of crime. *The armed robber did not rob society, he robbed the victim.* His debt, therefore, is not to society; it is to the victim. There are really two types of restitution proposals: a system of "punitive" restitution and a "pure" restitutional system.

1. Punitive Restitution

"Since rehabilitation was admitted to the aims of penal law two centuries ago, the number of penological aims has remained virtually constant. Restitution is waiting to come in."¹ Given this view, restitution should merely be added to the paradigm of punishment. Stephen Schafer outlines the proposal: "[Punitive] restitution, like punishment,

must always be the subject of judicial consideration. Without exception it must be carried out by personal performance by the wrong-doer, and should even then be equally burdensome and just for all criminals, irrespective of their means, whether they be millionaires or laborers."²

There are many ways by which such a goal might be reached. The offender might be forced to compensate the victim by his own work, either in prison or out. If it came out of his pocket or from the sale of his property this would compensate the victim, but it would not be sufficiently unpleasant for the offender. Another proposal would be that the fines be proportionate to the earning power of the criminal. Thus, "A poor man would pay in days of work, a rich man by an equal number of days' income or salary."³ Herbert Spencer made a proposal along similar lines in his excellent "Prison-Ethics," which is well worth examining.⁴ Murray N. Rothbard and others have proposed a system of "double payments" in cases of criminal behavior.⁵ While closer to pure restitution than other proposals, the "double damages" concept preserves a punitive aspect.

Punitive restitution is an attempt to gain the benefits of pure restitution, which will be considered shortly, while retaining the perceived advantages of the paradigm of punishment. Thus, the prisoner is still "sentenced" to some unpleasantness—prison labor or loss of X number of days' income. That the intention is to preserve the "hurt" is indicated by the hesitation to accept an out-of-pocket payment or sale of assets. This is considered too "easy" for the criminal and takes none of his time. The amount of payment is determined not by the *actual harm* but by the *ability of the offender to pay*. Of course, by retaining the paradigm of punishment this proposal involves many of the problems we raised earlier. In this sense it can be considered another attempt to salvage the old paradigm.

2. Pure Restitution

"Recompense or restitution is scarcely a punishment as long as it is merely a matter of returning stolen goods or money. . . . The point is not that the offender deserves to suffer, it is rather that the offended party desires compensation."⁶ This represents the complete overthrow of the paradigm of punishment. No longer would the deterrence, reformation, disablement, or

rehabilitation of the criminal be the guiding principle of the judicial system. The attainment of these goals would be incidental to, and as a result of, reparations paid to the victim. No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required. What follows is a possible scenario of such a system.

When a crime occurred and a suspect was apprehended, a trial court would attempt to determine his guilt or innocence. If found guilty, the criminal would be sentenced to make restitution to the victim. If a criminal is able to make restitution immediately, he may do so. This would discharge his liability. If he were unable to make restitution, but were found by the court to be trustworthy, he would be permitted to remain at his job (or find a new one) while paying restitution out of his future wages. This would entail a legal claim against future wages. Failure to pay could result in garnishment or a new type of confinement.

If it is found that the criminal is not trustworthy, or that he is unable to gain employment, he would be confined to an employment project. This would be an industrial enterprise, preferably run by a private concern, which would produce actual goods or services. The level of security at each employment project would vary according to the behavior of the offenders. Since the costs would be lower, inmates at a lower security project would receive higher wages. There is no reason why many workers could not be permitted to live with their families inside or outside the facility, depending, again, on the trustworthiness of the offender. Room and board would be deducted from the wages first, then a certain amount for restitution. Anything over that amount the worker could keep or apply toward further restitution, thus hastening his release. If a worker refused to work, he would be unable to pay for his maintenance, and therefore would not in principle be entitled to it. If he did not make restitution he could not be released. The exact arrangement which would best provide for high productivity, minimal security, and maximum incentive to work and repay the victim cannot be determined in advance. Experience is bound to yield some plans superior to others. In fact, the experimentation has already begun.⁷

While this might be the basic system, all sorts of refinements are conceivable, and certainly many more will be invented as needs arise. A few exam-

private
 ples might be illuminating. With such a system of repayment, victim *crime insurance* would be more economically feasible than at present and highly desirable. The cost of awards would be offset by the insurance company's right to restitution in place of the victim (right of subrogation). The insurance company would be better suited to supervise the offender and mark his progress than would the victim. To obtain an earlier recovery, it could be expected to innovate so as to enable the worker to repay more quickly (and, as a result, be released that much sooner). The insurance companies might even underwrite the employment projects themselves as well as related industries which would employ the skilled worker after his release. Any successful effort on their part to reduce crime and recidivism would result in fewer claims and lower premiums. The benefit of this insurance scheme for the victim is immediate compensation, conditional on the victim's continued cooperation with the authorities for the arrest and conviction of the suspect. In addition, the centralization of victim claims would, arguably, lead to efficiencies which would permit the pooling of small claims against a common offender.

Another highly useful refinement would be *direct arbitration* between victim and criminal. This would serve as a sort of healthy substitute for plea bargaining. By allowing the guilty criminal to negotiate a reduced payment in return for a guilty plea, the victim (or his insurance company) would be saved the risk of an adverse finding at trial and any possible additional expense that might result. This would also allow an indigent criminal to substitute personal services for monetary payments if all parties agreed. . . .

Something analogous to the medieval Irish system of *sureties* might be employed as well.⁸ Such a system would allow a concerned person, group, or company to make restitution (provided the offender agrees to this). The worker might then be released in the custody of the surety. If the surety had made restitution, the offender would owe restitution to the surety who might enforce the whole claim or show mercy. Of course, the more violent and unreliable the offender, the more serious and costly the offense, the less likely it would be that anyone would take the risk. But for first offenders, good workers, or others that charitable interests

found deserving (or perhaps unjustly convicted) this would provide an avenue of respite.

Restitution and Rights

These three possible refinements clearly illustrate the flexibility of a restitutional system. It may be less apparent that this flexibility is inherent to the restitutional paradigm. Restitution recognizes rights in the victim, and this is a principal source of its strength. The nature and limit of the victim's right to restitution at the same time defines the nature and limit of the criminal liability. In this way, the aggressive action of the criminal creates a *debt* to the victim. The recognition of rights and obligations make possible many innovative arrangements. Subrogation, arbitration, and suretyship are three examples mentioned above. They are possible because this right to compensation⁹ is considered the property of the victim and can therefore be delegated, assigned, inherited, or bestowed. One could determine in advance who would acquire the right to any restitution which he himself might be unable to collect.

The natural owner of an unenforced death claim would be an insurance company that had insured the deceased. The suggestion has been made that a person might thus increase his personal safety by insuring with a company well known for tracking down those who injure its policy holders. In fact, the partial purpose of some insurance schemes might be to provide the funds with which to track down the malefactor. The insurance company, having paid the beneficiaries would "stand in their shoes." It would remain possible, of course, to simply assign or devise the right directly to the beneficiaries, but this would put the burden of enforcement on persons likely to be unsuited to the task.

If one accepts the Lockean trichotomy of property ownership,¹⁰ that is, acquiring property via exchange, gifts, and homesteading (mixing one's labor with previously unowned land or objects), the possibility arises that upon a person's wrongful death, in the absence of any heirs or assignees, his right to compensation becomes unowned property. The right could then be claimed (homesteaded) by anyone willing to go to the trouble of catching and prosecuting the criminal. Firms might specialize in

this sort of activity, or large insurance companies might make the effort as a kind of "loss leader" for public relations purposes.

This does, however, lead to a potentially serious problem with the restitutional paradigm: what exactly constitutes "restitution"? What is the *standard* by which compensation is to be made? Earlier we asserted that any such problem facing the restitutional paradigm faces civil damage suits as well. The method by which this problem is dealt with in civil cases could be applied to restitution cases. But while this is certainly true, it may be that this problem has not been adequately handled in civil damage suits either.

Restitution in cases of crimes against property is a manageable problem. Modern contract and tort doctrines of restitution are adequate. The difficulty lies in cases of personal injury or death. How can you put a price on life or limb, pain or suffering? Is not any attempt to do so of necessity arbitrary? It must be admitted that a fully satisfactory solution to this problem is lacking, but it should also be stressed that this dilemma, though serious, has little impact on the bulk of our case in favor of a restitutional paradigm. It is possible that no paradigm of criminal justice can solve every problem, yet the restitutional approach remains far superior to the paradigm of punishment or any other conceivable rival.

This difficulty arises because certain property is unique and irreplaceable. As a result, it is impossible to approximate a "market" or "exchange" value expressed in monetary terms. Just as there is no rational relationship between a wrongfully taken life and ten years in prison, there is little relationship between the same life and \$20,000. Still, the nature of this possibly insoluble puzzle reveals a restitutional approach theoretically superior to punishment. For it must be acknowledged that a real, tangible loss has occurred. The problem is only one of incommensurability. Restitution provides some tangible, albeit inadequate, compensation for personal injury. Punishment provides none at all.¹¹ . . .

Advantages of a Restitutional System

1. The first and most obvious advantage is the assistance provided to victims of crime. They may have suffered an emotional, physical, or financial

loss. Restitution would not change the fact that a possibly traumatic crime has occurred (just as the award of damages does not undo tortious conduct). Restitution, however, would make the resulting loss easier to bear for both victims and their families. At the same time, restitution would avoid a major pitfall of victim compensation/welfare plans: Since it is the criminal who must pay, the possibility of collusion between victim and criminal to collect "damages" from the state would be all but eliminated.

2. The possibility of receiving compensation would encourage victims to report crimes and to appear at trial. This is particularly true if there were a crime insurance scheme which contractually committed the policyholder to testify as a condition for payment, thus rendering unnecessary oppressive and potentially tyrannical subpoenas and contempt citations. Even the actual reporting of the crime to police is likely to be a prerequisite for compensation. Such a requirement in auto theft insurance policies has made car thefts the most fully reported crime in the United States. Furthermore, insurance companies which paid the claim would have a strong incentive to see that the criminal was apprehended and convicted. Their pressure and assistance would make the proper functioning of law enforcement officials all the more likely.

3. Psychologist Albert Eglash has long argued that restitution would aid in the rehabilitation of criminals. "Restitution is something an inmate does, not something done for or to him. . . . Being reparative, restitution can alleviate guilt and anxiety, which can otherwise precipitate further offenses."¹² Restitution, says Eglash, is an active effortful role on the part of the offender. It is socially constructive, thereby contributing to the offender's self-esteem. It is related to the offense and may thereby redirect the thoughts which motivated the offense. It is reparative, restorative, and may actually leave the situation better than it was before the crime, both for the criminal and victim.¹³

4. This is a genuinely "self-determinative" sentence. The worker would know that the length of his confinement was in his own hands. The harder he worked, the faster he would make restitution. He would be the master of his fate and would have to face that responsibility. This would encourage

useful, productive activity and instill a conception of reward for good behavior and hard work. Compare this with the current probationary system and "indeterminate sentencing" where the decision for release is made by the prison bureaucracy, based only (if fairly administered) on "good behavior"; that is, passive acquiescence to prison discipline. Also, the fact that the worker would be acquiring *marketable* skills rather than more skillful methods of crime should help to reduce the shocking rate of recidivism.

5. The savings to taxpayers would be enormous. No longer would the innocent taxpayer pay for the apprehension and internment of the guilty. The cost of arrest, trial, and internment would be borne by the criminal himself. In addition, since now-idle inmates would become productive workers (able, perhaps, to support their families), the entire economy would benefit from the increase in overall production.

6. Crime would no longer pay. Criminals, particularly shrewd white-collar criminals, would know that they could not dispose of the proceeds of their crime and, if caught, simply serve time. They would have to make full restitution plus enforcement and legal costs, thereby greatly increasing the incentive to prosecute. While this would not eliminate such crime it would make it rougher on certain types of criminals, like bank and corporation officials, who harm many by their acts with a virtual assurance of lenient legal sanctions. It might also encourage such criminals to keep the money around for a while so that, if caught, they could repay more easily. This would make a full recovery more likely.

A restitutional system of justice would benefit the victim, the criminal, and the taxpayer. The humanitarian goals of proportionate punishment, rehabilitation, and victim compensation are dealt with on a *fundamental* level making their achievement more likely. In short, the paradigm of restitution would benefit all but the entrenched penal bureaucracy and enhance justice at the same time. What then is there to stop us from overthrowing the paradigm of punishment and its penal system and putting in its place this more efficient, more humane, and more just system? The proponents of punishment and others have a few powerful counterarguments. It is to these we now turn.

Objections to Restitution

1. Practical Criticisms of Restitution.

It might be objected that "crimes disturb and offend not only those who are directly their victim, but also the whole social order."¹⁴ Because of this, society, that is, individuals other than the victim, deserves some satisfaction from the offender. Restitution, it is argued, will not satisfy the lust for revenge felt by the victim or the "community's sense of justice." This criticism appears to be overdrawn. Today most members of the community are mere spectators of the criminal justice system, and this is largely true even of the victim. One major reform being urged presently is more victim involvement in the criminal justice process. The restitution proposal would necessitate this involvement. And while the public generally takes the view that officials should be tougher on criminals, with "tougher" taken by nearly everyone to mean more severe in punishing, one must view this "social fact" in light of the lack of a known alternative. The real test of public sympathies would be to see which sanction people would choose: incarceration of the criminal for a given number of years or the criminal's being compelled to make restitution to the victim: While the public's choice is not clearly predictable, neither can it be assumed that it would reject restitution. There is some evidence to the contrary.

This brings us to a second practical objection: that monetary sanctions are insufficient deterrents to crime. Again, this is something to be discovered, not something to be assumed. There are a number of reasons to believe that our *current* system of punishment does not adequately deter. . . . In fact, many have argued that the deterrent value of sanctions has less to do with *severity* than with *certainty*, and the preceding considerations indicate that law enforcement would be more certain under a restitutional system. In the final analysis, however, it is irrelevant to argue that more crimes may be committed if our proposal leaves the victim better off. It must be remembered: *Our goal is not the suppression of crime; it is doing justice to victims.*

A practical consideration which merits considerable future attention is the feasibility of the employment project proposal. A number of questions

can be raised. At first blush, it seems naively optimistic to suppose that offenders will be able or willing to work at all, much less earn their keep and pay reparations as well. On the contrary, this argument continues, individuals turn to crime precisely because they lack the skills which the restitution plan assumes they have. Even if these workers have the skills, but refuse to work, what could be done? Would not the use of force to compel compliance be tantamount to slavery?

... [O]ne can advance several responses. First, the problem as usually posed assumes the offender to be highly irrational and possibly mentally unbalanced. There is no denying that some segment of the criminal population fits the former description. What this approach neglects, however, is the possibility that many criminals are making rational choices within an irrational and unjust political system. Specifically I refer to the myriad laws and regulations which make it difficult for the unskilled or persons of transitory outlook to find legal employment. I refer also to the laws which deny legality to the types of services which are in particular demand in economically impoverished communities. Is it "irrational" to choose to steal or rob when one is virtually foreclosed from the legal opportunity to do otherwise? Another possibility is that the criminal chooses crime not because of foreclosure, but because he enjoys and obtains satisfaction from a criminal way of life. Though morally repugnant, this is hardly irrational.

Furthermore, it no longer can be denied that contact with the current criminal justice system is itself especially damaging among juveniles. The offenders who are hopelessly committed to criminal behavior are not usually the newcomers to crime but those who have had repeated exposure to the penal system. In Kuhn's words, "Existing institutions have ceased to meet the problems posed by an environment *they have in part created*." While a restitutionary system might not change these hardcore offenders, it could, by the early implementation of sanctions perceived by the criminal to be just, break the vicious cycle which in large part accounts for their existence.

Finally, if offenders could not or would not make restitution, then the logical and just result of their refusal would be confinement until they could

or would. Such an outcome would be entirely in their hands. While this "solution" does not suggest who should justly pay for this confinement, the problem is not unique to a restitutionary system. In this and other areas of possible difficulty we must seek guidance from existing pilot programs as well as from the burgeoning research in this area and in victimology in general.

2. Distributionary Criticisms of Restitution.

There remains one criticism of restitution which is the most obvious and the most difficult with which to deal. Simply stated, it takes the following form: "Doesn't this mean that rich people will be able to commit crimes with impunity if they can afford it? Isn't this unfair?" The *practical* aspect of this objection is that whatever deterrent effect restitution payments may have, they will be less for those most able to pay. The *moral* aspect is that whatever retributive or penal effect restitution payments may have they will be less for those who are well off. Some concept of equality of justice underlies both considerations.

Critics of restitution fail to realize that the "cost" of crime will be quite high. In addition to compensation for pain and suffering, the criminal must pay for the cost of his apprehension, the cost of the trial, and the legal expenditures of *both* sides. This should make even an unscrupulous wealthy person think twice about committing a crime. The response to this is that we cannot have it both ways. If the fines would be high enough to bother the rich, then they would be so high that a project worker would have no chance of earning that much and would, therefore, have no incentive to work at all. If, on the other hand, you lower the price of crime by ignoring all its costs, you fail to deter the rich or fully compensate the victim.

This is where the option of arbitration and victim crime insurance becomes of practical importance. If the victim is uninsured, he is unlikely to recover for all costs of a very severe crime from a poor, unskilled criminal, since even in an employment project the criminal might be unable to earn enough. If he had no hope of earning his release, he would have little incentive to work very hard beyond paying for his own maintenance. The victim

would end up with less than if he had "settled" the case for the lesser amount which a project worker could reasonably be expected to earn. If, however, the victim had full-coverage criminal insurance, he would recover his damages in full, and the insurance company would absorb any disparity between full compensation and maximal employment project worker's output. This cost would be reflected in premium prices, enabling the insurance company which settled cases at an amount which increased the recovery from the criminal to offer the lowest rates. Eventually a "maximum" feasible fine for project workers would be determined based on these considerations. The "rich," on the other hand, would naturally have to pay in full. This arrangement would solve the practical problem, but it should not be thought of as an imperative of the restitutional paradigm.

The same procedure of varying the payments according to ability to pay would answer the moral considerations as well (that the rich are not hurt enough) and this is the prime motive behind *punitive* restitution proposals. However, we reject the moral consideration outright. The paradigm of restitution calls not for the (equal) hurting of criminals, but for restitution to victims. Any appeal to "inadequate suffering" is a reversion to the paradigm of punishment, and by varying the sanction for crimes of the same magnitude according to the economic status of the offender it reveals its own inequity. *Equality of justice means equal treatment of victims.* It should not matter to the victim if his attacker was rich or poor. His plight is the same regardless. Any reduction of criminal liability because of reduced earning power would be for practical, not moral, reasons.

Equality of justice derives from the fact that the rights of men should be equally enforced and respected. Restitution recognizes a victim's right to compensation for damages from the party responsible. Equality of justice, therefore, calls for equal enforcement of each victim's right to restitution. *Even if necessary or expedient, any lessening of payment to the victim because of the qualities of the criminal is a violation of that victim's rights and an inequality of justice.* Any such expedient settlement is only a recognition that an imperfect world may make possible only imperfect justice. As a practical matter, a resti-

tutional standard gives victims an enormous incentive to pursue wealthy criminals since they can afford quick, full compensation. Contrast this with the present system where the preference given the wealthy is so prevalent that most victims simply assume that nothing will be done.

The paradigm of restitution, to reiterate, is neither a panacea for crime nor a blueprint for utopia. Panaceas and utopias are not for humankind. We must live in a less than perfect world with less than perfect people. Restitution opens the possibility of an improved and more just society. The old paradigm of punishment, even reformed, simply cannot offer this promise.

Endnotes

¹ Gerhard O. W. Mueller, "Compensation for Victims of Crime: Thought before Action," *Minnesota Law Review* 50 (1965): 221.

² Schafer, p. 127.

³ *Ibid.*

⁴ Herbert Spencer, "Prison-Ethics," in *Essays: Scientific, Political and Speculative* (New York: D. Appleton & Co., 1907), 3:152-91.

⁵ Murray N. Rothbard, *Libertarian Forum* 14, no. 1 (January 1972): 7-8.

⁶ Kaufmann, p. 55.

⁷ For a recent summary report, see Burt Calaway, "Restitution as an Integrative Punishment" (paper prepared for the Symposium on Crime and Punishment: Restitution, Retribution, and Law, Harvard Law School, March 1977).

⁸ For a description of the Irish system, see Joseph R. Peden, "Property Rights in Medieval Ireland: Celtic Law versus Church and State" (paper presented at the Symposium on the Origins and Development of Property Rights, University of San Francisco, January 1975); for a theoretical discussion of a similar proposal, see Spencer, pp. 182-86.

⁹ Or, perhaps more accurately, the compensation itself.

¹⁰ For a brief explanation of this concept and several of its possible applications, see Murray N. Rothbard. "Justice and Property Rights," in *Property in a Humane Economy*, ed. Samuel L. Blumenfeld (La Salle, Ill.: Open Court Publishing Co., 1974), pp. 101-22.

¹¹ That the "spiritual" satisfaction which punishment may or may not provide is to be recognized as a legitimate form of "compensation" is a claim retributionists must defend.

¹² Albert Eglash, "Creative Restitution: Some Suggestions for Prison Rehabilitation Programs," *American Journal of Correction* 40 (November–December 1958): 20.

¹³ *Ibid.*; see also Eglash's "Creative Restitution: A Broader Meaning for an Old Term," *Journal of Criminal Law and Criminology* 48 (1958): 619–22; Burt Galaway and Joe Hudson, "Restitution and Rehabilitation—Some Central Issues," *Crime and Delinquency* 18 (1972): 408–10.

¹⁴ Del Vecchio, p. 198.

Study Questions

1. Which of the following does Wilson argue will likely have a greater deterrent effect on criminal behavior: changing the levels of penalties to which wrongdoers are subjected or making changes to increase the probability the wrongdoers will be apprehended and convicted?
2. Wilson admits that a variety of social factors (parenting; educational and employment opportunities) are significant in the causal explanation of criminal behavior. If this is true, is it morally justifiable to assume that wrongdoers are "rational economic actors" whose incentives to criminal conduct can be effectively altered by appropriate penalties? Is this what a deterrence-oriented theory assumes?
3. What two kinds of counterexamples does Moore develop as arguments against the utilitarian theory of punishment?
4. What argument does Moore use to reject the mixed theory of punishment?
5. In 1996, the California State Assembly narrowly defeated a bill that would have reinstituted corporal punishment for youthful offenders. The bill provided that juveniles found to have vandalized property with graffiti would be whacked on the bottom up to ten times with a wooden paddle wielded by a parent. If the parent refused to mete out the punishment or to deliver a sufficient blow, the judge could empower the bailiff to administer the punishment. Proponents argued that the measure would give the judge an additional tool in the effort to combat vandalism; opponents claimed that corporal punishment would backfire by breeding anger and resentment. Can corporal punishment be justified on utilitarian grounds? What assumptions would be necessary in the utilitarian view to show the justifiability of such punishment? Could corporal punishment be justified on retributive grounds? Would you have endorsed the bill? Why or why not?
6. The Women's Coalition of Pasadena, California, proposed in 1997 to seek legislation requiring permanent, lifetime cuffs to be affixed to sexual offenders after they leave prison. The cuffs would contain an antitampering microchip to avoid removal. Children could then be taught to recognize the bracelet and avoid those who wear it. Do you think such restraints would be justified, assuming that the cuffs could be shown to reduce the rate of child molestation?
7. According to the majority of the Supreme Court in *Payne*, upon what two assumptions did the rulings in the earlier *Booth* and *Gathers* cases rely?
8. How does the majority in *Payne* respond to the argument that the use of victim-impact evidence will encourage juries to assign degrees of punishment to criminal defendants based on the status (wealth, social standing, etc.) of their victims?
9. How does Barnett explain the distinction between "punitive" and "pure" restitution? Which one of these does Barnett favor? Why?
10. According to Barnett, how would restitution by the wrongdoer to the victim be assured when the wrongdoer is unable or unwilling to provide it?
11. How does Barnett propose that restitution be handled in cases in which the victim has been killed?
12. In 1995, two Native American teenagers of the Tlingit tribe were convicted in the beating and

robbery of a pizza deliveryman. Rather than sentence them for the crime, however, the Washington state judge turned the youths over to tribal authorities who proposed to deal with the offenders in a way more consistent with their tribal traditions. The two eighteen-year-olds were given the punishment of banishment: provided with the basics, a Bible, and a book on Tlingit culture, the boys were sent to live for a year on uninhabited islands in Alaska. Tribal authorities argued that banishment is integral to a process of rehabilitation. Restitution was also to be a part of the punishment: the families of the teenagers gave money to the victim, and the boys were forced to carve objects for sale toward restitution. Is such a form of punishment justifiable? If so, on what grounds?

13. In a recent essay, Randy Barnett applied the arguments for restitution to the case of O.J. Simpson. The Simpson case presented a strong *prima facie* argument against restitution, Barnett maintained, for "here was an accused murderer who really could write a check to the victim's family and presumably walk away free and clear." Barnett responded to this criticism by insisting that "while it is true that a

wealthy person could make restitution, by the same token a wealthy person can use his or her wealth to avoid being punished" by hiring expensive lawyers who will help them avoid or delay punishment. "Under the prevailing system," Barnett claimed, "wealthy defendants can claim vindication they would have been denied if they had been compelled to make restitution." (Barnett, "Harshes Sentence Is Restitution," *National Law Journal*, January 7, 1997, p. A22.) Are Barnett's arguments here convincing? Why or why not?

14. Growing frustration with drug-related crimes has prompted several state legislators to introduce bills with harsh punishments. One such bill, introduced recently in the Texas legislature, would have punished convicted drug dealers by cutting off their fingers, one finger for each conviction. A bill introduced in Delaware would have required felony drug offenders to receive "no fewer than five nor more than 40 lashes well laid on" on a bare back. Should either mutilation or flogging be permissible punishments for such offenses?

D. The Death Penalty

The Case of Karla Faye Tucker

One out of every three executions in the United States occurs in the state of Texas. In early February 1998, one scheduled execution drew intense scrutiny from both opponents and proponents of the death penalty. Karla Faye Tucker was sched-

uled to die as punishment for her participation in a double murder. In 1983 Tucker, then twenty-three-years-old, along with her boyfriend, broke into the apartment of an acquaintance to steal motorcycle parts. Tucker killed the acquaintance with a pickax, claiming that she experienced an orgasm with each blow; a woman found in the apartment was killed