

January 2012

## What Can the Feds and the French Teach Us About Criminal Restitution in Maine?

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### Recommended Citation

Benjamin M. Birney, *What Can the Feds and the French Teach Us About Criminal Restitution in Maine?*, 65 Me. L. Rev. 247 (2012).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol65/iss1/11>

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# WHAT CAN THE FEDS AND THE FRENCH TEACH US ABOUT CRIMINAL RESTITUTION IN MAINE?

*Benjamin M. Birney*

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## WHAT CAN THE FEDS AND THE FRENCH TEACH US ABOUT CRIMINAL RESTITUTION IN MAINE?

Benjamin M. Birney\*

### I. INTRODUCTION

On New Year's Eve 1981, seventeen year old Kevin Tunell, returning home from a party at which he had consumed a large amount of champagne, struck and killed eighteen year old Susan Herzog.<sup>1</sup> In 1982, Tunell pleaded guilty to manslaughter and was sentenced to lecture to teens on the dangers of drunk driving for one year.<sup>2</sup> Herzog's family, outraged at what they perceived to be the leniency of the sentence, brought a civil action against Tunell, obtaining a \$100,000 settlement from his insurance company.<sup>3</sup> In addition, Tunell agreed to send one dollar to Herzog's family every week for eighteen years.<sup>4</sup> Despite Tunell's efforts to dissuade teens from driving drunk, the death of Susan Herzog led the family to grow to hate Tunell.<sup>5</sup> Tunell, for his part, repeatedly failed to send the dollar, eventually earning a jail sentence for contempt of court.<sup>6</sup> Herzog's family members insisted that their main interest in the weekly dollar was to punish Tunell, and that his failure to send the dollars represented to them his forgetfulness of the crime.<sup>7</sup> Susan Herzog's father stated that "every time we don't get a check, there's only one thing that comes to our mind: [Tunell] doesn't remember."<sup>8</sup>

This troubled victim-offender relationship neatly illustrates several tensions in the law of restitution and victims' rights. Although Tunell's single-dollar obligation was not the result of criminal restitution but rather of a civil settlement, it bears many of the characteristics of restitution as used in the criminal law: Its purpose is in part to punish and in part to rehabilitate the offender, as well as to compensate the victim.<sup>9</sup> The relationship between the victims of a crime and the offender is complex and deeply personal. The offender often has trouble paying the restitution. And finally, the victims, in order to obtain what they see as justice

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\* J.D. Candidate, 2013, University of Maine School of Law. I am grateful to Professors Melvyn Zarr and Martin Rogoff for their guidance in researching this comment and to the many law students, judges, and practitioners who were kind enough to provide their opinions on Maine's restitution law.

1. Peter Carlson & Josh Hammer, *Outrage over Drunk Driving*, PEOPLE.COM (July 25, 1983), <http://www.people.com/people/archive/article/0,,20085540,00.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Bill Hewitt & Tom Nugent, *Kevin Tunell Is Paying \$1 a Week for a Death He Caused and Finding the Price Unexpectedly High*, PEOPLE.COM (Apr. 16, 2000), <http://www.people.com/people/archive/article/0,,20117385,00.html>. Tunell did spend a great deal of time lecturing to young people on the dangers of drunk driving. *Id.*

7. *Id.*

8. *Id.*

9. See JAMES B. WHITE, *HERACLES'S BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* 194 (1985).

from the offender in the form of restitution, have only limited tools to press their claims in the justice system.

This Comment argues that Maine could improve the outcome of its criminal justice system with respect to crime victims by giving victims greater procedural and substantive rights to restitution. Obviously, this position assumes that making the victim whole is a desirable outcome of criminal justice, so this Comment begins by placing victims' interests in the context of Maine's criminal law.<sup>10</sup> The Comment then suggests that Maine could improve the efficiency and effectiveness of its criminal justice system by creating a mechanism by which sentencing courts would be guided, in part by victims themselves, to use more restitution and less prison time. The mechanism to accomplish this rebalancing includes a refinement of this journal's 1974 proposal that Maine adopt some limited elements of victim self-advocacy from the French *partie civile* system. The proposed mechanism would also create stronger incentives for offenders to pay their restitution than exist currently, and would offer offenders practical support in meeting their obligations. This Comment draws on statutory restitution and victims' rights law from several sources outside Maine—primarily U.S. federal criminal law and French criminal law.

Part II examines the purpose of restitution in the context of civil and criminal law, particularly as enunciated in the Maine Criminal Code. Part III compares Maine crime victims' procedural and substantive rights with the rights afforded by France and by the U.S. Congress. Part IV identifies specific areas where Maine could improve its current system. Part V suggests statutory reforms that enhance both victims' rights and the use of restitution. These proposed reforms also enhance offenders' incentives to pay restitution and provide new support mechanisms to help them meet their obligations.

## II. THE PURPOSE OF RESTITUTION IN THE CONTEXT OF CIVIL AND CRIMINAL LAW

In general, criminal law focuses on punishing an offender and protecting society, while civil law focuses on protecting and making whole an injured party. However, neither domain is mutually exclusive. In limited cases, civil remedies also serve to punish particularly culpable civil defendants. And, in the case of restitution, the criminal law also attempts to make the crime victim whole for his loss.<sup>11</sup>

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10. "Despite the venerable heritage of restitution and its widespread use today," *see infra* note 11, "the idea that compensating the victim complements punishing the criminal is vulnerable to theoretical challenge." Benjamin M. Birney, *Restitution is old. Is it just?*, BENJAMIN BIRNEY (Aug. 25, 2012), <http://www.bbirney.com/wp-content/uploads/2012/08/Restitution-is-old.-Is-it-just.pdf>. This comment proceeds, in accordance with the great weight of state and federal statutory and case law, as though criminal restitution were both desirable and consistent with due process of law. I have briefly discussed several arguments against restitution elsewhere, *see generally id.*, and I look forward to considering the theoretical justifications for criminal restitution in more depth in a later article.

11. The laws of the ancient Hebrews are early examples of restitution in human law. *See, e.g., Exodus* 21:18-19 (battery); *Exodus* 21:33-36, 22:14-15 (injury and death to domestic animals); *Exodus* 22:3 (theft); *Exodus* 22:5-6 (damage to real property and crops); *Exodus* 22:7-13 (loss of property by a negligent bailee). Theologian Gary DeMar argues that restitution as a criminal punishment "remind[s]

Legal practitioners have traditionally understood criminal sanctions to serve any of four, sometimes conflicting, purposes: (1) deterring the offender and others like him, (2) protecting the public by restraining the offender, (3) rehabilitating the offender, and (4) punishing the offender.<sup>12</sup> Maine has announced similar goals in its criminal statutes.<sup>13</sup> Most penology through the 1960s focused on deterrence and rehabilitation as the dominant goals of criminal law.<sup>14</sup> However, since then, courts and commentators have focused more heavily on punishing the defendant simply because his actions were wrongful.<sup>15</sup> For instance, Judge Kermit V. Lipez, at the time a justice in the Maine Superior Court,<sup>16</sup> noted that a prison sentence “advances the goal of punishment . . . [not] in the service of some other sentencing goal, such as deterrence . . . [but] in its pure sense, the subject addressed delicately by the criminal code when it [instructs] judges to impose sentences ‘which do not diminish the gravity of offenses.’”<sup>17</sup> In Maine, a sentencing judge must craft a sentence that attempts both to individualize punishment to the defendant, based on the facts of his crime and of his background, and also to punish similar crimes with similar sentences.<sup>18</sup>

Civil remedies, by contrast, generally focus on the rights of the plaintiff. In most cases, a civil judgment uses compensatory damages to make the plaintiff whole for any injury that he suffered to his person or property.<sup>19</sup> Less frequently, courts may issue an injunction to compel the defendant to future action or

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the criminal that he is ultimately responsible to God for his actions, and his victims, created in God’s image, must be compensated in the manner prescribed by the Judge of all the earth.” Gary DeMar, *The Biblical Doctrine of Restitution*, AM. VISION (May 12, 2010), <http://americanvision.org/2480/the-biblical-doctrine-of-restitution/> (internal quotations omitted). In other words, restitution is justified, not because the crime is an offense against an individual or against society, but because it is an offense against God, who has prescribed restitution as the correct remedy.

Many other ancient legal codes included restitution as well. See generally Christopher Bright, *Restitution*, RESTORATIVE JUST. ONLINE (1997), <http://www.restorativejustice.org/university-classroom/01introduction/tutorial-introduction-to-restorative-justice/outcomes/restitution/>.

12. WHITE, *supra* note 9, at 194. See also MODEL PENAL CODE § 1.02 (Proposed Official Draft 1962) (identifying similar goals).

13. See 17-A M.R.S.A. § 1151(1), (8) (2006 & Supp. 2011) (“The general purposes [of Maine’s criminal sentencing provisions] are . . . [t]o prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons . . . [and] [t]o permit sentences that do not diminish the gravity of offenses . . .”).

14. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 978 (1999).

15. *Id.* at 979. See also C.S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 287-89 (Walter Hooper, ed., 1970) (arguing that deterrence and rehabilitation, as goals of the criminal justice system, deprive each person of human rights).

16. Kermit V. Lipez, *Sentencing Without Resources A Challenge To Intellectual Honesty*, 8 ME. B.J. 182, 182 (1993).

17. *Id.* at 183 (quoting § 1151(8)). See also *id.* (“[Criminal punishment] is a civilized version of the cry for vengeance. . . . Although these legitimate expectations of the victim must not control my sentencing decision, they should influence it.”). See also *id.* at 183-84 (expressing doubts as to the “intellectual honesty” of deterrence and rehabilitation as goals).

18. *State v. Sweet*, 2000 ME 14, ¶ 10, 745 A.2d 368.

19. See *Estate of Hoch v. Stifel*, 2011 ME 24, ¶ 41, 16 A.3d 137; see also *Wendward Corp. v. Group Design, Inc.*, 428 A.2d 57, 62 (Me. 1981) (“That measure [of calculating damages] which most precisely compensates a plaintiff for its loss . . . should be applied.”).

forbearance that will prevent harm to the plaintiff.<sup>20</sup> However, although the overall focus of the civil judgment is to prevent or repair harm to the injured party, “punitive” money damages can also serve to punish particularly malicious civil defendants.<sup>21</sup> In this sense, punitive damages have an overlapping purpose with the purposes of the criminal law. For instance, Maine uses punitive damages to supplement the deterrent effects of the criminal law when criminal sanction “cannot . . . adequately fulfill its role as an enforcer of society’s rules.”<sup>22</sup> This is so even though the state relies on a private plaintiff to request such punitive damages as part of his or her civil remedy.<sup>23</sup>

Likewise, restitution can be used by a criminal sentencing court to compensate a victim for his injury.<sup>24</sup> Various jurisdictions and commentators describe restitution as either serving primarily to rehabilitate the offender, or else primarily to compensate the victim.<sup>25</sup> Although these goals are usually complementary, the jurisdiction’s focus is important because it gives direction to a sentencing court seeking to apply restitution as part of a criminal sentence.<sup>26</sup> This is so because, in imposing any criminal sentence, a sentencing judge considers the purpose of criminal sanction. A judge faced with an offender and with a victim who has suffered economic damages must weigh these purposes. If the jurisdiction is more offender-focused, the judge might ask: Does the offender’s crime and individual characteristics make restitution an effective method of deterrence, punishment, and rehabilitation? On the other hand, if the jurisdiction is more victim-focused, the judge might ask instead: Are this victim’s economic damages such that ordering restitution would effectively make the victim whole? In reality, of course, a judge will ask *both* questions; the difference will lie in the weight to which he gives each answer. In the aggregate, the jurisdiction’s focus will inform whether the justice system as a whole leans toward punishing more heavily with restitution or with imprisonment.

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20. 43A C.J.S. *Injunctions* § 11 (2011).

21. *Tuttle v. Raymond*, 494 A.2d 1353, 1358 (Me. 1985).

22. *Id.* (internal citations omitted). *See also id.* at 1363 (“[T]he primary concern of the doctrine of punitive damages is to deter misconduct, not to benefit plaintiffs.”). In Maine, a civil plaintiff must prove by “clear and convincing evidence that the defendant acted with malice” to be awarded punitive damages. *Id.*

23. *Id.* at 1358 (“The potential for recovering an exemplary award provides an incentive for private civil enforcement of society’s rules against serious misconduct.”) (footnote omitted). A plaintiff naturally has plenty of economic incentive to request punitive damages, since they constitute a “windfall,” compensating him for more than the amount of his actual damages. *Id.*

24. MODEL PENAL CODE § 301.1 (Proposed Official Draft 1962).

25. *Compare id.* (the goal of restitution is to “help the defendant to lead a law-abiding life”) with An Act to provide additional protections and assistance to victims and witnesses in Federal cases, Victim and Witness Protection Act of 1982, Pub. L. No. 97–291, 96 Stat 1248§ 2(b)(2), (1982) (later codified at 18 U.S.C.A. § 3663 (2000 & Supp. 2012)) (“The Congress declares that the purposes of this act [include] . . . to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime . . .”).

26. *Compare* *State v. Williams*, 90 P.3d 785, 789 (Ariz. Ct. App. 2004) (“The purpose of the restitution statutes is to make victims whole.”) with *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 702 (2d Cir. 2000) (“Restitution as part of a defendant’s sentence serves the traditional penal functions of punishment, including rehabilitation.”).

*A. The Purpose of Restitution in Maine's Criminal Law*

Maine identifies restitution as a distinct, independent purpose of criminal sentencing,<sup>27</sup> focusing partly on the victim but primarily on the offender.<sup>28</sup> With respect to the offender, Maine intends restitution to serve a rehabilitative purpose.<sup>29</sup> Maine's criminal statute anticipates that restitution can rehabilitate by "reinforc[ing] the offender's sense of responsibility for the offense . . . [and] provid[ing] him the opportunity to pay his debt to society and to his victim . . . ."<sup>30</sup> However, restitution also serves to "ease the burden of the victim as a result of the criminal conduct."<sup>31</sup> Nonetheless, the statute makes clear that restitution's benefit to the victim is secondary, at least from a sentencing perspective, to the punishment inflicted on the offender.<sup>32</sup> Consistent with that perspective, the sentencing judge is required to *consider* restitution at sentencing, but is not under any circumstances required to *order* it.<sup>33</sup> The judge may not, for instance, impose restitution if it would impose an "excessive financial hardship" on the offender—or his dependents.<sup>34</sup> This criterion illustrates the statute's focus on the offender; the judge must consider the victim's financial hardship, but it is the offender's hardship that is dispositive.<sup>35</sup>

Consistent with this focus on the offender, Maine's provisions for victims'

27. 17-A M.R.S.A. § 1151(2) (2006 & Supp. 2011).

28. One gives the Maine Legislature the benefit of the doubt in this interpretation. One might also conclude that the Legislature struggled to select from among fundamentally conflicting purposes in formulating the statute. Compare 17-A M.R.S.A. § 1321 (2006) ("The Legislature finds and declares that the victims of crimes often suffer losses through no fault of their own and for which there is no compensation. . . . It is the purpose of [restitution] to encourage compensation of victims by . . . the offender . . . .") with *id.* ("[R]epayment . . . by the offender to the victim . . . can operate to rehabilitate the offender in certain instances. . . . The Legislature recognizes that crime is an offense against society as a whole, not only against the victim of the crime, and that restitution for victims is therefore ancillary to the central objectives of the criminal law."). But see *id.* § 1151(2) (identifying restitution as the one of eight "general purposes" of criminal sentencing, equal with deterrence, rehabilitation, and restraint). Regardless, the Legislature's express intent in the statute seems to embrace both making the victim whole and punishing the offender.

29. *Id.* § 1321.

30. *Id.*

31. *Id.*

32. See *id.* ("[The Legislature] intends restitution to be applied only when other purposes of sentencing can be appropriately served.").

33. 17-A M.R.S.A. § 1323 (2006). Compared to the Federal restitution statute and the *partie civile* system used in France, Maine's restitution statute leaves a very large amount of discretion in the hands of the judge as to whether restitution shall be ordered. See *infra* note 67.

34. 17-A M.R.S.A. § 1325(D) (2006).

35. Unlike § 1325, the Legislature's directions to sentencing judges for calculating a term of imprisonment are notably silent on the issue of financial hardship on the offender. See 17-A M.R.S.A. § 1252-C (2006 & Supp. 2011). The Supreme Judicial Court of Maine, sitting as the Law Court, has interpreted § 1252-C to permit the sentencing judge to consider restitution among the aggravating and mitigating factors used to personalize a sentence of imprisonment to the offender. *State v. Reese*, 2010 ME 30, ¶ 19, 991 A.2d 806. Thus, the judge may consider the offender's financial hardship in deciding whether or not to impose restitution, and may consider any restitution paid in deciding how long to imprison the offender. This situation presents the danger of deep-pocketed offenders buying down their prison time, notwithstanding the Legislature's admonition against such a result. 17-A M.R.S.A. § 1321.

rights are silent on the issue of restitution. A crime victim must be notified of the various procedural stages of the trial;<sup>36</sup> must be permitted to address the court at sentencing;<sup>37</sup> must be notified of the offender's release;<sup>38</sup> and is assured that information relating to his current address or location is kept confidential.<sup>39</sup> However, the statute creates no individual right to restitution.<sup>40</sup> Furthermore, as noted above, not only is the court under no obligation to actually order restitution, it is positively instructed to consider the financial hardship on the offender when making this decision.<sup>41</sup>

Under Maine law, victims of certain crimes do have a right to limited compensation from the Victims' Compensation Board.<sup>42</sup> However, save for a small mandatory assessment to benefit the Victims' Compensation Fund,<sup>43</sup> the procedure for victims' compensation is disconnected from the criminal proceeding. This disconnect further highlights the offender-focused nature of Maine's restitution provisions.

Despite this focus on the offender, Maine's restitution scheme is in some ways similar to civil compensatory damages. For instance, the amount of restitution is measured against the amount of the victim's economic loss.<sup>44</sup> The burden of proof is also similar; a sentencing judge only needs to find the amount of the victim's damages by a preponderance of the evidence.<sup>45</sup> Because a crime victim must be allowed to address the court at sentencing if he wishes to do so,<sup>46</sup> he has at least a rough analog to his opportunity in a civil proceeding to present evidence of his damages.<sup>47</sup> To the casual observer, a sentencing hearing at which a victim requests

36. 17-A M.R.S.A. § 1172 (2006).

37. *Id.* § 1174 (2006 & Supp. 2011).

38. *Id.* § 1175.

39. *Id.* § 1176.

40. During his address at sentencing, a well-informed victim could, on his own initiative, ask the court to consider his economic damages and award restitution. *See id.* § 1174 (2006). However, victims must be educated about this opportunity in order to use it, and may need assistance in compiling evidence of their damages. Maine only "encourage[s] [counties] to establish a victim . . . support program to assist the victims of criminal offenses." 30-A M.R.S.A. § 460 (2011). All sixteen Maine counties have established Victim/Witness Advocates. *List of VWAs in Maine*, ME. VICTIM WITNESS ADVOCATES (Jun. 13, 2007), [http://mainevwa.org/List\\_Of\\_VWAs.htm](http://mainevwa.org/List_Of_VWAs.htm). The Maine Attorney General's office also has two Victim Witness Advocates who offer some support to the families of homicide victims. *See Homicides*, OFF. OF THE ME. ATT'Y GEN. (2011), [http://www.maine.gov/ag/crime/crimes\\_we\\_prosecute/homicides.shtml](http://www.maine.gov/ag/crime/crimes_we_prosecute/homicides.shtml). The frank language of the relevant topical subtitle within the Frequently Asked Questions section in the Attorney General's page on homicides illustrates the underlying problem, however: "A member of my family was murdered. The system is confusing, and I am overwhelmed." *Id.*

41. 17-A M.R.S.A. §§ 1323, 1325 (2006).

42. 5 M.R.S.A. §§ 3360-B, 3360-E (2002 & Pamph. 2011).

43. *Id.* § 3360-I (2002).

44. *State v. McCray*, 1999 ME 151, ¶ 7, 740 A.2d 38.

45. *State v. Berube*, 1997 ME 165, ¶ 19, 698 A.2d 509.

46. 17-A M.R.S.A. § 1174 (2006).

47. *See, e.g., Griffin v. State*, 2001 WL 34128258, at \*1-2 (Me. Super. July 16, 2001) (denying post-conviction review sought on the grounds that the sentencing judge had taken a victim impact letter describing economic loss into account in determining the sentence; defendant had the opportunity to rebut the statements in the letter but failed to do so).



restitution would appear similar to a civil bench trial, with the prosecutor standing in for plaintiff's counsel.

In sum, Maine's restitution scheme combines some elements of civil compensatory damages with a primary purpose, now increasingly disfavored,<sup>48</sup> of rehabilitating the offender. Comparison with the federal restitution statute will provide a context for the statutory improvements that this Comment suggests.

### *B. The Purpose of Restitution in Federal Criminal Law*

Restitution under federal law is significantly more focused on the victim.<sup>49</sup> Federal law, like Maine law, requires a sentencing judge to consider restitution at every sentence,<sup>50</sup> but also makes restitution mandatory<sup>51</sup> for most violent crimes, offenses related to tampering with consumer products, and "offense[s] against property."<sup>52</sup> The mandatory restitution statute requires that the offender be ordered to compensate the victim for any economic personal or property damage that the victim suffers as a result of the crime.<sup>53</sup>

The legislative history behind 18 U.S.C. § 3663A reveals a much greater interest in the rights of the victim than does Maine's restitution statute. With regard to the Victim Restitution Act of 1995, codified at § 3663A,<sup>54</sup> the Senate Committee on the Judiciary stated that it wished to "ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due."<sup>55</sup> The Committee described restitution in terms strongly reminiscent of civil compensatory damages:

The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers, it should also ensure that the wrongdoer is required to the degree possible *to restore the victim to his or her prior state of well-being*.<sup>56</sup>

Reciting a series of statistics illustrating the economic costs of violent crime in the United States, the Committee required that "the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that [the] offender be held accountable to repay these costs."<sup>57</sup>

The federal legislative history also reveals a parallel interest in punishing the offender. This interest is more consistent with current thought on criminal sanction

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48. See *supra* notes 15-17 (discussing the trend away from rehabilitation as a purpose of the criminal law).

49. See S. REP. NO. 104-179, at 13 (1995), reprinted in 1996 U.S.S.C.A.N. 924, 926, 1995 WL 731704 (expressing the Senate Committee on the Judiciary's desire for a more "victim-centered justice system.").

50. 18 U.S.C.A. § 3663 (2000 & Supp. 2012).

51. *Id.* § 3663A.

52. *Id.* § 3663A(c)(1)(A).

53. *Id.* § 3663A(b).

54. Codified at § 3663A.

55. S. REP. NO. 104-179, *supra* note 49, at 12.

56. *Id.* at 12-13 (emphasis added).

57. *Id.* at 18.

than that expressed by the Maine Legislature. For instance, the Senate Committee on the Judiciary, responding to concerns from the federal judiciary that most offenders are unable to pay restitution, asserted that restitution serves penological goals by making the offender more accountable for the harm he caused.<sup>58</sup> The Committee also wanted to “ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society.”<sup>59</sup> Notably absent from the Committee’s report, and from the statute itself, is any mention of rehabilitation as a purpose of restitution. Eighteen years after Maine’s restitution statute was passed, the U.S. Congress had recognized the shift in thinking on the purpose of the criminal law—away from rehabilitation, and toward punishment.<sup>60</sup>

Notwithstanding its almost apologetic association with the traditional goals of criminal punishment, the legislative history of the federal mandatory restitution statute reveals an undeniable preference for using restitution as a tool to make crime victims whole for their losses.

### III. RESTITUTION AND VICTIMS’ PROCEDURAL RIGHTS IN MAINE WITH COMPARISONS TO OTHER DOMESTIC AND INTERNATIONAL JURISDICTIONS

Compared to the federal restitution and victims’ rights statutes and to the Civil Code model exemplified by the French *partie civile*, Maine’s restitution and victims’ rights laws are unfavorable to crime victims. This situation does not, on its own, warrant an adjustment to the law. After all, criminal law is traditionally focused on the criminal and on society at large,<sup>61</sup> and a crime victim still has the option to bring a civil suit against the offender.<sup>62</sup> However, given Maine’s stated<sup>63</sup> and inferable<sup>64</sup> public intent to restore and re-empower crime victims, the State is well served by adapting to its own needs the most compatible laws of more victim-favorable jurisdictions. The substantive and procedural rights available in the U.S. federal courts and in French courts illuminate new possibilities for crime victims in Maine.

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58. *Id.*

59. *Id.* at 12.

60. See Kadish, *supra* note 14, at 978-81.

61. See WHITE, *supra* note 9, at 194-95.

62. See 17-A M.R.S.A. § 1327 (2006). However, this is not a practical alternative for many crime victims because the likelihood of actually recovering a civil judgment from many offenders is quite low. See *Civil Court Action for Victims and Survivors*, AARDVARC.ORG (May 5, 2011), <http://www.aardvarc.org/victim/civilsuit.shtml> (“If the perpetrator has no assets, is not likely to come into any assets, and is not insured, then there may be limited prospects for a victim to collect on a judgment. Suing for money doesn’t mean the defendant HAS any . . .”). Plaintiffs’ lawyers working on a contingent fee basis do not have a strong incentive to take cases in which the defendant is judgment-proof.

63. 17-A M.R.S.A. § 1321 (2006).

64. See 5 M.R.S.A. §§ 3360 to 3360-M (2002 & Pamph. 2011) (establishing a Victims’ Compensation Fund); 17-A M.R.S.A. §§ 1171-1177 (2006 & Supp. 2011) (defining procedural rights for crime victims).

*A. Restitution and Victims' Procedural Rights under Maine Law*

In Maine, judges have substantial discretion over when to order restitution and in what amount. Furthermore, what limitations exist on that discretion protect offenders, not victims. A crime victim is entitled only to have the sentencing court inquire, "whenever practicable," into the amount of the victim's economic loss.<sup>65</sup> This "inquiry" is made of the prosecutor, a law enforcement officer, or the victim himself.<sup>66</sup> Maine requires that the sentencing court order restitution when it is "appropriate"; if restitution is not ordered, the judge shall explain why not.<sup>67</sup> In determining whether to award restitution, a sentencing court must consider any misconduct by the victim during the crime, any delay in reporting the crime, and whether the offender is able to pay restitution.<sup>68</sup> The judge may not award restitution if doing so would "create[] an excessive financial hardship on the offender or [a] dependent of the offender."<sup>69</sup> By the plain language of the statute, the offender bears no burden as to this "defense"; however, the Law Court has held that the offender bears the burden of production as to any excessive financial hardship.<sup>70</sup>

Crime victims' other rights in Maine, like their restitution rights, are narrowly circumscribed. The prosecutor must, again "when practicable," notify the victim of the time and place of the sentencing.<sup>71</sup> The victim has the right to address the court during sentencing, either by making an oral statement in open court or by making a written statement to the court.<sup>72</sup> The court must "consider" the statements of the victim in imposing a sentence, "along with all other appropriate factors."<sup>73</sup> Even the Legislature's inclusion of restitution as an independent goal of sentencing expressly limits its application to cases where "other purposes of sentencing can be appropriately served."<sup>74</sup> Although Maine maintains a public fund to pay compensation to the victims of many crimes,<sup>75</sup> the fund payout is limited to a maximum of \$15,000 of "actual and unreimbursed losses."<sup>76</sup> Furthermore, the Victims' Compensation Board has substantial discretion to limit the award based on, among other factors, the amount of money actually available in the fund and how many claims are being made.<sup>77</sup>

Finally, a crime victim in Maine who believes a sentencing judge erred in not awarding restitution, or in determining the amount of the restitution, has no means

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65. 17-A M.R.S.A. § 1323(1) (2006 & Supp. 2011).

66. *Id.*

67. *Id.* § 1323(2).

68. *Id.* § 1325(1) (2006).

69. *Id.* § 1325(2)(D).

70. *State v. Berube*, 1997 ME 165, ¶ 19, 698 A.2d 509.

71. 17-A M.R.S.A. § 1172 (2006).

72. *Id.* § 1174(1) (2006).

73. *Id.* § 1174(2).

74. *Id.* § 1151(2) (2006 & Supp. 2011).

75. 5 M.R.S.A. § 3360-B (2002 & Supp. 2011).

76. *Id.* § 3360-E (2002).

77. *Id.* § 3360-F.

by which to appeal the judge's decision.<sup>78</sup> The only recourse available to such a victim is the Victims' Compensation Board.<sup>79</sup>

### *B. Restitution and Victims' Procedural Rights under Federal Law*

#### *1. The Federal Law*

Before a federal district court, 18 U.S.C. § 3663A gives a crime victim significantly more rights and opportunities to advocate for himself.<sup>80</sup> A federal sentencing judge *must* order restitution for any "crime of violence," any "offense against property," and most drug crimes.<sup>81</sup> The sentencing judge may also, at his discretion, apply a sentence of restitution for *any* crime, provided that some evidence of the victim's economic loss is available.<sup>82</sup> For violent crimes, the compensation can include the victim's medical bills, the cost of his occupational and physical therapy, and any lost income.<sup>83</sup> Mandatory restitution also covers any expenses that the victim incurs while participating in the investigation and trial, including lost income and child care expenses.<sup>84</sup> In cases requiring mandatory restitution, the sentencing judge may not deny restitution based on any consideration of the defendant's financial position or likely future ability to pay.<sup>85</sup> The United States is responsible for collecting unpaid restitution, and in fact must prioritize restitution payments over "[a]ll other fines, penalties, costs, and other payments required under the sentence."<sup>86</sup> The First Circuit has held that the government may use garnishment procedures specified in the Federal Debt Collection Procedures Act of 1990<sup>87</sup> even if the restitution is owed, not to the United States, but to a private party.<sup>88</sup>

Even more striking than a federal crime victim's rights to restitution are his enhanced rights to advocate for himself under 18 U.S.C. § 3771.<sup>89</sup> As in Maine, a crime victim in federal court has the right to "be reasonably heard at any public

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78. See 17-A M.R.S.A. §§ 1321 to 1330-B (2006 & Supp. 2011) (lacking any language establishing a right of appeal in the crime victim).

79. See *supra* note 77.

80. 18 U.S.C.A. § 3663A (2000 & Supp. 2012).

81. *Id.* § 3663A(a), (c). In the case of offenses against property, § 3663A(b)(1) requires the defendant to either return all of the property or else compensate the victim for the part that he is unable to return.

82. 18 U.S.C.A. § 3663(b)(1)-(2) (2000 & Supp. 2012).

83. *Id.* § 3663A(b)(2).

84. *Id.* § 3663A(b)(4).

85. See *id.* § 3663A(c)(3) (identifying exceptions to the requirement of mandatory restitution, among which is no reference to the defendant's financial position or likely future ability to pay). See also 18 U.S.C.A. § 3664(f)(1)(A) (2000) (requiring that the defendant's "economic circumstances" not be a consideration when a sentencing judge issues a restitution order); *U.S. v. Leftwich*, 628 F.3d 665, 668 (4th Cir. 2010) (contrasting mandatory and non-mandatory restitution, and reaffirming that a sentencing judge may not "remit" a mandatory restitution order).

86. 18 U.S.C.A. § 3612(c) (2000 & Supp. 2012).

87. 104 Stat. 4933 (codified at 28 U.S.C.S. §§ 3001-3308 (2005 & Supp. 2012)).

88. *U.S. v. Witham*, 648 F.3d 40, 41 (1st Cir. 2011).

89. 18 U.S.C.A. § 3771 (Supp. 2012).

proceeding in the . . . court involving release, plea, sentencing, or any parole proceeding.”<sup>90</sup> However, such a victim also has “[t]he right to full and timely restitution as provided in law”<sup>91</sup>—not, as in Maine, the right to have his damages “inquire[d] [into]” “whenever practicable” and restitution ordered when the judge deems it, in his discretion, to be “appropriate.”<sup>92</sup> Furthermore, a crime victim has a limited right to *compel* a federal district court to act on the rights guaranteed in § 3771 by motion in the jurisdiction in which either the crime is being prosecuted—or, if it is not yet being prosecuted, in which the crime occurred.<sup>93</sup> Even more remarkably, if a district court denies a victim’s motion asserting his § 3771 rights, the victim may petition the appropriate circuit court of appeals for a writ of mandamus to compel the district court to take correct action.<sup>94</sup> The circuit courts of appeals are split on whether to require such a petitioner to meet the traditionally high standard required for a writ of mandamus or whether to grant mandamus on a lesser showing.<sup>95</sup>

## 2. *An Illustrative Case*

*U.S. v. Monzel* is a useful case study in the restitution rights of a victim in the federal court system, and of that victim’s ability to enforce those rights under §

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90. *Id.* § 3771(a)(4). These provisions are roughly analogous to Maine’s victims’ rights provisions. See 17-A M.R.S.A. § 1173 (2006) (plea proceeding); § 1174 (sentencing); § 1175 (release from prison).

91. 18 U.S.C.A. § 3771(a)(6).

92. 17-A M.R.S.A. § 1323(1) (2006). The language in § 1325 makes even more clear that restitution is optional in Maine: “Restitution may be authorized, in whole or in part, as compensation for economic loss. In determining the amount of restitution authorized, the following shall be considered: [contributory misconduct of the victim, failure to timely report the crime, and the present and future financial capacity of the offender].” *Id.* § 1325(1).

93. *Id.* § 3771(d)(3) (Supp. 2012). Remarkably, even if “no prosecution is underway,” a person believing himself to be entitled to § 3771 rights as a crime victim may file a “motion asserting a victim’s rights” that the District Court must consider and decide “forthwith.” *Id.* The language of the statute does not address whether the District Court may, on such a motion from a crime victim, order the appropriate federal prosecutor to take action, though the statute does expressly refuse to impinge on the prosecutorial discretion of the Attorney General or his delegates. *Id.* § 3771(d)(6).

94. *Id.* § 3771(d)(3). A single circuit judge must either issue the writ or give reasons for denying it within seventy-two hours of filing. *Id.*

95. The Sixth, Tenth, and D.C. Circuits have held that the victim must meet the traditional – and steep – requirements for mandamus, showing “that [the victim] has a clear and indisputable right to relief, that the district court has a clear duty to act, and that [the victim] has no other adequate remedy.” *U.S. v. Monzel*, 641 F.3d 528, 532 (D.C. Cir. 2011) (holding that the traditional standard is required and collecting cases), *cert. denied sub nom* Amy v. Monzel, 132 S.Ct. 756 (2011). However, the Second, Third, Ninth, and Eleventh Circuits have applied more relaxed standards. See *id.* at 532-33 (collecting cases). In *Monzel*, the D.C. Circuit implied that the controversy might have arisen because Congress granted what appears on its face to be an ordinary right of appeal using the archaic and infrequently used writ of mandamus. See *id.* at 533 (analyzing arguments for applying a lesser standard than traditionally required for mandamus relief). Congress’s decision to use mandamus rather than direct appeal is logical, however, considering that the victim is not, in American criminal law, a party to a criminal proceeding. See *U.S. v. Aguirre-Gonzalez*, 597 F.3d 46, 54-55 (1st Cir. 2010) (holding that a victim may not appeal the sentence of a criminal offender; only the Government has that right). *But cf. infra* Part II.C (discussing the French *partie civile*, in which the victim is a full “party” at a criminal proceeding).

3771.<sup>96</sup> Michael Monzel pleaded guilty to possession and distribution of child pornography.<sup>97</sup> One of his victims, “Amy” (a pseudonym), requested restitution in the amount of \$3,263,758.<sup>98</sup> Because Amy did not present any evidence of her actual damages, the district court ordered Monzel to pay \$5,000 in “nominal” restitution.<sup>99</sup> The court acknowledged that this was significantly less than the amount of economic damage that Monzel caused to Amy.<sup>100</sup>

Amy petitioned the District of Columbia Circuit for a writ of mandamus under § 3771(d)(3), seeking to compel the district court to award her the full restitution that she requested.<sup>101</sup> Addressing the circuit split on the standard to apply in considering petitions for the writ of mandamus, the D.C. Circuit sided with the Sixth and Tenth Circuits, holding that the “traditional” mandamus standard applied to petitions under § 3771(d)(3).<sup>102</sup> In so holding, the court noted that the remedy of mandamus is an “extraordinary” one and that Congress understood this in using the term “mandamus” in § 3771(d)(3).<sup>103</sup>

However, the court also held that—even under the stringent traditional standard—Amy was entitled to the writ.<sup>104</sup> Mandamus traditionally requires three elements: that the petitioner has a “clear and indisputable right to relief, that the district court has a clear duty to act, and that [the petitioner] has no other adequate remedy.”<sup>105</sup> Amy’s right to relief was “clear and indisputable” because the statute criminalizing Monzel’s conduct provided unambiguously for restitution to the victim in the amount of losses suffered “proximately” from the offense.<sup>106</sup> While not expressly addressing the issue of “a clear duty to act,” the court’s holding necessarily assumes that the duty to award restitution in the actual amount of damages is a “clear” one, satisfying the requirements for mandamus.<sup>107</sup> Finally, in holding that no other remedy available to Amy was adequate, the court acknowledged that “every circuit to consider the question has held that mandamus is a crime victim’s only recourse for challenging a restitution order.”<sup>108</sup> While not

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96. *Monzel*, 641 F.3d at 530.

97. *Id.*

98. *Id.* at 530. As a victim of child sexual exploitation, Amy was entitled to restitution under 18 U.S.C.A. § 2259 (2000 & Supp. 2012) rather than 18 U.S.C.A. § 3663A (2000 & Supp. 2012). Sec. 2259 provides that “[t]he order of restitution . . . shall direct the defendant to pay the victim . . . the full amount of the victim’s losses . . .” 18 U.S.C.A. § 2259(b)(1) (2000 & Supp. 2012). The criteria used to determine the amount of restitution under § 2259 are substantially similar to those used under § 3663A. Compare *id.* § 2259(b)(3) with, 18 U.S.C.A. §§ 3663A(b)(2), (4) (2000 & Supp. 2012).

99. *Monzel*, 641 F.3d at 530.

100. *Id.* at 530-31. The District Court also declined to hold Monzel jointly and severally liable for Amy’s entire harm. *Id.* at 531.

101. *Id.* Amy also filed a direct appeal of Monzel’s sentence, but the D.C. Circuit held that § 3771 does not permit a direct appeal. *Id.* at 541-44.

102. *Id.* at 533.

103. *Id.*

104. *Id.* at 534.

105. *Id.*

106. *Id.* at 535.

107. See *id.* at 539 (“The district court did . . . clearly err by awarding an amount of restitution it acknowledged was less than the harm Monzel had caused.”).

108. *Id.* at 540.

granting Amy the full amount that she requested, the court did order the district court to make findings as to the amount of Amy's actual losses, and to order restitution in that amount.<sup>109</sup>

As a victim of child pornography, Amy had a statutory right to restitution. She failed to present evidence of her actual damages, instead asking for a very high dollar amount. The government, evidently, did little to aid the district court in reaching a conclusion as to her damages,<sup>110</sup> and the district court consequently made a best guess.<sup>111</sup> Amy enforced her rights by petitioning for a writ of mandamus, met the high standard of review required for such a procedure, and compelled the district court and the government to unearth facts that would enable the district court to award her restitution.

Amy's case demonstrates the working out of the purposes of restitution. On remand, the district court will have to determine how to both punish Monzel and make Amy whole for her financial loss with a sentence awarding restitution.<sup>112</sup> Under the federal restitution and victims' rights statutes, Amy will be assured of a judgment awarding her restitution, and Monzel's punishment will include highly personal compensation to the person he wronged.<sup>113</sup>

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109. *Id.*

110. *See id.* at 539-40 ("In this case . . . the government failed to submit any evidence whatsoever regarding the amount of Amy's losses attributable to Monzel . . . . We expect the government will do more this time around [on remand] to aid the district court [in determining the proper amount of restitution]." (internal quotations omitted)). Section 3771 requires the Department of Justice to make "best efforts" to ensure that crime victims are afforded their guaranteed rights. 18 U.S.C.A. § 3771(c)(1) (Supp. 2012).

111. *See Monzel*, 641 F.3d at 540. ("[On remand], the district court must rely upon some principled method for determining the harm Monzel proximately caused.") The district judge, perhaps uncomfortable denying restitution to a victim of child pornography but lacking government evidence as to actual damages, just gave it "the old college try." Billy Sunday, "The Old College Try," *WARSAW UNION*, Nov. 29, 1918, at 2, available at <http://news.google.com/newspapers?id=3L5GAAAIBAJ&sjid=GHsMAAAAIBAJ&dq=college-try&pg=4386%2C5294990>.

112. The Supreme Court denied Amy's petition for a writ of certiorari on November 28, 2011. *Amy v. Monzel*, 132 S.Ct. 756 (2011) (mem.). At the time of this writing, the case had not yet been re-heard by the U.S. District Court for the District of D.C.

113. While a federal sentencing judge may not consider the ability of an offender to pay when determining the *amount* of the restitution judgment, he must consider this factor when determining the schedule over which the offender will make the payments. 18 U.S.C.A. § 3664(f)(2) (2000). Here, if Monzel lacked the financial resources to make an immediate lump-sum payment, his restitution obligation could be spread out over the period of his supervised release. *See U.S. v. Payan*, 992 F.2d 1387, 1395-96 (5th Cir. 1993) (interpreting a challenged restitution order as a "condition subsequent . . . of supervised release").

When the supervised release period terminates, the victim may seek the unpaid balance "in the same manner as a judgment in a civil action." *Id.* at 1395 n.59 (quoting 18 U.S.C.A. § 3663 (2000 & Supp. 2012)). At least one federal district court has stated, in dicta, that an unpaid restitution award entitles a plaintiff to immediate civil judgment in the amount of the unpaid balance. *See Teachers Ins. & Annuity Assoc. v. Green*, 636 F.Supp. 415, 418 (S.D.N.Y. 1986); *but see Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 703 (2d Cir. 2000) (disagreeing with *Teachers Ins. & Annuity* and holding that § 3663 creates no federal civil cause of action to enforce a restitution order). In the context of bankruptcy proceedings, the Supreme Court has held that the unpaid balance on a restitution order is not a "debt," which adds some weight to the view that no civil cause of action is available to enforce the

Had Amy's case occurred in Maine, she would have had no sure method by which to challenge the sentencing court's decision on restitution. Maine provides no mechanism for a crime victim to challenge a restitution order, and Amy would not necessarily have found a ready advocate in the overworked state prosecutor. At best, Amy would have had to make do with whatever funds the Victims' Compensation Board could spare. Amy could also have brought a civil action against Monzel, but such a suit could be lengthy and intrusive—particularly onerous conditions for the victim of a depraved crime.

### C. Restitution and Victims' Procedural Rights under French Law

The French approach to restitution and the rights of crime victims is a study in contrasts with the American system. The *partie civile* ("civil party") procedure in French criminal law permits crime victims to be active, legally-empowered advocates for their own rights, particularly with respect to damages from the offender.<sup>114</sup>

A *partie civile* is a person who suffers some economic injury because of allegedly criminal acts.<sup>115</sup> The *partie civile* joins a criminal prosecution as a full party, and may even initiate an investigation and prosecution.<sup>116</sup> France divides crimes into three overall classifications,<sup>117</sup> and in each case a *partie civile* may either introduce the charge or else join the action as a party at any time before closing arguments.<sup>118</sup>

Rather than requiring separate statutes to enable restitution, France weaves the idea of restoring victims into the complete substance and procedure of its criminal law. The second article of the *Code de Procédure Pénale* guarantees the availability of the civil action to "all those who have personally suffered damage directly caused by [a criminal offense]."<sup>119</sup> In the Assize Court, which has jurisdiction over

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restitution order. See *Kelly v. Robinson*, 479 U.S. 36, 50, 53 (1986) (holding that a state criminal restitution order is not a "debt" for the purpose of discharge under federal bankruptcy law, because its purpose is to serve the "State's interests in rehabilitation and punishment, rather than the victim's desire for compensation . . ."); but see *id.* at 56-57 & n.4 (Marshall, J., dissenting) (arguing that the restitution order should be treated as a "debt" for bankruptcy purposes because the victim benefited by the order *could* enforce it "as a civil judgment" under federal law and some states' laws).

114. See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] arts. 1-2. (Fr.), translated in CODE OF CRIMINAL PROCEDURE (John Rason, trans., Legifrance 2006), available at [http://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code\\_34.pdf](http://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code_34.pdf) [hereinafter C. PR. PÉN. Trans.] (stating that prosecution may be initiated by injured parties and civil action for damages suffered due to felonies, misdemeanors, or petty offenses is available to injured parties).

115. *Id.* art. 2.

116. *Id.* arts. 2, 85, 86.

117. Ranging from most to least serious, the classifications of crimes are felonies (*crimes*), delicts (*délits*), and contraventions (*contraventions*). Richard S. Frase, *Introduction to THE FRENCH CODE OF CRIMINAL PROCEDURE* 1 (Gerald L. Kock & Richard S. Frase trans., rev. ed., Fred B. Rothman & Co. 1988).

118. See C. PR. PÉN. Trans., *supra* note 114, arts. 85-87 (*partie civile* joinder in general); *id.* art., 534 (*contraventions*); *id.* art. 392 (*délits*); *id.* arts. 306-316 (setting general hearing procedures, including participation of the *partie civile*, in trials for *crimes*).

119. *Id.* art. 2 (emphasis added).



*crimes* (felonies), the judge, acting without the jury,<sup>120</sup> is required to award the *partie civile* damages in the amount caused by the crime.<sup>121</sup> No provision limits the award of damages based on any consideration of the defendant's present or future financial position.<sup>122</sup> Even if the defendant is acquitted of criminal liability, the *partie civile* may nonetheless petition to be awarded civil compensation for damages caused by the defendant.<sup>123</sup>

The *partie civile* system also fully integrates victim advocacy into the workings of criminal procedure. Crime victims have a broad array of procedural rights throughout the criminal investigation and trial. As noted previously, the *partie civile* may bring the criminal complaint to the attention of the authorities and compel an investigation.<sup>124</sup> In addition, the *partie civile* may require a hearing in camera,<sup>125</sup> request an audiovisual recording of the proceedings,<sup>126</sup> present witnesses

120. France limits the use of juries in criminal matters to trials before the Assize Court, in which three judges are joined by nine lay persons. *Id.* arts. 244, 248, 296. This panel determines both criminal guilt and sentence. *Id.* arts. 355-65.

121. *Id.* art. 371. This procedure is representative of similar procedures in the lower criminal courts. Reckless *parties civiles* beware: the Assize Court can also award restitution from an unsuccessful plaintiff against the vindicated defendant. *Id.* art. 371.

122. *See id.* arts. 372-373 (allowing an exception to restitution only if granting it would "present a danger for persons or property"). The Assize Court can also award trial costs to the successful *partie civile*, though it may consider the financial position of both parties in making such an award. *Id.* art. 375.

123. *Id.* art. 372 (Fr.). The Court of Cassation, the highest appellate court in the French civil court system, recently reversed the principle that a criminal acquittal bars civil liability if the charged crime had the same elements as the alleged civil wrong. B. S. Markesinis, *Foreign Law Translations - DP 1930. 1. 41 Case Ollagnier v. Bourbon and Malécot Subsequent developments*, U. TEX. AUSTIN SCH. L. (Dec. 15, 2005), [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/french/case.php?id=1210](http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1210) (commentary following case translation).

The French attitude toward standards of proof makes this rule something of a curiosity. Even in the Assize Court, the French criminal system does not enunciate a standard of proof to the same exacting specification as the American system. Article 353, governing the deliberations of the Assize Court, states:

The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defense. The law asks them but this single question, which encloses the full scope of their duties: are you inwardly convinced?

C. PR. PÉN. Trans., *supra* note 114, art. 353.

In general, the plaintiff in an independent civil action has the burden to prove all elements of his claim, and the defendant has the burden to prove any affirmative defense. *See* PETER HERZOG & MARTHA WESER, *CIVIL PROCEDURE IN FRANCE*, 301-11 (1967). However, French civil courts are, like criminal courts, relaxed in their attitude toward the standard of proof. *See id.* at 309-10 (arguing that because French civil courts enjoy very wide discretion in evaluating evidence, the issue of standard of proof is comparatively unimportant); *see also* GERT BRÜGGEMEIER, *MODERNISING CIVIL LIABILITY LAW IN EUROPE, CHINA, BRAZIL AND RUSSIA* 49-50 (2011) (arguing that the French standard of proof in civil matters is, "in fact," much less than "beyond any reasonable doubt").

124. *See* discussion *supra* note 114 and accompanying text.

125. C. PR. PÉN. Trans., *supra* note 114, art. 306.

and evidence to the court,<sup>127</sup> question witnesses,<sup>128</sup> present closing arguments in advance of the public prosecutor,<sup>129</sup> and file miscellaneous pleadings to the court.<sup>130</sup> Additionally, the *partie civile* has a direct right of appeal from the civil judgment.<sup>131</sup> In such an appeal, he may request an increase in damages<sup>132</sup> and the payment of his legal expenses.<sup>133</sup>

In addition to these express procedural rights, there are other legal and practical advantages to becoming a *partie civile* to a criminal matter rather than bringing a separate civil action. For example, criminal proceedings move more quickly; the expense to the *partie civile* is less than if he brought civil litigation; and the procedures are relatively easier to manage for the victim.<sup>134</sup> Some victims may not even need the assistance of counsel to participate.<sup>135</sup>

Had Amy's case occurred in France, Amy could have initiated or joined the prosecution as a *partie civile*. In such a capacity, Amy would have had the burden to "inwardly convince" the Assize Court of her specific financial losses.<sup>136</sup> If Monzel could assert an affirmative defense comparable to what he would present in a traditional civil action, he would bear the burden to prove it during the criminal trial. Armed with evidence of Amy's actual damages—required for her to succeed as a *partie civile*—the court would have been obliged to order restitution under C. PR. PÉN. art. 371. If Amy disagreed with the Assize Court's restitution, she would have a right of direct appeal from the judgment.<sup>137</sup>

#### *D. Restitution and Victims' Rights in Other U.S. States*

Restitution is available as an element of sentencing in every U.S. state.<sup>138</sup> In roughly half the states, an order of restitution is mandatory, or at least required absent a showing of extraordinary circumstances.<sup>139</sup> Likewise, almost every state

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126. *Id.* art. 308.

127. *Id.* art. 464.

128. *Id.* art. 312.

129. *Id.* art. 346.

130. *Id.* art. 315.

131. *Id.* arts. 380-82.

132. *Id.* arts. 380-86.

133. *Id.* art. 375.

134. Comment, Compensating Victims of Crime: Individual Responsibility and Governmental Compensation Plans, 26 ME. L. REV. 125, 139 (1974) [hereinafter Compensating Victims].

135. *Id.*

136. See C. PR. PÉN. Trans., *supra* note 114, art. 353.

137. Decisions of the Assize Court are appealed directly to a second, different Assize Court. *Id.* art. 380-81. From there, appeals may be had to a Court of Appeals, and then to the Court of Cassation. Frase, *supra* note 117, at 36.

138. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.5(k) (3d ed. 2010).

139. *Id.* The New England states generally make restitution optional, at the discretion of the sentencing judge. See VT. STAT. ANN. tit. 13, § 7043 (2011) (establishing optional restitution in Vermont); N.H. REV. STAT. ANN. § 651:63 (2012) (establishing optional restitution in New Hampshire); Commonwealth v. McIntyre, 436 Mass. 829, 833, 767 N.E.2d 578, 582 (Mass. 2002) (reaffirming optional common-law restitution power in Massachusetts); CONN. GEN. STAT. ANN. § 53a-28a (West 2012) (establishing optional restitution in Connecticut); R.I. GEN. LAWS §§ 12-19-32 to 12-19-32.1 (2009) (establishing both optional and mandatory restitution in Rhode Island).

has adopted a “victims’ rights” statute of some kind, and more than half have enshrined this concept into their constitutions.<sup>140</sup> This widespread adoption shows a clear social consensus that the rights of the victim should be in some way represented in the criminal justice system. Such a focus shifts away from the traditionally defendant-centered perspective; victims’ rights are not among the four “traditional” purposes of the criminal law.<sup>141</sup>

In the early years after the American Revolution, criminal prosecution was frequently initiated and conducted by the victim of a crime.<sup>142</sup> Some states still preserve the use of private prosecutors.<sup>143</sup> A private prosecution grants victims procedural rights that are, in some senses, analogous to the *partie civile* system in France; the private attorney may, in most cases, perform all of the procedural tasks that a public prosecutor would perform.<sup>144</sup>

Recent developments in the criminal law doctrine of “abatement” provide another illustration of the increasing concern for victims’ rights in U.S. states. In the 1970s and 1980s, state courts gradually adopted a doctrine that called for the dismissal of any criminal appeal during which the defendant died and the immediate abatement, *ab initio*, of the judgment of conviction.<sup>145</sup> Maine, adopting this rule, cited the interest of the defendant’s family in clearing the name of the deceased as sufficient justification for vacating the conviction before an appeal had been decided.<sup>146</sup> Recently, however, state courts have reversed course, only dismissing the appeal without abating the conviction.<sup>147</sup> This has the effect of terminating the appellate litigation but preserving the conviction, along with any sentence that might have been imposed. As a result, at least in some jurisdictions, the victim can collect the restitution order from the victim’s estate.<sup>148</sup> These courts have cited the victim’s interests in restitution as one justification for allowing the

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140. LAFAVE ET AL., *supra* note 138.

141. See WHITE, *supra* note 12, at 194.

142. Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29, 34 (1987).

143. See, e.g., W. VA. CODE, § 7-7-8 (2012) (“No provision of this section shall be construed to prohibit the employment by any person of a practicing attorney to assist in the prosecution of any person or corporation charged with a crime.”); *State v. Storm*, 661 A.2d 790, 794 (N.J. 1995) (acknowledging the use of private prosecutors in New Jersey municipal courts). Maine does not use private prosecutors.

144. See, e.g., TEX. CODE CRIM. PROC. ANN. Art. 2.07 (West 2011) (providing that a judge-appointed prosecutor may perform all the “duties of the office”).

145. See, e.g., *State v. Carter*, 299 A.2d 891, 894-95 (Me. 1973) (adopting the rule that “the death of the defendant [during a direct appeal from a criminal conviction] will . . . abate the appeal and require dismissal of it on grounds both of mootness and the inability of the appellate tribunal to proceed because of loss of an indispensable party to the proceeding . . . [W]henver the death of the defendant in a criminal prosecution causes a dismissal of the direct review (by appeal) of a judgment of conviction entered against said defendant, the judgment of conviction will be vacated and the criminal prosecution will be held abated, *ab initio*.”).

146. *Id.*

147. See, e.g., *State v. Carlin*, 249 P.3d 752, 764 (Alaska 2011) (overturning precedent to hold that “the interests of the victim [e.g., in restitution] . . . persist even after the defendant’s death.”); *State v. Benn*, 274 P.3d 47, ¶ 11 (Mont. 2012) (“[W]e recognize that it is possible a criminal appeal could involve issues which are not mooted because of a defendant’s death. For example, a restitution condition imposed within a criminal judgment may be enforceable by victims against the defendant’s estate.”); *Bevel v. Commonwealth*, 717 S.E.2d 789, 795 (Va. 2011) (declining to adopt an abatement rule).

148. See *Benn*, 274 P.3d at ¶ 11.

conviction to stand—a justification substantial enough, in some cases, to overturn precedent.<sup>149</sup> Maine, however, continues to stand by the older doctrine of abatement.

#### IV. ROOM FOR IMPROVEMENT IN THE MAINE SYSTEM

Maine's statutes on restitution and victims' rights, while functional, miss some opportunities to further the goals of criminal law while also serving to restore crime victims more fully. Victims could be bolstered both psychologically and economically by enhanced procedural rights in the criminal process. The incentives on offenders to actually pay restitution are currently weak. Furthermore, assisting probationers in finding and keeping employment would reduce the problem of criminals' frequently limited ability to pay larger restitution awards. Finally, tilting the balance of criminal sanction away from incarceration and toward restitution—particularly for non-violent criminals and those with little criminal history—could well be a more cost effective method of punishment.

##### *A. Limited Self-Advocacy for Crime Victims*

On its own, Maine's relative paucity of restitution rights and procedural rights for crime victims is not necessarily problematic. After all, the goals of criminal sanction still focus primarily on the offender and his relationship to society, not on the victim. However, the Maine Legislature, the U.S. Congress, and many other state legislatures have all recognized a legitimate purpose of the criminal law in making the victim whole. This goal of criminal law, while in some ways awkwardly competitive with the goals of civil compensatory damages, may nonetheless be advanced through restitution and victims' rights procedures. Maine's current restitution and victims' rights regimes do not fully realize opportunities to make victims whole on both a psychological and economic level.

##### *1. The Psychological Problem*

A person who has been the victim of a crime, particularly a violent crime, is placed into a vulnerable and violated position.<sup>150</sup> He may suffer long-term psychological trauma.<sup>151</sup> A victim of particularly heinous or long-lasting crime may even adopt an attitude of "learned helplessness,"<sup>152</sup> recreating his victimization

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149. Alisa A. Johnson, *Defendant's Death During Appeal Doesn't Void Prosecution Ab Initio*, BLOOMBERG BNA CRIMINAL LAW REPORTER (Feb. 22, 2012).

150. See, e.g., Dean G. Kilpatrick & Randy K. Otto, Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning, 23 WAYNE L. REV. 7, 13 (1987).

151. *Id.* at 9.

152. See, e.g., Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. TRAUMATIC STRESS No. 3 377, 384 (1992) ("[C]hronically traumatized people are often described as passive or helpless. Some theorists have in fact applied the concept of 'learned helplessness' to the situation of battered women and other chronically traumatized people.") (citations omitted).

in other areas of his life.<sup>153</sup> Many victims—even of single crimes—suffer from Post-Traumatic Stress Disorder.<sup>154</sup>

Unfortunately, exposure to the criminal justice system can exacerbate the victim's psychological trauma.<sup>155</sup> The victim's perception of the relative fairness with which the system treats him, compared to the criminal, can worsen his self-perception of helplessness and disadvantage.<sup>156</sup> Furthermore, a victim may lack knowledge about the system; may be reminded uncomfortably of the crime and the criminal; and may be subject to character and credibility attacks by the defendant.<sup>157</sup> All of these conditions create further stress for the victim.<sup>158</sup>

Learning new, self-respectful ways of thinking about a negative life experience may give a crime victim tools to overcome his trauma and stress.<sup>159</sup> Legal self-advocacy is one such experience that may be able to combat victimized thinking.<sup>160</sup>

The relationship between a criminal and a victim is frequently very personal.<sup>161</sup> A crime victim who has the experience of participating actively in the prosecution and punishment of the person who hurt him has taken steps to experience a more positive self-image and has learned self-advocacy skills that he can apply to other areas of his life. Even if the victim is not physically present in court, he receives reports of proceedings from his advocate, and, if so empowered, has the opportunity to "drive the process" himself by contributing to litigation decisions. Likewise, a crime victim who receives a monthly check originating from his offender<sup>162</sup> throughout the course of the offender's probation—or perhaps even carefully supervised personal service from that offender—can reverse the unbalanced power relationship that exists between victim and offender. Either manifestation of this re-balanced relationship between them would work a deeper and more lasting "socialized revenge" than a single statement made at sentencing and a trip to the Victims' Compensation Board.<sup>163</sup>

By contrast, a victim who sits on the sidelines of the criminal justice system, as Maine victims to a large degree currently do, gains little psychological advantage. He is notified of proceedings by the government prosecutor; he depends on the prosecutor to inform him of his right to ask for restitution; he may stand up and

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153. *Id.* at 386-87.

154. See Kilpatrick & Otto, *supra* note 150, at 16.

155. *Id.* at 18-20. See also Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 WAYNE L. REV. 51, 56 (1987) ("Unfortunately, no individuals or institutions rival the agencies of criminal justice as perpetrators of second injuries.").

156. See Kilpatrick & Otto, *supra* note 150, at 19.

157. *Id.* at 20.

158. *Id.*

159. See *id.*

160. Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 244 (2005).

161. See *Compensating Victims*, *supra* note 134, at 134 & n.41.

162. In most cases the court orders the offender to pay the clerk of the court, and the clerk in turn writes a check to the victim.

163. See *supra* notes 72, 77. See also *Compensating Victims*, *supra* note 134, at 135-46 (arguing that government compensation does not assuage a victim's desire for socialized revenge, whereas direct reparation from the criminal to the victim provides "moral restitution").

speak at sentencing, but he has only a limited platform from which to present evidence—particularly if he is not represented by counsel. His restitution is reduced or eliminated if it would be too burdensome on the criminal who hurt him or violated his privacy or property. The victim has virtually no substantive legal rights, beyond the right to have restitution be “considered” by the court. The victim’s inclination toward passivity and dependency on others would likely be reinforced by this process.<sup>164</sup>

Victims’ rights advocates have long recognized the shortcomings of criminal justice systems that have characteristics similar to Maine’s with respect to victims.<sup>165</sup> In fact, some victims’ rights advocates in the 1980s proposed adjusting the Sixth Amendment to include a guarantee that a crime victim has “the right to be present and to be heard at all critical stages of judicial proceedings.”<sup>166</sup> Although the proposed Amendment was never enacted, the victims’ rights movement has made substantial progress in statutory reform, particularly at the federal level.<sup>167</sup>

## 2. *The Economic Incentive Problem*

State prosecutors, with near-unanimous consistency (and substantial justification), report that the volume of their case loads makes it impractical to devote significant resources to many individual cases.<sup>168</sup> The burden of acting as a social worker for a crime victim may be particularly impractical.<sup>169</sup> As a result, a prosecutor may be unable to devote enough time to perform a detailed investigation of a victim’s damages, perhaps assuming that the victim will seek compensation through a civil action if the damages are of particular economic value. However, the economic impact on a victim of a crime may be disproportionate to the economic value perceived by the prosecutor. For instance, a \$100 loss to a person who lives under the poverty line is, as a proportion of income, of much more relative significance than it would be to a State civil servant.<sup>170</sup>

The victim himself has some incentive to provide the prosecutor with evidence of his economic loss, but little procedural opportunity to make an effective showing if the prosecutor is not inclined to pursue restitution.<sup>171</sup> If evidence of damages is complex or requires witnesses, the sentencing hearing is not sufficient. The victim could indeed seek compensation independently through a civil suit, but these can

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164. See Kilpatrick & Otto, *supra* note 150. See also Young, *supra* note 155, at 58-59 (documenting the emotional effects of procedural marginalization on crime victims). Young quotes one victim advocate as imploring: “All we ask is that we be treated just like a criminal.”

165. Arthur J. Lurigio, Wesley G. Skogan & Robert C. Davis, *Criminal Victimization, in VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS* 7, 9 (Arthur J. Lurigio et al. eds., 1990).

166. See Eikenberry, *supra* note 142, at 34.

167. See *supra* Section III.B.1 (describing 18 U.S.C. § 3771 (Supp. 2012)).

168. See O’Hara, *supra* note 160, at 240.

169. See *id.*

170. See Young, *supra* note 155, 52-53 (conducting a basic economic analysis of the impact of loss on low-income crime victims).

171. See 17-A M.R.S.A. § 1174(1) (2006) (providing that the victim may make a statement to the court during sentencing, but not that the victim may directly present witnesses and evidence of his damages independently of the prosecutor).

be long, complex, uncertain, and require the victim to revisit stressful and traumatic details of the crime for a second time.<sup>172</sup> Forcing the victim to resort to a civil suit also clogs the courts with largely redundant litigation.<sup>173</sup> Furthermore, even assuming a victim can obtain a civil judgment, he does not have the added “stick” of a probation condition to help him collect. By contrast, when restitution is assigned as a condition of probation, the amount may be split into many installments, but the probationer has ample incentive to make payments.<sup>174</sup> If he fails, a court “may” send the probationer back to prison, at least during the period of probation.<sup>175</sup>

### *B. Limited Incentive for Offenders to Pay Restitution*

The word “may,” however, highlights a flaw that mars the probationer’s incentives under the current probation system. Because the courts have substantial discretion in revoking a suspended sentence for probation violations, an offender, ordered to pay restitution but unwilling to do so, can often obtain near-endless extensions from a judge without being truly coerced by the threat of a return to prison.<sup>176</sup> If judges are unwilling to use the real threat of a return to prison to coerce probationers to come up with the money, probationers are much less likely to pay their restitution.

Maine’s “deferred disposition” statute—a sort of pre-sentencing probation—presents a similar problem on paper, although practitioners report that it is more successful in actually collecting restitution payments from offenders. Under this program, Class C, D, and E offenders who have pled guilty are eligible for “deferred disposition.”<sup>177</sup> The court defers the offender’s sentencing on the condition that he meets certain court-mandated requirements,<sup>178</sup> one of which is commonly the payment of restitution. Because deferred disposition is limited to offenders who plead guilty,<sup>179</sup> it will almost always arise in the context of a plea agreement. Thus, the district attorney retains significant control over the

172. Susan Hillenbrand, *Restitution and Victim Rights in the 1980s*, in VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS 188, 190 (Arthur J. Lurigio et al. eds., 1990). See also Melvyn Zarr, Professor of Law, Univ. Me. Sch. of Law, Remarks to the Class of 2013 (Oct. 6, 2010) (“The civil trial is like a tank. It’s become so heavy it can hardly move.”).

173. The standard of proof in a civil trial and the standard of proof at a sentencing hearing are identical – the facts in both situations must be found by a preponderance of the evidence. *State v. Berube*, 1997 ME 165, ¶ 19, 698 A.2d 509.

174. While this may occur in many restitution situations, probation itself may not be ordered for some class D or E crimes. 17-A M.R.S.A. § 1201(1) (2006 & Supp. 2011). Probation may also not be ordered for a murder conviction. *Id.*

175. 17-A M.R.S.A. § 1206(7-A) (2006 & Supp. 2011). See also *supra* note 113 (discussing the uncertain availability of a federal civil cause of action to recover the balance of a restitution order after the period of supervised release ends).

176. See § 1206(7-A). Sources familiar with state criminal courtrooms report that this is a serious problem in practice as well as in theory.

177. 17-A M.R.S.A. §§ 1348 to 1348-C (2006 & Supp. 2011).

178. *Id.* § 1348-A(1).

179. *Id.*

conditions to which the offender agrees.<sup>180</sup> Furthermore, courts retain the authority and discretion to modify the deferred disposition conditions if they impose an “unreasonable burden” on the offender.<sup>181</sup> Thus, an offender delinquent in his restitution payments can obtain extensions and waivers from a court, just as he can during probation. Nonetheless, as noted above, anecdotal evidence suggests that deferred disposition usually produces more consistent restitution payments than does probation.

### C. Missed Opportunity for More Cost-Effective Criminal Sanction

A criminal sentence can be a collection of elements: incarceration,<sup>182</sup> fines,<sup>183</sup> asset forfeiture,<sup>184</sup> and restitution<sup>185</sup> are among them. Incarceration costs for offenders continue to be a massive burden on Maine’s budget, as in many other states.<sup>186</sup> In response to this financial burden, many states have developed sentencing alternatives that serve the goals of criminal law without requiring costly incarceration. For instance, alternative sentencing programs, such as “mental health courts,” can reduce long-term prison costs by reducing recidivism rates.<sup>187</sup> Maine has experimented with just such alternatives, with a partly successful record.<sup>188</sup>

Using probation and restitution with serious suspended sentences more frequently—along with the real threat of a return to prison for failure to pay—could serve as an economically viable alternative to incarceration, particularly for non-violent and non-career criminals. A short prison term would give the offender a taste of prison life (at a modest cost to the state), and the long probation period

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180. The victim is included in the process only at the discretion of the district attorney. *See id.* Thus, this scheme suffers from the same flaw as does the current procedure for ordering restitution as a component of a sentence: the victim is on the sidelines of the process.

181. 17-A M.R.S.A. § 1348-A(2) (2006 & Supp. 2011).

182. *Id.* §§ 1251-52.

183. *Id.* §§ 1301-34.

184. *Id.* § 1158-A.

185. *Id.* §§ 1321 – 1330-B.

186. *See* Heather Steeves, *Maine prison offers free college in effort to reduce repeat offenders, save money*, BANGOR DAILY NEWS, Jan. 14, 2011, available at <http://bangordailynews.com/2011/01/14/news/maine-prison-offers-free-college-in-effort-to-reduce-repeat-offenders-save-money/> (reporting the Maine Department of Corrections’ budget at \$143 million for 2010-2011, and noting that Maine spends \$44,000 per prisoner year, compared to a national average of \$29,000). *See also* Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 453 (1993) (discussing the “staggering” financial costs of building and operating penal institutions).

187. *See* John E. Cummings, Comment, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 LOY. L. REV. 279, 281 (2010) (connecting lower recidivism rates with lower per capita incarceration costs).

188. *See* Judy Harrison, *High recidivism rate spells end to Bangor drug court*, BANGOR DAILY NEWS, Sept. 22, 2011, available at <http://bangordailynews.com/2011/09/21/news/bangor/adult-drug-court-closing-in-bangor-courts-spokeswoman-cites-high-recidivism-rates/> (noting that the state was about to shut down an under-performing “drug court” to re-allocate funds to more efficient and successful mental health courts that had adapted to lessons learned from the experience).



would make it easier for him to comply with the restitution condition of probation. Steady, financially manageable restitution payments, spread out over a long period of time, would permit the offender to make relatively complete repayment to the victim, while vindicating the victim's sense of dignity and self-worth.<sup>189</sup>

Of course, even with strong incentives to keep probationers motivated to make payments, some probationers will struggle to find employment after being released from prison. Not every probationer who misses a restitution payment is trying to cheat the system; some genuinely lack the ability to pay. Delinquent probationers of both sorts can make it difficult to distinguish those who are making a good faith but unsuccessful effort to pay from those who could pay but do not. This might explain why some judges could be hesitant to revoke suspended sentences in response to failures to pay restitution; it is, perhaps, better to err on the side of mercy. Section V, below, will offer one possible solution to this problem.

In sum, although judges are currently required to consider restitution at sentencing,<sup>190</sup> allowing victims to advocate for restitution more directly than they can at present would strengthen restitution's appeal.<sup>191</sup> However, for restitution to be an effective alternative to incarceration, offenders need both strong incentives to make restitution payments and some flexibility and support when they are genuinely unable to make payments. The next section will propose legislative changes to accomplish all of these goals.

#### V. REFORMS THAT ENHANCE VICTIMS' RIGHTS AND THE USE OF RESTITUTION

If one accepts that the Maine Legislature views honoring a crime victim's restitution rights as a legitimate goal of criminal sanction, it follows that both the rules of criminal procedure and the substantive rights of victims should advance this goal. At present, Maine's statutory support for victim restitution is comparatively narrow.<sup>192</sup> At the very least, Maine could follow the U.S. federal model, adopting provisions analogous to the Crime Victims' Rights Act to give crime victims procedural and substantive rights with respect to restitution.<sup>193</sup> Enhancements to the "script" of the sentencing colloquy could also help to prompt victims to speak out about their economic damages. However, Maine has an opportunity to go further and experiment with enhanced crime victim participation

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189. Regrettably, the Law Court has looked with some disfavor on just such a creative application of probation and restitution by the lower courts. *See* *State v. Downs*, 2007 ME 41, ¶ 14 & n.5, 916 A.2d 210 (implying that assembling numerous consecutive sentences to establish a long probationary period, making an "otherwise impossibly large amount of restitution" financially manageable for the defendant, might violate an element of judicial discretion afforded by 17-A M.R.S.A. § 1256(2) (2006)).

190. 17-A M.R.S.A. § 1323(1).

191. *See supra* Part III.A (discussing procedural limitations of Maine's victims' rights provisions).

192. *See supra* Part III (comparing Maine's victims' rights and restitution statutes with federal and foreign national models).

193. *See supra* Part III.B.1 (describing 18 U.S.C.A. § 3663A (2000 & Supp. 2012)). Maine could, for instance, provide either a direct appeal for a crime victim from a restitution order, as in the French model, or else an appeal via a petition for mandamus, as in the U.S. federal model.

in the legal system.<sup>194</sup>

*A. Some Previous Proposals for Enhancement of Victims' Procedural Rights*

Since at least the 1970s, victims' advocates have seen criminal procedure as a vehicle to aid crime victims.<sup>195</sup> Early on, the Brooklyn Criminal Court briefly experimented with a "Victim Involvement Project," in which "victim advocates" participated in the criminal proceeding to ensure that the victim's interests were represented.<sup>196</sup> The first major changes in the federal courts emerged in 1982 in the President's Task Force on Victims of Crime, resulting in the Omnibus Victim and Witness Protection Act.<sup>197</sup> In the 1980s and 1990s, scholars suggested enhancements to the procedural mechanisms for compensating crime victims,<sup>198</sup> increasing the use of the Victim Impact Statement in state courts,<sup>199</sup> enhancing victims' access to courtrooms,<sup>200</sup> and increasing the use of restitution at the expense of other forms of punishment.<sup>201</sup> Others proposed adding language to the Sixth Amendment to give crime victims constitutionally protected procedural rights, as noted above.<sup>202</sup> Still others fought a rearguard action for the common law system of private prosecutions.<sup>203</sup>

In 1974, this journal proposed an experimental procedure in which portions of the French *partie civile* system would be adopted in Maine criminal trials.<sup>204</sup> The proposed procedure would treat the victim as "in all respects a party to the prosecution—from sitting with the state's attorney at counsel table to assisting the prosecutor in the preparation of the case where appropriate."<sup>205</sup> The proposal qualified this participation, however: "Prosecutorial discretion would . . . be strictly maintained."<sup>206</sup> All constitutional protections for the defendant would

194. "[A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . . ." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

195. See Lurigio et al., *supra* note 165, at 8.

196. See Eikenberry, *supra* note 142, at 36-37. The "VIP" program failed in part because prosecutors were chary to cooperate with the victim advocates, seeing their interests as divergent. *Id.*

197. See Lurigio et al., *supra* note 165, at 8.

198. See e.g., SUSAN KISS SARNOFF, *PAYING FOR CRIME: THE POLICIES AND POSSIBILITIES OF CRIME VICTIM REIMBURSEMENT* xi – xii (1996).

199. See, e.g., Deborah Kelley, *Victim Participation in the Criminal Justice System*, in *VICTIMS OF CRIME: PROBLEMS, POLICIES, AND PROGRAMS* 172, 177-81 (Arthur J. Lurigio et al. eds., 1990).

200. *Id.*

201. See, e.g., CHARLES F. ABEL & FRANK H. MARSH, *PUNISHMENT AND RESTITUTION: A RESTITUTIONARY APPROACH TO CRIME AND THE CRIMINAL* 57-85 (1984). See also Peter J. Ferrara, *Retribution and Restitution: A Synthesis*, 6 J. LIBERTARIAN STUD. 105, 119 (1982), available at [http://mises.org/journals/jls/6\\_2/6\\_2\\_1.pdf](http://mises.org/journals/jls/6_2/6_2_1.pdf) ("[B]oth restitutive and retributive punishment are necessary for a completely moral, just and efficient system of [criminal] legal sanctions.").

202. See Eikenberry, *supra* note 142, at 34. The proposed additional sentence would have read: "The victim in every criminal proceeding shall have the right to be present and to be heard at all critical stages of judicial proceedings." *Id.*

203. *Id.* at 35.

204. *Compensating Victims*, *supra* note 134, at 145-47.

205. *Id.* at 146.

206. *Id.*

remain.<sup>207</sup> Finally, and most significantly with respect to restitution, this journal proposed that “[a]t the conclusion of the trial, the victim would be allowed to present evidence on the issue of damages.”<sup>208</sup> Because evidence of damages would be highly prejudicial to the defendant, this evidence would be presented after the verdict if the case was tried to a jury.<sup>209</sup>

Curiously, this journal opined that “[t]he effects of the proposed procedure are essentially psychological. Little is done to change the conduct of the trial.”<sup>210</sup> This conclusion was somewhat at odds with the proposal. After all, permitting the victim to be a “party to the prosecution” and affording him a procedural window in which to present evidence of his damages would seem, realistically, to have a meaningful impact on both the adjudication of guilt or innocence and on the imposition of a sentence. Nonetheless, this journal saw the primary goal of the proposal as “re-focus[ing] the ways in which crime and restitution are perceived by the victim, the offender, and the society.”<sup>211</sup> It was hoped that the more victim-focused procedure would encourage judges to use restitution more frequently and more “creative[ly].”<sup>212</sup> At its root, the proposal aimed to counter the perception that victim compensation is the responsibility of the government, and restore a sense of individual responsibility between the offender and victim.<sup>213</sup>

#### *B. Proposed Changes to Maine’s Restitution and Victims’ Rights Statutes*

With some refinements, this journal’s 1974 proposal can be made more effective and palatable in Maine’s current criminal justice system. This section proposes an addition to Maine’s victims’ rights statute, to which it will refer as 17-A M.R.S.A. § 1174-B.<sup>214</sup> The statute would be premised on two theories: (1) that crime victims are better served by having the opportunity to participate actively in the determination of their restitution awards, and (2) that it is better and cheaper for most offenders to be punished by working to repay their victims than it is for them to be imprisoned.<sup>215</sup> Sec. 1174-B would create an additional procedural window in which a crime victim may, independently of the prosecutor, present evidence of his damages flowing from the crime. It would also establish conditions under which

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207. *Id.* at 147.

208. *Id.* at 146.

209. *Id.* at 146 n. 97.

210. *Id.* at 147.

211. *Id.* at 147-48.

212. *Id.* at 147.

213. *Id.* at 148.

214. At present, there is no § 1174-B in Chapter 48 of the Maine Revised Statutes. Section 1174-A establishes procedural rules for notification of crime victims when a convict’s probation is terminated early.

215. It is “better” to punish by imposing restitution both from a pure punishment perspective and from a rehabilitative perspective. From a punishment perspective, the offender is in a symbolic way being made a servant of his victim, in the same way that he is made a servant of the State when he is imprisoned. Compared to imprisonment, the offender’s punishment is more personal and immediate by his servitude to the victim. From a rehabilitation perspective, giving the offender the ability to work during his punishment, particularly with support and assistance from the State, should in theory help to reduce recidivism and help the offender to develop more constructive social and professional skills.

restitution is a mandatory element of sentencing, a right in the crime victim to appeal the restitution order, and a sentencing guideline by which prison time can be suspended in proportion to the amount of the restitution award as a percentage of the defendant's projected annual income. The proposed statute relieves some burden on the prosecutor and shifts it to the party most interested in the outcome with respect to restitution—the crime victim. It acknowledges some of the value of the old private prosecution system, while maintaining almost all of the discretion currently entrusted to the public prosecutor and judge. It would also advance the stated purpose of restitution as a criminal sanction by ensuring that a victim is made whole for his loss while still meaningfully punishing the offender. Finally, it would aim to reduce prison costs and shift corrections resources toward re-establishing the offender as a productive wage earner.

Some elements of the proposed changes codify what already happens in the criminal sentencing process, serving in large part to educate victims. As noted above, the victim does currently have the opportunity to address the court at sentencing and request restitution. He may even present limited evidence of his damages. With appropriate “scripting” of the sentencing colloquy, the victim could be prompted to address his economic damages—although he would need to be notified in advance of the sentencing hearing to effectively gather the evidence. Likewise, the defendant already has a limited opportunity to dispute the victim's evidence of damages. Seen from this perspective, the “Damages Hearing” described below takes this existing practice, expands it slightly, and makes it more consistent with a civil bench trial. It also gives the defendant a more formal opportunity to dispute the victim's evidence of damages and to assert affirmative defenses.

### *1. The Damages Hearing*

Sec. 1174-B would create a Damages Hearing—a procedural window in which the crime victim could, at his option, present evidence and witnesses regarding his damages flowing from the crime. The Damages Hearing would, on the victim's motion, take place before the court ordered the production of any presentence investigation report (“PSI Report”); the probation officer preparing the PSI Report could then incorporate the information from the Damages Hearing. At such a hearing, the crime victim could call witnesses and enter evidence into the record just as the prosecutor would during the trial.<sup>216</sup> As in a traditional civil trial, the defendant would have the opportunity to impeach the victim's witnesses and evidence and to introduce his own rebuttal witnesses and evidence. The sentencing judge would be required to consider this evidence when deciding whether to award restitution. To avoid unduly interfering with the prosecutor's efforts, the crime victim would be required to notify the prosecutor in advance of any witnesses and

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216. To preserve the defendant's right to be convicted only by a jury, and only by proof beyond a reasonable doubt, this post-verdict damages evidence would not be considered on appeal with regard to the defendant's guilt or innocence. Rather, it could only be considered in an appeal on the issue of the award of restitution. Evidence that was included in the prosecution's main case against the defendant would continue to be reviewed normally on appeal.

evidence he planned to present during a Damages Hearing. Likewise, the defendant would be permitted to perform limited discovery regarding the witnesses and evidence to be presented by the victim so as to enable an effective defense.<sup>217</sup>

Following the Damages Hearing, the sentencing court would be required to make findings of fact as to the amount of the crime victim's loss. "Recovery" by way of restitution would continue to be limited to actual, non-speculative financial loss, and would not include any amounts attributable to pain and suffering. The victim would have the burden of production as to damages and causation; the defendant would bear the burden of production as to any affirmative defense. For instance, if the defendant could prove that the plaintiff was partly responsible for his own damages, then the sentencing court could reduce the restitution award proportionally, as in comparative negligence.<sup>218</sup> The sentencing court would be directed to find facts by a preponderance of the evidence, matching the current standard for fact-finding at sentencing.<sup>219</sup>

The sentencing court would, with one exception, continue to have the current level of discretion as to sentencing. Following some elements of 18 U.S.C. § 3663A,<sup>220</sup> restitution would be mandatory for any violent crime and for any crime against property. In such cases, as in the federal system, it would be reversible error for the court to fail to order restitution.<sup>221</sup> Such mandatory restitution gives effect to the basic purpose of the enhanced procedure: that if the victim can prove he suffered non-speculative pecuniary loss, the court will order the defendant to make the victim whole. This would make the restitution award somewhat more analogous to a civil money judgment, which necessarily follows, absent judgment as a matter of law,<sup>222</sup> from the jury's finding of the amount of the plaintiff's damages.

## 2. *Effects of Restitution on a Later Civil Trial*

As noted above, restitution ordered under § 1174-B would not include damages attributable to pain and suffering. However, the victim would continue to have the right to bring an additional civil action after the criminal trial, and any damages he recovered in the civil action would be reduced by the amount of his restitution.<sup>223</sup> Thus, if the victim wished to recover damages for pain and suffering, he could do so through the vehicle of a civil action. To simplify the civil trial, the criminal conviction (or guilty plea) would have *res judicata* effect on the defendant's civil liability for the harm resulting from the crime. Consequently, the

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217. This was precisely the problem that led to a request for post-conviction review in *Griffin v. State*. See *supra* note 47.

218. See 14 M.R.S.A. § 156 (2003 & Supp. 2011) (adopting a modified comparative negligence rule in Maine).

219. *State v. Walker*, 675 A.2d 499, 501 (Me. 1996).

220. This Comment does not suggest that restitution be mandatory for drug crimes, as in 18 U.S.C.A. § 3663A(c)(1)(A)(ii) (2000 & Supp. 2012).

221. See 18 U.S.C.A. § 3771(d)(3) (Supp. 2012) (establishing a procedure to correct errors by federal sentencing judges using a writ of mandamus).

222. ME. R. CIV. P. 50(b) (1993).

223. 17-A M.R.S.A. § 1327 (1977).

only issue of fact at the civil trial would be the causation and amount of damages attributable to pain and suffering.

Sec. 1174-B would require that, in a civil trial to recover damages for pain and suffering, punitive damages are disallowed if restitution has been awarded under the terms of the new statute. Traditionally, the purpose of punitive damages has been to punish the wrongdoer, not to make the plaintiff whole; by contrast, the purpose of restitution is precisely to make the victim whole. However, by replacing some period of imprisonment with restitution—on which more below—the new § 1174-B expands the purpose of restitution to also serve as one of the primary methods of punishing the offender. Thus, in almost all situations, punitive damages would unfairly duplicate the monetary punishment on the offender; the justice system has already meted out a monetary punishment through restitution.

### 3. *The Right of Appeal*

To ensure that crime victims' rights are respected in the criminal proceeding, § 1174-B would grant victims an express right to petition the Law Court for a Writ of Mandamus, similar to the provisions in 18 U.S.C. § 3771(d)(3)<sup>224</sup>. This right would be limited only to appeals from (1) the sentencing judge's findings of fact as to the amount of the victim's damages, and (2) the sentencing court's order of restitution. Should the victim establish to the satisfaction of the Law Court that the sentencing court clearly erred in its determination of the victim's damages or in its award of restitution, the writ could issue, requiring the sentencing court to correctly apply the restitution statute. The standard of review for mandamus under § 1174-B should be for "abuse of discretion or legal error"; this would permit a more scrutinizing review on appeal than is traditionally used in mandamus proceedings.<sup>225</sup>

Although a victim could challenge a sentencing court's restitution order, the victim could not challenge a sentencing court's decision to vary from the guideline reduction to the offender's term of imprisonment, discussed in more detail below.<sup>226</sup> The victim's interest in such a variance is much less than the offender's and the State's interests; the right to appeal a variance should lie only with the offender or the prosecutor.

### 4. *Converting Prison Time to Supervised Release with Restitution; Exceptions and Judicial Discretion*

Part of the rationale for adopting the proposed § 1174-B would be to reduce prison costs. One way to do this would be to adjust the balance of sentencing elements away from imprisonment and toward restitution. To meet this goal, § 1174-B would provide a guideline by which a judge should convert, for certain

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224. Mandamus is preferable to direct appeal because, as noted previously, the victim is not a party to the criminal prosecution. See *supra* note 95. Direct appeals are limited to parties. *Id.*

225. *Kenna v. U.S. Dist. Ct. for C.D. Cal.*, 435 F.3d 1011, 1017 (9th Cir. 2006). The *Kenna* court applied this standard to a petition for a writ of mandamus under § 3771(d)(3).

226. See *infra*, Part V.B.4 (describing the guideline reduction in prison sentence and the mechanism for variance).

classes of crimes, a sentence of imprisonment into a suspended sentence, with payment of restitution as a condition of probation. This guideline would take into account both the amount of restitution and the financial impact that the restitution will have on the defendant; it would, after all, be unjust to permit a wealthy defendant to “buy down” his prison time by paying a large restitution.

The guideline would ask the judge to estimate the likely annual income of the defendant—from all sources—after he is released from prison and compare that to the amount of annual restitution payments (with compounded interest), assuming the restitution is spread out over the lifetime of the period of probation. Thus, for a \$10,000 restitution award (including capitalized interest) assigned to an offender who would be on probation for ten years,<sup>227</sup> and who is likely to earn \$20,000 per year upon release, this “restitution quotient” would be 1/20, or 5%.<sup>228</sup> This quotient represents the impact of the restitution payments on the offender, adjusted for his income. For each 1% of the restitution quotient, the defendant would be eligible for one year—or, for a more granular approach, 365 days—deducted from his prison sentence. In the example above, this would result in a 5-year reduction in the prison sentence. If the defendant above were instead projected to earn \$100,000 per year upon release—an unusual case, but not impossible—the quotient would be 1/100, or 1%.<sup>229</sup> His prison sentence would be reduced by just one year instead of five, reflecting the fact that the restitution will have a lesser financial impact on the wealthier defendant than on the poorer defendant.<sup>230</sup> The statute

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227. Four years is the maximum period of probation for most Class A crimes, but for sexual crimes against persons under the age of twelve, the probation period can last up to eighteen years. 17-A M.R.S.A. §§ 1202(1), (1-A) (2006 & Supp. 2011). For Class D and E crimes, the maximum probation period is one year. *Id.* The guideline formula could be adjusted to accommodate these shorter maximum probation periods. Such an adjustment should maintain a compelling “stick” of prison time as punishment for violating probation conditions while also making a meaningful comparison between the defendant’s post-prison annual income and the shorter period during which he is required to make restitution to the victim.

228. \$10,000 divided by 10 years’ probation is \$1,000 per year; divided again by the projected post-release gross annual income of \$20,000 yields 1/20.

229. \$10,000 divided by 10 years’ probation is \$1,000 per year; divided again by the projected post-release gross annual income of \$100,000 yields 1/100.

230. As an alternative to this method of calculating the reduction, the statute could instead use a simpler formula. An offender could opt to pay one year’s income to reduce his prison time by one year, and likewise for additional years or smaller fractions of one year. This money would be given first to the victim until he had been fully compensated, and then would be used as additional funds for the work assistance program. *See infra*, Section V.B.4 (describing the proposed work assistance program for probationers). There would still be a limit, defined by class of crime, on the reduction amount; this would ensure that offenders served at least some of their sentences of imprisonment, in an amount proportional to the blameworthiness of their crimes. Payment of restitution would continue to be a condition of supervised release.

This alternative has the interesting effect of permitting an offender to choose to make a financial contribution to both the victim *and to the State* in lieu of imposing the burden of his incarceration costs on both. This element of choice on the part of the offender could have profound advantages from a penological perspective; the offender’s choice reinforces the personal responsibility he bears for the damage he caused. However, it also makes restitution optional, and shifts the focus of restitution away from the victim and onto the offender. Because the Maine Legislature is correct that restitution is itself a desirable goal of the criminal law – and because the goal of the proposed statute is to empower the

would also expressly approve the practice of accumulating consecutive probation periods for multiple counts so as to lengthen the overall probation period and make payment of a larger restitution award feasible for the defendant.<sup>231</sup>

The proposed statute must be practical to be effective. To satisfy our need for “socialized revenge” and make the statute politically feasible, no sentence could be reduced below certain minima per class of crime.<sup>232</sup> For instance, for a Class A crime, the minimum below which restitution could not reduce the sentence might be two years. Likewise, to prevent unrealistic and unenforceable restitution orders, the total restitution amount would be capped at 50% of the defendant’s total estimated post-release annual income over the probation period. If, in the example above, the restitution amount was \$1,000,000, but the defendant’s estimated post-release annual income were only \$30,000 over a ten year probation period, then the restitution amount would be capped at \$150,000.<sup>233</sup>

To ensure that the defendant is motivated to pay the restitution, the sentence reduction reached by applying the guideline would be converted into a proportionally higher suspended sentence. A 1% restitution quotient would reduce the prison sentence by one year, but convert that year into one and a half years of suspended sentence. Continuing the example above, the offender’s prison sentence would be reduced from ten years to five years, but those five years would be replaced with a suspended sentence of seven and a half years. Monthly payments toward the restitution would be a condition of probation.

Even with these higher suspended sentences, Maine courts retain the discretion to vacate all, some, or none of the suspended sentence when a probationer violates the terms of his probation.<sup>234</sup> While this is entirely appropriate in most circumstances, this discretion may permit some recalcitrant probationers to avoid restitution payments that they would otherwise find a way to make. To put teeth behind § 1174-B’s larger suspended sentences, 17-A M.R.S.A. § 1206(7-A) should be amended to require that, for the second and all subsequent violations of a probation condition requiring payment of restitution under § 1174-B, the court shall vacate *at least* some pre-determined number of days of the suspended sentence for each violation. The required number of days should escalate with each subsequent violation; for instance, the first violation could result in the vacation of at least ten

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victim psychologically while also making him whole economically – the Legislature should be wary of adopting this alternative.

Nonetheless, I am indebted to colleague Kristian Terison for suggesting this insightful alternative.

231. This would counter the disapproval expressed by the Law Court for such a scheme in *State v. Downs*. See *supra* note 189. If necessary, another condition for the use of consecutive sentences could be added at 17-A M.R.S.A. § 1256(2) (2006 & Supp. 2011), specifying that consecutive sentences of probation may be used to extend the period of probation to allow for supervised payment of a restitution order over a longer time.

232. The limit on the period of reduction is distinct from a minimum sentence of imprisonment. The judge is still free to impose any sentence of imprisonment within his statutory authority.

233. \$30,000 projected post-release gross annual income, divided in half, is \$15,000. Multiplied by ten years over which he will make the payments, the defendant’s total restitution amount is capped at \$150,000.

234. 17-A M.R.S.A. § 1206(7-A) (2006 & Supp. 2011).



days of the suspended sentence, the next in at least twenty days, and so on. Courts should retain the discretion to waive this mandatory penalty only on a finding of extreme financial hardship to the probationer. Proper implementation of the work assistance and supervision program, described in detail below, should make such waivers rare.

Finally, the approach outlined in this section would not work for every offender. For certain dangerous or repeat offenders, the guideline would be suspended or disallowed in favor of a more traditional incarceration program. To preserve judicial discretion in sentencing, a sentencing judge could vary from the result reached under the guideline as to reduction in the period of imprisonment, subject on appeal to review for reasonableness.<sup>235</sup> This standard would give the Law Court the ability to ensure that sentencing courts follow the spirit of the statute while also allowing for flexibility in unusual cases.

#### *5. Work Assistance and Supervision for Probationers; Two Model Maine Programs*

Even offenders who might benefit from a reduced prison sentence under § 1174-B might struggle at first to find work and make restitution payments, putting them at risk of violating their probation conditions and returning to prison. This leaves neither the crime victim nor the probationer better off. To ease the probationer's transition back to society and increase the likelihood that the victim will actually receive restitution, § 1174-B would also provide for and fund a work assistance and mental health program for offenders newly released from prison. Such a program would combine increased probation oversight with either work placement assistance or direct, but temporary, employment by the State or a State-funded non-profit organization. Funds for the assistance program could be reallocated from the prisons in anticipation of a reduced inmate population. If early experiments with the system showed that probationers still had difficulty finding employment during their period of supervised release, Maine could also consider prohibiting employers from denying employment based solely on past felonies during the probation period.<sup>236</sup> This would have the added advantage of giving newly released probationers the opportunity to establish a positive work record, aiding them in finding future employment after their supervised release periods end.

Maine Pretrial Services (MPS), an independent non-profit organization that

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235. This requirement would be similar to the requirements placed on sentencing judges in federal courts. A judge must "consult [the Federal Sentencing Guidelines] and take them into account when sentencing," but may vary from the guidelines for good cause. *U.S. v. Booker*, 543 U.S. 200, 264 (2005). Sentencing decisions are reviewed on appeal for "unreasonableness." *Id.* See also *supra* Section V.B.3 (describing the elements of a restitution sentence subject to appeal by the victim and by the prosecutor).

236. Realistically, this would require that the State prevent criminal record checks from revealing the presence of any felony while the probationer is currently serving his period of supervised release. This could be made more palatable to the business community by providing a fund to insure against harm caused by a probationer whose felonies were suppressed from the results of a criminal record check by the employer.

provides “pretrial bail supervision of defendants who are charged with crimes or probation violations,” is a public/private partnership model that the state could use as the foundation of the § 1174-B work assistance program.<sup>237</sup> MPS provides a “least restrictive bail alternative,” for defendants who either cannot pay bail or who a court determines need extra supervision if released before trial.<sup>238</sup> Among other things, MPS recommends appropriate bail conditions, preferring the least restrictive conditions consistent with public safety, and provides “community supervision and monitoring of court-ordered conditions of release.”<sup>239</sup> Critically, MPS also helps select defendants to participate in Maine’s Co-occurring Disorders Court, Family Treatment Drug Court, Adult Treatment Drug Court, and the Kennebec Regional Re-Entry Project.<sup>240</sup> MPS mainly works with defendants prior to their trial or probation revocation hearing.<sup>241</sup>

MPS is not without flaws. A 2006 study, commissioned by the state’s Corrections Alternatives Advisory Committee,<sup>242</sup> concluded that MPS was only offered consistently in twelve of sixteen counties, services were not standardized across counties, and the scope of services was below the national standards for pretrial services programs because of a lack of state funding.<sup>243</sup> Nonetheless, these findings do not cast doubt on the strength of the model; rather, they show that Maine is not yet fully implementing it.<sup>244</sup>

Creative Work Systems (CWS), another independent Maine non-profit organization, helps people with “cognitive, physical and psychiatric disabilities” to find and keep employment in Maine.<sup>245</sup> CWS helps its clients find appropriate employment, provides job skills training, and assists employers to accommodate special needs workers.<sup>246</sup> CWS also maintains ongoing contact with both clients and their employers to provide support for unexpected difficulties and ensure that the clients remain employed.<sup>247</sup> For some clients, CWS maintains an outsourced staffing practice under the “Pine Tree Business Solutions” brand, directly employing the disabled clients and providing managed services to local

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237. *Maine Pretrial Services*, ME. PRETRIAL SERVICES 1, <http://mainepretrial.org/resources/revised-mps-info-sheet.pdf> (last visited Apr. 22, 2012).

238. Marie VanNostrand, Gena Keebler, Patrick Jablonski & Brian Kays, *Pretrial Case Processing in Maine: A Study of Efficiency & Effectiveness*, ME. PRETRIAL SERVICES 33 (Sept. 2006), <http://mainepretrial.org/resources/case-processing-study.pdf> [hereinafter *Pretrial Case Processing*].

239. *Objectives*, ME. PRETRIAL SERVICES, <http://mainepretrial.org/objectives.asp> (last visited Apr. 22, 2012).

240. *Programs*, ME. PRETRIAL SERVICES, <http://mainepretrial.org/programs.asp> (last visited Apr. 22, 2012).

241. *See Objectives*, *supra* note 239.

242. *Pretrial Case Processing*, *supra* note 238, at 1.

243. *Id.* at 151-52. Despite the 2006 report, MPS still only operates in twelve of sixteen Maine counties. *Programs*, *supra* note 240.

244. *See Pretrial Case Processing*, *supra* note 238, at 152 (describing specific benefits of a pretrial services program that meets national standards, including economic benefits to the corrections system).

245. *About Creative Work Systems*, CREATIVE WORK SYS., <http://www.creativeworksystems.com/about/> (last visited Apr. 22, 2012).

246. *Employment Services*, CREATIVE WORK SYS., <http://www.creativeworksystems.com/employment-services/> (last visited Apr. 22, 2012).

247. *Id.*

businesses.<sup>248</sup>

The § 1174-B work assistance program could either be state-managed through Probation Services or else could follow a model that combines elements of both MPS and CWS. In the latter case, the state could establish funding for one or more independent non-profit organizations that would provide work assistance and supervision support to probationers. The organizations would work in parallel and in cooperation with both Probation Services and with the Central Maine Pre-Release Center, which provides pre-release work opportunities for prisoners during the last fourteen months of their sentences.<sup>249</sup> The funding would require that recipient organizations provide support to probationers in finding and keeping work, meeting the requirements of drug and mental health courts, and making restitution payments. For probationers particularly difficult to place with employers, the organizations could be authorized to employ the probationers directly. As with other alternative sentencing programs, the State should expect to save money in the long term by reducing the expensive prison inmate population and shifting resources to community support programs that keep probationers employed, drug-free, and in compliance with the terms of their probation—such as making restitution payments.

### *C. Likely Outcomes of the Proposed Changes*

If Amy's case were to occur in Maine after the adoption of proposed § 1174-B, the criminal prosecution would be conducted according to today's criminal procedure until after Monzel's guilty plea or conviction. Amy would then move the sentencing court to schedule a Damages Hearing. The sentencing judge would be required to schedule the hearing to occur within some reasonable time period; perhaps two to four weeks. At the Damages Hearing, Amy—through active participation with her counsel—would have the burden to show her actual, financial damages caused by Monzel's actions. Monzel would assert, as an affirmative defense, that because he did not personally commit every act of distributing the photos and video, he is not personally responsible for the whole of Amy's financial loss. Thus, he should not be held jointly and severally liable for the damages.<sup>250</sup> The sentencing court would find, as fact, what portion of Amy's damages were directly and proximately attributable to Monzel's possession and distribution of the images and video. Then, unless the court chose to exercise the discretion afforded it under § 1174-B, it would issue a Restitution Order compelling Monzel to compensate Amy.

Assume, hypothetically, that the sentencing court found that Monzel was likely

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248. *Pine Tree Business Solutions*, CREATIVE WORK SYS., <http://www.creativeworksystems.com/pine-tree-business-solutions/> (last visited Apr. 22, 2012).

249. *Adult Community Corrections*, ME. DEP'T OF CORRECTIONS, <http://www.maine.gov/corrections/adult/index.htm> (last visited Apr. 22, 2012).

250. In Monzel's original restitution order, the District Judge limited the restitution award for precisely this reason. *U.S. v. Monzel*, 641 F.3d 528, 531 (D.C. Cir. 2011).

to earn \$30,000 per year upon release from prison.<sup>251</sup> Assume also that the sentencing court found Amy's actual damages flowing from Monzel's possession and distribution to be \$1,000,000. Finally, assume that the court would, absent § 1174-B, have ordered a sentence of ten years imprisonment and ten years of probation. Monzel's restitution amount would be capped at \$150,000.<sup>252</sup> Because \$15,000 per year is 50% of his projected annual gross income after release, Monzel's restitution quotient is one-half, or 50%. This would produce a reduction of fifty years, exceeding the ten year sentence.<sup>253</sup> Thus, absent the minimum period of imprisonment below which restitution cannot lower the sentence, all of Monzel's prison term would be eliminated by the restitution quotient. However, for a Class A crime, the restitution quotient would be prevented from lowering the period of imprisonment below two years, ensuring that Monzel serve at least some time in prison.<sup>254</sup>

Upon release, Monzel would have ten years during which to pay back the \$150,000 restitution amount.<sup>255</sup> Making each monthly payment would be one of the terms of his probation. Because § 1174-B reduced his sentence by eight years, his suspended sentence would be twelve years.<sup>256</sup> The § 1174-B work assistance and mental health program would help Monzel to find and keep employment, both to help rehabilitate him and to make sure that Amy receives her restitution payments.

This outcome is advantageous to Amy, to the State, and, within reason, to Monzel. Amy has been awarded a restitution amount that is, while less than her actual damages, an amount that she stands at least a good chance of actually receiving. Amy knows that Monzel will be punished with both prison time and a long period during which a very large portion of his income is redirected to Amy. Most importantly, Amy has taken an active role, supported by the criminal justice system, in punishing Monzel. While she may not choose to be in court for the Damages Hearing, a good lawyer will have emphasized to her the assertive, proactive nature of her involvement. At best, this will give Amy a positive, self-affirming psychological experience; at worst, it is no worse than the current

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251. Monzel was a former nurse at the time of his sentencing. Mike Scarcella, *D.C. Circuit Orders Hearing in Child Pornography Victim's Restitution Dispute*, THE BLT: THE BLOG OF LEGALTIMES (April 19, 2011), <http://legaltimes.typepad.com/blt/2011/04/dc-circuit-child-pornography-victim-owed-more-restitution.html>. Although he will probably not be allowed to return to nursing, he may be able to use his specialized medical knowledge to obtain medical clerical work. Thus, \$30,000 per year, if optimistic, is at least possible.

252. \$30,000 per year divided in half is \$15,000, times ten years of probation is \$150,000.

253. One year for each 1% of restitution quotient, with a 50% quotient, yields fifty years of reduction. This high reduction value results from the very high amount of Amy's damages compared to Monzel's projected post-release income. Regrettably, this is probably a common scenario.

254. See *supra* note 232 (noting that this reduction limit is different than a mandatory minimum sentence).

255. The guideline reduced Monzel's sentence by eight years, from ten to two. However, the probation period is untouched by the guideline reduction.

256. See *supra* Section V.B.4 (describing the relationship between the reduction in prison sentence and the length of supervised release).

system.<sup>257</sup>

From the State's perspective, this outcome fulfills the criminal law's purposes of socialized revenge, restraint, and making the victim whole.<sup>258</sup> It may also provide effective general deterrence, as Monzel's long term punishment of payment may be more visible to his peers than if he were locked away in prison. The burden on the State of incarcerating Monzel is reduced from ten years to two. Finally, the prosecutor is relieved of the burden of investigating and proving Amy's damages.

Monzel himself, meanwhile, has received less time in prison.<sup>259</sup> During the period of his supervised release, he will have both a strong incentive and assistance to find and keep work; he will also have complementary mental health assistance. Maine's experience with mental health and drug courts suggests that this will substantially reduce the chances that Monzel will commit other crimes.<sup>260</sup>

#### *D. Limitations and Possible Drawbacks of the Proposed Changes*

While the proposed § 1174-B would improve the functioning of criminal sentencing in many ways, it does have possible drawbacks compared to Maine's current procedure, the French *partie civile* system, and this journal's 1974 proposal. The proposed adjustments to the current procedure are highly limited in comparison to the latter two systems.

First, as against Maine's current procedure, the proposed procedure would remove some discretion from the prosecutor. A prosecutor who did not believe restitution to be an appropriate element of punishment would not be able to prevent the victim from asking for it and presenting complete evidence and witnesses related to his damages. Furthermore, the guideline reduction in the offender's prison term would also remove some discretion from both the prosecutor and the judge. Although the guideline reduction, like the Federal Sentencing Guidelines, would not be binding on the judge, the widely-scoped "reasonableness" standard of review means that judges may be wary of invoking their discretion to vary. Finally, the process of discovery as to the victim's damages, and the addition of a Damages Hearing before sentencing, would add somewhat to the overall length and burden of the criminal proceeding.

The exact cost to the State, compared with current practice, is difficult to predict. It would undoubtedly require significant extra funding for Probation Services. The program should, over time, shift the allocation of financial resources from the prison system to the probation system, as convicts spend less time in prison and more time being monitored and assisted by probation officers—or by the staff of independent non-profit agencies. The work assistance and mental

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257. Results may vary.

258. See *supra* Section II (placing restitution in context among other purpose of the criminal law).

259. Appropriately economizing incarceration time is one of the purposes of Maine's criminal law. See 17-A M.R.S.A. § 1151 (2006 & Supp. 2011) ("The general purposes of [sentencing include] . . . to minimize correctional experiences which serve to produce further criminality.")

260. See Cummings, *supra* note 187 (describing the economic and penological benefits of mental health courts).

health programs for probationers would certainly incur costs, though evidence suggests that these costs would be less than the costs of long-term incarceration for repeat offenders.<sup>261</sup> The true measure of success for the program, however, would be whether recidivism rates decline, overall state expenditures on corrections decline, and victim satisfaction with the criminal justice system increases.

Next, as compared with the French *partie civile* system, the proposed changes would provide comparatively less agency to the crime victim and fewer procedural guarantees. The victim would remain without the ability to proactively initiate prosecution, for instance.<sup>262</sup> Likewise, unless called as a witness, the victim may not participate in the process of adjudicating guilt or innocence, as he may in France.<sup>263</sup> Although the victim would have the right, following an acquittal, to initiate a separate civil action against the acquitted defendant,<sup>264</sup> the victim would not be able to seek civil damages against the acquitted defendant *in the same criminal proceeding*, as he may in France.<sup>265</sup>

Finally, unlike the procedure this journal proposed in 1974, there would be no right in the victim to be a full party to the prosecution.<sup>266</sup> The victim would not sit with the state's attorney at counsel table, nor even be guaranteed access to the courtroom prior to the verdict. He would have no additional procedural rights during the adjudication of guilt or innocence. In this sense, the proposed changes hew more closely to Maine's current system than to the simplified *partie civile* system envisioned in 1974.

Even with these limitations and drawbacks, the proposed statute is still worth implementing. The impingement on prosecutorial and judicial discretion is minimal, and the proposal mirrors changes already in place at the federal level and

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261. See Steeves, *supra* note 186 (documenting the high cost of recidivism); see also Ray Price, Jr., *The Impact of Drug Courts on Incarceration*, 2011 J. INST. JUST. & INT'L STUD. 37, 37-40 (collecting and discussing recent data as to the rise in incarceration rates and the attendant costs, and documenting a correlation between participation in a drug court and markedly lower rates of recidivism).

262. Compare *supra* Section V.B (recommending adjustments to Maine's Victim's Rights Statutes without any right in the victim to initiate prosecution) with *supra* note 116 (noting that in France a victim may initiate a State investigation and prosecution). See also 18 U.S.C.A. § 3771(d)(3) (Supp. 2012) (providing a right in the victim to compel a federal court to vindicate his rights as a crime victim).

263. Compare *supra* Section V.B (recommending no right in the victim to participate in adjudication of guilt or innocence) with *supra* Section III.C (noting a broad range of procedural participation by the victim in a French criminal proceeding).

264. See 17-A M.R.S.A. § 1327 (2006) (recognizing the right of a victim to seek civil damages separately from the criminal proceeding); see also, e.g., *Rufo v. Simpson*, 86 Cal. App. 4th 573 (Cal. Ct. App. 2001) (upholding a California civil wrongful death judgment of \$33,500,000 against football and television star O.J. Simpson following his acquittal on criminal charges stemming from the murders of his ex-wife and her boyfriend).

265. Compare *supra* Section V.B (recommending no right in the victim to seek damages after the acquittal of the defendant) with *supra* note 123 (noting that in France a victim may seek civil damages after the acquittal of the defendant).

266. Compare *supra* Section V.B (recommending no changes to the phases of the criminal trial occurring before the verdict) with *Compensating Victims*, *supra* note 134, at 146 ("The victim would be considered in all respects a party to the prosecution – from sitting with the state's attorney at counsel table to assisting the prosecutor in the preparation of the case where appropriate.")

in about half of the states.<sup>267</sup> It is true, and a valid criticism, that an additional post-verdict hearing in the criminal trial, preceded by something like civil discovery, will lengthen the sentencing phase. However, the actual weight of this burden should be within the capacity of the system. Unlike damages evidence in more complex civil litigation, evidence of direct economic harm to crime victims—doctors' bills, valuation of destroyed property, lost wages—should be comparatively simple to collect.

It is also true that the current proposal is more limited than this journal's 1974 proposal, and significantly more limited than the full *partie civile* system implemented in France. This should not stop Maine from taking steps in the right direction. Some further progress toward restoring and empowering victims of crime, even if not as far-reaching as it could be, would be an improvement over the current system. As Maine gains experience with recalibrating its criminal justice system away from incarceration and toward victim restitution, the state will undoubtedly need to make further changes.

## VI. CONCLUSION

Restitution is one element of criminal sentencing, but it is an element that could be highly effective at meeting the stated goals of criminal law in Maine. Compared to U.S. federal law and to French law, Maine's provisions for victims' rights in the criminal process and for the use of restitution are both relatively limited. Rather than provide victims a proactive, engaged role, the criminal process marginalizes victims, further exacerbating the damage done by the crime. Maine could improve its treatment of both victims and offenders by using more restitution and less jail time. Furthermore, Maine could adopt a "Damages Hearing" procedural window in which the victim would present evidence of his economic damages to the sentencing court. Additional monitoring of and assistance to probationers can increase the chances that the restitution order is not a false hope to the victim, but rather a promise that one day he will be made whole. All of these steps would create a more positive psychological experience for the victim and potentially relieve economic pressure on Maine's criminal justice system.

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267. See 18 U.S.C.A. § 3663A (2000 & Supp. 2012) (establishing mandatory restitution for certain federal crimes); *supra* note 138 ("In . . . roughly half of the states, judges are either mandated to order restitution or told that restitution must be ordered unless they find a special reason not to do so.")