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Unpaid Restitution: An under-Enforced Right of Victims and Suggestions to Improve the Collection of Restitution in Wyoming

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UNPAID RESTITUTION: AN UNDER-ENFORCED RIGHT OF VICTIMS AND SUGGESTIONS TO IMPROVE THE COLLECTION OF RESTITUTION IN WYOMING

*Daniel M. Fetsco**

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I. INTRODUCTION

Requiring offenders to pay restitution to crime victims has a long history. Roman law, Mosaic Law, and the Code of Hammurabi all featured provisions that required payment of restitution.¹ In the United States system of criminal justice,

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¹ Glen Kercher et al., *Restitution in Texas: A Report to the Legislature*, CRIME VICTIMS' INSTITUTE, at 3, <http://www.crimevictimsinstitute.org/documents/Restitution%20Report.pdf> (last visited Apr. 9, 2012).

judicial officials order restitution to victims of crime to achieve several goals, one of which is compensating the victim's financial loss. In recent years, however, United States citizens have become increasingly concerned about the high rate of uncollected restitution.

Various jurisdictions around the country have reported excessive dollar amounts of unpaid court-ordered obligations. For example, recently reported uncollected federal court-ordered restitution is more than \$50 billion, most of which is owed to victims and others harmed by offenders.² Many states and counties have experienced low rates of restitution collection. In Iowa, for example, unpaid court-ordered obligations, including restitution, totaled \$533 million as of 2010.³ A 2008 report from Texas revealed that more than ninety percent of offenders discharged from parole between 2003 and 2008 still owed restitution to their victims.⁴ Arizona reported the amount of unpaid court-ordered debt at \$831 million.⁵ In Pennsylvania, the amount was \$638 million in unpaid restitution.⁶ In a single Nevada county, \$70 million in restitution went uncollected over an eight-year period.⁷

Another factor that complicates restitution collection is that many jurisdictions do not compile data on the amount of restitution recovered.⁸ While Wyoming does not track the exact amount of restitution and other court-ordered obligations received from offenders, a scoping paper prepared for the Wyoming Legislature in 2010 reported that only forty percent of probationers and parolees pay their restitution obligation in full by the time their sentence expires.⁹ Wyoming also has a Division of Victim Services (DVS) within the Attorney General's Office, which is authorized to pay compensation to victims of crime and pursue reimbursement from offenders as restitution. A majority of that compensation, however, goes uncollected, as it was reported that only \$300,000 was recovered from the roughly \$1.2 million paid in fiscal year 2009.¹⁰

² *Making Restitution Real: Five Case Studies on Improving Restitution Collection*, NATIONAL CENTER FOR VICTIMS OF CRIME, at 3 (2011), <http://www.ncvc.org/ncvc/AGP.net/Components/documentViewer/Download.aspxnz?DocumentID=48480> [hereinafter *Making Restitution Real*].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ THE LEG. OF THE STATE OF WYO. MGMT. AUDIT COMM., STATEWIDE COLLECTION OF COURT-ORDERED RESTITUTION 10 (May 26, 2010), available at <http://legisweb.state.wy.us/progeval/REPORTS/2010/Restitution%20Scoping%20paper.pdf>.

¹⁰ *Report Criticizes Wyoming Victim Services*, CASPER STAR-TRIB. (Mar. 9, 2010 12:00 AM), http://trib.com/news/state-and-regional/article_4bdc96f4-d8bd-5146-89bd-f8f9d5f0a08b.html.

In addition to the financial losses suffered, these victims are trying to recover from other losses they sustained—physical, emotional, and financial. Practical examples are victims without health insurance who cannot afford to pay their hospital or counseling bills, small-business owners scrambling to keep their shops open after being defrauded by employees, and elderly and vulnerable victims who have been swindled out of their life savings. Not only do the victims suffer financial loss, but also the loss of dignity, security, physical health, well-being, and independence. The nation's recent economic downturn has added to the plight of victims owed restitution.

Failure to collect restitution also promotes a belief among victims and the public that ignoring court orders has no repercussions, which causes a loss of faith in the criminal justice system. This can lead to a negative public perception of the criminal justice system, can cause under-reporting of crime to law enforcement agencies, and can create uncooperative victims and witnesses.¹¹ Repayment of restitution also makes an important societal statement: the state and offender recognize the harm caused by the offender's actions and the offender's obligation to make amends.¹²

Restitution can also play a vital role in the offender reformation process. Courts have acknowledged that payment of restitution is significant and rehabilitative as it "forces the defendant to confront, in concrete terms, the harm his or her actions have caused."¹³ Further, a study that examined the correlation between restitution and recidivism found that offenders who pay a higher percentage of their court-ordered restitution are less likely to commit a new crime.¹⁴ Interestingly, the study revealed that the payment of criminal fines did not have this same effect, which indicates that the act of repaying the victim, rather than paying a fine to the state, positively influences the offender's ability to lead a law-abiding life.¹⁵

As discussed in this article, courts consider the ability to pay restitution when sentencing offenders, although many victim advocates would argue that the ability to pay should not be taken into account, maintaining that the offender's ability to pay should only be considered when setting a repayment schedule.¹⁶ Offenders also face other obstacles to repaying restitution. Employment for individuals with felony and criminal records can be difficult to find, and when they do find jobs,

¹¹ Olga Tsoudis, *The Likelihood of Victim Restitution in Mock Cases: Are the 'Rules of the Game' Different From Prison and Probation?*, 28 SOC. BEHAVIOR AND PERSONALITY, no. 5, 2000 at 481, 482–83.

¹² *Id.*

¹³ *People v. Moser*, 50 Cal. App. 4th 130, 135 (1996) (quoting *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986)) (internal quotation marks omitted).

¹⁴ *Making Restitution Real*, *supra* note 2, at 4.

¹⁵ *Id.*

¹⁶ Kercher et al., *supra* note 1, at 5.

the pay is often at the lower wage scales.¹⁷ With crimes such as embezzlement, check fraud, and property destruction, the amount owed can be in the hundreds of thousands of dollars, making it practically impossible for the offender to repay the amount while serving probation or parole, let alone pay the debt during his or her lifetime.¹⁸ Offenders may not have the physical, mental, or emotional capacity for employment.¹⁹ In addition to restitution obligations, offenders often owe child support and other debts that stretch their income while on supervision.²⁰ Many offenders serve their entire sentence in prison, or have their probation or parole revoked, resulting in incarceration, which greatly limits their ability to pay.²¹

The lack of restitution collection in Wyoming and across the country has sparked much discussion about ways to improve the collection of restitution from criminal defendants. Several states or counties have begun implementing new methods of collecting restitution, or aggressively pursuing collection under existing frameworks, thereby increasing the effectiveness of their respective attempts at collecting debt and repaying victims.²² This article reviews the history of restitution in the United States, examines Wyoming restitution law, compares Wyoming restitution law to restitution law in other jurisdictions, and suggests potential improvements to our current system of restitution collection. No system of restitution collection is perfect. The models explored in this article may not work perfectly for Wyoming, but the reported lack of collection justifies the need to evaluate and possibly alter Wyoming's current system.

II. HISTORY OF RESTITUTION COLLECTION IN THE UNITED STATES

Prior to the American Revolution, courts required convicted criminals to pay restitution to their victims, and if they could not pay, the criminals became their victims' servants for a period of time commensurate with the crimes they committed.²³ If the victim so desired, the criminal could be sold, and victims who chose to sell their criminals were permitted one month to find a buyer.²⁴ After a month elapsed, the victim had to pay for the criminal's maintenance in jail or the criminal would be released.²⁵

¹⁷ THE LEG. OF THE STATE OF WYO. MGMT. AUDIT COMM., *supra* note 9, at 9.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Making Restitution Real*, *supra* note 2, at 4–5.

²³ See generally William McDonald, *The Role of the Victim in America*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 295 (Randy E. Barnett & John Hagel III eds., 1977).

²⁴ *Id.*

²⁵ *Id.*

In the pre-American Revolutionary system of criminal justice, prosecutions were brought on behalf of the State, but were essentially private prosecutions in which the State was uninvolved.²⁶ Police departments and prosecutor offices did not exist as they do today—victims were required to either pay the sheriff to investigate crimes or hire private detectives.²⁷ Once the offender was located, the victim paid a fee to secure a criminal warrant and hire an attorney to draw up an indictment.²⁸ To prosecute the case, the victim either litigated the case himself or hired an attorney to do so.²⁹ Thus, collection of restitution was available in colonial times, but it was available only to those who had the money to pay for it.

Following the American Revolution, the victim's role in the criminal justice system diminished to the point that the victim became an afterthought, if considered at all.³⁰ The State began to assume the role of prosecutor. As such, the State, not the victim, became the injured party, and restitution to the actual victim occurred less frequently as a sanction.³¹ Convicted offenders were more often punished with fines rather than being required to pay restitution to their victims, and victims were left to find redress in civil courts.³² The rise of the penitentiary also contributed to the lost focus on victims' rights:

In contrast to the barbaric penological practices of the heartless British, the new republic would show the world that hardened criminals could be reclaimed by humane and natural methods. Instead of whippings, forced servitude, or the hangman's noose, the Americans would place their criminals in prisons where they could read the Bible, meditate in silence, and come to see the error of their ways. The severity of the punishment could be easily proportioned to the harm done by varying the length of time in prison. The victim had no role to play under this new plan. In fact, his influence over the administration of justice had to be eliminated because it reduced the certainty of punishment. In 1778, the first prison opened in Philadelphia. Within thirty years, eleven states had prisons.³³

²⁶ *Id.*

²⁷ *Id.* at 296.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 297–98.

³¹ See generally Susan Hillenbrand, *Restitution and Victim Rights in the 1980s*, in VICTIMS OF CRIME: PROBLEMS, POLITICS, AND PROGRAMS 189 (Arthur Lurigio, Wesley Skogan, & Robert Davis eds., 1990).

³² *Id.*

³³ McDonald, *supra* note 23, at 297.

After the Revolutionary War, modern police departments formed and grew into large bureaucracies. Public prosecutors assumed the prosecution for most crimes, further minimizing the role the victim occupied prior to the Revolution.³⁴ The founders of the modern criminal prosecution system were wary of a model in which only wealthy citizens could afford to buy law enforcement and justice, and they largely removed the victim from the process until the resurgence in victims' rights in the last few decades.

Public lack of confidence in rehabilitation of offenders led to the rise in the importance of victims' rights, including the right to collect restitution. Beginning in the 1960s, restitution paid directly to the victim was not a sentencing option.³⁵ However, by the end of the 1960s, the United States Supreme Court incorporated more of the Bill of Rights and applied them to state governments to the same extent they applied to the federal government (e.g., the right against unreasonable search and seizure, the right against cruel and unusual punishment, the right to assistance of counsel, the right against self-compelled incrimination, the right of confrontation, the right to a speedy trial, the right to compulsory process for obtaining witnesses, and the right to a jury trial in a felony case).³⁶

In the wake of this due process revolution initiated by the Supreme Court, the public, perhaps misguidedly, began to attribute a rise in crime rates to the perception that the Court had a permissive attitude toward criminals.³⁷ Richard Nixon made "law and order" a platform for both of his 1968 and 1972 presidential campaigns, promising that he would rectify the perceived problem by appointing more conservative jurists to the Supreme Court.³⁸ This movement continued into the Reagan era and in 1982, President Reagan appointed a special task force on crime victims, which reported that victims were regarded as "appendages of a system appallingly out of balance."³⁹ In response, Congress passed the Victim and Witness Protection Act of 1982, which made the granting of victim restitution a norm in sentencing, and the Victims of Crime Act of 1984, which established a federally funded victim compensation fund which now dispenses hundreds of millions of dollars in compensation, assistance, and grants to victims.⁴⁰

³⁴ *Id.* at 297–98.

³⁵ Gregory Orvis & David Reitzel, *Balancing Criminal Victims' and Criminal Defendants' Rights*, in *CONTROVERSIES IN VICTIMOLOGY* 1, 6–10 (Laura Moriarty ed., 2008).

³⁶ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Klopper v. North Carolina*, 386 U.S. 213 (1967); *Washington v. Texas*, 388 U.S. 14 (1967); *Pointer v. Texas*, 380 U.S. 400 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Robinson v. California*, 370 U.S. 660 (1962); *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁷ Orvis & Reitzel, *supra* note 35, at 7–8.

³⁸ *Id.* at 8.

³⁹ *Id.* at 9.

⁴⁰ *Id.* at 3.

Today, every state and the federal government has at least some form of crime victims' laws on the books, and thirty-three states have adopted victims' rights amendments to their constitutions that feature provisions for the payment of restitution to victims.⁴¹ Clearly, the United States has made great strides in recent years in recognizing the importance of the victim in the criminal justice system, but the efforts to collect court-ordered restitution have produced mixed results.

III. RESTITUTION LAW IN WYOMING

A. *Statutory Law*

Wyoming law defines restitution as "full or partial payment of pecuniary damages to a victim," and victim is defined as "a person who has suffered pecuniary damage as a result of a defendant's criminal activities."⁴² Pecuniary damage is defined as "all damages which a victim could recover against the defendant in a civil action arising out of the same facts or events, including damages for wrongful death."⁴³ The statute additionally states that it does not include punitive damages or damages for pain, suffering, mental anguish, and loss of consortium.⁴⁴ Insurance companies that compensate victims for pecuniary damages caused by crimes are not entitled to restitution if they have subrogation rights against the offender.⁴⁵

Following a conviction for a misdemeanor or felony, Wyoming courts must order criminal defendants to pay restitution to each victim "unless the court specifically finds that the defendant has no ability to pay and that no reasonable probability exists that the defendant will have an ability to pay."⁴⁶ Prosecutors are responsible for presenting any claim submitted by any victim to the sentencing court.⁴⁷ The courts are then required to "fix a reasonable amount as restitution owed to each victim for actual pecuniary damage resulting from the defendant's criminal activity."⁴⁸

Wyoming law also requires the "court consider and include as a special finding, each victim's reasonably foreseeable actual pecuniary damage that will result in the future as a result of the defendant's criminal activity."⁴⁹ Courts in

⁴¹ *Id.* at 1.

⁴² WYO. STAT. ANN. § 7-9-101(a)(iv), (v) (2011).

⁴³ *Id.* § 7-9-101(a)(iii).

⁴⁴ *See id.*

⁴⁵ *Id.* § 7-9-101(a)(v).

⁴⁶ *Id.* § 7-9-102.

⁴⁷ *Id.* § 7-9-103(a).

⁴⁸ *Id.* § 7-9-103(b).

⁴⁹ *Id.*

Wyoming may also order a defendant to pay restitution in the form of long-term physical health care if the physical injury suffered is expected to require more than three months of care.⁵⁰ This long-term restitution order “may exceed the length of any sentence imposed upon the defendant for the criminal activity.”⁵¹ Court-ordered restitution creates a judgment by operation of law on the date the order is entered.⁵² At the request of the victim, the DVS, or the prosecuting attorney, the court clerk is required to issue execution of the restitution order in the same manner as in a civil action.⁵³

In any case in which the court has ordered restitution, the defendant is required to cooperate with the probation agent to promptly prepare a plan to pay each victim.⁵⁴ Before accepting the restitution plan, the probation agent and the court shall consider the number of victims and the pecuniary damages sustained by each victim.⁵⁵ With regard to the defendant, the court shall consider physical and mental health, age, education, employment circumstances, potential employment and vocational training, family circumstances, the defendant’s financial condition, and whether he or she has an ability to pay restitution or whether a reasonable probability exists that the defendant will have an ability to pay.⁵⁶ In crafting the plan, the court is also obligated to consider several factors including whether any compensation has been paid to any victim under the state’s Crime Victims Compensation Act and what plan of restitution will most effectively aid the rehabilitation of the defendant.⁵⁷ The DVS is authorized to pay up to \$15,000 to victims or to the survivors of victims who suffered personal injury or were killed.⁵⁸

Compliance with the court-approved plan shall be a condition of probation.⁵⁹ The board is required to provide for payment of restitution in the amount determined by the court unless, upon reviewing enumerated factors in section 7-9-106 of the Wyoming Statutes, the court modifies the amount to be paid.⁶⁰ Payments are to be made to the clerk of court, and in probationary cases, the

⁵⁰ *Id.* § 7-9-113(a).

⁵¹ *Id.* § 7-9-114(a).

⁵² *Id.* § 7-9-103(d).

⁵³ *Id.*

⁵⁴ *Id.* § 7-9-104(a).

⁵⁵ *Id.* § 7-9-106(a)(i), (ii).

⁵⁶ *Id.* § 7-9-106(a)(iii).

⁵⁷ *Id.* § 7-9-106(a)(iv), (v), (vi).

⁵⁸ *Id.* §§ 1-40-102(a)(ix), -107(d).

⁵⁹ *Id.* § 7-9-108(a).

⁶⁰ *Id.* § 7-13-421(b). State law also requires the board to make repayment of offender obligations to the victims compensation fund as a condition of parole. *Id.* § 1-40-112(g)(i).

restitution order may be enforced by civil or criminal contempt proceedings, punishable by up to one year of incarceration.⁶¹ The court may extend the period of time for repayment for up to ten years following the defendant's discharge from sentence.⁶² In the event that a victim is unsatisfied with the restitution plan required or modified by either the court or board, the remedies available are a civil action or execution of the order pursuant to section 7-9-103(d) of the Wyoming Statutes.⁶³ Similar to the discretion of the court to make a finding of inability to pay, the board may waive payment of some or all of the restitution as a condition of parole if it finds the payment will cause an undue hardship on the parolee or his family.⁶⁴ Victims who have requested notification pursuant to section 1-40-204(d) of the Wyoming Statutes, however, shall be given notice and the opportunity to be heard prior to the board making a decision to waive some or all of the ordered restitution.⁶⁵

While Wyoming statutes contain great detail with regard to the court and board's ability to require repayment of restitution, once the offender's sentence expires, the statutes provide little assistance to the victim—essentially leaving victims to pursue collection of any unpaid restitution on their own. As referenced above, the statutes warn that “[i]n the event the victim is not satisfied with the restitution plan,” the victim's exclusive remedy is a civil action, whether it be a new filing or execution of the restitution order as a judgment.⁶⁶ Moreover, if a victim fails to provide updated mailing information for one year, any payment received during that time shall be forfeited and deposited in the crime victims compensation account.⁶⁷

B. Constitutional and Case Law

The Wyoming Constitution holds that “no person shall be imprisoned for debt, except in cases of fraud.”⁶⁸ The Wyoming Supreme Court has also held that a convicted person cannot be subject to probation revocation for nonpayment of restitution unless, in accordance with statute, a developed plan demonstrates the required criteria, including a capacity to pay.⁶⁹ In the absence of a finding of a capacity to pay, along with reasonable efforts to pay being made, imprisonment

⁶¹ *Id.* §§ 7-9-108(b), -109.

⁶² *Id.* § 7-9-109.

⁶³ *Id.* §§ 7-9-111, 7-13-421(g).

⁶⁴ *Id.* § 7-13-421(d).

⁶⁵ *Id.*

⁶⁶ *Id.* § 7-9-111.

⁶⁷ *Id.* § 7-9-108(c).

⁶⁸ WYO. CONST. art. 1, § 5.

⁶⁹ *Seaton v. State*, 811 P.2d 276, 281 (Wyo. 1991).

for debt occurs in contravention of the state constitution.⁷⁰ Wyoming courts are authorized to order restitution only for crimes to which a criminal defendant has pled guilty, or “any other crime which is admitted by the defendant, whether or not prosecuted.”⁷¹ The DVS, however, may pay compensation to a victim regardless of whether the alleged criminal has been apprehended, prosecuted, or convicted. The DVS shall not consider the result of any criminal proceedings against the offender.⁷² Of course, as the recent report found, only a small fraction of that money has been paid to victims.⁷³

For offenders on both probation and parole in Wyoming, the option of revoking that supervision status is available to both the courts and the board for cases of non-payment of restitution.⁷⁴ The United States Supreme Court has held that the constitutional protections that apply to the revocation of probation also apply to the revocation of parole, stating “revocation of probation where sentence has been previously imposed is constitutionally indistinguishable from the revocation of parole.”⁷⁵ In *Bearden v. Georgia*, the United States Supreme Court examined the State’s authority to revoke probation for failure to pay restitution, holding that “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacks the resources to pay it.”⁷⁶ The Court further held that “if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.”⁷⁷

The Court further explained that the State may not incarcerate a probationer who “demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous.”⁷⁸ The Court concluded that the deprivation of conditional freedom due to the probationer’s inability to pay “would be contrary to the fundamental fairness required by the Fourteenth Amendment.”⁷⁹ The Court created a two-part test, where the court must first determine whether the defendant made a bona fide

⁷⁰ *Id.*

⁷¹ WYO. STAT. ANN. § 7-9-101 (a)(i); see *Van Riper v. State*, 999 P.2d 646, 648 (Wyo. 2000).

⁷² WYO. STAT. ANN. § 1-40-110(c).

⁷³ See generally *Report Criticizes Wyoming Victim Services*, *supra* note 10.

⁷⁴ WYO. STAT. ANN. §§ 7-13-305(c), -408(a).

⁷⁵ *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

⁷⁶ 461 U.S. 660, 667–68 (1983).

⁷⁷ *Id.* at 668–69.

⁷⁸ *Id.* at 671.

⁷⁹ *Id.* at 673.

effort to pay the amount ordered, and second, the court must consider whether alternative measures are inadequate “to meet the State’s interests in punishment and deterrence.”⁸⁰ These alternatives can include extending the time for making payments, reducing the amount owed, or directing the defendant to perform labor or public service in lieu of the payment.⁸¹ Thus, if a court finds that the failure to pay restitution was not willful and other adequate measures can vindicate the State’s interests, a defendant may not be imprisoned for failure to pay restitution.

In *Dickson v. State*, the Wyoming Supreme Court applied the United States Supreme Court’s analysis to a case involving a revocation of probation for failure to pay restitution.⁸² The Wyoming Supreme Court determined that imprisonment is an appropriate punishment for a defendant who willfully fails to pay restitution, but not for a defendant who makes reasonable efforts to repay the debt:

[A] probationer’s failure to make sufficient bona fide efforts . . . to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. . . . [T]he State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available.⁸³

While the Wyoming Supreme Court did not discuss what constitutes alternative means of punishment, the option to revoke an offender’s sentence and place him back on supervision with additional time to pay restitution is available to both the courts and the board.⁸⁴

From July 1, 2008 to June 30, 2011, the board reviewed thirty-eight cases where parolees owed restitution to victims at the end of their sentences, and in nineteen of those cases, a revocation was initiated.⁸⁵ Only anecdotal information is available to gauge the rationale behind the board’s decisions to not revoke parole

⁸⁰ *Id.* at 672.

⁸¹ *Id.*

⁸² 903 P.2d 1019, 1020 (Wyo. 1995).

⁸³ *Id.* at 1023 (quoting *Bearden*, 461 U.S. at 668) (internal quotation marks omitted).

⁸⁴ WYO. STAT. ANN. §§ 7-13-305(a)(c), -421(c) (2011).

⁸⁵ Spreadsheet, Restitution & Revocation, Fiscal Years 2008–2011 (on file with the Wyoming Board of Parole).

for failure to fully pay restitution. In many such cases, however, the parolee has consistently paid the required monthly amount of restitution, in some instances much more, and otherwise complied with the conditions of supervision. In cases where the board permits a parolee's sentence to expire without full payment of restitution, victims who have requested notification pursuant to section 1-40-204(d) of the Wyoming Statutes receive written notification of the decision and an advisement that they may pursue collection of the outstanding balance through a civil proceeding.

IV. INNOVATIONS IN RESTITUTION COLLECTION IN OTHER JURISDICTIONS

Ineffective collection of restitution and other court-ordered obligations is a problem nationwide that occurs at every level of government. To alleviate this problem, several jurisdictions have changed their approaches to collecting restitution. While many states, counties, and other governmental units have been implementing changes to enhance their restitution collection efforts, this article will discuss the state of Vermont and Maricopa County, Arizona in particular. More specifically, it will review the effectiveness of Vermont's state-run collection agency that pursues unpaid court-ordered obligations and will review Maricopa County's recently established restitution court.

A. Vermont

Vermont reformed its restitution collection methods after a special report to the Vermont Legislature in 2001.⁸⁶ The report, entitled *Vermont's Restitution System: Failing to Pay the Victim*, found that “[a]n average of only 13 cents of every dollar owed for restitution in Vermont has been collected and repaid to victims during the past ten years. Nearly 5000 people are currently owed restitution, many of whom will wait years to be paid.”⁸⁷ The report concluded that four factors contributed to the low rate of restitution collection: (1) the collection of restitution was not a high priority for the agencies responsible; (2) the collection process was inefficient and ineffective; (3) a lack of a coordinated system among the many public and private offices involved; and (4) the courts did not have processes in place to assist them in carrying out their statutory obligations to follow through with the collection of restitution.⁸⁸ Not surprisingly, the scoping paper prepared for the Wyoming Legislature identified some of the same deficiencies that were found in Vermont, such as the lack of centralization of collection efforts, poor coordination among the various state agencies involved, and the lack of judicial resources to assist victims once the courts lose jurisdiction over the offender.⁸⁹

⁸⁶ *Making Restitution Real*, *supra* note 2, at 38.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ THE LEG. OF THE STATE OF WYO. MGMT. AUDIT COMM., *supra* note 9, at 10–11.

Before the 2001 Vermont report, the Vermont Department of Corrections (VDOC) was responsible for collecting restitution.⁹⁰ Offenders would send their payments to a private collection agency, under contract with the VDOC, and after the collection agency deducted its commission, the net amount was sent to the VDOC who in turn paid the victim.⁹¹ The process was described as slow, cumbersome, and an accounting nightmare.⁹² As a result, the Vermont Legislature mandated the gathering of key stakeholders to create a new restitution model, which included the Commissioner of Corrections, the Executive Director of the Department of State's Attorney, the Court Administrator, the Defender General, and the Executive Director of the Center for Crime Victim Services.⁹³ After working together for the better part of a year, the stakeholders recommended creating a restitution fund, and the Vermont Legislature followed by passing Act 57 (the Act), which made significant changes to Vermont's system of ordering, paying, and collecting restitution.⁹⁴

The Act capitalized a restitution fund through a fifteen percent surcharge added to criminal and traffic fines.⁹⁵ The fund was designed to pay victims at the time restitution was ordered, and it eliminated the need for victims to wait for repayment.⁹⁶ During fiscal year 2004, the fund generated \$1.2 million and now brings in between \$1.5 million and \$2 million each year.⁹⁷ The newly created restitution unit pays out an average of \$1.7 million in restitution to victims each year.⁹⁸ As part of the Act, a restitution unit was created and tasked with collecting restitution and removing it from the VDOC.⁹⁹ The fund is used to cover the expense of operating the restitution unit, which was estimated to cost \$500,000 annually.¹⁰⁰

Much like the Wyoming DVS, which provides for a \$15,000 payment, the Vermont restitution unit may pay victims up to \$10,000 out of the fund.¹⁰¹ However, unlike the Wyoming system, the Vermont model is not limited to paying

⁹⁰ *Making Restitution Real*, *supra* note 2, at 38.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ VT. STAT. ANN. tit. 13, § 5363 (2011); *see Making Restitution Real*, *supra* note 2, at 38.

⁹⁵ *Making Restitution Real*, *supra* note 2, at 38.

⁹⁶ *Id.*

⁹⁷ *Id.* at 42.

⁹⁸ *Id.*

⁹⁹ *Id.* at 39.

¹⁰⁰ *Id.* at 42.

¹⁰¹ VT. STAT. ANN. tit. 13, § 5363 (2011); WYO. STAT. ANN. § 1-40-107(d) (2011); *see Making Restitution Real*, *supra* note 2, at 42.

victims who suffer crimes involving bodily injury.¹⁰² In Vermont, the victims must provide evidence of uninsured material losses suffered because of the crime to the court, and the court is obligated to order restitution.¹⁰³ The order, which identifies the offender, the name of the victim, the total amount of restitution ordered, and in some cases, a repayment plan, is then sent to the restitution unit.¹⁰⁴ The unit also receives a report from the victim's advocate, based out of the prosecutor's office, containing the confidential address of the victim.¹⁰⁵ An affidavit is sent to the victim to be signed and returned to the unit, verifying that the victim is owed the restitution and has not been otherwise compensated for the loss, and payment is then sent to the victim.¹⁰⁶

Similar to Wyoming, the Vermont restitution order is also a civil judgment, giving the unit the ability to pursue legal action to recover the money.¹⁰⁷ After an enforcement action is filed to recover the restitution, any further proceedings are heard in the court where the order was filed.¹⁰⁸ If the court determines the offender has violated the condition requiring payment of restitution, it may take any action it deems necessary to ensure the offender will make the required restitution payments, including amending the payment schedule; ordering the disclosure, attachment, and sale of assets; ordering the garnishment of wages; and ordering the suspension of recreational licenses.¹⁰⁹ The Vermont Unit also has the authority to seize Vermont lottery winnings and Vermont state tax returns.¹¹⁰

Despite the fact that the statute indicates that the Vermont courts "may take any action" deemed necessary to enforce the restitution payments, Vermont officials have second-guessed the decision to remove the collection of restitution from the VDOC, going so far as to call the "decoupling" of restitution from probation a "mistake."¹¹¹ In evaluating the unit, Vermont restitution officials found that:

When the collection of restitution was moved from the Department of Corrections to the unit, the law was changed to sever probation from restitution. Prior to the unit's creation, an offender could be kept on probation until the restitution was paid

¹⁰² VT. STAT. ANN. tit. 13, § 7043 (a)(2); WYO. STAT. ANN. § 1-40-102(a)(iii).

¹⁰³ VT. STAT. ANN. tit. 13, § 7043; see *Making Restitution Real*, *supra* note 2, at 39.

¹⁰⁴ *Making Restitution Real*, *supra* note 2, at 39.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ VT. STAT. ANN. tit. 13, § 7043(i).

¹⁰⁸ *Id.* § 7043(l).

¹⁰⁹ *Id.* § 7043(l)(1-4).

¹¹⁰ *Id.* § 7043(m).

¹¹¹ See *id.* § 7043(l); *Making Restitution Real*, *supra* note 2, at 37, 45.

in full. Obviously, this could result in burdensome caseloads for probation officers when an offender had met all other conditions of probation but had not—and in some cases could not—pay restitution. Since the creation of the unit, the only condition of probation that is connected to restitution is that an offender must “cooperate with the Restitution Unit.” Once offenders are released from probation, they are free to leave the state. And once offenders leave the state, the chances of the unit collecting restitution decrease dramatically.¹¹²

The retention of the authority for the court and board to extend the period of supervision to enable more time for repayment is a valuable tool, worthy of preservation.

In terms of structure, the Vermont restitution unit is set up like a collection agency employing a unit manager, two data specialists, one of whom serves as a victim liaison, four collection analysts, and a contracted attorney from a private law firm specializing in collection work.¹¹³ Vermont has reported that the vast majority of individual crime victims receive, through the fund, complete payment of the restitution owed to them.¹¹⁴ As discussed earlier, there is a \$10,000 cap on what can be paid to individual crime victims, and most orders are less than \$10,000; for example, in fiscal year 2009, of 1572 restitution orders processed, only 3% were more than \$10,000.¹¹⁵

Features of Vermont’s restitution unit could also be replicated in Wyoming, as the necessary apparatus is present in the DVS. The DVS is, after all, a division of the Attorney General’s Office.¹¹⁶ While funding would undoubtedly be an issue in today’s economy, a restitution collection unit in Wyoming would have the potential to reduce the amount of uncollected restitution and recover some of the compensation already paid by DVS, thereby indirectly offsetting its operational expenses. Vermont is still slightly larger than Wyoming, in terms of population, and its restitution unit functions with seven full-time staff and a private, contracted attorney.¹¹⁷ If Wyoming implemented a similar unit, it would make sense to locate it within the DVS and create a new assistant attorney general position with support staff, specializing in collection law.

¹¹² *Making Restitution Real*, *supra* note 2, at 45.

¹¹³ *Id.* at 39.

¹¹⁴ *Id.* at 43.

¹¹⁵ *Id.*

¹¹⁶ WYO. STAT. ANN. § 9-1-636(a) (2011).

¹¹⁷ See *Making Restitution Real*, *supra* note 2, at 39. The 2010 populations of Wyoming and Vermont were 563,626 and 625,741, respectively. *Wyoming State & County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/56000.html> (last visited Apr. 9, 2012); *Vermont State & County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/50000.html> (last visited Apr. 9, 2012).

B. Maricopa County, Arizona

In May 2008, a victim's advocate for Arizona Governor Janet Napolitano attended a meeting of the Probation and Sentencing Committee of the Superior Court of Maricopa County, requesting the court and probation department intercept all federal stimulus checks received by probationers.¹¹⁸ In response, Judge Roland J. Steinle, III, a prominent and innovative judge in Maricopa County, observed that with the time and logistics involved, any attempt to seize those checks would have been futile and he suggested using the existing Arizona statutes to enforce the obligations.¹¹⁹ Specifically, Judge Steinle envisioned utilizing section 13-810 of the Arizona Revised Statutes, which permits a court to hold civil contempt proceedings to collect the delinquent payments.¹²⁰ Beyond that, Judge Steinle volunteered to dedicate one morning a month to hold restitution enforcement proceedings or restitution court.¹²¹

To determine which cases are appropriate for contempt proceedings, a probation and financial compliance supervisor reviews cases using the following criteria: (1) payment history, selecting cases where the probationer is at least six months behind; (2) the probationer's attitude and cooperation; (3) the nature of the offense; and (4) the victim, giving top priority to victims who have "opted in" to exercise their rights.¹²² Once the supervisor finds a case appropriate for contempt proceedings, the supervisor places it on the pending assignment list to one of the two courts that conduct the hearings. The cases are then prioritized based upon the following factors: (1) the type and number of victims; (2) the number of months delinquent; (3) the amount of restitution owed; (4) the amount delinquent; (5) the cooperation with probation officials; and (6) the class of felony.¹²³

Once the court receives a prioritized list of delinquent probationers, court clerks prepare an Order to Show Cause, which is transmitted to the probation officers for delivery to the probationer.¹²⁴ Before the hearing, the probation department prepares a case summary, detailing payment history and related issues.¹²⁵ At the hearing, the court first determines if the payment records are correct and gauges the probationer's willingness and ability to pay or whether

¹¹⁸ *Making Restitution Real*, *supra* note 2, at 64.

¹¹⁹ *Id.*

¹²⁰ See ARIZ. REV. STAT. ANN. § 13-810(A) (2011); *Making Restitution Real*, *supra* note 2, at 64.

¹²¹ *Making Restitution Real*, *supra* note 2, at 64–65.

¹²² *Id.*

¹²³ *Id.* at 65.

¹²⁴ *Id.*

¹²⁵ *Id.*

the probationer has made a good faith effort to make payment.¹²⁶ Probationers are required to bring their financial records to the hearing, and the court makes an inquiry into: (1) whether the probationer rents or owns a residence, what their payments are, and if the payments are current; (2) whether they own an automobile, and if payments are required, are they current; (3) whether they have cable or satellite television, and if so, if they have any additional cable packages; (4) the probationer's utilities, and whether the payments are current; and (5) how many cell phones the probationer owns.¹²⁷ If the probationer is paying all of the above bills and establishes the ability to pay restitution, it then becomes the probationer's burden to show why restitution has not been paid.¹²⁸

If the court finds that the probationer willfully refused or failed to pay restitution, the court can incarcerate the probationer and set a purge amount, which is the amount that must be paid before the probationer can be released from jail.¹²⁹ The purge amount can be the entire amount owed, or it can be a portion of the delinquency. Judge Steinle recommends setting the purge at the full amount owed and waiting to see if the defendant can satisfy the debt.¹³⁰ After the courts determine the probationer has an ability to pay, many probationers offer to enter into a payment plan, and if persuaded, the courts will accept the agreement on the record and continue the matter on review for one to four months to assure compliance with the agreement.¹³¹ The majority of contempt hearings are resolved through voluntary agreements by the probationers to pay their court-ordered restitution.¹³²

In cases where the probationer pays all delinquencies or is otherwise in compliance with the voluntary agreement, the court congratulates the participant for complying with said agreement and discharges the participant from restitution court in display of all the other offenders in the group.¹³³ After recognizing the successful participants of restitution court, the judge next calls a defendant who has refused to pay or has made very little effort to pay, and if in contempt, that particular defendant is taken into custody, and a purge is set, again making an example for the other group members.¹³⁴ Judge Steinle noted that only a few individuals who were found in contempt remained in jail for more than seventy-two hours. For those who stay in custody, the court holds a review hearing seven

¹²⁶ *Id.* at 66.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 66–67.

¹³⁰ *Id.* at 67.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 67–68.

¹³⁴ *Id.* at 68.

to thirty days later where the offender is typically released under a voluntary agreement to pay.¹³⁵ Offenders who are placed in custody are also granted work release privileges, and Judge Steinle commented that the court “is usually amazed how quickly they find employment, and the number of hours defendants work while in the work release.”¹³⁶

Judge Steinle reported that the costs of restitution court are minimal, requiring judges to volunteer two hours of calendar time per month.¹³⁷ The probation supervisor from financial compliance is also required to attend the hearing, which was already necessary on a usual work day, and since the proceedings are initiated upon the court’s own motion, no prosecutor is needed.¹³⁸ The only obstacle identified by Judge Steinle for the restitution court was what he referred to as “institutional inertia,” or “not the way we do things.”¹³⁹ Initially, the Judge observed an institutional reluctance to commence revocation for strictly financial issues, and that other judges were resistant to take on additional work, especially since Maricopa County has a dedicated probation revocation court.¹⁴⁰

In an eighteen-month period, the restitution court collected approximately \$200,000 in delinquent payments, adding five to six new cases to the docket each month.¹⁴¹ In certain cases, defendants were willing to pay substantial amounts to avoid contempt findings, including payments of \$10,000, \$9500, \$5600, \$3500, and a number of payments between \$1000 and \$2500.¹⁴² In one particular case, the defendant moved into a smaller apartment, sold her car and took the bus to work, cancelled cable television, and was actively looking for a second job, which so impressed the victim that the victim agreed to a monthly restitution payment reduction from \$1000 to \$500 per month.¹⁴³

Judge Steinle indicated that Arizona was considering a number of efforts to expand the restitution court, not only adding additional judges in Maricopa County, but also creating restitution courts statewide.¹⁴⁴ Judge Steinle would also like to expand the program to enforce restitution obligations after offenders have completed their sentences, either in prison or on parole.¹⁴⁵ After reviewing the

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 68–69.

¹⁴¹ *Id.* at 69.

¹⁴² *Id.*

¹⁴³ *Id.* at 67.

¹⁴⁴ *Id.* at 69.

¹⁴⁵ *Id.* at 70.

cases that have come through his restitution court, Judge Steinle observed that the underlying crimes are mostly theft-related, and include forgery, embezzlement, fraud schemes, and artifice.¹⁴⁶ Having listened to the various excuses as to why offenders are not paying, Judge Steinle commented that the offenders have manipulative personalities and try to exploit the system, but when faced with jail time for contempt, “the money to pay the delinquencies miraculously appears.”¹⁴⁷ Judge Steinle also noted:

[T]he individuals brought to restitution court are not those making an effort, but are falling short each month. There is a major difference in the person who is paying consistently—but less than the court-ordered amount—and the person who has simply not paid anything in 18 months. Restitution court is designed to identify and hold accountable the later category.¹⁴⁸

Not only did Judge Steinle understand that some offenders cannot pay their restitution in full, but he also understands that the legal system views offenders who, despite their best efforts, simply cannot pay their restitution much differently than criminal defendants who can pay but make excuses for not doing so. Any system of restitution should aim to separate the offenders who have the ability and means to pay restitution but chose not to do so from those who struggle to survive and continue to make at least a token payment.

V. SUGGESTIONS TO IMPROVE RESTITUTION COLLECTION IN WYOMING

There are aspects of both the restitution court created by Maricopa County in Arizona and the state of Vermont restitution collection model that are worth examining in light of Wyoming’s current method of collecting unpaid court-ordered obligations. In Wyoming, there is existing statutory framework to create restitution courts similar to the version utilized in Arizona. As discussed earlier, courts in Wyoming have the authority to “extend the period of time for restitution” for up to ten years following the date of the defendant’s discharge from sentence or expiration of probation.¹⁴⁹ If the sentence has expired, the court may enforce the restitution order through civil or criminal contempt proceedings, and criminal contempt sanctions are punishable by imprisonment for up to a year.¹⁵⁰ This facet of the Wyoming restitution statutes may address at least one of the common shortcomings identified by the programs in Maricopa County, Arizona and the

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 71.

¹⁴⁸ *Id.*

¹⁴⁹ WYO. STAT. ANN. § 7-9-109 (2011).

¹⁵⁰ *Id.*

state of Vermont: the lack of legal enforcement, either prior to the expiration of the sentence or after. The ability to extend the time for restitution payment for up to ten years after the expiration of sentence is a powerful tool that is already available but underused in Wyoming.

The Wyoming Legislature did not enact widespread reform to the restitution laws following the findings of the 2010 scoping paper. The legislature did, however, make an important amendment to the restitution execution statute by making it mandatory for court clerks to issue execution of restitution orders as judgments by operation of law upon request.¹⁵¹ Prior to this statutory amendment, it was optional for court clerks to issue execution of restitution orders. This request for execution can come from the victim, DVS, or the prosecutor.¹⁵² By utilizing this mandate, a method to increase the amount of restitution collected in Wyoming would be to empower the victims with greater awareness of the available legal remedies and their right to access the courts to enforce those rights, through the development of a self-help restitution collection program, similar to what is being developed in Maricopa County. The court in Arizona is working with victim advocates to create an Order to Show Cause form available at its self-service center, with directions for completing the form and complying with service of process requirements.¹⁵³ Following the recent statutory change in Wyoming, the board and DVS have met to discuss implementing something similar to the Order to Show Cause form that is being created in Arizona, and further discussions will take place regarding making the forms and corresponding instructions available to victims.

VI. CONCLUSION

It is important to recognize that certain amounts of restitution will never be collected. Some offenders will repeatedly victimize the public, will be in and out of prisons, and will never pay but a pittance of restitution. Other offenders will move out of state, and continue moving if settling down means being located for service of process. Some offenders will die in prison; others will owe such large amounts that they can never realistically hope to repay the debt in a lifetime. Whether the State ever considers or creates a restitution unit notwithstanding, the initiative to provide victims with a self-help system of collecting restitution is an undertaking with great promise.

¹⁵¹ *Id.* § 7-9-103(d).

¹⁵² *Id.*

¹⁵³ *Making Restitution Real*, *supra* note 2, at 70.

As Vermont officials cautioned, the separation of restitution collection from the VDOC was a mistake, yet they acknowledged that keeping offenders on supervision until restitution is paid in full would result in burdensome caseloads.¹⁵⁴ Not only does this increase probation and parole caseloads, intuitively speaking, it also increases the length of time and opportunities for offenders to be revoked and returned to prison. There was a time in the not-so-distant past, when victims were individually responsible for collecting restitution. This article certainly does not advocate for victims to bear the sole burden in collecting restitution, but there is merit in discussing whether they can be effectively assisted by the legal system in collecting the restitution owed to them while minimizing the involvement of the probation or parole process. Now that it is mandatory for court clerks to issue execution of restitution orders as judgments when requested by the victim, today's victims in Wyoming have much easier access to the courts than their pre-American Revolutionary counterparts. An awareness and willingness on the part of the judicial system to assist victims who seek to utilize the courts to enforce collection of restitution will also be a necessary component for a successful victim-based system of restitution collection.

Wyoming has an admirable history of embracing many of the principles that developed in response to the victim movement in the United States, including crafting simple and effective restitution collection statutes. Like the rest of the nation, Wyoming's efforts to enforce the collection of restitution have been ineffective, but perhaps not for lack of a viable means of collecting more restitution than is currently being captured. The creation of a restitution collection unit is something that could benefit Wyoming and its victims of crime. However, the advantages of educating and empowering victims to collect restitution on their own, and providing them with the necessary resources and legal support to do so, should not be overlooked as a means to improve the startlingly low rates of restitution collection that were reported virtually everywhere in the country.

¹⁵⁴ *Id.* at 37, 45.