Reform restitution in California

Overview

In theory, crime survivors in California have a constitutional right to restitution and a robust statutory framework to enforce their right to restitution. Yet in practice, the vast majority of crime survivors receive little or no restitution. And last-resort public compensation programming (such as the California Victim Compensation Board) fails to make up the difference. This article examines problems in the current restitution framework and proposes a spectrum of solutions to help survivors fulfill their right to restitution: from creating a legislative task force to study restitution outcomes to establishing a publicly funded restitution system that does not rely on defendants to pay.

Analysis

Crime survivors have a right to restitution

Californians have held a constitutional right to restitution since 1982 when voters adopted Proposition 8 (The Victims' Bill of Rights) — an initiative that codified many rights for crime survivors.[1] Proposition 8 required restitution for "all persons who suffer losses as a result of criminal activity" unless "compelling and extraordinary reasons exist to the contrary."[2] And in 2008 Proposition 9 (known as Marsy's Law) removed the "compelling and extraordinary reasons" exception, effectively requiring restitution in all cases. Since 1983, California's legislature implemented this right to restitution by enabling crime survivors to enforce restitution orders as money judgments, requiring restitution fines be paid to the state restitution fund in all criminal cases, and allocating money to the State Restitution Fund.[3] These statutory enforcement mechanisms are codified in Penal Code section 1202.4.

Courts, counties, and state agencies can enforce restitution orders and collect restitution fines.[4] Local jurisdictions can collect restitution through a designated county agency, probation departments, or prosecutors.[5] Many counties contract with the Franchise Tax Board as part of its Court-Ordered Debt Collection

Program.[6] Through that program the FTB may intercept up to 25% of an individual's weekly disposable income.[7] The California Department of Corrections and Rehabilitation is responsible for enforcing restitution against incarcerated individuals. CDCR may garnish 20–50% of wages and inmate trust accounts (accounts into which families deposit money for food, hygiene items, healthcare, and communications),[8] and up to 70% for individuals sentenced to death.[9]

Restitution is not necessarily about survivor compensation

The current restitution framework involves collecting money from criminal defendants using the Penal Code's statutory enforcement tools, either through restitution orders or restitution fines. The difference between orders and fines lies in their intent: restitution orders are about compensation, but restitution fines are about revenue.

Judicial restitution orders issue upon conviction and are designed to compensate survivors for all out-of-pocket expenses they incurred. Reimbursable losses include medical expenses, mental health counseling expenses, lost wages, and collection costs.[10] When someone suffers such a financial loss, a restitution order is mandatory and a sentence without a restitution order is invalid — regardless of the defendant's ability to pay and even if the defendant is a juvenile.[11]

Counterintuitively, restitution fines are not intended to make crime survivors whole. Instead, restitution fines are punishment: additional monetary penalties imposed on defendants at sentencing. Restitution fines generate revenue for the State Restitution Fund, which remits that money to the California Victim Compensation Board, a public payer-of-last-resort for survivors who cannot otherwise obtain compensation.[12] Restitution fines range from $150 to $1,000 for misdemeanors and from $300 to $10,000 for felonies.[13] Because restitution fines are intended to generate revenue rather than compensate, these fines are ordered after every conviction, even if no one suffered a financial loss.

Survivors rarely receive restitution from defendants and compensation from

the state is limited

Although restitution orders and fines ostensibly expand access to restitution, the reality is that the overwhelming majority of survivors receive very little compensation; many never receive any restitution at all. In a 2021 survey of 528 survivors in San Francisco, only 2% of respondents reported receiving any restitution and only 1% received the full amount of restitution ordered.[14] Nearly 93% of respondents reported restitution was never ordered to them. And 68% of respondents who got restitution orders never received any payment.[15] Another survey of 771 survivors statewide found 66% of respondents had restitution ordered, but most received little or no payment, and what was received came slowly and in small amounts.[16]

Low restitution payment rates are unsurprising, considering that most defendants are indigent and thus unable to pay restitution. A 2015 study reported that the median pre-detainment income of incarcerated individuals nationwide was just $19,815.[17] And in 2018, the federal Government Accountability Office analyzed federal restitution data and found that, of the $110 billion in outstanding restitution, $100 billion (91% of the total debt) was uncollectible due to the defendants' inability to pay.[18] The realities of pre-incarceration poverty, empirical evidence, anecdotal experience, and common sense suggest that if a low-income person is ill-situated to pay before being convicted, their ability to pay will worsen post-conviction. It is futile to order people to pay money they do not (and likely never will) have.[19] Constitutional and statutory protections notwithstanding, this immutable fact renders most restitution orders symbolic, rather than an effective method of compensating survivors.

California attempts to mitigate that reality with partial state subsidies. The California Victim Compensation Board (CalVCB) provides some survivors compensation where direct restitution is unobtainable. This state agency is funded by restitution fines via the State Restitution Fund, but fine revenue is insufficient and requires general fund appropriations.[20] CalVCB has some advantages over judicial restitution orders: CalVCB can pay survivors based on a police report alone,

meaning restitution does not depend on identifying, charging, or convicting the perpetrator. And as a state agency, CalVCB has reliable legislative funding and can pay more than most individual defendants. In fact, CalVCB pays out the bulk of survivor compensation statewide: a 2020 study of national restitution practices found that CalVCB pays out $28 for every $1 paid by individual defendants in restitution.[21]

But CalVCB has major limitations. As a payer-of-last-resort, CalVCB only compensates survivors who have exhausted all other potential sources of compensation, such as direct restitution orders, private insurance, or workers' compensation.[22] And CalVCB does not reimburse for property damage, survivors who were involved in the crime that led to their loss, survivors of straight misdemeanors, and survivors who are incarcerated, on a sex offender registry, or on parole, probation, or post-release community supervision.[23] When CalVCB does compensate, the compensation is often limited and untimely. It caps compensation at $70,000 — no matter how much loss was suffered.[24] Under that cap certain costs are reimbursed at reduced rates or excluded entirely; dental costs, for example, are reimbursed at 75% of the amount billed.[25] CalVCB applicants must wait up to three months while their application is reviewed, which is little help for immediate needs like relocation costs and medical expenses.[26] In the survey of 771 survivors in California, 55% of respondents reported not accessing necessary services because they could not pay upfront and out-of-pocket.[27]

Because it relies on funding through restitution fines via the State Restitution fund,[28] CalVCB itself suffers from the practical impossibility problem identified above: funding is predicated on defendants' ability to pay, creating the same unreliable and unsustainable revenue streams that survivors face with direct restitution orders. This reliance limits CalVCB's ability to pay and undercuts its purpose of compensating crime survivors who cannot obtain restitution through traditional restitution mechanisms.

Thus, the practical problem underlying the restitution system is that you cannot get

blood from a stone. Most criminal defendants are poor, and their economic outlook is unlikely to improve post-conviction. California has spent decades building and operating statutory mechanisms to put into practice its constitutional restitution mandate, but the evidence shows those mechanisms are failing. To implement the constitutional requirement to compensate crime survivors, California must accept that its current restitution system does not and cannot realistically meet the need. California should reorder its restitution system to eliminate dependence on defendant funding.

California should reform its restitution system to better help survivors

For many crime survivors, the right to restitution is illusory because it depends on defendants to pay without regard for their financial means. To address that fact, the legislature could consider the following proposals to support survivors seeking restitution. Some recommendations are statutory and require neither voter input nor constitutional change. But the real solution — publicly funding restitution — requires constitutional amendment.

The legislature could authorize the California Law Revision Commission and the California Little Hoover Commission to study possible reforms to the restitution system. Doing so would provide stakeholders an opportunity to develop and present data in a public-hearing context. Further empirical evidence and study is important because existing statewide and county-by-county data on restitution outcomes are sparse and inconsistent. Restitution problems cannot be solved until they are understood, and these two commissions are ideal arenas for developing potential policy and statutory solutions. This is also an avenue to explore the more substantive solutions proposed next.

The legislature can reorient victim compensation to focus on CalVCB. Because CalVCB does not need a conviction to compensate, law enforcement can inform survivors of available resources at the time of the initial investigation; CalVCB could, for example, promulgate a standard form with its contact information for police to distribute when taking a report. The legislature could expand existing notification requirements to include prosecutors and victim service representatives, in addition to police officers.[29] Existing data suggest that survivors who receive help navigating

the application process achieve better outcomes. For example, the survey of 528 survivors found that CalVCB denied only 6.9% of applications processed through the Victim Services Division of the San Francisco District Attorney's Office, compared to a statewide denial rate of 12%. Similarly, a 2015 report by the Legislative Analyst's Office found that survivors represented by a victim advocate had the highest rate of CalVCB claim approval at 86%, compared to less than 70% for unrepresented individuals.[30]

The legislature can expand CalVCB eligibility and coverage to provide fuller compensation to those harmed by violence and crime. With additional funding, CalVCB can immediately improve survivor support by increasing compensation caps, paying out the full amount of medical costs, and reimbursing personal property loss. CalVCB began as a social insurance program, and expanding it is essentially increasing that coverage: the public is already contributing to the system through continued legislative appropriations, and increasing CalVCB eligibility and payout enables more people to access the service they are paying into.[31] This leans into restitution as crime insurance benefits, with the public self-insuring for losses due to crime.

These proposals may achieve only small increases in survivor support because cutting to the heart of the issue requires a bigger change: establishing a publicly funded restitution system that does not rely on defendants or restitution fines for funding. Administering all survivor compensation through CalVCB or a similar program — rather than relying on convicted defendants to pay victims directly — will help more survivors receive compensation and more efficiently address their needs. This change confronts three primary obstacles: constitutional amendment, cost, and policy objections.

A publicly funded restitution system requires constitutional amendment to eliminate the individual restitution mandate. Because CalVCB is a payer-of-last-resort, survivors who receive restitution orders are ineligible for agency compensation, even if defendants cannot pay. Yet continuing to issue unenforceable individual restitution orders will bar survivors from accessing public restitution funds and saddle defendants with the obstacles court debt creates (such as impeding probation

completion and harming credit scores), even where their payment is no longer necessary. Maintaining the individual mandate also permits double payment to survivors and state agencies. Of course, rallying support for a policy that lightens burdens on defendants (even when that policy primarily improves conditions for crime survivors) could prove difficult. The same victims' rights groups that supported the Victims Bill of Rights and Marsy's Law are likely opponents.

Cost is another obstacle to a publicly funded restitution system — especially given the projected budget deficit in 2023.[32] But the current restitution system already relies on state funding: restitution fines only partly fund CalVCB, and the agency routinely requires general fund appropriations. From 2020 to 2022, CalVCB received $53.5 million from the general fund; across those same years, it paid out just over $93 million, suggesting that half of compensation comes from legislative appropriations.[33] Expanding this program's funding will be relatively inexpensive: the Legislative Analyst's Office estimates that eliminating restitution fines and backfilling fine revenue in the coming years would require $23.5 million, or less than 0.05% of last year's $55 billion general fund surplus.[34] Paradoxically, public funding could lessen some system costs associated with enforcing individual restitution and restitution fine orders, including administrative costs in tracking outstanding obligations and the time and the government expends trying to collect payment.[35]

Finally, a publicly-funded restitution system may face policy objections. To many, it may not seem fair for society to shoulder the cost of crime instead of the actual perpetrator. And removing the restitution mandate may give the perception that defendants are not responsible for their own actions. But the current system is fundamentally flawed, provably unfixable by expecting funds from defendants, and is already publicly funded in practice. Acknowledging that reality by committing to full public funding is the only practical solution. Despite an individual restitution mandate and statutory enforcement mechanisms, survivors rarely receive restitution. Taxpayers should consider how their money is best spent: fueling futile bureaucracy or making survivors whole.

Other policy considerations favor a publicly-funded restitution system over the status quo. Requiring restitution from individual defendants arguably neither makes

society safer nor is it the most efficient method of compensating survivors. The current system requires court appearances, probation supervision, and administrative resources to extract token restitution payments from (mostly) indigent defendants. This is particularly true of restitution fines: because state law requires restitution fines with every conviction, defendants convicted of misdemeanors like public intoxication are on the hook for restitution, even without an identifiable victim. Thus, the current restitution system costs taxpayers even while it fails survivors.

Criminal fines, fees, and restitution also prolong defendants' system involvement, which may be counterproductive to reentry. Paying restitution is often a condition of probation, meaning a defendant's inability to pay prevents them from completing probation even where they comply with all other conditions.[36] And until very recently, unpaid restitution was itself a sufficient reason to deny expungement, even where defendants could not afford payments.[37] Finally, using restitution fines and fees to fund probation departments and jails arguably creates a perverse incentive to convict more people to benefit the budget instead public safety.[38]

Publicly funding restitution requires a commitment to public crime insurance and a financial investment, but it is the only solution that eliminates the root problem with our current restitution system. Other solutions, such as increasing CalVCB eligibility or improving training for law enforcement and victim advocates, are mere band-aids for the system's structural failing that at best will marginally improve survivor compensation. Without rebuilding its restitution system, California will continue to make a constitutional promise to crime survivors that it cannot keep.

Conclusion

The constitutional requirement to provide restitution is unmet under the existing framework because it premises compensation on the defendant's ability to pay. No legal reform or policy solution exists that can achieve the alchemy of getting restitution from defendants with no money. That conflict between a constitutional right and a truism of life both creates a substantive legal problem (a constitutional nullity) and further harms crime survivors with an empty promise. To resolve this

conflict the legislature should reform restitution by implementing the solutions proposed above.

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1. Cal. Const., art. I, § 28(b)(1)–(17). ↑
2. Cal. Const., art. I, § 28(b)(13)(A). ↑
3. California Bill Analysis, S.B. 1768 Sen., April 14, 1998. ↑
4. Pen. Code, §§ 2085.6(a)–(b). ↑
5. Pen. Code, §§ 2085.5(e), (f), 1202.42(h). ↑
6. Rev. & Tax. Code, § 19280. ↑
7. Franchise Tax Board, *Help with Withholding Orders*. ↑
8. Pen. Code, § 2085.5(a)–(d). ↑
9. Pen. Code, § 2700.1. ↑
10. Pen. Code §§ 1202.4(f)(3)(A)–(L) ↑
11. *People v. Rowland* (1997) 51 Cal.App.4th 1745; Pen. Code, § 1202.4(f); *see also* Cal. Const., art. I, § 28(b)(13); WIC, § 730.6(a)(1); WIC, § 730.6(h)(1). ↑
12. Gov. Code § 13950 et seq. ↑
13. Pen. Code, § 1202.4(c). Upon adjudication, juveniles must be ordered to pay restitution fines of up to $100 for misdemeanors and up to $1,000 for felonies. Pen. Code, §§ 2085.6(a)–(b). ↑
14. This survey was conducted in late 2020, at the height of the COVID-19

pandemic, so the response rate may not necessarily reflect the experience of most survivors. ↑

15. San Francisco District Attorney's Office, *2020 Victim Impact Survey Report* (2020) at 16. ↑

16. Gena Castro Rodriguez, *Survivor Voices* (2021) at 20. ↑

17. Prison Policy Initiative, *Prisons of Poverty: Uncovering the Pre-incarceration Income of the Imprisoned* (2015). ↑

18. Government Accountability Office, *Federal Criminal Restitution* (2018). ↑

19. Jail as a sanction for nonpayment of restitution is not an option. Almost all states statutorily or constitutionally banned debtors' prisons by the 1870s. Three main factors drove debtors' prison abolition: new debt enforcement mechanisms like chattel mortgages and liens were preferable to imprisonment; the growth of capitalism dissuaded the imprisonment of potential laborers; and movement into a commercial society reframed social perceptions of nonpayment as a matter of risk rather than wrongdoing. Christopher Hampson, *The New American Debtors' Prisons*, American Journal of Criminal Law (2017) at 20–27. ↑

20. The legislature supplemented State Restitution Fund with $33,000,000 from general fund in the 2021–22 budget. See Legislative Analyst's Office, *The 2021–22 Budget: Overview of the Spending Plan*. ↑

21. Karin Martin and Matthew Fowle, *Restitution Without Restoration? Exploring the Gap Between the Perception and Implementation of Restitution* (2020) 63 Sociological Perspectives 1015, 1025. ↑

22. CalVCB, *Who is Eligible*. ↑

23. *Ibid*. ↑

24. CalVCB, *Frequently Asked Questions*. ↑

25. *Ibid*. ↑

26. CalVCB, *How Compensation Works*. ↑

27. Gena Castro Rodriguez, *Survivor Voices* (2021) at 18. ↑

28. Gov. Code § 13964. CalVCB may also (and often does) seek a restitution order against a defendant after it compensates a survivor. Pen. Code § 1202.4(f)(4)(A). ↑

29. Gov. Code § 13962. ↑

30. Legislative Analyst's Office, *The 2015–16 Budget: Improving State Programs for Crime Victims* (2015) at 16. ↑

31. California established CalVCB in 1965 as the country's first survivor compensation program. The program was administered by the Department of Social Welfare. CalVCB, *About the Board*. Though the program sometimes recouped costs from defendants, it originally functioned as a social insurance program under the logic that if the state was willing to pay for a defendant's prosecution and incarceration, it should also pay for the survivor's losses. Jeremy Levine and Kelly Russel, *Crime Pays the Victim: Criminal Fines, the State, and Victim Compensation Laws, 1964–1984* (2022) American Journal of Sociology at 25–26. ↑

32. Legislative Analyst's Office, *The 2023–24 Budget: California's Fiscal Outlook*. ↑

33. Legislative Analyst's Office, *The 2020–21 Budget: Overview of the Governor's Budget*, *The 2021–22 Budget: Overview of the Spending Plan*. ↑

34. Legislative Analyst's Office, *The 2022–23 Budget: Overview of the Spending Plan*. ↑

35. Brennan Center, *The Steep Costs of Criminal Justice Fines and Fees* (2019). ↑

36. Pen. Code § 1202.4(l). ↑

37. Following the passage of Senate Bill 1106, unpaid restitution will no longer

be grounds to deny record clearance as of January 1, 2023. ↑

38. Alexandra Natapoff, *Punishment Without Crime* (2018) at 117. In 2019, California captured $1 billion in fee and fine revenue, not including amounts collected by cities and municipalities for local costs. Urban Institute, *Following the Money on Fines and Fees* (2022) at 2–3. ↑