

# Garnishing Graft: A Strategy for Recovering the Proceeds of Bribery

On October 10, 1973, Vice President Spiro T. Agnew resigned his office and pleaded *nolo contendere* to a single count of federal income tax evasion<sup>1</sup> on cash payments that Maryland road contractors had made to him in return for official favors.<sup>2</sup> More than seven years later, a Maryland state circuit court ordered Agnew to repay to the state nearly \$250,000<sup>3</sup> of bribe moneys and interest.<sup>4</sup> Prior to entering judgment for the Maryland Attorney General as plaintiff-intervenor, the court severed from the suit the three Maryland citizens who had initiated the case.<sup>5</sup>

Courts,<sup>6</sup> legislatures<sup>7</sup> and commentators<sup>8</sup> have endorsed such citizen suits for the restitution of bribe proceeds. This Note argues that restitution<sup>9</sup> addresses the unique social harm that bribetaking officials impose

1. *United States v. Agnew*, No. 73-0535 (D. Md. Oct. 10, 1973).

2. For a detailed account of the investigation and conviction of Agnew, see R. COHEN & J. WITCOVER, *A HEARTBEAT AWAY* (1974).

3. See *Agnew Told to Pay State \$248,735 for Funds He Accepted*, Wash. Post, Apr. 28, 1981, at A1, col. 5 (of the \$248,735 awarded, \$147,500 was principal and \$101,235 interest) [hereinafter cited as *Agnew Told to Pay State*]. On Jan. 4, 1983, Agnew exhausted his appeals and made payment, which had grown to \$268,482, to the Maryland treasury. See *Agnew Gives \$268,482 Check to Maryland in Graft Lawsuit*, N.Y. Times, Jan. 5, 1983, at A10, col. 4.

4. *State v. Agnew*, No. 23,638 (Anne Arundel Co. Cir. Ct. Apr. 27, 1981).

5. Judge Williams held that the taxpayers lacked standing to sue because they had not suffered "special damages" as distinguished from the general harm to all citizens. See *Agnew Told to Pay State*, *supra* note 3, at A2, col. 3.

6. See, e.g., *Mackey v. McDonald*, 504 S.W.2d 726, 731 (Ark. 1974); *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201, *cert. denied*, 344 U.S. 838 (1952). *But see*, e.g., *Fuchs v. Bidwill*, 65 Ill.2d 503, 359 N.E.2d 158 (1976) (attorney general has sole authority to represent state in enforcing codes of conduct against public officials); *Tuscan v. Smith*, 130 Me. 36, 44, 153 A. 289, 293 (1931) (stating that "individual taxpayers have not the right to apply for remedial relief after the commission of an illegal act"); *State ex rel. Wallen v. Miller*, 202 Tenn. 498, 304 S.W.2d 654 (1957) (finding that intervention of district attorney is necessary for private citizen to maintain suit to obtain recovery for county of amounts wrongly paid to officers). Many jurisdictions have not considered the issue of citizen standing to sue public officials for restitution of bribe proceeds. Comment, *Defending the Public Interest: Citizen Suits for Restitution Against Bribed Officials*, 48 TENN. L. REV. 347, 348 (1981).

7. See, e.g., ALASKA STAT. § 39.50.100 (1980) (allowing restitution suit by any qualified Alaskan voter to enforce statute that prohibits use of public office "for the primary purpose of obtaining financial gain"); IOWA CODE ANN. § 68B.9 (West Supp. 1982) (allowing initiation of restitution suit by any Iowa resident 18 years of age or older to enforce statute that forbids acceptance by officials of gifts over \$25).

8. See Comment, *supra* note 6, at 368-69; Flaum & Carr, *The Equitable Bill of Accounting—A Viable Remedy for Combatting Official Misconduct*, 62 ILL. B.J. 622, 627-28 (1974).

9. Restitution is the correctional device by which the offender returns the victim to the status quo ante. It contemplates not only the return of tangible property taken, but also payment by the offender to the victim for other harms inflicted in the course of the offense. In contrast, compensation is payment to the victim by the state for loss or physical harm. See LAW REFORM COMM'N OF CANADA, COMMUNITY PARTICIPATION IN SENTENCING, WORKING PAPER NO. 5, RESTITUTION AND COMPENSATION 8 (1976). In English criminal law, restitution and compensation are both paid by the offender.

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upon a democratic society. Restitution effectively serves the state's interest in both general<sup>10</sup> and distributive<sup>11</sup> retribution, symbolic denunciation of crime,<sup>12</sup> and deterrence<sup>13</sup> of prospective<sup>14</sup> offenders.<sup>15</sup> This Note maintains, however, that the penological benefits of restitution of bribe proceeds are best realized not by citizen suits, but rather within the framework of criminal bribery prosecutions. It proposes not that courts use existing sentencing powers for restitutive ends,<sup>16</sup> but that legislatures create a distinct mechanism to ensure that restitutory aims are achieved. It advocates the appending of a mandatory restitution hearing, similar to procedures widely used in Continental<sup>17</sup> and English<sup>18</sup> systems, to the

Restitution is the returning of tangible property only, see Theft Act, 1968, ch. 60, § 28, while compensation is payment to the victim for harms inflicted in the course of the offense, see Power of Criminal Courts Act, 1973, ch. 62, § 35.

10. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 230-37 (1968); A. VON HIRSCH, DOING JUSTICE 45-55 (1976). General retributivism posits that "wicked conduct injuring others itself calls for punishment," even if not necessary to prevent reoffending. H.L.A. HART, *supra*, at 234. In its strongest form, retributivism maintains that criminal acts create a moral debt to the society that the society is obligated to collect to retain the integrity of its principles of justice. In its weaker form, retributivism holds that society may, if it chooses, punish retrospectively to restore equilibrium between offender and society, whether or not a prospective benefit will issue. See E. VAN DEN HAAG, PUNISHING CRIMINALS 17 n.\* (1975).

11. Distributive retributivism guides the allocation of already justified punishment. It maintains that, whatever the justifying aim, punishment should be meted out only to criminal actors for specific acts that they have committed. See H.L.A. HART, *supra* note 10, at 11-13.

12. See E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 70-110 (1933) (justifying punishment on ground that it is a socially beneficial ritual that serves to express dramatically society's adherence to its norms); see also K. ERIKSON, WAYWARD PURITANS 3-29 (1966) (arguing that punishment serves important social function of boundary definition); J. FEINBERG, DOING AND DESERVING 95-118 (1970) (describing expressive function of punishment).

13. Deterrence theory assumes that all individuals are rational utility-maximizers and thus posits that individuals will commit crimes when it is in their self-interest to do so. The state, in this view, can reduce crime by altering individuals' cost calculations through the imposition of additional sanctions. See J. BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 170-336 (2d ed. London 1823 & photo. reprint 1948) (1st ed. London 1789); F. ZIMRING & G. HAWKINS, DETERRENCE (1973).

14. Deterrence takes two forms, general and specific. Specifically deterrent sanctions attempt to prevent the offender himself from reoffending. Generally deterrent measures seek to restrain prospective offenders from offending. See F. ZIMRING & G. HAWKINS, *supra* note 13, at 72-74. In the case of bribery, specific deterrence is usually irrelevant; convicted bribetaking officials will rarely, if ever, be in a position to commit similar offenses. Hence, the term deterrence, when used in this Note, will denote general deterrence.

15. These various justifications for punishment are not mutually exclusive. See Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 401 (1958).

16. Most sentencing courts could use their sentencing powers to effect restitution, unless the amount of the bribe exceeds the statutory maximum fine that may be imposed. The federal bribery statute avoids the problem of an inadequate ceiling for fines by setting the maximum fine at "not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater." 18 U.S.C. § 201(e) (1976). Courts, however, are under no obligation to use their fining power to implement restitutory objectives. In addition, the failure to separate structurally the power of the court to award restitution from the power of the court to fine blurs an important penological distinction. Federal law now recognizes this distinction. See *infra* note 85.

17. See S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 18-59 (2d ed. 1970) (surveying such methods in Europe).

18. See *id.* at 111-14, 143-46.

sentencing phase of the criminal adjudication. The proposed scheme would retain a residual role for citizen initiative in instances of possible collusion between the state and the criminal.

### I. Bribery: Treason to Democratic Expectations<sup>19</sup>

Our society has always felt that the crime of bribery merits special attention.<sup>20</sup> Article II, section 4 of the United States Constitution, for example, cites explicitly only one impeachable domestic offense: bribery.<sup>21</sup> Both federal<sup>22</sup> and state<sup>23</sup> statutes declare political bribery a felony and prescribe severe criminal punishments.<sup>24</sup> More recent federal statutes make bribery a predicate felony for course-of-conduct crimes that command enhanced punishments.<sup>25</sup> In addition, the Ethics in Government Act of 1978<sup>26</sup> compels the United States Attorney General to request that a United States Court of Appeals appoint and supervise a special prosecutor to investigate corruption charges against certain federal officials if the Attorney General cannot determine, after brief investigation, that such charges are baseless.<sup>27</sup>

19. This paraphrases Professor Reisman, who draws the useful parallel between treason in the international sphere and bribery in the domestic sphere. In each case, the integrity of the state itself is compromised. The traitor facilitates incursion by an external power; the bribetaker strikes at the society's organizing principles from within. See W. REISMAN, *FOLDED LIES* 3-4 (1979).

20. Political corruption may also be problematic in societies that are not industrial democracies. In developing countries, for example, corruption has been posited to be a hindrance to economic development and a facilitator of authoritarian takeover. See 2 G. MYRDAL, *ASIAN DRAMA: AN ENQUIRY INTO THE POVERTY OF NATIONS* 937-58 (1968). But cf. Leff, *Economic Development through Bureaucratic Corruption*, AM. BEHAVIORAL SCIENTIST, Nov. 1964, at 8 (claiming that corruption facilitates growth in less developed countries). Communist regimes have also been plagued by rampant bureaucratic corruption. See H. SMITH, *THE RUSSIANS* 81-101 (1976).

21. U.S. CONST. art. II, § 4 (naming bribery as cause for impeachment and removal from office of president, vice president, and all civil officers). See W. REISMAN, *supra* note 19, at 3-4 ("It should be no surprise that the first modern experiment in popular government fixed so sharply on bribery as a fundamental violation of the trust the people were putting in an elected leader.").

22. See 18 U.S.C. § 201(c) (1976) (public official may not demand or receive anything of value in return for "being influenced in his performance of any official act; or . . . being induced to do or omit to do any act in violation of his official duty").

23. See, e.g., CAL. PENAL CODE §§ 68, 86 (West Supp. 1982) (felony for executive officer or legislator to receive bribe upon understanding that his official actions shall be influenced); N.Y. PENAL LAW § 200.10 (McKinney 1975) (same).

24. In addition to fines, see *supra* note 16, the federal bribery statute authorizes imprisonment for up to fifteen years. In addition, the official may be disqualified permanently from holding any federal office. 18 U.S.C. § 201(e) (1976). In California, a convicted officer or legislator may be punished by imprisonment for a minimum of two and a maximum of four years, forfeiture of office, disenfranchisement, and permanent disqualification from holding any office of public trust. CAL. PENAL CODE §§ 68, 86 (West Supp. 1982). In New York, a convicted official can be sentenced to up to seven years in prison. N.Y. PENAL LAW § 70 (McKinney 1975).

25. See, e.g., Travel Act, 18 U.S.C. § 1952(b)(2) (1976); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(1) (1976).

26. Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified in scattered sections of 2, 5, 18, 26, 28 U.S.C.).

27. See 28 U.S.C. §§ 591-594 (Supp. V 1981). The Act requires the Attorney General to conduct an investigation whenever he receives specific information that a high level member of the Executive

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Although criminalized like many other antisocial acts, political bribery in a democratic-capitalist society is, in a sense, a crime of unique social harm. In such a society, public officials must be insulated from the incentives of the market in order to preserve the legitimacy of governmental action. By injecting the market into the public sphere, bribetaking officials convey damaging messages to the remainder of the society and erode the basis for the assertion of governmental authority.

### A. *Government and Market: Separate Spheres of Activity*

This concern with the crime of bribery reflects the efforts of a democratic-capitalist society to preserve the legitimacy of governmental activity. One goal of democratic lawmaking is to limit individuals' pursuit of private gain when it conflicts with notions of the public good. Prohibitions on the acquisition of wealth by means, for example, of robbery,<sup>28</sup> stock fraud,<sup>29</sup> or insider trading<sup>30</sup> reflect considered democratic choices about appropriate limitations on individuals' pursuit of wealth.

The preservation of democratic legitimacy requires that individuals who act as public agents in this process of making and enforcing limitations on private economic choices have no direct financial stake in the outcomes.<sup>31</sup>

Branch or presidential campaign official has violated a federal criminal law (other than a petty offense). If he is unable to resolve the matter within 90 days, he is required to apply to a specially constituted division of the United States Court of Appeals for appointment of a special prosecutor. The Court appoints and supervises the special prosecutor who has full independence from the Department of Justice in investigating the wrongdoing charged.

28. See Hobbs Act, 18 U.S.C. § 1951 (1976) (prohibiting robbery or extortion affecting commerce).

29. See 15 U.S.C. § 77q (1976).

30. See 15 U.S.C. § 78p(b) (1976).

31. To be sure, money has an impact on political decisions and decision-makers. Public officials who are motivated by ambition for higher office or desire for reelection may act with a view toward future contributions. Similarly, the official who discusses government business with a lobbyist over an expensive meal or during a complimentary weekend trip may be influenced by the provision of such luxuries. Outright bribery is on a continuum with a myriad of such transactions which blur the line between disinterest and self-interest. See Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451, 451 (1978) ("The distinction between a campaign contribution and a bribe is almost a hairline's difference. You can hardly tell one from the other.") (remarks of Sen. Daniel Inouye, quoting Sen. Russell Long).

Congress has indicated its concern about the influence of money on political decisions in all of these areas. Bribery of public officials is a felony. 18 U.S.C. § 201 (1976 & Supp. V 1981). The Federal Election Campaign Act attempted to limit campaign contributions and expenditures in federal elections. 2 U.S.C. § 441 (1976). Such limitations have as their primary purpose "to limit the actuality and appearance of corruption resulting from large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Acceptance of excessive largesse from lobbyists could bring an officer within the gratuity provisions of the federal bribery statute, 18 U.S.C. § 201(f)-(i) (1976).

But constitutional limits circumscribe the power of the Congress to regulate campaign contributions and lobbying far more than they curtail its ability to prohibit bribery. The quid pro quo contractual bribe transaction is purely action rather than expression and therefore is not shielded by First Amendment values. In contrast, campaign donations and lobbying implicate fundamental First Amendment values that constrain Congressional regulation. The campaign contribution is a form of political speech that "serves as a general expression of support for the candidate and his views." *Buckley v.*

Financially interested officials would have great incentive to permit their own acquisitive agendas to distort public policy.<sup>32</sup> Hence, democratic societies attempt to insulate the public sphere of activity from the pervasive influence of the market.<sup>33</sup>

### B. *Bribe-taking: The Convergence of the Spheres*

Political bribery destroys this division between the government command economy and the capitalist market economy. A corrupt official captures for himself part of the value of his service to financially interested parties.<sup>34</sup> Legislative outcomes then reflect patterns of covert transactions rather than levels of public support.<sup>35</sup> In the administrative context, bribery results in the provision of services, promulgation of rules, or patterns of enforcement based upon willingness and ability to pay. Similarly, a

Valeo, 424 U.S. 1, 21 (1976). *But see* Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (arguing that political contribution is not identical with political speech). In addition, the ability to contribute money to a political committee or group is protected by the First Amendment's freedom of association. *See* Buckley v. Valeo, 424 U.S. 1, 22 (1976). The lobbyist also engages in political speech and speaks for an association of individuals. In addition, he asserts the First Amendment right to redress grievances before the government. Hence, while campaign contributions and lobbying activities may skew decision-making and seem to require a response similar to that of bribery, competing constitutional values inhibit such a response. *Cf.* *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981) (holding that while government has legitimate interest in controlling noncommunicative aspects of speech, First Amendment forecloses control of communicative aspects).

32. *See* S. ANDRESKI, *PARASITISM AND SUBVERSION* 67 (1966). *But see* S. ROSE-ACKERMAN, *CORRUPTION* 6 (1978) ("The existence of such a payment does not necessarily imply that the principal's goals have been subverted—indeed the payment may even increase the principal's satisfaction with the agent's performance.") (footnote omitted).

33. The economy for government services is a command economy characterized by mandatory pricing. Services are allocated not to the highest bidder, but to all at a single price. Similarly, the compensation of public officials does not reflect the market value of particular legislative votes or administrative action. Rather, officials receive salaries determined by the democratic process. *See* Tilman, *Emergence of Black-Market Bureaucracy: Administration, Development, and Corruption in the New States*, 28 PUB. AD. REV. 437 (1968); van Klaveren, *Die historische Erscheinung der Korruption in ihrem Zusammenhang mit der Staats- und Gesellschaftsstruktur betrachtet*, 44 VIERTELJAHRSSCHRIFT FÜR SOZIAL- UND WIRTSCHAFTSGESCHICHTE 289 (1957), reprinted as *The Concept of Corruption* in *POLITICAL CORRUPTION* 38-39 (A. Heidenheimer ed. 1970).

34. The market for bribery does not, of course, function well enough to guarantee that the official will reap the full value of his service. Buyers and sellers are few. The quality of the product is difficult to evaluate; the fact of illegality hinders bargaining. *See* S. ROSE-ACKERMAN, *supra* note 32, at 8.

35. In a political landscape dominated by organized pressure groups, outcomes often will reflect the intensities of preference of those willing to spend for lobbying. Much legislation probably is not majoritarian in this sense. For the pluralist theorist of democracy, such an outcome is neither surprising nor troubling. Indeed, some would regard the outcome of competing interest group pressures as "public-interested." *See* Wright, *supra* note 31, at 1013-21 (describing but rejecting pluralist view).

Bribery, however, even in the pluralist scheme, is vastly different from such concentrations of power in the political marketplace. It is far different from the sympathetic or considered hearing that might be obtained with a political contribution. Bribery "imports the notion of some more or less specific *quid pro quo* . . . [an] express or implied agreement to act favorably to the donor when necessary." *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976); *see also* *United States v. Brewster*, 506 F.2d 62, 81 (D.C. Cir. 1974) (requiring specific knowledge of official act for which bribe is received); *Dukehart-Hughes Tractor & Equip. Co. v. United States*, 341 F.2d 613, 616 (Ct. Cl. 1965) (same).

bribed judiciary renders self-interested rather than disinterested justice.

The revelation that public officials are pursuing their own private gain rather than fulfilling their public trust can be profoundly harmful to a democratic-capitalist society. In failing to abide by the regulations on their economic activity that, in turn, legitimate their own regulatory actions, bribetakers teach the society that those in power revere the pursuit of private wealth over the ideal of altruistic restraint. They generate cynicism about the entire process of democratic lawmaking, thereby weakening the society's commitment to adhere to restrictions that officials have enacted.<sup>36</sup>

## II. Punishing Bribetakers: The Efficacy of Restitution

Restitution responds to the symbolic harms that bribetakers impose on society. Restitutory measures also further retributive aims of punishment, and, when added to existing penalties, they enhance general deterrence.

### A. *The Value Lessons of Restitution*

In every society, punishment has a symbolic function.<sup>37</sup> The amount and nature of the sanction for a particular crime teach the public about the substance of the norms being vindicated and the tenacity with which these norms are held. In cases of political bribery, the restitutory sanction helps to demonstrate symbolically the society's strong commitment to its democratic ideals.

When the state imprisons, fines, or drives the offender from office, it expressly disavows the bribetaking official's elevation of private gain above public weal.<sup>38</sup> Restitution, when added to existing sanctions, uniquely augments this denunciation. The imposition of restitution declares that, whatever other deprivations this offender might suffer, he will not be al-

36. See A. ROGOW & H. LASSWELL, *POWER, CORRUPTION, AND RECTITUDE* 58 (1963) ("If the membership of an institution does not collectively enforce rectitude standards, the tendency toward individual corruption is increased."); Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719, 725 (1966) ("If the elite is believed to be widely and thoroughly corrupt, the man-in-the-street will see little reason why he too should not gather what he can for himself and his loved ones.").

Most individuals abide by laws not because they fear penalties for violations, but rather because of their moral commitment to those laws. See F. ZIMRING & G. HAWKINS, *supra* note 13, at 29-30. When high officials commit crimes, the society's belief in the moral force of laws may be undermined. In the case of bribery this harm is even more serious. Officials, while requiring that individuals refrain from acquiring money improperly, do precisely what they forbid. Norms against pecuniary greed are thus specifically and uniquely undermined. Most other official lawlessness is not so baldly hypocritical.

37. See E. DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 64-75 (1938); J. FEINBERG, *supra* note 12, at 95-118.

38. See J. FEINBERG, *supra* note 12, at 101 (calling punishment an "authoritative disavowal" by the state of the criminal act). Where the act was committed by an insider, a state official, the importance of this symbolic divorce of the offender from the state increases.

lowed to use for his own benefit those funds for which he was willing to compromise the public interest. Restitution seems distinctly well suited to symbolic denunciation of the offender's unjust enrichment, and thus, to reinforcement of fiduciary norms of public service.

### B. *Restitution as Retribution*

Restitution also addresses the concept of debt that is at the core of a retributive justification of punishment.<sup>39</sup> Retributive theory posits that each member of a society implicitly agrees to constrain his own behavior and demands the same from all others.<sup>40</sup> When someone infringes another's rights materially, he both injures that person and gains an unfair advantage over everyone else.<sup>41</sup> He disturbs the delicate equilibrium of cooperative restraint.<sup>42</sup> Simultaneously, he intrudes upon the rights of a particular victim. Having incurred debts to both a victim and to the polity, he must repay a dual debt.<sup>43</sup>

In the case of political bribery, the official owes each of these debts to the same entity. The state is the polity thrown into disequilibrium by this breach of the social contract. It is also a directly injured victim, having suffered a number of distinct harms. It is a betrayed principal; its agent

39. The concepts of restitution and retribution are linked. In more primitive societies, the criminal act was viewed as an offense solely against the victim. The victim or his kin group would punish the offender with retaliation and revenge. Such vengeance, however, was regulated by customary rules. See Jacob, *The Concept of Restitution: An Historical Overview*, in *RESTITUTION IN CRIMINAL JUSTICE* 45 (J. Hudson & B. Galaway eds. 1977). With the settlement of tribes into more stable communities came systems of monetary compensation in which the offender negotiated an indemnification of goods or money for the victim or his heirs. See Lasker, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. RICH. L. REV. 71, 72 (1970).

This system eventually became regularized, and compensation was made according to scales of tariffs. Homer, for example, refers in the ninth book of the *Iliad* to the death fine in ancient Greece. Ajax reminds Agamemnon that even a brother's death may be compensated with money. Jacob, *Reparation or Restitution by the Criminal Offender to his Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 152, 155 n.43 (1970). The Doms of Alfred (circa 870 A.D.) provided that if a man knocked out another's front teeth he was to pay him eight shillings. An eye tooth would require four shillings as compensation, while a molar would cost fifteen. *Id.* at 154. As Jacob notes, "It is clear that the origins of modern systems of criminal law are found in the victim's right to reparation for the wrong done to him." *Id.* at 155.

Gradually, central government grew stronger and assumed a more active role in the compensation process. S. SCHAFER, *supra* note 17, at 6-7. In England, the state began to take a share of the victim's compensation. Crimes began to be viewed as offensive to both victim and state. At this point, the criminal process aimed at both retribution and restitution. In time, the state came to be defined as the sole offended party in the criminal law and its right to claim compensation began to exclude entirely the restitutory right of the victim. See Jacob, *The Concept of Restitution: An Historical Overview*, *supra*, at 47.

40. See I. KANT, *THE PHILOSOPHY OF LAW* 196-97 (1887) (1st ed. Königsberg 1797).

41. See A. VON HIRSCH, *supra* note 10, at 47-48.

42. See Morris, *Persons and Punishment*, in *HUMAN RIGHTS* 113 (A. Melden ed. 1970).

43. See A. VON HIRSCH, *supra* note 10, at 47-48. *But cf.* E. VAN DEN HAAG, *supra* note 10, at 15-17 (arguing that notion of debt to society is misapplied; punishment is not a retroactive license that "pays for" the crime).

has profited unjustly while acting on its behalf.<sup>44</sup> In addition, bribetaking may impose direct economic losses<sup>45</sup> as well as attitudinal costs engendered by a climate of corruption.<sup>46</sup>

While other punishments serve as the “counterbalancing disadvantages”<sup>47</sup> that restore the society’s equilibrium, restitution makes reparation for the injury to the state as betrayed principal. In making restitution, the bribetaker not only pays contractual or tort damages<sup>48</sup> for his civil injury to the state, but also provides “spiritual” or “idealistic” satisfaction to the state as victim for his criminal intrusion on its rights.<sup>49</sup>

### C. *The Deterrent Efficacy of Restitution*

In selecting a desirable level of deterrence,<sup>50</sup> the state can choose one or a combination of punishments. The major forms of punishment—imprisonment and monetary penalties—are necessarily incommensurable.<sup>51</sup> Some offenders would not be deterred by a fixed term of imprisonment if they were able to retain all or part of the anticipated proceeds of their crimes. Others would be willing to pay stiff monetary penalties, but would be deterred by threatened deprivation of liberty. A mixed scheme is therefore necessary for adequate deterrence of all offenders.

44. See *infra* pp. 136-37.

45. In many cases of bribery, the bribed official will impose no direct financial loss on the state. In some cases, however, the loss is direct. The bribed government purchaser, for example, may enter into higher cost contracts with a bribing supplier. See *Mahesan v. Malaysian Gov't Officers' Coop. Hous. Soc'y, Ltd.*, 1979 A.C. 374 (P.C.) (Malaysia).

46. See G. MYRDAL, *supra* note 20, at 941 (“Merely shouting from the house-tops that everybody is corrupt creates an atmosphere of corruption. People feel they live in a climate of corruption and they get corrupted themselves.”) (statement of Prime Minister Nehru of India); *id.* at 941 n.2 (“The general belief about failure of integrity amongst Ministers is as damaging as actual failure.”) (Santhanam Committee Report on corruption in India).

47. A. VON HIRSCH, *supra* note 10, at 47.

48. See *infra* pp. 136-37.

49. See S. SCHAFER, *supra* note 17, at 120.

50. Although the deterrent effect of penalties is ultimately an empirical question, the theory of deterrence presupposes the rational economic man who will refrain from certain activities because he fears the imposition of threatened penalties. See generally F. ZIMRING & G. HAWKINS, *supra* note 13, at 92-224; Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966). The rational utility-maximizing criminal, however, may well be a fiction. Choices to commit criminal acts are often not rational and deliberate, but rather impulsive and objectively disadvantageous. See Tittle, *Restitution and Deterrence: An Evaluation of Compatibility*, in OFFENDER RESTITUTION IN THEORY AND ACTION 34 (B. Galaway & J. Hudson eds. 1978). In addition, criminal actors may not know the actual penalties or they may perceive that their chances of apprehension are so small that penalties are irrelevant. A number of empirical studies have indicated that severity of sanctioning may be irrelevant where the probability of apprehension is low. See, e.g., Tittle, *Crime Rates and Legal Sanctions*, 16 SOC. PROBS. 409 (1969); Bailey & Smith, *Punishment: Its Severity and Certainty*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 530 (1972); Logan, *General Deterrent Effects of Imprisonment*, 51 SOC. FORCES 64 (1972).

51. See Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980). But see Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980).

As an addition to existing penalties, restitution enhances deterrence by altering the offender's calculus.<sup>52</sup> If subject to restitution, the offender would know that no matter how great his preference for money and how weak his aversion to incarceration, he could not possibly hope to remain better off if apprehended. In addition, restitution is useful because it is tied to the size of the bribe; its deterrent effectiveness is independent of the amount received.<sup>53</sup>

### III. The Inadequacy of Existing Techniques for Implementing Restitution

Courts and legislatures have devised a number of techniques for restitution of bribery proceeds. These techniques, however, fail to capture reliably the full denunciatory, retributive, and deterrent value of the restitutory sanction.

#### A. *Private and Public Civil Suits: Problematic Enforcement Tools*

Civil suits to recover the proceeds of bribery, brought either by private citizens or an attorney general, are penologically ineffective and economically inefficient. Such suits inevitably delay and thereby attenuate the denunciatory and deterrent effects of restitution. In addition, such suits fail to protect the interests of both the official and society in distributive retributivism.

##### 1. *The Case for Citizen Suits*

Civil suits to recover the proceeds of bribery can be grounded in one of a number of common law theories. A public official can be viewed as a trustee for the public, and hence, he owes a fiduciary duty of trusteeship to the public.<sup>54</sup> Alternatively, the official is held to owe a fiduciary duty as

52. See Harland, *Theoretical and Programmatic Concerns in Restitution: An Integration*, in OFFENDER RESTITUTION IN THEORY AND ACTION, 193, 197 (B. Galaway & J. Hudson eds. 1979) ("use of financial restitution allows the offender to compute in advance at least part of the cost of being apprehended"); LAW REFORM COMM'N OF CANADA, *supra* note 9, at 7 ("Depriving offenders of the fruits of their crimes . . . should assist in discouraging criminal activity."); Flaum & Carr, *supra* note 8, at 628 (bill of accounting serves as "meaningful deterrent to the abuse of public office"); Comment, *supra* note 6, at 368-69 ("If citizens can . . . [force officials] to account for all monies received while in office, the degree of corruption among government officials might decrease substantially.")

53. Hence restitution is a unitary marginal deterrent; the level of disutility remains constant at every dollar amount of bribetaking. Restitution is more effective on the margin than a flat prison sentence imposed for a bribe of any amount, although, if the prison sentence is sufficiently long, imprisonment may always be a more effective absolute deterrent. The flat sentence is characterized by diminishing marginal disutility, deterring small bribetaking more strongly than larger bribetaking. Restitutory penalties, however, are weaker marginal deterrents than penalties which impose more than one dollar's penalty for each dollar's increase in bribetaking.

54. See *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979) ("Governor of the State of Maryland is thus trustee for the citizens and the State of Maryland and thus owes the normal fiduci-

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a consequence of his agency relationship to the principal state.<sup>55</sup> It is a long established principle of both law and equity that a fiduciary who receives a secret consideration while acting on behalf of his principal is accountable to that principal for the profit made.<sup>56</sup> The right to recover is not contingent upon the principal suffering a loss.<sup>57</sup> Rather, the cause of action serves to prevent the unjust enrichment of the trustee-agent, even if the recovery of the bribes is a windfall for the principal-beneficiary.<sup>58</sup> Criminal statutes or sanctions against the bribetaker in no way extinguish the civil cause of action.<sup>59</sup> Instead, a criminal conviction for bribery constitutes estoppel in favor of the state in the subsequent civil case.<sup>60</sup>

In many jurisdictions, the attorney general has sole authority to represent the public in suits of this nature.<sup>61</sup> Citizens of such jurisdictions who lack independent legal rights distinct from citizens generally are denied standing to sue. In many cases of bribery, no citizen suffers such specific harm.<sup>62</sup> Hence, the attorney general possesses, in effect, a monopoly on the civil initiative.

Advocates of citizen suits have maintained that barring citizen access to the courts to enforce the public right against corrupt officials can render that right nugatory.<sup>63</sup> Supporters regard citizen rights of action as both symbolically important and efficient. They argue that citizen suits are necessary to enforce directly the moral will of the people against officials who have bartered away popular interests. In addition, proponents of such suits do not trust an attorney general to enforce the public right consistently against fellow public officials.<sup>64</sup> They believe that the dispersion of

ary duties of a trustee.”), *rev'd on other grounds* 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980); *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201, *cert. denied*, 344 U.S. 838 (1952).

55. *United States v. Carter*, 217 U.S. 286 (1910); *United States v. Kearns*, 595 F.2d 729 (D.C. Cir. 1978); *City of Chicago ex rel. Cohen v. Keane*, 64 Ill. 2d 559, 357 N.E.2d 452 (1976).

56. *See United States v. Carter*, 217 U.S. 286 (1910); *Fawcett v. Whitehouse*, 39 Eng. Rep. 51 (Ch. 1829); *Boston Deep Sea Fishing & Ice Co. v. Ansell*, 39 Ch. D. 339 (1888).

57. In cases where there is financial loss, the state can recover that loss under a fraud theory. *See Mahesan v. Malaysia Gov't Officers' Coop. Hous. Soc'y, Ltd.*, 1979 A.C. 374 (P.C.) (Malaysia).

58. *See United States v. Carter*, 217 U.S. 286 (1910); *see also* RESTATEMENT OF RESTITUTION § 197 comment c (1937).

59. *See United States v. Kearns*, 595 F.2d 729, 732-33 (D.C. Cir. 1978); *Continental Mgmt., Inc. v. United States*, 527 F.2d 613, 620 (Ct. Cl. 1975).

60. *See United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978).

61. *See, e.g., Fuchs v. Bidwill*, 65 Ill. 2d 503, 359 N.E.2d 158 (1976); *Tuscan v. Smith*, 130 Me. 36, 153 A. 289 (1931); *State ex rel. Wallen v. Miller*, 202 Tenn. 498, 304 S.W.2d 654 (1957).

62. In some cases, however, particular citizens do suffer actual harm. For example, consider a case in which a contractor or supplier bidding for a government contract fails to obtain the contract because a competitor made a payoff to an official. In such an example, the contractor or supplier would seem to have suffered a special economic injury that might confer standing.

63. *See, e.g., Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 476, 86 A.2d 201, 222, *cert. denied*, 344 U.S. 838 (1952); *Comment, supra note 6*, at 364-65.

64. *See Comment, supra note 6*, at 364 (analogizing role of attorney general proceeding against fellow officials to that of doctors in malpractice actions reluctant to act against fellow professionals).

initiative to an almost infinite pool of potential law enforcers increases certainty of enforcement.<sup>65</sup>

## 2. *The Inadequacies of Citizen Suits*

While citizen causes of action may enhance participatory democratic values, they do so at the cost of penological and economic efficiency. First, the deterrent and denunciatory functions of punishment require that detection, trial, and disposition be as contemporaneous as possible. Both aims are best achieved when public attention and perception of punishment are focused at a single time.<sup>66</sup> Citizen suits, which typically conclude years after the criminal trial, substitute a fragmented and dispersed message for the required outburst of disapproval.

Further, civil suits proceeding parallel to criminal actions are redundant. They litigate the precise issues that are central to the criminal adjudication: whether and how much money was taken.<sup>67</sup> Finally, citizen suits also compromise the norm of distributive retributivism. A criminal justice system should punish only the truly guilty.<sup>68</sup> To the public official, involvement in a citizen suit is inevitably punitive to some degree. Particularly for the public official wrongly accused of malfeasance, the accusation itself subjects a defendant to the stigma of ruinous publicity and exposure.<sup>69</sup>

Yet civil process is poorly suited to the important task of screening out

65. Actually, the mere existence of a civil cause of action implies nothing about the level of enforcement that will ultimately result. The availability of citizen suits may incite a great deal of litigation. Alternatively, the cost and trouble of such suits might discourage citizens from suing to enforce the public right.

66. See J. BENTHAM, *supra* note 13, at 184 ("Punishment must be further increased in point of magnitude . . . as it falls short in point of proximity."); E. DURKHEIM, *supra* note 12, at 108 (arguing that social norm should be "affirmed forcibly at the very moment when it is contradicted") (emphasis added).

67. This claim is inapplicable both when the government wishes to recover its loss and when the bribery charge is negotiated down to a lesser charge. In the former case, the government will seek compensation of lost revenues rather than the amount of the bribe. In the latter case, the government may be limited to claiming for the transaction described in the plea. Agnew, for example, pleaded *nolo contendere* not to bribery charges, but rather to a single count of income tax evasion on moneys received in one year. Attorney General Richardson, however, read into the record a statement of all the illegal transactions that the investigation had uncovered. See R. COHEN & J. WITCOVER, *supra* note 2, at 346.

The Agnew case, however, is something of an anomaly, for it is rare that major political corruption cases are resolved by plea bargaining. Nathan, *Corruption Trials: The Pitfalls*, Nat'l L.J., Apr. 13, 1981, at 15, col. 4. In addition, both case law, see *United States v. Runck*, 601 F.2d 968, 970 (8th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980); *State v. Scherr*, 9 Wis. 2d 418, 422, 101 N.W.2d 77, 80 (1960), and the logic of plea bargaining cases, see *infra* note 85, seem to indicate that restitution for non-pled offenses could be negotiated by the parties as part of the plea agreement.

68. See H.L.A. HART, *supra* note 10, at 11-12; N. WALKER, *SENTENCING IN A RATIONAL SOCIETY* 15-19 (1969).

69. Exposure of bribetaking can create a public perception of widespread corruption that is socially harmful. See *supra* note 46.

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nonmeritorious or malicious cases. Since the disputed question will always be one of fact, the court cannot avoid proceeding at least to the conclusion of the plaintiff's presentation of evidence.<sup>70</sup> In addition, the civil suit permits determination of the critical factual issue—whether the official committed the crime of bribery—by a preponderance of evidence<sup>71</sup> rather than beyond a reasonable doubt.<sup>72</sup>

By contrast, the criminal process contains numerous screens to guard against the problem of baseless accusation. First, a number of prosecuting officials must review the decision to prosecute.<sup>73</sup> This provides a first screen of evidentiary sufficiency. Once the decision to prosecute has been made, a disinterested official, the magistrate, must determine probable cause.<sup>74</sup> In many jurisdictions, a grand jury must return an indictment.<sup>75</sup> Finally, the trier of fact must determine guilt beyond a reasonable doubt.

The lesser protection the civil process offers argues more strongly against citizen civil suits than against attorney general civil suits. While a public official can bring an ill-motivated or ill-considered prosecution, he is less likely than an individual citizen to do so. Public prosecutors are far more accountable to the public for such partisan actions. The prosecutor has a duty to enforce the law impartially.<sup>76</sup> The failure to do so can affect the state official directly at the polls, or can undermine a national administration's credibility.<sup>77</sup> Also, in the federal system, a major political corruption prosecution would have to receive approval by several officials.<sup>78</sup> In contrast to this limited locus of decision-making, the citizen initiative is without bound. If every citizen but one decides not to proceed, the suit can still go forward.

70. See F. JAMES & G. HAZARD, CIVIL PROCEDURE §4.14, §6.18, at 222-25 (2d ed. 1977).

71. Limiting such suits only to cases where a criminal conviction has already occurred ensures that the critical question of whether the official took a bribe is determined by the higher standard of proof. But the necessity for citizen initiative is far greater in the case where the prosecutor has not acted at all. Limiting citizen suits to post-conviction situations would eliminate citizen initiative where it is most needed: in cases of collusion.

72. See *In re Winship*, 397 U.S. 358, 364 (1970) (requiring that determination of criminal guilt in state trials be beyond reasonable doubt).

73. Most large prosecutorial offices are structured hierarchically. In a case as controversial as a political bribery prosecution, subordinates will need to present their case and obtain approval from higher ranking prosecutors.

74. See C. WHITEBREAD, CRIMINAL PROCEDURE 331-35 (1980).

75. See *id.* at 375-78.

76. In addition, public perception of partisan prosecution policies has brought down governments. The fall of the first Labour government in Britain in 1924 is generally believed to have been caused by the exposure of Prime Minister Ramsay MacDonald's interference with his Attorney General's decision to prosecute radical journalist John Ross Campbell. See J. EDWARDS, THE LAW OFFICERS OF THE CROWN 199-225 (1964).

77. In recent memory are the Carter Administration's foibles in the Marston affair in Philadelphia, see N.Y. Times, Jan. 22, 1978, § 4, at 2, col. 1, and the "Billygate" matter, see N.Y. Times, July 26, 1980, at A1, col. 6.

78. See *supra* note 73.

Yet the comparative disadvantages of even attorney general civil suits for restitution emerge when compared to public criminal prosecution. As in citizen suits, criminal issues are resolved in the inappropriate forum of the civil courts. Although diminished by the potentially harmful consequences of the appearance of vindictiveness, the possibility of harassing suits remains. In addition, attorney general suits similarly involve repetition, unnecessary expense and delay of punishment.

### B. *Public Analogues: New Directions in RICO*

Fulfilling many of the penological aims that civil suits neglect, the innovative mandatory forfeiture provisions of the Racketeer Influenced and Corrupt Organizations (RICO) statutes<sup>79</sup> suggest an effective restitutory strategy for bribery. In RICO prosecutions, the government alleges in the indictment the extent of the interest subject to forfeiture.<sup>80</sup> The jury must then render a special verdict as to the extent of the interest or property subject to forfeiture.<sup>81</sup>

These provisions in RICO assure restitution for crimes that fall within the ambit of the statute. The forfeiture provisions follow mandatorily. In addition, since the restitutory process is embedded in the criminal trial, it facilitates a single litigation with the procedural safeguards of criminal procedure. Hence, norms of distributive retributivism are protected. In addition, the sanction of restitution follows immediately upon conviction. Denunciatory and deterrent messages are thus contemporaneous.

Although suggesting innovative restitutory techniques, RICO provisions are of limited direct applicability in bribery cases. RICO forfeiture provisions do not apply when the government is able to prove one, but not two, predicate felonies.<sup>82</sup> Hence, to obtain RICO forfeiture, the government would have to bring a more cumbersome and difficult prosecution.

79. 18 U.S.C. § 1963 (1976). RICO violators "shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, or claim against or property or contractual right of any kind affording a source of influence over, any enterprise which he has established . . ." *Id.* § 1963(a) (emphasis added).

RICO forbids conducting the affairs of an enterprise through a pattern of racketeering activity, *id.* § 1962. A pattern of racketeering activity is defined to include the commission of two predicate felonies within a specified time. Among the enumerated predicate felonies are federal bribery, *id.* § 201, or "any act . . . involving . . . bribery . . . chargeable under State law," *id.* § 1961(1)(A).

80. See FED. R. CRIM. P. 7(c)(2) (requiring allegation of amount subject to criminal forfeiture in indictment).

81. See FED. R. CRIM. P. 31(e) (requiring special verdict for amount of criminal forfeiture).

82. It would not be feasible to amend RICO so that every bribetaker would fall under its provisions. Both the legislative history and the statutory language indicate an intent by Congress to strike at organized large scale criminal enterprises. To revise the predicate felony figure downward to one would be contrary to the general thrust of the statute.

#### IV. Mandatory Restitution as Part of Criminal Adjudication

Restitution is most effectively and equitably effected by appending a mandatory hearing to the sentencing phase of the criminal process. Such a combined procedure, analogous to the *Adhäsionsprozess* of the Germanic<sup>83</sup> and the *action civile* of the French<sup>84</sup> systems, would achieve restitution reliably while furthering the denunciatory, retributive, and deterrent aims that the civil process often neglects.

##### A. *The Proposal*

Every bribery conviction or accepted nolo plea would give rise, in addition to the sentencing hearing, to a mandatory restitution hearing.<sup>85</sup> At that point, under the more relaxed evidentiary standards of the sentencing process,<sup>86</sup> the parties would have an opportunity to supplement the record, not on the issue of liability (which would have been collaterally determined already through determination of criminal guilt), but rather on the issue of the amount of restitution.<sup>87</sup> Having considered the record and whatever additional evidence was offered, the court would issue a judgment stating the amount of restitution, the court's basis for arriving at that figure, and the jurisdiction to which the money was owed. The court would also assure that the amount awarded was linked to the criminal offense adjudicated.<sup>88</sup>

83. See ALLGEMEINE BÜRGERLICHE GESETZBUCH arts. 1338, 1340 (Austria).

84. CODE DE PROCEDURE PENALE arts. 1-3 (France).

85. The nolo plea is equivalent to a guilty plea for the purposes of criminal sentencing. See *North Carolina v. Alford*, 400 U.S. 25, 35-36 (1970). A problem arises where the conviction is by guilty or nolo plea to a lesser charge or one of a series of charges. In these cases, a prosecutor would be able to bargain away the restitution hearing that adheres only to a bribery charge. Under the proposed scheme, prosecutors should be urged to take into account in the bargaining process the importance of restitution as a punishment for bribery. Prosecutors should adopt guidelines that reflect the legislative intent to secure restitution in all cases of this type. A new federal statute eliminates the problem of bargaining away a bribery charge in the federal system. The Victim and Witness Protection Act of 1982 permits a federal court to impose restitution either as an additional punishment or as a mandatory condition of probation for any violation of Title 18 of the United States Code. A judge who does not order restitution must state reasons for failing to do so. See *Victim and Witness Protection Act of 1982*, Pub. L. No. 97-291, 1982 U.S. CODE CONG. & AD. NEWS (96 Stat.) 1248, 1253-54 (to be codified at 18 U.S.C. § 3579).

86. Although adopting the mandatory aspect of the RICO statutes, this proposal rejects the special pleading and verdict features of RICO for the appended post-conviction hearing. See *supra* p. 140. The appended hearing avoids confusing the jury with the separate issues of guilt and damages. See Chappell, *The Emergence of Australian Schemes to Compensate Victims of Crime*, 43 S. CAL. L. REV. 69, 80 (1970). In addition, the appended procedure permits the government to choose to sue for actual loss rather than for the sum of the bribe.

87. See *State v. Scherr*, 9 Wis. 2d 418, 101 N.W.2d 77 (1960) (analogizing restitution hearing to presentence investigation).

88. Courts have held that restitution can be had only for loss suffered as a direct result of the crime for which the offender is convicted. See *Karrell v. United States*, 181 F.2d 981 (9th Cir. 1950); *People v. Becker*, 349 Mich. 476, 84 N.W.2d 833 (1957); see also Feinman, *Legal Issues in the Operation of Restitution Programs in a Juvenile Court*, in VICTIMS, OFFENDERS, AND ALTERNATIVE

Such a proceeding would fulfill the requirements of due process. In determining the quantum of penalty, the court would provide a number of procedural guarantees: notice, and opportunity to be heard and to produce and dispute evidence.<sup>89</sup>

### B. *Advantages of the Proposal*

This proposal avoids many of the problems with civil suits brought by either citizens or public officials. Unlike civil enforcement, the appended process demands that a magistrate or a grand jury screen charges of bribery and that a jury decide them beyond a reasonable doubt. As in the analogous sentencing determination, the trial judge, having heard the case and the additional evidence, would be in an ideal position to determine restitution. The issue of restitution arises only for those offenders who already stand convicted. In addition, since the procedure is mandatory, every convicted offender is subject to restitution. Hence, restitution is effected in every actual case of bribery, while false or baseless charges are not permitted to create an erroneous perception of widespread bribetaking.

In addition, the sanction follows immediately upon conviction and therefore maximizes its penological effect. The messages of disapproval are focused at a single time. Penalties are not discounted as far into the future. Finally, unlike in the citizen suit, the state polices itself. The citizenry does not need to intervene to act for a recalcitrant state. Public officials act to renounce positively the actions of one of their own and to confiscate his ill-gotten market rewards.

The appended procedure also achieves in one proceeding what previously required two. Issues need not be relitigated. No second judge, set of lawyers, or panel of jurors is required. In contrast to the application of RICO provisions to bribetakers, the proposal is comprehensive, applying to all instances of bribery.

### C. *The Lingering Problem of Collusion*

The appended procedure obviates the need for subsequent civil suit after criminal conviction. It cannot operate, however, where the public prosecutor decides not to initiate criminal proceedings. Commentators have argued that the prosecuting officials often may have political loyalties, personal acquaintance, or professional empathy with the bribetaking offi-

SANCTIONS 139 (J. Hudson & B. Galaway eds. 1980) (discussing case law on scope of restitution order).

89. See AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES §§ 4.4, 4.5(b), 5.4(b) (Approved Draft 1971) (recommending these procedural protections for sentencing).

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cial that would lead to collusive nonfeasance.<sup>90</sup> While the realities of media pressure and of overlapping federal-state jurisdiction make such an outcome unlikely, such collusion is nonetheless possible. Clearly, the option of citizen suits must survive in order to rectify instances of collusion. It must, however, be circumscribed.

This Note proposes that in cases of nonprosecution, the citizen should initiate a form of relator action,<sup>91</sup> requesting the attorney general of the state or of the United States to file criminal or civil suit against the official. Within a specified period, the public prosecutor would then either permit the citizen to file a civil suit on the prosecutor's behalf, file a civil or criminal suit on behalf of the state, or provide detailed written reasons for his refusal to proceed.<sup>92</sup> By forcing the official to account for his actions publicly, such an initiative prevents the dishonest use of low visibility discretion. At the same time, the action prevents citizens from gaining access to court by spuriously claiming collusion. This initiative is only a residual last resort. In most cases, the important aims of restitution will be achieved through the more efficient and more penologically effective appended process.

### Conclusion

Addressing the harm corrupt officials impose, restitution stands as an important element of punishment for bribetakers. It dramatizes society's commitment to fundamental norms, restores the equilibrium of rights between offender and state, and deters prospective bribetakers. Restitution obtained through the criminal process most effectively promotes these penological goals.

90. See *supra* p. 137.

91. The relator action is the English analogue of the citizen suit. A citizen with no special interest in a matter applies to the attorney general to "borrow," in effect, the attorney general's standing to sue in the public interest. See Casenote, 41 MOD. L. REV. 58, 59 (1978). The attorney general must consent to the action for it to go forward. If he does consent, he retains the nominal power to control the proceedings but, in practice, generally gives the relator a free hand. The attorney general is free to withhold consent and is not obligated to explain his withholding. See *Gouriet v. Union of Post Office Workers*, 1978 A.C. 435.

92. The attorney general would have to provide a detailed explanation of evidentiary insufficiency. "The public interest" or "sound prosecutorial discretion" would be insufficient reasons to decline action.