

An illustration of a hand with a dark skin tone reaching into the pocket of a pair of brown trousers. The hand is positioned as if searching for something. The trousers are worn with a dark belt. The background is a solid light beige color.

EMPTY POCKETS AND EMPTY PROMISES:

*How Federal
Restitution Law
Fails Everyone*

Cortney E. Lollar



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EMPTY POCKETS AND EMPTY PROMISES:

*How Federal Restitution
Law Fails Everyone*

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The National Association of Criminal Defense Lawyers and the NACDL Foundation for Criminal Justice

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL envisions a society where all individuals receive fair, rational, and humane treatment within the criminal legal system.

NACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal legal system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level.

The members of NACDL—and its 90 state, local and international affiliates—include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to promoting fairness in America's criminal legal system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and practices.

The NACDL Foundation for Criminal Justice (NFCJ) is a 501(c)(3) charitable non-profit organized to preserve and promote the core values of the American criminal legal system guaranteed by the Constitution—among them access to effective counsel, due process, freedom from unreasonable search and seizure, the right to a jury trial, and fair sentencing. The NFCJ supports NACDL's efforts to promote its mission through resources, education, training and advocacy tools for the public, the nation's criminal defense bar, and the clients they serve.

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Executive Summary

Criminal restitution has become a regular part of sentencing in criminal cases. And yet it remains widely misunderstood—both in its implementation and its effects. Criminal restitution is seen as one of the criminal legal system’s primary mechanisms for helping those who have committed a wrong recognize the harm they have caused and financially restore the crime victim to their pre-crime status, to the extent possible. Although courts have repeatedly acknowledged restitution’s punitive nature, many perceive restitution to be a legal financial obligation distinct from criminal fines, forfeiture, and court fees because of its unique role in compensating crime victims. In practice, however, criminal restitution operates similarly to other criminal legal financial obligations. Criminal restitution has become a form of punishment whose laudatory compensation goals are eclipsed by its punitive effects. Closer scrutiny of this criminal remedy permits a clearer picture of its strengths and weaknesses and will allow for a critical re-envisioning of criminal restitution so that it better satisfies crime victims and minimizes the outsized impact on those with criminal restitution orders.

Criminal restitution has become a form of punishment whose punitive effects eclipse its laudatory compensation goals.

About This Report

This report seeks to challenge the premise that restitution should be considered

separate and apart from other legal financial obligations imposed in criminal cases. It aims to debunk some of the existing myths about criminal restitution in order to allow for a greater understanding of how restitution operates in practice. With a more accurate picture of how criminal restitution functions, we can more perceptively identify the gaps between theory and practice and more adequately ascertain how to adapt the criminal restitution process to better serve its desired compensatory ends.

The vast majority of people ordered to pay restitution in the federal criminal system do not have the ability to pay the full amount of restitution ordered, especially when interest accrues and penalties are applied. One of the primary federal statutes requiring the imposition of restitution expressly prohibits a judge from taking into consideration a defendant’s ability to pay. As such, defendants are incumbered by wildly unrealistic financial obligations and billions of dollars of restitution remain unpaid annually.

One common misperception is that those who have committed crimes requiring restitution have financially benefitted from their crime; yet often, that is not the case. Likewise, many crime victims have not incurred expenses or losses to reimburse. In fact, no loss was incurred in 30% of cases where the defendant was convicted of a federal economic crime.

Those convicted of white collar offenses are regularly ordered to pay restitution, but the image many have of a white collar defendant is based on yet another set of misconceptions. A common belief is that white collar offenders are from different demographic backgrounds than others who come into contact with the criminal legal system. White collar offenders are presumed more likely to be white, educated, wealthier, older, and from more privileged backgrounds. The reality does not match that perception.

As in the rest of the criminal legal system, those convicted of white collar offenses are disproportionately people of color, and about a third of them are female. Although many white collar offenders are older than average and have a higher level of education, race and gender do not align in the manner many anticipate.

Crime victims also do not match common assumptions. Federal government agencies were identified as the crime victim in almost 40% of federal cases in which restitution was ordered; the other 60% includes not only individuals but state agencies, corporations, and other businesses. Similarly, the federal government benefits from interest and penalties stemming from restitution payments, receiving more than \$6 million in fiscal year 2023 alone.

Because of the mismatch between the common understanding about how federal restitution operates and the on-the-ground realities, this report seeks to uncover the details of how restitution works in the federal system. A more accurate picture of federal restitution will help us better align the goals of this monetary remedy with its implementation. This realignment will aid victims in feeling more satisfied and allow for those with criminal convictions to more successfully re-enter society.

Key Findings

- \$110 billion of federal restitution debt remains outstanding, \$100 billion of which has been deemed “uncollectible.”
- The racial and gender demographics of those ordered to pay criminal restitution, including those convicted in white collar cases, mirrors the racial and gender demographics of those convicted of other crimes.
- The average amount of a federal criminal restitution order is more than \$3.3 million. This amount not only includes the “full amount” of a victim’s losses, but often includes calculations of pre-and post-judgment interest as well.
- Typically, courts are not permitted to consider a defendant’s ability to pay when calculating restitution.
- In 37% of cases where federal criminal restitution debt was paid, the victim was a federal government agency.
- Crime victims include federal agencies, insurance companies, state governments, corporations, communities and individuals.
- Criminal restitution can be ordered even when the victim does not experience a financial loss. In 30% of cases, there was no loss amount.
- The federal government received more than \$6 million in interest and penalties from restitution payments in fiscal year 2023.
- If a victim declines restitution, restitution is still required and the restitution payments go to the U.S. Treasury’s Unclaimed Funds account.
- Restitution hearings can be held after sentencing hearings, and not every circuit recognizes a defendant’s right to be present at those restitution hearings. Consequently, restitution orders can be and are issued outside the presence of the person ordered to pay, raising due process concerns.
- Courts do not have to apportion liability among defendants; when defendants are found “jointly and severally liable,” each defendant is legally responsible for the full amount of the victim’s losses.
- Double compensation for victims is not expressly prohibited by federal statutes.

Key Implications

- Criminal restitution is intended to have dual goals: victim compensation and offender punishment. The way criminal restitution operates in practice gives short shrift to compensating the average victim, focusing instead on ensuring the person ordered to pay restitution fully experiences its punitive effects. Thus both individual victims and defendants are left wanting in the process, with governmental agencies and private companies being the primary beneficiaries of the current restitution set-up.
- Criminal restitution is an ineffective system. Victims are not getting paid as promised, as illustrated by the billions of dollars of uncollected and uncollectible debt, and those with restitution orders remain enmeshed in the criminal legal system solely due to their failure to pay off that debt. Those with restitution orders are in a Sisyphean struggle to satisfy their court debt while also trying to cover the payments necessary for basic human needs, especially as they age.
- Criminal restitution statutes' prohibition on considering a defendant's ability to pay when imposing restitution likely violates the Eighth Amendment's Excessive Fines clause as well as the anti-ruination principle the court has identified in the excessive fines context. The anti-ruination principle stems from a historical reluctance to impose a financial penalty that deprives a person of their livelihood. Many restitution orders violate this principle.
- Those ordered to pay restitution often do not understand how much they will be ordered to pay, how involved the government will be with every one of their future financial decisions, and that the government now has a lien on all of their property. Particularly when restitution orders are entered at a separate time than

the sentencing hearing and outside their presence, the person being ordered to pay can experience great frustration and shock at learning how much they owe and how quickly they have to begin paying. They don't realize the government will garnish their wages—prison and otherwise, seize any monetary gifts they receive, take some of their retirement savings, and prohibit them from taking part in everyday decisions with financial implications.

Key Recommendations

This report recommends several changes to help ensure that criminal restitution does a better job of compensating non-governmental and non-corporate victims and ensuring that defendants are not overly punished through their restitution orders. These changes fall within the umbrella of seven specific policy goals:

- A. Regularize the Process for Imposing Restitution
- B. Evaluate Defendants' Ability to Pay
- C. Make Restitution Proportional to Ability to Live
- D. Compensate for Actual Losses and Prohibit Accrual of Interest & Penalties
- E. Prohibit Double Compensation & Compensation for Ordinary Costs of Business
- F. Encourage and Publicize Remissions of Restitution
- G. Track Data

Summary of Policy Recommendations

1. Both Congress and the Supreme Court should recognize that a restitution hearing is part of the sentencing process and therefore is a “critical stage” in the criminal legal process at which the defendant has a right to be present.
2. Because of the focus on incarceration at sentencing, a separate restitution hearing should be required to specifically address how much restitution should be ordered and to whom.
3. Defense counsel should be better trained to discuss the impacts of restitution orders and other legal financial obligations with their clients.
4. The federal restitution statutes should be amended so that judges are required to take into account a defendant’s financial resources and ability to pay, with an eye toward ensuring restitution orders adequately compensate victims but do not run afoul of the anti-ruination principle embedded in the Eighth Amendment’s Excessive Fines clause.
5. Defendants should only be required to reimburse actual losses.
6. Joint and several liability should be eliminated.
7. Congress should also eliminate the accrual of interest and penalties, both in the calculating of restitution awards and at the time of a person’s payment.
8. Courts should issue annual reports to those paying restitution documenting the outstanding amount of restitution, how much and to whom restitution has been paid, and the termination date of the restitution order.
9. The Supreme Court should acknowledge that any attempts to retroactively extend or change the restitution order violate the Ex Post Facto clause.
10. Pardons should be permitted for those who owe restitution orders, and a person or department should be tasked with obtaining data on restitution so that policymakers and the public can continue to better understand how it operates, and therefore more appropriately learn the strengths and weaknesses of the current system.

I. Overview of Criminal Restitution

Restitution has long been a remedy available in courts of law and equity. Historically, and on the civil side of legal processes, restitution contemplated a person's disgorgement or relinquishment of an unlawful gain. Over the past forty years, the criminal legal system adopted the traditionally civil legal concept of restitution and expanded it into a criminal remedy that more closely resembles civil damages. Through that process, victim compensation became one of the primary goals of criminal restitution.

Criminal restitution in the U.S. now bears little resemblance to restitution's common-law roots. Criminal restitution is a legal financial obligation regularly imposed as part of sentencing orders. Often criminal restitution is imposed for losses stemming from the crime of conviction, but courts also regularly impose restitution for conduct that is not part of the formal charges brought in the case or an element of a crime of conviction. Rather than being a primarily compensatory remedy, restitution has become an overly retributive method of punishing a defendant for the crime committed.

In fiscal year 2023, the total amount of restitution ordered in federal cases amounted to almost \$8.5 billion. Judges ordered restitution most often in cases involving tax offenses, arson, fraud, theft, embezzlement, and forgery, counterfeiting, or copyright infringement. Notably, there was no loss amount in about 30% of economic crime cases, but in cases in which there was a loss amount, the average loss amount was more than \$3 million.

The demographics of those convicted of federal economic crimes do not conform to the stereotypes many have. Like others charged criminally in the United States, those charged with white collar crimes are disproportionately people of color. The profile of an average victim for criminal restitution purposes also is not what many would predict. According to the most recent data, federal governmental agencies were denominated the victim in almost 40% of all federal cases. The remaining 60% is a combination of businesses, state agencies, and individuals.

A. The Framework and Impact of Criminal Restitution Obligations

Restitution is statute-based. In the federal system, two primary statutes govern restitution orders: the Victim and Witness Protection Act (VWPA) and the Mandatory Victims Restitution Act (MVRA). Each statute covers different crimes within the federal code.

1. Victim and Witness Protection Act

The first statute to make restitution a regular part of federal criminal proceedings, the Victim and Witness Protection Act (VWPA), became law in 1982, at the height of the victims' rights movement.¹ Crime victims felt the criminal legal system was not responsive to their needs, and compensation through restitution was one in a series of proposals aimed at including victims in the criminal justice process. The VWPA authorizes judges to impose restitution as part of a sentencing order.

a. Expanding the Definition of “Restitution”

The first part of the statute conceptualizes restitution in a traditional manner, requiring the defendant to “return the property to the owner” in a case involving the theft of property, or “if return ... is impossible, impractical, or inadequate,” to “pay an amount equal to ... the value of the property on the date” it was damaged, lost or destroyed.

But the rest of the statute incorporates a conception of “restitution” that breaks new ground. Under the VWPA, restitution is no longer limited to repaying the victim the value of money, goods, or services taken from them; criminal restitution now includes compensation for:

- physical injuries
- mental injuries
- emotional losses
- medical, psychiatric, or psychological treatment
- wages lost prior to sentencing
- physical and occupational therapy
- rehabilitation
- funeral costs
- “necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”

If the victim of the offense is deceased, the judge can order compensation to the estate of the decedent for any of these expenses.

b. Expanding the Definition of “Victim”

Under the VWPA, a “victim” is defined as someone who was “directly and proximately” harmed by an offense for which restitution can be ordered.² However, the VWPA also allows for compensation to individuals who are not victims of the crime of conviction: A person can be ordered to pay restitution to someone harmed in the course of a “scheme,

conspiracy, or pattern” of conduct that does not include the crime of conviction.³ Likewise, the court may order restitution to other individuals, businesses, or agencies “if agreed to by the parties in a plea agreement.”⁴

In cases with no identifiable victim, the statute also permits a court to order restitution based on the amount of “public harm” caused by the offense. Judges tend to impose this type of “community” restitution in drug cases.⁵ The statute requires 65% of the restitution award to be paid to the state entity in charge of crime victim assistance in the state where the crime occurred, and 35% to “the State entity designated to receive Federal substance abuse block grant funds.”⁶

c. Consideration of a Defendant’s Ability to Pay

The VWPA did impose some guardrails on the scope of restitution: The imposition of criminal restitution is not mandatory. Additionally, as part of a court’s consideration as to whether to impose restitution and if so, how much, the law requires the judge to consider both the amount of loss sustained and the financial resources of the defendant and “such other factors as the court deems appropriate.”⁷ In other words, the court must consider a defendant’s ability to pay, as well as other relevant factors, before imposing restitution under the VWPA.

This limitation is a critical check on outsized restitution orders, and serves to help ensure that restitution imposed under the VWPA is imposed in an amount a defendant is able to pay, thereby increasing the odds the restitution is fully paid and the victim’s expectations are met. Although the VWPA explicitly directs the court to weigh a defendant’s finances in determining the appropriate amount of criminal restitution to order, some circuits have found that the sentencing court must compensate the victim for the full amount of their losses,⁸ creating tension in scenarios where a defendant does not have the ability to pay the full amount of a victim’s losses.

d. Prohibition on Double Compensation

The initial version of the VWPA prohibited double compensation. If a crime victim already had received or expected to receive other compensation for their losses, restitution could not be imposed for that portion of the losses. The law contained a broad exception to that rule, however: a defendant could be ordered to reimburse a third party who had paid some of the victim's expenses stemming from the crime. As a practical matter, courts ordered defendants to compensate insurance

companies, medical providers, governments, and corporations for costs incurred under this provision, thereby removing the teeth from the double compensation bar.

In its current manifestation, the statute no longer contains language prohibiting double recovery for losses or language permitting compensation to third parties. Despite the removal of that language, courts continue to authorize restitution awards to third parties who have compensated victims for losses. Now, courts find the authority to order

Violence Against Women Act (VAWA) and Amy, Andy & Vicky Act (AAVA)

Federal statutes have separate, distinct restitution provisions for sex-related and domestic violence crimes. Two years after the VWPA was enacted, Congress passed the Violence Against Women Act (VAWA) as part of the infamous 1994 Crime Bill.⁹ As part of its "tough on crime" initiative, Congress included a provision in the initial bill authorizing mandatory restitution in most criminal cases. Ultimately, however, the sole mandatory restitution provision that remained in the final version of the bill authorized mandatory restitution only for sex-related and domestic violence crimes. VAWA's restitution provision¹⁰ requires defendants convicted of a federal sex-related or domestic violence crime to "pay" the victim "the full amount" of their losses and compensate them for their physical and psychological injuries that occurred as a result of the commission of the crime,¹¹ regardless of the defendant's financial means or ability to pay. VAWA was the first federal statute to mandate criminal restitution, with no consideration of a defendant's ability to pay, as part of a criminal sentence.

More than twenty years later, in 2018, the Amy, Andy and Vicky Child Pornography Victim Assistance Act (AAVA) amended the restitution provision of VAWA.¹² The amended statute now requires a mandatory minimum amount of restitution for defendants convicted of crimes related to "child sexual abuse material." The AAVA compels courts to order a defendant to pay "no less than \$3,000" in restitution to the victim of any trafficking in child pornography offense subsequent to a court's determination of the "full amount" of the victim's losses "incurred or [] reasonably projected to be incurred" based on the "relative role in the causal process" the defendant played.¹³ In other words, courts are required to impose at least a \$3,000 statutory mandatory minimum amount of restitution in child pornography cases.¹⁴ The AAVA allows courts to order restitution based solely on a rough estimate of how much harm an individual has caused, with a threshold mandatory minimum amount always required, regardless of the court's analysis and calculation of what a victim is owed.¹⁵ In awarding restitution under AAVA, the sentencing court still is not permitted to consider a defendant's ability to pay.

such compensation through the expansive definition of the term “victim.”

2. Mandatory Victim Restitution Act

Two years after the Violence Against Women Act (VAWA) made restitution mandatory for sex-related federal criminal charges (see boxed text on page 12), several members of Congress sought to require criminal restitution in the bulk of criminal cases through a new federal restitution statute: the Mandatory Victim Restitution Act (MVRA).¹⁶ This time, they were successful in their efforts. The MVRA made restitution mandatory in almost any federal criminal case with an “identifiable victim.”¹⁷ Specifically delineated in the MVRA are requirements of court-ordered restitution in cases involving violence, fraud or deceit, and crimes in which “a victim or victims has suffered a physical injury or pecuniary loss.” In 2000, certain drug crimes were added to the list.¹⁸ The court is required to order the defendant to pay the “full amount” of each victim’s losses.¹⁹

Like the definition of “victim” in the VWPA, the MVRA’s definition of victim is broad, including anyone “directly or proximately harmed” by the offense, and any person harmed by the defendant’s criminal conduct “in the course of [a] scheme, conspiracy, or pattern.”²⁰ As with the VWPA, under the MVRA, a defendant is required to return, reimburse, or compensate for:

- property losses
- past and future lost income²¹
- medical, psychological and other therapeutic expenses directly and proximately caused by the offense
- “necessary and reasonable” expenses directly related to the investigation and prosecution of the case²²
- lost income
- child care costs, transportation, and other expenses from court attendance

- necessary medical, psychological, physical, therapeutic and other professional services.²³

Courts often order defendants jointly and severally liable for a restitution amount, but restitution orders do not apportion financial liability. Typically, judges enter orders for the “full amount” of a victim’s identified losses and leave it to the defendant to “work it out” with anyone else who might be jointly and severally liable.

In contrast with the VWPA, a judge must award restitution under the MVRA.²⁴ As with VAWA, the court is not permitted to consider a defendant’s ability to pay in assessing and imposing restitution.²⁵ If the victim is underage, incompetent, deceased or incapacitated, the court may appoint someone to assume the victim’s restitution payments.²⁶

3. Other Statutory Sources of Restitution

Even when restitution is not authorized by the aforementioned federal statutes, courts have read the federal supervised release and probation statutes as giving courts “wide discretion in ordering restitution as a condition of supervised release” for any criminal offense.²⁷ Likewise, courts consistently have entered orders for restitution the parties have agreed to in a plea agreement.²⁸ Plea agreements regularly include provisions expanding the scope of restitution beyond victims of the offense of conviction, as permitted by the federal restitution statutes.²⁹

Taken collectively, these statutes therefore authorize the imposition of criminal restitution for almost every federal crime.

B. How Courts Determine the Amount of a Restitution Order

The Government bears the burden of establishing restitution amounts by a preponderance of the evidence.³⁰ The language specific to each restitution statute, as discussed above, provides the starting

point for calculating the amount of restitution owed by each defendant. The parameters of what the court can order in restitution varies depending on which statute applies to a case. As noted previously, the trial court is only permitted to consider a defendant's ability to pay when calculating restitution under the VWPA.³¹ The MVRA and other restitution statutes do not permit the court to consider a defendant's ability to pay in determining the amount owed.

1. Calculating Loss Amounts

In some instances, the amount of restitution owed is straightforward. In many cases, particularly white-collar cases, it is not. Calculating loss amounts can be complicated.³² In calculating the loss amount, a court may have to determine the value of a piece of real property or the value of a stock or security on a particular date—and sometimes, the court will have to determine the relevant date from which to calculate the loss.³³

Drawing on language from the U.S. Supreme Court decision in *Paroline v. United States*,³⁴ courts consistently note that they need not calculate the loss amounts or other restitution computations with "exact precision,"³⁵ but need "only make a reasonable determination of appropriate restitution."³⁶ As the *Paroline* Court noted, "At a general level of abstraction, a court must assess as best it can from available evidence the significance of the individual defendant's conduct ... This cannot be a precise mathematical inquiry and involves the use of discretion and sound judgment."³⁷ Consistent with the prevailing approach, courts have "eschewed rigid rules and instead taken 'a pragmatic, fact-specific approach' to loss calculation."³⁸

Sometimes criminal restitution is ordered even though the victim has not claimed a loss.³⁹ Often, these are cases in which the court orders restitution to a third party for coverage they provided to the victim as a result of the offender's conduct. In these cases, there is no unmitigated loss to cover.

Tanya Pierce wanted to help low-income New Yorkers and their families obtain permanent housing. Having resided in public housing and a shelter at an earlier point in her life, in the early 2000s Ms. Pierce became a property owner and manager to help others gain the stability she previously lacked. She was convicted at trial of conspiracy to commit wire fraud, conspiracy to commit bank fraud, and bank fraud in relation to certain properties owned by a company with which she worked. As a result of her conviction, Ms. Pierce ended up with a \$2.5 million restitution order. Her attorney did not request a restitution hearing.

Ms. Pierce began paying restitution during her incarceration and has been paying restitution for ten years now. Ms. Pierce asked the clerk's office for an accounting of her restitution payments. According to the document they provided her, no disbursements have been made since she first began paying in 2015. Attorneys from the U.S. Attorney's Office's Financial Litigation Unit contact her annually to fill out financial forms. As she says, "I served 12 years of my life after being convicted by a jury . . . of defrauding a lender of \$35,000. While in prison, not only did I lose my freedom, dignity, and liberty. I lost my ability to have children due to early onset menopause without treatment. When is enough enough?"

2. Apportionment

In the event more than one defendant is responsible for the harm, a court may apportion liability among defendants according to their respective culpability or capacity to pay. Alternately, it may hold each defendant liable for the full amount of restitution by imposing joint and several liability, a much more common scenario.⁴⁰ Courts regularly order defendants “jointly and severally liable” for the full amount of the restitution ordered, meaning that even if one co-defendant bears responsibility for the vast majority of the losses, the requirement to pay the full amount of restitution rests equally on all defendants.

3. Double Compensation

Although restoring crime victims financially is often mentioned as the primary aim of restitution statutes, double compensation is permissible in federal cases. By statute, the court can only offset, or reduce, an order of restitution if a victim is awarded compensatory damages in a parallel civil proceeding for the same loss.⁴¹ The statute is explicit: “In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.”⁴² In other words, if a victim has already been compensated for the amount of their losses from some other source—for example, through a private settlement between

A Virginia court imposed restitution on Cathie Kissick after she was convicted of one count of conspiracy to commit bank fraud, sentenced to eight years in prison, and sent to a Federal Work Camp to begin serving her sentence. Her restitution order holds her jointly and severally liable with other individuals to the FDIC for more than \$500 million in losses related to the failure of the bank where she worked. The FDIC obtained a \$335 million civil settlement from other entities for the same losses, but neither the court nor the government offset the criminal restitution judgment by the amount of that civil recovery. According to Ms. Kissick, her attorney told her that the amount of restitution ordered and the number of victims included in the order did not matter because “you’ll never be able to pay it back anyway.”

Ms. Kissick has paid \$500 toward her restitution debt every month that she has been off home confinement. She offered to pay the government a lump sum of a lesser amount to settle the restitution part of her sentence, but the Assistant United States Attorney indicated that “restitution can’t be settled for something less than the actual loss amount” because by statute, victims have a right to “full and timely restitution,” and the Fourth Circuit, in which Virginia sits, has indicated that courts do not have the authority to adjust restitution orders.

Ms. Kissick did not financially benefit from her crime. As she says, “Not all people convicted of white-collar crimes are Bernie Madoff. Many of us haven’t taken anything. We knew something was going on but were too afraid to go to the authorities. Does that make it right? No. But to sentence us to a lifetime of paying back something we didn’t take” isn’t right either. “We will ALWAYS be second class citizens. ALWAYS. It’s a hopeless feeling, knowing you will never, ever be truly free unless something changes.”

the defendant and the victim or through insurance pay-outs—that compensation cannot be factored into the determination of how much restitution a defendant owes.⁴³ Since each federal statute, with the possible exception of the VWPA, requires compensation of the “full amount” of a victim’s losses, the law permits a victim to receive a potential windfall by being compensated twice for the same loss.

C. Who Counts as a Victim Under Restitution Statutes?

Much of the appeal of restitution comes from the premise that it provides financial compensation to crime victims so that they can be “made whole,” to the extent possible. Yet the recipients of restitution are different than many would anticipate. One might imagine that most recipients of restitution are individual, perhaps vulnerable, victims of crime. However, of the federal restitution debt collected over a recent two-year period, 37% was paid to federal agencies that were designated as “crime victims.”⁴⁴ One percent of the collected debt was considered “community restitution.”⁴⁵ The remaining approximately 60% was allocated to some combination of individuals, corporations, and state and local governments.⁴⁶ No available data indicates how this 60% allocation breaks down.⁴⁷

Surprisingly, those classified as crime victims are not always the persons harmed by the crime(s) of conviction. Courts now permit restitution to be imposed for “relevant conduct.”⁴⁸ The MVRA requires and VWPA permits the defendant to remunerate such “relevant conduct.”⁴⁹ “Relevant conduct,” according to the U.S. Sentencing Guidelines, constitutes “all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.”⁵⁰ To be considered part of a “common scheme or plan,” two offenses may be connected to one another by something as disparate as common victims, common accomplices, a similar modus

operandi, or a common purpose.⁵¹ Thus the law allows for criminal restitution to be imposed for actions not committed by, or at the instruction of, a particular defendant.

Some portion of the federal restitution collected is not disbursed due to lack of accurate contact information for the victims.⁵² As of June 2017, more than \$132 million in collected restitution owed to 113,260 victims could not be disbursed because of a lack of accurate data.⁵³ Those defendants paying on those undisbursed restitution orders must continue to make payments, however, or they will incur penalties for and interest on late restitution payments.

Substitution of Victims

By statute, courts are permitted to substitute victims in the event a crime victim dies, or becomes incapacitated or incompetent.⁵⁴ However, corporate victims, and the possibility of a business dissolution or sale, are not contemplated in the language of the restitution statutes. Although courts entertain motions from corporate victims to substitute receivers or others deemed the equivalent of the business’s successors as the restitution recipient—allowing them to assume the corporate victim’s rights, most appellate courts have rejected these substitutions. In most cases, the trial court does not have any statutory authority to amend the restitution order with a new restitution recipient after the fourteen-day time limit for amending sentencing orders.⁵⁵ A majority of the attempts to substitute victims occur after this period has run. The result is that when a corporation dissolves or is purchased and subsumed into a new business, the restitution paid by the defendant seems to remain in the court’s coffers collecting interest but not being disbursed.

D. How Does Restitution Become Part of a Criminal Sentence?

Typically, a restitution order is entered as part of a defendant’s sentencing in

a criminal case. The prosecutor has the burden of proof for restitution amounts, although the probation officer assigned to write the presentence report calculates the restitution amount as well. Courts rely on both calculations in determining how much restitution to order. When the restitution amount is not contested by the defense, the court generally does not hold a restitution hearing. Rather, the court enters the amount of restitution it deems appropriate and legally authorized into the final judgment and commitment order.

1. Restitution Hearings

When the restitution amount is contested, the court often will hold a hearing at which the government calls witnesses or submits documents to establish the amount of the victim's losses. If desired, the defense may call witnesses or submit documents on the defendant's behalf as well. The government must prove up restitution by a preponderance of the evidence, but the evidentiary rules do not apply,⁵⁶ so hearsay is permitted. Often, when a restitution hearing is held, defendants have an uphill battle trying to counter the government's evidence, as some courts appear to simply credit the government's proof of loss.⁵⁷

Although the court may elect to hold a restitution hearing, none is required. The minimum requirement is that the procedures afford the defendant—through defense counsel—a “reasonable opportunity to respond” and “to be heard” on any disputed issue.⁵⁸ Thus, courts have the authority to determine restitution awards, even contested restitution awards, without holding a hearing. The district court has “broad discretion to determine the procedures for calculating the amount of restitution.”⁵⁹ Although defendants have both a constitutional and statutory right to be present at sentencing, circuits have conflicting views on whether a defendant has a right to be present

at a separate post-sentencing restitution hearing.⁶⁰ As a consequence, federal restitution awards are often entered without the defendant being present.

2. Post-Sentencing Restitution Orders

With some regularity, the government has trouble ascertaining the amount of loss or the appropriate restitution amount for one or more victims in time for sentencing. Although by statute, restitution is supposed to be ordered within ninety (90) days of sentencing,⁶¹ that deadline is often treated as optional by the courts. In a 2010 case with a missed 90-day deadline, the U.S. Supreme Court held that “[t]he fact that a sentencing court misses the statute’s 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution.”⁶²

3. Plea Agreements

If the parties have agreed to a restitution amount in their plea agreement, with rare exception, the court accepts the agreed upon amount—even if the amount is not a loss claimed by the victim of the offense of conviction—and enters a restitution order in accordance with the agreement. Later attempts to challenge the agreed upon amount tend to be unavailing, even when the restitution covers uncharged conduct or conduct outside the scope of the conviction.

4. Timing of Payments

As with any other monetary obligation imposed at sentencing, the court has the authority to require immediate payment of restitution or to allow for payment of restitution in installments, in which case the court can set the payment schedule.⁶³ Courts can authorize the collection of restitution to begin immediately or after the person finishes their sentence of incarceration. Most restitution orders require restitution to be “due and payable immediately” as a “lump

sum” payment, thereby requiring defendants with sentences of incarceration to pay a portion of the nominal wages they receive for prison work and any funds deposited in their prison account by family members or friends toward that restitution order.

If restitution is imposed as a condition of supervised release, however, the government cannot require a defendant to make immediate payment.⁶⁴ If the court orders a defendant to pay restitution as part of their period of supervised release, the government cannot commence collection efforts until the defendant is released from incarceration.⁶⁵

E. Who Is Being Ordered to Pay?

According to the most recent United States Sentencing Commission report, courts ordered restitution to be paid to the victim of the crime in 12.4 percent of federal criminal cases.⁶⁶ Judges ordered restitution most often in cases involving tax offenses (restitution ordered in 85.7% of cases), arson (75.9%), fraud, theft, or embezzlement (74.5%), and forgery, counterfeiting, or copyright infringement (67.9%).⁶⁷ Historically, those convicted of larceny and robbery crimes also incur significant restitution obligations.⁶⁸ The total amount of restitution ordered in individual cases over the course of fiscal year 2023 was around \$9.2 billion.⁶⁹

The demographics of those convicted of federal economic crimes do not necessarily conform to widely held stereotypes. Like others charged criminally in the United States, those charged with white collar crimes are disproportionately people of color. According to recent data, approximately 42.2% of those sentenced federally for economic crimes were Black, 33.7% were White, and 17.7% were Hispanic.⁷⁰ About 2/3 were male, and 1/3 female.⁷¹ Almost 90% were U.S. citizens, and on average, they were older and more educated than others convicted in federal court.⁷² About 45% of those convicted of

federal economic crimes were age 41 and older, and about half had completed at least some college.⁷³

Notably, there was no loss amount in about 30% of economic crime cases (about 1,945 cases), but in cases in which there was a loss amount, the average loss amount was \$3,321,676, and the median loss amount was \$109,900.⁷⁴

\$110 billion in restitution debt remains outstanding in criminal cases, \$100 billion of which the United States Attorney’s Offices have deemed “uncollectible” due to an inability to pay. The Department of Justice is estimated to only have collected the full amount of restitution ordered in about 5% of all cases.

Uncollectible Restitution

Not surprisingly, most restitution debt goes unpaid. According to a 2018 GAO report, \$110 billion in restitution debt remains outstanding in criminal cases, \$100 billion of which the United States Attorney’s Offices have deemed “uncollectible” due to an inability to pay.⁷⁵ The Department of Justice is estimated to only have collected the full amount of restitution ordered in about 5% of all cases.⁷⁶ U.S. Attorneys have the power to suspend collection actions on debt they deem uncollectible.⁷⁷ Although some evidence suggests that restitution is suspended with regularity,⁷⁸ anecdotal evidence indicates this practice is not common in most jurisdictions.

F. Methods of Collection

If a court orders restitution payments to be payable immediately, the government can begin collecting restitution payments immediately and can use whatever mechanisms they wish, within the parameters listed below, to collect on that order.

Permissible methods include liens, wage garnishment, and coordinating with asset forfeiture staff to use forfeited assets to pay the restitution debt.⁷⁹

Under each of the restitution statutes, the government may enforce restitution against all property and rights to property owned by a defendant, not just property obtained from or relating to the defendant's crime of conviction.⁸⁰ In other words, an order of restitution constitutes a lien in favor of the United States against all of a defendant's property and rights to property.⁸¹

1. Garnishment

The government may enforce restitution through a writ of garnishment under the Federal Debt Collection Procedures Act,⁸² a statute that provides the primary remedy for the government to collect a judgment on a

restitution debt.⁸³ A defendant may move to quash the writ, so long as they do so within 20 days of receiving the notice. They also may request a hearing, but the issues that can be addressed at that hearing are quite narrow and limited by the statute.⁸⁴ A judgment debtor who contests a writ of garnishment bears the burden of showing they are entitled to an exemption.⁸⁵ A hearing is not required if the court believes the objection is "plainly without merit, or where the objection was simply a matter of statutory interpretation."⁸⁶

Certain property is exempt from garnishment or levy. Included in that list of exempted property are certain annuity or pension payments (primarily for railroad workers or former military members), workmen's compensation payments, child support payments, and certain disability payments.⁸⁷ Primary residences and a baseline portion of wages and salary are not exempt, however, and remain subject to government liens.⁸⁸

2. Withholding of Federal Tax Refunds and Benefits

The government often relies on the Treasury Offset Program ("TOP") for restitution

Gertie Parker, age 71, was convicted of conspiracy to commit health care fraud after a trial in Louisiana. Ms. Parker's conviction was based on false billing of Medicare for unneeded psychological testing. She was ordered to pay \$7.3 million in restitution to Medicare. Yet, according to Ms. Parker, the restitution amount she was ordered to pay exceeded the amount she could have received from Medicare for that testing, by the terms of the contract she had with them. Thus her restitution order exceeded the actual loss to Medicare, as well as any intended loss.

Ms. Parker suffers from a chronic lung disease acquired from a virus in 2010. She served her prison sentence and was released in 2022. As a consequence of her chronic illness, she is unable to work. Because of the restitution she owes, she has no savings and her retirement benefits—as well as her widow's benefit from the New Orleans Fire Department—are garnished, according to Ms. Parker, at percentages beyond what the relevant statutes authorize.

collection.⁸⁹ The TOP allows federal agencies, including the Department of Justice, to submit unpaid debts to the Department of Treasury for collection. The Treasury Department then can reduce or withhold all or part of a debtor's federal benefits, including federal tax refunds, to help satisfy the unpaid debt.

3. Continuing Financial Disclosures

Even after the criminal case is closed, the government can subpoena documents to establish the defendant's financial condition in order to enforce the restitution judgment.⁹⁰ The government is not required to accept the defendant's representations regarding their assets, but rather "has the legal right" to subpoena documents in order to determine whether the defendant is being forthcoming about their assets and their financial transactions. The government can pursue this course of action regardless of whether the person is delinquent or in default on their payments.⁹¹ If the defendant fails to comply with the subpoena, the court can hold them in contempt for failing to comply without adequate excuse.⁹²

4. BOP's Inmate Financial Responsibility Program

For those who are incarcerated and owe restitution, the Bureau of Prisons (BOP) can determine the amount of a person's restitution payments.⁹³ Although district courts are not permitted to delegate to the BOP, or to a probation officer, the setting of restitution payment schedules,⁹⁴ the BOP has "independent power" to administer its Inmate Financial Responsibility Program (IFRP) and in so doing, can require defendants to pay restitution to victims at a "higher or faster rate" than specified by the sentencing court.⁹⁵ Although current BOP rules permit the exclusion of \$75 from a person's monthly payment schedule under the IFRP,⁹⁶ the rules also require a person to pay 50% of

their monthly income from infinitesimal prison wages toward their court debt. A new proposal would require that people put some percentage of the money contributed to their prison accounts from family and friends—funds intended to cover the costs of exorbitant telephone calls and necessary commissary items—to help satisfy their restitution obligations.⁹⁷ Because participation in the IFRP is purportedly "voluntary," when a person protests the payment schedule or allocation, courts generally decline to get involved.

A closer look at the program belies the characterization of a defendant's participation in the IFRP as "voluntary," particularly in light of the BOP's recent proposed changes to the IFRP, which are pending and likely to be implemented imminently.⁹⁸ Currently, a failure to participate in the program ensures placement in the lowest housing status, limits access to programming, commissary purchases, and desirable work details, and weighs negatively for furlough, and when still applicable, parole opportunities.⁹⁹ The changes outlined in the BOP's pending proposal would additionally prohibit someone who does not participate in the program from earning or applying First Step Act Time Credits and from receiving an incentive for participation in residential drug treatment programs.¹⁰⁰ Thus the IFRP places a heavy thumb on the scale to encourage "voluntary" participation in the program.

5. Termination of Restitution Obligations

The obligation to pay restitution terminates twenty (20) years from either the entry of a judgment or release from imprisonment, whichever is later.¹⁰¹ Death does not terminate the restitution obligation, as by statute, "the individual's estate will be held responsible for any unpaid balance of the restitution amount," and any lien of the U.S. government on the debtor's property continues "until the estate receives a written release of that liability."¹⁰²

G. Where Does the Money Go?

Each time someone makes a restitution payment to the clerk's office, the clerk is required to notify the Attorney General.¹⁰³ Accordingly, the designated Assistant United States Attorneys have a case tracking database documenting the payments made and those outstanding.¹⁰⁴ The clerk's office administers the payments to the restitution recipients.

Anecdotal evidence suggests that some clerk's offices wait until a certain low threshold amount of restitution comes in before issuing a check to the victim. Different clerks' offices likely have different protocols for how regularly they send out restitution payments to victims and at what minimum amount. But most send them out shortly after receiving the payment.

In some instances, a victim declines restitution. By statute and case law, this action does not relieve the defendant of their obligation to pay restitution.¹⁰⁵ If a person declines restitution before sentencing, the person can assign their interest in receiving restitution payments to the Crime Victims Fund in the Treasury.¹⁰⁶ Courts have typically not allowed such a substitution more than fourteen days after sentencing.¹⁰⁷ Restitution paid to the clerk's office but declined by the victim is held by the court in a checking account in the Treasury, accruing interest, for a period of time—sometimes one year, sometimes five years—before being transferred to the U.S. Treasury's unclaimed funds account.¹⁰⁸

H. What Are the Ramifications of Outstanding Restitution Obligations?

So long as a person has outstanding criminal restitution obligations, they remain subject to the same restrictions as anyone who is still under criminal court supervision. As a baseline, a person with a restitution obligation

continues to have prolonged contact and involvement with the criminal justice system. They also often are restricted in their ability to vote,¹⁰⁹ subject to driver's license suspensions,¹¹⁰ prohibited from running for office, prohibited from possessing a firearm, prohibited from getting certain professional licenses, among other limitations. Those with outstanding restitution obligations can be alienated from their ability to participate in the basic forms of democracy and citizenship solely because of their outstanding criminal debt. The stigma of owing criminal debt and remaining under the constant surveillance of the government remains while the restitution obligation remains.

For those who have unpaid restitution obligations that they are unable to pay, the consequences are even more significant. Revocation and incarceration remain regularly utilized options.¹¹¹ Nearly a quarter of the incarcerated population, state and federal, is detained for failure to pay their legal financial obligations,¹¹² with a failure to pay restitution regularly cited by courts as a reason for revoking a person's probation or supervised release.¹¹³

Even while incarcerated, a person can face sanctions for not keeping up with their payments. Take Jeremiah Torrence, for example. He is serving a twenty-year sentence and earns nominal money from his work in the prison mess hall. He also receives periodic \$50 payments from his family.¹¹⁴ He agreed to pay \$25 toward his restitution every three months. One pay period, he came up 60 cents short. As a consequence, he was placed in "refusal" status and his prison wages reduced to \$5 a month. He moved the court to modify his restitution obligation and to delay his repayment obligations until his release from incarceration. The court refused, saying he did not have a change of circumstance from when he was sentenced, and he could not delay his restitution payments.

The consequences of unpaid restitution are not only felt by the person who is unable to pay. Studies have shown that crime victims are less satisfied, feel more disempowered, and experience greater disillusionment when they are promised a different amount of compensation through restitution than they ultimately receive.¹¹⁵ A recent study out of Iowa found that smaller restitution orders resulted in a higher percentage of payments, and, unsurprisingly, that those who were not incarcerated were able to pay more on their restitution orders than those in prison.¹¹⁶

II. Concerns About Criminal Restitution

The appeal of compensating crime victims for their losses seems intuitive. Most would agree that requiring someone to repay another for the losses they caused, compensate for the expenses paid out as a result of their harm, and make financial remunerations in an effort to repair the damage done are desirable aims. On the surface, criminal restitution appears to meet these goals.

Yet the reality of criminal restitution is far from what Congress and other lawmakers likely envisioned. Criminal restitution has become unmoored from the reparative ideas that motivated the societal push for victim compensation and instead has become heavily punitive. Large corporations barely experience the losses which indigent defendants struggle to repay for years on end. Federal agencies know that restitution debt has ballooned and do not depend on the reimbursement payments from those with criminal records to finance their daily work. And when victims either decline restitution or are unable to be located, leaving money sitting in government coffers while the person ordered to pay the restitution is barely able to pay medical bills and mortgage or rent payments, the system is broken. Rather than a restorative mechanism, restitution has become yet another overly punitive criminal legal financial obligation that keeps those with convictions enmeshed in the criminal legal system for twenty years and often much longer.

Federal restitution statutes have always served a dual purpose: they are intended to compensate victims and to punish

defendants.¹¹⁷ Yet as restitution has expanded beyond the straightforward repayment of a victim's losses and compensation for specific and narrowly-delineated harms, its punitive goals have eclipsed any other aim. When unpaid restitution is in the billions of dollars, everyday crime victims remain largely uncompensated, and thousands of people who have otherwise completed their criminal sentences remain under persistent, onerous financial scrutiny from the federal government, restitution is not working.

A. Failure to Evaluate Ability to Pay

One of the most striking features of the recent changes to federal criminal restitution is the prohibition on a judge's consideration of a person's ability, or inability, to pay the restitution at the time they enter a restitution order. The stark implications of this congressional choice are apparent in the billions of dollars of uncollected and uncollectible debt, and the decreased satisfaction victims experience when led to expect, or even hope for, more than nominal compensation. If courts were permitted to consider a defendant's financial resources, a more realistic restitution order would be assessed and entered, a greater number of restitution obligations would be paid in full, and victims would be more likely to receive the compensation they deserve.

By requiring judges to ignore evidence of a defendant's inability to pay the full amount of a victim's losses, Congress has shown that punishment is more important than

compensation. When faced with the average multi-million dollar restitution order, a person who has served a carceral sentence and is coming out with a federal criminal conviction can feel overwhelmed by the reality that they will never be able to meet that obligation. Even the average person without a criminal conviction would feel daunted by owing that much money. And in many cases, the person owing restitution feels additional frustration because they never obtained any financial benefit from their criminal conduct, and to the extent they did, the government inevitably seized those assets at the time of their arrest or sentencing. Requiring a person to make even small payments for twenty years barely makes a dent in the compensation of a victim's multi-million dollar loss.

Making a victim whole simply is not the aim in this scenario. Rather, the aim is punitive. Our system is set up to make sure the defendant continues to feel the full weight of their wrong, and the helplessness of being unable to right that wrong in the way the court has ordered.

Courts currently have the ability to adjust the amount of restitution payments due to changed economic circumstances, but courts are very narrow in their interpretation of what counts as a changed economic circumstance.¹¹⁸ Additionally, although the court can change the schedule or amount of restitution payments, the court cannot reduce the total restitution amount based on a defendant's inability to pay the entire amount, even if it does find a change in the person's economic circumstances.

B. Corporate & Government "Victims"

Although businesses were certainly contemplated as crime victims with the passage of the predominant federal restitution statutes, businesses, insurance agencies, state governments and federal

agencies were not the primary impetus for passing restitution statutes. Compensating ordinary people who experienced harms and losses as a result of criminal activity drove the creation of the restitution statutes. Yet many restitution obligations are owed to governmental and corporate entities rather than to private individuals.

1. Federal and State Agency Crime Victims

As noted earlier, federal agencies are a common crime victim for federal restitution purposes, with recent two-year data showing they are the restitution recipient in almost 40% of cases.¹¹⁹ With tax fraud as the most common charge for which restitution is imposed, the Internal Revenue Service is likely a top beneficiary of restitution payments.¹²⁰ In addition to ordering compensation for tax losses, courts often include interest as part of the restitution amount owed to the IRS, as federal tax law imposes interest on tax debts in order to compensate the government for the "time-value"¹²¹ of its tax loss. Courts have incorporated that statutory allowance into the final restitution amount owed.¹²² Thus the scope of what counts as the "full amount" of a victim's losses continues to expand beyond the actual loss incurred.

Several federal agencies are tasked with investigating crimes, most of which fall under the auspices of the Department of Justice and have budgets to support their investigative work. Troublingly, under the MVRA and a 2018 Supreme Court case, a court can order a defendant to reimburse the costs of a government's investigation into the defendant's criminal conduct.¹²³ These investigative costs are regularly included as part of the claimed losses by state and federal governmental agencies.¹²⁴ One might presume that legislative bodies generally authorize sufficient funds for state and federal agencies to operate without needing the financial input

from restitution payments to balance budgets. Yet increasingly, governmental agencies are dependent on restitution, forfeiture, fees, and surcharges to fund their activities and balance their budget.¹²⁵ In the 1980s, the Conference of State Court Administrators acknowledged a “burgeoning reliance upon courts to generate revenue to fund both the courts and other functions of government.”¹²⁶ Researchers have identified the 2008 recession as the start of an escalation in the use of monetary sanctions in the criminal legal system to make up for the lost revenue from other sources.¹²⁷

Funding a criminal legal system on the backs of those without means, as the American Bar Association has noted, is “anathema to public access to the courts. All components of the justice system, including courts, prosecutors, public defenders, pre-trial services, and probation, should be sufficiently funded from public revenue sources and not reliant on fees, costs, surcharges, or assessments levied against criminal defendants or people sanctioned for civil infractions.”¹²⁸

From a purely economic standpoint, this approach also is unsound.¹²⁹ Outstanding restitution debt is upward of \$110 billion, \$100 billion of which has been deemed uncollectible, making it financially ineffective to rely on defendants paying that debt for any portion of a jurisdiction’s budget. In addition to the lack of ability to collect much of the debt to fund the government work, government agencies frequently hire people whose primary job is to collect that debt. Certain U.S. Attorney positions, for example, are created solely to try and collect criminal (and civil) debt.¹³⁰ Attorneys in Financial Litigation Units (FLUs) spend countless hours searching for debtors and their assets. According to the DOJ Inspector General, criminal debts account for the majority of the FLUs’ caseloads.¹³¹ In other words, the federal government incurs the additional salary and benefits costs of employing individuals in

each of the 93 U.S. Attorneys Offices across the country to seek and collect criminal debt, including restitution debt.

Over a recent two-year period, when FLUs were focused on trying to increase the amount of restitution debt collected, DOJ collected \$2.95 billion in restitution debt, most of which was debt imposed over that same two-year period.¹³² Sixteen percent of those with restitution imposed during that two-year-period paid the entirety of their restitution debt.¹³³ In total, the DOJ collected 4% of the amount of restitution imposed during that two-year period.¹³⁴ Yet \$110 billion in debt remained outstanding, \$100 billion of it deemed uncollectible.¹³⁵ That is a significant investment of resources for a very low rate of return.¹³⁶

2. Insurance Company Crime Victims

Insurance companies are also regular recipients of criminal restitution. A case out of Tennessee is illustrative. A health insurance company paid medical bills for the two injured occupants in a car accident in an involuntary manslaughter case; the defendant’s car insurance company paid out claims as well.¹³⁷ At sentencing, the court ordered the defendant to pay back the insurance companies as part of his restitution obligation. Likewise, in a mail fraud and perjury case, a West Virginia court ordered the defendants to reimburse the insurance company the costs of litigating the bad faith claim against the defendant, after the insurance agency denied coverage and the defendant sued.¹³⁸ In an arson case out of Iowa, the court awarded both pre- and post-judgment interest to the insurance agency as well. Relying on a Second Circuit case, the court found, “If sentencing courts are required to compensate victims for ‘the full amount of each victim’s losses,’ there is no reason to exclude losses that result from the deprivation of the victim’s ability to put its money to productive use.”¹³⁹ Thus when criminal conduct is involved, insurance

agencies often get paid in restitution more than they pay out in insurance claims.

The imposition of restitution owed to insurance companies is especially problematic, as costs incurred by insurance agencies are part of the standard assumption of risk that carriers undertake as part of their normal course of business. Defendants are regularly required to reimburse insurance companies the amounts they pay out in federal cases through restitution awards, and to pay the pre- and post-judgment interest on those monies.

C. Government as Creditor

As mentioned previously, the government is often the beneficiary of restitution payments, both directly and indirectly. One of the indirect ways the government financially benefits is through the collection of interest and penalties on restitution payments.¹⁴⁰ Unclaimed restitution eventually reverts to the government as well.

1. Interest on Outstanding Restitution

By statute, interest accrues on any amount of outstanding restitution over \$2500.¹⁴¹ Although the Attorney General can waive such interest or limit the amount of interest or the time period over which it is collected,¹⁴² that does not seem to happen with regularity. In one recent case, for example, a defendant ordered to pay around \$7,500 in restitution at his sentencing in 1996 had accrued sufficient interest that by the time of his release from prison in 2022, he owed almost double the amount initially ordered due to interest.¹⁴³

2. Penalties for Late and Outstanding Restitution Payments

Additionally, if a restitution payment is deemed “delinquent,” meaning it is more than 30 days late,¹⁴⁴ federal law requires the defendant to pay “as a penalty” an amount equal to 10% of

the principal amount that is delinquent. If the defendant is in “default” on restitution payments, meaning more than 90 days late, a 15% penalty on the principal amount in default is required.¹⁴⁵ The imposition of “late fees” on restitution payments further emphasizes the punitive character of criminal restitution, particularly when those fees do not inure to the benefit of the victim but rather to the government itself as the money collector. Against a backdrop of large amounts of uncollected and uncollectible restitution debt, this punitive approach arguably undermines the legitimacy of a mechanism purportedly aimed both at making victims whole and at helping defendants understand the harm they have caused.

For many who owe federal restitution obligations, the debt feels like a life sentence.

According to the Department of Justice’s annual financial report, in fiscal year 2023 alone, the DOJ collected more than \$6.7 million in “fines, penalties, interest and other revenue” attributable to late payments that were transmitted to the U.S. Treasury General Fund.¹⁴⁶ Consequently, government coffers are improved by the significant number of late payments for federal restitution.

D. Lifelong Impact

For many who owe federal restitution obligations, the debt feels like a life sentence. Every financial decision one makes is subject to intense governmental scrutiny and the possibility of the government seizing any modicum of money that might come in—through the homestead exemption for home ownership, through a gift bestowed at the death of a loved one, through

widow's retirement benefits, through the sale of a home in order to downsize as retirement approaches, or through the receipt of retirement benefits as part of one's employment. The government maintains a lien on every bit of property a person owns so long as restitution is owed. Normal life choices that people not under criminal legal supervision make daily are subject to close examination, governmental review, and the seizure of assets if one elects to accept the money. The degree of government involvement in any financial decision is prohibitive for most changes one might want to make to conserve finances for retirement, to support one's children, or to simply live a semblance of a normal life after completing all of one's sentence but the restitution payments.

1. Expiration of Restitution Obligations

As indicated earlier, criminal restitution debt expires the later of twenty years from the entry of the restitution order, or from the person's release from prison.¹⁴⁷ Consequently, someone who is ordered to serve some amount of incarceration but is also ordered to pay restitution immediately will often be paying on their restitution debt for much longer than twenty years. Anecdotally, some courts, either on government motion or *sua sponte*, have extended the twenty-year period, despite this action constituting both a Constitutional ex post facto and a statutory violation, according to some circuit courts.¹⁴⁸ By federal statute, in most cases, even if the person owing restitution passes away, the restitution order does not disappear or "abate."¹⁴⁹

2. Restitution Obligations After Death

The abatement doctrine provides that if a defendant dies while their appeal is still pending, the defendant's indictment or conviction is treated as though it legally never happened. The conviction is vacated or the indictment dismissed. Thus, in some jurisdictions, if a case is pending on direct appeal and the defendant

dies, the restitution order is treated as if it was never entered.¹⁵⁰ Courts do not agree, however, on whether the abatement doctrine cuts off unfulfilled obligations under a restitution order.¹⁵¹ Plea bargains often include provisions that state, "Any restitution judgment is intended to and will survive Defendant, notwithstanding the abatement of any underlying criminal conviction."¹⁵²

Mary Kay Rogers is a single mother of six, one of whom has autism. She was convicted of conspiracy to commit bank fraud. Since her release from prison in 2013, she has worked long hours to get her life back on track and to ensure she is not a burden to her children. She turned 65 last year and is hoping to be able to slow down on her work schedule and gradually retire.

She has a restitution order for \$4 million to National City Bank, a bank that has now become part of PNC Bank, although National City Bank has stated Ms. Rogers was not responsible for the \$4 million loan at issue in the case. Ms. Rogers has continued to pay her restitution regularly. When Ms. Rogers attempted to confirm whether PNC Bank has received any restitution payments from the Department of Justice, they were unable to verify, directing her to the DOJ. The Attorney General's Office indicated that the loan documents related to her case had been shredded.

Because of her outstanding restitution obligation, her monthly Social Security payments have been reduced by about 25%. Ms. Rogers asks, "Why do I and so many others have a noose of restitution around our necks for the rest of our lives?"

III. Proposals for Reform

Despite the presence of many concerning features of criminal restitution, many issues can be addressed by taking several proactive measures. Most of these require Congressional action. Some of them are likely to be politically challenging, but all of them are worth enacting so that criminal restitution is truly meeting its aim of compensating victims of crimes for tangible losses in a transparent and less burdensome manner. Other changes may require action by the Supreme Court to clarify how to interpret the Constitution, ideally in a way that recognizes criminal restitution's true character and scope. And finally, some changes can be effectuated through training of defense counsel to better advise their clients on restitution issues.

A. Regularize the Process for Imposing Restitution

Those ordered to pay restitution often feel caught off guard by the amount they are ordered to pay, the fact that they can be ordered to pay restitution even without a clear loss to the victim, and the long-term consequences of having an outstanding restitution order. In cases where restitution is included as a part of a plea agreement, too often attorneys do not focus on the monetary aspects of the likely sentence when discussing the terms of the agreement with their clients. Thus, those ordered to pay restitution are surprised and even taken aback when they learn of the amount of restitution they owe, how much they will have to pay each month, and how closely

their finances will be monitored. Many do not understand that due to the restitution order, the government now has a lien on every bit of their property, even property having no relation to the criminal case. This reality can come as quite a shock.

1. A Right to Have and Be Present at Restitution Hearings

This surreal experience can become even more upsetting when a person learns that the restitution was ordered at a separate hearing at which they were not present. As mentioned earlier, at times, the court does not decide the restitution amount at sentencing. When the government is still seeking clarity on who the victims are and how much they owe, the court can schedule a post-sentencing hearing within ninety days. Although defendants have both a constitutional and statutory right to be present at sentencing, circuits have taken different positions on whether they have a right to be present at separate post-sentencing restitution hearings.¹⁵³ Some circuits find a defendant does have a right to be present; others find they do not. At times, courts schedule a post-sentencing restitution hearing but ultimately do not hold the hearing, relying on prior representations by counsel to determine the restitution amount. As a consequence, it is not uncommon for restitution orders to be entered without the defendant being present and, in the event of inattentive counsel, without the defendant knowing the restitution order was entered until they receive notice that their assets are

being seized and any income, including prison wages, garnished.

In many federal cases, lawyers and their clients are focused on whether the person convicted is facing incarceration, and if so, how much. This is the case both if the client elects to go to trial and—as is far more likely—if the client elects to take a plea that has been offered. As a result, some lawyers do not sufficiently discuss with their clients the monetary consequences when weighing decisions about whether to take the case to trial or take the plea offer. Even when those conversations are had, sometimes attorneys fail to challenge the restitution calculations, again because they often are focused on the carceral portion of the sentence.

The Supreme Court has held that defense counsel is constitutionally required to discuss the possible immigration consequences of a plea offer with their client.¹⁵⁴ Consistent with ABA recommended standards for defense counsel, the Court should find the Constitution requires a similar conversation with regard to legal financial obligations.¹⁵⁵ The imposition of these penalties has serious financial ramifications both for the defendant and their families that often have significant impacts. Counsel should be constitutionally required to discuss those ramifications with their client in discussions of any plea offer.

Even if the Supreme Court declines to make this a constitutionally required conversation, defense attorneys should be trained and encouraged to speak with their clients about their restitution obligations, as well as any other legal financial obligations that might be imposed.

Courts also should be required to hold a restitution hearing that is separate and apart from a person's sentencing hearing. The overriding concern at sentencing is the carceral portion of the sentence, often preventing due attention from being paid,

by both the lawyers and the defendant, to the financial implications of a criminal sentence—which can carry as long-lasting an impact as the period of incarceration. The current reality that permits courts to determine contested restitution awards without a hearing and without a defendant present must cease. Independent restitution hearings should become a regular part of the sentencing process.

Likewise, a person facing the imposition of a restitution order should have a right to be present at their restitution hearing. A defendant has a constitutional right to be present at every “critical stage” of criminal proceedings.¹⁵⁶ Sentencing has been deemed a critical stage. Federal Rule of Criminal Procedure 43 also confers a statutory right to be present at every trial stage, including sentencing.¹⁵⁷ District and circuit courts have taken different positions on whether a defendant has a right, statutory and/or constitutional, to be present at a restitution hearing. The Supreme Court should find a defendant has a constitutional right to be present at a restitution hearing, thereby resolving a circuit split on the issue. Congress or the Rules Committee of the U.S. Judicial Conference should amend Rule 43 to clarify that a defendant has a statutory right to be present at such a hearing, even if the restitution hearing is held after the sentencing.

2. A Right to a Jury Determination of the Restitution Amount

The Supreme Court should take up the issue of whether the Sixth Amendment jury trial right applies to criminal restitution, as it does to criminal fines.¹⁵⁸ The Supreme Court's Sixth Amendment jurisprudence, articulated in *Apprendi v. New Jersey*, requires that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt.”¹⁵⁹ Finding that a criminal fine is a criminal penalty subject to Sixth Amendment protections, the Court in *Southern Union v. United States* further clarified that any fact that increases the maximum amount of a criminal fine also must be proven to a jury beyond a reasonable doubt.¹⁶⁰

Every circuit to consider the question has determined that because restitution has no statutory maximum amount, the Sixth Amendment jury trial right does not apply to criminal restitution.¹⁶¹ However, as one circuit judge has recognized, “Restitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed.”¹⁶² Someone has to make a factual determination as to what the “full amount” is. Several circuits have recognized the tension between the current state of circuit precedent and the Supreme Court’s Sixth Amendment jurisprudence.¹⁶³ Yet none have been willing to take the necessary step to bring their cases in line with what the Constitution requires. Consistent with the Sixth Amendment, the jury should be the fact finder that determines what the maximum amount of restitution is using a beyond a reasonable doubt standard, just as they do with criminal fines.

3. Mandatory Apportionment of Restitution

Congress should remove joint and several liability as an option and require the court to apportion the losses among the various defendants according to their respective culpability. Such a change is a matter of basic fairness. This way, each defendant is only financially responsible for the losses they caused—not for the losses caused by any other person.

4. Restitution Settlements

In the event a person is ordered to pay restitution in an amount they are unlikely to be able to pay over the course of twenty

years, United States Attorneys’ Offices and defendants should be able to negotiate a settlement on the amount of restitution owing. This approach would permit crime victims to have a more realistic sense of what compensation they are likely to receive, and would alleviate the unrealistic financial burdens on those ordered to pay millions of dollars in restitution there is no chance they will ever be able to pay. If Congressional action is necessary to permit restitution settlements, Congress should pass such legislation.

5. Annual Restitution Statements

After restitution is imposed, a person owing and paying restitution should be provided, on request, with an annual statement from the clerk’s office documenting what they have paid in, how much they still owe on the primary restitution obligation, how much interest they owe, how much has been paid out, and to what victims. If the person’s restitution order is subject to joint and several liability, the court’s report also should include the amount paid by co-defendants toward the total joint and several liability restitution amount. The print-out should note the termination date of the restitution obligation. Anecdotal evidence suggests that obtaining this information is a challenge in many jurisdictions. Allowing for transparency about where money is going helps ensure the legitimacy of the system.

B. Evaluate Defendants’ Ability to Pay

As noted, federal judges are mostly required to impose criminal restitution without any consideration of a defendant’s financial situation or ability to pay. Although the court is required to consider a person’s financial resources in determining the amount each payment should be and the schedule of those payments,¹⁶⁴ too often, people with criminal legal debt are required to pay such a significant portion of their monthly income to the court

Imposing smaller restitution orders tends to leave victims more satisfied because their expectations are met, rather than when they feel there is something they deserve but won't receive.

that it limits and undermines their access to basic human needs. Excessive penalties are both harmful and counterproductive. If financial penalties are required, those penalties should be such that people remain able to pay their bills and support their families in addition to paying off their court financial obligations.

Recalibrating how the law addresses restitution does not mean losing sight of the primary reason mandatory restitution first became required: victim compensation. Allowing judges to consider a defendant's financial capabilities in making a restitution decision will increase the likelihood that the person is ordered to pay an amount they can successfully meet, likely increasing victim satisfaction in the process. As noted earlier, previous studies have found imposing smaller restitution orders tends to leave victims more satisfied because their expectations are met, rather than when they feel there is something they deserve but won't receive.

The American Bar Association's Guidelines on Court Fines and Fees recommends that before any sanction for nonpayment of fines, fees, or restitution, the court should hold an "ability-to-pay" hearing.¹⁶⁵ This same assessment should be made before imposing any financial penalty, including restitution. "Ability-to-pay" determinations should be based on objective, concrete criteria grounded in what someone can afford to pay at the time of the hearing, not what the court

thinks they might be able to pay prospectively or under different circumstances.¹⁶⁶

If a victim declines to accept restitution, a defendant should not be ordered to pay restitution. Other forms of punishment are sufficient without the need to impose restitution when the victim does not desire that form of compensation.

C. Make Restitution Proportional to Ability to Live

In the context of the Eighth Amendment Excessive Fines clause, the Supreme Court has emphasized the critical role a person's ability to earn a livelihood should play when conducting an excessive fines analysis. Both the majority opinion and Justice Thomas's concurrence in *Timbs v. Indiana* highlight the legal system's historical reluctance to impose a financial penalty that deprives a person of their livelihood.¹⁶⁷ As Justice Thomas noted, the excessive fines clause prohibits the economic "ruin of [a] criminal."¹⁶⁸

Several circuit courts have applied the excessive fines clause in evaluating criminal restitution.¹⁶⁹ Those courts who reject this analysis do so because they dispute the conclusion that criminal restitution is punitive in nature.¹⁷⁰ Although criminal restitution purports to be primarily compensatory, the reality is that its outsized punitive aims now dwarf any compensatory purpose. As such, defense counsel should raise the Eighth Amendment argument with regard to large restitution orders, and courts should analyze restitution through an excessive fines lens with the anti-ruination principle in mind.¹⁷¹

Currently, all restitution statutes, with the exception of the VWPA, run afoul of the Eighth Amendment since they don't permit courts to consider a person's ability to pay when imposing criminal restitution. A constitutionally adequate excessive fines analysis must permit judges the opportunity to consider ability to

pay. The provision of the restitution statutes requiring courts to impose the “full amount” of a victim’s losses, even if it results in the loss of a person’s livelihood, is in contravention of the Eighth Amendment’s protections. These statutes should be amended to remove the mandatory requirement that a full amount of the victim’s losses be ordered, and instead mirror the VWPA, giving the judge discretion to take into consideration “the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant’s dependents, and such other factors as the court deems appropriate.”

Relatedly, given that criminal restitution’s punitive aims have long overtaken its compensatory justifications, the government should be prohibited by the Ex Post Facto clause from continuing to enforce payment of a restitution order that has run its statutory course.¹⁷² In fact, the Supreme Court recently granted certiorari on a case that will address part of this Ex Post Facto argument in the context of the MVRA.¹⁷³ Until the issue is resolved by the Court, lower courts should find retroactive extension of the payment period beyond the maximum time authorized by statute to be a constitutional violation.

Statutory Changes

Several other statutory changes could help honor the anti-ruination principle. Congress should add an exemption on seizures of primary residences and a baseline of salary or wages, as it does for property seizures in other contexts.¹⁷⁴ Rather than restitution orders remaining collectible for twenty years after the entry of a restitution order or a person’s release from incarceration, whichever is later, restitution orders should expire after ten years.

Spousal benefits should remain free from seizure, even in community property states like Louisiana. Recognizing that as one ages, one’s ability to work declines and, consequently, so does their income level, caps on how much Social Security can be seized

should be implemented and lessened from the current 15% cap to 10%. Courts should make an individualized determination of how much other pension and retirement income should be exempt from garnishment, based on the size of the pension or retirement, while also ensuring the person has the ability to cover the basic costs of living and health care as one ages. Although federal statutes address this issue to some degree already, the caps remain sufficiently high that they render someone facing the challenges of older age unable to adequately address those medical, financial, and other changed realities.

Courts also should scrutinize the penalties incurred for being “delinquent” or in “default” in one’s payment. At least one circuit has found that although a city’s civil fines for parking meter violations were not disproportionate to the underlying offense, the late fee penalty might be, remanding the case to the trial court to make that determination.¹⁷⁵ Applying the excessive fines clause to these penalties, particularly taking into consideration the anti-ruination principle, is another way to keep criminal restitution orders appropriately balanced.

D. Compensate for Actual Losses and Prohibit the Accrual of Interest & Penalties

The federal government makes a significant amount of money off the interest and penalties stemming from late restitution payments. Interest payments only serve as a windfall to the government when paid, and in the vast majority of cases—where interest remains unpaid—it becomes part of the uncollectible criminal restitution debt and further enmeshes people in the criminal legal system without serving the compensatory goal of criminal restitution. Interest solely serves to further tether someone to the court system by requiring money beyond what the court has already ordered. Congress should prohibit courts and their clerks from charging

defendants interest on unpaid legal financial obligations, including criminal restitution.

Penalties for nonpayment or late payment of restitution are equally problematic. When more than 90% of criminal restitution is not being paid because people don't have the ability to pay it—making it “uncollectible”—imposing penalties for non-payment serves no goal other than to place the debtor further into debt, further decreasing the chances that the victim is going to receive the compensation ordered. If people were failing to make their restitution payments in an effort to flout the court or to escape judgment, a common but unsupported narrative, perhaps late-pay penalties might make sense. There is no evidence that the imposition of late fees or penalties increase the likelihood of timely payment. They simply add additional debt to the already significant amount the person already owes. Consequently, Congress should remove the penalties for non-payment of criminal restitution.

Courts should narrow the category of losses compensated to only those that the government can prove as actual losses. Likewise, when courts are ordering criminal defendants to pay pre- and post-judgment interest as part of their initial restitution order on the theory that the person has “deprived” the victim of the ability to “put its money to productive use,”¹⁷⁶ restitution can become limitless. This contemplation of pre- and post-judgment interest is nowhere to be found in any of the restitution statutes, and Congress should make clear that such interest goes beyond the “full amount” of a victim's losses and should not be ordered.

E. Prohibit Double Compensation & Compensation for Ordinary Costs of Business

The MVRA prohibits a sentencing court from considering the fact that a victim has

received or is entitled to receive compensation for the same loss “from insurance or any other source” in determining the amount of restitution.¹⁷⁷ The statute goes on to indicate that if a victim *has* received compensation from insurance or some other source, the court should order that restitution amount payable to the insurance company or other source rather than the victim.¹⁷⁸ However, in practice, victims sometimes do receive both compensation from an outside source as well as a court order requiring the defendant to pay restitution for that same loss.¹⁷⁹

Many times, the other compensation a victim receives comes from an insurance company, as the statute indicates, but it can also come from other places. For example, when certain assets are seized or forfeited, the sale of that property can go toward the restitution amount owed.¹⁸⁰ Likewise, the person ordered to pay restitution or someone associated with them sometimes pays the amount of the losses prior to the criminal case being brought. The court is prohibited from factoring these payments into the restitution calculation.

Although courts try hard to ensure that no victim receives a windfall, provisions prohibiting courts from factoring in other payments should be removed. If a victim has already received compensation for the losses, the only possible reason to still require a defendant to pay for that same loss is punitive. The court can order a fine if the judge feels a monetary punishment is in order. Victims should not be permitted to get double compensation for their losses, and particularly not when the decision whether to offset the amount of restitution order is solely dependent on the judge one appears before.

In addition to making these clarifications to the existing restitution statutes, Congress should also prohibit restitution from being ordered for insurance companies and government agencies who are doing what they do during their ordinary course of

business. For example, only in cases of actual losses—such as when a person commits arson on a property in order to collect insurance and then receives that insurance payment—should restitution be payable to insurance companies. In cases where one would expect the insurance company to include an exclusion for criminal conduct or bad acts, the company’s failure to do so should not result in a restitution payment despite that failure. If an insurance company chooses to cover a victim’s losses, that coverage should come from the premiums charged as part of the insurer’s ordinary course of business. A defendant should not be ordered to pay for those costs through restitution.

Likewise, restitution payments should not go to pay for the costs of investigations when government agencies are tasked with conducting investigations as part of their daily business. Any expenses incurred that are part of the daily operations of a government agency should not be reimbursable through criminal restitution. Congress should make these changes to ensure that businesses and governmental agencies are not getting double compensation for their everyday jobs.

F. Encourage and Publicize Remissions of Restitution

The current application for pardons on the website of the U.S. Pardon Attorney does not explicitly allow for applications for remission of restitution. In light of the extraordinary

and often unpayable sums due through restitution, allowing a person to apply for a remission of restitution should be both permitted and encouraged, and the process for how to seek such a remission should be well publicized. Pardons that include the elimination of outstanding restitution obligations should also be encouraged. Both restitution remissions and pardons are consistent with the policies laid out in the Department of Justice’s Manual.¹⁸¹

G. Track Data

Data on the true scope of criminal restitution—how much is owed nationwide, how much is collected, how it is disbursed, and where payments go—is lacking, both in the federal system and in states across the country.¹⁸² Without that data, on a practical day-to-day level, it can be challenging to ascertain how restitution is working, where the problem areas are, and what best practices are with regard to ordering, collecting, and disbursing restitution.¹⁸³ This data should be tracked, along with the demographic data of both the person paying restitution and the victim receiving it. On a broader systemic level, collecting and analyzing data can help us figure out whether the restitution process is working well, whether it is operating in a non-discriminatory manner, and where the strengths and weaknesses are in our current system.

Conclusion

Although ostensibly different in nature than other criminal fines and fees due to its purported focus on victim compensation, in practice criminal restitution shares many of the same features and problems as other criminal legal financial obligations: the disproportionate impact on people of color, the ability to keep people ensnared in the criminal legal system for years on end solely due to an inability to pay a legal debt, and a government benefitting from the meager finances of indigent defendants. Several statutory fixes could change the system to make it both more satisfactory for victims of crimes and more realistic for those convicted of a federal crime. Clarity from the Supreme Court on what constitutional protections a person with an outstanding restitution order is owed would also be beneficial. And an independent

oversight authority should be ordered to track the data. With more reliable data about what is working and what is not, government resources could be spent less on trying to track down uncollectible criminal debts and more on other pressing issues. Victims would receive more of the restitution they are owed, and we could give those convicted of crimes a viable way to serve their sentence and move on with their lives, having fully paid their reasonable debt to society, both figuratively and literally.

Endnotes

- 1 Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 350-53 (2013).
- 2 18 U.S.C. § 3663(a)(2).
- 3 *Id.* See also, e.g., United States v. Brock-Davis, 504 F.3d 991, 998-99 (9th Cir. 2007) ("After the amendment [to the VWPA in 1990], restitution may be ordered for losses to persons harmed in the course of the defendant's scheme *even beyond the counts of conviction.*") (citing United States v. Rutgard, 116 F.3d 1270, 1294 (9th Cir. 1997)); United States v. Hensley, 91 F.3d 274 (1st Cir. 1996)(finding defendant's fraudulent, but uncharged, acquisition of software from a computer company was sufficiently similar to conduct alleged in the indictment to permit the district court to rule that the former acquisition came within unitary scheme to defraud, and thus to require restitution payments to computer company).
- 4 18 U.S.C. § 3663(a)(3).
- 5 See, e.g., United States v. Leman, 574 Fed. App'x 699, 707-08 (6th Cir. 2014) (upholding "community restitution" order in conspiracy to distribute oxycodone and methamphetamine case); United States v. Bloomgren, 42 Fed. App'x 147 (10th Cir. 2002) (permitting "community restitution" in conspiracy to distribute methamphetamine case); United States v. Ushery, 2013 WL 458347 (M.D. Pa. 2013).
- 6 18 U.S.C. § 3663(c)(3).
- 7 18 U.S.C. § 3663(a)(1)(B)(i)(II).
- 8 United States v. Diaz, 865 F.3d 168 (4th Cir. 2017); 18 U.S.C. § 3664(f)(1)(A).
- 9 Officially titled the "Violent Crime Control and Law Enforcement Act of 1994."
- 10 Pub. L. No. 103-322, sec. 40113 (1994), currently codified primarily at 18 U.S.C. § § 2248 and 2259.
- 11 18 U.S.C. § 2259(b)(1).
- 12 The Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (AVAA) was codified primarily at 18 U.S.C. §§ 2259, 2259A, and 2259B. Although defendants in child pornography cases already were required to pay restitution to victims under VAWA, AVAA delineated particular restitution amounts the court is required to impose based on the type of crime for which a defendant is convicted. Applying specifically to defendants convicted of child pornography crimes, the statute requires the court to assess restitution in amounts ranging from \$3,000 to \$50,000.
- 13 18 U.S.C. § 2259(b)(2)(A), (B)(2018).
- 14 The requirement of a statutory mandatory minimum payment has the potential to implicate the Sixth Amendment jury trial right under *Alleyne v. United States*, 570 U.S. 99, 103 (2013), a fact recognized by at least one circuit court recently. See *United States v. Caudillo*, 110 F.4th 808, 812 (5th Cir. 2024). However, to date, no court has squarely addressed this issue.
- 15 To some degree, AVAA codified parts of the Supreme Court's holding in *Paroline v. United States*. 572 U.S. 434, 460 (2014). The Supreme Court in *Paroline* provided a non-exhaustive list of factors for courts to consider as "rough guideposts" to determine the appropriate amount of restitution under Section 2259. *Id.* at 460. According to *Paroline*, the factors courts may consider include: the number of past defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved; whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role. *Id.*
- 16 Prior to the passage of the VWPA, restitution appeared infrequently in the criminal context. As of 1925, federal judges were authorized to order restitution only as a condition of probation and only for the amount of the victim's actual loss of property or its equivalent value. Woody R. Clermont, *It's Never Too Late to Make Amends: Two Wrongs Don't Protect a Victim's Right to Restitution*, 35 NOVA L. REV. 363, 373 (2011). Under this system, an order for restitution was dependent on the judicial officer's determination of a defendant's ability to pay. *Id.* After the passage of the VWPA, there remained a sense that restitution was not being sufficiently utilized, yet was a remedy desired by victims. See, e.g., OFF. FOR VICTIMS OF CRIME, OFF. JUST. PROGRAMS, U.S. DEP'T OF JUST., NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 357 (1998) https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/OVC_Archives/directions/pdfxt/chap15.pdf ("Despite the passage of federal and state legislation, restitution remains one of the most underenforced victim rights within the criminal and juvenile justice systems.").
- 17 18 U.S.C. § 3663A(c)(1)(B).

- 18 See 21 U.S.C. § 856. If a person leases or rents property for the purpose of manufacturing, distributing, or using drugs, or makes property available for any of those purposes, they can be required to reimburse the owner of the property for any damage to the property, or value of the property, caused by the making or selling of drugs there. *Id.*
- 19 18 U.S.C. § 3664(f)(1)(A).
- 20 18 U.S.C. § 3663A(a)(2).
- 21 See, e.g., *United States v. Serawop*, 505 F.3d 1112 (10th Cir. 2007) (upholding restitution award of more than \$325,000 for future lost earnings from age seventeen and the amount of tribal stipend victim would have received over the course of her life in a voluntary manslaughter case where father was convicted of killing his three-month-old Native American daughter).
- 22 Investigation costs incurred by the government are recoverable as restitution, but private investigations by the victim for its own investigative and other purposes are not. *Lagos v. United States*, 584 U.S. 579 (2018).
- 23 18 U.S.C. § 3663A(a)(4).
- 24 18 U.S.C. § 3663A (“The Court shall order ...”).
- 25 18 U.S.C. § 3664(f)(1)(A).
- 26 18 U.S.C. § 3663A(a)(2).
- 27 *United States v. Kilpatrick*, 798 F.3d 365, 391 (6th Cir. 2015) (citing *United States v. Batson*, 608 F.3d 630, 635 (9th Cir. 2010) (“[The Supervised Release Statute [18 U.S.C. § 3583(d)], together with the Probation Statute [18 U.S.C. § 3563], unambiguously authorizes federal courts to order restitution as a condition of supervised release for any criminal offense, including one under Title 26, for which supervised release is properly imposed.”)).
- 28 See, e.g., *United States v. Mobley*, 2023 U.S. 165962, at *3 (6th Cir. 2023). See also 18 U.S.C. § 3663(a)(3); 18 U.S.C. § 3663A(a)(3).
- 29 18 U.S.C. § 3663A(a)(3).
- 30 18 U.S.C. § 3664(e).
- 31 18 U.S.C. § 3663(a)(1)(B)(i)(II).
- 32 See, e.g., *United States v. Naphaeng*, 906 F.3d 173, 179 (1st Cir. 2018) (noting confusion between calculations of loss amount for sentencing guidelines purposes and calculations of loss amount for restitution statutes).
- 33 See, e.g., *United States v. Hilliard*, 823 Fed. App’x 80, 84 (3d Cir. 2020) (involving a determination of whether the losses of another co-conspirator were reasonably foreseeable in a bank fraud case, and if so, which ones); *United States v. Boccagna*, 450 F.3d 107, 113-19 (2d Cir. 2007) (calculating how to value property in a case involving false statements to HUD); *United States v. Gordon*, 393 F.3d 1044, 1051-60 (9th Cir. 2004) (examining methods for determining the amount of loss in an embezzlement case).
- 34 572 U.S. 434 (2014). *Paroline* was a child pornography possession case in which the court took on the issue of how to ascertain the amount of harm caused by a defendant when the potential pool of defendants is numerous and proximate cause difficult to pin down. *Paroline* addressed the contours of restitution in the context of VAWA, 18 U.S.C. § 2259, but the general principle has been applied to the other restitution statutes as well.
- 35 *United States v. Anthony*, 942 F.3d 955, 970 (10th Cir. 2019) (quoting *United States v. Ferdman*, 779 F.3d 1129, 1133 (10th Cir. 2015)).
- 36 *United States v. Kearney*, 672 F.3d 81, 100 (1st Cir. 2012).
- 37 *Paroline*, 572 U.S. at 459.
- 38 *United States v. Gonzalez*, 2024 WL 3511016 (D. Me. 2024) (quoting *United States v. Prange*, 771 F.3d 17, 35 (1st Cir. 2014)).
- 39 See, e.g., *United States v. Cliatt*, 338 F.3d 1089, 1090-93 (9th Cir. 2003) (finding that because victim would have been able to seek reimbursement had she been responsible to pay for her own care, reimbursement of medical and mental health treatment victim received for free through the military healthcare system was justified); *United States v. Hackett*, 311 F.3d 989, 990-93 (9th Cir. 2002).
- 40 18 U.S.C. § 3664(h); *United States v. Ochoa*, 58 F.4th 556, 561 (1st Cir. 2023).
- 41 18 U.S.C. § 3664(j)(2) (A court may only offset restitution “by any amount later recovered as compensatory damages for the same loss by the victim in any Federal civil proceeding; and any State civil proceeding, to the extent provided by the law of the State.”).

- 42 18 U.S.C. § 3664(f)(a)(B).
- 43 Some courts have permitted other compensation to the victim to count as a credit toward the defendant's restitution obligation, but courts consistently decline to reduce the amount of the restitution ordered. *See, e.g., United States v. Miell*, 744 F.Supp.2d 961 (N.D. Iowa 2010). *Cf. United States v. Elson*, 577 F.3d 713, 733 (6th Cir. 2009).
- 44 In fact, individual crime victims should be prioritized over any United States government entity that is identified as a victim when it comes to restitution. 18 U.S.C. § 3664(i) ("In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution."). The prevalence of federal agency victims indicates that most of the victims receiving restitution are not individual victims, given the statutory requirement that they be prioritized in awarding restitution.
- 45 U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 23 (Feb. 2018), <https://www.gao.gov/assets/gao-18-203.pdf>.
- 46 *Id.*
- 47 Some evidence suggests that corporations and businesses receive a substantial portion of this 60%. Financial institution fraud and government benefits fraud are consistently among the top five most prevalent type of economic crimes. COURTNEY SEMISCH, U.S. SENT'G COMM'N, WHAT DOES FEDERAL ECONOMIC CRIME REALLY LOOK LIKE? 1 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190130_Econ-Crime.pdf. Mortgage fraud historically has been among the top economic crimes as well. *Id.* at 7. Additionally, federal prosecutions for insurance fraud, health care fraud, and government procurement fraud are common. Each of these tends to have either a government or corporate victim. We know that judges order restitution in almost 75% of fraud, theft, and embezzlement cases, and typically the amount of restitution in that type of fraud case is not small. Thus one might reasonably conclude that some significant portion of the remaining 60% of restitution not going to federal agencies is going to banks, insurance companies, health care companies, or other businesses.
- 48 *See, e.g., United States v. Dickerson*, 370 F.3d 1330, 1341 (11th Cir. 2004). *But see United States v. Bennis*, 740 F.3d 370, 377–78 (5th Cir. 2014) (holding restitution cannot be ordered for relevant conduct, only for the offense of conviction); *United States v. Freeman*, 741 F.3d 426, 434–35 (4th Cir. 2014) (holding restitution must be for "victims of the offense of conviction" not "'relevant conduct,' 'a related offense,' or a 'factually relevant offense'").
- 49 18 U.S.C. § 3663A(a)(1), (2); 18 U.S.C. § 3663(a)(1)(A), (a)(2).
- 50 U.S. SENT'G GUIDELINES MANUAL § 1B1.3 (a)(2)(2023).
- 51 U.S. SENT'G GUIDELINES MANUAL § 1B1.3 cmt. 5(B).
- 52 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 24. By statute, it is incumbent on the victim to notify the court or the Attorney General's office of a change of address. 18 U.S.C. § 3612(b)(1)(G).
- 53 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 24. Ordinarily, when a victim dies, for example, or a small business closes, someone files to substitute the named victim for an appropriate substitute—the heirs in the case of a victim passing away, the owners of the business in the event of a business closing. In the instances here, no one has sought to replace the named victim with a substitute.
- There is a circuit split on when and whether it is appropriate to substitute the Crime Victims Fund as the substitute payee. *Compare United States v. Johnson*, 378 F.3d 230, 244–46 (2d Cir. 2004), and *United States v. Hankins*, 858 F.3d 1273, 1279 (9th Cir. 2017), *with United States v. Pawlinski*, 374 F.3d 536, 539–40 (7th Cir. 2004), and *United States v. Speakman*, 594 F.3d 1165, 1179 (10th Cir. 2010).
- 54 18 U.S.C. § 3663(a)(2); 18 U.S.C. § 3663A(a)(2).
- 55 *See, e.g., United States v. Harvey*, 20 F.4th 71 (1st Cir. 2021). *See also Fed. R. Crim. Pro.* 35. Only a few exceptions, listed in 18 U.S.C. § 3664(o), allow a court to modify a restitution order under certain narrow circumstances, none of which apply in this type of scenario.
- 56 Fed. R. Evid. 1101(d)(3).
- 57 *Cf. United States v. Robl*, 8 F.4th 515, 527 (7th Cir. 2021).
- 58 *United States v. Nazzari*, 644 Fed. App'x 655, 661 (6th Cir. 2016).
- 59 *Robl*, 8 F.4th at 527.
- 60 *Compare Robl*, 8 F.4th at 528, *with United States v. Lockwood*, 165 F.3d 919 (9th Cir. 1998), and *United States v. Johnson*, 2009 WL 4043551, at *6 (D. Neb. 2009).

- 61 18 U.S.C. § 3664(d)(5).
- 62 *Dolan v. United States*, 560 U.S. 605, 611 (2010).
- 63 18 U.S.C. § 3572(d).
- 64 *United States v. Westbrook*, 858 F.3d 317, 328 (5th Cir. 2017), *vacated on other grounds by* *Westbrook v. United States*, 584 U.S. 901 (2018); *United States v. Hassebrock*, 663 F.3d 906, 924 (7th Cir. 2011).
- 65 *United States v. Lavigne*, 734 F. Supp.3d 654 (E.D. Mich. 2024).
- 66 The cases referred to here are cases with individual, as opposed to corporate or institutional defendants. UNITED STATES SENTENCING COMMISSION, FISCAL YEAR 2021: OVERVIEW OF FEDERAL CRIMINAL CASES 10 (Apr. 2022).
- 67 *Id.*
- 68 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 18.
- 69 U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbls. 17 & O-2 (subtracting amount of restitution ordered in cases involving the sentencing of organizational offenders from the total amount of restitution ordered in all cases), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023_Sourcebook.pdf.
- 70 U.S. SENT'G COMM'N, QUICKFACTS, CREDIT CARD AND OTHER FINANCIAL INSTRUMENT FRAUD (2024), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Credit_Card_Fraud_FY23.pdf. See also U.S. SENT'G COMM'N, SOURCEBOOK, *supra* note 69, at Tbl. E-1 (noting similar recent statistics).
- 71 U.S. SENT'G COMM'N, SOURCEBOOK, *supra* note 69, at Tbl. E-2.
- 72 *Id.*, at Tbls. E-3 & E-5.
- 73 *Id.*
- 74 *Id.*, at Tbl. E-6.
- 75 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 25.
- 76 *Id.*, at 23.
- 77 *Id.*, at 25.
- 78 *Id.*, at 25-26.
- 79 *Id.*, at 12, 35.
- 80 See 18 U.S.C. § 3613(a); see also 18 U.S.C. §§ 3613(f), 3664(m)(1).
- 81 See 18 U.S.C. § 3613(c).
- 82 28 U.S.C. § 3001, et seq.
- 83 28 U.S.C. §§ 3001(a), 3002(3), 3205(c); see also, e.g., *United States v. Cohan*, 798 F.3d 84, 89 (2d Cir. 2015) ("The government may enforce restitution orders arising from criminal convictions using the practices and procedures for the enforcement of a civil judgment under the federal or state law as set forth in the [FDCA]"); *United States v. Yielding*, 657 F.3d 722, 726 (8th Cir. 2011).
- 84 28 U.S.C. § 3202(d). The issues are limited to: the validity of any claim of exemption by the judgment debtor; compliance with any statutory requirement for the issuance of the post-judgment remedy granted; and if the judgment is in default, and "only to the extent that the Constitution or another law of the United States provides a right to a hearing on the issue, to (A) the probable validity of the claim for the debt which is merged in the judgment; and (B) the existence of good cause for setting aside such judgment." *Id.*
- 85 *United States v. Sawaf*, 74 F.3d 119, 122 (6th Cir. 1996).
- 86 *United States v. Miller*, 588 F. Supp. 2d 789, 797 (W.D. Mich. 2008) (collecting cases).
- 87 18 U.S.C. § 3613(a)(1); 26 U.S.C. § 6334(a)(1)-(8), (10) & (12).

- 88 *Id.* This failure to include exemptions for primary residences and baseline wages and salary is in contrast to the bankruptcy, tax and civil systems, each of which allows a debtor to exempt their primary residences (up to certain values in the bankruptcy context) and other basic income from judgment and creditor liens. See 11 U.S.C. § 522(b), (d) (exemptions from bankruptcy judgments); 15 U.S.C. § 1673 (restriction on garnishment of wages); 26 U.S.C. § 6344(a)(9), (13) (exemptions from tax liens); 28 U.S.C. § 3014 (exemptions from debt collections under Fair Debt Collection Procedures Act). See *also* 5A FED. PROC., L. ED. §9:847 (2024).
- 89 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 28.
- 90 "The United States may have discovery regarding the financial condition of the debtor in the manner in which discovery is authorized by the Federal Rules of Civil Procedure in an action on a claim for a debt." 28 U.S.C. § 3015(a).
- 91 *United States v. Scott*, 2009 WL 10703347, at *3 (E.D.N.Y. Jan. 7, 2009); see *also* *United States v. Badoolah*, 2021 WL 3675147, at *4 (E.D.N.Y. Aug. 19, 2021) (stating that Section 3015(a) "plainly allows the government to discover financial information pursuant to FDCPA civil procedures after restitution is imposed"); *United States v. Price*, 2020 WL 7647368, at *6 (D. Mont. Nov. 18, 2020) ("The U.S. Attorney's Office may employ discovery tools to enforce the collection of restitution and accurately determine amounts owed to victims").
- 92 See FED. R. CIV. PRO. 45(g) ("The court for the district where compliance is required ... may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it").
- 93 See, e.g., *United States v. Gonzales*, 2024 WL 466757 (9th Cir. 2024).
- 94 *United States v. Gunning*, 401 F.3d 1145, 1150 (9th Cir. 2005).
- 95 *United States v. Lemoine*, 546 F.3d 1042, 1044 (9th Cir. 2008).
- 96 Inmate Financial Responsibility Program, 28 C.F.R. § 545.11(b) (1999).
- 97 88 Fed. Reg. 1331 (Jan. 10, 2023). A letter from the NACDL to the BOP's General Counsel lays out well the concerns regarding these proposed changes. See Letter from NACDL to BOP General Counsel's Office (Mar. 10, 2023), <https://www.nacdl.org/Document/CommentsBOPRestitutionProposal-03102023>.
- 98 The BOP's recent proposals appear to stem from media attention to three high profile cases of wealthy and famous individuals, individuals who are not reflective of the vast majority of federal inmates. See *id.*, at 1.
- 99 Inmate Financial Responsibility Program, 28 C.F.R. § 545.11(c), (d) (1999).
- 100 88 FED. REG. 1331 (Jan. 10, 2023). See *also* Letter from NACDL to BOP General Counsel's Office (Mar. 10, 2023), <https://www.nacdl.org/Document/CommentsBOPRestitutionProposal-03102023>.
- 101 18 U.S.C. § 3613(b).
- 102 *Id.*
- 103 18 U.S.C. § 3612(a).
- 104 U.S. ATTYS' MANUAL, § 3-9.210 (2014).
- 105 18 U.S.C. § 3664(g)(2); *United States v. Johnson*, 378 F.3d 230, 244 (2d Cir. 2004).
- 106 18 U.S.C. § 3664(g)(2).
- 107 See, e.g., *United States v. O'Hara*, 114 F.4th 557, 560-63 (6th Cir. 2024). But see *United States v. Hankins*, 858 F.3d 1273, 1279 (9th Cir. 2017). See *also* Kaeli M. Whalley, Note, *The Mandatory Victims Restitution Act: The Court's Authority to Redirect Disclaimed Payments*, 46 W. NEW ENG. L. REV. 345 (2024) (discussing circuit split on courts' ability to redirect disclaimed payments to the Crime Victims Fund).
- 108 28 U.S.C. §§ 2042, 2043, 2045. See *also* *About Unclaimed Funds*, U.S. DIST. CT. N. DIST. CAL., <https://cand.uscourts.gov/about/clerks-office/finance/unclaimed-funds-information/> (last viewed Aug. 28, 2024).
- 109 Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards, and Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIMINOLOGY 471, 475 (2018). See, e.g., Fla. Stat. Ann. § 98.0751(2)(a)(5)(a) (2021).
- 110 Martin et al., *supra* note 109, at 475. Cf. *State v. Pyette*, 159 P.3d 232 (Mont. 2007) (finding no due process violation for statute to impose driver's license suspension for failure to pay criminal fine until time fine is paid; statute also imposes driver's license suspension for failure to pay criminal restitution); *Milwaukee v. Kilgore*, 532 N.W.2d 690 (Wisc. 1995) (constitutional to suspend driver's licenses for failure to pay restitution).

- 111 *United States v. Downey*, 2024 WL 489298 (9th Cir. 2024).
- 112 See, e.g., COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/7D78-AVBE>] (confirming that in some jurisdictions, 20% of jail inmates are incarcerated for failure to pay their criminal justice debts).
- 113 Wendy Heller, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL'Y 219, 226 (2006).
- 114 *United States v. Torrence*, 2024 WL 3822693, at *1 (N.D. Ohio 2024).
- 115 Cortney E. Lollar, *What Is Criminal Restitution*, 100 IOWA L. REV. 93, 127 n.124 (2014). See also R. BARRY RUBACK ET AL., CRIME, LAW, & JUSTICE PROGRAM, PENN STATE UNIVERSITY, EVALUATION OF BEST PRACTICES IN RESTITUTION AND VICTIM COMPENSATION ORDERS AND PAYMENTS 123 (2006); Robert C. Davis et al., *Restitution: The Victim's Viewpoint*, 15 JUST. SYS. J. 746, 751-54 (1992).
- 116 Jessica Gonzales-Bricker, *The Importance of Making Data-Driven Restitution Decisions*, COUNCIL OF STATE GOV'T JUST. CTR., <https://csgjusticecenter.org/2022/04/28/the-importance-of-making-data-driven-restitution-decisions/> (Apr. 28, 2022).
- 117 B. S. Yamey, *Reports of Committees: Compensation for Victims of Crimes of Violence*, 24 MOD. L. REV. 744, 744 (1961) (discussing legislative intent behind restitution provision in Victim and Witness Protection Act of 1982); 140 Cong. Rec. S121 (daily ed. Aug. 22, 1994) (statement of Sen. Joseph Biden) (discussing intent of restitution provision in Violence Against Women Act of 1994); S. Rep. No. 104-179, at 12 (1995) (discussing intent of restitution provision in Mandatory Victims Restitution Act of 1996).
- 118 18 U.S.C. § 3664(o). Courts are divided on whether the list of circumstances that might allow for modification of a restitution order after judgment in 18 U.S.C. § 3664(o) is exhaustive. See *United States v. Phillips*, 9 F.4th 382, 385 (6th Cir. 2021) (collecting cases).
- 119 As noted earlier, *supra* note 44, federal law requires individual crime victims to be prioritized over any United States government entity that is identified as a victim when it comes to restitution. 18 U.S.C. § 3664(i) ("In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution."). The prevalence of federal agency victims indicates that most of the victims receiving restitution are not individual victims, given the statutory requirement that they be prioritized in awarding restitution.
- 120 See, e.g., *United States v. Lawrence*, 557 F. App'x 520, 531 (6th Cir. 2014) (recognizing that "if a defendant has been convicted of a tax crime under Title 26, and a court finds that the government has suffered a loss, the court may order the defendant to make restitution as a special condition of supervised release"); *United States v. Perry*, 714 F.3d 570 (8th Cir. 2013); *United States v. Qurachi*, 634 F.3d 669, 703-04 (2d Cir. 2011).
- 121 Under 26 U.S.C. § 6601, if a delinquent tax has not been paid by the last date prescribed for payment, "interest on such amount ... shall be paid for the period from such last date to the date paid." Thus, typically, the interest or "time-value" of the loss is calculated for the period of time from the commission of the crime to the imposition of the restitution order. See, e.g., *United States v. Hassebrock*, 663 F.3d 906, 926 (7th Cir. 2011) ("In this case, the district court adopted the PSR's conclusions in their entirety. The PSR arrived at an amount of restitution (\$997,582.98) based on a tax amount owed of \$593,557, representing actual loss, plus interest until the date of sentencing hearing."); *Qurachi*, 634 F.3d at 703-04.
- 122 See 26 U.S.C. § 6601. See also *Perry*, 714 F.3d at 577.
- 123 *Lagos v. United States*, 584 U.S. 577 (2018).
- 124 See, e.g., *United States v. Haileselassie*, 668 F.3d 1033, 1034 (8th Cir. 2012); *United States v. De La Fuente*, 353 F.3d 766, 768-69, 772-74 (9th Cir. 2003); *United States v. Quillen*, 335 F.3d 219 (3d Cir. 2003).
- 125 Alexander Billy & Neel U. Sukhatme, *Creditor Courts*, 85 OHIO L.J. 195 (2024); Cortney E. Lollar, *The Costs of the Punishment Clause*, 106 MINN. L. REV. 1827, 1874-78 (2022); Lollar, *supra* note 115, at 142-48; PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, HAMILTON PROJECT, NINE FACTS ABOUT MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 6 (Mar. 2019). For example, one recent study found that thirty-eight cities received ten percent or more of their revenue from fines and fees. One town relied on fines and fees for 30.4 percent of its revenue. *Targeted Fines and Fees Against Communities of Color: Civil Rights and Constitutional Implications*, U.S. COMM'N ON CIV. RTS. 21 (Sept. 2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [<https://perma.cc/6NB7-YDSJ>]. Cf. Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 948-49 (2017).
- 126 *Targeted Fines and Fees*, *supra* note 125, at 8 (quoting CARL REYNOLDS & JEFF HALL, 2011-2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS 1 (2012)).
- 127 *Targeted Fines and Fees*, *supra* note 125, at 10.
- 128 ABA RESOLUTION 114 REPORT 5 (2018) (adopting ABA Guidelines on Court Fines and Fees), <https://www.americanbar.org/content/dam/aba/administrative/news/2018-AM-Resolutions/114.pdf>.

- 129 Cortney E. Lollar, *Eliminating the Criminal Debt Exception for Debtors' Prisons*, 98 N.C. L. REV. 427, 434 (2020); Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93, 109-10 (2015). See also Lula Hagos, *Debunking Criminal Restitution*, 123 MICH. L. REV. 470, 500 (2024) ("Criminal restitution amplifies economic inequalities in the criminal system. Because criminal restitution bears directly on wealth, it reinforces existing patterns of economic injustice, particularly along racial lines.... Criminal restitution further compromises economic mobility, keeping people stuck in continuing cycles of criminal debt and court surveillance.").
- 130 U.S. ATTYS' MANUAL § 3-9.120 (2014).
- 131 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 2 n.5.
- 132 *Id.* at 23.
- 133 *Id.*
- 134 *Id.*
- 135 *Id.* at 25.
- 136 Cf. Billy & Sukhatme, *supra* note 125, at 233-34 (discussing how in Florida courts, the amount spent trying to collect debt relative to how much debt is collected "actually drains resources").
- 137 United States States v. Sizemore, 850 F.3d 821, 823-24, 828-29 (6th Cir. 2017). See also Cortney E. Lollar, *Punishment Through Restitution*, 34 FED. SEN'G REP. 98, 100 (2022).
- 138 United States v. Gibson, 92 F.Supp.2d 562, 563-64 (S.D. W.Va. 2000).
- 139 United States v. Weimer, 63 F.Supp.3d 922, 932 (N.D. Iowa 2014)(citing *Qurachi*, 634 F.3d at 703).
- 140 U.S. DEP'T OF JUST. AGENCY FINANCIAL REPORT, FY 2023, 94 (Nov. 2023) ("other custodial collections on behalf of the General Fund of the U.S. Government occur for interest, fines, and penalties.").
- 141 18 U.S.C. § 3612(f)(1).
- 142 18 U.S.C. § 3612(f)(3).
- 143 Brief of Defendant-Appellant, *United States v. Ellingburg*, 2023 WL 8895567, at *8-9 (Dec. 14, 2023); United States v. Ellingburg, 113 F.4th 839, 840 (8th Cir. 2024) (*per curiam*), *petition for cert. granted*, 2025 WL 1020364 (Apr. 7, 2025) (No. 24-482).
- 144 18 U.S.C. § 3572(h).
- 145 18 U.S.C. § 3612(g).
- 146 U.S. DEP'T OF JUST. AGENCY FINANCIAL REPORT, FY 2023, 95 (Nov. 2023).
- 147 18 U.S.C § 3613(b).
- 148 See, e.g., United States v. Norwood, 49 F.4th 189 (3d Cir. 2022)("Thus, any extension of the liability period is a *de facto* increase of a criminal punishment."). Cf. Petition for Writ of Certiorari, *Ellingburg v. United States*, 113 F.4th 839 (8th Cir. 2024) (*per curiam*), *petition for cert. granted*, 2025 WL 1020364 (Apr. 7, 2025)(No. 24-482) (highlighting circuit split and seeking certiorari on question of whether criminal restitution under the MVRA is penal for purposes of the ex post facto clause).
- 149 According to 18 U.S.C. § 3613(b), "The individual's estate will be held responsible for any unpaid balance of the restitution amount," and any lien of the U.S. government on the debtor's property continues "until the estate receives a written release of that liability."
- 150 United States v. Koblan, 478 F.3d 1324, 1325-26 (11th Cir. 2007); United States v. Logal, 106 F.3d 1547, 1551-52 (11th Cir. 1997).
- 151 CHARLES DOYLE, CONGRESSIONAL RESEARCH SERVICE, RESTITUTION IN FEDERAL CRIMINAL CASES: A SKETCH 8 (Oct. 15, 2019).
- 152 United States v. Whipple-Duncan, 2024 WL 981142 (11th Cir. 2024).
- 153 See Robl, 8 F.4th at 528. But see Lockwood, 165 F.3d 919; Johnson, 2009 WL 4043551, at *6.
- 154 Padilla v. Kentucky, 559 U.S. 356 (2010).
- 155 AMER. BAR. ASSOC., CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, *Standard 4-5.4: Consideration of Collateral Consequences* (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

156 *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

157 Fed. R. Crim. Pro. 43(a)(3).

158 Justice Gorsuch has repeatedly encouraged the Court to address this issue, regularly filing dissents from the Supreme Court's denials of certiorari when the question of the jury trial right to restitution is presented. See *Rimlawi v. United States*, 604 U.S. ___, 145 S.Ct. 518 (2025); (Gorsuch, J., dissenting from denial of certiorari); *Hester v. United States*, 586 U.S. 1104, 1106–1107 (2019) (Gorsuch, J., dissenting from denial of certiorari). In his recent dissent, he wrote:

Consistent with the Sixth Amendment's promise of a trial by jury, this Court has held that "only a jury may find facts that increase the prescribed range of penalties to which a criminal defendant is exposed." That means a jury must find both those facts that increase a criminal defendant's exposure to imprisonment and any facts that increase his exposure to monetary fines. If all that is true, it is difficult to see how a judge's factual findings might suffice to increase a criminal defendant's exposure to a restitution award. As this Court has recognized, the scope of the constitutional jury right must be informed by the historical role of the jury at common law. And more than a little evidence suggests that, at the time of the founding, juries found the facts needed to justify criminal restitution awards.

I would have granted review in this case to resolve whether the Fifth Circuit's decision comports with this Court's precedents and the Constitution's original meaning. In the absence of this Court's review, I can only hope that federal and state courts will continue to consider carefully the Sixth Amendment's application to criminal restitution orders. Cf. *State v. Davison*, 973 N.W. 2d 276, 279 (Iowa 2022) ("restitution must be based on jury findings"). The right to trial by jury should mean no less today than it did at the Nation's founding.

Rimlawi, 604 U.S. at ___, 145 S.Ct. at 518-19.

159 530 U.S. 466, 490 (2000).

160 567 U.S. 343 (2012).

161 Lollar, *Punishment*, *supra* note 137, at 100-01.

162 *United States v. Leahy*, 438 F.3d 328, 342-43 (3d Cir. 2006) (en banc) (McKee, J., concurring in part and dissenting in part).

163 See, e.g., *United States v. Elliott*, 600 F. App'x 225, 227 (5th Cir. 2015) ("We recognize that there is some tension between statements of the Supreme Court in *Southern Union Co. v. United States* and our court's conclusion that the Sixth Amendment does not require a jury to find the amount of restitution."); *United States v. Green*, 722 F.3d 1146, 1150 (9th Cir. 2013) ("*Southern Union* provides reason to believe *Apprendi* might apply to restitution."); *Leahy*, 438 F.3d at 339–48 (McKee, J., concurring in part and dissenting in part)(recognizing that the logic of *Apprendi* requires jury findings to support an award of criminal restitution).

164 See 18 U.S.C. § 3664(f)(2), (4).

165 ABA PRESIDENTIAL TASK FORCE ON BLDG. PUB. TR. IN THE AM. JUSTICE SYS., TEN GUIDELINES ON COURT FINES AND FEES 4 (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf [<https://perma.cc/YM59-CKZ6>].

166 SHARON BRETT & MITALI NAGRECHA, CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM 13-14 (2019), <https://perma.cc/XCV9-BYWZ>].

167 *Timbs v. Indiana*, 586 U.S. 146, 151-52 (2019); *Id.* at 162-63 (J. Thomas, concurring).

168 Judith A. Resnik, (*Un*)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin," 129 YALE L.J. FORUM 365, 368 (2020) (citing *Timbs*, 586 U.S. at 162-63 (J. Thomas, concurring)).

169 *United States v. Dighlawi*, 452 F. App'x 758, 760 (9th Cir. 2011) (finding restitution subject to excessive fines clause of Eighth Amendment); *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (analyzing restitution award under excessive fines clause); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003) (finding restitution subject to excessive fines clause of the Eighth Amendment); *United States v. Bollin*, 264 F.3d 391, 419–20 (4th Cir. 2001) (applying excessive fines analysis to restitution award); *United States v. Dubose*, 146 F.3d 1141, 1144–46 (9th Cir. 1998) (holding criminal restitution subject to Eighth Amendment excessive fines clause).

170 *U.S. Commodity Futures Trading Comm'n v. Escobio*, 833 Fed. App'x 768, 773 (11th Cir. 2020) ("we doubt that [restitution] should be considered a punishment for purposes of the Excessive Fines Clause"); *United States v. Gozes-Wagner*, 977 F.3d 323, 347–48 (5th Cir. 2020) ("the Supreme Court has never held that the Excessive Fines Clause applies to restitution awards"). But see *United States v. Suarez*, 215 Fed App'x 872 (11th Cir. 2007) (analyzing and rejecting argument that a particular restitution award violated the excessive fines clause, with no suggestion that the clause did not apply to restitution) and *United States v. Hasson*, 333 F.3d 1264, 1280 (11th Cir. 2003) (same).

- 171 Resnik, *supra* note 168, at 368-69.
- 172 See, e.g., Petition for Writ of Certiorari, *Ellingburg v. United States*, 113 F.4th 839 (8th Cir. 2024) (*per curiam*), *petition for cert. granted*, 2025 WL 1020364 (Apr. 7, 2025)(No. 24-482) (arguing that enforcement of payment beyond the authorized twenty-year statutory period violates the Ex Post Facto clause of the U.S. Constitution).
- 173 *Ellingburg v. United States*, ___ S.Ct. ___, 2025 WL 1020364 (2025).
- 174 This could be done by adding additional cross-references in 18 U.S.C. § 3613(a)(1) to 26 U.S.C. §§ 6334(a)(9) and (a)(13).
- 175 *Pimentel v. City of Los Angeles*, 974 F.3d 917, 925-26 (9th Cir. 2020).
- 176 *Weimer*, 63 F.Supp.3d at 932 (citing *Qurachi*, 634 F.3d at 703); *United States v. Le*, 2024 WL 694034 (N.D. Cal. 2024) (ordering pre-judgment interest under VWPA).
- 177 18 U.S.C. § 3664(f)(1)(B).
- 178 18 U.S.C. § 3664(j)(1).
- 179 See, e.g., *Miell*, 744 F.Supp.2d at 968 (“Even if Miell has somehow fully compensated AFI for the claimed loss, other compensation to a victim cannot be offset against a defendant’s restitution amount.”).
- 180 See, e.g., *United States v. Ruff*, 420 F.2d 772 (8th Cir. 2005).
- 181 See, e.g., U.S. DEP’T OF JUST. MANUAL, § 9-140.112(D) (2018)(a “felony conviction may result in a wide variety of legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon.”). A felony conviction accompanied by a restitution award that is beyond a person’s ability to pay seems to fall squarely in this category.
- 182 U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 45; *Gonzales-Bricker*, *supra* note 116.
- 183 *Gonzales-Bricker*, *supra* note 116.



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