

VICTIM COMPENSATION THROUGH SENTENCING

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A crime victim in America is victimized twice: first, by an attacker and second, by a system which ignores crime victims and their needs. The criminal justice system designed to prevent crime and punish violations ignores the very citizens the system is designed to protect. This shortcoming has not escaped notice or criticism by legislators or the public.¹ A vocal force of crime victims has emerged, marshalling public opinion and political support to establish an active role for victims in criminal prosecutions.²

Many factors combined to spark the crime victims' lobby. Citizens became outraged when they compared the careful treatment of accused felons given court-appointed attorneys and the indifference afforded the felons' victims.³ Victims felt dehumanized in criminal proceedings that treated their injuries as mere evidence.⁴ Many victims resented that their personal injury became a societal injury punished through the criminal justice system, leaving them to seek civil redress.⁵

Those factors combined to create a general dissatisfaction with the justice system's treatment of crime victims. Given this dissatisfaction, the law followed the path predicted by Holmes, changing to correspond with the actual feelings and demands of the community.⁶ Thus, legislators responded with state victim compensation funds,⁷ crime victim restitution in sentencing,⁸ probation⁹ and parole¹⁰

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¹ 128 *Cong. Rec.* §3853-61 (daily ed. April 22, 1982) (statements of Senators Heinz, Laxalt, Jackson, Mitchell, Moynihan, Metzenbaum and Chiles); *S. Rep. No. 532*, 97th Cong., 2d Sess. 10, reprinted in 1982 *U.S. Code & Ad. News* 2515, 2516; *Older Americans Fighting the Fear of Crime: Hearing before the Senate Special Comm. on Aging*, 97th Cong., 1st Sess. 158 (1981) (statement of Frank Carrington, Crime Victims Legal Advocacy Institute).

² Crime victim organizations vary from specific nationally oriented groups like the Victims' Assistance Legal Organization, Inc. (VALOR) and the National Organization for Victim Assistance (NOVA) to local grassroots efforts like Project CARE (Community Advocacy Resource for the Elderly) in Yonkers, New York. Each organization provides information, guidance and publicity to help crime victims.

³ *Omnibus Victims Protection Act: Hearing Before the Subcomm. on Criminal Law of the Comm. on the Judiciary on S.2420*, 97th Cong., 2d Sess. 69 (statement of Virginia Montgomery), "There is no one to represent me, the victim. Everyone in the system seems to only care about the assailant. I have felt like I am down in a hole with no way of getting out." *Id.* at 66 (statement of Senator Heinz).

⁴ *Id.* at 187.

⁵ *Id.* at 189, "It killed me when I got a subpoena saying, the State v. _____. He didn't do shit to the state, he did it to me and what he did to me was swept under the rug!"

⁶ *O. Holmes, THE COMMON LAW* 41 (1881).

⁷ Ramker and Meagher, *Crime Victim Compensation: A Survey of State Programs, Fed. Probation*, Mar. 1982 at 68. See also Lamborn, *The Methods of Governmental Compensation of Victims of Crime*, 1971 *U. Ill. L.F.* 655 (comparing different methods of administering a compensation program), Note, *State Legislation in Aid of Victims and Witness of Crime*, 10 *J. Legis.* 394 (1983) (highlights victims' problems with procedure and suggests basic improvements), Annot., 20 *A.L.R.* 4th 63 (1983).

⁸ *Colo. Rev. Stat.* § 17-28-101 (1973); *Iowa Code Ann.* § 907.12(2)(WEST 1979); *Me. Rev. Stat. Ann.* tit. 17-A, § 1151(2)(Pamphlet 1982); *Mo. Ann. Stat.* § 559.021 (Vernon Supp. 1982); *N.M. Stat. Ann.* § 31-17-1A (Pamphlet 1981); *S.D. Codified Laws Ann.* § 23A-28-1 (1979). *But cf. Me. Rev. Stat. Ann.* tit. 17-A, § 1321 (Pamphlet 1982).

⁹ *Va. Code* § 19.2-305(Supp. 1982). For an exhaustive listing of state probation statutes suggesting or mandating victim restitution, see Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 *UCLA L. Rev.* 52, 69 nn. 109-11 (1982).

¹⁰ *Ga. Code Ann.* § 17-14-4 (1983). See generally Read, *How Restitution Works in Georgia*, 60 *Judicature* 323 (1977).

programs aiding victim restitution and, on the federal level, the Probation Act¹¹ and the Victim and Witness Protection Act of 1982.¹²

Underlying these actions rests the belief that the justice system should recognize the rights of victims in the criminal law process. The degree of victim involvement may vary from active participation in the trial preparation¹³ and the pre-sentencing investigation to passive acceptance of procedural information and social services aid.¹⁴ In a justice system designed to protect and vindicate society, each party should be present: the offender, the society as prosecutor, and the society as victim.

The injured citizen, the convicted felon and the justice system benefit from the involvement of the victim in the judicial process. Bringing the victim into the criminal process removes some of the crime's emotional impact as the citizen sees his injury vindicated through the legal process.¹⁵ Including the victim also removes his fear of the unknown, the courtroom and the trial process, as a doctor quiets a patient's fears about pending surgery. A victim who is involved in the prosecution from the first complaint to sentencing is more likely to feel justice has been served and is more likely to have a favorable impression of the justice system.¹⁶

The convicted felon benefits when the victim has an active role. Many felons undoubtedly view their victims as nameless "pigeons." Bringing the victim into the process personalizes the crime and forces the offender to see the human cost of his action.¹⁷ Restitution as part of the criminal sentence goes further to quantify the extent of the injury.¹⁸ Some social psychologists support restitution as a means of eliminating the criminal's distress at committing an unjust act.¹⁹ Given the option of justifying his criminal behavior or compensating his victim, a felon is more likely to become rehabilitated through victim restitution.²⁰ The felon

¹¹ 18 U.S.C. S 3651 (1982). The restitution provision dates from the Federal Probation Act's revision June 25, 1948, ch.645, 62 Stat. 842. See generally *Roberts v. United States*, 320 U.S. 264 (1943)(reviews origins of the Federal Probation Act.

¹² Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1501, 1512-15, 3579, 3580 (1982)).

¹³ Active participation could include the victim as a witness and a willing information source during the investigation rather than a perfunctory appearance at trial. Victims may actively participate in the presentence report through the Victim and Witness Protection Act's addition to the *Fed. R. Crim. P.* 32(c)(2), see *supra* note 12.

¹⁴ State compensation funds typically act like an insurance recovery with a fixed deductible and ceiling. The victim reports the crime, submits a detailed voucher to the compensation fund authority and waits for the check, see *supra* note 7.

¹⁵ *Victims Protection Act* hearing, *supra* note 3 at 190-91, see also *infra* note 17.

¹⁶ *Id.*, *Older Americans Fighting the Fear of Crime* hearing, *supra* note 1 at 67.

¹⁷ Zehr and Umbreit, *Victim Offender Reconciliation: An Incarceration Substitute?*, *Fed. Probation* Dec. 1982 at 65-6.

¹⁸ Offenders tend to underestimate the extent of their victims' loss, either out of ignorance or self-justification. See Hudson, Galaway and Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 *Judicature* 313,316 (1977).

¹⁹ *Id.* at 317. "Restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility. The probationer may learn to consider more carefully the consequences of his or her actions. One who successfully makes restitution should have a positive sense of having earned a fresh start and will have tangible evidence of his or her capacity to alter old behavior patterns and lead a law-abiding life." *Huggett v. State*, 83 Wis.2d 790,794, 266 N.W.2d 403,407 (1978). The criminal should understand the extent to which he has harmed the victim as a human being. *People v. Richards*, 17 Cal.3d 614, 620, 552 P.2d 97, 100-101, 131 Cal. Repr. 537, 540-41 (1976).

²⁰ Hudson, Galaway and Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, *Fed. Probation* Feb. 1977 at 317.

should participate in the restitution evaluation for the payment to aid rehabilitation.²¹ If the felon does not equate the payment with the costs of his actions, restitution becomes another criminal fine.²²

The benefit to the justice system from active victim involvement can be measured in the number of crimes reported. Alienated victims do not report crimes; they seek to limit their losses by ignoring the offense.²³ If victims believe they will be treated fairly, they will be more apt to report crimes and cooperate with the police investigation and the ensuing prosecution.²⁴ Because eighty-seven percent of all crimes come to police attention through victim reports, public opinion about victim treatment is crucial.²⁵

Thus, victim involvement may take many forms: knowledge of the proceeding, assistance by state compensation funds, contributions to the presentence investigation, appearance at the sentencing hearing and the receipt of restitution as a condition of sentencing, probation or parole. This article will analyze victim compensation as one element of victim involvement, the policies underlying its payment and its method of administration. Each method of compensation has its shortcomings and must address problems such as offender's inability to pay, constitutionally challenged restitution statutes and fiscal shortfalls of compensation funds. By focusing on the goal of helping the victim, this article will suggest solutions to finance and constitutionally administer restitution to improve victim compensation.

I. RESTITUTION—A TRADITIONAL SANCTION REVISED

Restitution's Historical Foundations

Restitution is not a new remedy for criminal injury but an ancient sanction that fell into disuse after the division of criminal and tort causes of action. Victim compensation through offender restitution can trace its origins to the Code of Hammurabi,²⁶ the Bible²⁷ and Anglo-Saxon law.²⁸ Early cultures recognized a single injury when an individual harmed another, requiring a single payment of restitution by the offender to the injured party.²⁹ This monetary payment compensated the victim, or the victim's family, for personal injury or property damage, averting vendettas through rough justice.³⁰

²¹ *Supra* note 17 at 65.

²² *Id.*

²³ More than 70% of personal larcenies occurred without contact between criminal and victim and more than 60% of personal larcenies with victim-criminal contact are *not* reported to the police. *Sourcebook of Criminal Justice Statistics* 1982 at 294. This reticence to report larcenies illustrates not only the public's lack of faith in police effectiveness, but also a reluctance to become a confused victim in the criminal proceedings. Applying the public's sense of cost-benefit analysis, reporting a crime is not worth the trouble.

²⁴ *Victims Protection Act* hearing, *supra* note 3 at 153 (citing the Final Report, Attorney General's Task Force on Violent Crime, Recommendation 62).

²⁵ *Id.* at 191.

²⁶ Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 *Minn. L. Rev.* 223, 224 (1965)(Code of Hammurabi c. 2380 B.C.), Hobhouse, *Law and Justice*, in *Considering the Victim* 9 (1975).

²⁷ *Exodus* 21:18, 19 (restitution for personal injury), *Exodus* 22:1, 5-6 (restitution for property damage).

²⁸ 2 *F. Pollock and F. Maitland, History of English Law* 449-62 (2d ed. Washington, D.C. 1959)(1st ed. London 1895), *F. Maitland and F. Montague, A Sketch of English Legal History* 6, 19-21, 193-99 (1915).

²⁹ Colson and Benson, *Restitution as an Alternative to Punishment*, II *Det. C.L. Rev.* 523 *passim* (1980), Wolfgang, *supra* note 20 at 223. For a succinct overview of early culture's application of restitution see Hobhouse, *supra* note 20.

³⁰ Wolfgang, *supra* note 26 at 223-26.

Early societies followed the simple logical precept: repair the injury and return the status quo. If this is not possible, harm the offender to the extent the victim was harmed:--retribution to achieve justice. Society's preference, victim restitution, more efficiently restored the status quo by redistributing gain rather than an additional loss through retribution.

Victim restitution fell into disuse during the twelfth and thirteenth centuries in England due in part to the sovereign's greed as well as the increasingly complex legal bureaucracy.³¹ Under Anglo-Saxon law, a statutory schedule of payments described the value of various injuries.³² This schedule ensured consistent restitution. A killer would pay the *wergild*, or statutory sum, to the slain man's family.

Gradually the system of payment became more sophisticated, requiring the offender to redress the injury twice: *bot*, or betterment, to the injured party, and a second payment, a *wite*, to the King for breaking the King's peace.³³ Recovery became bifurcated because the King wanted to enrich the royal treasury. The combination of two payments, one to the victim and the other to the King, perished due to over-elaboration; devising a fixed payment for each diverse injury became too difficult.³⁴ As the use of the victim's *bot* declined, the King's share increased until the entire compensation became a fine payable to the Crown.³⁵ Injury compensation provided a principal source of state revenue but failed to recompense the victim or the victim's family.³⁶

Restitution's Modern Application

The division between victim restitution and criminal sanctions continued unchallenged for hundreds of years. The introduction of probation in the late nineteenth century broke this precedent, providing the opportunity to require victim restitution as a probation condition.³⁷ Victim compensation, however, remained as only a minor concern until 1951 when Margery Fry, a British magistrate, advocated a national crime victim compensation plan.³⁸ Fry recommended a

³¹ Wolfgang, *supra* note 20 at 228, B. Galaway and J. Hudson, *Offender Restitution in Theory and Action* 16-17 (1977), Harland, *supra* note 9 at 52 and n.1. A complementary explanation for the criminal and tort division may be found in the twelfth century bureaucratization of the legal system. See S. Milson, *Historical Foundations of the Common Law* 404-28 (1981) for an overview of early criminal procedure, and generally, for legal history theory that bureaucratic changes met unforeseen, far-reaching results.

³² F. Maitland and F. Montague, *supra* note 28 at 193-99. For example, under the laws of King Aethelbert, A.D. 600, "if a man be slain, let him make 'bot' with XX shillings". *Id.* at 194. F. Pollock and F. Maitland, *supra* note 28 at 460-61.

³³ F. Pollock and F. Maitland, *supra* note 28 at 451, Wolfgang, *supra* note 26 at 225-26.

³⁴ *Id.*, *supra* note 28 at 458-62, F. Maitland and F. Montague, *supra* note 28 at 20-21.

³⁵ F. Pollock and F. Maitland, *supra* note 28 at 459. The family of a slain man lost their right to receive the *wergild*. Parliament enacted a statute to give the family a right to claim civil damages, Lord Campbell's Act, Stat. 9-10 Vict. C.93. *Id.* at 459 & n.5.

³⁶ Wolfgang, *supra* note 26 at 228. Critics point to this same shortcoming in the United States criminal justice system, "Even where fines are imposed today, the state retains the proceeds, and the victim gets no compensation." *Id.* at 227 quoting Barnes & Teeters, *New Horizons in Criminology* 401 (1943). As states enact victim compensation statutes, this criticism becomes less valid.

At restitution's nadir the Parliament had to pass a statute, 21 Hen.VIII c.11, allowing a larceny victim to sue for restitution of his stolen goods because at common law the criminal indictment was at the King's discretion and did not include the victim. 4 W. Blackstone, *Commentaries on the Laws of England* 355-56 (1769).

³⁷ Harland, *supra* note 9 at 57. New York enacted an early victim restitution provision, *N.Y. Code Crim. Proc.* SS 483(2), 932 (McKinney 1910). *Id.* at 57 & n.33.

³⁸ L. Forer, *Criminals and Victims* 289-90 (1980), R. Meiners, *Victim Compensation* 9 (1978). For a brief insight into Fry's philosophy, See Fry, *Justice for Victims in Considering the Victim* 54 (1975).

national fund to insure citizens against losses due to crime in the same manner that workmen's compensation protects employees against work-related injuries.³⁹

Using these two new approaches to victim compensation, probation conditioned sentencing and a national compensation fund, victims could receive restitution directly from the offender through probation, sentencing or parole conditions, or receive restitution from a state compensation fund.⁴⁰ State legislatures have adopted both methods. Some states limit restitution to offender payments; others supplement payments with state victim compensation funds.⁴¹ None of these methods is problem-free.

On the federal level, Congress limits victim restitution to offender repayment. The Federal Probation Act allows judges the discretion to include victim restitution as a condition of probation.⁴² Congress augmented this infrequently used provision with the Victim and Witness Protection Act of 1982 (VWPA) which allows victim restitution as part of the criminal sentence.⁴³ Restitution awards pursuant to this Act become a condition of parole.⁴⁴ The VWPA's restitution provisions faced a constitutional challenge in *United States v. Welden*⁴⁵ on equal protection, due process and seventh amendment grounds.⁴⁶

Congress' concern for budget deficits has thwarted the creation of a national victim compensation program.⁴⁷ The budgetary obstacle has not only continued, but also worsened as the United States now faces a trillion dollar national debt. With fiscal concerns removed, Congress probably would support some form of national victim compensation as evidenced by Congress' wide support for the VWPA,⁴⁸ Congressmen's statements exhorting governmental responsibility for victims⁴⁹

³⁹ Fry, *supra* note 38 at 55-6.

⁴⁰ See *supra* notes 7-9 and accompanying text.

⁴¹ See *R. Meiners*, *supra* note 33 at 25-39. See generally Lamborn, *supra* note 7. [insert example statutes].

⁴² 18 U.S.C. § 3651.

⁴³ Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-15, 3579, 3580 (1982)).

⁴⁴ 18 U.S.C. § 3579(g).

⁴⁵ 568 F. Supp. 516 (1983).

⁴⁶ In *Welden*, the United States District Court for the Northern District of Alabama ruled the VWPA's restitution provisions, 18 U.S.C. §§ 3579, 3580 violated the defendant's equal protection and due process rights due to the poor statutory drafting and the potential haphazard application. Equating the restitution award at the sentencing hearing with a civil trial for damages, the court also held this restitution award violated the seventh amendment right to a jury trial in a controversy with a value exceeding twenty dollars. 568 F. Supp. at 534-35. The government has appealed the decision in *Welden* to the United States Court of Appeals for the Eleventh Circuit.

⁴⁷ Introducing the VWPA's predecessor legislation, S. 2420, the *Omnibus Victims Protection Act of 1982*, Senator John Heinz laid out two parameters to victim assistance: no additional federal expenditures and no infringement on the constitutional rights of defendants. 128 Cong. Rec. S3853 (daily ed. April 22, 1982)(statement of Sen. Heinz). Sen. Lawton Chiles also supported S.2420 and reiterated that the legislation did not entail additional federal funding. *Id.* at S3861. Given President Reagan's dramatic budget cutbacks, any new budget outlays faced almost certain disapproval. Thus, passage of the victim assistance legislation depended on a zero budget impact.

⁴⁸ The VWPA passed the United States House of Representatives by unanimous consent on October 1, 1982. 128 Cong. Rec. H8464-70 (daily ed. October 1, 1982 Part III).

⁴⁹ "Clearly, there is an appropriate and necessary role for the Federal Government in addressing the problems encountered by crime victims." 128 Cong. Rec. H8207 (daily ed. September 30, 1982)(statement by Rep. McCollum). "Enactment of Federal legislation in this area [victim assistance] must be one of the highest priorities of the 97th Congress." 128 Cong. Rec. H8470 (daily ed. October 1, 1982)(statement by Rep. Fish).

and the political appeal of the victim assistance issue.⁵⁰ Legislation introduced in the House of Representatives and the Senate seeks to overcome Congress' fiscal wariness by creating a crime victim assistance fund supported by judicially imposed criminal fines and compensation fees.⁵¹ The United States Department of Justice would channel this money to federal crime victims as well as state compensation programs.⁵²

II. VICTIM COMPENSATION'S WATERLOO: PROCEDURE AND FUNDING

Each of the avenues for victim compensation contains pitfalls. Requiring victim restitution through criminal sentencing has met constitutional resistance.⁵³ Thus, sentencing procedures incorporating restitution must be improved and clearly explained so they may be fairly and constitutionally applied. Money and justice rarely can be equated, but in victim compensation, the offender's or the state's lack of funds means a victim will be left without recovery. Sources of funds need not be mutually exclusive. No reason exists to choose between offender fines, state payment and federal compensation. Indeed, combining different funding approaches would improve the likelihood that all victims receive full compensation.

Surmounting the procedural problems, noted in *Welden*, and the offender's and government's financial problems is possible if legislators, judges and criminal justice administrators endorse the concept of victim compensation. Many state and federal legislators appear to support victim restitution by offenders and, when financially feasible, governmental compensation funds.⁵⁴ Whether these legislators are motivated by public opinion backing victims' interests, potential reelection votes for supporting victim assistance or their personal belief that victim compensation is just, the result remains the same—support for compensation. In contrast, the judiciary appears divided.⁵⁵ Some judges favor creative sentencing

⁵⁰ Introduced in an election year, the VWPA's predecessor legislation, S.2420, had sponsors ranging from conservative Utah Senator Orrin Hatch to the paradigm liberal advocate, Senator Edward Kennedy. S.2420's introduction on April 22, 1982, coincided with National Crime Victims' Week (128 *Cong. Rec.* S3853 (daily ed. April 22, 1982)(statement by Senator Heinz)) and immediately preceded President Reagan's Executive Order 12360 establishing a task force on victims of crime (*Victims Protection Act* hearing, *supra* note 3 at 85).

⁵¹ S.704, 98th Cong., 1st Sess. (1983), H.R. 5124, 98th Cong., 2d Sess. (1984).

⁵² Introduced by Senators Heinz and Grassley, S.704 provides a one time compensation fee for misdemeanors and felonies. The bill also authorizes up to a 100% surcharge on criminal fines, depending on the criminal's ability to pay, with the proceeds directed to the Crime Victim's Assistance Fund. In a letter to their colleagues, the Senators note that an estimated \$45 to \$125 million could be generated for the fund in 1983 (letter of March 9, 1983 on file at *William and Mary Law Review* office).

⁵³ *United States v. Welden*, 568 F. Supp. 516 (1983). See text, and accompanying notes.

⁵⁴ At least thirty states have statutes providing victim restitution as a probation condition. Harland, *supra* note 9 at 69 n.109. In a budget survey 1978-80, thirty states (some not included in the statutory compilation above) provided funding for crime victim compensation. Ramker and Meagher, *supra* note 7 at 69. Federal support for compensation can be measured by the VWPA's passage and the introduction of S.704 and H.R. 5124, see *supra* notes 48-52 and accompanying text.

⁵⁵ Some judges advocate the rehabilitative use of restitution and its accompanying benefit to the victim. Judge Lois Forer, Court of Common Pleas, Philadelphia, outlined the reasons for her support in her book, *Criminals and Victims* (1980). Using restitution as a parole condition, Judge Forer believed the victim receiving payment recognizes there is justice in the criminal justice system, the state saves incarceration costs and the offender, spared from prison, benefits by atoning for his or her crime. *Id.* at 296. Judge Forer added an economic purpose for restitution. Requiring restitution for crimes with monetary gain removed criminal profit and added a deterrent effect. *Id.*

Justice Albert Kramer, District Court in Quincy, Massachusetts, operates a program called *Earn-it* which combines financial restitution and community service work. The program includes victim-offender meetings at which restitution agreements are formed benefitting both parties. *National Law*

including victim restitution.⁵⁶ Others adamantly oppose incorporating a civil remedy into a criminal setting.⁵⁷ Like many legislators, criminal justice administrators, prosecutors and parole officials appear to appreciate the benefits of victim compensation in furthering criminal prosecutions and tailoring sentences to fit individual crimes.⁵⁸

*Improving the Imposition of Victim Restitution:
Meeting the Constitutional Challenge*

The federal statutory authority for victim restitution as a sentencing condition was declared unconstitutional in *United States v. Welden*.⁵⁹ The United States Court of Appeals for the Eleventh Circuit reversed the *Welden* decision, finding the VWPA did not violate the seventh amendment, the due process or equal protection clauses.⁶⁰ Though the statute can therefore be constitutionally construed, amendments could clarify the challenged sentencing guidelines. Clearer rules of application would increase the restitution provisions' usefulness and the frequency of judicially imposed restitution.

United States v. Welden marked one of the first times a federal judge attempted to apply the VWPA's restitution provisions.⁶¹ The three *Welden* defendants kidnapped a woman, raped her and murdered her boyfriend.⁶² Upon their conviction, the judge sought to apply the new statute, balancing the defendants' ability to pay with the victims' injuries.⁶³ The judge, noting a host of unanswered questions and criticizing Congress' poor draftmanship, found that sections 3579 and

Journal, Aug. 23, 1982 at 1, col. 2.

Other judges feel restitution should not be allowed in criminal cases. "Disposing of civil liability cannot be a function of restitution in a criminal case." *People v. Richards*, 17 Cal.3d 614,620, 552 P.2d 97, 101, 131 Cal. Rptr. 537,541 (1976). "If one makes use of the criminal law for some collateral or private purpose, such as to compel the delivery of property or payment of a debt rather than to vindicate the law, he is guilty of a misuse of process, and a fraud upon the law." *People v. Moore*, 43 Mich. App. 693, 697, 204 N.W.2d 737,739 (1972)(quoting *Hall v. American Inv. Co.*, 241 Mich. 341, 353, 217 N.W. 18, 20 (1928). For these and further criticisms of restitution in criminal cases, see Harland, *supra* note 9 at 54 & n.13.

⁵⁶ L. Forer, *Criminals and Victims* 289 (1980).

⁵⁷ This Note will show that restitution through sentencing is *not* a civil remedy. See *infra* notes ----- and accompanying text. *But cf.* *People v. Richards*, 17 Cal. 3d 614, 552 P.2d 97, 131 Cal. Rptr. 537 (1976); *State v. Scherr*, 9 Wis.2d 418, 101 N.W.2d 77 (1960)(comparing restitution to a civil remedy).

⁵⁸ "We strongly agree that restitution should be a sentencing tool available in all criminal cases—not only where sentences are probated." *Omnibus Victims Protection Act* hearing, *supra* note 3 at 92 (statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, U.S. Dept. of Justice). "The victim impact statement enriches the presentence report by providing the judge information of a type and quality provided by no other means . . . By supplying correct and verified information concerning amounts of financial losses to the victim, it makes a more accurate restitution decision possible." *Id.* at 146 (statement of Paul R. Falconer, Chief U.S. Probation Officer, District of Maryland). "On the practical side, victims and witnesses plan [sic] an *indispensable* role in our criminal justice system. As practitioners, we need to encourage their cooperation to the maximum extent possible." *Id.* at 163 (statement of Michael McCann, District Attorney of Milwaukee County, Wisconsin).

⁵⁹ 568 F. Supp. 516 (1983).

⁶⁰ 743 F.2d 827 (1984).

⁶¹ The judge, in orally announcing the decision, noted, "I don't expect to be the last court to speak on this question, but it looks like I'll be the first." 568 F.Supp. at 535-36.

⁶² 568 F. Supp. at 517, 525. One of the victims, Miss Calloway, had been struck on the head with a shotgun, had seen her boyfriend dead on the floor of their home, had been stripped naked and threatened with death, and was twice made to engage in oral sex while bleeding profusely from her head wound. *Id.* at 525. The victim impact statement estimated her damages at \$599. *Id.*

⁶³ VWPA restitution provision, 18 U.S.C. § 3580(a).

3580 of the Act violated the fifth amendment's equal protection and due process provisions and the seventh amendment's right to a jury trial on the issue of damages.⁶⁴ Although the Eleventh Circuit found these sections constitutional, the district court judge's dilemma highlights problems in imposing victim restitution.

The court in *Welden* found the restitution provisions violated due process and equal protection because they lacked sufficient procedural safeguards to ensure consistent results.⁶⁵ Though the court acknowledged that the federal statute allowing probation with victim restitution was not unconstitutionally vague despite indefinite standards,⁶⁶ the court found "a crucial distinction" between probation and sentencing.⁶⁷ Citing the probability of disparate results, the court ruled the statute violative of equal protection.⁶⁸ Given the indefinite procedural guidelines for imposing victim restitution, the court ruled the statute also violated the Due Process Clause.⁶⁹

The major error in the court's reasoning, and the flaw which still threatens the

⁶⁴ 568 F. Supp. at 534-35.

⁶⁵ "This Court thinks that Congress granted too much discretion to the courts and to the Attorney General, and, by exceeding its powers of delegation, created a potential Frankenstein." *Id.* at 534.

⁶⁶ *Id.* at 534. In *United States v. Baker*, 429 F.2d 1344 (7th Cir. 1977), the court held the Probation Act was not unconstitutionally vague. Further, the court held that delegation of discretionary powers did not need precise standards supporting Congress' determination that effective sentencing required broad discretion. 429 F.2d at 1347. This decision undermines the court in *Welden*'s requirement of *ascertainable standards* (emphasis added). 568 F. Supp. at 534.

⁶⁷ 568 F. Supp. at 535. The court failed to elaborate on the difference between restitution as a condition of probation and restitution as a sentencing condition. In probation and sentencing hearings, the defendant may be given an opportunity to review the probation service's presentence report. *Fed. R. Crim. P.* 32(c)(3). The offender also may address the court before sentencing to present any information in mitigation of punishment. *Fed. R. Crim. P.* 32(a)(1). *Accord, Hill v. United States*, 368 U.S. 424 (1962); *Green v. United States*, 365 U.S. 301 (1961).

In *Welden*, the court criticized restitution as a sentencing condition enforceable as a civil judgment. 568 F. Supp. at 535, 18 U.S.C. § 3579(h). Restitution as a probationary condition also may be enforced as a civil judgment. 18 U.S.C. § 3651. However, in *Bearden v. Georgia*, - U.S. -, 103 S.Ct. 2065 (1983), the Court held failure to pay probation-conditioned restitution, was not a ground for cancellation of probation because petitioner, an indigent, had made a bona fide effort to pay. This decision may militate against civil enforcement measures such as contempt to press restitution sentencing awards against indigents. The VWPA's mandate that judges consider the defendant's ability to pay lessens potential enforcement problems.

⁶⁸ 568 F. Supp. at 535. Justice Frankfurter addressed the problem of disparate results in *Winters v. New York*, 333 U.S. 524 (1947), ". . . diversity in result for similar conduct in different trials under the same statute is an unavoidable feature of criminal justice. So long as these diversities are not designed consequences but due merely to human fallibility, they do not deprive persons of due process of law." 333 U.S. at 535.

Disparity in result inevitably will occur when different judges seek to balance the VWPA's factors of victim's financial loss, defendant's financial resources, defendant's financial needs and earning ability and the financial needs and earning ability of defendant's dependents. 18 U.S.C. § 3580(a). Balancing these factors requires judgment, not application of a statutory grid to determine restitution. The goal in restitution is not as much equal sentences as fair sentences and the VWPA's provisions can achieve this goal.

For theories of judicial interpretation of broad statutory language, see Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *Colum. L. Rev.* 527 (1947), Freund, *The Use of Indefinite Terms in Statutes*, 30 *Yale L.J.* 437 (1921).

⁶⁹ 568 F. Supp. at 535. The court criticized the lack of standards such as rules of evidence, rules of discovery, burdens of proof, requirements of notice and requirements of standing. *Id.* Because restitution comprises one part of the offender's sentence, the determination of restitution follows the same procedure as the general criminal sentence. *Fed. R. Crim. P.* 32. Thus, the judge reviews the presentence report, questions the defendant and hears any mitigating evidence the defendant may offer. *Id.* The Federal Rules of Evidence do not apply at a sentencing hearing. 568 F. Supp. at 534.

If restitution's award was a civil hearing, criticism regarding this procedural vagueness would be valid. However, restitution is not a civil award, but a component of the criminal sentence designed to further rehabilitation while aiding the crime victim.

concept of victim restitution, is that restitution through sentencing is the constitutional equivalent of a civil suit for tort damages.⁷⁰ The goals and purposes of these two recoveries are different and should not be confused. Restitution through sentencing is a form of criminal punishment like a fixed term of incarceration.⁷¹ Within minimum and maximum terms of punishment, criminal sentences for the same offense can vary drastically. The sentence varies depending on the offender's past criminal record, the sentencing judge's attitude on incarceration, the offender's likelihood of rehabilitation and other mitigating and aggravating circumstances outlined in the presentencing report.⁷² Variations in sentences are not aberrations. They are the desired result of a criminal sentencing process that seeks to tailor each sentence to each individual crime. Victim restitution, equally variable, upholds the same goal because it tailors the amount of restitution to each crime, considering the financial needs and ability of the offender and the victim's injuries.

Congress did not intend to substitute victim restitution through sentencing for a victim's civil suit for tort damages.⁷³ The civil suit remains as a remedy in which the victim's recovery is unhampered by considerations of defendant's ability to pay.⁷⁴ Restitution is a part of the criminal sentence, supported by penal and rehabilitation theories.⁷⁵ The sentencing judge retains the same discretion in awarding restitution as other sentencing sanctions.⁷⁶

The court in *Welden* accurately noted the absence of standards for rules of evidence and discovery in assessing restitution, but this shortcoming does not render the application of restitution procedurally unconstitutional. The law

⁷⁰ 568 F. Supp. at 534. "The value in controversy . . . exceeds twenty dollars, and § 3579(h) turns a restitution order into a civil judgment." *Id.* This VWPA section allows a restitution order to be enforced "in the same manner as a judgment in a civil action." 18 U.S.C. § 3579(h). If the court in *Welden's* analysis accurately characterizes restitution as a civil judgment, then all federal criminal fines and penalties are also civil judgments for under 18 U.S.C. § 3565 these fines and penalties are enforceable "in like manner as judgments in civil cases." 18 U.S.C. § 3565 (1982).

⁷¹ VWPA's restitution provisions, SS 3579, 3580, joined the other sentencing provisions of Title 18, Chapter 227, Sentence, Judgment and Execution because restitution is a sentencing condition. A just sanction for the offender should ensure that the wrongdoer repair his or her victim's harm. *S.Rep. No. 532, 97th Cong., 2d Sess. 30* (1982).

⁷² *Williams v. New York*, 337 U.S. 241, 244-52 (1948); *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979). "Would that a simple algebraic formula consisting of the crime, times the defendant's history, times extenuating circumstances, which would equal the proper sentence, be productive of universally fair sentences; were this the case, the courts should be the first to welcome its adoption. In actual practice the rationale of sentencing is not that simple—nor should it be." *Id.* at 153-54. *See also Fed. R. Crim. P. 32* (presentence report submission and availability to defendant).

In *United States v. Danilow Pastry Co., Inc.* 563 F. Supp. 1159 (S.D.N.Y. 1983), the court, using the Probation Act to impose creative sentencing, required six wholesale bakeries charged with Sherman Act violations to donate fresh baked goods to needy organizations.

⁷³ 128 *Cong. Rec.* H8205 (daily ed. Sept. 30, 1982)(section-by-section analysis of companion bill H.R. 7191)"Subsection (c) of new section 3579 precludes the court from ordering restitution if the procedures necessary to issue the order will unduly prolong or complicate the sentencing process. This is necessary to insure that the sentencing process does *not* become a sort of *mini-civil trial for damages.*"(emphasis added).

⁷⁴ A victim may recover damages for criminal actions in a civil suit if the victim can show the defendant's action proximately caused the injury and the amount of damage suffered with the reasonable certainty. *D. Dobbs, Handbook on the Law of Remedies* 148-49 (1973). VWPA provision 18 U.S.C. § 3579(e)(2) provides a set off against later civil awards for any restitution payments.

⁷⁵ Restitution's rehabilitative function makes the offender of his or her wrongdoing and gives an opportunity for atonement, *see supra* notes 17-19. Restitution also penalizes the offender similarly to a criminal fine but the proceeds go to the victim rather than the government. *See generally*, E. Pincoffs, *The Rationale of Legal Punishment* 69 (1966)(principles to consider in sentencing a criminal).

⁷⁶ *See supra* notes 62 and 71.

allowing probation with restitution⁷⁷ contains *no* guidelines, yet has been found constitutional.⁷⁸ Victim restitution through sentencing has *some* guidelines and follows the United States Supreme Court's requirement that procedural due process provide an opportunity to be heard "at a meaningful time and in a meaningful manner."⁷⁹ The convicted felon and his or her attorney has an opportunity to address the court before sentencing to present information in mitigation of punishment.⁸⁰ Government counsel has a similar opportunity to speak.⁸¹ The court also receives information from the presentence report which details among other things the victim's needs.⁸²

At this hearing, the court resolves any dispute as to the amount of restitution by a preponderance of the evidence.⁸³ The defendant bears the burden of proving his or her financial needs and resources.⁸⁴ Government counsel represents the victim's interest and bears the burden of providing losses.⁸⁵

Admittedly, the VWPA's provisions offer a judge broad discretion in arriving at an award figure. In *Welden*, this latitude troubled the judge who was faced with an incomplete presentence report⁸⁶ and three defendants with limited assets.⁸⁷ But a poorly prepared report should not condemn a valid statutory provision. Rather courts should promote effective administration of court procedure by encouraging more complete investigations. That some information may be missed despite a probation officer's best efforts but glaring omissions, like Mr. Hill's death as a victim, should not be condoned.

The court presented a litany of unanswered questions to highlight the provision's latitude and, implicitly, to criticize the vagueness of the provision's deliberately flexible sanction.⁸⁸ Answering a few of these questions will show how the VWPA can be constitutionally construed and applied.

*Question. If the court is dealing with more than one defendant should it apportion the restitution amount between the defendants on the basis of their degrees of guilt, or on the basis of their ability to pay, or some other basis or bases?*⁸⁹

⁷⁷ The Federal Probation Act, 18 U.S.C. S 3651 (1982).

⁷⁸ *United States v. Baker*, 429 F.2d 1344 (7th Cir. 1977). See *supra* note 65 and accompanying text.

⁷⁹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). For a review of hearing procedure, see *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

In addressing the Probation Act's broad guidelines, the United States Supreme Court noted, "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁸⁰ *Fed. R. Crim. P.* 32(a)(1).

⁸¹ *Id.*

⁸² *Fed. R. Crim. P.* 32(c)(2)(D).

⁸³ 18 U.S.C. S 3580(d).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 568 F. Supp. at 525. The crime in *Welden* involved three victims: Miss Calloway, beaten, abducted and forced to engage in oral sex; Mr. Hill, killed during Miss Calloway's abduction; and Mr. Little, deprived of the car upholstery clipped as evidence of Miss Calloway's bloodstains. *Id.* The victim-impact statement failed to mention either Mr. Hill's or Mr. Little's damages though both were victims under VWPA definition. 18 U.S.C. § 3579.

⁸⁷ 568 F. Supp. 525-26. *Welden*'s assets totaled \$40,200 with \$17,000 in liabilities. Allison's assets totalled \$13,000 with \$20,000 in debts. Satterfield claimed no assets though his lawyer stated Satterfield had a statutory right-to-redeem worth \$12,000. *Id.*

⁸⁸ 568 F. Supp. at 527.

⁸⁹ *Id.*

Answer. The court must balance the offender's culpability with the degree of victim's injuries and the offender's ability to pay. If the court looked primarily to the offender's ability to pay, then greater emphasis would be placed on the victim's complete financial recovery. Instead, the court should weigh an offender's culpability and ability to pay to arrive at a figure which represents a sacrifice to the offender similar to the victim's degree of injury. A small sum from an impoverished burglar may not repay the victim's total losses, but it will aid the criminal's rehabilitation by bringing the theft to his terms as well as recognizing the victim's loss.

Question. Do the Federal Rules of Evidence apply during a restitution hearing? For instance, is "hearsay" admissible?⁹⁰

Answer. As the court in *Welden* accurately noted, the Federal Rules of Evidence do not apply at sentencing hearings.⁹¹ Because restitution is a sentencing sanction, the restitution part of the hearing also does not follow the Federal Rules of Evidence. A jury already found the defendant guilty in a trial conducted according to the Federal Rules of Evidence to prevent juror prejudice, bias and misunderstanding. The sentencing judge, acting without evidentiary proscriptions, may weigh the value of all facts and testimony such as the offender's previous criminal record, family background and general character. These factors are irrelevant to determine guilt but they give the judge insight to tailor a sanction both penal and rehabilitative.

The starting point to answer the court's questions must be the constitutional protections for the accused. Sentencing hearing guidelines, albeit broad, provide due process. Instead of returning to a *wergild* statutory payment schedule,⁹² judicial discretion promotes equal protection, shaping the restitution award to fit the crime so each offender receives a fair sentence tailored to his or her particular crime. In this respect, equal protection means equal fairness, not identical sentences.

With constitutional protections secured, the next analysis should incorporate the policies behind victim restitution.⁹³ The strong support for victim compensation emphasizes the policy supporting judicial acknowledgment of victim's needs.⁹⁴ This support for victims, however, should be tempered. Despite due process protections, the defendant faces a loss of property based on government counsel's statements and the presentence investigation of victim's losses. Because the award determination imprecisely measures defendant's needs and ability to pay against victim's injuries, and because the victim retains the right to sue for civil damages, the court should err on the side of the offender in awarding restitution.

⁹⁰ *Id.* at 528.

⁹¹ *Id.* at 534.

⁹² See *supra* notes 32-36 and accompanying text.

⁹³ In his treatise, *The Rationale of Punishment*, Bentham observed that no punishment could be tailored more equally than criminal fines because the quantum of fine can be "proportioned to the means which the delinquent has of bearing it. *J. Bentham, The Rationale of Punishment* 254 (1830).

⁹⁴ Congress' main consideration appeared to be victim compensation. 128 *Cong. Rec.* S3853-3863 (daily ed. April 22, 1982) Restitution, however, joined other sentencing provisions with all the accompanying sentencing goals of vengeance, deterrence, restraint, compensation (*J. Bentham, supra* note 92 at 4) and rehabilitation. *L. Forer, Criminals and Victims* 298 (1980). Thus, both victim and offender considerations need to be balanced.

In *Welden*, the court found the VWPA's provisions unconstitutionally violated the defendants' fifth amendment rights to equal protection and due process and seventh amendment right to a jury trial for a controversy exceeding \$20 in value.⁹⁵ The Eleventh Circuit's decision in *Satterfield*, reversing *Welden*, rejected this view. In comparing restitution through sentencing with restitution through probation, both sanctions meet the Supreme Court's broad requirements for equal protection and due process.⁹⁶ Because restitution through sentencing is not a civil damages award, the seventh amendment jury requirement does not apply.⁹⁷ Therefore, the VWPA restitution provisions are not constitutionally invalid.

Policies supporting victim restitution sentencing

Though the VWPA's broad restitution provisions pass constitutional muster, they are nonetheless indefinite guidelines requiring thoughtful judicial application. The statute less clearly defines the manner of assessing the defendant's financial situation and gives the judiciary limited guidance to balance these two figures in arriving at a just award.⁹⁸ Reviewing the policies promoting victim restitution may offer insight to answer the questions left open by the broad statutory language.

The VWPA introduces concern for the victim into the sentencing process via restitution. The sanction remains a sentencing alternative, however, and so sentencing policies should receive primary emphasis.⁹⁹ The goals of sentencing are several, among them rehabilitation, retribution, deterrence and incapacitation.¹⁰⁰ Restitution through sentencing promotes each of the above goals, furthering society's interest in criminal sentencing while aiding the victim.

Restitution aids offender rehabilitation by giving the offender an opportunity to make amends for his or her crime.¹⁰¹ To be effective, the assigned restitution should be clearly defined, measurable and achievable.¹⁰² Achievability of restitution ensures the offender will succeed in fulfilling the set goal and enjoy a sense of accomplishment.¹⁰³ An achievable restitution figure can be set if the court considers the offender's ability to pay.¹⁰⁴

Without returning to the vindictive justice of "an eye for an eye,"¹⁰⁵ restitution offers a more complete punitive sanction.¹⁰⁶ Restitution through sentencing redresses society's injury, a broken law, with incarceration, and redresses the victim's injury with financial compensation. Thus, restitution becomes an integrated

⁹⁵ *Id.*

⁹⁶ 568 F. Supp. at

⁹⁷ See *supra* notes 77-79 and accompanying text.

⁹⁸ 18 U.S.C. § 3579.

⁹⁹ 18 U.S.C. § 3579(d), "The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process." See also Harland, *supra* note 9 at 90 (balancing factors).

¹⁰⁰ *W. LaFare and A. Scott, Handbook on Criminal Law* 21 (1972).

¹⁰¹ See *supra* notes 17-22 and accompanying text.

¹⁰² Keve, *The Therapeutic Uses of Restitution*, in *Offender Restitution in Theory and Action* 61 (1977). See also Harland, *supra* note 9 at 122-26.

¹⁰³ In *Huggett v. State*, 83 Wis.2d 790, 266 N.W.2d 403 (1978), the court criticized a repayment condition which would have taken twenty-seven years to repay, "[C]onditioning probation on the satisfaction of requirements which are beyond probationer's control undermines the probationer's sense of responsibility." *Id.* at 798-99, 266 N.W.2d at 407.

¹⁰⁴ 18 U.S.C. § 3580(a). The VWPA includes defendant's current financial status and future earning ability as well as defendant's dependents' financial status.

¹⁰⁵ *Exodus* 21:24.

¹⁰⁶ See generally Schafer, *The Restitution Concept of Punishment*, in *Considering the Victim passim* (1975).

criminal sanction recognizing both society's and the victim's injuries.

Requiring the offender to reimburse his victim adds a deterrent element to restitution, the discouragement of criminal gain.¹⁰⁷ This deterrent effect would be strongest in property crimes like larceny or embezzlement.¹⁰⁸ In assessing punishment, Bentham noted the "pain of privation occasioned by the loss . . . of money."¹⁰⁹ Because man derives the main source of his pleasures from money,¹¹⁰ the forfeiture of money through restitution is an additional punishment and a disincentive to commit offenses.

Restitution's deterrent effect increases as judges become more willing to impose this repayment as an additional sanction.¹¹¹ This increased likelihood presents another risk for the would-be offender to assess in computing both the odds of punishment and the severity of punishment. If offenders sense judges are more likely to impose hefty restitution awards instead of jail terms, then offenders may seek to mitigate victim injuries.¹¹² This change in behavior would follow if offenders placed greater value on personal finances than potential prison time.

Restitution does not further the goal of offender incapacitation. But, with the VWPA's adoption, restitution may accompany incapacitation because restitution can now be imposed *with* a prison sentence.¹¹³ Before the VWPA, courts were limited to restitution as a probationary condition which required the offender's release.¹¹⁴ Allowing restitution through sentencing removes the necessity for courts to choose between imprisonment or victim restitution with probation. After the offender has completed a partial sentence and parole is granted, the restitution award will attach as another parole condition.¹¹⁵

While furthering sentencing goals, restitution also benefits the victim, a newly recognized figure in criminal justice. Though the victim retains the option to sue civilly for damages, this remedy may be chimerical given the cost of prosecution and the mental anguish of reliving the crime for a second trial.¹¹⁶ Thus, allowing restitution through sentencing saves the victim the financial and emotional cost of a civil damage suit. The victim need not hire private counsel for a civil action. Instead, the prosecution represents the victim's interests at the sentencing hearing without charge. Although restitution ordered at sentencing may be less than

¹⁰⁷ L. Forer, *supra* note 38 at 296.

¹⁰⁸ *Id.*. See also Gandy, *Attitudes Toward the Use of Restitution*, in *Offender Restitution in Theory and Action* 127 (1977)(given restitution's deterrent element, retributionist organizations can favor creative restitution).

¹⁰⁹ J. Bentham, *supra* note 92 at 254.

¹¹⁰ *Id.* at 255.

¹¹¹ Despite a victim's right to sue for civil damages, few victims pursue a civil remedy, though this hesitancy may be changing. *Older Americans Fighting the Fear of Crime* hearing, *supra* note 1 at 158-62. *But see In re Harrel Brooks v. State*, 393 So. 2d 486 (Ala. 1981)(defendant erroneously prohibited from cross-examining victim in criminal trial regarding pending civil suit for damages arising from the same act); *State v. Anonymous*, 36 Conn. Sup. 9 (1980-1)(two cases)(involves request for daily transcripts of criminal trial for use in civil suit).

¹¹² Assuming offenders at times proceed rationally, a necessary assumption for deterrence theory, then an offender aware of restitution may limit the amount of irreparable damage, i.e. choose theft over vandalism.

¹¹³ 18 U.S.C. § 3579(a)(1), "[I]n addition to or in lieu of any other penalty authorized by law . . ."

¹¹⁴ 18 U.S.C. § 3651.

¹¹⁵ 18 U.S.C. § 3579(g).

¹¹⁶ Some victims are willing to endure the criminal trial and a civil trial to achieve justice. Mrs. Mary Knight, a rape victim, recovered a \$365,000 judgment in 1976 against her two attackers. *Older Americans Fighting the Fear of Crime* hearing, *supra* note 1 at 161. "[T]he purpose of this trial wasn't to collect. The purpose of this trial was that it's high time somebody got off their tail and did something about 'rape' . . ." *Id.* quoting *Washington Post*, Feb. 1, 1976, Section B, at 1, col. 6.

a civil damage award, the victim still receives compensation. For lower income victims ineligible for legal aid, the prosecution's advocacy may be the best alternative.

By providing an alternative forum for reparation, restitution through sentencing can promote judicial efficiency. The VWPA minimizes the judicial cost of the subsequent civil trial, and these suits may be abandoned altogether if victims are satisfied with their restitution awards. In the first instance, the VWPA promotes judicial efficiency by minimizing issue relitigation; the criminal conviction "shall estop the defendant from denying the essential allegations of the offense."¹¹⁷

In the second, a crime victim may prefer not to pursue a civil action with a possibly generous judgment,¹¹⁸ in favor of smaller restitution awards¹¹⁹ with no additional time or emotional commitment.¹²⁰

Financing Victim Compensation: A Treasure Hunt for Victim Compensation

Even if restitution sentencing meets constitutional requirements and can be fairly administered, the victim may still be left holding the bag, an empty bag. Though the first goal of restitution sentencing should be to include the victim in the criminal process, the second must be to promote meaningful compensation. The first result, victim participation is good; the second, victim reparation, is better.

Financing victim compensation requires money from offenders, the state or federal governments or private insurance. Ideally, the offender should pay the entire cost of making his victim whole. When the offender lacks sufficient funds, private insurance or government compensation programs should be available to supplement the deficit.

Problem of the Indigent Offender

In the ideal restitution sentence, the offender would fully compensate the victim for all injuries. Full repayment by the offender would promote the rehabilitative and penal goals of restitution and would ensure that the victim did not suffer a financial loss due to the crime. Unfortunately, most offenders do not have unlimited resources,¹²¹ so courts must balance the offender's ability to pay against the victim's injuries.¹²²

The problem of partial offender restitution arises if the offender has limited funds or if the victim suffered expensive losses. Though many offenders are poor,¹²³ some are financially able to pay the full restitution amount.¹²⁴ Even if the offender has modest resources, restitution remains possible for the majority of

¹¹⁷ 18 U.S.C. § 3580(e).

¹¹⁸ See *supra* note 115.

¹¹⁹ Restitution awards through sentencing are likely to be smaller given the absence of punitive damages and the balancing requirement of defendant's ability to pay. 18 U.S.C. § 3580(a).

¹²⁰ See Kellogg, *Making Criminals Pay*, *Fed. Probation*, Sept. 1982 at 15.

¹²¹ See Lamborn, *Remedies for the Victims of Crime*, 43 *S. Cal. L. Rev.* 22, 37-39 (1970). Using court-appointed counsel as a measure of indigency, Lamborn noted 43% of all persons tried for felonies received court-appointed defense counsel. *Id.* citing L. Silverstein, *Defense of the Poor* 7-8 (1965).

¹²² 18 U.S.C. § 3580(a)(VWPA balancing test); see *supra* notes 87-88 and accompanying text.

¹²³ See *supra* note 120.

¹²⁴ *United States v. McMichael*, 699 F.2d 193 (4th Cir. 1983)(defendant convicted of bank embezzlement ordered to pay \$14,119.06 in restitution). In a 1978 survey of the Victim Services Agency Brooklyn restitution program, 59% (360 defendants) completed restitution payments. Zalichin, Schraga and Chytlo, *Restitution in Brooklyn and Bronx Criminal Courts: A Victim-Oriented Approach*, in *Victims, Offenders and Alternative Sanctions* 125 (1980).

minor property crimes such as burglary and purse-snatching.¹²⁵ Thus, restitution only presents a problem when the victim's losses exceed the offender's financial resources.

An indigent offender may still pay victim restitution through participation in a prison or probationary work program. Few, if any, prisons administer a job program which could generate earnings for victim compensation.¹²⁶ Some restitution analysts have criticized this shortcoming in penal programs noting inmate employment could teach job skills, supplement the costs of incarceration and provide income from which to pay victim restitution.¹²⁷ Two states, Minnesota and Georgia, pioneered restitution probation programs enabling offenders to work and either repay their victims directly or indirectly through community service.¹²⁸ The preferred result from the victim's point of view would be direct payment, but even the VWPA provides that victims may nominate an alternative beneficiary to receive restitution through services in lieu of money.¹²⁹

Though indigent at sentencing, an offender may receive funds after sentencing.¹³⁰ Victims of the "Son of Sam" killer, David Berkowitz, can have their civil damage judgments satisfied from a royalty escrow fund established by the New York legislature.¹³¹ The VWPA also requires the Attorney General to report to Congress regarding laws to ensure a federal felon does not profit from the sale of the story of his crime.¹³² Despite the rarity of criminal story royalties, this money should be made available for victim restitution on a regular sentencing basis.¹³³ In a macabre sense, the victim equally earned the royalty through his death or injuries. Allowing royalty capture gives courts an additional source of restitution funding without tapping private insurance or public governmental resources.

Alternative Sources of Compensation Funding

A victim faced with partial offender restitution must look to alternative sources of funds to pay his medical bills or replace stolen articles. Two options, private insurance and public victim compensation, provide reimbursement for loss. The debate continues, however, on which funding source should bear the greater burden.¹³⁴

¹²⁵ Thirty-nine percent of the larcenies committed in the United States in 1980 were for under \$50, 33% were for \$50-\$200. *Sourcebook of Criminal Justice Statistics, Dept. of Justice* 376 (1982).

¹²⁶ Chesney, Hudson and McLagen, *A New Look at Restitution: Recent Legislation, Programs and Research*, 61 *Judicature* 348, 354 (1978).

¹²⁷ *Id.*. Some states authorize restitution from regular prison-labor income. *Ariz. Rev. Stat. Ann.* § 31-254(D)(2)(Supp. 1982-1983); *Fla. Stat. Ann.* §§ 944.49(2)(b), 945.091(5)(a)(West Supp. 1982); *Md. Ann. Code art. 27*, § 645 M(a)(3)(1982).

¹²⁸ See Hudson, Galaway and Chesney, *supra* note 18 at 313-14; Read, *supra* note 10.

¹²⁹ 18 U.S.C. § 3579(b)(4).

¹³⁰ David Berkowitz, the "Son of Sam" killer, illustrates a convicted criminal who received royalty payments for the right to publicize his crime. The State of New York responded with a law, *N.Y. Exec. Law* § 632(a)(Consol. Supp. 1982), to establish a royalties' escrow fund from which his victims' civil damage judgments could be paid. *Older Americans Fighting the Fear of Crime* hearing, *supra* note 1 at 161-62.

¹³¹ *Id.*

¹³² VWPA, section 7, 96 Stat. 1257.

¹³³ In jurisdictions where legislatures have enacted "Son of Sam" royalty laws, judges should include a royalty escrow provision as a standard practice in sentencing. The criminal remains free to exercise his first amendment right to tell his story. He is limited, however, in the ability to enjoy the economic fruits of his crime.

¹³⁴ See Wolfgang, *supra* note 26 *passim*, asserting a government responsibility exists to redress crime victims based on the gravity of the harm, not degree of need, because of the government's failure to protect its citizens. *But see* W. Luksetich and M. White, *Crime and Public Policy* 167-76 (1982), noting the free rider problem in state compensation programs and supporting private insurance.

Insurance should be the first alternative to supplement offender's partial restitution because individuals should be encouraged to mitigate their damages before relying on public funds.¹³⁵ Also, many people already are insured against theft or physical injury making insurance a common source of victim compensation.¹³⁶ By looking to insurance as the first alternative after offender restitution, courts and legislatures could save taxpayer dollars, prevent unjust enrichment through double recoveries and equitably limit victim reimbursement with public funds to the victim's out-of-pocket losses.¹³⁷

Not all victims carry insurance, however, so governments should establish a public victim compensation program to ensure crime victims do not suffer economic harm as a result of their injuries.¹³⁸ Theories supporting government accountability for victim restitution range from a failure-to-protect thesis¹³⁹ to the general notion of public welfare assistance.¹⁴⁰ Regardless of rationale, placing the state as the final alternative for victim indemnification, after the offender and private insurance, spreads the cost of complete restitution over a broad sector thereby minimizing the individual cost of compensation protection. Having a state compensation program also ensures complete victim restitution. The victim is not left to hope the rapist or thug has reachable assets. Nor is the victim forced to rely solely on his personal insurance.

Though strong philosophical arguments support victim restitution based on harm rather than need,¹⁴¹ pragmatism requires a look at states' limited financial resources.¹⁴² Given scarce state funding, more victims can be aided if state programs set a minimum level at which expenses will be reimbursed, for example \$100, and require a showing of financial need. The needs test necessarily requires some middle-income victims to absorb the cost of their injuries. But this requirement would free restitution funds for other victims who cannot bear the increased financial hardship of their victimization.¹⁴³

¹³⁵ This idea conflicts with Wolfgang's thesis, *supra* note 26, that government should be the primary reimbursor when offender restitution insufficiently compensates the victim.

¹³⁶ See Annot., 20 A.L.R. 4th 63 (1983)(deduction for insurance reimbursement); Lamborn, *supra* note 7 at 32-3.

¹³⁷ Annot., 20 A.L.R. 4th *passim* (1983).

¹³⁸ Thirty states administer public victim compensation programs funded through a combination of criminal fines, criminal fine surcharges and tax dollars. See Ramker and Meagher, *supra* note 7. See also Note, *State Legislation in Aid of Victims and Witnesses of Crime*, *supra* note 7.

¹³⁹ See Wolfgang, *supra* note 26 at 232-34.

¹⁴⁰ See generally W. Luksetich and M. White, *supra* note 133 at 175-76 (characterizing victim compensation as a "merit good").

¹⁴¹ Wolfgang, *supra* note 26.

¹⁴² For a list of state compensation budgets, see Ramker and Meagher, *supra* note 7 at 69.

¹⁴³ In 1980, 506,873 families with incomes less than \$3,000 suffered burglaries. Families with incomes from \$3,000 to \$7,499 suffered 632,224 burglaries. *Sourcebook of Criminal Justice Statistics*, Dept. of Justice 307 (1982).

CONCLUSION

Victim compensation through sentencing benefits the offender, the victim and the criminal justice system. The offender experiences the rehabilitative effect of personally redressing his crime and recognizes the human costs of his crime. The victim receives recognition of his injury through the criminal process and receives a monetary award to compensate, at least as much as money will allow, for his injuries. In the process of victim compensation, the justice system benefits through more cooperative victim/witnesses and an improved citizens' attitude toward judicial fairness and effectiveness.

Because the offender's payment of victim restitution must be tailored to the individual crime for maximum rehabilitative effectiveness, difficulties arise in fairly administering a flexible restitution policy. Due process and equal protection considerations require a consistent approach to victim restitution as a condition of sentencing, but this approach should emphasize first, sentencing goals of rehabilitation, punishment and deterrence, and second, victim reparation. If the goal of victim restitution, benefitting both offender and victim, remains a guiding star, then variable sentences will be the desired result rather than a tragic miscarriage of justice.

Funding victim compensation becomes a problem when the victim's losses exceeds the offender's ability to pay. This problem can be mitigated through offender work programs in prisons and parole activities. "Son of Sam" royalty legislation also can ensure that future offender windfalls will be subject to capture to compensate victims.

When the offender falls short of full restitution, private insurance should augment victim compensation. As a final resort, public victim compensation funds, financed through criminal fines and tax dollars, should ensure that victims receive complete compensation. This latter alternative, government-sponsored restitution, may be limited to those victims who would experience a financial hardship without compensation.

Restitution remains a viable option for redressing wrongs and punishing the offender. In its modest context of victim compensation through sentencing, restitution goes further to include the victim in the criminal justice process and give aggrieved victims a greater sense of justice and vindication. The value of victim compensation can be measured in increased victim respect for the justice system, transfer payments from offender to victim redressing criminal injuries and the rehabilitative and penal sentencing goals furthered by victim restitution. This value merits the effort to develop fair administrative procedures for victim restitution and to fund victim compensation when the offender's finances fall short.