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Douglas J. Kepple

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THE VICTIM AND WITNESS PROTECTION ACT OF 1982: RETROACTIVE APPLICATION FOR CONTINUING CRIMES

INTRODUCTION

In response to the needs of victims of federal crimes, the 97th Congress enacted the Victim and Witness Protection Act of 1982 ("VWPA"). The VWPA authorizes a federal court to award restitution as part of a defendant's sentence but, by its terms, applies only to offenses occurring on or after January 1, 1983, the effective date of the statute.

Federal courts are divided over whether the statute permits restitution for losses sustained by victims of continuing crimes when such losses occurred before the effective date. The Third, Fourth and Fifth Circuits look to the language of the effective date and allow restitution only for losses occurring on or after January 1, 1983. Under this approach, victims may still recover pre-effective date losses in subsequent civil proceedings. The Second, Sixth, Ninth and Eleventh Circuits, however, grant restitution for losses occurring before and after the effective date of the VWPA when the offense is a continuing crime or scheme to defraud.

1. See 18 U.S.C. § 3663(a) (Supp. V 1987) (originally codified at 18 U.S.C. § 3579(a)(1)). "The court, when sentencing a defendant convicted of an offense under this title . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.”

These circuits focus on the unified nature of continuing offenses and regard such criminal acts as having been committed after the effective date of the VWPA.  

This Note discusses whether the VWPA should provide restitution for losses occurring before the effective date of the statute if those losses were sustained as a result of a continuing crime. Part I examines the legislative history of the VWPA and the policies served by restitutionary remedies. Part II discusses the nature of continuing crimes and the problems in applying the effective date of the VWPA to such crimes. Part II argues that where continuing crimes are concerned, going beyond the effective date of the VWPA is essential in order to fulfill the purpose of the statute. Part III addresses the ex post facto clause and the constitutionality of demanding restitution for losses incurred before the VWPA’s effective date. This Note concludes that the VWPA should permit restitution for pre-effective date losses when such losses are suffered as part of a continuing crime.

I. LEGISLATIVE HISTORY AND THE POLICY OF RESTITUTION

A. Legislative History

Addressing the judiciary’s mistreatment of crime victims, President Reagan said in 1982 that, “The plight of innocent citizens victimized by lawlessness deserves immediate national attention.” The President urged “all . . . involved in the criminal justice system to devote special attention to the needs of victims of crime, and to redouble their efforts to make our system responsive to those needs.”

Sharing the President’s views, the Special Senate Subcommittee on Ag-scheme which continued in operation after January 1, 1983, and therefore, was subject to the restitution provisions of the Act.”); United States v. Barnette, 800 F.2d 1558, 1571 (11th Cir. 1986) (“[T]he conspirators continued to defend and promote their fraudulent scheme after January 1, 1983 . . . . Therefore, the restitution order imposed . . . . is authorized.”) (citation omitted), cert. denied, 480 U.S. 935 (1987).
7. See Bortnovsky, 879 F.2d at 42; Angelica, 859 F.2d at 1393; Furthar, 823 F.2d at 968; Barnette, 800 F.2d at 1571.
10. Id. The President further declared the week beginning April 19, 1982 as “Crime Victims’ Week.” See id.
VWPA & CONTINUING CRIMES

ing and the Senate Judiciary Subcommittee on Criminal Law conducted hearings on victims’ rights. These hearings indicated that victims were the “forgotten persons” in the criminal justice system and that their needs were being ignored.

Soon after these hearings, and in response to the national outcry concerning victims’ rights, separate bills were introduced in the Senate and House which eventually became the VWPA. The VWPA passed both houses with exceptional speed and support, and created a panoply of devices that increase protection of both victims and witnesses. The VWPA has three major provisions. First, the VWPA amends the Federal Rules of Criminal Procedure to require that a pre-sentencing report assessing the financial, social, psychological and medical impact of the crime upon the victim be filed with the trial judge.

Second, Section 1512 of Title 18 broadens the definition of witness to include victims and expands witness protection to cases other than organized crime offenses. Section 1512 also provides criminal penalties for intimidation of victims and witnesses and lowers the threshold requirements for com-


14. See id.

15. See supra note 8 and accompanying text.


18. See Fed. R. Crim. P. 32(c)(2). The “Victim Impact Statement” is prepared by the Probation Department; see also Senate Report on Criminal Law, supra note 11, at 2517-20 (testimony of probation department that a victim impact statement be prepared).


20. See id.
mission of an intimidation offense. 21 Third, Section 3663 of Title 18 authorizes restitution for crime victims, 22 but does so only when its imposition will not unduly complicate or prolong the sentencing process. 23

Congress intended the restitution provision, Section 3663, to "ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime . . . ." 24 The Senate report accompanying the Act called the "insensitivity and lack of concern for the victim and witness . . . a tragic failing in our criminal justice system" 25 and asserted that federal courts were following the trend of state courts by "reducing restitution from being an inevitable if not exclusive sanction to being an occasional afterthought." 26 Consequently, by enacting Section 3663, the Senate ensured that "the wrongdoer [would be] required to the degree possible to restore the victim to his or her prior state of well-being." 27

By providing restitution as part of a defendant's sentence, the VWPA fills what the Ninth Circuit felt was a sentencing gap in the Uniform Probation Act, 28 the predecessor of the VWPA. The Uniform Probation

Sen. Heinz commented that "it is, unfortunately, not too strong a statement to make that most crime victims are victimized twice—the second time by the insensitivity of a criminal justice system which fails to acknowledge that people, too, are victims. This bill takes a long step forward in preventing that second crime." See 128 Cong. Rec. 26,810 (1982); see also 128 Cong. Rec. 27,392 (1982) (statement by Representative Fish) ("It is time for this Congress to show the compassion to victims of Federal crime that they deserve and have a right to expect").

26. Id. at 2536. The Senate sought to implement "new methods of constructive, victim-oriented sentencing practices [that] can insure . . . that the prosecutorial, judicial and probation authorities know, and are encouraged to respond to, the victim's monetary damages." Id. at 2537.
27. Id. at 2536. Senator Laxalt stated that "[i]t is the intent of Congress that judges order restitution in each and every case where the court finds there has been property loss or injury to the victim. The purpose of this bill is to attempt to make the victim whole once again." 128 Cong. Rec. 26,811 (1982).
28. See United States v. Signori, 844 F.2d 635, 640 (9th Cir. 1988). The Uniform Probation Act provided, in pertinent part, that the court,

[upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, . . . may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

. . . .

While on probation and among the conditions thereof, the defendant . . . may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .

In addition to filling the sentencing gap, Congress expanded the term "offense" under
Act awarded restitution only as a condition of probation. The VWPA, in contrast, allows restitution in conjunction with imprisonment or fine.

B. Policy of Restitution

The two primary goals of restitution are to prevent unjust enrichment and to promote rehabilitation. Traditional notions of justice provide that a defendant who profits from wrongdoing "in equity and good conscience... should not be permitted to retain that by which [he] has been enriched." Furthermore, by forcing the defendant to disgorge his ill-gotten gains, restitution fosters societal confidence in the fairness of the legal system. Restitution also forces a defendant to assume financial responsibility for his unlawful actions and impresses upon the

Section 3663 of the VWPA. The Uniform Probation Act provided that a defendant "[m]ay be required to make restitution... to aggrieved parties for... loss caused by the offense for which conviction was had..." 18 U.S.C. § 3651 (1986) (repealed Nov. 1, 1987). The VWPA does not contain this limiting language and provides that a court may order "the defendant make restitution to any victim of such offense". 18 U.S.C. § 3663(a) (Supp. V 1987). This liberalization of "offense" is some indication of intent by Congress to expand the reaches of Section 3663 beyond those for which a conviction was had. See Project, Congress Opens a Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982, 52 Fordham L. Rev. 507, 509-17 (1984).

32. See B. Galaway, Toward the Rational Development of Restitution Programming, Restitution in Criminal Justice 77 (1977). Professor Galaway postulates five purposes for restitution: (1) redress for victims; (2) rehabilitation for offenders; (3) reduction of the need for vengeance by the victim; (4) less severe and more humane sanctions for offenders; and, (5) reduced demand upon the criminal justice system. See id. at 82-83. "[R]estitution is an appropriate and effective criminal sanction that promotes the criminal law's goals of rehabilitation, deterrence and retribution. Moreover, only within the criminal justice system can restitution foster these aims." Note, Victim Restitution in the Criminal Process: A Procedural Analysis, 97 Harv. L. Rev. 931, 941 (1984); see S. Rep. No. 532, 97th Cong., 2d Sess. 3, reprinted in 1982 U.S. Code Cong. & Admin. News 2538 (VWPA allows alternative forms of restitution so that restitution can "satisfy the victim and provide maximum rehabilitative incentives to the offender").
33. Federal Sugar Refining Co. v. United States Sugar Equalization Bd., Inc., 268 F. 575, 582 (S.D.N.Y. 1920). One commentator argues that the deterrent value of restitution would be greater if supervised restitution were imposed in an amount which would penalize the criminal. See K. Menninger, The Crime of Punishment 68 (1968).
34. See Lamborn, Remedies for the Victims of Crime, 43 S. Cal. L. Rev. 22 (1970); McAdam, Emerging Issue: An Analysis of Victim Compensation in America, 8 Urban Law. 346, 349-50 (1976). If victims are given prompt and full restitution, they have an immediate sense that justice has been done. See Lamborn, supra, at 27. The criminal justice system, by forcing the convicted defendant to make the victim whole, restores trust and confidence to our judicial system. See id.
35. See Durst v. United States, 434 U.S. 542, 554 (1978); B. Galaway, supra note 32, at 83; Note, supra note 32, at 939. Restitution's rehabilitative effectiveness "stems from its direct relation to the amount of damage suffered by the victim: by ordering restitution, a court forces the defendant to
criminal that he has injured a human being. When the criminal is forced to compensate the victim, this enforces the idea that his incarceration is not a punishment by and for the state, but is a result of his injuring the victim. See Laster, Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness, 5 U. Rich. L. Rev. 71, 80 (1970).

37. Note, supra note 32, at 938. Restitution provides the offender an opportunity for a cathartic recognition of his wrongdoing and a symbolic expiation of guilt. See Eglash, Creative Restitution: A Broader Meaning for an Old Term, 48 J. Crim. L. & Criminology 619, 622 (1958); Schafer, Restitution to Victims of Crime—An Old Correctional Aim Modernized, 50 Minn. L. Rev. 243, 249-50 (1965); see also 128 Cong. Rec. 26,348 (1982) (statement of Rep. Rodino) ("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.") (citing Huggett v. State, 83 Wis. 2d 790, 798, 266 N.W.2d 403, 407 (Wis. 1978).
1. Conspiracies

A conspiracy has been defined as "a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means." Conspiracy is an offense distinct from the object of the conspiracy. Under the no-merger rule, conspiracy is prosecuted as a crime separate from any substantive offenses committed in the course of the conspiracy. Federal statutes provide criminal liability for each member of the conspiracy in actions brought within a five-year statute of limitations. The statute of limitations begins to run immediately after the completion of the last overt act in furtherance of

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45. R. Perkins & R. Boyce, Criminal Law 681 (1982) (citing Pettibone v. United States, 148 U.S. 197, 203 (1893)); see Troutman v. United States, 100 F.2d 628, 632 (10th Cir. 1938) ("two or more persons combining with the intent and purpose of committing a public offense by doing an unlawful act or doing a lawful act in an unlawful manner"). Several elements make up a common law conspiracy. These elements are often changed by statutory definition. First, there must be an agreement. See Krulewitch v. United States, 336 U.S. 440, 447-48 (1949) (Jackson, J., concurring). The agreement, however, need not be formalized. See United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 182 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971). Second, either the ends or the means must be illegal. See R. Perkins & R. Boyce, supra, at 684. It is not the agreement which is illegal, but the result of the agreement. See United States v. Kissel, 218 U.S. 601, 608 (1910). Third, while at common law a mere agreement between parties was enough to constitute a conspiracy, see R. Perkins & R. Boyce, supra, at 684, statutes now commonly require an overt act in furtherance of the conspiracy. See 18 U.S.C. § 371 (1982). Acts sufficient to satisfy this third element include, for example, taking a position to observe the activities of the intended victim of a kidnapping planned for the future, see People v. Stevens, 78 Cal. App. 395, 396, 248 P. 696, 697 (Cal. Dist. Ct. App. 1926), or purchasing the necessary stamps to be used in a conspiracy to commit murder by mail. See People v. Corica, 55 Cal. App. 2d 130, 134, 130 P.2d 164, 167 (Cal. Dist. Ct. App. 1942). One court held that a meeting to discuss plans was not an overt act in addition to the agreement because it was a part of the agreement itself. See People v. Hines, 168 Misc. 453, 457, 6 N.Y.S.2d 2, 5 (N.Y. Sup. Ct. 1938).

46. See Troutman v. United States, 100 F.2d 628, 632 (10th Cir. 1938); see also United States v. Kissel, 218 U.S. 601, 603-04 (1910).

47. See Troutman, 100 F.2d at 632. This doctrine is known as the "No Merger Rule." See Johl v. United States, 370 F.2d 174, 177 (9th Cir. 1966). The "Pinkerton Rule", articulated by the Supreme Court in Pinkerton v. United States, 328 U.S. 640 (1946), further broadened the net of conspiracy by concluding that, when a conspiracy and a substantive offense are charged, a conspirator can be held guilty of the substantive offense even though he did no more than join the conspiracy. See id. at 647.

48. The general federal conspiracy statute provides:

If two or more persons conspire either to commit any [Title 18] offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.


the conspiracy.\textsuperscript{50}

Conspiracies begin when an agreement has been formed and one or more overt acts have been performed in furtherance of the unlawful design\textsuperscript{51} and continue as long as the conspirators act to further the ends of the agreement.\textsuperscript{52} If the conspirators agree to further their primary purpose by taking additional steps, such as dividing profits,\textsuperscript{53} the conspiracy will continue until those additional acts are accomplished or abandoned.\textsuperscript{54} Conspiracies end when their goals are accomplished or the conspiracy has been abandoned.\textsuperscript{55}

2. Mail Fraud

Mail fraud, like conspiracy, is a continuing crime.\textsuperscript{56} The federal mail fraud statute provides that anyone who devises a scheme to defraud and uses the mails in furtherance of that scheme can be held criminally liable.\textsuperscript{57} The essential elements of mail fraud are the act of having devised

\begin{footnotes}
\item 50. See W. LaFave & J. Israel, supra note 41, at 699.
\item 51. See Troutman v. United States, 100 F.2d 628, 632 (10th Cir. 1938).
\item 52. See United States v. Hickey, 360 F.2d 127, 141 (7th Cir.), cert. denied, 385 U.S. 928 (1966); see also United States v. Kissel, 218 U.S. 601, 607 (1910) ("mere continuance of the result of a crime does not continue the crime").
\item 53. See United States v. Walker, 653 F.2d 1343, 1350 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982); Atkins v. United States, 307 F.2d 937, 940 (9th Cir. 1962); Koury v. United States, 217 F.2d 387, 388 (6th Cir. 1954) (per curiam); see also United States v. CFW Construction Co., Inc., 583 F. Supp. 197, 206 (D.S.C.) (where agreement includes a payoff, conspiracy continues until payoff received), aff'd, 749 F.2d 33 (4th Cir. 1984).
\item 54. See United States v. Hickey, 360 F.2d 127, 141 (7th Cir.), cert. denied, 385 U.S. 928 (1966); United States v. Allegretti, 340 F.2d 254, 256 (7th Cir. 1964), cert. denied, 381 U.S. 911 (1965); McDonald v. United States, 89 F.2d 128, 133 (8th Cir.), cert. denied, 301 U.S. 697 (1937).
\item 55. See United States v. Kissel, 218 U.S. 601, 608 (1910).
\item 56. See United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987); see also United States v. Cohen, 516 F.2d 1358, 1364 (8th Cir. 1975) ("proof of mail fraud scheme involving two or more persons is analogous to the nature of proof in a conspiracy").
\item 57. The mail fraud statute provides:

Whoever, having devised . . . any scheme or artifice to defraud, [and] . . . for the purpose of executing such scheme . . . places in any post office . . . any matter or thing . . . to be sent or delivered by the Postal Service . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both. 18 U.S.C. § 1341 (1982).

The federal mail fraud statute has been applied to a broad range of offenses. See, e.g., United States v. Lovett, 811 F.2d 979 (7th Cir. 1987) (bribery); United States v. Washita Construction Co., 789 F.2d 809 (10th Cir. 1986) (bid rigging); United States v. Girdner, 754 F.2d 877 (10th Cir. 1985) (election fraud).

The Supreme Court, in McNally v. United States, 483 U.S. 350 (1987), greatly restricted the applicability of the federal mail fraud statute by holding that it could not be used to prosecute those who fraudulently deprive others of "intangible rights" such as the
or intended to devise a scheme to defraud, and the act of placing or causing mail to be placed in an authorized depository with the intent to carry out an essential step in the execution of the scheme to defraud.

A mailing must be sufficiently related to the scheme to defraud to constitute mail fraud. For example, letters used to lure victims into the scheme are closely related to the scheme and are covered by the statute. A mailing which is not sufficiently related to the scheme, such as mailing stolen credit card receipts, or which occurs after the scheme has reached fruition, does not fall within the purview of the mail fraud statute.

Although each use of the mails may constitute a separate instance of mail fraud, when the mailings are part of a larger mail fraud scheme, all of them must be prosecuted as one unified scheme to defraud. Consequently, each mailing is simply a count within the indictment.

### B. The VWPA and Continuing Crimes

A strict interpretation of the VWPA, adopted by the Fifth, Fourth and Third Circuits, precludes restitution for losses from a continuing crime right to an honest government. See id. at 366-67 (Stevens, J., dissenting). The Court so held even though mail fraud was often the "sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit." Note, McNally v. United States and its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?, 39 Mercer L. Rev. 697, 697 (1988) (quoting Rakoff, The Federal Mail Fraud Statute I, 18 Duq. L. Rev. 771, 772 (1980)).

59. See id.
61. See United States v. Maze, 414 U.S. 395, 403 (1974). "Lulling letters" include not only those which entice the victim into the scheme, but also those which lull a victim into a false sense of security or postpone the victims' ultimate complaint. See Ashdown, 509 F.2d at 799-800.
62. See Maze, 414 U.S. at 402. The defendant was engaged in a stolen credit card scheme. When a merchant mails receipts from stolen credit cards to the collecting bank, he is not perpetuating the scheme.
63. See Kann v. United States, 323 U.S. 88, 94 (1944). The scheme, purchasing goods or services with fraudulent checks, reached fruition when the defendant received the goods or services. The bank's use of the mails in the ordinary course of business to effectuate collection of the check was not in furtherance of the scheme.
which occurred prior to January 1, 1983. This interpretation, however, creates procedural difficulties. In the case of continuing crimes, it may be very difficult to distinguish between losses taking place before and after the effective date. This confusion can have the effect of complicating and prolonging the sentencing process. If substantial, the complication might bar the granting of restitution. In addition, this strict interpretation ignores the VWPA’s mandate to provide compensation to victims of offenses and furthers neither the purpose of the VWPA nor the policy of restitution. Rather than follow this literal approach, courts should construe the effective date of the VWPA to permit pre-effective date restitution.

1. Statute of Limitations Analysis

A statute of limitations has the procedural effect of barring prosecution for an offense if the action is not brought within a requisite time period. Limiting exposure to criminal prosecution relieves individuals of the burden of defending themselves against charges when the relevant facts have been obscured by the passage of time. All statutes of limitations provide that the period of limitations begins to run when every element in the statutory definition of an offense has been committed. For continuing crimes, the statute of limitations begins to run when the course of conduct or defendant’s complicity terminates.

A statute of limitations also has an evidentiary effect when applied to continuing crimes. Despite the time-bar to prosecution, acts occurring outside the statute of limitations may be introduced into evidence when

67. See supra note 4, 5 and accompanying text.
68. See United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987).
69. Two circuit courts have found that the severance of a mail fraud or conspiracy into pre- and post-effective date loss is at best impractical and would certainly complicate the sentencing process. See United States v. Purther, 823 F.2d 965, 968 (6th Cir. 1987); United States v. Woods, 775 F.2d 82, 88 (3d Cir. 1985). For example, in Purther, a mail fraud case, the court stated that “[i]t would be virtually impossible to determine precisely when each victim of a scheme ... actually suffered his or her loss. This is especially so where ... the perpetrator makes some payments of ‘interest’ or ‘return on investment’ ...” Purther, 823 F.2d at 968.
71. The term “offense” has caused some interpretational problems. One commentator discussed the problems courts were having in applying both a broad and narrow interpretation of offense. See Project, supra note 28, at 509-17.
72. See supra notes 24-37 and accompanying text.
74. See id. at 114.
75. See W. LaFave & J. Israel, supra note 41, § 18.5(a), at 699.
they are part of a continuing crime.\textsuperscript{78}

Criminal acts occurring within the statute of limitations are subject to prosecution under the no-merger rule. In contrast, evidence of criminal acts occurring outside the statute of limitations can be admitted only as evidence of the continuing nature of a continuing crime, but cannot be introduced to support substantive prosecution of the criminal act.\textsuperscript{79} Thus, crimes which cannot be the focus of an indictment can nevertheless be used as evidence to demonstrate the nature of the scheme and the intent required to prove a continuing crime.\textsuperscript{80} Courts admit proof of events occurring outside the statute of limitations because "[i]t would be a bizarre result indeed if a [continuing] crime properly prosecuted within the limitations period could not be proven because an essential element . . . could only be established by proof of incidents occurring outside the period."\textsuperscript{81}

The effective date provision of the VWPA is arguably similar in operation to a statute of limitations.\textsuperscript{82} Both create cut-off dates, points at which prior events cannot be made the basis for the pertinent govern-

\begin{footnotesize}
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\item[78.] See United States v. Seuss, 474 F.2d 385, 391 (1st Cir.) ("pre-statute of limitations evidence [is] admissible 'to show the nature of the scheme and the intent', but only 'if it is connected up with the scheme existing when the overt acts were performed'") (quoting defendant's admission regarding pre-statute of limitations evidence) (citation omitted), \textit{cert. denied}, 412 U.S. 928 (1973).
\item[79.] In Troutman v. United States, 100 F.2d 628 (10th Cir. 1938), the court stated that "evidence tending to prove relevant acts or conduct which occurred before the date on which it is charged the scheme was devised, or more than three years before the return of the indictment, may be admitted if within the period of limitations the mails were used in furtherance of such scheme." \textit{Id.} at 633; see United States v. Perholtz, 842 F.2d 343, 365 (D.C. Cir.) (because mailings that clearly furthered scheme to defraud occurred within five years of indictment, mail fraud prosecution is not time barred as agreement to pay bribes falling within time-barred period), \textit{cert. denied}, 109 S. Ct. 65 (1988); United States v. Castellano, 610 F. Supp. 1359, 1384 (S.D.N.Y. 1985) (racketeering act falling outside of limitation period may be used as element of RICO prosecution, provided at least one other act occurred within period); United States v. Blosser, 440 F.2d 697, 699 (10th Cir. 1971) ("proof running back of the statute is admissible to show the scheme and intent if it is connected up with the scheme existing when use of the mails occurred"); Weatherby v. United States, 150 F.2d 465, 467 (10th Cir. 1945) (if any use of the mails was within period, the prosecution was timely); Little v. United States, 73 F.2d 861, 867 (10th Cir. 1934) (no defense that scheme was formed prior to the limitations period); Fournier v. United States, 58 F.2d 3, 6 (7th Cir. (date of mailing rather than date of agreement is germane to statute of limitations), \textit{cert. denied}, 286 U.S. 565 (1932); Munch v. United States, 24 F.2d 518, 519 (5th Cir. 1928) (usage of mails, not scheme to defraud, triggers the statute of limitations); United States v. Epperson, 552 F. Supp. 359, 361 (S.D. Ill. 1982) (while only nine of fourteen acts comprising mail fraud were committed within statute of limitations, court admitted remaining five acts as evidence of mail fraud scheme).
\item[80.] However, it must be proven that one overt act was performed during this period and that the overt act was performed in furtherance of the conspiracy. \textit{See} Grunewald v. United States, 353 U.S. 391, 396-97 (1957).
\item[81.] \textit{See supra} note 47 and accompanying text.
\item[82.] \textit{See United States v. Blosser, 440 F.2d 697, 699 (10th Cir. 1971).}
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ment action. Neither, however, should bar courts from recognizing the unique nature of continuing crimes and treating them as unitary crimes. A rigid adherence to effective date requirements would subvert the primary purpose of the underlying statute. Courts should be able to interpret the effective date of the VWPA to provide complete restitution to victims of continuing crimes. Similarly, in the statute of limitations context, the government may ignore the statute of limitations for evidentiary purposes despite the fundamental policies behind the statute of limitations.

Given the legislative history of the VWPA and the policy underlying all restitution, going beyond the effective date of the VWPA is no more objectionable than "breaching" the statute of limitations for evidentiary purposes. In the statute of limitations context, evidence is permitted to

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83. Any restitution to the victim must comply with the defendant's due process rights. See Project, supra note 28, at 544-67. In order to provide pre-effective date restitution for continuing crimes, therefore, it may be useful for the trial court to use a special interrogatory charge to the jury to determine which acts were committed, or continued, past the effective date of the legislation provisions. An analogy may be drawn to the statute of limitations; a continuing offense that occurs in part before the statute runs may be included in the offense charged. Id. at 21.

84. See Attorney General's Memorandum, supra note 82; supra notes 77-81 and accompanying text.

85. See Attorney General's Memorandum, supra note 82.
prove such essential elements as intent even though that evidence may offend the policies behind the statute of limitations.\(^8\) In contrast, going beyond the effective date of the VWPA clearly furthers the policy behind the VWPA.\(^7\) Going beyond the effective date of the VWPA provides complete restitution, and thereby fulfills the purposes of the VWPA.\(^8\) “Incomplete compensation does not remedy fully the wrong committed,”\(^9\) therefore, permitting the perpetrator of a continuing crime to avoid making restitution for pre-effective date losses is “intolerable from a societal perspective.”\(^10\)

III. CONSTITUTIONAL CONSIDERATIONS: \textit{Ex Post Facto} Analysis

The United States Constitution forbids the federal and state governments from enacting any \textit{ex post facto} law or bill of attainder.\(^9\) \textit{Ex post facto} laws retroactively criminalize past innocent acts,\(^9\) retroactively increase the punishment for crimes,\(^9\) or retroactively alter the rules of evidence to permit courts to receive less or different testimony than the law required at the time of the offense.\(^9\) The Supreme Court recognizes that the \textit{ex post facto} prohibition furthers two important purposes. First, it ensures “that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”\(^9\) Second, the prohibition also “restricts governmental power by restraining arbitrary and potentially vindictive legislation.”\(^9\)

In United States v. Corn, the Fifth Circuit refused to grant restitution for losses incurred prior to the effective date of the VWPA, reasoning that doing so would increase the punishment applicable to crimes and violate the \textit{ex post facto} clause.\(^7\) This court, however, erred in its application of \textit{ex post facto} principles to continuing crimes. When criminal conduct continues after the enactment or amendment of a statute which increases the penalty imposed on such conduct, the statute may be applied to the part of the continuing crime occurring before its enactment.

\begin{enumerate}
\item \textit{See} United States v. Ashdown, 509 F.2d 793, 798 (5th Cir.), cert. denied, 423 U.S. 829 (1975).
\item \textit{See supra} notes 31-37 and accompanying text.
\item \textit{See supra} notes 25-28 and accompanying text.
\item Partial restitution, although it does not fully address pecuniary harm, may still have some rehabilitative effects. \textit{See} Epstein, \textit{Crime and Tort: Old Wine in Old Bottles}, in Assessing the Criminal: Restitution, Retribution, and the Legal Process 231, 257 (1977).
\item United States v. McLaughlin, 512 F. Supp. 907, 912 (D. Md. 1981). The court stated that such incomplete restitution would not foster a defendant's acceptance of responsibility for his unlawful actions. \textit{See id.}
\item \textit{See} U.S. Const. art. I, § 9, cl. 3; § 10, cl. 1.
\item \textit{See} Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). \textit{Calder} envisioned the government enacting a law that would criminalize an act that was previously innocent, then applying the law to acts occurring before the law was passed. \textit{See id.}
\item \textit{See id.}
\item \textit{See id.}
\item Weaver v. Graham, 450 U.S. 24, 28-29 (1981).
\item \textit{Id.} at 29.
\item \textit{See} United States v. Corn, 836 F.2d 889, 895-96 (5th Cir. 1988).
\end{enumerate}
without violating the *ex post facto* prohibition.\textsuperscript{98} By engaging in criminal conduct after the effective date of a statute, the defendant voluntarily subjects himself to the increased penalty. Simply because the increased penalty relates to the conduct occurring prior to the effective date does not create an *ex post facto* violation. Courts universally cite the unitary nature of continuing crimes and conclude that a statute imposing a greater penalty for a continuing crime, where the crime is still being carried on after the date when the statute becomes effective, does not violate the *ex post facto* provision.\textsuperscript{99}

**CONCLUSION**

Given the policies that underlie restitution, the legislative intent of the VWPA and the unitary nature of continuing crimes, pre-effective date losses suffered as a result of ongoing crimes should be subject to restitution under the VWPA. It was Congress' intent to help the "forgotten persons"\textsuperscript{100} of the criminal justice system; granting pre-effective date restitution would further this goal.

\textit{Douglas J. Kepple}


\textsuperscript{99} See Johnson, 537 F.2d at 1175; Ferrara, 458 F.2d at 874; Huff, 192 F.2d at 915; Shackelford, 180 F. Supp. at 859; Ogull, 149 F. Supp. at 274.

\textsuperscript{100} See Senate Report on Criminal Law, supra note 11, at 2516.