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## Congress Opens a Pandora's Box - The Restitution Provisions of the Victim and Witness Protection Act of 1982

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# PROJECT

## CONGRESS OPENS A PANDORA'S BOX—THE RESTITUTION PROVISIONS OF THE VICTIM AND WITNESS PROTECTION ACT OF 1982

### INTRODUCTION

During the last decade, the plight of the victim, the “forgotten person,”<sup>1</sup> has come to the forefront of the public’s consciousness.<sup>2</sup> Victim and witness assistance programs have been established throughout the country, and a majority of states has enacted legislation designed to protect victims and witnesses.<sup>3</sup> The federal criminal justice system, however, has heretofore been “offender-oriented,”<sup>4</sup> unresponsive and insensitive to the needs of victims and witnesses.<sup>5</sup> Congress enacted the Victim and Witness Protection Act of 1982 (VWPA or Act)<sup>6</sup> to improve the treatment of victims and witnesses in the federal criminal system.<sup>7</sup> The Act is the federal government’s first attempt to respond to these concerns.

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1. S. Rep. No. 532, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2515, 2516 [hereinafter cited as Senate Report]; Division of Continuing Education and Training, Federal Judicial Center, Video Teleconference on the Victim and Witness Protection Act of 1982, March 15, 1983, Audio Tapes, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Prof. of Law, Univ. of Pa.) [hereinafter cited as Teleconference Tapes]. Traditionally, the victim has been deemed a “mere witness” without any input into the disposition of cases or charges levied against the defendant. Senate Report, *supra*, at 11 (testimony of Hon. Edward J. Northrop, Senior Judge, D. Md.), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2517. It has been stated that the victim “has no right of allocation and is often overlooked in the process of plea negotiation.” *Id.* The VWPA recognizes the integral role of the victim in the criminal justice system. See 18 U.S.C. § 1512 note (1982) (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System). In testimony before the Subcommittee on Criminal Law, Judge Edward S. Northrop stated that “[o]ur position is that we should not prosecute, try, and sentence any defendant without at least listening to the victim’s offense-related needs.” Senate Report, *supra*, at 11, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2517.

2. Bureau of Justice Statistics, U.S. Dep’t of Justice, Victim and Witness Assistance: New State Laws and the System’s Response 1 (1983) [hereinafter cited as New State Laws].

3. *Id.* at 1; see statutes cited *infra* note 194.

4. New State Laws, *supra* note 2, at 1.

5. Senate Report, *supra* note 1, at 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2516; New State Laws, *supra* note 2, at 1. The VWPA is landmark legislation recognizing and focusing upon the needs of victims. Teleconference Tapes, *supra* note 1, side 3 of 5 (statement of E. DiToro, Probation Officer, E.D.N.Y.).

6. Pub. L. No. 97-291, 96 Stat. 1248 (codified in scattered sections of 18 U.S.C. and Fed. R. Crim. P. 32(c)(2)).

7. See 18 U.S.C. § 1512 note (1982) (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System).

This Project focuses on the restitution provisions of the VWPA<sup>8</sup> which enable judges to order restitution in addition to other types of punishment<sup>9</sup> rather than solely as a condition of probation.<sup>10</sup> The Act favors the ordering of restitution;<sup>11</sup> judges must order restitution in each case unless they state reasons for not so doing.<sup>12</sup>

The restitution provisions are intended to aid crime victims by requiring convicted defendants to compensate their victims to the greatest extent possible,<sup>13</sup> thus achieving the "ultimate justice."<sup>14</sup> Congress, however, has limited the imposition of restitution to only those circumstances when restitution will "not unduly complicate or prolong the sentencing process,"<sup>15</sup> or infringe upon the defendant's constitutional rights.<sup>16</sup>

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8. 18 U.S.C. §§ 3579-3580 (1982). In addition to the restitution provisions, the Act has three major features. First, the obstruction of justice provisions of title 18 are amended to prohibit the harassment and intimidation of victims and witnesses. 18 U.S.C. §§ 1512-1515 (1982). Second, Rule 32(c)(2) of the Federal Rules of Criminal Procedure is amended to require that a Victim Impact Statement be prepared as part of the pre-sentence process so that the effect of the offender's crime upon the victim may be assessed. Fed. R. Crim. P. 32(c)(2). Finally, the VWPA adds as a condition of bail in non-capital offenses that the accused not commit an offense under the title 18 obstruction of justice provisions. 18 U.S.C. § 3146(a) (1982).

9. Senate Report, *supra* note 1, at 30, 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2536, 2538; *Implementation of the Restitution Provisions of the Victim and Witness Protection Act of 1982* at 4 (August 29, 1983) (memorandum from D. Lowell Jensen, Associate Attorney General) [hereinafter cited as *Justice Dep't Guidelines*]; see 18 U.S.C. § 3579(a)(1) (1982).

10. Prior to the enactment of the VWPA federal judges could impose restitution only as a condition of probation. *Justice Dep't Guidelines*, *supra* note 9, at 7; see 18 U.S.C. § 3651 (1982) (restitution as condition of probation); Senate Report, *supra* note 1, at 30 (VWPA restitution provisions permit court to order restitution independent of probation), reprinted in 1982 U.S. Code Cong. & Ad. News at 2536.

11. See Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 Yale L.J. 505, 509 & n.18 (1984).

12. 18 U.S.C. § 3579(a)(2) (1982) (when a judge orders partial or no restitution he must state his reasons for so doing on the record); Brief for United States at 2, *United States v. Welden*, appeal docketed, No. 83-7-444 (11th Cir. Aug. 8, 1983); *Justice Dep't Guidelines*, *supra* note 9, at 4.

13. Senate Report, *supra* note 1, at 30, reprinted in 1982 U.S. Code Cong. & Ad. News at 2536; *Justice Dep't Guidelines*, *supra* note 9, at 17, 20.

14. See 128 Cong. Rec. H8209 (daily ed. Sept. 30, 1982) (remarks of Rep. Fish); *id.* at H8207 (remarks of Rep. McCollum); Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Prof. of Law, Univ. of Pa.).

15. 18 U.S.C. § 3579(d) (1982). This provision was included "to prevent sentencing hearings from becoming prolonged and complicated trials on the question of damages." Senate Report, *supra* note 1, at 31, reprinted in 1982 U.S. Code Cong. & Ad. News at 2537; see Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Prof. of Law, Univ. of Pa.) (no restitution is to be ordered if the sentencing process will be unduly complicated and prolonged). Congress considered how restitution would affect the sentencing process when the Criminal Code Reform Act of 1981 was drafted. The bill's legislative history stated that a court should not consider imposing restitution when such consideration would un-

The first part of this Project analyzes the Act's key terms as well as the problems arising from the failure of the Act to address various issues. Part II examines the procedural considerations that result from the introduction of restitution as a component of sentencing, including the need for a jury and plea bargaining. The third part questions the effectiveness of restitution as a means to meet the VWPA goal of compensating victims. The congressional limitations imposed upon restitution affect the scope of the Act, the procedures used to implement the Act, and the effectiveness of restitution in fully compensating victims.

### I. THE SCOPE OF THE VWPA

Many of the Act's terms relating to restitution are not defined. As a result, trial judges have not been provided with guidance to effectuate the goals of the Act. Several problems that result from the Act's failure to define adequately and to address various issues can be highlighted by the following hypothetical crime.<sup>17</sup> Two armed men enter a federally-insured bank and order the tellers to empty the cash drawers and deliver the contents to them. The tellers comply with the demand and give the offenders \$20,000. A teller is then assaulted by one of the perpetrators with the butt of a pistol. The other employees' and customers' jewelry and money are stolen. The armed men flee the bank in a stolen automobile. Two weeks after the first bank robbery, the perpetrators rob a second bank.

The culprits are later apprehended and charged with both bank robberies and the assault upon the teller of the first bank. The defendants are convicted for the first bank robbery and the assault. The first bank is awarded \$5000 in restitution.

#### A. *The Definition of "Offense": The Basis of Restitution*

The VWPA provides that the court "when sentencing a defendant convicted of an offense . . . may order . . . that the defendant make

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duly complicate or prolong the sentencing process. S. Rep. No. 307, 97th Cong., 2d Sess. 993, 1000 [hereinafter cited as 1981 Senate Report]. The Justice Department recommends that "[t]he simplest, most unencumbered method of handling [the] sentencing hearing" be utilized. *Justice Dep't Guidelines, supra* note 9, at 4. It has warned that the Department will "resist attempts to expand sentencing into a full-blown hearing separate from the allocution process." *Id.*

16. 18 U.S.C. § 1512 note (1982) (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System).

17. The hypothetical is largely derived from the hypothetical crime presented at the Teleconference on the VWPA. See Division of Continuing Education and Training, Federal Judicial Center, Materials to Accompany "Video Teleconference on the Victim and Witness Protection Act of 1982," March 15, 1983, at 16-21 [hereinafter cited as Materials to Accompany Teleconference].

restitution to any victim of the offense."<sup>18</sup> The definition of "offense" necessarily determines the overall victimization—the compensable harm suffered by those considered to be victims.<sup>19</sup> The statute does not define "offense," and there are a number of possible interpretations.<sup>20</sup> Application of each of these possible interpretations of "offense" in the context of the hypothetical crime may result in dramatically different restitution awards. If restitution is limited to the title 18 offenses of which the defendants are convicted<sup>21</sup> only the first bank and the assaulted bank teller would be eligible to receive restitution.<sup>22</sup> Alternatively, if restitution is based on the criminal transaction charged,<sup>23</sup> the sentencing judge could also order restitution to the second bank even though the defendants were not convicted of that robbery.<sup>24</sup> An even broader view might entitle the owner of the stolen automobile and the customers of the first bank to recover.<sup>25</sup>

### 1. The Restrictive Interpretation

The restrictive interpretation of "offense" is similar to the offense limitation of the Federal Probation Act.<sup>26</sup> The Probation Act provides that "among the conditions [of probation] the defendant . . . [m]ay be required to make restitution . . . to aggrieved parties for . . . loss caused by the *offense for which conviction was had*."<sup>27</sup> The VWPA does not contain this limiting language. Despite the absence of such

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18. 18 U.S.C. § 3579(a)(1) (1982).

19. See Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Prof. of Law, Univ. of Pa.).

20. See *Overview and Analysis of the Victim and Witness Protection Act of 1982: Responsibilities of Federal Defenders 2-3* (March 15, 1983 Teleconference) (memorandum of Fred Warren Bennett, Federal Public Defender, D. Md.) (available in files of *Fordham Law Review*) [hereinafter cited as Bennett]; *Victim and Witness Protection Act of 1982 6* (June 28, 1983) (memorandum from Frank X. Altimari, United States District Court Judge to Judges of the Eastern District of New York) (available in files of *Fordham Law Review*) [hereinafter cited as Altimari].

21. Bennett, *supra* note 20, at 2. See *infra* note 27.

22. See *infra* note 27 and accompanying text.

23. See Bennett, *supra* note 20, at 2; *Justice Dep't Guidelines*, *supra* note 9, at 7, 17. An order of restitution based on the criminal transaction charged could extend beyond the conviction, and encompass harm resulting from crimes which were charged but for which no conviction was obtained.

24. See *infra* note 46 and accompanying text.

25. See *infra* note 47 and accompanying text.

26. 18 U.S.C. § 3651 (1982).

27. *Id.* (emphasis added). Courts have construed the language of the Probation Act literally. See, e.g., *United States v. Buechler*, 557 F.2d 1002, 1007 (3d Cir. 1977); *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962); *United States v. Follette*, 32 F. Supp. 953, 955 (E.D. Pa. 1940). For judicially-created exceptions to the Probation Act limitation see *infra* notes 39-42 and accompanying text.

language in comparable state restitution statutes, a number of state courts have adopted the same restrictive interpretation.<sup>28</sup>

This interpretation ensures that restitution is directly related to the criminal act.<sup>29</sup> Further, the defendant may not have had an opportunity to have adjudicated his guilt or innocence for the additional offenses encompassed in a broadly-defined restitution order.<sup>30</sup> Finally, the rehabilitative effects of restitution may be diminished if the restitution order encompasses conduct that caused harm that is not obvious or apparent to the offender in relation to the crime for which he was charged and convicted.<sup>31</sup> For example, the offenders in the hypothetical crime may resent a requirement that restitution be made to the owner of the stolen automobile when they were neither charged with nor convicted of that offense. Restitution aids in the rehabilitation of offenders<sup>32</sup> by strengthening their sense of responsibility<sup>33</sup> and

28. See, e.g., *People v. Becker*, 349 Mich. 476, 483-84, 84 N.W.2d 833, 837 (1957); *People v. Lofton*, 78 Misc. 2d 202, 205, 356 N.Y.S.2d 791, 793 (Crim. Ct. 1974); *People v. Funk*, 117 Misc. 778, 779-80, 193 N.Y.S. 302, 303 (Erie County Ct. 1921); *State v. Barnett*, 110 Vt. 221, 227, 231-32, 3 A.2d 521, 524, 525 (1939); Note, *Use of Restitution in the Criminal Process: People v. Miller*, 16 UCLA L. Rev. 456, 460-61 (1969) [hereinafter cited as *Use of Restitution*]. A number of state legislatures have explicitly adopted the conviction-only limitation in state restitution statutes. See, e.g., Alaska Stat. § 12.55.100(a)(2) (1980); Fla. Stat. Ann. § 947.181 (Supp. 1982); Va. Stat. Ann. § 19.2-305.1 (1983).

29. See *Use of Restitution*, *supra* note 28, at 460; cf. *People v. Dominguez*, 256 Cal. App. 2d 623, 627, 64 Cal. Rptr. 290, 293 (1967) (court struck down sentence imposing restitution for acts that were not related to crime for which defendant was convicted); *People v. Mahle*, 57 Ill. 2d 279, 284, 312 N.E.2d 267, 271 (1974) (restitution may not extend to matters "unrelated to charges before court").

30. See Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. Rev. 52, 81 (1982) (restitution may encompass offenses never adjudicated or charged) [hereinafter cited as Harland I]. In *United States v. Buechler*, 557 F.2d 1002 (3d Cir. 1977), the district court imposed restitution as a condition. *Id.* at 1003. The amount ordered exceeded the amount of loss caused by the specific acts for which the defendant was convicted. The defendant argued that such restitution was a violation of due process because it required the payment of restitution based upon facts that the defendant had no opportunity to contest. The Court of Appeals did not reach the constitutional issue; rather, it relied on the limiting language of the Probation Act to strike the condition. *Id.* at 1003, 1007-08.

31. *State v. Stalheim*, 275 Or. 683, 688, 552 P.2d 829, 832 (1976). *But see* *People v. Miller*, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967) (rehabilitation requires that defendant's probation be conditioned on realities of situation without all technical limitations in determining scope of the offense for which defendant was convicted). For a complete discussion of *People v. Miller* see *Use of Restitution*, *supra* note 28.

32. Senate Report, *supra* note 1, at 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2538; Teleconference Tapes, *supra* note 1, side 2 of 5 (statement of D. Chamlee, Deputy Chief, Probation Division, Administrative Office of the U.S. Courts). Restitution serves two purposes—it restores the victim to his prior state of well-being and aids in the rehabilitation of the offender. Laster, *Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness*, 5 U. Rich. L. Rev. 71, 80 (1970).

33. *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981); Teleconference Tapes, *supra* note 1, side 2 of 5 (statement of D. Chamlee, Deputy Chief,

leading them to appreciate the consequences of their actions.<sup>34</sup> These rehabilitative goals are not furthered if the offenders are punished for a crime of which they have not been found guilty.

The restrictive approach, however, presents practical difficulties that could limit victim compensation.<sup>35</sup> In the hypothetical crime, for example, a decision by the United States District Attorney to prosecute only the first bank robbery<sup>36</sup> would effectively eliminate the restitution rights of the assaulted teller and the second bank.<sup>37</sup> The restrictive approach may also affect a prosecutor's willingness to negotiate a plea arrangement.<sup>38</sup> One court analyzing the restrictive approach of the Federal Probation Act has noted that "[i]f a defendant [cannot] consent to make restitution for the actual loss caused by his or her conduct" that did not result in conviction, the prosecutor has less reason to dismiss counts pursuant to plea bargaining in order to limit a defendant's potential period of incarceration.<sup>39</sup> This may lead to further congestion of the already crowded court system.

Two judicially-created exceptions to the restrictive approach have been adopted in cases decided under the Federal Probation Act to respond to some of these problems. The first exception applies when there is a plea-bargaining arrangement in which the defendant has agreed to make restitution for conduct other than that for which the

Probation Division, Administrative Office of the U.S. Courts). Restitution is a penal sanction imposed against the offender to require him to recognize his obligation to the victim of the offense. 1981 Senate Report, *supra* note 15, at 1001.

34. *State v. Stalheim*, 275 Or. 683, 688-89, 552 P.2d 829, 832 (1976); *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403, 407 (1978); Schafer, *Restitution to Victims of Crime—An Old Correctional Aim Modernized*, 50 Minn. L. Rev. 243, 250 (1965); see *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981); see also *Durst v. United States*, 434 U.S. 542, 549, 553-54 (1978) (restitution may result in increased respect for the law).

35. See *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981) (restrictive approach diminishes likelihood of plea bargaining and frustrates rehabilitative goals); *People v. Mahle*, 57 Ill. 2d 279, 284, 312 N.E.2d 267, 271 (1974) (restitution may not extend to matters unrelated to the charges before the court); *State v. Cox*, 35 Or. App. 169, 171-72, 581 P.2d 104, 105-06 (1978) (restrictive approach eliminates restitution rights of victims if full loss not originally reported—conviction will be based on lesser degree of crime).

36. See *State v. Scherr*, 9 Wis. 2d 418, 423, 101 N.W.2d 77, 80 (1960) ("[I]t [is] a common practice . . . for a prosecutor to charge a defendant with the commission of only one offense of a series."); Harland I, *supra* note 30, at 82-83 ("The prolific activities of many checkpassers . . . are usually underrepresented because of the typical prosecution practice of charging only one or two counts in exchange for a negotiated guilty plea.").

37. See *Justice Dep't Guidelines*, *supra* note 9, at 8 (only victims named in indictment are eligible to receive restitution).

38. *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981).

39. *Id.* The reasoning of the *McLaughlin* case is even more appropriate under the VWPA because the prosecutor acts as the victim's advocate. See *infra* note 44.

conviction was had.<sup>40</sup> In this instance, the defendant simply agrees to pay restitution for losses. The second exception is when the defendant admits to or does not contest the amount of harm.<sup>41</sup> Such exceptions are appropriate because the reasons supporting the conviction-only limitation do not apply if a defendant has admitted his liability or has agreed to make restitution.<sup>42</sup> When a defendant admits liability, the factual question of the defendant's responsibility for the loss is moot. In addition, public policy dictates that a defendant willing to make restitution should be permitted to do so.<sup>43</sup> These exceptions should apply with equal force to the VWPA. Prosecutors, who serve as victim

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40. Teleconference Tapes, *supra* note 1, side 3 of 5 (statement of Judge J. Miller, Jr., D. Md.); *see, e.g.*, *Phillips v. United States*, 679 F.2d 192, 194 (9th Cir. 1982) (defendant consented, pursuant to plea agreement, to pay restitutionary amount which was not to be limited to the amount set forth in the counts); *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981) (defendant agreed to make restitution for losses resulting from five counts of embezzlement charged even though defendant was convicted of only one of these counts).

41. *See United States v. Davies*, 683 F.2d 1052, 1054 (7th Cir. 1982) (restitution upheld even though amount ordered was in excess of loss sustained from the acts for which defendant had pleaded guilty because amount had been established and admitted to by defendant); *United States v. Landay*, 513 F.2d 306, 308 (5th Cir. 1975) (defendant "freely and voluntarily admitted the exact amount the [bank] claimed he owed"). Several state restitution statutes have also adopted this exception. *See, e.g.*, Iowa Code Ann. § 910.1(3) (West Supp. 1983-1984) (restitution may include losses which defendant admits to or does not contest); Miss. Code Ann. § 99-37-3(1) (Supp. 1983) (same); N.M. Stat. Ann. § 31-17-1(A)(3), (4) (1981) (same); Or. Rev. Stat. § 136.103(1) (1981) (same); S.D. Codified Laws Ann. § 23A-28-2(3) (1979 & Supp. 1982) (same).

42. One factor supporting the restrictive approach is that it enhances the rehabilitative effect of restitution. *See supra* notes 31-34 and accompanying text. The rehabilitation of the offender also requires, however, that restitution be made when the offender admits to causing the harm or when he has consented to make restitution. *See United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981) (rehabilitative goal of restitution would be frustrated if defendant, as condition of probation, could admit guilt, consent to restitution, and later challenge the amount of restitution); *People v. Miller*, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967) (rehabilitation requires that the conditions of probation be imposed without many technical limitations). In addition, when a defendant admits to causing the harm or consents to restitution there is little likelihood that the harm is not obvious or apparent to him. *See supra* note 31 and accompanying text.

43. Permitting a defendant who has consented to restitution to escape a restitution order simply because the harm resulted from acts other than those for which the defendant was convicted is intolerable from a public policy viewpoint. *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981); *see People v. Gallagher*, 55 Mich. App. 613, 619, 223 N.W.2d 92, 95 (1974) (court, in authorizing restitution in amount greater than that resulting from acts for which defendant was convicted, stated that "[c]rime should not be profitable"). The goals of the VWPA also favor permitting the court to order restitution when the defendant admits to causing the harm or agrees to make restitution. Teleconference Tapes, *supra* note 1, side 3 of 5 (statement of Judge J. Miller, Jr., D. Md.).



advocates under the Act,<sup>44</sup> should be able to plea bargain or drop charges while preserving the restitutionary rights of all victims of such charges.

## 2. The Broad Interpretations

The absence of the restrictive statutory language of the Federal Probation Act<sup>45</sup> in the VWPA suggests that Congress intended a broad offense limitation based on the "criminal transaction" charged.<sup>46</sup> Sev-

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44. The Act imposes upon the prosecutor "[t]he burden of demonstrating the amount of the loss sustained by a victim." 18 U.S.C. § 3580(d) (1982); see *Justice Dep't Guidelines*, *supra* note 9, at 3. The extent to which a prosecutor should pursue a victim's claim, however, is unsettled. One commentator has suggested that "the prosecutor should be a vigorous advocate for the victim at the time of sentencing to insure [that] the court is fully cognizant of the extent of injury suffered by the victim." *Hearings on Victim and Witness Protection Act of 1982 before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. 4 (1983) (statement of Jay B. Stephens, Deputy Associate Attorney General); see *Teleconference Tapes*, *supra* note 1, side 1 of 5 (statement of Judge G. B. Tjoflat, 11th Cir.) (prosecutor to represent vigorously victim's interest). The Justice Department believes, however, that while "federal prosecutors should advocate fully the rights of victims on the issue of restitution," Office of the Attorney General, *Guidelines for Victim and Witness Assistance*, 48 Fed. Reg. 33,774, 33,777 (1983), the role of victim advocate is limited by both the other responsibilities of the prosecutor and the restriction of not unduly prolonging or complicating the sentencing process. *Justice Dep't Guidelines*, *supra* note 9, at 3. The Justice Department foresees little change in the role of the prosecutor, as he will vigorously pursue restitution only when all other prosecutorial functions can be satisfied. See *id.* (citing Office of the Attorney General, *Guidelines for Victim and Witness Assistance*, 48 Fed. Reg. 33,774, 33,777 (1983)). At least one state has adopted a similar approach. See *Me. Rev. Stat. Ann. tit. 17-A, § 1321* (1983) ("restitution to be applied only when other purposes of sentencing can be appropriately served"). Under this view, the concept of victim advocacy is of limited utility.

45. See *supra* text accompanying note 27.

46. *Justice Dep't Guidelines*, *supra* note 9, at 7-8 ("The Act changes [the Probation Act] restriction to allow victims named in a restitution order to receive the amount of compensation necessary to return them to as whole a position as possible. The determination of this amount is [now] entirely within the sentencing judge's discretion."); see *Senate Report*, *supra* note 1, at 30, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2536; *Justice Dep't Guidelines*, *supra* note 9, at 17 ("Only victims of the criminal transaction for which the defendant was convicted may receive restitution."); *Teleconference Tapes*, *supra* note 1, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Professor of Law, Univ. of Pa.) (supporting broad interpretation of term "offense" to account for aggregate victimization). *But see* *Petition for a Writ of Mandamus to the United States District Court for the Northern District of Alabama* at 6, *In re* United States, No. 83-7-583 (11th Cir. Oct. 25, 1983) (mandamus sought from order issued in *United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983)) (new restitution provisions simply expand application of restitution so that it is available in all criminal actions) [hereinafter cited as *Petition for Writ of Mandamus*]; *Teleconference Tapes*, *supra* note 1, side 2 of 5 (statement of D. Chamlee, Deputy Chief, Probation Division, Administrative Office of the U.S. Courts) (restitution to be

eral state courts have adopted the even broader view that the restitution order may encompass related crimes that have not been charged.<sup>47</sup> Including the harm caused by conduct for which there was no conviction or charge with that caused by the conduct charged would increase the aggregate victimization and, therefore, the restitution rights of victims.<sup>48</sup> Such a result would advance the VWPA's compensatory goal. The rule of lenity, which requires that "penal statutes . . . be strictly construed against the government or parties seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed,"<sup>49</sup> however, supports the restrictive interpretation because it results in a lower restitutionary obligation for the defendant.

Moreover, although the broad interpretations of the offense limitation best serve the compensatory goal of the VWPA, these views may

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limited to offense for which the conviction was obtained). The Criminal Code Revision Act of 1980, H.R. 6915, 96th Cong., 2d Sess. (1980), a proposed but unenacted bill, served as a model for the VWPA. See 128 Cong. Rec. H8202 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino). The bill provided that restitution would be imposed only with respect to damages established by conviction. It further prohibited restitution for damages caused by conduct in charges that were dismissed. H.R. Rep. No. 1396, 96th Cong., 2d Sess. 457 (1980) [hereinafter cited as House Report].

47. See, e.g., *People v. Miller*, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 23 (1967) (as condition of probation, defendant was required to make restitution not only to victim of one count of grand theft for which he was convicted but also to other customers of defendant); *People v. Richards*, 17 Cal. 3d 614, 619-20, 552 P.2d 97, 100, 131 Cal. Rptr. 537, 540 (1976) (court specifically rejected offense limitation of Probation Act and held that restitution would be allowed for losses in excess of those resulting from acts for which the defendant was convicted); *People v. Gallagher*, 55 Mich. App. 613, 617-19, 223 N.W.2d 92, 95 (1974) (restitution ordered for convicted offense and for another offense allegedly committed by defendant); *People v. Nawrocki*, 8 Mich. App. 225, 227, 154 N.W.2d 45, 46 (1967) (same).

48. Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Professor of Law, Univ. of Pa.) (recognition that conviction-only rule represents only small portion of total victimization that has occurred); *id.* side 2 of 5 (statement of D. Lowell Jensen, Associate Attorney General, U.S. Dep't of Justice) (restitutionary rights are greater under the broad view); see *United States v. Welden*, 568 F. Supp. 516, 517, 525 (N.D. Ala. 1983) (judge considered restitutionary rights of individuals who were not victims of offense for which conviction was had—these individuals suffered losses because of conduct related to acts for which defendants were convicted), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

49. 3 C. Sands, *Sutherland Statutes and Statutory Construction*, § 59.03, at 6-7 (4th ed. 1974) (citations omitted). This rule is to be utilized to the extent that it is appropriate in light of the stated goals of the legislation. *Id.* § 59.06, at 18-19; see *State v. Prevo*, 44 Hawaii 665, 668-69, 361 P.2d 1044, 1047 (1961) (rule that penal statutes are to be strictly construed does not permit court to ignore legislative intent). The rule is applicable to the VWPA because of the specific provision protecting the defendant's rights. See *supra* note 16 and accompanying text.

violate the constitutional rights of the defendant<sup>50</sup> and the legislative goal of not unduly prolonging or complicating the sentencing process.<sup>51</sup> An order of restitution based on the entire criminal transaction charged or on related uncharged crimes could require a defendant to make restitution for losses based upon facts that were not litigated.<sup>52</sup> The hypothetical crime illustrates this point: A restitution order encompassing the entire criminal transaction charged or related uncharged crimes could require the defendants to make restitution to the second bank, the customers of the first bank and the owner of the stolen automobile even though the defendants were not convicted of these offenses. This possibility raises the serious question whether the defendants have had an opportunity to contest these facts. If not, their due process rights have been violated.

Due process requires that the record factually support the restitution order<sup>53</sup> and that the defendant be given adequate notice and an opportunity to contest those facts.<sup>54</sup> Consequently, in order to support the restitution order, prosecutors would be required to prove facts ancillary to those necessary for a conviction. This would impermissibly prolong and complicate the sentencing process.<sup>55</sup> The offense limitation of the VWPA, therefore, should be interpreted as a conviction-

50. Due process safeguards may be particularly necessary when the restitution order extends beyond the convicted offense or takes the form of general damages. Harland I, *supra* note 30, at 103. In *People v. Richards*, 17 Cal. 3d 614, 552 P.2d 97, 131 Cal. Rptr. 537 (1976), the court stated:

A judge may infer from a jury verdict of guilt . . . that a defendant is liable to the crime victim. But a trial court cannot properly conclude that the defendant owes money to a third party for other unproved or disproved crimes or conduct. A party sued civilly has important due process rights, including appropriate pleadings, discovery, and a right to a trial by jury on the specific issues of liability and damages. The judge in the criminal trial should not be permitted to emasculate those rights by simply declaring his belief that the defendant owes a sum of money.

*Id.* at 620, 552 P.2d at 101, 131 Cal. Rptr. at 541.

51. See *supra* note 15.

52. See *supra* note 23 and accompanying text.

53. See *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 510, 407 A.2d 24, 27 (1979); *Cartwright v. State*, 605 S.W.2d 287, 289 (Tex. Crim. App. 1980); *Thompson v. State*, 557 S.W.2d 521, 525-26 (Tex. Crim. App. 1977).

54. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) (opportunity to be heard); *United States v. Raddatz*, 447 U.S. 667, 677 (1980) (same); *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 13, 17 (1978) (same); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (same); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (notice and opportunity to be heard); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (opportunity to be heard); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J. concurring) (notice); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity to be heard); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (same). See *infra* note 238 and accompanying text.

55. See *supra* note 15 and accompanying text.

only offense limitation with the restrictive edge dulled by the plea-bargaining and no-contest exceptions.

### B. Calculating Restitution Awards

#### 1. Types of Losses for Which Restitution is Available

The VWPA enumerates particular types of damages that may be the subject of a restitution order, such as medical expenses, property loss and funeral expenses.<sup>56</sup> Congress intended the VWPA to require “the wrongdoer . . . to the degree possible to restore the victim to his or her prior state of well-being.”<sup>57</sup> This goal, however, must be balanced against the goal that the sentencing process not become unduly

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56. 18 U.S.C. § 3579(b) (1982). The Act sets forth the types of damages the court “may require” the defendant to make restitution for as follows:

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including non-medical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury [that] also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services.

*Id.*

The enumeration of specific types of damages could mean that Congress intended to exclude all others. See *infra* note 65 and accompanying text. According to the Justice Department, pain and suffering and punitive damages are not covered by the restitution order. *Justice Dep't Guidelines, supra* note 9, at 9. This conclusion is appropriate considering the difficulty of measuring such damages.

57. Senate Report, *supra* note 1, at 30, reprinted in 1982 U.S. Code Cong. & Ad. News at 2536; see *Justice Dep't Guidelines, supra* note 9, at 7.

prolonged or complicated.<sup>58</sup> Congress intended to prevent the sentencing hearing from becoming a trial on the amount of damages.<sup>59</sup>

In a criminal action, the judge is usually not prepared to settle complex issues regarding the amount of damages. The sentencing judge, in the usual criminal case, has neither

the benefit of pleadings which frame the issues nor the testimony of witnesses to develop evidence relevant to the loss resulting from the defendant's wrongdoing. Thus, the trial judge is left in the difficult if not impossible position of having to assign a value to a loss he knows little about.<sup>60</sup>

Courts applying the VWPA are precluded from considering damages that are speculative or difficult to measure such as pain and suffering, loss of consortium or loss of prospective earnings.<sup>61</sup> For example, in the hypothetical crime, restitution should not be awarded to a bank customer who, for several months following the incident, suffers recurring headaches and insomnia. To place a dollar value on this bank customer's harm would, of necessity, prolong and complicate the sentencing process.<sup>62</sup> Courts, therefore, should be limited to consideration of the victim's liquidated and easily measurable damages,<sup>63</sup> such as the dollar amount stolen from the bank or the medical expenses incurred by the injured bank teller. It is unclear, however, whether courts are further restricted to only those damages enumerated in the Act.<sup>64</sup>

58. See 18 U.S.C. § 3579(d) (1982). Congress recognized that "an offense—particularly one causing bodily injury or death—may have lifelong cost implications for the victim . . . but it also recognize[d] that there may sometimes be a practical necessity in limiting . . . the amount of restitution ordered." Senate Report, *supra* note 1, at 31-32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2537-38. Such a practical necessity may arise when a "prolonged and complicated [trial] on the question of damages owed [to] the victim" would be required. *Id.* at 31, reprinted in 1982 U.S. Code Cong. & Ad. News at 2537.

59. Senate Report, *supra* note 1, at 31, reprinted in 1982 U.S. Code Cong. & Ad. News at 2537; see *Justice Dep't Guidelines*, *supra* note 9, at 4.

60. *State v. Stalheim*, 275 Or. 683, 687, 552 P.2d 829, 831 (1976).

61. See *supra* note 56.

62. See *supra* note 15 and accompanying text.

63. The allowance of the "imposition of unliquidated damages, thus including such losses as pain and suffering, decreased earning capacity, loss of consortium and the like, [will force] the trial judge . . . to make evaluations of losses usually reserved to civil juries." *State v. Stalheim*, 275 Or. 683, 686-87, 552 P.2d 829, 831 (1976). The Georgia courts have adopted a similar position. See, e.g., *Biddy v. State*, 138 Ga. App. 4, 8, 225 S.E.2d 448, 451 (1976); *O'Quinn v. State*, 121 Ga. App. 231, 232, 173 S.E.2d 409, 411 (1970). The Arizona and New Mexico courts appear more liberal. See *State v. Garner*, 115 Ariz. 579, 581, 566 P.2d 1055, 1057 (Ct. App. 1977) (trial court must use "great caution" if restitution goes beyond "special damages"); *Shenah v. Henderson*, 106 Ariz. 399, 401, 476 P.2d 854, 856 (1970) (judge had sufficient evidence upon which to base restitution); *State v. Mottola*, 84 N.M. 414, 415-16, 504 P.2d 22, 23-24 (Ct. App. 1972) (judge may assess damages in a criminal matter).

64. See *infra* notes 66-69 and accompanying text.

The canon of statutory interpretation, *expressio unius est exclusio alterius*, provides that "the mention of one thing implies the exclusion of another thing."<sup>65</sup> Therefore, the enumeration of certain types of damages in the VWPA should preclude a trial judge from ordering restitution for damages not enumerated in the Act. The legislative history of the Act, however, may imply that the enumeration of specific types of damages merely provides examples of recoverable losses.<sup>66</sup> The Senate Report on the Act states that the "several options . . . provide the court with some flexibility in determining the kind of restitution."<sup>67</sup> In the Report, however, it is unclear whether "options" refers to the enumerated damages or solely to whether the method of restitution should be in the form of money or services.<sup>68</sup> Because the Senate Report does not indicate a clear legislative intent to include other types of damages,<sup>69</sup> the statute should be construed to limit the sentencing judge to awarding restitution for the enumerated items.

## 2. Necessary Expenses and Mitigation

The Act permits the recovery of certain "necessary" expenses,<sup>70</sup> but does not indicate who has the burden of proving necessity.<sup>71</sup> One possibility is that necessity is determined by the victim, with the judge accepting this determination.<sup>72</sup> The more appropriate view, however, is that the burden of proof as to what is necessary falls upon the prosecutor, with the ultimate decision made by the judge.<sup>73</sup> This is consistent with the VWPA provision placing "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense [upon] the attorney for the Government."<sup>74</sup>

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65. E. Crawford, *Construction of Statutes* § 195, at 334-35 (1940). This canon of construction is to be utilized only to determine legislative intent, not to defeat such intent when it is apparent. *Id.* § 195, at 335-36.

66. Senate Report, *supra* note 1, at 32, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2538. *But see* 1981 Senate Report, *supra* note 15, at 1000. The Criminal Code Reform Act of 1981, S. 1630, 97th Cong., 1st Sess. (1981), a predecessor bill to the VWPA, specified particular damages and losses which could be the subject of a restitution order. The enumeration was included in that bill to assure that restitution be ordered only in instances when a court could easily resolve the issues. *Id.*

67. Senate Report, *supra* note 1, at 32, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2538.

68. *See id.*

69. The sentence prior to the quotation from the Senate Report, *id.*, refers to both the enumerated damages as well as the method of satisfying the restitution requirement. *Id.*

70. 18 U.S.C. § 3579(b)(2)(A), (B), (3) (1982). *See supra* note 56.

71. *See Bennett, supra* note 20, at 3.

72. *Id.*

73. *See id.* (discussing question of proof in relation to medical expenses and related professional services).

74. 18 U.S.C. § 3580(d) (1982).

In addition, it is unclear whether a victim is required to mitigate his damages.<sup>75</sup> Despite the Act's silence in the area, the rules of mitigation found in civil litigation should apply with equal force to the restitution provisions. Alternatively, the punishment and sentencing aspects of restitution suggest that the law of damages applicable to civil actions should be irrelevant. The failure to incorporate mitigation concepts in the VWPA provides a disincentive for victims to minimize their losses and can result in economic waste.<sup>76</sup> In light of these economic considerations, judges should calculate the amount of the restitution award in accordance with the civil rules of mitigation.

### C. Service Restitution in Lieu of Financial Restitution

The VWPA provides that the defendant may be ordered, "if the victim . . . consents, [to] make restitution in services in lieu of money."<sup>77</sup> The statute does not require corresponding consent from the convicted offender.<sup>78</sup>

A requirement that an offender perform services as part of the penalty for his crime is not unprecedented.<sup>79</sup> In fact, there has been an

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75. Bennett, *supra* note 20, at 4.

76. The civil law concept of mitigating damages results from the idea that economic waste should be avoided. D. Dobbs, Handbook on the Law of Remedies § 3.7 at 188 (1973). Arguably, the concept of mitigation is incorporated in the "necessity" requirement. See *supra* note 70 and accompanying text.

77. 18 U.S.C. § 3579(b)(4) (1982). Service restitution ordered pursuant to the VWPA may take the form of personal service restitution or community service restitution. See Senate Report, *supra* note 1, at 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2538 (if victim agrees, restitution may be made in services to a person or organization designated by the victim). See *infra* note 87. Restitution and community service are often juxtaposed in state restitution statutes. See Harland, *Court-Ordered Community Service in Criminal Law: The Continuing Tyranny of Benevolence?*, 29 Buffalo L. Rev. 425, 429 & table 1, col. 7, at 432-39 (1980) [hereinafter cited as Harland II]. Personal service restitution requires the offender to perform services directly for the victim to compensate for losses sustained by the victim. See Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Prof. of Law, Univ. of Pa.) (example of offender performing gardening service for victim as personal restitution). Community service restitution is not really restitution at all. Community service, although linked in theory to restitution by criminal offenders, Harland II, *supra*, at 429, generally satisfies a "secondary function by providing an option for those offenders who cannot afford financial [restitution] or whose crimes did not result in a restitutionable loss to the victim." *Id.* The victim is not directly compensated when the service is community service; instead the offender performs service to the community at large. See *id.* at 428-30 (community service benefits community, not victim); Miss. Code Ann. § 47-7-47(4) (Supp. 1983) (community service considered "restitution . . . to society"). In light of the VWPA requirement for victim consent to any form of service restitution, 18 U.S.C. § 3579(b)(4) (1982), the distinction between personal service and community service is of little consequence.

78. See 18 U.S.C. § 3579(b)(4) (1982).

79. The thirteenth amendment recognizes the propriety of involuntary servitude as punishment for crime. U.S. Const. amend. XIII, § 1 ("Neither slavery nor involun-

increase in the use of community service restitution for criminal offenders in a probationary context.<sup>80</sup>

Three reasons have been advanced to support the use of service restitution. First, performance of service provides an alternative to incarceration.<sup>81</sup> Judges order service to rehabilitate the offender without burdening society with the costs of maintaining the offender in prison. This rationale, however, is not wholly transferable to the VWPA, which enables a court to order service restitution in addition to incarceration.<sup>82</sup> Second, community service restitution as a condition of probation is a voluntary undertaking on the part of the offender; the offender can either agree to the conditions of probation or serve his sentence.<sup>83</sup> This alternative, however, is not available under the VWPA.<sup>84</sup> Finally, the performance of service is seen as a rehabilitative experience for the offender.<sup>85</sup> This last reason is the most pertinent to the VWPA. The compensatory goal of the Act may be satisfied while the rehabilitation of the defendant is also promoted.<sup>86</sup>

The use of service restitution as an alternative to financial restitution may discriminate against indigents because service may be the only viable means to achieve restitution when funds for financial

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tary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . .").

80. See Harland II, *supra* note 77, at 428-29. The increased use of community service has received widespread support. *Id.* at 426-27. Case law examining the legality of ordering community service as a condition of probation has not been established. *Id.* at 427. This form of restitution is presumably not challenged because service provides a less onerous alternative than incarceration for defendants who fail to meet the conditions of probation. It is likely that challenges to service restitution ordered in conjunction with incarceration will be made because of the absence of such an "alternative." See *id.*

81. *Id.* at 440. The notion that service restitution serves as an alternative to incarceration is explored in detail by Professor Harland who concludes that service does not actually serve as such an alternative. See *id.* at 441-51.

82. The VWPA allows a court to impose restitution "in addition to or in lieu of any other penalty authorized by law." 18 U.S.C. § 3579(a)(1) (1982).

83. Harland II, *supra* note 77, at 440; Laster, *supra* note 32, at 91; see *People v. Good*, 287 Mich. 110, 115, 282 N.W. 920, 923 (1938) (offender has option of serving jail term or fulfilling conditions of probation). Professor Harland discusses the theory of defendant consent to conditions of probation. Harland II, *supra* note 77, at 451-54. Consent may be viewed as a "strained fiction." *Id.* at 453. But see *Teleconference Tapes*, *supra* note 1, side 1 of 5 (statement of Judge G.B. Tjoflat, 11th Cir.) (defendants almost universally consent to the conditions of probation).

84. See *supra* note 9 and accompanying text.

85. Harland II, *supra* note 77, at 440.

86. Service restitution is offered as a sentencing option to provide the court with the necessary flexibility to compensate the victim and to provide for maximum rehabilitation of the offender. See Senate Report, *supra* note 1, at 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2538.



restitution are unavailable.<sup>87</sup> An affluent defendant, therefore, could avoid a service requirement while an indigent defendant may not be able to avoid such a requirement.<sup>88</sup> The result is "a situation in which offenders who can afford to pay may buy themselves out of a work assignment, while those without financial resources must submit to the service penalty or be incarcerated."<sup>89</sup> The conversion of financial restitution into service restitution for indigent offenders may unconstitutionally raise the ceiling of punishment for those offenders.<sup>90</sup>

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87. See Harland II, *supra* note 77, at 459. Professor Harland notes the discriminatory potential associated with using service restitution as an alternative to financial sanctions and states that "serious thought must be given to the propriety of replacing one class of people bound to involuntary servitude on the basis of race by another class similarly bound on the basis of a criminal conviction and economic status." *Id.* He further notes that "[o]ne aspect of selecting offenders to perform . . . service that may lead to immediate legal difficulties is the practice of selecting offenders on the basis of their inability to pay monetary penalties." *Id.* at 465. The option of service restitution in lieu of a financial sanction is particularly popular when "there is an inability to pay restitution." Harland I, *supra* note 30, at 118. The Probation Department has adopted the position that the Act allows community service restitution as an alternative to unavailable financial restitution. The Department has stated that "[w]hen it appears to be inappropriate or almost impossible for the defendant to repay the amount lost . . . , the Probation Officer may wish to suggest to the Court an alternative means of restitution such as general community service." *Victim Impact Statements* 8 (Nov. 28, 1983) (memorandum from Michael J. Luciano, Chief U.S. Probation and Pretrial Services Officer, S.D.N.Y.) [hereinafter cited as *Probation Dep't Memorandum*]. The Probation Department conclusion is supported by the legislative history of the Act, which indicates that service restitution is offered as a sentencing option to further the compensatory and rehabilitative goals of the VVPA. See Senate Report, *supra* note 1, at 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2538. Personal service restitution has an "aura of indentured servitude." *Probation Dep't Memorandum, supra*, at 8. In recognition of the problem of service restitution performed for the victim, as opposed to general community service, the Probation Department discourages the use of personal service as an alternative to financial restitution. *Id.*

88. See Harland I, *supra* note 30, at 118; Harland II, *supra* note 77, at 465.

89. Harland I, *supra* note 30, at 118.

90. *Id.* The constitutionality of service restitution as an alternative to unavailable financial restitution is premised on Supreme Court decisions relating to the automatic conversion of fines into incarceration. In *Tate v. Short*, 401 U.S. 395 (1971), the Court held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Id.* at 398 (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970)). The premise of this conclusion was that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." *Williams v. Illinois*, 399 U.S. 235, 244 (1970). The premise of *Tate* is equally applicable to financial restitution converted to service restitution if there is an inability to pay. See Harland I, *supra* note 30, at 118. *But cf.* *United States v. Weiner*, 376 F.2d 42, 43 (3d Cir. 1967) (restitution distinguished from costs); *Sprague v. State*, 590 P.2d 410, 415 (Alaska 1979) (restitution distinguished from fines); *State v. Garner*, 115 Ariz. 579, 581, 566

The existence of this problem depends on whether the choice of service restitution is available only following the court's decision to order restitution.<sup>91</sup> No potential for discrimination exists when the decision to order service follows the initial affirmative decision to impose restitution because restitution will be ordered only if the defendant has financial capability to comply with the order. The judge will not consider whether to order service as a means to ensure the receipt of restitution. The legislative history indicates, however, that service restitution is offered as an option "to provide the court with . . . flexibility in determining the kind of restitution which would both satisfy the victim and provide maximum rehabilitative incentives to the offender."<sup>92</sup> This flexibility could give rise to the unconstitutional application of service restitution to indigent defendants.<sup>93</sup>

#### D. *The Victim*

The VWPA provides for restitution to "any victim of the offense."<sup>94</sup> This section addresses the definition of "victim" as it relates to non-human victims and third parties who reimburse the actual victim.

##### 1. Non-Human Victims

Neither the Act nor the legislative history clearly indicates whether non-human victims are within the scope of the Act.<sup>95</sup> One judge concluded, however, that "the tone of the legislative history . . . concerns itself with the physical, emotional and financial problems of individuals affected by crime, not organizations."<sup>96</sup> This conclusion is justified in light of the circumstances in which the VWPA was en-

P.2d 1055, 1057 (1977) (same); *State v. Gunderson*, 74 Wash. 2d 226, 230, 444 P.2d 156, 159-60 (1968) (payment to victim is not a fine).

91. The court is to consider the financial resources of the defendant, as well as his ability to make restitution, when determining whether to order restitution, and if so, the amount. 18 U.S.C. § 3580(a) (1982); Teleconference Tapes, *supra* note 1, side 2 of 5 (statement of F. Bennett, Federal Public Defender, D. Md.); *see id.* side 3 of 5 (statement of F. Bennett, Federal Public Defender, D. Md.) (defense should establish a lack of financial resources of defendant to forestall any application of the Act whatsoever); *id.* side 4 of 5 (question and answer session) (indigency forestalls any application of the Act whatsoever).

92. Senate Report, *supra* note 1, at 32, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2538. *See supra* notes 67-68 and accompanying text.

93. *See supra* note 90.

94. 18 U.S.C. § 3579(a)(1) (1982). The Act does not define the term "victim." *See id.*

95. *See Justice Dep't Guidelines, supra* note 9, at 18.

96. Altamari, *supra* note 20, at 14. *See generally* 18 U.S.C. § 1512 note (1982) (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System) (findings and purposes of Act reflect suffering by victims due to physical, psychological, and financial hardships).

acted. Congress was responding to the frustration and anger of victims who felt lost and forgotten by the criminal justice system.<sup>97</sup>

A broad interpretation of the term "victim" to include persons, organizations, and the government, however, has been suggested.<sup>98</sup> The broad definition should be adopted despite the legislative indications to the contrary. Defendants should not be relieved of their obligation to make restitution simply because of the victim's identity.<sup>99</sup> In addition, it is inequitable not to compensate corporate or organizational victims who suffer losses that ultimately are borne by the consumer or shareholder.<sup>100</sup> For example, in the hypothetical crime, the banks' losses will ultimately be borne by the shareholders. The VWPA therefore should be construed or amended to reflect this policy.

## 2. Third Party Reimbursement

In the hypothetical crime an insurance company reimbursed the bank \$10,000 of the \$20,000 loss resulting from the robbery. Assume further that the assaulted teller's medical expenses were partially paid by a relative. Under the Act, restitution is not available for losses for which the victim has received or is to receive compensation. The VWPA allows the court, in the "interest of justice," to order restitution to any person who has compensated the victim for losses sustained.<sup>101</sup> The circumstances under which a third-party reimbursor is entitled to be subrogated to the rights of the victim, however, were not delineated. The sentencing judge clearly has the power to order

97. See *supra* note 1.

98. *Justice Dep't Guidelines*, *supra* note 9, at 3. North Carolina has enacted a restitution statute that is comparable to this broad view. N.C. Gen. Stat. § 15A-1343(d) (1983) ("victim" defined as "individuals, firms, corporations, associations or other organizations, and government agencies, whether federal, State or local").

99. Restitution fosters a defendant's acceptance of his or her unlawful actions. *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981). To permit a defendant admittedly guilty of causing loss to avoid making the victim whole is violative of public policy. *Id.*; see *United States v. Buechler*, 557 F.2d 1002, 1007 (3d Cir. 1977) (crime should not be profitable); *People v. Gallagher*, 55 Mich. App. 613, 619, 223 N.W.2d 92, 95 (1974) (same).

100. The problems of disallowing restitution to non-human victims are analogous to those associated with failing to allow insurers to be subrogated to the rights of the victim—offenders escape liability while consumers and shareholders bear the burden of loss. See *infra* note 104 and accompanying text.

101. 18 U.S.C. § 3579(e)(1) (1982); see *Teleconference Tapes*, *supra* note 1, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Prof. of Law, Univ. of Pa.) (unclear how one is to determine when and if it is in the interest of justice to allow subrogation). One federal district court judge has ordered restitution to a surety company that reimbursed a banking institution which was the victim of an offense. Record at 46, *United States v. Florence*, No. 83-175 (E.D. Mo. Nov. 4, 1983) (proceedings at sentencing), *appeal docketed*, No. 83-2-537 (8th Cir. Nov. 17, 1983).

the defendants to make restitution to the relative who has paid a portion of the bank teller's medical expenses. Less clear, however, is whether a corporate entity such as the bank's insurance company may be the proper recipient of a restitution order.

The legislative history contains contradictory statements regarding the payment of restitution to insurance companies.<sup>102</sup> In one instance the legislative history calls for restitution to be limited to "out-of-pocket (for example, uninsured) medical expenses."<sup>103</sup> By implication, insurance companies could not receive restitution. Other portions of the legislative history recognize, however, that "[t]he common practice of not permitting insurance companies to be subrogated to the rights of insured victims means that some offenders are being relieved of their debts. It also means that insurance companies and the insurance-buying public are being asked to pay off the offender's debt."<sup>104</sup> For example, the bank in the hypothetical crime may be required to pay higher insurance premiums in the future, which would affect the shareholders of the bank.

The Federal Probation Act and several states have limited restitution to aggrieved parties, thereby precluding third parties from receiving restitution.<sup>105</sup> Although it is generally agreed that restricting restitution is essential to prevent dilution of its rehabilitative benefits,<sup>106</sup> the compensatory goal of the Act suggests that it is proper for third-

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102. Compare Senate Report, *supra* note 1, at 31 (supporting insurers' right to receive restitution), reprinted in 1982 U.S. Code Cong. & Ad. News at 2537, with 128 Cong. Rec. S3854 (daily ed. April 22, 1982) (statement of Sen. Heinz) (limit restitution to uninsured losses) and 128 Cong. Rec. S3860 (daily ed. April 22, 1982) (statement of Sen. Chiles) (limit restitution to out-of-pocket expenses).

103. 128 Cong. Rec. S3854 (daily ed. April 22, 1982) (statement of Sen. Heinz).

104. Senate Report, *supra* note 1, at 31, reprinted in 1982 U.S. Code Cong. & Ad. News at 2537; see *Justice Dep't Guidelines*, *supra* note 9, at 18 (insurance company may receive restitution if it compensates victim for loss).

105. See, e.g., *Karrell v. United States*, 181 F.2d 981, 986-87 (9th Cir.) (restitution ordered pursuant to Probation Act could not include individuals not connected with counts for which defendant was convicted), *cert. denied*, 340 U.S. 891 (1950); *United States v. Follette*, 32 F. Supp. 953, 955 (E.D. Pa. 1940) (restitution limited to persons directly injured by criminal acts). Several state courts have held that insurers are ineligible to receive restitution. See, e.g., *People v. Daugherty*, 104 Ill. App. 3d 89, 93, 432 N.E.2d 391, 394 (1982); *People v. Grago*, 24 Misc. 2d 739, 742, 204 N.Y.S.2d 774, 778 (Oneida County Ct. 1960); *State v. Getsinger*, 27 Or. App. 339, 341-42, 556 P.2d 147, 148 (1976). *But see State v. Murray*, 621 P.2d 334, 338-39 (Hawaii 1980) (state reimbursed victim and would be entitled to receive restitution from offender); *Flores v. State*, 513 S.W.2d 66, 69 (Tex. Crim. App. 1974) (insurers are entitled to receive restitution).

Some states have adopted statutory provisions allowing restitution to be ordered to insurers who reimburse victims. See, e.g., Miss. Code Ann. § 99-37-1(d) (Supp. 1983); N.M. Stat. Ann. § 31-17-1(A)(1) (1981); Or. Rev. Stat. § 137.103(4) (1981).

106. *State v. Stalheim*, 275 Or. 683, 688, 552 P.2d 829, 832 (1976); cf. *Watson v. State*, 17 Md. App. 263, 274, 301 A.2d 26, 31-32 (1973) (restitution as condition of

party reimbursers, such as insurance companies, to receive restitution under the Act.<sup>107</sup>

### E. *Multiple Victims*

The hypothetical crime involves several victims who may be eligible to receive restitution. Two banks, bank employees and customers were all victimized. The VWPA provides that direct victims of offenses are entitled to receive restitution before compensation may be ordered for those who reimburse victims.<sup>108</sup> The Act is silent, however, on the priority of payments when multiple direct victims are involved. If a convicted offender has the financial ability to make full restitution to all victims, this issue is of no consequence. The more usual case, however, will involve a defendant with limited financial resources.<sup>109</sup> In those instances the court must allocate the limited resources among the victims.<sup>110</sup>

Various methods may be used to allocate restitution to the victims. Allocation of the defendant's resources may be made on the basis of victims' financial need, thus favoring the indigent victim. For example, the money and jewelry stolen from a bank customer may represent a substantially higher percentage of his wealth than the \$20,000 loss represents to the bank. The VWPA, however, was not enacted "to limit restitution to the financially needy."<sup>111</sup> In addition, an examination of victim needs would introduce an additional element into the sentencing hearing that could "unduly prolong or complicate the sentencing process."<sup>112</sup> A second alternative is to allocate on the basis of severity of injury. This would also prolong and complicate the

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probation should be easily comprehended by offender). *But see* *People v. Miller*, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967) (rehabilitation requires that defendant's probation be conditioned on realities of the situation without unnecessary technical limitations in determining scope of the offense for which defendant was convicted).

107. See 128 Cong. Rec. H8201 (daily ed. September 30, 1982) (statement of Rep. Rodino) (restitution should be ordered for purpose of making victim financially whole, but also serves function of rehabilitating offender). For an insightful discussion of the rehabilitative aspects of restitution, see *Huggett v. State*, 83 Wis. 2d 790, 798-99, 266 N.W.2d 403, 407 (1978).

108. 18 U.S.C. § 3579(e)(1) (1982); see *Justice Dep't Guidelines*, *supra* note 9, at 18.

109. See Bureau of Justice Statistics, U.S. Department of Justice, Report to the Nation on Crime and Justice 38 (1983) [hereinafter cited as Report to the Nation]. See *infra* notes 370-71 and accompanying text.

110. See Teleconference Tapes, *supra* note 1, side 4 of 5 (statement of Chief Judge Wm. T. Hodges, M.D. Fla.) (judge must establish restitution priorities as between victims).

111. Senate Report, *supra* note 1, at 13, reprinted in 1982 U.S. Code Cong. & Ad. News at 2519.

112. See *supra* note 15.

sentencing process as relative harm would have to be determined.<sup>113</sup> Allocation on the basis of severity of injury would be further complicated in instances of both human and non-human victims because the sentencing judge would be required to weigh the injuries of an individual against those of an entity. For example, in the hypothetical crime the physical injury of the bank teller would be weighed against the property loss of the bank.

A simpler approach, and one that avoids the problems of the other alternatives, is available. The court would determine the maximum restitution award that each victim would be entitled to if the defendant had financial ability to make full restitution. The court would then pro-rate each award in relation to the amount of available funds.

#### F. Multiple Defendants

The VWPA fails to provide guidance for the sentencing judge to allocate restitution when there are multiple defendants.<sup>114</sup> Depending upon the method adopted to deal with multiple defendants, there may be problems of "unduly prolonging or complicating the sentencing process" or of allowing restitution to become a windfall recovery for victims.

One alternative would require apportionment of restitution based upon the relative culpability of each defendant.<sup>115</sup> For example, the court would be required to consider which of the two defendants in the hypothetical crime was more at fault than the other, and would be forced to determine which of the defendants actually assaulted the teller and which one stole the car. The traditional and widespread rule at common law forbids the apportionment of liability as between joint tortfeasors.<sup>116</sup> This rule protects injured parties by making all of the wrongdoers completely liable for all damages suffered. In addition, the rule avoids the situation in which an injured party is unable to collect a part of the amount required to compensate him which is assessed solely against an insolvent defendant. Furthermore, a requirement that the court weigh fault and apportion liability is likely

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113. See *infra* note 116 and accompanying text.

114. *United States v. Welden*, 568 F. Supp. 516, 526-27 (N.D. Ala. 1983) (court dealing with three defendants questioned which basis to use when calculating amount of restitution that each should be ordered to pay), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983); *Bennett*, *supra* note 20, at 3.

115. See *Bennett*, *supra* note 20, at 3.

116. See, e.g., *Washington Gas Light Co. v. Lansden*, 172 U.S. 534, 552 (1898); *Hooks v. Vet.*, 192 F. 314, 315 (5th Cir. 1911); *Ferris v. Hotel Pick Arms, Inc.*, 147 Conn. 72, 74, 157 A.2d 106, 108 (1959); *Heath v. Thurmon*, 68 Misc. 2d 314, 315, 327 N.Y.S.2d 410, 412 (1971).

to prolong and complicate the sentencing process.<sup>117</sup> Finally, apportionment according to relative culpability is contrary to the general rule that each criminal is jointly and severally liable.<sup>118</sup>

Another alternative is to divide the total restitutionary requirement by the number of convicted offenders.<sup>119</sup> Although this alternative is simple to apply, full recovery is unlikely as an individual defendant may be unable to fulfill his restitutionary obligation.

A third alternative is to order full restitution by each defendant as though he were the only offender. This alternative is consistent with restitution being part of the sentence, and therefore, the restitution order would be determined as would any other form of punishment which is not allocated among the defendants. Full restitution by each offender also avoids the need to determine relative guilt, but may result in duplicative recoveries by the victim. The statute does not favor such duplicative recoveries and it intends to prevent restitution from becoming a "windfall for a victim."<sup>120</sup>

A final alternative is to adopt joint and several liability.<sup>121</sup> Joint and several liability satisfies the statutory goal of compensation. This theory of liability is also consistent with the traditional notion that each defendant should be liable for the entire amount of restitution until the victim is fully compensated.<sup>122</sup> This rule should be modified,

117. See *Justice Dep't Guidelines*, *supra* note 9, at 10; *Probation Dep't Memorandum*, *supra* note 87, at 6.

118. See, e.g., *People v. Goss*, 109 Cal. App. 3d 443, 460, 167 Cal. Rptr. 224, 234 (1980); *People v. Flores*, 197 Cal. App. 2d 611, 616, 17 Cal. Rptr. 382, 385 (1961); *People v. Peterson*, 62 Mich. App. 258, 267-68, 233 N.W.2d 250, 255-56 (1975). But see *People v. Kay*, 36 Cal. App. 3d 759, 763, 111 Cal. Rptr. 894, 896 (1973) (court must consider roles of others who caused damage, however, there was a large number of individuals responsible for damage and small number actually convicted); *State ex rel. D.G.W.*, 70 N.J. 488, 507-08, 361 A.2d 513, 523-24 (1976) (rebuttable presumption that parties are each equally liable for proportionate share).

119. See *State ex rel. D.G.W.*, 70 N.J. 488, 507-08, 361 A.2d 513, 523-24 (1976); *Justice Dep't Guidelines*, *supra* note 9, at 10. This view is an exception to the general rule. See *infra* note 122.

120. *Bennett*, *supra* note 20, at 3; see 18 U.S.C. § 3579(e)(1) (1982) (no restitution to victim with respect to losses for which he has received or will receive compensation); *id.* § 3579(e)(2) (set-off provision in event victim subsequently receives civil judgment for damages).

121. See *People v. Goss*, 109 Cal. App. 3d 443, 460-61, 167 Cal. Rptr. 224, 234, (1980); *People v. Flores*, 197 Cal. App. 2d 611, 616, 17 Cal. Rptr. 382, 385 (1961); *People v. Peterson*, 62 Mich. App. 258, 268, 233 N.W.2d 250, 256 (1975); *Justice Dep't Guidelines*, *supra* note 9, at 10. But see *People v. Kay*, 36 Cal. App. 3d 759, 763, 111 Cal. Rptr. 894, 895-96 (1973) (court must consider role of others who caused damage, however, there was a large number of individuals responsible for damage and small number actually convicted); *State ex rel. D.G.W.*, 70 N.J. 488, 507-08, 361 A.2d 513, 523-24 (1976) (rebuttable presumption that parties are each equally liable for proportionate share).

122. See W. Prosser, *Handbook of the Law of Torts* § 52, at 314-15 (4th ed. 1971) (it is well-settled in criminal law that when two or more persons act in concert each is

however, by the statutory requirement that the judge consider the defendant's financial circumstances.<sup>123</sup> Accordingly, a cap should be placed upon each defendant's liability in accord with this restriction.

### G. Appeals and Stay of Restitution Orders Pending Appeal

The VWPA may affect appeal rights of the defendant, the government, and the victim. Although the statute does not explicitly address these rights of appeal,<sup>124</sup> various provisions of the Act suggest the possibility of modification of appeal rights. This section examines the potential changes and analyzes whether a restitution order should be stayed pending appeal.

#### 1. Appeal Rights

The bank in the hypothetical crime suffered a loss of \$20,000. Assume that the bank was reimbursed \$10,000 from its insurer and received restitution of \$5000, leaving a net loss to the bank of \$5000. The bank, dissatisfied with this restitution award, seeks to be compensated for the \$5000 shortfall left unreimbursed by the restitution recovery and the insurance reimbursement. This raises the issue whether the bank may appeal a restitution order to recover the additional \$5000. A victim's right of appeal under the VWPA may be inferred from the victim's increased participation in the criminal justice process<sup>125</sup> or the requirement that a judge who does not order

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liable for entire result). *But see* *People v. Kay*, 36 Cal. App. 3d 759, 763, 111 Cal. Rptr. 894, 896 (1973) (court must consider roles of others who cause damage); *State ex rel. D.G.W.*, 70 N.J. 488, 507-08, 361 A.2d 513, 523-24 (1976) (established rebuttable presumption that parties are equally liable for a proportionate share).

123. 18 U.S.C. § 3580(a) (1982). Two judges in the Northern District of Georgia have adopted a similar alternative—each defendant is liable for full restitution unless there is apportionment and the court is to consider the ability of each co-defendant to contribute. Order to Facilitate Implementation of VWPA at 3 (N.D. Ga. June 27, 1983) (Moye, C.J.); Order to Facilitate Implementation of VWPA at 3 (N.D. Ga. June 17, 1983) (O'Kelley, J.).

124. *Justice Dep't Guidelines*, *supra* note 9, at 19. Although the VWPA is silent regarding appeal rights, it is significant to note that the Criminal Code Reform Act of 1981, S. 1630, 97th Cong., 1st Sess. (1981), a predecessor bill to the VWPA, specifically provided for a defendant's right to appeal a sentence that included a restitution order. 1981 Senate Report, *supra* note 15, at 1000.

125. The Act promotes victim participation in several ways. For example, in the only reference to plea negotiation and restitution, it recommends that the victim be consulted prior to any disposition of the case. 18 U.S.C. § 1512 note (1982) (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System). There is disagreement regarding the extent to which a prosecutor is bound by the victim's wishes. One view requires "full approval" by the victim to a plea arrangement. *See* Bennett, *supra* note 20, at 6. Alternatively, the prosecutor should only advocate restitution when there is no conflict with prosecutorial duties. *See Justice Dep't Guidelines*, *supra* note 9, at 3. Preservation of prosecutorial discretion



restitution or orders only partial restitution must state his reasons for so doing.<sup>126</sup> In addition, in *United States v. Welden*,<sup>127</sup> the court questioned whether a victim has a right of appeal because the defendant may appeal the restitution order, and in civil cases, both sides may appeal.<sup>128</sup> While a sentencing process that includes restitution has some of the characteristics of a civil action,<sup>129</sup> the essential nature of the proceeding remains criminal—sentencing the offender. Therefore, no appeal right vests in the victim merely because the defendant has such a right.

The VWPA contains no express provision granting the victim an appeal right,<sup>130</sup> and an appeal right found by implication would contravene the rule of lenity<sup>131</sup> because the victim would expose the defendant to liability a second time.<sup>132</sup> In addition, the VWPA does

as well as a strict construction of the statute preclude binding the prosecutor to the victim's position. 18 U.S.C. § 1512 note (1982) (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System) requires consultation but there is no explicit requirement that the prosecutor abide by the victim's wishes. *But see* Ark. Stat. Ann. § 41-1203(5) (1977) (concurrence of defendant, victim and prosecutor required to establish amount of restitution).

In addition to consultation, victims may have an opportunity to address the court at the time of sentencing. Office of the Attorney General, Guidelines for Victim and Witness Assistance, 48 Fed. Reg. 33,774, 33,776 (1983); *see* Fla. Stat. Ann. § 921.143 (West Supp. 1982) (victim has right to make statement at sentencing); *Justice Dep't Guidelines*, *supra* note 9, at 22 (victim may have right to make statement at hearing). It has been suggested, however, that victim testimony at the sentencing hearing is not preferred. *Id.* at 22 (sentencing hearing should be accomplished in least burdensome way for victim, court, and system). Discouraging victim testimony aids in providing the "simplest, most unencumbered method of handling [the] sentencing hearing." *Id.* at 4; *accord id.* at 22. In lieu of victim testimony, the prosecutor would present an affidavit from the victim or make an equivalent presentation. *Id.* at 22. Such information would be used in conjunction with the presentence report and the Victim Impact Statement to compute the entire sentence. *See id.* Affidavits or prosecutor presentations, however, may not be sufficient. In order to demonstrate damage or loss, victim testimony at the sentencing hearing should be allowed as it may be more persuasive than written statements. Victim allocation at sentencing "ensure[s] that the victim's side is heard and considered by the adjudicative officials." Senate Report, *supra* note 1, at 13, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2519; *see* Press & LaBrecque, *Giving Victims a Say in Court*, *Newsweek*, March 14, 1983, at 51 ("a flesh and blood victim may . . . sway a judge").

126. 18 U.S.C. § 3579(a)(2) (1982).

127. 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

128. *Id.* at 530.

129. *See infra* notes 146-49 and accompanying text.

130. *See supra* note 124.

131. *See supra* note 49 and accompanying text.

132. A defendant's sentence is subject to review and increase under certain circumstances. For example, the court may substitute a valid sentence for an invalid one

not address or enumerate appeal rights of the government and the defendant, and no other statute grants the government the right to appeal a judge's failure to order restitution.<sup>133</sup> Traditionally, the right of appeal is construed against the government.<sup>134</sup> Thus, the government has no right to appeal restitution orders because no right is enumerated. A defendant's right to appeal an order of restitution should be the same as his right to appeal any other sentence.<sup>135</sup> Restitution is a criminal penalty; consequently the usual rights of sentence and appellate review<sup>136</sup> are not restricted by the Act.

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even if the new sentence is more severe. *United States v. Thomas*, 356 F. Supp. 173, 174 (E.D.N.Y.), *aff'd*, 474 F.2d 1336 (2d Cir. 1972). In addition, a sentence may be declared void by the court because of the absence of the defendant's counsel at the time of the pronouncement. If this is done the court may increase the term on resentence on the theory that the void sentence was non-existent. *United States v. Howell*, 103 F. Supp. 714, 718 (S.D.W. Va.), *aff'd*, 199 F.2d 366 (4th Cir. 1952). Finally, even after the service of a sentence has commenced, the court may make the sentence more severe if it is necessary to bring the sentence up to the minimum required by statute. *Bozza v. United States*, 330 U.S. 160, 165-67 (1947); *United States v. Allen*, 588 F.2d 183, 185 (5th Cir. 1979); *Burns v. United States*, 552 F.2d 828, 831 (8th Cir. 1977); *United States v. Stevens*, 548 F.2d 1360, 1362-63 (9th Cir.), *cert. denied*, 430 U.S. 975 (1977).

133. The statute controlling government appeal rights, 18 U.S.C. § 3731 (1982), does not provide for a right to appeal a failure to order restitution. Congress may, however, broaden the government's right to appeal in relation to sentence review. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 149 (1983) [hereinafter cited as 1983 Senate Report]. Congress seeks to "preserve the concept that the discretion of a sentencing judge has a proper place in sentencing [that] should not be displaced by the discretion of an appellate court." *Id.* at 150. This concept is to be maintained, however, while promoting "fairness and rationality, and [reducing] unwarranted disparity, in sentencing." *Id.* The Senate Report describes the need for statutory changes:

It is clearly desirable, in the interest of reducing unwarranted sentence disparity, to permit the government, on behalf of the public, to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence, there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient.

*Id.* at 151. The proposed statute would thus equalize the appellate rights of defendants and prosecutors regarding sentences. *Id.* at 51-52, 151.

134. *Will v. United States*, 389 U.S. 90, 96-97 (1967); *United States v. Mersky*, 361 U.S. 431, 438 (1960); *United States v. Apex Distrib. Co.*, 270 F.2d 747, 751 (9th Cir. 1959); *United States v. Socony Mobil Oil Co.*, 252 F.2d 420, 422 (1st Cir. 1958). No appeal rights exist other than those enumerated. *See* Bennett, *supra* note 20, at 7; Teleconference Tapes, *supra* note 1, side 2 of 5 (statement of F. Bennett, Federal Public Defender, D. Md.).

135. *See* Bennett, *supra* note 20, at 7 (right to appeal a restitution order would be part and parcel of defendant's general right of appeal); *Justice Dep't Guidelines*, *supra* note 9, at 19 (restitution order is part of defendant's sentence and is appealable).

136. Bennett, *supra* note 20, at 7. Rule 35 of the Federal Rules of Criminal Procedure continues to control the review of sentences, including restitution, by the sentencing court. *See Justice Dep't Guidelines*, *supra* note 9, at 19.

## 2. Staying an Order of Restitution Pending Appeal

The stay of a sentence pending appeal is controlled by Rule 38 of the Federal Rules of Criminal Procedure. Rule 38 does not include a provision relating to restitution ordered in conjunction with incarceration or other forms of sentencing. The VWPA fails to address whether the restitution order may be stayed pending appeal.<sup>137</sup> The compensatory goal of the VWPA suggests that restitution should not be stayed pending appeal.<sup>138</sup> The defendant's interest in preserving his funds, should he ultimately prevail, suggests an opposite conclusion.

Restitution, as part of a sentence, should be stayed pending appeal. Restitution ordered as a condition of probation may be stayed under Rule 38.<sup>139</sup> Moreover, Rule 38 provides for the stay of the payment of fines and costs pending appeal.<sup>140</sup> The Rule contains provisions to assure payment by allowing the court to require the offender to deposit all or part of the amount due with the registry of the court.<sup>141</sup> This ensures the availability of the funds to the party in whose favor the appeal is ultimately decided.

An alternative approach would require the payment of restitution to the victim pending appeal.<sup>142</sup> This is supported by the Justice Department's perception of the Act's intent "to make victims as whole as possible, as soon as possible through restitution. Since an appeal may take years, the court should be encouraged to require the defendant to make restitution payments pending appeal."<sup>143</sup> This approach ignores the defendant's interest in preserving his funds should he prevail on appeal. Rule 38 should be amended to provide for the stay,

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137. The VWPA's silence is puzzling. The Criminal Code Reform Act of 1981, S. 1630, 97th Cong., 1st Sess. (1981), a predecessor bill to the VWPA, provided that a restitution order may be stayed pending appeal or sentence review. 1981 Senate Report, *supra* note 15, at 1000.

138. See *Justice Dep't Guidelines*, *supra* note 9, at 20 (victim should be made whole as soon as possible: appeal process may create long delays in victim compensation).

139. Fed. R. Crim. P. 38(a)(4) (conditions of probation may be stayed pending appeal).

140. *Id.* R. 38(a)(3). Because both fines and financial restitution are sentences involving the payment of money by the offender, the fines and costs provisions of Rule 38 provide a ready analogy. A number of cases, however, have distinguished restitution orders from sentences to pay fines and costs. See, e.g., *United States v. Weiner*, 376 F.2d 42, 43 (3d Cir. 1967) (per curiam) (restitution distinguished from costs); *Sprague v. State*, 590 P.2d 410, 415 (Alaska 1979) (restitution distinguished from fines); *State v. Garner*, 115 Ariz. 579, 581, 566 P.2d 1055, 1057 (1977) (same); *State v. Gunderson*, 74 Wash. 2d 226, 230, 444 P.2d 156, 159-60 (1968) (payment made to victim of crime is restitution, not fine).

141. Fed. R. Crim. P. 38(a)(3).

142. See *Justice Dep't Guidelines*, *supra* note 9, at 19-20.

143. *Id.* at 20.

pending appeal, of restitution ordered in conjunction with another form of sentence.<sup>144</sup> The provisions presently applicable to fines and costs should be utilized.<sup>145</sup>

This section analyzed key terms of the Act as well as additional problems presented by the Act's failure to address various issues. The next section examines the procedural considerations that arise from the introduction of restitution as a component of sentencing.

## II. PROCEDURAL CONSIDERATIONS AND PLEA BARGAINING

Restitution is a unique form of criminal sentence that borrows several concepts from the civil law of torts.<sup>146</sup> Under the VWPA, restitution is similar to a tort remedy because the Act seeks to compensate the victim for the violation of his private rights.<sup>147</sup> The VWPA also gives the victim the right to enforce the restitution order as if it were a civil judgment.<sup>148</sup> Moreover, the defendant is estopped from denying the essential facts of the offense underlying a restitution order in a subsequent civil action.<sup>149</sup>

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144. Congress has proposed an amendment to Rule 38 that would allow restitution ordered as a component of sentencing to be stayed pending appeal. 1983 Senate Report, *supra* note 133, at 537. The proposed amendment provides the same assurances regarding the availability of the funds as the present Rule 38 provisions for fines and costs. The court may require the offender to deposit all or part of the restitution amount with the court registry. *See id.*

145. *See* 1981 Senate Report, *supra* note 15, at 1000 (provisions relating to the stay of fines and costs should be applied to restitution orders).

146. *State v. Dillon*, 637 P.2d 602, 606-07 (Oregon 1981); *Legislation to Revise and Recodify Federal Criminal Laws, 1977-78: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 2602 (1977-1978) (comments of the Business Roundtable on the sentencing provisions of the Proposed Federal Criminal Code) [hereinafter cited as *Business Roundtable Discussion*]; N. Cohen & J. Gobert, *The Law of Probation and Parole* § 6.39, at 291 (1983); *see* Senate Report, *supra* note 1, at 30, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2536 (purpose of restitution is to make the victim whole); 128 Cong. Rec. H8201 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino) (same).

147. *Compare* J. Hall, *General Principles of Criminal Law* 241 (2d ed. 1960) (tort remedy compensates victim) *and* W. Prosser, *supra* note 122, § 2, at 7 (same) *with* Senate Report, *supra* note 1, at 30 (purpose of restitution provisions is to have offender make good the harm he has caused the victim), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2536. In the middle ages, the goal of victim compensation was severed from the criminal law and became part of the civil law of torts. S. Schafer, *Compensation and Restitution to Victims of Crime* 11-12 (2d ed. 1970); Jacob, *The Concept of Restitution: An Historical Overview*, in *Restitution in Criminal Justice* 45, 47 (J. Hudson & B. Galaway eds. 1970). Compensation remedies a violation of an individual's rights; other types of sentences seek to punish the defendant for the violation of public rights. 2 W. Blackstone, *Commentaries* § 5, at 2152 (W. Jones ed. 1916); J. Hall, *supra*, at 241; W. Prosser, *supra* note 122, § 2, at 7.

148. 18 U.S.C. § 3579(h) (1982). *See infra* notes 177-82 and accompanying text.

149. 18 U.S.C. § 3580(e) (1982). *See infra* notes 169-76 and accompanying text.

Nevertheless, restitution under the VWPA is also a form of criminal sentencing<sup>150</sup> and is intended to serve other goals.<sup>151</sup> As a sentence, restitution is intended to assist in rehabilitation<sup>152</sup> by helping the defendant to understand his social responsibility<sup>153</sup> and the impact of the crime upon the victim.<sup>154</sup> Restitution also achieves the retributive purpose of punishment by providing the defendant with a constructive opportunity to pay his debt to society and the victim.<sup>155</sup> Before

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150. See 128 Cong. Rec. H8467 (daily ed. Oct. 1, 1982) (statement of Rep. McCollum) ("Restitution would become a sentence that could, in and of itself, be imposed."); 128 Cong. Rec. S11,436 (daily ed. Sept. 14, 1982) (statement of Sen. Mathias) ("[This Act] [p]ermit[s], for the first time, a Federal judge to order restitution as part of the sentence for crimes involving loss of property or personal injury."); 128 Cong. Rec. S3860 (daily ed. April 22, 1982) (statement of Sen. Chiles) ("[I]t provides the remedy of restitution as a sentencing tool for judges. . ."); see also *State v. Lack*, 98 N.M. 500, 508, 650 P.2d 22, 30 (1982) (restitution must be considered part of sentencing process); *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 509-10, 407 A.2d 24, 27 (1979) (restitution is a criminal sentence).

151. 128 Cong. Rec. H8201 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino); see 1981 Senate Report, *supra* note 15, at 1001; see also Laster, *supra* note 32, at 80 (criminal restitution has two purposes: to restore victim and aid in offender's rehabilitation).

152. 128 Cong. Rec. H8201 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino) (quoting *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403, 407 (1978)); see Senate Report, *supra* note 1, at 32, reprinted in U.S. Code Cong. & Ad. News at 2538; Laster, *supra* note 32, at 80. Several state courts have recognized that restitution achieves the goal of rehabilitation. *People v. Richards*, 17 Cal. 3d 614, 622, 552 P.2d 97, 102, 131 Cal. Rptr. 537, 542 (1976); *State v. Harris*, 70 N.J. 586, 592-93, 362 A.2d 32, 34-35 (1976); *State v. Killian*, 245 S.E.2d 812, 815 (N.C. App. 1978); *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 507-08, 407 A.2d 24, 25-26 (1979); *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403, 407 (1978). A number of state statutes explicitly recognize the rehabilitative importance of restitution as a criminal sanction. See, e.g., Ark. Stat. Ann. § 41-1201 (1977); Minn. Stat. Ann. § 299B.13 (West Supp. 1984); Miss. Code Ann. § 99-37-3(2) (Supp. 1983); N.M. Stat. Ann. § 31-17-1(D) (1978); Or. Rev. Stat. § 137.106(2) (1981); S.D. Codified Laws Ann. § 23A-28-5 (1979). *But see* Harland I, *supra* note 30, at 123 (there is little empirical data to support theory that restitution assists defendant's rehabilitation).

153. Schafer, *supra* note 34, at 250; Teleconference Tapes, *supra* note 1, side 2 of 5 (statement of D. Chamlee, Deputy Chief Probation Division, Administrative Office of the U.S. Courts); see *People v. Richards*, 17 Cal. 3d 614, 622, 552 P.2d 97, 102, 131 Cal. Rptr. 537, 542 (1976); *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403, 407 (1978).

154. *Huggett v. State*, 83 Wis. 2d 790, 807, 266 N.W.2d 403, 411 (1978) (Callow, J., dissenting); S. Schafer, *supra* note 147, at 135; see *United States v. Buechler*, 557 F.2d 1002, 1007 (3d Cir. 1977); *People v. Lippner*, 219 Cal. 395, 399, 26 P.2d 457, 458 (1933).

155. S. Schafer, *supra* note 147, at 135; see Cohen, *The Integration of Restitution in the Probation Services*, 34 J. Crim. L. & Criminology 315, 316 (1944); Harland I, *supra* note 30, at 125; see also Senate Report, *supra* note 1, at 30 ("The premise of the section is that the court in devising just sanctions for adjudicated offenders, should insure that the wrongdoer [will] make [good], to the degree possible, the harm he has caused his victim."), reprinted in 1982 U.S. Code Cong. & Ad. News at 2536.

ordering restitution, therefore, a court must balance the victim's right to compensation against these other goals of criminal sentencing.<sup>156</sup>

The defendant's rights in this hybrid sentencing procedure must be protected. If the defendant were sued by the victim in a tort action, the defendant would be afforded a number of procedural safeguards not available at criminal sentencing,<sup>157</sup> including the right to a jury, the right to call and cross-examine witnesses, and the protection provided by the rules of evidence.<sup>158</sup>

This section discusses the procedures required to implement this hybrid sentence without violating the defendant's constitutional rights.<sup>159</sup> In addition, because plea bargaining plays an important role

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Further, it has been noted that restitution can act as an effective deterrent. Harland I, *supra* note 30, at 125; see N.J. Stat. Ann. § 2C:44-2a(2) (West 1982).

156. See Senate Report, *supra* note 1, at 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2538. See *infra* notes 196-210 and accompanying text.

157. See *Business Roundtable Discussion*, *supra* note 146, at 2602; N. Cohen & J. Gobert, *supra* note 146, § 6.39, at 291; Lundberg, *Criminal Law—Defendant's Rights Abridged When Probation Decree Contains Condition of "Damages" Type Restitution*, 30 Rocky Mtn. L. Rev. 215, 216 (1958); see also *State v. Sullivan*, 24 Or. App. 99, 105-06, 544 P.2d 616, 619 (1976) (Schwabb, C.J., dissenting) ("The defendant is being deprived of property without an opportunity to be heard. . . . [T]he majority approves joinder of questions of criminal liability with questions of liability for civil damages for trial, but then does not allow a trial on civil liability.").

158. See *People v. Richards*, 17 Cal. 3d 614, 620, 552 P.2d 97, 101, 131 Cal. Rptr. 537, 541 (1976); *State v. Stalheim*, 275 Or. 683, 688, 552 P.2d 829, 831 (1976); N. Cohen & J. Gobert, *supra* note 146, § 6.39, at 291; Note, *Rehabilitation of the Victims of Crime: An Overview*, 21 UCLA L. Rev. 317, 327 & n.50 (1973) [hereinafter cited as *Rehabilitation of Victims*]; Altimari, *supra* note 20, at 19.

159. The Probation Act, 18 U.S.C. § 3651 (1982), provides useful analogies to aid in interpreting various terms of the VWPA. See *supra* pt. I. There are, however, basic differences between the two acts that preclude using the Probation Act as a basis for establishing procedures for the VWPA. The nature of a restitution order under the VWPA is substantially different from restitution under the Probation Act. See *United States v. Welden*, 568 F. Supp. 516, 535 (N.D. Ala. 1983), appeal docketed, No. 83-7-444 (11th Cir. Aug. 8, 1983), petition for writ of mandamus filed sub nom. *In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983); *Business Roundtable Discussion*, *supra* note 146, at 2603.

Under the Probation Act, restitution is imposed as an alternative sentence. 18 U.S.C. § 3651 (1982); *Business Roundtable Discussion*, *supra* note 146, at 2605. Most defendants willingly consent to a sentence of restitution in order to avoid a prison term. See *Teleconference Tapes*, *supra* note 1, side 1 of 5 (statement of Judge G. B. Tjoflat, 11th Cir.). Courts have justified the lack of procedures afforded the defendant on the grounds that a court must be given wide discretion in choosing conditions of probation. In order to achieve offender rehabilitation, the Probation Act states that probation may be "upon such terms and conditions as the court deems best." 18 U.S.C. § 3651 (1982). In interpreting the Probation Act, the Supreme Court has recognized that the trial court has "an exceptional degree of flexibility in" setting terms and conditions of probation. *Burns v. United States*, 287 U.S. 216, 220 (1932); accord *United States v. Baker*, 429 F.2d 1344, 1347 (7th Cir. 1970); see Best & Birzon, *Conditions of Probation: An Analysis*, 51 Geo. L.J. 809, 826 (1963); Harland

in obtaining criminal convictions, this section will discuss the impact of restitution on the plea bargaining process.

### A. *Right to a Jury under the VWPA*

The civil elements of a restitution order raise the issue whether restitution is subject to the seventh amendment thus requiring that the defendant be given the right to a jury to compute the award.<sup>160</sup> The seventh amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ."<sup>161</sup> To fall within the scope of the seventh amendment, a new cause of action must be comparable to a historical common-law action.<sup>162</sup>

In *United States v. Welden*,<sup>163</sup> the district court found that the restitution provision of the VWPA creates an action at "common law," thereby entitling the defendant to a jury trial pursuant to the seventh amendment.<sup>164</sup> The court reasoned that the right to a jury was required because a restitution order has the same effect as a civil judgment.<sup>165</sup> The court stated that it "cannot construe a hearing which necessarily results in a civil judgment, . . . not to be a 'suit at common law' within the contemplation of the Seventh Amendment."<sup>166</sup> The court relied upon the collateral estoppel<sup>167</sup> and enforce-

I, *supra* note 30, at 73-74, 126. Under the VWPA, the court has an obligation to impose restitution as part of every criminal sentence involving property loss or physical injury, *Justice Dep't Guidelines*, *supra* note 9, at 12; see 128 Cong. Rec. S13,064 (daily ed. Oct. 1, 1982) (statement of Sen. Laxalt); Petition for Writ of Mandamus, *supra* note 46, at 11, and must state its reasons for not doing so. 18 U.S.C. § 3579(a)(2) (1982).

160. *United States v. Welden*, 568 F. Supp. 516, 534 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983); Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of Judge G. B. Tjoflat, 11th Cir.); Bennett, *supra* note 20, at 4; see *Rehabilitation of Victims*, *supra* note 158, at 327 n.50.

161. U.S. Const. amend. VII.

162. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2302, at 14-15 (1971); see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979); *United States v. Welden*, 568 F. Supp. 516, 534 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

163. 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

164. *Id.* at 534.

165. *Id.*

166. *Id.*

167. *Id.* Although the court referred to "res judicata," see *id.*, the VWPA contains a collateral estoppel provision. There is a technical difference between res judicata

ment provisions<sup>168</sup> of the Act to justify its conclusion. This section examines these rationales in addition to other factors affecting the nature of the restitution procedure.

### I. Collateral Estoppel Provision

Section 3580(e) of the VWPA provides that “[a] conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding . . . brought by the victim.”<sup>169</sup> This provision does not incorporate a new concept into federal law. Several circuit courts have held that a defendant cannot relitigate the facts underlying a criminal conviction in a subsequent civil proceeding.<sup>170</sup> Additionally, the Supreme Court has stated that the doctrine of collateral estoppel is “applicable to the decisions of criminal courts.”<sup>171</sup>

The *Welden* court’s reliance on the Act’s collateral estoppel provision to justify the need for a jury at a restitution hearing was misplaced. In its analysis of the provision the court reasoned that because

and collateral estoppel. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Res judicata means that a final judgment on the merits of an action precludes parties or those in privity with them from relitigating the same cause of action and any claims or defenses that were or might have been raised in a prior suit. *Id.*; see *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4402, at 7 (1981) (quoting *Kaspar Wire Works, Inc. v. Leco Eng’g & Mach., Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978)). Collateral estoppel, on the other hand, only precludes further litigation of those issues actually determined in a prior suit and necessary to the earlier judgment. See *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 n.5 (1979). The term “res judicata” has traditionally comprised both of these doctrines, 18 C. Wright, A. Miller & E. Cooper, *supra*, § 4402, at 6-7, and the court in *Welden* apparently used the term in this broad sense. In the legislative history of the Act, Congress similarly used the term “res judicata” to refer to the collateral estoppel provision of the Act stating “that the underlying facts of an adjudicated crime are to be treated as res judicata in a later civil proceeding.” Senate Report, *supra* note 1, at 31, reprinted in 1982 U.S. Code Cong. & Ad. News at 2537. Thus, the *Welden* court’s broad use of the term does not affect the analysis.

168. 568 F. Supp. at 534; see 18 U.S.C. § 3579(h) (1982).

169. 18 U.S.C. § 3580(e) (1982). The collateral estoppel provision applies only to the extent that it is consistent with the law in the state that the victim brings the action. *Id.*

170. See *Raiford v. Abney*, 695 F.2d 521, 523 (11th Cir. 1983); *Wolfson v. Baker*, 623 F.2d 1074, 1078, 1080 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978); *Tomlinson v. Lefkowitz*, 334 F.2d 262, 264-65 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965). Several state statutes that authorize the court to impose restitution in conjunction with other sentences contain collateral estoppel provisions. See, e.g., Ala. Code § 15-18-75 (1982); Fla. Stat. Ann. § 895.05(8) (West 1982); Miss. Code Ann. § 99-37-17(2) (Supp. 1983).

171. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951) (quoting *Frank v. Mangum*, 237 U.S. 309, 334 (1915)).



the Act could estop a defendant from relitigating the facts underlying a restitution order in a subsequent civil action brought by the victim, a restitution hearing was an action at "common law."<sup>172</sup> The court failed to recognize however, that the defendant is estopped from relitigating the facts underlying a restitution order only if these facts were fully and fairly litigated at the criminal trial, or stipulated through a guilty plea.<sup>173</sup>

The Act's provision merely obviates a victim's need to reestablish the defendant's liability in a subsequent civil action.<sup>174</sup> If the victim's level of injury was not part of the essential allegations underlying the criminal conviction then the Act's collateral estoppel provision would be inapplicable.<sup>175</sup> The collateral estoppel provision of the Act relates to facts underlying the criminal conviction that are decided prior to a sentencing court's restitution decision.<sup>176</sup> Thus, the collateral estoppel provision of the VWPA does not turn the sentencing hearing into an action at common law and is unrelated to the defendant's right to a jury.

## 2. The Enforcement Provision

Section 3579(h) of the VWPA provides that "[a]n order of restitution may be enforced by the United States or a victim . . . in the same manner as a judgment in a civil action."<sup>177</sup> The *Welden* court did not suggest how this provision transforms the criminal sentencing hearing into an action at "common law," and there does not appear to be any sound explanation. Section 3579(h) simply makes the procedures that apply to collection of a civil judgment applicable to an order of restitution.<sup>178</sup>

172. See *United States v. Welden*, 568 F. Supp. 516, 534 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

173. See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 569 (1951); *Raiford v. Abney*, 695 F.2d 521, 523 (11th Cir. 1983); Senate Report, *supra* note 1, at 32, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2538. A plea of nolo contendere as compared to a guilty plea does not have a collateral estoppel effect. Fed. R. Evid. 410(2); see *Mickler v. Fahs*, 243 F.2d 515, 517 (5th Cir. 1957); *A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 101 (S.D.N.Y. 1950), *appeal dismissed*, 197 F.2d 498 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952).

174. Senate Report, *supra* note 1, at 32, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2538; see *Justice Dep't Guidelines*, *supra* note 9, at 9.

175. 18 U.S.C. § 3580(e) (1982).

176. See *id.*

177. *Id.* § 3579(h) (1982).

178. *Petition for Writ of Mandamus*, *supra* note 46, at 8; see *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 463-64 (1936); Senate Report, *supra* note 1, at 33, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2539.

Under the Probation Act, if a defendant fails to comply with a restitution order the court can revoke probation.<sup>179</sup> Congress recognized, however, that under the Probation Act courts have indifferently enforced restitution orders.<sup>180</sup> To eliminate this problem, Congress gave victims the right to enforce the restitution order in the same manner as a civil judgment under the VWPA.<sup>181</sup> This type of provision is not unprecedented. For example, section 3565 of title 18 of the United States Code gives the government the right to collect a criminal penalty in the same manner as a civil judgment is collected.<sup>182</sup> The VWPA merely extends this right to crime victims.<sup>183</sup> Similarly, a number of state statutes that authorize restitution in conjunction with other sentences provide that the restitution order may be enforced by the victim in the same manner as a civil judgment.<sup>184</sup> The inclusion of this type of provision in the VWPA does not convert the restitution order into an action at common law.<sup>185</sup>

### 3. Restitution—A Criminal Sentence

The seventh amendment only guarantees the right to a jury in *actions* at common law.<sup>186</sup> The restitution provisions of the VWPA do not create an action in any form.<sup>187</sup> The Act merely creates new rights for crime victims by giving them the opportunity to receive limited compensation through sentencing.<sup>188</sup> The characterization of a pen-

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179. *United States v. Steiner*, 239 F.2d 660, 662 (7th Cir.), *cert. denied*, 353 U.S. 936 (1957); *Gross v. United States*, 228 F.2d 612, 615 (8th Cir. 1956); 18 U.S.C. § 3651 (1982); *see Unites States v. O'Quinn*, 689 F.2d 1359, 1360-61 (11th Cir. 1982); *Schneider v. Housewright*, 668 F.2d 366, 368-69 (8th Cir. 1981).

180. Senate Report, *supra* note 1, at 30, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2536.

181. *Id.* at 33, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2539.

182. 18 U.S.C. § 3565 (1982) states that a penalty imposed as a criminal sanction may be collected "by execution against the property of the defendant in like manner as judgments in civil cases." *Id.*

183. *See* Petition for Writ of Mandamus, *supra* note 46, at 7.

184. *See* Fla. Stat. Ann. § 775.089(6) (West Supp. 1983); Ga. Code Ann. § 17-14-13 (1982); Miss. Code Ann. § 99-37-13 (1983); N.J. Stat. Ann. § 2C:46-2b (West 1982); N.D. Cent. Code § 12.1-32-08 (1975); Utah Code Ann. § 77-18-6 (Supp. 1983); S.C. Code Ann. § 16-3-1270 (Law. Co-op. Supp. 1983) (restitution charge shall constitute a lien).

185. *See* Petition for Writ of Mandamus, *supra* note 46, at 7.

186. U.S. Const. amend VII.

187. *See* Teleconference Tapes, *supra* note 1, side 4 of 5 (question and answer session) (An "order of restitution is not an adjudication of victim's claims against the offender. The victim always retains the right to institute a civil claim."); *Justice Dep't Guidelines*, *supra* note 9, at 26 (A "restitution order is imposed as part of a sentencing hearing, not as an action for damages brought by the government against an individual.").

188. *See* Senate Report, *supra* note 1, at 31-32 (victim's right to compensation is limited by the goals of defendant rehabilitation and the need to keep unencumbered

alty as civil or criminal is a matter of legislative intent.<sup>189</sup> Although an order of restitution achieves the civil goal of compensation, Congress intended restitution to be a criminal sanction<sup>190</sup> rather than a form of civil liability.<sup>191</sup> When Representative Rodino introduced the House version of the VWPA, he stated that the Act "explicitly recognizes the importance of restitution as a criminal sanction."<sup>192</sup> Since the enactment of the Probation Act, federal courts have viewed restitution as a criminal sanction within the judge's sentencing power.<sup>193</sup> In addition, virtually all state judges have either common-law or statutory authority to impose restitution.<sup>194</sup>

the sentencing process), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2537-38; 128 Cong. Rec. H8207 (daily ed. Sept. 30, 1982) (statement of Rep. McCollum) ("The restitution provisions . . . contain a logical limitation on awarding restitution.").

189. *See* *United States v. Ward*, 448 U.S. 242, 248 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

190. *See* 128 Cong. Rec. H8467 (daily ed. Oct. 1, 1982) (statement of Rep. McCollum) ("Restitution would become a sentence that could, in and of itself, be imposed."); 128 Cong. Rec. S11,436 (daily ed. Sept. 14, 1982) (statement of Sen. Mathias) ("[This Act] [p]ermit[s], for the first time, a Federal judge to order restitution as part of the sentence for crimes involving loss of property or personal injury."); 128 Cong. Rec. S3860 (daily ed. April 22, 1982) (remarks of Sen. Chiles) ("[I]t provides the remedy of restitution as a sentencing tool for judges. . . ."); 1981 Senate Report, *supra* note 15, at 1001 (restitution is a penal sanction against offender); *see also* *State v. Lack*, 98 N.M. 500, 508, 650 P.2d 22, 30 (1982) (restitution must be considered part of sentencing process); *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 509-10, 407 A.2d 24, 26-27 (1979) (restitution is a criminal sentence).

191. 128 Cong. Rec. H8467 (daily ed. Oct. 1, 1982) (statement of Rep. McCollum); *see* Senate Report, *supra* note 1, at 31, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2537. A number of state courts have held that restitution is not a form of civil liability. *State v. Garner*, 115 Ariz. 579, 581, 566 P.2d 1055, 1057 (1977); *Cannon v. State*, 246 Ga. 754, 755, 272 S.E.2d 709, 710 (1980); *People v. Tidwell*, 33 Ill. App. 3d 232, 237, 338 N.E.2d 113, 117 (1975); *People v. Good*, 287 Mich. 110, 115, 282 N.W. 920, 923 (1938); *State v. Harris*, 70 N.J. 586, 597-98, 362 A.2d 32, 38 (1976); *State v. Lack*, 98 N.M. 500, 508, 650 P.2d 22, 30 (1982); *Feldman v. Reeves*, 45 A.D.2d 90, 92, 356 N.Y.S.2d 627, 629 (1st Dep't 1974); *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 507-08, 407 A.2d 24, 27 (1979); *State v. Dillon*, 637 P.2d 602, 606 (Oregon 1981); *State v. Scherr*, 9 Wis. 2d 418, 425, 101 N.W.2d 77, 81 (1960).

192. 128 Cong. Rec. H8205 (daily ed. Sept. 30, 1982).

193. *See* *United States v. Boswell*, 565 F.2d 1338, 1342-43 (5th Cir.), *cert. denied*, 439 U.S. 819 (1978); Senate Report, *supra* note 1, at 30, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2536; *Justice Dep't Guidelines*, *supra* note 9, at 26; Petition for Writ of Mandamus, *supra* note 46, at 6.

194. *Omnibus Victims Protection Act: Hearings on S. 2420 Before the Subcomm. on Criminal Law of the Sen. Comm. on the Judiciary*, 97th Cong., 2d Sess. 82 (1982) (statement of Marlene A. Young, Executive Director of the National Organization for Victim Assistance (NOVA)) [hereinafter cited as *Senate Hearings*]; New State Laws, *supra* note 2, at 2. Numerous states have passed statutes giving the sentencing judge the authority to order restitution as a criminal penalty in conjunction with other

Further, the criminal nature of a restitution order distinguishes it from an action at common law subject to the seventh amendment jury requirement. At the sentencing hearing, the court imposes restitution as part of the defendant's penalty. Once guilt has been established at a trial in which a jury was available or through a plea, the defendant does not have the right to demand a jury to determine the penalty.<sup>195</sup>

The *Welden* court failed to recognize that the criminal aspects of a restitution order distinguish it from a civil judgment. Before ordering restitution, the court must consider the defendant's financial needs and resources<sup>196</sup> so that restitution will not interfere with rehabilitation.<sup>197</sup> A defendant's lack of resources may prevent a judge from ordering restitution even though the victim has proved his losses.<sup>198</sup> The Act also permits the court to order service restitution in lieu of cash restitution,<sup>199</sup> giving the judge flexibility to tailor a sentence with the maximum rehabilitative effect.<sup>200</sup>

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forms of punishment. See Ala. Code § 15-18-67 (1980); Alaska Stat. § 12.55.015(a)(5) (1980); Fla. Stat. Ann. § 775.089 (West Supp. 1983); Ga. Code Ann. § 17-14-3 (1982); Hawaii Rev. Stat. § 706-605(1)(e) (1976 & Supp. 1982); Ill. Ann. Stat. ch. 38, § 1005-5-3(b)5, 7 (Smith-Hurd 1982); Ind. Code Ann. § 35-50-5-3(a) (Burns Supp. 1983); Iowa Code Ann. § 910.2 (West Supp. 1983-1984); Me. Rev. Stat. Ann. tit. 17-A, § 1323 (1983); Md. Ann. Code art. 27, § 640(b) (Supp. 1982); Miss. Code Ann. § 99-37-3 (Supp. 1983); N.J. Stat. Ann. § 2C:44-2 (West 1982); N.M. Stat. Ann. § 31-17-1 (1981); N.C. Gen. Stat. § 148-57.1 (1983); N.D. Cent. Code § 12.1-32-02(1)(e) (Supp. 1983); Ohio Rev. Code Ann. § 2929.11(E) (Page 1983); Or. Rev. Stat. § 137.106 (1981); Pa. Cons. Stat. Ann. tit. 18, § 1106(a) (Purdon Supp. 1983); R.I. Gen. Laws § 12-19-32 (1981); S.C. Code Ann. § 24-23-210(B) (Law. Co-op. Supp. 1982); S.D. Codified Laws Ann. § 23A-28-1 (1979 & Supp. 1983); Utah Code Ann. § 76-3-201(3)(a) (Supp. 1983); Wash. Rev. Code Ann. § 9.94A.140(2) (Supp. 1983-1984).

195. See *Morgan v. Wainwright*, 676 F.2d 476, 481 (11th Cir.), cert. denied, 103 S. Ct. 380 (1982); *Clark v. Blackburn*, 605 F.2d 163, 166 (5th Cir. 1979); *Turnbough v. Wyrick*, 551 F.2d 202, 203 (8th Cir.), cert. denied, 431 U.S. 941 (1977).

196. 18 U.S.C. § 3580(a) (1982); Senate Report, *supra* note 1, at 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2538; see 1981 Senate Report, *supra* note 15, at 999 (before ordering restitution court must "examine the overall financial implications to the defendant").

197. Restitution in an amount greater than the defendant's ability to pay will undermine the defendant's rehabilitation by placing an overwhelming burden on him. *Harland I*, *supra* note 30, at 92-93; see *State v. Garner*, 115 Ariz. 579, 581, 566 P.2d 1055, 1057 (1977); *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 509, 407 A.2d 24, 26 (1979); *Huggett v. State*, 83 Wis. 2d 790, 798-99, 266 N.W.2d 403, 407 (1978), and may even encourage the defendant to commit more crimes to meet his obligation. See *infra* note 390 and accompanying text.

198. See *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 508-09, 407 A.2d 24, 26 (1979); *Huggett v. State*, 83 Wis. 2d 790, 803-04, 266 N.W.2d 403, 409 (1978); Senate Report, *supra* note 1, at 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2538; N. Cohen & J. Gobert, *supra* note 146, § 6.42, at 296.

199. 18 U.S.C. § 3579(b)(4) (1982). See *supra* notes 77-93 and accompanying text.

200. Senate Report, *supra* note 1, at 32, reprinted in 1982 U.S. Code Cong. & Ad. News at 2538. See *supra* note 86 and accompanying text.

The type and extent of losses recoverable through restitution are also more limited than those generally recoverable in a civil action.<sup>201</sup> For example, the Act precludes a victim from recovering speculative damages, such as pain and suffering,<sup>202</sup> that may be recovered in a tort action for personal injury.<sup>203</sup> Similarly, a victim is precluded from recovering "loss of use" damages<sup>204</sup> that may be recovered in an action for property damage.<sup>205</sup> The Act also gives the court discretion not to order restitution, an option that is clearly unavailable in an action at common law, if doing so would unduly complicate or prolong the sentencing process.<sup>206</sup>

Moreover, because restitution is a criminal sentence, a judge must balance a victim's need for compensation against the other goals of sentencing<sup>207</sup>—rehabilitation, deterrence, retribution, and restraint.<sup>208</sup> This balancing process requires the court to consider information regarding the defendant's character, lifestyle, and prior crimi-

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201. See Bureau of Justice Statistics, U.S. Dep't of Justice, Analytic Report No. VAD-9, Restitution to Victims of Personal and Household Crimes 6 (1981) [hereinafter cited as Analytic Report]; Harland I, *supra* note 30, at 86.

202. See *supra* note 61 and accompanying text.

203. D. Dobbs, *supra* note 76, § 8.1, at 545; W. Prosser, *supra* note 122, § 12, at 50; see *Anderson v. Sears, Roebuck & Co.*, 377 F. Supp. 136, 138-39 (E.D. La. 1974); *Tucker v. Lower*, 200 Kan. 1, 9, 434 P.2d 320, 327 (1967).

204. 18 U.S.C. § 3579(b)(1) (1982).

205. D. Dobbs, *supra* note 76, § 5.11, at 383; see *Koninklijke Luchtvaart Maatschaapi, N.V. (KLM Royal Dutch Airlines) v. United Technologies Corp.*, 610 F.2d 1052, 1056 (2d Cir. 1979); *Snavelly v. Lang*, 592 F.2d 296, 299 (6th Cir. 1979).

206. 18 U.S.C. § 3579(d) (1982). Congress included this provision specifically to prevent the sentencing hearing from becoming a substitute for a civil damages trial. 128 Cong. Rec. H8467 (daily ed. Oct. 1, 1982) (statement of Rep. McCollum); see Senate Report, *supra* note 1, at 31, reprinted in 1982 U.S. Code Cong. & Ad. News at 2537; Cong. Rec. H8205 (daily ed. Sept. 30, 1982) (statement of Sen. Rodino). As a practical matter, requiring a jury trial at sentencing would be the end of the restitution provisions of the Act. Teleconference Tapes, *supra* note 1, side 2 of 5 (statement of L. Schwartz, Benjamin Franklin Professor of Law, Univ. of Pa.).

207. Senate Report, *supra* note 1, at 32 (congressional intent was "to provide the court with some flexibility in determining the kind of restitution which would both satisfy the victim and provide maximum rehabilitative incentives to the offender"), reprinted in 1982 U.S. Code Cong. & Ad. News at 2538; Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of L. Schwartz, Benjamin Franklin Prof. of Law, Univ. of Pa.) (when ordering restitution court must take into account defendant's resources and finances, victim's needs and needs of system); see *Commonwealth v. Fuqua*, 267 Pa. Super. 504, 510, 407 A.2d 24, 27 (1979) (when ordering restitution, court must consider "the type of payment . . . that will best serve the needs of the victim and the capabilities of the defendant"). See *infra* notes 389-92 and accompanying text.

208. A. Campbell, *Law of Sentencing* § 4, at 21 (1978); N. Kittrie and E. Zenoff, *Sanctions, Sentencing and Corrections—Law, Policy and Practice* 12-15 (1981).

nal record<sup>209</sup> that would be irrelevant, and often inadmissible,<sup>210</sup> in a "common law" action for damages.

Finally, restitution should be imposed by the judge rather than by the jury, because juries do not have the expertise<sup>211</sup> required to assess the type or amount of restitution that would best meet the compensation needs of the victim, the correctional needs of the offender, and the sentencing needs of society.<sup>212</sup> A proper sentencing decision requires the judge to have a thorough understanding of modern sentencing goals.<sup>213</sup> A juror cannot be expected to develop this level of understanding and competence for the infrequent occasions that he is called upon to exercise his civic duty.<sup>214</sup> Thus, the decision to impose restitution should be made by the judge in his sentencing capacity.<sup>215</sup>

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209. C. Wright, *Federal Practice and Procedure: Criminal* § 526, at 100-01 (2d ed. 1982). See *infra* note 220 and accompanying text.

210. C. Wright, *supra* note 209, § 526, at 89-90; 3 ABA Standards for Criminal Justice, Standard 18-1.1 commentary at 18.16 n.3 (2d ed. 1980) [hereinafter cited as ABA Standards].

211. 4 C. Torcia, *Wharton's Criminal Procedure* § 625, at 257 (12th ed. 1976) (main objection to jury sentencing is that jurors have no opportunity to develop expertise); ABA Standards, *supra* note 210, Standard 18-1.1 commentary at 18.16 (sentencing decision requires expertise that jury does not possess); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 145 (1967) (jury does not have expertise to assess correctional needs of offenders) [hereinafter cited as *Challenge of Crime*]; Note, *Jury Sentencing In Virginia*, 53 Va. L. Rev. 968, 1001 (1967) (jury sentencing is inadequate because jurors "lack . . . education in . . . goals of modern sentencing") [hereinafter cited as *Jury Sentencing*].

212. Cf. *Challenge of Crime*, *supra* note 211, at 141 ("A sentence prescribes punishment, but it also should be the foundation of an attempt to rehabilitate the offender, to insure that he does not endanger the community, and to deter others from similar crimes in the future."). See *supra* note 207 and accompanying text, *infra* 389-91 and accompanying text.

213. See A. Campbell, *supra* note 208, § 93, at 299-300 ("Proper performance of the judicial sentencing role is far from easy. Selecting the appropriate sentence often requires detailed knowledge of the individual offender, of the range and probable effect of various sentencing alternatives, and of complex substantive and procedural sentencing rules."); cf. *Jury Sentencing*, *supra* note 211, at 1001 (jurors lack education in goals of modern sentencing); see also *Challenge of Crime*, *supra* note 211, at 145 (Commission recommends programs to "educate judges in sentencing and correctional methods.").

214. ABA Standards, *supra* note 210, Standard 18-1.1 commentary 18.16; see also *Challenge of Crime*, *supra* note 211, at 141 ("There is no decision in the criminal process that is as complicated and difficult as the one made by the sentencing judge.").

215. See *Cannon v. State*, 246 Ga. 754, 755, 272 S.E.2d 709, 710 (1980); *People v. Gallagher*, 55 Mich. App. 613, 620, 223 N.W.2d 92, 96 (1974); *State v. Harris*, 70 N.J. 586, 598, 362 A.2d 32, 37-38 (1976); *State ex rel. D.G.W.*, 70 N.J. 488, 503, 361 A.2d 513, 521 (1976); *State v. Lack*, 98 N.M. 500, 506, 508, 650 P.2d 22, 28, 30 (1982); *State v. Dillon*, 637 P.2d 602, 607 & n.7 (Oregon 1981); Jacob, *Reparation or*

Although a defendant does not have a right to a jury at sentencing, the civil aspects of restitution require that a defendant be given more procedural protection than that traditionally afforded at sentencing.<sup>216</sup> The next section analyzes these traditional procedures and the scope of additional procedures necessitated by the Act.

### B. Due Process at Sentencing

While the defendant has important due process rights at sentencing,<sup>217</sup> he need not be accorded the same degree of protection afforded at the criminal trial.<sup>218</sup> Trial-like procedures would impair the judge's

*Restitution by the Criminal Offender to His Victim: An Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. Crim. L. Criminology & Police Sci. 152, 165-66 (1970) [hereinafter cited as Jacob II]; *Justice Dep't Guidelines*, *supra* note 9, at 26. *Contra* United States v. Welden, 568 F. Supp. 516, 534 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug 8, 1983), *petition for writ of mandamus filed sub nom. In re* United States, No. 83-7-583 (11th Cir. Oct. 25, 1983); Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of Judge G. B. Tjoflat, 11th Cir.); Bennett, *supra* note 20, at 4; *see* Ark. Stat. Ann. § 43-2352 (Supp. 1983) ("If a defendant pleads guilty . . . the court . . . determine[s] the amount of restitution . . . [i]f defendant is found guilty . . . [by the] jury, the jury . . . determine[s] the amount of restitution . . ."); Ky. Rev. Stat. Ann. § 431.200 (Bobbs-Merrill Supp. 1982) (if defendant consents to an amount of restitution that is liquidated, court will order judgment accordingly; if defendant contests amount, however, jury is impaneled to ascertain amount); Mo. Ann. Stat. § 546.640 (Vernon 1949) (same); Tenn. Code Ann. § 40-20-116 (1982) (when defendant has been convicted of stealing property, court will order restitution in an amount determined by a jury).

216. *See* United States v. Welden, 568 F. Supp. 516, 534-35 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re* United States, No. 83-7-583 (11th Cir. Oct. 25, 1983); Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of Judge G. B. Tjoflat, 11th Cir.); Altimari, *supra* note 20, at 19-20; *cf. Rehabilitation of Victims*, *supra* note 158, at 327 (defendant should have same procedural safeguards as civil trial if restitution becomes part of every sentence). *But see Justice Dep't Guidelines*, *supra* note 9, at 22 (traditional sentencing procedures should be maintained).

217. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("[I]t is now clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause."); *see* *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *Specht v. Patterson*, 386 U.S. 605, 610-11 (1967); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *United States v. Schell*, 692 F.2d 672, 677-78 (10th Cir. 1982). In *United States v. Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980), the court recognized that sentencing is a critical stage of the criminal process. For defendants, it is often the only critical stage because the vast majority of convictions are obtained through guilty pleas. *Id.* at 396; House Report, *supra* note 46, at 444 (1980) ("Since approximately 90 percent of all Federal convictions result from pleas of guilty, the most significant event in the Federal criminal justice process, for . . . the offender, usually is sentencing."); *see* *Estelle v. Smith*, 451 U.S. 454, 463 (1981) (because of gravity of penalty stage, defendant's fundamental constitutional rights must be preserved).

218. *Williams v. New York*, 337 U.S. 241, 245-46 (1949); *United States v. Stephens*, 699 F.2d 534, 537 (11th Cir. 1983); *United States v. Fatico*, 579 F.2d 707,

ability to individualize the sentence,<sup>219</sup> which requires the consideration of information unrelated to the defendant's guilt or innocence that would be inadmissible at trial.<sup>220</sup> The defendant's interests at sentencing also must be balanced against the nature of the government function.<sup>221</sup> The government has an interest in maintaining an

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711 (2d Cir.), *on remand*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *United States v. Espinoza*, 481 F.2d 553, 566 (5th Cir. 1973); *United States v. Needles*, 472 F.2d 652, 657-58 (2d Cir. 1973); see ABA Standards, *supra* note 210, Standard 18-6.4 commentary at 18.449. Although the scope of the defendant's due process rights at sentencing have not been clearly defined, see *id.* Standard 18-6.4 commentary at 18.452-455; A. Campbell, *supra* note 208, § 41, at 150-51; N. Kittrie & E. Zenoff, *supra* note 208, at 144, the trend is towards affording the defendant greater procedural safeguards. *Fatico*, 441 F. Supp. at 1290 ("There has been a clear drift away from the absolute no-due-process-at-sentence position . . ."); ABA Standards, *supra* note 210, Standard 18-6.4 commentary at 18.453-455; N. Kittrie & E. Zenoff, *supra* note 208, at 144; see *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Harris*, 558 F.2d 366, 373-74 (7th Cir. 1977); *United States v. Bass*, 535 F.2d 110, 119 (D.C. Cir. 1976). The Supreme Court has accorded extensive procedural safeguards to parolees and probationers before parole or probation is revoked. See *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972). Commentators have noted that "[s]ince the defendant who has not yet been sentenced has all of the liberty interests but none of the restrictions of the parolee or probationer, . . . the need for providing due process safeguards appears even stronger." Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1615, 1639 (1980); *accord Fatico*, 458 F. Supp. at 402; Harkness, *Due Process in Sentencing: A Right to Rebut the Presentence Report?*, 2 Hastings Const. L.Q. 1065, 1089 (1975). Further, the ABA has noted that a higher level of procedural protections is needed when the judge is required to make a finding of fact at sentencing. ABA standards, *supra* note 210, Standard 18-6.4 commentary at 18.450-451.

219. *Williams v. New York*, 337 U.S. 241, 247 (1949); *United States v. Harris*, 558 F.2d 366, 372-73 (7th Cir. 1977); *United States v. McCoy*, 517 F.2d 41, 44 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975).

220. At sentencing, the court is expected to individualize the sentence to "[suit] the defendant's character, social history, and potential for recidivism." Fennell & Hall, *supra* note 218, at 1616 (footnote omitted); *accord United States v. Grayson*, 438 U.S. 41, 53 (1978) (sentencing decision requires consideration of defendant's person and personality); *United States v. Harris*, 558 F.2d 366, 372 (7th Cir. 1977) ("In determining an appropriate punishment, all the circumstances of the particular crime and the background of the individual offender must be considered."). The court is allowed to rely upon hearsay information. See *Williams v. Oklahoma*, 358 U.S. 576, 583-84 (1959); *Williams v. New York*, 337 U.S. 241, 246-47 (1949); *United States v. Fatico*, 579 F.2d 707, 712 (2d Cir. 1978) (court may rely on hearsay information, but not on materially false information), *on remand*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); C. Wright, *supra* note 209, § 526, at 94 ("The only real limitation on the information the judge may consider is that it is error if it can be shown that he relied on information that was in fact not true.").

221. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *State ex rel. D.G.W.*, 70 N.J. 488, 502-03, 361 A.2d 513, 521



unencumbered sentencing process.<sup>222</sup> To afford the defendant a second trial at sentencing would result in unreasonable delay and prohibitive cost to the government.<sup>223</sup>

In federal court, as long as the defendant is afforded notice and an opportunity to be heard, as required by Rule 32 of the Federal Rules of Criminal Procedure, due process is satisfied.<sup>224</sup> Rule 32 requires the Probation Department to "make a presentence investigation and report to the court" prior to the sentencing hearing.<sup>225</sup> In addition, the court must disclose the report to the defendant and his counsel.<sup>226</sup> The court also must afford the defendant, his counsel, and the prosecutor the opportunity to make a statement at the sentencing hearing.<sup>227</sup>

Rule 32 contemplates an informal sentencing hearing. At the hearing, the defendant does not usually have the right to call and cross-examine witnesses to rebut information contained in the presentence report.<sup>228</sup> The Supreme Court has recognized, however, that the de-

(1976); *State v. Lack*, 98 N.M. 500, 507, 650 P.2d 22, 29 (1982); see ABA Standards, *supra* note 210, Standard 18-6.4 commentary at 18.449; Friendly, "Some Kind Of Hearing," 123 U. Pa. L. Rev. 1267, 1278 (1975).

222. *State ex rel. D.G.W.*, 70 N.J. 488, 503, 361 A.2d 513, 521 (1976); *State v. Lack*, 98 N.M. 500, 507, 650 P.2d 22, 29 (1982); see 18 U.S.C. § 3579(d) (1982).

223. See ABA Standards, *supra* note 210, Standard 18-6.4 commentary at 18.451.

224. Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 763-64 (1980); see *United States v. Behrens*, 375 U.S. 162, 165 (1963) (opportunity for defendant to make statement); *United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1171 (2d Cir. 1983) (due process requires that upon request, defendant be permitted to read presentence report); Fennell & Hall, *supra* note 218, at 1637 (right to disclosure of presentence report).

225. Fed. R. Crim. P. 32(c)(1).

226. *Id.* R. 32(a)(1)(A).

227. Rule 32(a)(1)(C) affords the defendant two rights at sentencing, the right "to make a statement in his own behalf and to present any information in mitigation of punishment." *Id.* R. 32(a)(1)(C). These rights are commonly referred to as the defendant's right to "allocution." See C. Wright, *supra* note 209, § 525, at 82.

228. Rule 32(c)(3)(A) gives the defendant or his counsel the opportunity to comment on and to correct any factual inaccuracies in the presentence report. C. Wright, *supra* note 209, § 526, at 91. Although courts have held that the defendant must be given the opportunity to rebut information contained in the report, *United States v. Aguero-Segovia*, 622 F.2d 131, 132 (5th Cir. 1980); *United States v. Hodges*, 556 F.2d 366, 369 (5th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978); *United States v. Bass*, 535 F.2d 110, 119 & n.17 (D.C. Cir. 1976); *Shelton v. United States*, 497 F.2d 156, 159 (5th Cir. 1974); *Collins v. Buchkoe*, 493 F.2d 343, 345 (6th Cir. 1974); *United States v. Espinoza*, 481 F.2d 553, 556 (5th Cir. 1973); C. Wright, *supra* note 209, § 526, at 91, the defendant does not have a constitutional right to cross-examine witnesses at the sentencing hearing, see *Williams v. New York*, 337 U.S. 241, 250 (1949); A. Campbell, *supra* note 208, § 67, at 216; Schulhofer, *supra* note 224, at 760; see also *United States v. Needles*, 472 F.2d 652, 657-58 (2d Cir. 1973) (statements in presentence report need not be "established or refuted by presentation of evidence").

defendant has the right to be sentenced on the basis of accurate information.<sup>229</sup> Thus, a sentencing court has the discretion to conduct a more formal hearing to settle disputes regarding the presentence report.<sup>230</sup> Such a hearing may be appropriate when the court orders restitution under the Act.<sup>231</sup>

Congress changed sentencing to include the goal of victim compensation.<sup>232</sup> This goal differs substantially from the traditional sentencing goals of deterrence, rehabilitation, retribution, and restraint.<sup>233</sup> Due process is a pliable concept that bends to meet the needs of a particular situation,<sup>234</sup> thus, when the sentencing situation includes the goal of victim compensation different sentencing procedures may be needed.<sup>235</sup> Before a defendant is ordered to make restitution, the

229. See *Dorszynski v. United States*, 418 U.S. 424, 431 n.7 (1974); *United States v. Tucker*, 404 U.S. 443, 447-49 (1972); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *United States v. LoRusso*, 695 F.2d 45, 51 n.2 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1525 (1983). Pursuant to a 1983 amendment, Rule 32 requires the court to make a factual finding for the record if the defendant or his counsel challenge the accuracy of the information contained in the presentence report. Fed. R. Crim. P. 32(e)(3)(D).

230. At the hearing, the defendant may have the right to dispute information contained in the presentence report by "submit[ing] affidavits or documents, supply[ing] oral statements, or even participat[ing] in an evidentiary hearing." *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976) (footnotes omitted); see *United States v. Charmer Indus.*, 711 F.2d 1164, 1172 (2d Cir. 1983); *Knight v. Johnson*, 699 F.2d 162, 165 (4th Cir.), *cert. denied*, 104 S. Ct. 112 (1983); *United States v. Harris*, 558 F.2d 366, 373-74 (7th Cir. 1977); *Shelton v. United States*, 497 F.2d 156, 159 (5th Cir. 1974); *United States v. Espinoza*, 481 F.2d 553, 557-58 (5th Cir. 1973). In *United States v. Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980), the court recognized that a defendant being sentenced under a special-offender statute has the right to cross-examine witnesses who supplied information for the presentence report. *Id.* at 398-99. Some writers have stated that the defendant should always have the right to cross-examine witnesses if he disputes information in the presentence report. Harkness, *supra* note 218, at 1089; Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information By Cross-Examination*, 3 Rut.-Cam. L.J. 111, 117 (1971) [hereinafter cited as *Disclosure of Reports*].

231. See *infra* notes 324-30 and accompanying text.

232. See Senate Report, *supra* note 1, at 30, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2536.

233. *J. Hall*, *supra* note 147, at 241; *Harland I*, *supra* note 30, at 119-20; *W. Prosser*, *supra* note 122, § 2, at 7.

234. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); see *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

235. See Epstein, *Crime and Tort: Old Wine in Old Bottles*, in *Assessing the Criminal: Restitution, Retribution, and the Legal Process* 231, 255-56 (R. Barnett & J. Hagel eds. 1977); Klein, *Revitalizing Restitution: Flogging a Horse that May Have Been Killed for Just Cause*, 20 *Crim. L.Q.* 383, 390 (1978); *Rehabilitation of Victims*, *supra* note 158, at 327 & n.50.

defendant must be given timely notice<sup>236</sup> of the victim's claim and a meaningful opportunity to challenge the facts supporting it,<sup>237</sup> the two basic elements of due process.<sup>238</sup> This section discusses whether the procedures established by Congress for ordering restitution afford the defendant adequate due process. When the existing procedures do not afford the defendant adequate due process, alternative procedures are suggested.

### 1. Procedures for Ordering Restitution

Congress paid little attention to the procedural aspects of restitution in enacting the VWPA.<sup>239</sup> Neither the House nor the Senate discussed how a sentence of restitution affects the due process rights of the defendant.<sup>240</sup> The procedural provisions for ordering restitution were added to the Act on the day Congress passed the legislation<sup>241</sup> and fail to elaborate on the exact procedures that a court must follow.

The VWPA provides that before ordering restitution, the court must consider the degree of harm suffered by the victim<sup>242</sup> and the financial needs and resources of the defendant and the defendant's dependents.<sup>243</sup> The prosecutor must prove the victim's losses.<sup>244</sup> The defendant must prove his financial needs and resources.<sup>245</sup> The court

236. See *infra* notes 275-83 and accompanying text.

237. See *infra* notes 297-330 and accompanying text.

238. One element of due process is notice. *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). The other element of due process is opportunity to be heard. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

239. See *United States v. Welden*, 568 F. Supp. 516, 527-30 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

240. *Id.*

241. On September 30, 1982, Representative Rodino introduced the House version of the VWPA, H.R. 7191 (Comprehensive Victim and Witness Protection and Assistance Act of 1982), 128 Cong. Rec. H8201 (daily ed. Sept. 30, 1982). Mr. Rodino's legislation contained § 3580, Procedure for Issuance Order of Restitution. *Id.* at H8206. On September 30, 1982, the House passed H.R. 7191, and then took up consideration of S. 2420, the Senate version of the VWPA. *Id.* at H8212. The House voted to strike all portions of S. 2420 after the enacting clause and to substitute the provisions of H.R. 7191. *Id.* at 8215. On October 1, 1982, the House and Senate passed the amended version of the Act. 128 Cong. Rec. H8464-70 (daily ed. Oct. 1, 1982); 128 Cong. Rec. S13056-64 (daily ed. Oct. 1, 1982). There was no debate in either the House or the Senate concerning the added procedures.

242. 18 U.S.C. § 3580(a) (1982).

243. *Id.*

244. *Id.* § 3580(d).

245. *Id.*

receives this information through a report<sup>246</sup> prepared by the Probation Department.<sup>247</sup> This report must be disclosed to the defendant and the prosecutor.<sup>248</sup> Additionally, the Act provides that disputes concerning restitution are to be resolved by the court using a "preponderance of the evidence standard."<sup>249</sup>

These procedures leave a number of questions unanswered. It is unclear whether the information in the presentence report must be verified. The Act does not require verified information, but the legislative history contains references to the need for verified information.<sup>250</sup> Additionally, the Act does not specify when the restitution

246. The information may be provided in the presentence report or in a separate restitution report. *Id.* § 3580(b). Section 3 of the VWPA amends paragraph 2 of Rule 32(c) of the Federal Rules of Criminal Procedure as follows:

(2) Report—The presentence report shall contain:

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

Fed. R. Crim. P. 32(c)(2)(C), (D). These provisions were intended to encourage and aid the court when ordering restitution. *See* Senate Report, *supra* note 1, at 13, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2519; 128 Cong. Rec. H8202 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino). The Department of Justice states that the victim impact statement "will be used to determine the amount of restitution." *Justice Dep't Guidelines*, *supra* note 9, at 5; *see* Altimari, *supra* note 20, at 4. For the purposes of this Project, the information relied upon by a court when ordering restitution, whether contained in a presentence report or in a separate report, will be referred to as a "restitution report."

247. 18 U.S.C. § 3580(b) (1982).

248. *Id.* § 3580(c).

249. *Id.* § 3580(d).

250. The Senate version of the Act contained an amendment to Rule 32 of the Federal Rules of Criminal Procedure that would have required every presentence report to contain a "'victim impact statement' which consists of verified information assessing the financial, social, psychological, and medical impact upon the victim of the crime." Senate Report, *supra* note 1, at 13, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2519; *see* 128 Cong. Rec. S11436 (daily ed. Sept. 14, 1982) (statement of Sen. Mathias); 128 Cong. Rec. S3859 (daily ed. April 22, 1982) (statement of Sen. Laxalt). During the hearings before the Senate Committee on the Judiciary, the need for verified information in the victim impact statement was stressed. *Senate Hearings*, *supra* note 194, at 147 (statement of Paul R. Falconer, Chief U.S. Probation Officer, D. Md.) ("It is essential that a victim impact statement be factual and confirmed . . . [w]e never want to be guilty of waving the bloody shirt; neither are we to bury the bloody shirt with the victim still in it."). The House version of the Act omitted the verification requirement. 128 Cong. Rec. H8202-07 (daily ed. Sept. 30, 1982) (section-by-section analysis of legislation). The Act passed without the verification requirement on October 1, 1982. Cong. Rec. S13,056-64 (daily ed. Oct. 1, 1982); 128 Cong. Rec. H8468-70 (daily ed. Oct. 1, 1982). Notwithstanding the absence of the verification requirement, one probation officer has noted that probation departments are responsible for verifying the information in the presentence

report should be disclosed.<sup>251</sup> Further, there is no indication of the scope of the defendant's right to disclosure. Specifically, the effect of the Act on the nondisclosure provisions of Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure is not delineated.<sup>252</sup> Moreover, the Act does not specify a forum for resolving disputes concerning restitution, and it is unclear whether disputes are to be resolved at the sentencing hearing or a separate proceeding.<sup>253</sup> Finally, the Act does not indicate what procedural protections, such as the rules of evidence and the opportunity to confront witnesses,<sup>254</sup> are to be afforded the defendant at this proceeding. These questions implicate the defendant's right to due process<sup>255</sup> because the procedures established by the Act do not assure that the defendant will receive meaningful prior notice<sup>256</sup> of a victim's alleged loss or a meaningful opportunity to contest that claim.<sup>257</sup>

## 2. Adequate Notice

Under the VWPA, the defendant receives notice of the victim's restitution claim through the restitution report.<sup>258</sup> The report provides meaningful prior notice only if the information contained in the report is reliable<sup>259</sup> and the defendant receives the report sufficiently in advance of the hearing to prepare his case.<sup>260</sup> Because the VWPA does

report unless the record is clear and there is no dispute. Teleconference Tapes, *supra* note 1, side 2 of 5 (statement of D. Chamlee, Deputy Chief Probation Division, Administrative Office of the U.S. Courts). The legislative history does not define the term "verified." For the purposes of this Project, information is considered verified if it is presented in the form of affidavits, *see State ex rel. D.G.W.*, 70 N.J. 488, 504, 361 A.2d 513, 522 (1976); *Justice Dep't Guidelines*, *supra* note 9, at 22, or if the information has been independently investigated, Teleconference Tapes, *supra* note 1, side 2 of 5 (statement of D. Chamlee, Deputy Chief Probation Division, Administrative Office of the U.S. Courts).

251. See *infra* notes 275-83 and accompanying text.

252. See *infra* notes 284-92 and accompanying text.

253. See *infra* notes 293-96 and accompanying text.

254. See *infra* notes 308-11 and accompanying text.

255. *United States v. Welden*, 568 F. Supp. 516, 534-35 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States No. 83-7-583* (11th Cir. Oct. 25, 1983); *see Altimari*, *supra* note 20, at 19-20; *Bennett*, *supra* note 20, at 4-5.

256. See *infra* notes 258-90 and accompanying text.

257. See *infra* notes 297-311 and accompanying text.

258. 18 U.S.C. § 3580(c) (1982). See *supra* note 248.

259. See *Dorszynski v. United States*, 418 U.S. 424, 431 n.7 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Mempa v. Rhay*, 389 U.S. 128, 133 (1967); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *United States v. Fatico*, 458 F. Supp. 388, 398 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *Harkness*, *supra* note 218, at 1070-71.

260. *United States v. Robin*, 545 F.2d 775, 780 (2d Cir. 1976) ("To enable a defendant to effectively present his version of the facts . . . a defendant must be given

not require verified information in the report, there is a potential for unreliability.<sup>261</sup> In addition, the Act's failure to address the timing of disclosure affects the defendant's opportunity to rebut adequately the statements in the report.<sup>262</sup>

a. *Verified Information in the Presentence Report*

A recent study of the use of presentence reports in federal district courts found that "[t]he principal problem inherent in the use of the presentence report is its potential for introducing inaccurate or misleading information."<sup>263</sup> This problem may be particularly acute under the VWPA. When a victim is not required to verify his losses to receive compensation, he may be tempted to inflate his claim.<sup>264</sup> The VWPA's failure to require verified information may result in the court ordering the defendant to pay an amount in excess of the victim's losses.<sup>265</sup> In addition, if the defendant's financial resources are not verified, his liability may exceed his ability to pay.<sup>266</sup>

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adequate time to prepare and present a rebuttal to information which he contests."); see Fennell & Hall, *supra* note 218, at 1644 (defendant must be given adequate time to decide whether to challenge report's contents).

261. Cf. N. Cohen & J. Gobert, *supra* note 146, § 6.42 (presentence report may contain little reliable information on which to base restitution). See *infra* notes 263-64 and accompanying text.

262. See *infra* notes 275-83 and accompanying text.

263. Fennell & Hall, *supra* note 218, at 1628; see N. Cohen & J. Gobert, *supra* note 146, § 6.42; National Advisory Commission on Criminal Justice Standards & Goals: Corrections standard 5.17 comment at 191 (1973).

264. N. Cohen & J. Gobert, *supra* note 146, § 6.42, at 296 n.448; Altimari, *supra* note 20, at 5; see *Business Roundtable Discussion*, *supra* note 146, at 2603 ("[Restitution] could encourage the unscrupulous to lodge false criminal charges in order to benefit financially from another's criminal trial. . ."); see also Geis, *Restitution by Criminal Offenders: A Summary and Overview*, in *Restitution in Criminal Justice* 147, 153 (J. Hudson & B. Galaway eds. 1977) ("[V]ictims may inflate their claims against offenders, just as they do against insurance companies. . ."). One study of restitution programs revealed that program directors, criminal offenders, and the parents of juvenile offenders are concerned that victims may inflate their claims. Hudson, Galaway & Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 *Judicature* 313, 316 (1977).

265. See *State v. Ivie*, 38 Or. App. 453, 455, 590 P.2d 740, 740 (1979). In *Ivie*, the court upheld a sentence that included a restitution order of \$338 and a five-year term of imprisonment even though the victim's claim that the defendant stole a jar of pennies worth \$15 and five record albums worth \$75 was never verified and the defendant contested the amount. In pronouncing sentence, the trial court conceded that the victim's claim may have been somewhat inflated. *Id.* at 455, 590 P.2d at 740-41 (quoting trial court).

266. In *United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983), the presentence report stated that one of the defendants had no assets, *id.* at 526, yet at the sentencing hearing, the defendant's counsel stated that the defendant owned a statutory right to

An unverified restitution report may also unnecessarily limit the victim's recovery. If the report understates either the victim's harm or the defendant's financial resources, the victim may be undercompensated. In *United States v. Welden*,<sup>267</sup> the victim was kidnapped at gunpoint and brutally assaulted.<sup>268</sup> The restitution report listed the victim's medical expenses, but no attempt was made by the Probation Department to verify this information<sup>269</sup> or to investigate whether the victim suffered other recoverable losses.<sup>270</sup>

To avoid the problems inherent in unverified reports, Congress should amend the Act to require verification of information on matters relating to restitution.<sup>271</sup> The victim should document his claimed loss,<sup>272</sup> and the defendant should be required to submit a financial statement and an affidavit from his employer stating his potential

redeem some of his property from a foreclosure sale. *Id.* Faced with such contradictory evidence, it was impossible for the court to determine the "true financial condition of [the] defendant." *Id.* Because the VWPA requires the court to consider the defendant's finances before ordering restitution, 18 U.S.C. § 3580 (1982), it is vitally important that this information accurately reflect the defendant's ability to make restitution.

267. *United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom.* In *re* *United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

268. *Id.* at 525.

269. *Id.* The amount of the victim's medical bill was based on the Probation Officer's third-hand references. *Id.* at 535. The report did not indicate whether the bills had been paid by the victim or her insurance company. *Id.* at 525.

270. The Probation Department did not investigate whether the victim lost income as a result of the crime or needed psychological counseling. *Id.* Both types of losses are recoverable under the Act. 18 U.S.C. § 3579 (b)(2)(A), (C) (1982).

271. The Comprehensive Crime Control Act of 1983, S. 1762, 98th Cong., 1st Sess. (1983), would amend Rule 32 of the Federal Rules of Criminal Procedure to require verified information on matters relating to restitution. 1983 Senate Report, *supra* note 133, at 535; *see* ABA Standards, *supra* note 210, Standard 18-5.1(c) ("All material information in the presentence report should be factual and verified. . . ."); Model Sentencing and Corrections Act § 3-601(b) (1979) (if restitution is considered, presentence report must contain documentation regarding the nature and amount of victim's loss); National Advisory Commission on Criminal Standards and Goals standard 5.14(7) (1973), *reprinted in* Compendium of Model Correctional Legislation and Standards VIII-71 (2d ed. 1975) ("All information in the presentence report should be factual and verified. . . .").

272. If the victim is claiming medical losses he should be required to submit an affidavit from his doctor, hospital or clinic documenting those losses. *See Justice Dep't Guidelines*, *supra* note 9, at 22. Similar documentation should be required for claims related to the cost of funeral expenses, which are recoverable under the Act. 18 U.S.C. § 3579(b)(3) (1982). If the victim claims property loss, affidavits should be required documenting the cost of repair or replacement or describing the basis of the value claimed. *See State ex rel. D.G.W.*, 70 N.J. 488, 504, 361 A.2d 513, 521-22 (1976); Del. Code Ann. tit. 11, § 4106(a) (Supp. 1982); R.I. Gen. Laws § 12-19-35 (1981); N. Cohen & J. Gobert, *supra* note 146, § 6.42, at 296.

income.<sup>273</sup> If this information is disputed, the defendant and the prosecutor should be given the right to cross-examine persons who supplied information for the report and to present evidence to the contrary.<sup>274</sup>

### b. *Timing of Notice*

To provide meaningful prior notice of the victim's claim, the report must be disclosed well in advance of the sentencing hearing.<sup>275</sup> The right to disclosure is worthless unless the defendant has an adequate opportunity to assess<sup>276</sup> and challenge<sup>277</sup> the accuracy of the report and to gather resources to support a defense at sentencing.<sup>278</sup>

A survey of ninety federal district courts found that "[o]nly 13 districts disclose the presentence report to both defendant and counsel prior to the day of sentencing in 90% or more of the cases."<sup>279</sup> In response to this problem, courts must now disclose the presentence report to the defendant a reasonable time prior to sentencing.<sup>280</sup> This response is inadequate, however, because reasonableness is a matter

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273. *Justice Dep't Guidelines*, *supra* note 9, at 22. The defendant should also be required to submit an affidavit from his dependents describing their financial needs. *Id.* Finally, if the defendant owns property, an affidavit should be submitted estimating its value. See *United States v. Welden*, 568 F. Supp. 516, 526 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

274. *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976); see *United States v. Harris*, 558 F.2d 366, 374 (7th Cir. 1977); 1983 Senate Report, *supra* note 133, at 472. See *infra* notes 324-25 and accompanying text.

275. *United States v. Robin*, 545 F.2d 775, 780 (2d Cir. 1976); see *Miller v. State*, 407 So. 2d 959, 960 (Fla. Dist. Ct. App. 1982); *State ex rel. D.G.W.*, 70 N.J. 488, 505, 361 A.2d 513, 522 (1976); *State v. Lack*, 98 N.M. 500, 507-08, 650 P.2d 22, 29-30 (1982). See *infra* note 281.

276. 1983 Senate Report, *supra* note 133, at 74; see *United States v. Robin*, 545 F.2d 775, 780 (2d Cir. 1976); Fed. R. Crim. Proc. 32(c)(3)(A), (B), (C) advisory committee note; ABA Standards, *supra* note 210, Standard 18-5.5 commentary at 18.379; Fennell & Hall, *supra* note 218, at 1643; Harkness, *supra* note 218, at 1071.

277. See *United States v. Robin*, 545 F.2d 775, 780 (2d Cir. 1976); 1983 Senate Report, *supra* note 133, at 81; ABA Sentencing Standards, *supra* note 210, standard 18-5.5(a)(6) commentary at 18.379-.380; Fennell & Hall, *supra* note 218, at 1644.

278. *United States v. Robin*, 545 F.2d 775, 780 (2d Cir. 1976); see *Goodson v. State*, 400 So. 2d 791, 793 (Fla. Dist. Ct. App. 1981); 1983 Senate Report, *supra* note 133, at 81.

279. Fed. R. Crim. P. 32(c)(3)(A), (B), (C) advisory committee note (citing Fennell & Hall, *supra* note 218, at 1640-49). The survey further found that "[i]n 14 districts, disclosure is made only on request, and such requests are received in fewer than 50% of the cases. . . . [I]n 18 districts, a majority of the judges do not provide any notice of the availability of the report, and in 20 districts such notice is given only on the day of sentencing." *Id.*

280. *Id.* R. 32(c)(3)(A) and advisory committee note.



within judicial discretion and the defendant may still not be afforded an adequate opportunity to investigate or challenge claims presented to him for the first time in the report.

To ensure that the defendant receives timely notice, Congress should require disclosure of the report at least ten days before the sentencing hearing.<sup>281</sup> Early disclosure provides both the defendant and the government with an opportunity to correct any inaccuracies<sup>282</sup> in the report and to gather information to support their respective positions at the hearing.<sup>283</sup>

### c. *Scope of Disclosure of the Presentence Report*

The VWPA also fails to define the scope of the defendant's right to notice. The statute requires disclosure of all portions of the report to the defendant and prosecutor.<sup>284</sup> The Act, however, does not specify how this provision relates to Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure,<sup>285</sup> which allows the court to withhold information obtained under a promise of confidentiality "which, if disclosed, might result in harm . . . to the defendant or other persons."<sup>286</sup>

281. See 1983 Senate Report, *supra* note 133, at 471 (presentence reports must be disclosed ten days prior to sentencing). The Comprehensive Crime Control Act, S. 1762, 98th Cong., 1st Sess. (1983), would also contain a provision requiring the court to give the defendant and the government notice that it is considering the imposition of restitution prior to the sentencing hearing. *Id.* at 472. The notification is intended "to enable the parties to prepare adequately for the sentencing hearing." *Id.* at 81. Chief Judge Moye of the Northern District of Georgia established procedures to implement the VWPA in his court. These procedures require the United States Attorney to "file with the court and serve upon the defendant a notice which shall name each claimed victim of the offense, and shall detail the types of injuries sustained by each victim, and shall show the monetary damages as to each injury." Order to Facilitate Implementation of VWPA at 1 (N.D. Ga. June 27, 1983) (Moye, C.J.). If the case is disposed of by plea, the prosecutor must file the notice prior to the plea; if the case is disposed of by trial, he must file the notice at least two weeks prior to the date set for sentencing. *Id.*; Order to Facilitate Implementation of VWPA at 1 (N.D. Ga. June 17, 1983) (O'Kelley, J.) (same); see ABA Standards, *supra* note 210, Standard 18-5.5 commentary at 18.379 (presentence report should be disclosed sufficiently prior to the imposition of sentence to afford a reasonable opportunity for verification).

282. See *supra* notes 276-77 and accompanying text.

283. See *supra* note 278.

284. 18 U.S.C. § 3580(c) (1982).

285. See Altimari, *supra* note 20, at 4.

286. Fed. R. Crim. P. 32(c)(3)(A). When the Rule 32 exception applies to information contained in the report, the court must give either an oral or written summary of the confidential information on which it relied. *Id.* R. 32(c)(3)(B). For an excellent analysis of the confidentiality exception of Rule 32 see Fennell & Hall, *supra* note 218, at 1651-66.

Victims are often hesitant to supply information for presentence reports unless the court promises confidentiality.<sup>287</sup> It is unclear whether a court could give such a promise under the VWPA.<sup>288</sup> If a court promises confidentiality to the victim, the defendant will not receive full disclosure of the basis for the victim's restitution claim.<sup>289</sup> Notice is meaningful only if it is complete.<sup>290</sup>

The legislative history of the VWPA indicates that Congress did not intend Rule 32(c)(3)(A) to apply to portions of the presentence report related to restitution.<sup>291</sup> To ensure uniform interpretation by the district courts, the VWPA should be amended to state that the nondisclosure privilege of Rule 32(c)(3)(A) does not apply to portions of the

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287. See Teleconference Tapes, *supra* note 1, side 3 of 5 (statement of Judge J. Miller, Jr., D. Md.). A victim may hesitate to give information for fear of retaliation from the defendant. The federal District Court of Maryland had used victim impact statements prior to the enactment of the VWPA and has developed a practice of assuring victims who were hesitant to supply information for the report that the information would be kept confidential. *Id.*

288. It has been noted that this practice could not be continued under the VWPA because of its disclosure provisions, 18 U.S.C. § 3580(c) (1982). Teleconference Tapes, *supra* note 1, side 3 of 5 (statement of Judge J. Miller, Jr., D. Md.).

289. A defendant would only receive a summary of the information relied upon by the court in reaching its decision. Fed. R. Crim. P. 32(c)(3)(B). There is a "serious problem in the summarization practices of federal judges." Fennell & Hall, *supra* note 218, at 1663. Only a minority of judges attempt to satisfy the summarization requirement. *Id.* (Only 11.8% of the judges in ninety districts surveyed provide the defendant with an oral or written summary, and less than 5% provide a summary as a standard practice.).

290. Even if the defendant is provided with a summary of the information, the summary "may fail to furnish the defense with adequate factual information to permit commentary and challenge." Fennell & Hall, *supra* note 218, at 1663.

291. In analyzing the disclosure provision of the VWPA, 18 U.S.C. § 3580(c) (1982), Representative Rodino stated:

In order to have a fair procedure for determining whether to order restitution (and the amount of such restitution), both the attorney for the Government and the defendant should have full access to information in the presentence report (and in separate reports) about the factors described in section 3580(a). Thus, the Committee has provided in section 3580(c) for full disclosure to that information, and the provisions [of] Rule 32(c)(3) of the Federal Rules of Criminal Procedure will not apply to that information when that information is included in a presentence report.

128 Cong. Rec. H8207 n.21 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino); see Teleconference Tapes, *supra* note 1, side 3 of 5 (statement of Judge J. Miller, Jr., D. Md.). This interpretation is also consistent with the rule of statutory construction that "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States*, 446 U.S. 398, 406 (1980); 2A C. Sands, *supra* note 49, § 51.05, at 315; see *Hill v. Morgan Power Apparatus Corp.*, 259 F. Supp. 609, 611 (E.D. Ark.), *aff'd*, 368 F.2d 230 (8th Cir. 1966). The VWPA is a more specific statute than Rule 32 of the Federal Rules of Criminal Procedure because the VWPA deals specifically with restitution reports. See 18 U.S.C. § 3580(c) (1982).

presentence report concerning restitution.<sup>292</sup> Restitution is primarily for the victim's benefit. A victim who is unwilling to supply information for the report should be required to bring a civil action in order to receive compensation from the defendant. If a victim wishes to recover for his losses in a civil action, he will not be able to withhold necessary information.

Unless the VWPA is amended to eliminate these problems, it is unlikely that the defendant will receive meaningful prior notice of the victim's restitution claim. Under the present statute, a defendant's notice may be unreliable, poorly timed and incomplete; these deficiencies must be corrected.

### 3. The Defendant's Opportunity to Be Heard

Congress intended restitution to become an integral part of sentencing without encumbering it.<sup>293</sup> The legislative history of the Act indicates that Congress intended courts to avoid trial-like procedures when ordering restitution.<sup>294</sup> The Department of Justice supports this position and recommends that present pre-trial and sentencing procedures be maintained.<sup>295</sup> The Justice Department has stated that the defendant's opportunity to be heard on questions relating to restitution should not be extended beyond the defendant's right to allocution under Rule 32.<sup>296</sup>

The practicalities of criminal sentencing, however, suggest that the informal procedures outlined by Rule 32 and the VWPA may not provide the defendant with a meaningful opportunity to challenge a victim's restitution claim.<sup>297</sup> Commentators have noted that sentencing often takes place "within a compressed time frame that precludes reflective deliberation."<sup>298</sup> Further, a judge has usually reached a

292. See 128 Cong. Rec. H8207 n.21 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino). Commentators who have studied the disclosure provision of Rule 32, Fed. R. Crim. P. 32(c)(3), favor full disclosure. ABA Standards, *supra* note 210, Standard 18-5.4 commentary at 18.365; Harkness, *supra* note 218, at 1067.

293. The court can order restitution only to the extent that it "will not unduly complicate or prolong the sentencing process." 18 U.S.C. § 3579(d) (1982). See *supra* note 15.

294. See Senate Report, *supra* note 1, at 31, reprinted in 1982 U.S. Code Cong. & Ad. News at 2537.

295. Justice Dep't Guidelines, *supra* note 9, at 3, 22.

296. *Id.* at 4. For a description of the defendant's right to allocution under Rule 32, see *supra* note 227.

297. The Supreme Court has stated that "[a] fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted in a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); see *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

298. ABA Standards, *supra* note 210, Standard 18-5.5 at 18.382; see M. Frankel, *Criminal Sentences 36-37* (1973); Address by Federal District Court Judge Gerhard

tentative decision on the sentence prior to the informal hearing.<sup>299</sup> This raises the problem that an informal decision regarding restitution may be made before the defendant has had the opportunity to challenge the validity of the victim's claim.<sup>300</sup>

Unlike other types of sentences, restitution requires the court to decide issues of quantum that are usually decided at a civil trial.<sup>301</sup> Because a victim's loss need not be proved to obtain a conviction, it is rarely determined by a jury verdict or a guilty plea.<sup>302</sup> Consequently, the court may be faced with this issue for the first time at the sentencing hearing.<sup>303</sup> This is especially true if the restitution order includes losses caused by acts that are not a part of the convicted offense.<sup>304</sup> The defendant must be given a meaningful opportunity to present his

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Gessell, D.C. Cir., Judicial Sentencing Institute, November 22, 1968, *quoted in* Miller, *The Lawyer's Hang-Up: Due Process Versus the Real Issue*, 11 Am. Crim. L. Rev. 197, 210 n.50 (1972).

299. M. Frankel, *supra* note 298, at 36-37. The ABA states that "counsel often does little more than 'go through the motions' in making an allocution presentation . . . , more important, that counsel's presentation is often a token effort made after a de facto decision has already been reached." ABA Standards, *supra* note 210, Standard 18-5.5 commentary at 18.383; *see* Fennell & Hall, *supra* note 218, at 1679 (presentence conference helps to assure defense of "a substantive rather than ceremonial role in the sentencing decision").

300. It is important that the defendant be given the opportunity to address the court regarding the basis of the victim's claim, *see* State *ex rel.* D.G.W., 70 N.J. 488, 501-03, 361 A.2d 513, 520-21 (1976), whether the victim's expenses were necessary, *see* Bennett, *supra* note 20, at 3, and whether the amount of restitution is fair in view of defendant's financial resources, *see* Senate Report, *supra* note 1, at 32, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2538 ("[T]he offender's ability to pay will be a factor in the restitution order. . . ."). Additionally, if there are multiple defendants, the defendant should be given the opportunity to discuss how his obligation will be determined. *See* State *ex rel.* D.G.W., 70 N.J. 488, 503, 361 A.2d 513, 521 (1976).

301. Under the Act, the victim is able to recover damages usually only recoverable in a tort action. *See supra* notes 61-63 and accompanying text. For example, the victim is able to recover the value of property that cannot be returned, 18 U.S.C. § 3579(b)(1)(B) (1982), and the amount of medical costs, *id.* § 3579(2)(A).

302. *Business Roundtable Discussion*, *supra* note 146, at 2604; *see* Patterson v. State, 161 Ga. App. 85, 86, 289 S.E.2d 270, 272 (1982); N. Cohen & J. Gobert, *supra* note 146, § 6.40, at 293; Harland I, *supra* note 30, at 98-99; *Justice Dep't Guidelines*, *supra* note 9, at 16; *see also* People v. Heil, 79 Mich. App. 739, 748, 262 N.W.2d 895, 900 (1977) ("Criminal and civil liability are not synonymous. A criminal conviction does not necessarily establish the existence of civil liability.").

303. *See* Patterson v. State, 161 Ga. App. 85, 86, 289 S.E.2d 270, 272 (1982) (at restitution hearing court will consider factors not relevant to or addressed during adjudicatory phase).

304. *See* State v. Zimmerman, 37 Or. App. 163, 166, 586 P.2d 377, 379 (1978) (restitution order included victims of other offenses that were dropped from the indictment during plea bargaining and for which the defendant was never convicted). This possibility may result if "offense" is broadly defined to include the entire criminal transaction. *See supra* note 52 and accompanying text.

version of the facts before the court reaches a decision regarding his obligations.<sup>305</sup>

The sentencing hearing may also be inherently too coercive to provide the defendant with a meaningful opportunity to be heard on the issues related to restitution.<sup>306</sup> The fear of a harsher sentence may well inhibit the defendant from challenging a restitution order at the hearing.<sup>307</sup> This may be especially true under the VWPA when the

305. See *Maples v. State*, 397 So. 2d 1146, 1147 (Fla. Dist. Ct. App. 1981); *Latti v. State*, 364 So. 2d 828, 830 (Fla. Dist. Ct. App. 1978); *Cannon v. State*, 246 Ga. 754, 756, 272 S.E.2d 709, 710 (1980); *Patterson v. State*, 161 Ga. App. 85, 86, 289 S.E.2d 270, 272 (1982); *State ex rel. D.G.W.*, 70 N.J. 488, 505-06, 361 A.2d 513, 522 (1976); *State v. Lack*, 98 N.M. 500, 507-08, 650 P.2d 22, 29-30 (1982); *State v. Bergeron*, 326 N.W.2d 684, 687 (N.D. 1982); *State v. Dillon*, 637 P.2d 602, 606 (Or. 1981); *State v. Stalheim*, 275 Or. 683, 688, 552 P.2d 829, 832 (1976). Additionally, a number of state statutes that authorize the court to order restitution in conjunction with other types of sentences provide that the defendant has the right to a hearing to settle issues concerning restitution. See, e.g., Ala. Code § 15-18-67 (1982); Hawaii Rev. Stat. § 706-604 (1976); Md. Ann. Code art. 27, §§ 640(b), 641(a) (Supp. 1983); Miss. Code Ann. § 99-37-3(3) (Supp. 1983); N.C. Gen. Stat. § 148-57.1(d) (1983); N.D. Cent. Code § 12.1-32-08(1) (1976); Or. Rev. Stat. § 137.106(3) (1981); Utah Code Ann. § 76-3-201(3)(c) (Supp. 1983); see also *Ariz. Rev. Stat. Ann. § 13-803(B)* (Supp. 1983) (court has authority to conduct hearing if it does not have sufficient evidence to determine amount of restitution); N.J. Stat. Ann. § 2C3:43-3(e) (1982) (if record does not contain sufficient evidence, court must hold hearing to determine amount of restitution); Wash. Rev. Code § 9A.20.030 (Supp. 1983) (if record does not contain sufficient evidence, court may conduct full hearing); Wis. Stat. Ann. § 973.09(b) (Supp. 1983) (upon application of interested party, court will hold evidentiary hearing to determine value of victim's loss).

306. Professor Harland has advocated a bifurcated sentencing process to provide the defendant with a meaningful opportunity to be heard on restitution. The first part of the process would "determine the type of sentence (incarceration versus a community disposition such as probation), and the second [would] assess conditions of that sentence, such as restitution." Harland I, *supra* note 30, at 105-06 (footnotes omitted).

307. *State v. Stalheim*, 275 Or. 683, 687, 552 P.2d 829, 831 (1976); see *State v. Harris*, 70 N.J. 586, 595-96, 362 A.2d 32, 36-37 (1976) (faced with possibility of jail, defendant threw herself on mercy of court rather than challenge clearly excessive restitution); *State v. Sullivan*, 24 Or. App. 99, 105-06, 544 P.2d 616, 619-20 (1976) (Schwab, C.J., dissenting) (fact that defendant has choice is unpersuasive); *State v. Barnett*, 110 Vt. 221, 236, 3 A.2d 521, 527 (1939) (Sherburne, J., dissenting) (threat of imprisonment forces a settlement); N. Cohen & J. Gobert, *supra* note 146, § 6.42, at 296 (in his desire for release defendant may hastily agree to pay a large sum of money in too short a time). The court in *Stalheim* stated:

[W]hen faced with the alternative of paying what he might regard as an exorbitant measure of damages or of going to prison, the defendant might hesitate to argue with an award of restitution or reparation no matter how speculative or unfair it might be or however summary the procedure under which it was imposed.

275 Or. 683, 687, 552 P.2d 829, 831 (1976). This concern is not totally unfounded. In *State v. Ivie*, 38 Or. App. 453, 590 P.2d 740 (1979), the Oregon Court of Appeals upheld a \$338 restitution award in conjunction with a five-year term of imprison-

defendant can be sentenced to a term of imprisonment in addition to making restitution.

Traditional sentencing procedures also restrict the manner in which a defendant can dispute a victim's claim.<sup>308</sup> For example, the defendant usually does not have the right to call witnesses at a sentencing hearing even though such witnesses might dispute the victim's claim.<sup>309</sup> The defendant may need this right under the VWPA because the court may order restitution based upon evidence that would be inadmissible at a civil trial.<sup>310</sup> It may be impossible for the defendant to ascertain the reliability of this information without confronting witnesses.<sup>311</sup>

To ensure that the defendant is provided with a meaningful opportunity to be heard on the determination of restitution, the VWPA should require the court to hold a presentence conference before ordering restitution.<sup>312</sup> This will afford the defendant the chance to

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ment. The trial court, in pronouncing sentence, stated that the defendant is "in no situation, if [he] steal[s] things, to complain of the value that somebody may set on their property." *Id.* at 455, 590 P.2d at 740-41 (quoting trial court); see *People v. McClean*, 130 Cal. App. 2d 439, 440-41, 279 P.2d 87, 88-89 (1955) (when imposing restitution as condition of probation, court stated that defendant would be sent to the penitentiary if restitution was not made).

308. Whether the defendant has the right to cross-examine witnesses is not addressed in the Act or its legislative history. The Department of Justice suggests that witnesses should not be present. *Justice Dep't Guidelines*, *supra* note 9, at 22; see *United States v. Welden*, 568 F. Supp. 516, 535 (N.D. Ala.), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983) (cross-examination not contemplated by statute).

309. See *supra* note 228 and accompanying text.

310. See *United States v. Welden*, 568 F. Supp. 516, 534-35 (N.D. Ala.), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983); *Altimari*, *supra* note 20, at 19. See *supra* note 220 and accompanying text.

311. *United States v. Fatico*, 458 F. Supp. 388, 398-99 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); see *United States ex rel. Brown v. Rundle*, 417 F.2d 282, 285 (3d Cir. 1969); *Harkness*, *supra* note 218, at 1089; *Disclosure of Reports*, *supra* note 230, at 116-17.

312. See *Teleconference Tapes*, *supra* note 1, side 4 of 5 (statement of Chief Judge Wm. T. Hodges, M.D. Fla.) (court should hold pre-evidentiary hearing or pre-trial conference). Several state restitution statutes specifically provide for a presentence hearing to resolve issues relating to restitution. *E.g.*, Ill. Ann. Stat. ch. 38, § 1005-5-6(a) (Smith-Hurd 1982) (hearing as a matter of right); Md. Ann. Code art. 27, § 641(a) (Supp. 1983) (same); N.J. Stat. Ann. § 2C:43-3(e) (West 1982) (hearing if trial record is unclear on amount of damages); N.D. Cent. Code § 12.1-32-08(1) (1976) (hearing as a matter of right); Wash. Rev. Code Ann. § 9A.20.030 (Supp. 1983-1984) (hearing if the trial record is unclear on the amount of damages); see *Harland I*, *supra* note 30, at 107; see also N.Y. Crim. Proc. Law § 400.10 (McKinney 1983) (court has discretion to hold presentence conference); House Report, *supra* note 46, at 445 (Criminal Code Revision Act of 1980 would have required "the sentencing

discuss issues relating to restitution without the pressures or anxieties present at a sentencing hearing.<sup>313</sup> At the conference, the probation officer, prosecutor, defendant, defense counsel, and judge should discuss the amount of loss claimed by the victim,<sup>314</sup> a schedule of payment<sup>315</sup> and the defendant's financial resources.<sup>316</sup> In addition, the government and defendant's counsel should make available any information to be presented at the sentencing hearing.<sup>317</sup> The prosecutor and defense attorney also should be given the power to stipulate that the judge will not consider disputed information when imposing restitution.<sup>318</sup> Finally, the defendant should be permitted to present a restitution plan at the conference.<sup>319</sup> This plan would be developed with a probation officer.<sup>320</sup>

The presentence conference will give the judge time to reflect upon the defendant's obligations and analyze whether restitution is appropriate in view of the defendant's financial resources and the other

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judge, at least 5 days after disclosure of the presentence report to the defendant, to conduct a hearing to determine any unresolved issue of fact that is essential to the sentencing decision."); ABA Standards, *supra* note 210, Standard 18-5.5(c) commentary at 18.382 (recommending use of presentence conference prior to all sentencing hearings); Fennell & Hall, *supra* note 218, at 1679 (recommending use of presentence conferences whenever possible).

313. See Harland I, *supra* note 30, at 105-06.

314. See N.D. Cent. Code § 12.1-32-08(1)(a) (1976) (reasonableness of victim's damages must be discussed at conference); Harland I, *supra* note 30, at 107 (victim's losses should be discussed).

315. Harland I, *supra* note 30, at 107; see Ill. Ann. Stat. ch. 38, § 1005-5-6(b) (Smith-Hurd 1982); Md. Ann. Code art. 27, § 641(a) (Supp. 1983).

316. Harland I, *supra* note 30, at 107; see Ill. Ann. Stat. ch. 38, § 1005-5-6(a) (Smith-Hurd 1982); N.D. Cent. Code § 12.1-32-08(1)(b) (1976).

317. See Order to Facilitate Implementation of VWPA at 2 (N.D. Ga. June 27, 1983) (Moye, C.J.) ("The parties shall make available any documents or written statements on which they intend to rely in a restitution proceeding."); Order to Facilitate Implementation of VWPA at 2 (N.D. Ga. June 17, 1983) (O'Kelley, J.) (same); ABA Sentencing Standards, *supra* note 210, Standard 18-5.5 commentary at 18.379-380 ("prior mutual exchange of sentencing information is desirable"); Altieri, *supra* note 20, at 20 ("court might consider . . . ordering full disclosure of all relevant financial and medical reports").

318. See ABA Standards, *supra* note 210, Standard 18-5.5(b) commentary at 18.380; Fennell & Hall, *supra* note 218, at 1678. This will reduce the need to introduce formal evidence at the sentencing hearing. See ABA Standards, *supra* note 210, Standard 18-5.5(b) commentary at 18.380.

319. See State v. Garner, 115 Ariz. 579, 581-82, 566 P.2d 1055, 1057-58 (1977); People v. Gallagher, 55 Mich. App. 613, 620, 223 N.W.2d 92, 96 (1974); State v. Lack, 98 N.M. 500, 506, 650 P.2d 22, 28-29 (1982); Ga. Code Ann. § 17-14-7 (1982); Iowa Code Ann. § 907.12.3 (West 1979); N.M. Stat. Ann. § 31-17-1(B) (1978); S.D. Codified Laws Ann. § 23A-28-4 (1979); Va. Code § 19.2-305, 19.2-305.1(B) (Supp. 1982); Harland I, *supra* note 30, at 106.

320. Harland I, *supra* note 30, at 107.

goals of sentencing.<sup>321</sup> The judge will also have an opportunity to question the parties in order to clarify the issues concerning restitution without the time constraints present at sentencing.<sup>322</sup> In most cases, disputes concerning restitution could be resolved at this informal conference.<sup>323</sup>

After the conference the court should schedule a sentencing hearing. In the event a dispute still exists concerning the victim's claim, the defendant would have the right to present evidence at the hearing<sup>324</sup> and to call and cross-examine witnesses.<sup>325</sup> Rules of evidence are unnecessary,<sup>326</sup> provided the defendant has the opportunity to challenge

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321. See ABA Standards, *supra* note 210, Standard 18-5.5 commentary at 18.384-.385.

322. See *id.* at 18.385 (hearing will allow for meaningful dialogue between defendant and court).

323. Although the ABA standards provide for an evidentiary sentencing hearing, ABA Standards, *supra* note 210, Standard 18-6.4, the ABA states that such a hearing should be the exception, and used only when the "need for further evidence has been eliminated by the presentence conference." *Id.* Standard 18-6.4 commentary at 18.448.

324. *United States v. Robin*, 545 F.2d 775, 779-80 & n.15 (2d Cir. 1976); Model Sentencing Act art. III, § 10 (rev. ed. 1972), in *Compendium of Model Correctional Legislation and Standards*, at II-57 (2d ed. 1975); ABA Standards, *supra* note 210, Standard 18-6.4, at 18.460; National Advisory Commission on Criminal Standards and Goals Standard 5.17(1)(b) (1973), *reprinted in* *Compendium of Model Correctional Legislation and Standards at VIII-74* (2d ed. 1975); Fennell & Hall, *supra* note 218, at 1678-79; see *Utah Code Ann.* § 76-3-201(3)(c) (Supp. 1983); *Wis. Stat. Ann.* § 973.09(1m)(b) (West Supp. 1983-1984).

325. See *People v. Tidwell*, 33 Ill. App. 3d 232, 237, 338 N.E.2d 113, 117 (1975); *People v. Schleyhahn*, 4 Ill. App. 3d 591, 596, 281 N.E.2d 409, 413 (1972); *State v. Harris*, 70 N.J. 586, 598, 362 A.2d 32, 38 (1976); *State v. Lack*, 98 N.M. 500, 508, 650 P.2d 22, 30 (1982); Model Sentencing and Corrections Act § 3-206(b) (1979); ABA Standards, *supra* note 210, Standard 18-6.4(b); National Advisory Commission on Criminal Standards and Goals standard 5.17(1)(c), (d) (1973), *reprinted in* *Compendium of Model Correctional Legislation and Standards at VIII-74* (2d ed. 1975); *Harkness*, *supra* note 218, at 1089; *Disclosure of Reports*, *supra* note 230, at 117. In some circuits, the cross-examination of probation officers and others who supply information for the report is routine. ABA Standards, *supra* note 210, Standard 18-6.4 commentary at 18.455; *e.g.*, *United States ex rel. Brown v. Rundle*, 417 F.2d 282, 285 (3d Cir. 1969); *United States v. Fatico*, 458 F. Supp. 388, 398 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); *cf.* *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (right to cross-examine before probation revoked); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1971) (right to cross-examine before parole revoked). The Comprehensive Crime Control Act of 1983 contains a provision that would allow the court to employ any additional procedures that are necessary to implement restitution, which can include "hearing the testimony of witnesses." 1983 Senate Report, *supra* note 133, at 81, 472.

326. *Fed. R. Evid.* 1101(d)(3); see *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959); *Williams v. New York*, 337 U.S. 241, 246-47 (1949); *United States v. Fatico*, 579 F.2d 707, 713 (2d Cir.), *on remand*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980); Order to Facilitate



any disputed evidence through cross-examination of witnesses. Evidentiary rules may exclude information that the judge needs to tailor the sentence to meet the needs of the defendant, the victim and society.<sup>327</sup> Further, in civil actions, the protection provided by the rules of evidence is most needed when the action is before a jury.<sup>328</sup> At a sentencing hearing, the judge will be sitting without a jury<sup>329</sup> and should be able to discount unreliable information without specifically applying evidentiary rules.<sup>330</sup>

#### 4. Statement of the Reasons for Ordering Restitution

The Act requires a judge to state his reasons for not ordering restitution,<sup>331</sup> but the reasons for granting restitution are as important as the reasons for denying it. A statement of the reasons for awarding restitution assists an appellate court in reviewing whether the trial court abused its discretion when it ordered restitution.<sup>332</sup> Without such a

Implementation of VWPA at 2 (N.D. Ga. June 27, 1983) (Moye, C.J.) (Federal Rules of Evidence do not apply in restitution proceedings); Order to Facilitate Implementation of VWPA at 2 (N.D. Ga. June 17, 1983) (O'Kelley, J.) (same); Model Sentencing and Corrections Act § 3-605 comment at 213; ABA Standards, *supra* note 210, Standard 18-6.4; A. Campbell, *supra* note 208, § 85, at 275. *Contra* Bennett, *supra* note 20, at 4-5 (Federal Rules of Evidence should apply to a contested restitution hearing); Altimari, *supra* note 20, at 20 (same); *see* Model Sentencing Act article III, § 10 (1972 revision), *reprinted in* Compendium of Model Correctional Legislation and Standards at II-57 (2d ed. 1975) (hearsay evidence not admissible). Judges, however, may want to apply evidentiary rules regarding relevancy and qualifications of witnesses, such as Rule 104 of the Federal Rules of Evidence.

327. In order to choose the most appropriate sentence, probation or imprisonment, the judge should consider information concerning the defendant's lifestyle and character that would be inadmissible at trial, for example evidence excluded pursuant to Rule 404 of the Federal Rules of Evidence. *See supra* note 220 and accompanying text. This information may also influence the judge's decision concerning restitution. The judge may need to weigh the victim's need for compensation against society's desire to imprison the defendant. A decision to imprison the defendant may preclude the judge from ordering restitution. *See infra* notes 381-88 and accompanying text.

328. G. Lilly, An Introduction to the Law of Evidence § 3, at 3 n.4 (1978); McCormick's Handbook of the Law of Evidence § 60 (E. Cleary 2d ed. 1972) [hereinafter cited as McCormick]; *see* City of Indianapolis v. Parker, 427 N.E.2d 456, 463 (Ind. App. 1981); Bauer v. Graner, 266 N.W.2d 88, 94 (N.D. 1978); J. Thayer, A Preliminary Treatise on Evidence at the Common Law 508 (1898).

329. *See supra* notes 186-215 and accompanying text.

330. McCormick, *supra* note 328, § 60; *see* Clark v. United States, 61 F.2d 695, 708 (8th Cir. 1932), *aff'd*, 289 U.S. 1 (1933); State v. Johnson, 101 Idaho 581, 583, 618 P.2d 759, 761 (1980). Allowing the defendant to cross-examine witnesses will give him an adequate opportunity to probe the reliability of the evidence contained in the report. State v. Johnson, 101 Idaho 581, 584, 618 P.2d 759, 762 (1980).

331. 18 U.S.C. § 3579(a)(2) (1982).

332. Harland I, *supra* note 30, at 101-02; *see* 1983 Senate Report, *supra* note 133, at 80.

statement it is impossible for an appellate court to know what information the trial judge relied on in reaching his decision.<sup>333</sup> Additionally, requiring the judge to state his reasons encourages him to carefully consider the type and amount of restitution.<sup>334</sup> Finally, a statement of the reasons for ordering restitution helps the defendant to understand the purpose behind the order, thus enhancing its rehabilitative effect.<sup>335</sup> The Act therefore should be amended to require the court to state its reasons for ordering restitution.<sup>336</sup>

The VWPA makes victim compensation a goal of criminal restitution; however, this laudable goal must be achieved within the confines of the Constitution. In order to provide victims with compensation without infringing on the defendant's constitutional rights, the sentencing process must be complicated to some extent. The procedures suggested in this section will assure that the defendant receives adequate protection before the court orders restitution without transforming the sentencing hearing into a full-blown trial.

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333. Several circuit courts have stated that they strongly encourage trial judges to state their reasons for a sentence because this helps to assure that the defendant is not sentenced on the basis of erroneous information. *See, e.g.*, *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *United States v. Deere*, 428 F.2d 1119, 1122 (2d Cir. 1970); *Scott v. United States*, 419 F.2d 264, 266-67 (D.C. Cir. 1969). *But cf.* *United States v. Thompson*, 541 F.2d 794, 795 (9th Cir. 1976) (court need not state reasons for imposing sentence).

334. *See* *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973); *see also* ABA Standards, *supra* note 210, Standard 18-6.6 commentary at 18.486 ("[T]he disciplining effect of such an obligation on the sentencing court's own thought processes can be significant. The court is thereby induced to systematize and order its reasons, to avoid irrelevancies, and to develop a more consistent sentencing philosophy.") (footnote omitted).

335. *See* *Johnson v. State*, 274 Md. 536, 544-45, 336 A.2d 113, 118 (1975).

336. Several states have required the judge to state his reasons for ordering restitution. *Cannon v. State*, 246 Ga. 754, 756, 272 S.E.2d 709, 710 (1980); *State v. Harris*, 70 N.J. 586, 599, 362 A.2d 32, 39 (1976); N.D. Cent. Code § 12.1-32.02(5) (Supp. 1983); Utah Code Ann. § 76-3-201(3) (Supp. 1983); *cf.* 1983 Senate Report, *supra* note 133, at 472 (Comprehensive Crime Control Act of 1983, S. 1762, 98th Cong., 1st Sess. (1983), requires court to state reasons for ordering restitution). Several sentencing proposals suggest that the court state its reasons for imposing a sentence. ABA Standards, *supra* note 210, Standard 18-6.6; National Advisory Commission on Criminal Standards and Goals Standard 5.19(3) (1973), *reprinted in* *Compendium of Model Correctional Legislation and Standards VIII-76* (2d ed. 1975) (judges should state reasons for sentence); *cf.* *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (written statement by factfinders is required before probation can be revoked); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (before parole can be revoked, due process requires a "written statement by the factfinders as to the evidence relied on and reasons for revoking parole").

### D. Plea Bargaining

Approximately 90% of all criminal convictions are obtained through guilty pleas.<sup>337</sup> Because the entire criminal justice system has come to rely upon a high rate of plea bargaining,<sup>338</sup> the impact of the Act on the plea-bargaining process must be examined.

#### 1. Advising Defendants of the Possibility of Restitutionary Obligations Prior to Accepting a Guilty Plea

The court has a duty to advise a defendant of the direct consequences of a guilty plea,<sup>339</sup> which now may include restitution.<sup>340</sup> Failure to advise a defendant of at least the possibility of restitution may invite attacks on the sentence, as the defendant may argue that his plea was not voluntary because he was unaware of its direct consequences.<sup>341</sup> Moreover, greater disclosure than merely informing

337. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966). Guilty pleas or pleas of nolo contendere account for "about eighty to ninety percent of all federal convictions." 1 S. Schulhofer, Prosecutorial Discretion and Federal Sentencing Reform 8-9 (1979).

338. D. Newman, *supra* note 337, at 4. Guilty pleas are cost efficient; they assure conviction at a lower cost than does a trial. *Id.*

339. *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1365 (4th Cir.), *cert. denied*, 414 U.S. 1005 (1973); *Tindall v. United States*, 469 F.2d 92, 92 (5th Cir. 1972) (per curiam); *Wade v. Coiner*, 468 F.2d 1059, 1060 (4th Cir. 1972); D. Newman, *supra* note 337, at 32; *see Bennett, supra* note 20, at 6. A direct consequence of a guilty plea "[is] a definite, immediate and largely automatic effect on the range of defendant's punishment." *State v. Cameron*, 30 Wash. App. 229, 233, 633 P.2d 901, 904-05 (1981); *accord Cuthrell*, 475 F.2d at 1365-66.

340. Restitution should be considered a direct consequence of a guilty plea because the VWPA requires the imposition of restitution in all cases, 18 U.S.C. § 3579(a)(1) (1982), unless the judge can state reasons for not so ordering, *id.* § 3579(a)(2). A state court has noted that when the imposition of restitution "stems directly from the conviction of a crime that results in . . . loss to the victim," restitution is a "direct consequence" of the guilty plea. *State v. Cameron*, 30 Wash. App. 229, 233-34, 633 P.2d 901, 905 (1981) (emphasis in original). The sentencing court may not impose restitution upon a defendant who pleads guilty unless the defendant is informed of the possibility of restitution as part of the sentence prior to entry of the plea. *Id.*; *see* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 98 F.R.D. 381, 401-02 (1983) (restitution is aspect of defendant's sentence and therefore a matter about which defendant tendering guilty plea should be advised) [hereinafter cited as Proposed Amendment]; *Justice Dep't Guidelines, supra* note 9, at 12.

341. *See* Teleconference Tapes, *supra* note 1, side 1 of 5 (statement of Judge G. Tjoflat, 11th Cir.). The need to inform defendants of the possibility of restitution has been recognized. The Justice Department has stated that "[a]t proceedings pursuant to Rule 11, Fed. R. Crim. P., the court [should] incorporate in its description of the maximum sentence . . . the fact that the defendant may be sentenced to pay restitu-

the defendant of the possibility of restitution may be required to discharge the court's duty. Advising the defendant of the possibility of restitution but not the limits or range of such restitution results in the defendant not being aware of the actual maximum penalty at the time he offers his plea.

Rule 11 of the Federal Rules of Criminal Procedure requires the court to inform the defendant of the maximum and minimum penalties provided by law.<sup>342</sup> The Rule is designed to ensure that the defendant's plea is made voluntarily and intelligently.<sup>343</sup> A proposed amendment to Rule 11 is presently being considered that would require a defendant to be advised of the possibility of restitution before the plea is accepted.<sup>344</sup> The proposed amendment requires advice only of the possibility of restitution "[b]ecause [the VWPA] contemplates that the amount of the restitution . . . will be ascertained later in the sentencing process . . . . The exact amount or upper limit cannot and need not be stated at the time of the plea."<sup>345</sup> The amendment may have the effect of discouraging guilty pleas because a defendant may fear a limitless restitution order.<sup>346</sup> This effect must be avoided because pleas promote efficiency within the criminal justice system.<sup>347</sup>

A slightly more restrictive alternative was suggested by the Supreme Court of North Dakota.<sup>348</sup> The court reviewed a guilty plea that the trial court accepted without specifying the amount of restitution that could be ordered and stated that "[w]hen a defendant agrees to pay for the damage . . . and has a general idea of the amount . . . which is to be determined later, he cannot . . . claim . . . that he was not made aware of the amount."<sup>349</sup> To effectuate this alternative, a report

tion." *Justice Dep't Guidelines*, *supra* note 9, at 12. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has presented an amendment to Rule 11 which would make advising the defendant of the possibility of restitution a statutory requirement. Proposed Amendment, *supra* note 340, at 401-02. One federal district court judge suggests that the defendant be informed not only of the possibility of restitution but also that a failure to comply with the restitution order may result in a parole violation. Teleconference Tapes, *supra* note 1, side 3 of 5 (statement of Judge J. Miller, Jr., D. Md.).

342. Fed. R. Crim. P. 11(c)(1).

343. See *United States v. Journet*, 544 F.2d 633, 636 (2d Cir. 1976); Fed. R. Crim. P. 11 advisory committee notes.

344. See *supra* note 341.

345. Proposed Amendment, *supra* note 340, at 402.

346. See *United States v. Welden*, 568 F. Supp. 516, 535 (N.D. Ala. 1983), *appeal docketed*, No. 83-7-444 (11th Cir. Aug. 8, 1983), *petition for writ of mandamus filed sub nom. In re United States*, No. 83-7-583 (11th Cir. Oct. 25, 1983).

347. D. Newman, *supra* note 337, at 4; see *Santobello v. New York*, 404 U.S. 257, 260 (1971).

348. *State v. Thorstad*, 261 N.W.2d 899 (N.D.), *cert. denied*, 436 U.S. 906 (1978).

349. *Id.* at 901.

could be prepared at the time the indictment is drafted that would include a description of the loss sustained by the victim. Such a report poses no practical difficulty. Victim identification must be made prior to drafting the indictment because only those victims included in the indictment will be eligible to receive restitution.<sup>350</sup> This report, if made available to the defendant prior to the Rule 11 proceeding, would provide him with a general idea of the dollar amount of the harm, thus satisfying the North Dakota court's limited disclosure requirement and reducing fears of limitless restitution orders.

The defendant must at least have the opportunity to examine the report describing victim losses in order to weigh the advisability of a guilty plea.<sup>351</sup> These procedures will not discourage guilty pleas or pleas of *nolo contendere* while giving the defendant a general idea of the level of damage.

## 2. Restitution as an Element of Plea Bargaining

Whether to order restitution under the VWPA is a matter of judicial discretion;<sup>352</sup> however, it is generally agreed that restitution may be made part of a plea arrangement.<sup>353</sup> Allowing restitution to be bargained with raises the potential that it may be used as leverage.<sup>354</sup> For example, a reduced charge may be exchanged for a defendant's promise to make restitution.<sup>355</sup> The potential for a defendant to "buy out" of all or part of a jail term raises the problem of disparate treatment of defendants based on their inability to pay.<sup>356</sup> The ceiling

350. *Justice Dep't Guidelines*, *supra* note 9, at 8.

351. See *supra* note 349 and accompanying text.

352. See 18 U.S.C. § 3579(a)(1) (1982).

353. See *United States v. Davies*, 683 F.2d 1052, 1054 (7th Cir. 1982) (restitution may be negotiated under the Federal Probation Act); *Phillips v. United States*, 679 F.2d 192, 194 (9th Cir. 1982) (same); *United States v. McLaughlin*, 512 F. Supp. 907, 912 (D. Md. 1981) (same). At least one state court has also recognized restitution as a "bargaining chip." *State v. McIntyre*, 33 N.C. App. 557, 561, 235 S.E.2d 920, 923 (1977). *But see* *People v. Anonymous*, 56 Misc. 2d 792, 795, 290 N.Y.S.2d 507, 511 (Nassau County Ct. 1968) (restitution to be made subject to and under judicial control, not as part of plea-bargaining arrangement to avoid prosecution).

The Justice Department takes the position that plea bargaining "offers the government attorney the opportunity to fashion the maximum [restitutionary] relief for victims." *Justice Dep't Guidelines*, *supra* note 9, at 25; see *Bennett*, *supra* note 20, at 6 (although imposition of restitution is a matter of judicial discretion, it is a "legitimate subject matter of plea bargaining").

354. Teleconference Tapes, *supra* note 1, side 4 of 5 (question and answer session).

355. D. Newman, *supra* note 337, at 129.

356. This potential for disparate treatment is the same as that posed by ordering service restitution in lieu of unavailable financial restitution. See *supra* notes 87, 90 and accompanying text. The constitutional implications are more serious in the area of plea bargains because incarceration is involved instead of the mere substitution of service for financial restitution. Maine has recognized this problem and has stated

of punishment for indigents thus would be greater than the punishment for defendants with means. The VWPA should be amended to include a statement of policy that restitution should not be used as leverage in the bargaining process.<sup>357</sup>

### III. THE EFFECTIVENESS OF COMPENSATION

Unless the Act is effective in delivering restitution, the "ultimate justice," the VWPA will merely be a procedural skeleton to convey an empty congressional promise. Congress expanded the applicability of restitution beyond that of the Probation Act in an attempt to meet more effectively the compensation needs of crime victims.<sup>358</sup> Yet, the legislative history of the VWPA indicates that Congress was aware that restitution would be an ineffective means to accomplish this goal.<sup>359</sup> Compensating crime victims through sentencing may be appealing in the abstract but is often disappointing in reality because victims frequently do not receive adequate compensation.<sup>360</sup>

A victim must overcome a number of obstacles before he can receive restitution through sentencing.<sup>361</sup> One of the major obstacles that a

that restitution should not "result in preferential treatment for offenders with substantial financial resources." Me. Rev. Stat. Ann. tit. 17-A, § 1321 (1983).

357. Although restitution should remain an element of plea bargaining to serve the compensatory goals of the Act, see *supra* note 40 and accompanying text, Congress must develop a scheme to prevent affluent defendants from benefiting from the ability to make restitution in relation to the level of punishment they receive. Cf. Me. Rev. Stat. Ann. tit. 17-A, § 1321 (1983).

358. See Senate Report, *supra* note 1, at 30-31, reprinted in 1982 U.S. Code Cong. & Ad. News at 2536-37; 128 Cong. Rec. S3860-61 (daily ed. April 22, 1982) (statement of Sen. Chiles).

359. Senate Report, *supra* note 1, at 33, reprinted in 1982 U.S. Code Cong. & Ad. News at 2539; 128 Cong. Rec. H8202 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino) (recognizing that restitution is not likely to satisfy all victims); 128 Cong. Rec. S3854-55 (daily ed. April 22, 1982) (statement of Sen. Heinz).

360. Galaway, *Toward Rational Development of Restitution*, in *Restitution in Criminal Justice* 77, 82 (J. Hudson & B. Galaway eds. 1977) [hereinafter cited as Galaway I]; see Harland, *Compensating the Victims of Crime*, 14 *Crim. L. Bull.* 203, 215 (1978) [hereinafter cited as Harland III]; L.G. Shultz, *The Violated: A Proposal to Compensate Victims of Violent Crimes*, 10 *St. Louis U.L.J.* 238, 243 (1965). Despite the ineffectiveness of restitution as a means of compensating crime victims, a large number of commentators support it for its rehabilitative effect. See Galaway I, *supra*, at 83. A survey of nineteen restitution programs in the United States and Canada revealed that victim compensation was the primary goal of only four programs. J. Hudson, B. Galaway & S. Chesney, *supra* note 264, at 314.

361. See Harland III, *supra* note 360, at 215 ("The first factor confronting a crime victim seeking restitution is that the criminal justice system works in many ways that virtually assure that the offender will *not* pay restitution.") (emphasis in original).

362. See Harland III, *supra* note 360, at 221; Analytic Report, *supra* note 201, at 25.

victim faces is finding a defendant.<sup>362</sup> A victim can only receive compensation if the defendant is apprehended and convicted.<sup>363</sup> Studies show that a majority of criminals are never caught.<sup>364</sup> This is especially true in cases of crimes against property.<sup>365</sup> Yet, ironically, restitution is most frequently applied to these property crimes.<sup>366</sup> Even if the offender is caught, plea bargaining severely reduces the probability that a victim will receive compensation.<sup>367</sup> Due to the pervasive use of plea bargaining,<sup>368</sup> most restitution orders compensate victims for only a small portion of the total harm suffered.<sup>369</sup>

Another obstacle a victim faces in obtaining compensation is finding a defendant with the ability to make restitution.<sup>370</sup> A 1978 na-

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363. See Senate Report, *supra* note 1, at 33, reprinted in 1982 U.S. Code Cong. & Ad. News at 2539; 128 Cong. Rec. H8202 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino); Galaway, *The Use of Restitution*, 23 Crime & Delinq. 57, 64 (1977) [hereinafter cited as Galaway II]; Harland III, *supra* note 360, at 215; Analytic Report, *supra* note 201, at 22.

364. See Bureau of Justice Statistics, United States Department of Justice, Sourcebook of Criminal Justice Statistics—1982, at 294-303 (estimate of victimization not reported to police) [hereinafter cited as Sourcebook]; Harland III, *supra* note 360, at 215 (a large portion of criminals are never caught). When the offender is caught, the arrest often does not result in a conviction. E. Kittrie & N. Zenoff, *supra* note 208, at 189; Galaway II, *supra* note 363, at 64.

365. Analytic Report, *supra* note 201, at 23 (Uniform Crime Reports of 1974 show property offenses have lowest clearing rate).

366. Harland III, *supra* note 360, at 216-17; Analytic Report, *supra* note 201, at 23; see Edelhertz, *Legal and Operational Issues in the Implementation of Restitution Within the Criminal Justice System*, in Restitution in Criminal Justice 63, 69-70 (J. Hudson & B. Galaway eds. 1975); Jacob II, *supra* note 215, at 155; *Rehabilitation of Victims*, *supra* note 158, at 323.

367. Analytic Report, *supra* note 201, at 23; see Hudson, Galaway & Chesney, *supra* note 264, at 318; Klein, *supra* note 235, at 402-03.

368. Approximately 90% of all federal convictions result from guilty pleas. House Report, *supra* note 46, at 444; cf. Report to the Nation, *supra* note 109, at 65 (examples of state rates of guilty pleas: Manhattan, N.Y.-63%, Rhode Island-79%).

369. This would occur under a definition of "offense" that limits recovery to offenses for which a conviction was had. Teleconference Tapes, *supra* note 1, side 1 of 5 (L. Schwartz, Benjamin Franklin Prof. of Law, Univ. of Pa.). See *supra* notes 26-27 and accompanying text. Often an offender will plead guilty to one count in return for an agreement with the prosecutor to drop similar charges. Analytic Report, *supra* note 201, at 23. Unless a defendant admits to his total financial liability, he may not be required to compensate victims of the counts dropped. See *Justice Dep't Guidelines*, *supra* note 9, at 8.

370. Ability to pay restitution encompasses the defendant's financial resources and his present earning ability. Materials to Accompany Teleconference, *supra* note 17, at 29. A recent report on the effectiveness of restitution in the criminal system stated that "[a] significant number of offenders . . . will be unsuitable for a straight cash restitution disposition because they are unemployed, earn too little, or are juveniles." Analytic Report, *supra* note 201, at 17; see L. G. Shultz, *supra* note 360, at 243 (restitution is ineffective in meeting "compensation needs of the great majority of victims because probationers and parolees are either insolvent or, if employed, do not earn enough to exceed basic needs"); Chesney, Hudson & McLagen, *A New Look at*

tional survey of jail inmates in the United States reported that the median income was \$3,714.<sup>371</sup> This obviously affects the victim's ability to collect an award and may also affect both the court's willingness to order restitution and the amount ordered.<sup>372</sup> Under the VWPA, the court must consider the defendant's finances before ordering restitution<sup>373</sup> and "[t]he economic status of the offender influences the remedy imposed to a greater degree than does the harm he caused to his victim."<sup>374</sup>

Victims of non-violent property crimes may have a better chance of receiving compensation.<sup>375</sup> One study reported that the average loss for crimes such as pocket-picking, purse-snatching, burglary, vehicle theft, and unarmed robbery are well within the financial means of most offenders.<sup>376</sup> In addition, these crimes rarely result in incarceration.

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*Restitution: Recent Legislation, Programs and Research*, 61 *Judicature* 348, 357 (1978) (At Georgia's four restitution shelters only 26% of total restitution obligations for the year were repaid because of offender unemployment.). At the teleconference, it was cautioned that victims may not receive restitution in light of the fact that most defendants are poor. Teleconference Tapes, *supra* note 1, side 4 of 5 (open discussion among panelists). Professor Harland states, however, that the "question of the offender's ability to pay may not be as problematic as most commentators have assumed," Harland III, *supra* note 360, at 221, because of the "low loss figures reported for the types of victimizations for which restitution is frequently used . . . purse-snatching/pocket-picking, burglary, larceny, vehicle theft, and unarmed robbery," *id.* at 220; see Senate Report, *supra* note 1, at 30, reprinted in 1982 U.S. Code Cong. & Ad. News at 2536 (average dollar losses victims suffer total hundreds, not thousands of dollars), and because restitution can be paid in installments. Harland III, *supra* note 360, at 221; see 18 U.S.C. § 3579(f) (1982).

371. Sourcebook, *supra* note 364, at 522; see Analytic Report, *supra* note 201, at 19; *Business Roundtable Discussion*, *supra* note 146, at 2604.

372. See R. Dawson, *Sentencing: The Decision as to the Type, Length, and Conditions of Sentence* 109 (F. Remington ed. 1969) (judges show unwillingness to order restitution if offender is receiving public assistance); Chesney, Hudson & McLagen, *supra* note 370, at 355 (common criteria for judges in ordering restitution is offender's ability to make restitution).

373. 18 U.S.C. § 3580(a) (1982). See *supra* notes 196-98 and accompanying text.

374. Edelhertz, *supra* note 366, at 63. One public defender maintains that if the defendant is shown by the preponderance of the evidence to be indigent, the Act cannot be applied. Teleconference Tapes, *supra* note 1, side 3 of 5 (statement of F. Bennett, Federal Public Defender, D. Md.); see 1981 Senate Report, *supra* note 15, at 999 (before ordering restitution court must "examine the overall financial implications to the defendant").

375. See Harland III, *supra* note 360, at 220-21.

376. Analytic Report, *supra* note 201, at 9 (Almost one-half of the six non-violent offenses studied, larceny from the home, larceny away from the home, burglary, purse-snatching/pocket-picking, vehicle theft and unarmed robbery, that result in damages, "involved amounts of less than \$25 in 1974."); see Hudson, Galaway & Chesney, *supra* note 264, at 318 ("1974 Uniform Crime Report indicates that the average dollar loss in a burglary was \$391 . . . [and] the average value of property stolen in a theft was \$156."). *But see Senate Hearings*, *supra* note 194, at 68 (testimony of crime victim Virginia Montgomery) (medical bills of \$11,000 as result of



tion.<sup>377</sup> These offenses are usually state crimes, however, and the VWPA would be inapplicable.<sup>378</sup>

The likelihood of victim compensation is drastically reduced, however, when a defendant is incarcerated.<sup>379</sup> When restitution is ordered in conjunction with imprisonment, a defendant does not have the opportunity to work and save money. This is especially true when a defendant is convicted of a violent crime which usually results a long prison sentence.<sup>380</sup>

Restitution and a term of imprisonment are irreconcilable<sup>381</sup> because prison wages are very low.<sup>382</sup> Thus, while the VWPA gives the court authority to order restitution in conjunction with imprisonment,<sup>383</sup> this authority may be of little benefit to crime victims.<sup>384</sup> The incompatibility between restitution and imprisonment was reflected in *State v. Murray*,<sup>385</sup> in which the defendant was sentenced to a ten-

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purse snatching). Property crimes have the lowest arrest rate, however, thus reducing the likelihood of restitution. See *supra* note 364-66 and accompanying text.

377. See Harland III, *supra* note 360, at 216.

378. 128 Cong. Rec. S11,438 (daily ed. Sept. 14, 1982) (statement of Sen. Dodd); see Senate Report, *supra* note 1, at 10, reprinted in 1982 U.S. Code Cong. & Ad. News at 2516.

379. See Edelhertz, *supra* note 366, at 69; Harland III, *supra* note 360, at 216; Jacob II, *supra* note 215, at 152. For example, an estimated 90% of the inmates in the United States penitentiary in Atlanta, the largest federal correctional facility, are indigent. *Id.* at 152 n.3; see *Rehabilitation of Victims*, *supra* note 158, at 320.

380. See Analytic Report, *supra* note 201, at 23. Recent prison statistics show that the prison population is increasing in every state, and that the length of time served in prison is rising. Office of Justice Assistance, Research, and Statistics, U.S. Dep't of Justice, Justice Assistance News vol. 4, No. 7, at 5 (Sept. 1983).

381. Harland, *One Hundred Years of Restitution: An International Review and Prospectus for Research* 10 (Jan. 3-9, 1982) (presented at the International Symposium on Victimology; to be published in *Victimology*) ("[A]lthough a growing number of statutes have recently authorized courts . . . to pursue restitution through institutional correctional industries, . . . the reality in most instances continues to be that such industries either do not exist or offenders are so poorly paid, if paid at all, that restitution and imprisonment continue to be *de facto* incompatible sanctions.") [hereinafter cited as Harland IV]; see Chesney, Hudson & McLagen, *supra* note 370, at 354; Analytic Report, *supra* note 201, at 23.

382. Harland III, *supra* note 360, at 216; Jacob II, *supra* note 215, at 152, 160; see *Challenge of Crime*, *supra* note 211, at 176 (federal prison wages averaged \$40 per month in 1965).

383. 18 U.S.C. § 3579(a)(1) (1982).

384. See Harland, *The Views of Practitioners* 145 (undated) (unpublished report for the U.S. Dep't of Justice) (available in files of *Fordham Law Review*) [hereinafter cited as Harland V]. In interviews with nine felony court judges, eight deputy district attorneys and five probation officers from Oregon, *id.* at 122, "[a]ll respondents saw little practical value in the . . . law authorizing sentencing courts to impose restitution for offenders sentenced to prison," *id.* at 154. The general consensus among the judges was "that ordering restitution coupled with a term in the penitentiary was mostly a symbolic gesture, 'to get it on the record,' without much hope that it would ever be paid or be very meaningful to the victim." *Id.* at 145.

385. 621 P.2d 334 (Hawaii 1980).

year term of imprisonment and ordered to make restitution.<sup>386</sup> Because of low prison wages, the appellate court rejected ordering restitution to be paid from the prisoner's earnings.<sup>387</sup> The court noted the conflict between restitution, which extracts money from a defendant, and imprisonment, which restricts the defendant's ability to earn money.<sup>388</sup>

Another limitation on the victim's recovery is the subordination of restitution to more traditional sentencing goals.<sup>389</sup> Some judges are reluctant to order restitution because they fear it might pressure the defendant into committing another crime in order to meet his restitution obligation.<sup>390</sup> Such a result would conflict with the goal of rehabilitation.<sup>391</sup> Even in civil law jurisdictions such as Germany and France, where the victim has the right to assert a civil claim along with the criminal prosecution, courts invariably subrogate the goal of victim compensation to the punitive and rehabilitative goals of sentencing.<sup>392</sup>

The victim's recovery is also reduced because under the Act the victim can only recover those losses that are enumerated in the Act.<sup>393</sup> Further, the Department of Justice takes the position that a sentencing hearing cannot be delayed to enable a victim to gather information regarding on-going medical expenses;<sup>394</sup> thus, the victim may never

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386. *Id.* at 336.

387. *Id.* at 340.

388. *Id.* at 342.

389. See Senate Report, *supra* note 1, at 31 (victim can receive compensation only when sentencing is not unduly complicated), *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2537; *Justice Dep't Guidelines*, *supra* note 9, at 22-23 (cannot delay sentencing to allow victim to gather information regarding on-going medical expenses); Harland III, *supra* note 360, at 216 ("restitution must assume its place among hierarchy of traditional sentencing goals of deterrence, deserts, rehabilitation, and incapacitation"); see Me. Rev. Stat. Ann. tit. 17-A, § 1321 (1983-1984) (restitution should be ordered only when other purposes of sentencing can be appropriately served).

390. Edelhertz, *supra* note 366, at 64; Harland V, *supra* note 384, at 148. At the Teleconference on the VWPA, one federal judge expressed his concern with ordering restitution in conjunction with incarceration because of his experience with a defendant who engineered a massive mail fraud scheme in order to pay a restitution order and thereby avoid a revocation of probation proceeding. Teleconference Tapes, *supra* note 1, side 4 of 5 (statement of Chief Judge Wm. T. Hodges, M.D. Fla.). *Contra* Chesney, Hudson & McLagen, *supra* note 370, at 356 (judges generally support restitution as rehabilitative).

391. Restitution may conflict with the punitive goal of sentencing, if the defendant must be sentenced to a prison term for the protection of society. Because of this conflict, restitution is used primarily as an alternative sentence. Analytic Report, *supra* note 201, at 23; Harland III, *supra* note 360, at 216.

392. Harland IV, *supra* note 381, at 12-13.

393. See *supra* note 56 and accompanying text.

394. *Justice Dep't Guidelines*, *supra* note 9, at 22-23.

have the opportunity to prove even the limited losses provided for in the Act.

Finally, a victim can only receive restitution if courts and probation departments actively monitor restitution payments. In the past, judges have stated that the enforcement of restitution orders reduces the court to a debt collection agency.<sup>395</sup> Probation officers have also stated that "effective probation supervision is impossible when they must perform extensive collection agency functions."<sup>396</sup> Although the VWPA gives the victim the right to bring a civil action to enforce a restitution order,<sup>397</sup> this will only help those victims with the time and financial resources to bring such an action. The Justice Department has indicated that the victim cannot look to the government for assistance in this respect.<sup>398</sup> Rather than outlining specific procedures for the courts and probation departments to follow, the Act places the burden of collection on the victim. Such a burden does little to advance the congressional goal of assisting crime victims.<sup>399</sup>

As a result of these problems, Congress is promising victims greater compensation than the system can deliver.<sup>400</sup> In fact, the restitution

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395. See *People v. Moore*, 43 Mich. App. 693, 697, 204 N.W.2d 737, 739 (1972); *People v. Grago*, 24 Misc. 2d 739, 742, 204 N.Y.S.2d 774, 778 (Oneida County Ct. 1960); *State v. Barnett*, 110 Vt. 221, 236, 3 A.2d 521, 527 (1939) (Sherburne, J., dissenting); see also *State v. Scherr*, 9 Wis.2d 418, 424, 101 N.W.2d 77, 80 (1960) ("Neither should the criminal process be used to supplement a civil suit or as a threat to coerce the payment of civil liability and thus reduce the criminal court to a collection agency.").

396. R. Dawson, *supra* note 372, at 105 & n.15; see Chesney, Hudson & McLagen, *supra* note 370, at 354; Galaway II, *supra* note 363, at 66; Harland III, *supra* note 360, at 218. In the legislative history of the VWPA, Congress recognized that restitution orders have been indifferently enforced. Senate Report, *supra* note 1, at 30, reprinted in 1982 U.S. Code Cong. & Ad. News at 2536.

397. 18 U.S.C. § 3579(h) (1982); see Senate Report, *supra* note 1, at 33, reprinted in 1982 U.S. Code Cong. & Ad. News at 2539.

398. *Justice Dep't Guidelines*, *supra* note 9, at 9 ("The Department's position is that assistance from the government should be granted on a case-by-case basis in compelling circumstances.").

399. See Senate Report, *supra* note 1, at 30, reprinted in 1982 U.S. Code Cong. & Ad. News at 2536; 128 Cong. Rec. H8201 (daily ed. Sept. 30, 1982) (statement of Rep. Rodino); 128 Cong. Rec. S3861 (daily ed. April 22, 1982) (statement of Sen. Chiles).

400. Teleconference Tapes, *supra* note 1, side 4 of 5 (statement of Chief Judge Wm. T. Hodges, M.D. Fla.). The Senate version of the VWPA contained a provision that would have required the Attorney General "within six months of the title's enactment . . . [to] report to Congress whether additional laws are necessary to ensure . . . all crime victims [receive] just compensation." Senate Report, *supra* note 1, at 33, reprinted in 1982 U.S. Code Cong. & Ad. News at 2539. Commentators generally agree that victim compensation programs meet the needs of crime victims more effectively than criminal restitution. See Edelhertz, *supra* note 366, at 63; Galaway I, *supra* note 360, at 82; Geis, *supra* note 264, at 151; Jacob II, *supra* note 215, at 152. Compensation funds are usually operated by the state, see Harland I,

provision may be counterproductive.<sup>401</sup> In theory restitution may be available to all victims, but Congress can not alter the fact that many offenders are never caught. Even when an offender is caught, he is likely to be indigent and thus unable to deliver compensation. Restitution, therefore, may be an illusion. When a victim realizes that compensation is not forthcoming, he may feel frustrated and victimized by the system designed for his benefit.

### CONCLUSION

Congress has opened a Pandora's box by enacting the VWPA without adequately addressing the difficulties of incorporating restitution into the criminal justice system. The problems discussed in this Project prevent the VWPA from providing a viable framework for courts to use at sentencing. Unless these problems are resolved, the VWPA and criminal restitution in general cannot compensate victims without infringing upon defendants' constitutional rights. The legislative response to these problems will indicate whether Congress is earnestly trying to meet the needs of crime victims or is merely attempting "to placate a growing number of electorates"<sup>402</sup> who have become concerned with the plight of victims.<sup>403</sup>

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*supra* note 30, at 59, and a victim can receive compensation regardless of whether the defendant is apprehended, Analytic Report, *supra* note 201, at 2. Legislation to create a federal victim compensation fund has been introduced in Congress every year since 1965. Harland I, *supra* note 30, at 59. On March 7, 1983, Senator Heinz again introduced such a bill. S. 704, 98th Cong., 1st Sess., 129 Cong. Rec. S2293-94 (daily ed. March 8, 1983). President Reagan also has endorsed a compensation fund plan. Wall St. J., Mar. 14, 1984, at 3, col. 4. The creation of a Crime Victim's Assistance Fund has been proposed. See *Hearings Concerning H.R. 3498—Victim Compensation Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 2 (1984) (statement of Lois Haight Herrington, Ass't Att'y Gen., U.S. Dep't of Justice).

401. Teleconference Tapes, *supra* note 1, side 4 of 5 (open discussion among panelists).

402. Harland III, *supra* note 360, at 224.

403. 128 Cong. Rec. S11,435 (daily ed. Sept. 14, 1982) (statement of Sen. Mathias) ("[T]here is increased public awareness of the need to sensitize the criminal justice system to the problems faced by victims of crime.").