What Is Criminal Restitution?

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ABSTRACT: A new form of restitution has become a core aspect of criminal punishment. Courts now order defendants to compensate victims for an increasingly broad category of losses, including emotional and psychological losses and losses for which the defendant was not found guilty. Criminal restitution therefore moves far beyond its traditional purpose of disgorging a defendant's ill-gotten gains. Instead, restitution has become a mechanism of imposing additional punishment. Courts, however, have failed to recognize the punitive nature of restitution and thus enter restitution orders without regard to the constitutional protections that normally attach to criminal proceedings. This Article deploys a novel definition of punishment to situate restitution alongside other forms of punishment. As with other forms of punishment, courts impose restitution subsequent to a criminal allegation, pursuant to a statute motivated by morally condemnatory intent, and resulting in a substantial deprivation or obligation. Because restitution has become a form of punishment, this Article argues that judges should recognize criminal restitution for what it is—victim compensation imposed at the state's request as condemnation for a moral wrong—and extend to defendants in restitution proceedings all the constitutional protections they enjoy in other criminal proceedings. This means submitting restitution to a jury for determination pursuant to the Sixth Amendment, and subjecting it to the excessive fines analysis of the Eighth Amendment.

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I. INTRODUCTION

Restitution imposed as part of a criminal sentence has become a core component of criminal punishment. Both the manner in which courts impose restitution and the implications of failing to pay criminal restitution illustrate restitution's increasingly punitive character. Take the following three examples:

First, a defendant is convicted of wire fraud and sentenced to serve a period of time in prison. As part of the sentence, the judge also orders the defendant to pay $40,000 in restitution to those he defrauded. The defendant

completes his prison term and all other court-ordered obligations but is unable to earn the money to pay the restitution. Because of the unpaid restitution, the state deems the criminal sentence incomplete and continues to prohibit the defendant from voting.[1]

Second, a janitorial supervisor at the post office in downtown Fargo, North Dakota, takes undeliverable BMG Columbia House CDs and DVDs from the post office trash and sells them. The disks were discarded as part of an agreement between BMG and the postal service, as it was less costly for BMG to produce replacement disks than to pay for the return of the undeliverable disks. After being charged in federal court with felony mail theft, the defendant pleads guilty to a misdemeanor charge and is ordered to pay restitution to BMG in the amount of his sales, even though BMG has suffered no financial loss.[2]

Third, a police officer responds to a call and attempts to arrest the suspect at the scene. The suspect flees in his car. The officer radios for assistance. Another officer, on duty but at home, sets out to help catch the fleeing suspect. On her way to assist the first officer, the second officer is involved in a single car accident that completely destroys her patrol car. At sentencing for eluding the first officer, the defendant is ordered to pay $22,509 in restitution to the police department to cover the costs of the second officer's patrol vehicle, even though the defendant was not responsible for her accident.[3]

Each of these cases illustrates how criminal restitution has become part of the larger retributive objective of the American criminal justice system. In each instance, the court issued an order as part of a criminal case that creates a legally binding obligation between the defendant and the state. Legislatures create—and courts impose—this legal obligation, in part, to convey the moral condemnation associated with criminal punishment. These cases reveal how the practical effects of criminal restitution are no different from the practical effects of a criminal fine, an undisputable form of criminal punishment. They also exemplify scenarios that require criminal defendants to pay restitution even when the victim has suffered no tangible loss, or the loss is only indirectly related to the defendant's criminal action. Finally, these examples show how criminal restitution is rarely used to disgorge a defendant's unlawful gain, but more often is calculated to compensate a victim's loss, often resulting in a benefit previously unknown to the victim.

Although it has become a regular part of a criminal defendant's sentencing, courts do not afford criminal restitution any of the constitutional

1. Johnson v. Bredesen, 624 F.3d 742, 746 (6th Cir. 2010) (citing Tenn. Code Ann. § 40-29-202(b)–(c) (2014)).

2. United States v. Chalupnik, 514 F.3d 748, 750 (8th Cir. 2008) (explaining that the restitution order was vacated on appeal due to the government's failure to put forth evidence of actual loss).

3. Dubois v. People, 211 P.3d 41, 42 (Colo. 2009) (en banc).

checks they normally provide punishment. In fact, many courts disavow the idea that criminal restitution is an instrument for punishment, instead characterizing restitution as solely compensatory. The result is consistent imposition of a form of criminal punishment without the constitutional protections the Sixth and Eighth Amendments afford defendants.[4]

Restitution has long been an available criminal remedy in the United States,[5] but courts only have imposed criminal restitution in a primarily condemnatory manner over the past decade. Rooted in the vigorous victims'

4. The Sixth Amendment affords the jury trial right to any finding that increases a defendant's criminal punishment. U.S. CONST. amend. VI. The Eighth Amendment limits the financial penalties that can be imposed on a defendant as punishment in a criminal case. U.S. CONST. amend. VIII. Generally, these rights have not been, but should be, afforded to criminal restitution findings as well.

5. Starting in 1925, federal judges were authorized to order restitution only as a condition of probation. Woody R. Clermont, *It's Never Too Late to Make Amends: Two Wrongs Don't Protect a Victim's Right to Restitution*, 35 NOVA L. REV. 363, 373 (2011); *see also, e.g.*, United States v. Boswell, 605 F.2d 171, 175 (5th Cir. 1979); United States v. Wilson, 469 F.2d 368, 370 (2d Cir. 1972); United States v. Taylor, 321 F.2d 339, 341–42 (4th Cir. 1963); *cf.* Tate v. Short, 401 U.S. 395, 397–99 (1971) (explaining that it is a violation of the Equal Protection Clause to convert the statutory ceiling of a punishment from payment of a fine to imprisonment based solely on an indigent defendant's inability to pay the fine (citing Williams v. Illinois, 399 U.S. 235, 240–42 (1970))). During this era, only a few states also had provisions for restitution in their criminal codes. *See* Note, *Restitution and the Criminal Law*, 39 COLUM. L. REV. 1185, 1195 (1939). The most common statutes required a defendant to return stolen property, or its equivalent value, to the owner in addition to receiving a punishment of possible imprisonment or a fine. *Id.* at 1195 & n.53 (citing statutes from D.C., Maryland, Pennsylvania). Other states had more elaborate procedures for reparations, requiring an application to the court prior to an order for restitution being entered. *Id.* at 1195–96 (citing statutes from Kentucky, Alabama, Nebraska, Arkansas and Delaware); *see also* Bruce R. Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L. & CRIMINOLOGY 152, 155 (1970); Marvin E. Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 229 (1965).

In 1982, at the height of the victims' rights movement, Congress passed the federal Victim and Witness Protection Act ("VWPA"), introducing a new era for restitution. As a result of the VWPA, for the first time, restitution became a common element in federal criminal sentencing. Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1688 (2009). In 1982, President Reagan's Task Force on Victims of Crime published its final report, which encouraged judges to order restitution in "all cases in which the victim has suffered financial loss, unless they state compelling reasons for a contrary ruling on the record." PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 73 (1982), *available at* http://ojp.gov/ovc/publications/presdntstskforcrprt/87299.pdf. In response to the Task Force's Final Report, Congress passed the VWPA, which codified numerous recommendations made in the report. Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the* Ex Post Facto *Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2722 (2005); Thomas M. Kelly, Note, *Where Offenders Pay for Their Crimes: Victim Restitution and Its Constitutionality*, 59 NOTRE DAME L. REV. 685, 685, 694 (1984); *see also* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C. and FED. R. CRIM. P. 32(c)(2)). Some states had enacted legislation authorizing, and even mandating, restitution prior to 1982. Joe Hudson & Burt Galaway, *Introduction*, *in* RESTITUTION IN CRIMINAL JUSTICE: A CRITICAL ASSESSMENT OF SANCTIONS 1, 2–4 (Joe Hudson & Burt Galaway eds., 1975).

rights movement of the 1980s, legislators encouraged restitution's currently accepted presence in criminal sentencing hearings, which corresponded with society's progressively vengeful approach to criminal defendants and punishment.[6] The desire to "make victims whole" accompanies the desire, figuratively and literally, to "make criminal defendants pay."

Along with the increasing use of restitution as a criminal remedy, legislators and judges have transformed the method of calculating criminal restitution. Courts no longer impose criminal restitution as a mechanism aimed at disgorging unlawful gains, as restitution was created to do.[7] Instead, courts impose criminal restitution now to compensate for economic, emotional, and psychological losses.[8] As a result, criminal restitution has become unmoored from the specific, tangible, and economic gains a defendant unlawfully earned at the victim's expense. Courts no longer require precise calculations. Rather, they employ "fudge factor[s]" to determine the amount of restitution to impose in a given case.[9] Thus, criminal restitution has evolved from a primarily restorative mechanism to a primarily punitive one. Whereas disgorgement is righting an economic imbalance, punishment is compensation loosely tied to a criminal act and imposed as a consequence of committing a moral wrong.

In order to identify when and how restitution operates as punishment, a basic definition of what constitutes punishment is needed. This Article articulates a new definition. Although the definition uses several previously articulated delineations as a starting point, it expands from these anchors to acknowledge the current increase in the use of punitive remedies, of which restitution is but one. This Article defines punishment as a state action subsequent to a criminal allegation, resulting in a substantial deprivation and/or obligation, and imposed: (1) pursuant to a statute that reveals morally condemnatory intent; (2) pursuant to a statute with unclear intent, but applied in a consistently condemnatory manner; or (3) with the effect of substantially diminishing a person's well-being as a result of the moral condemnation communicated by the state action.

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6. *See, e.g.*, DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE (2004); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259 (2011).

7. *See infra* note 17 and accompanying text.

8. Indeed, some statutes actually *require* judges to impose restitution for economic and psychological losses. *See, e.g.*, 18 U.S.C. §§ 2259(b)(3)(A), (F) (2012); *id.* § 3663(b)(2)(A). Federal judges consistently have interpreted federal restitution statutes as measuring restitution by a victim's losses rather than a defendant's unlawful gains. *See infra* Part II.A.

9. Transcript of Oral Argument at 31, Paroline v. United States, 134 S. Ct. 1710 (2014) (No. 12-8561).

Applying this definition reveals that when restitution is imposed as a part of sentencing in a criminal case, the restitution is punishment. As this Article will discuss in more detail, criminal restitution is a substantial financial obligation, as most criminal defendants are indigent. Courts impose criminal restitution pursuant to a criminal conviction sought by the state, even when the restitution imposed is for conduct beyond the scope of the conviction. Criminal restitution is imposed in a manner conveying moral condemnation, and pursuant to statutes that reveal condemnatory intent. The result is often the substantial diminution of a person's well-being due to the moral condemnation associated with the imposition of criminal restitution.

A closer look at how criminal restitution plays out in practice confirms its punitive character. The most obvious indication that criminal restitution is punishment is revealed by the consequences that attach to a defendant for non-payment of restitution after release from prison. The collateral consequences triggered by a failure to pay restitution mirror those that attach to other criminal punishments, including continued disenfranchisement for the inability to pay, preclusion from running for office, threat of further incarceration if someone is unable to prove her failure to pay was not willful, and suspension of one's driver's license.

Recent federal and state court opinions demonstrate the prevalence of this punitive approach. For example, courts commonly order criminal restitution for conduct for which the defendant has not been found guilty, including acquitted conduct, conduct occurring outside the statute of limitations, and conduct involving victims not named in the indictment.[10] In other words, courts hold defendants financially liable for conduct for which the defendants have not been found legally accountable. Even when a victim suffers no financial loss, courts order restitution.[11] Courts order criminal restitution in instances where the loss is not directly attributable to the defendant. Further, defendants across the country are regularly required to pay for the costs of the government's investigation and prosecution of them, often without any calculation as to what those costs actually are.[12]

Courts are using criminal restitution to punish defendants, without affording restitution the constitutional checks courts normally provide for punishment. Judges are awarding large restitution orders uncorrelated to any specific loss amount, for actions the government did not prove during the criminal trial, and to individuals the defendant's crime did not directly harm, without being constrained by any constitutional limitations. These large monetary penalties keep people under increasingly indefinite periods of criminal justice supervision, resulting in a new type of debtors' prison. In turn, the government uses restitution payments to fund the very law enforcement

10. *See infra* Part III.B.1.
11. *See infra* Part III.B.3.
12. *See infra* Part III.B.4.

agencies that prosecuted them, raising numerous due process and equal protection concerns.[13] Because courts impose criminal restitution as punishment, courts should grant the constitutional protections afforded to other forms of criminal punishment.

This Article begins in Part II by tracing the modern evolution of criminal restitution. After addressing some of the concerns with the shift toward restitution as a punitive rather than a compensatory device, the Article turns to the issue of punishment. Part II offers a new definition of punishment, and situates criminal restitution within the parameters of that definition. Part III reveals the many ways in which restitution operates on the ground as a primarily punitive device. In Part IV, the Article concludes by proposing that courts recognize criminal restitution's growing role as an instrument of punishment by providing defendants with the constitutional protections consistent with that categorization.

II. THE RESTITUTION REVOLUTION

Over the past 30 years, the American criminal justice system has endured a seismic shift in its treatment of alleged crime victims and offenders. Influenced heavily by a robust victims' rights movement, public opinion has shifted toward concern for victims in criminal proceedings, and legislative responses reflect that trend. At the same time, those accused of committing crimes have been subject to increasingly punitive responses, both in sentiment and law.[14] Retribution and incapacitation have become the prevailing criminal justice goals. As a result, offenders face ever more severe punishments, and the focus of criminal justice responses has shifted toward victims.[15]

The modern expansion of criminal restitution exemplifies this broader shift. Traditionally, in both the civil and criminal contexts, courts used restitution to financially restore a person economically damaged by another's actions, thereby preventing the unintended beneficiary from being unjustly enriched at the aggrieved party's expense.[16] With the shift toward incorporating the victim into the criminal justice process, restitution became a more common and prevalent mechanism utilized in criminal sentencing

13. Wayne Logan and Ronald Wright have discussed in more depth the concerns raised by this type of system, including that "courts and other criminal justice actors become mercenaries, in effect working on commission," equal justice concerns, and the observation that "a government that can fob off costs on criminals has an incentive to find criminals everywhere." Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1177–78 (quoting Kevin Baker, *Cruel and Unusual Punishment: Why Prisoners Shouldn't Pay Their Debt*, AM. HERITAGE MAG., June/July 2006, at 22, 22).

14. *See, e.g.*, *supra* note 6 and accompanying text.

15. *Id.*

16. *See, e.g.*, Elmar Weitekamp, *Can Restitution Serve As a Reasonable Alternative to Imprisonment? An Assessment of the Situation in the USA*, *in* RESTORATIVE JUSTICE ON TRIAL 81, 81–82 (Heinz Messmer & Hans-Uwe Otto eds., 1992).

hearings, as restoring the victim to her previous economic status was one way of including her in that process.

Initially, courts imposed restitution in a manner consistent with this original restorative purpose. In more recent years, however, restitution has become the criminal version of civil damages. No longer do courts use restitution solely to reimburse specific, concrete financial losses; now, courts regularly impose restitution as compensation for abstract emotional and psychological injuries.[17] The result is significant doctrinal confusion and incoherence, as restitution in the civil setting is a legal term of art that still strictly refers to disgorgement of unlawful gains,[18] whereas in the criminal context, "restitution" refers to what is more aptly termed "victim compensation."[19] The continued use of the misnomer "criminal restitution"

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17. "The new era for restitution began in 1982, with the passage of the federal Victim and Witness Protection Act (VWPA)." Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 351 (2013); *see also* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C. and FED. R. CRIM. P. 32(c)(2)); Dickman, *supra* note 5, at 1688; Kleinhaus, *supra* note 5, at 2722; Kelly, *supra* note 5, at 685, 694.

Under the VWPA, criminal restitution was no longer limited to repaying the victim the value of money, goods, or services taken from them; restitution could now be ordered as compensation for physical injuries, and as time went on, for mental injuries and emotional losses. For the first time, under the VWPA, if the victim suffered bodily injury, the court could order a defendant to pay for medical, psychiatric or psychological treatment, as well as reimburse the victim for wages lost prior to sentencing. 18 U.S.C. § 3579(b)(2), (3) (1982) (current version at 18 U.S.C. § 3664 (2012)).

In addition to importing civil damages into the scope of losses compensable by criminal restitution, Congress sought to make it easier for victims to prove civil damages in civil lawsuits based on the same criminal acts for which a defendant already had been punished. An additional provision of the VWPA prevented the defendant from "denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding brought . . . by the victim." 18 U.S.C. § 3580(e) (current version at 18 U.S.C. § 3664 (2012)). Congress' aim was to keep a person from having to prove a defendant's liability a second time as part of a civil tort suit. S. REP. NO. 97-532, at 32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2516. If a victim received compensation in a civil case, restitution payments could be offset against the damages ordered. 18 U.S.C. § 3579(e)(2) (current version at 18 U.S.C. § 3664 (2012)); Kelly, *supra* note 5, at 698. In short, Congress seems to have been doing everything it could to allow crime victims to get monetary payments to make up for their experiences, apparently viewing restitution as a type of panacea.

In 1994, the Violence Against Women Act ("VAWA") became the first federal statute to mandate criminal restitution. This was a change from the VWPA, which allowed a court to decline ordering restitution based on a defendant's indigency. 18 U.S.C. § 3579(a)(2) (current version at 18 U.S.C. § 3664 (2012)). VAWA required convicted defendants to compensate victims for physical and psychological injuries inflicted as a result of sex-related and domestic violence crimes, regardless of the defendant's financial means. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1904 (codified as amended at 18 U.S.C. § 2248 (2012)).

18. *See* RESTATEMENT (THIRD) OF RESTITUTION § 1 cmt. e(2) (2011).

19. Recent proposed changes to the Model Penal Code, for example, have acknowledged the confusion created by the use of the word "restitution" to describe two very different sets of compensatory mechanisms. *See* MODEL PENAL CODE: SENTENCING § 6.04A cmt. a (Preliminary Draft No. 10, Sept. 3, 2014) (on file with author). As a result, the American Law Institute initially

deflects attention away from how significant a deviation the current usage is from restitution's doctrinal roots. Beneath the veneer of identical language, "restitution" in the criminal context has become a punitive mechanism intended to compensate a broad range of victim's losses, quite distinct from the traditional understanding of restitution as a vehicle for disgorgement of unlawful gains, as it still operates in the civil realm.[20] No longer is "criminal restitution" measured by a defendant's unlawful gain; now, it is calculated based on a victim's losses.

Because courts now measure criminal restitution by a victim's tangible and abstract losses, restitution punishes an offender by holding her responsible for actions and results not necessarily attributable to her. Courts are imposing these restitution orders in the context of a criminal sentencing hearing, where courts impose the restitution at the request of, and create an obligation to, the state. Because the defendant is held accountable for actions and results beyond the scope of the criminal conviction, a criminal restitution order ends up being a state-sanctioned damages payment, often one that cannot even arguably be aimed at "making the victim whole." Restitution therefore comes to achieve retribution and punishment, rather than reimbursement and restoration. The legislative history, language of the primary restitution statutes, and application of those statutes each reveal a retributive intent, confirming that restitution is now being employed as an instrument of punishment.

A. CRIMINAL RESTITUTION'S SHIFT FROM DISGORGEMENT TO PUNISHMENT

The law's approach to criminal restitution has undergone a historic evolution in the past 30 years. Previously, both civil and criminal restitution consisted of the disgorgement of a wrongdoer's unjust enrichment, making the defendant's gain the critical component of the analysis. For example, if a defendant stole a victim's valuable watch and then sold it on the street, the defendant would be ordered to pay restitution in the amount of the watch's value. Now, courts no longer use criminal restitution solely to force a

proposed the adoption of the more accurate term "victim compensation" to describe what practitioners and legislators refer to as "restitution." *Id.* Although approved at the 2014 Annual Meeting, in the most recent Preliminary Draft, the Reporter has recommended maintaining the term "restitution." *See id.* § 6.04A cmt. b. This author fully endorses the adoption of the term "victim compensation" and believes it is a more accurate description of what is erroneously called "restitution." Because "victim compensation" is not yet recognized as a legal term of art in either state and federal criminal law or common legal parlance, however, this Article continues to use the outdated and misleading term "restitution," instead of "victim compensation." To distinguish what occurs in criminal proceedings from civil restitution, this Article uses the term "criminal restitution."

20. This shift in the legislatures' and courts' approach to criminal restitution is part of a larger shift in the criminal justice system from theories of punishment that focus on a defendant's blameworthiness to those that are more concerned with the harm a defendant's conduct has caused. *See, e.g.*, SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 93, 100 (9th ed. 2012).

defendant to disgorge a profit wrongfully taken. With the criminal justice system's shift toward focusing on the experience of the victim, legislators and courts have broadened the concept of criminal restitution to require compensation of a victim's loss rather than disgorgement of a defendant's gain. In other words, criminal restitution is now principally concerned with compensating the victim's injury. In fact, this approach to criminal restitution has become the prevailing approach.[21] Most courts find it is error to substitute a defendant's gain for the amount of a victim's loss in calculating criminal restitution,[22] despite restitution's original goals. As a result, courts and legislatures often provide victims with a financial benefit they did not previously possess.

Along with the shift in focus from unjust enrichment toward victim loss, legislatures and courts have begun to define "loss" more broadly. In the context of criminal restitution, loss now encompasses a much wider range of harms. Beyond reimbursing an economic loss, restitution orders currently compensate for emotional, psychological, and hedonic harms—as well as for expenses restitution did not previously reimburse, including costs victims incur in hiring their own lawyers (since prosecutors represent the state), past and future lost wages, and other financial losses previously deemed "consequential damages."[23]

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21. *See, e.g.*, United States v. Zangari, 677 F.3d 86, 94 (2d Cir. 2012) ("[I]t was error for the District Court to order restitution for the amount of Zangari's gain rather than the victims' actual losses."); United States v. Harvey, 532 F.3d 326, 341 (4th Cir. 2008) ("[A]ny order of restitution nevertheless must be based on sufficient evidence of the amount of actual loss incurred as a result of the fraudulently obtained contract. Profit gained by the defendants may not be used in its stead."); United States v. Arledge, 553 F.3d 881, 899 (5th Cir. 2008) ("We have held that the amount of the [restitution] award must be tied to the losses suffered by victims of the defendant's crime, not the defendant's gain from his illegal conduct."); United States v. Galloway, 509 F.3d 1246, 1253 (10th Cir. 2007) ("[A]lthough gain may be used to determine a defendant's offense level under the Guidelines . . . it is not an appropriate estimate of loss when determining the amount of restitution . . . ."); United States v. George, 403 F.3d 470, 474 (7th Cir. 2005) ("Restitution must be based on the victim's loss rather than the offender's gain."); United States v. Badaracco, 954 F.2d 928, 942–43 (3d Cir. 1992) ("Although we have held *supra* that gross gain is a valid measure of the loss attributable to this offense for purposes of guideline sentencing, a restitution order, in contrast, must be limited to the amount of Elysian's loss as a result of Badaracco's bank fraud.").

22. *See, e.g.*, *Zangari*, 677 F.3d at 91; *Harvey*, 532 F.3d at 341; *Galloway*, 509 F.3d at 1253–54; *Badaracco*, 954 F.2d at 942–43.

23. *Compare George*, 403 F.3d at 474 ("'Loss' means direct injury, not consequential damages."); United States v. Scott, 405 F.3d 615, 620 (7th Cir. 2005) ("[M]ost (though not all) cases classify attorneys' fees incurred by a crime victim . . . as 'consequential damages' that are therefore ineligible for restitution."); United States v. Sablan, 92 F.3d 865, 870 (9th Cir. 1996) (stating that consequential expenses should be excluded from restitution order); United States v. Mullins, 971 F.2d 1138, 1147 (4th Cir. 1992) ("[A]n award of restitution under the VWPA cannot include consequential damages such as attorney's and investigators' fees expended to recover the property."); United States v. Diamond, 969 F.2d 961, 968 (10th Cir. 1992) ("Numerous courts have held the VWPA does not authorize consequential damages such as attorney's fees and expenses as part of restitution."); United States v. Sharp, 927 F.2d 170, 174

The range of harms now covered by criminal restitution has begun to reach its outer limits, as criminal restitution has become unmoored from the harms directly attributable to the defendant's conviction conduct. Having already expanded the losses for which a victim could seek compensation from economic to psychological and hedonic, the only way to increase the financial proceeds a victim can receive is to broaden the range of behaviors attributable to a defendant. In the past few years, legislators, courts, and victims have done just that, pushing the limits of what reasonably can be considered losses attributable to a defendant. As this Article will discuss further in Part III, courts now commonly order criminal restitution for acquitted conduct, conduct occurring outside the statute of limitations, and to victims not named in the Indictment. Defendants also have been ordered to pay the government for the costs of the investigation and prosecution of their own cases. In other words, if any person or any conduct is even tangentially related to a case, a court can order a defendant to pay restitution as part of criminal sentencing, even if the defendant's conviction itself did not cover that victim or conduct.

Federal courts rely on the language of the Mandatory Victims Restitution Act ("MVRA"), a federal statute enacted in 1996, as authorization for criminal restitution's new scope. The MVRA made restitution mandatory in all federal criminal cases with an "identifiable victim."[24] The MVRA also requires judges

(4th Cir. 1991) (stating that lost income should not be included in restitution order); United States v. Koenig, 952 F.2d 267, 275 (9th Cir. 1991) (explaining that a reward granted to an informant is not restitution); *and* United States v. Mitchell, 876 F.2d 1178, 1183–84 (5th Cir. 1989) (expressing that no authority under VWPA to authorize restitution for lost income or cost of employing counsel to recover losses from insurance company), *with In re* Sealed Case, 702 F.3d 59, 66 (D.C. Cir. 2012) (stating attorneys' fees subject to restitution under 18 U.S.C. § 1593 (2012)); United States v. Amato, 540 F.3d 153, 159–60 (2d Cir. 2008) (stating that restitution can include attorneys' fees, accounting costs and expenses associated with investigation or prosecution "of the offense or attendance at proceedings related to the offense"); United Sates v. DeRosier, 501 F.3d 888, 897 (8th Cir. 2007) (upholding inclusion of attorneys' fees and investigative costs as part of restitution order under MVRA); United States v. Gordon, 393 F.3d 1044, 1056–57 (9th Cir. 2004) (ruling investigative costs and attorneys' fees recoverable as restitution); United States v. Hayward, 359 F.3d 631, 642 (3d Cir. 2004) (upholding investigative costs under the MVRA); United States v. Donaghy, 570 F. Supp. 2d 411, 430 (E.D.N.Y. 2008) (finding attorneys' fees recoverable as restitution when incurred as investigation cost).

A recent federal restitution provision applicable in the context of forced labor cases requires offenders to pay ill-gotten gains *and* victim's losses. 18 U.S.C. § 1593(b)(3) (2012) (requiring a defendant to pay "full amount of victim's losses" and in addition, "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act"); *see also In re* Sealed Case, 702 F.3d at 66.

24. Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132 (codified as amended in scattered sections of 18 U.S.C.). Regardless of a defendant's ability to pay, restitution is now required not only for all crimes in which "a victim or victims has suffered a physical injury or pecuniary loss," but also for victims of sex-related and domestic violence crimes as well. *Id.* In 2000, certain drug crimes were added to the list. *See* Children's Health Act of 2000, Pub. L. No. 106-310, 114 Stat. 1230 (codified as amended at 18 U.S.C. § 3663A(c)(1)(A)(ii)). If a person leases or rents property for the purpose of manufacturing, distributing or using drugs, or makes

to order restitution for the "full amount of each victim's losses."[25] Seizing on a poorly worded paragraph of the statute, attorneys for crime victims argued convincingly that "proximate cause" between the defendant's act and the victim's loss was not required for restitution; rather, restitution could be ordered for any harm that is a "proximate result" of a crime.[26] Although the Supreme Court in *Paroline v. United States* recently rejected the "proximate result" standard, it embraced a new standard for determining the proper scope of criminal restitution.[27] Interpreting the MVRA, the Court found where "it is impossible to trace a particular amount" of a victim's losses to a defendant "by recourse to a more traditional causal inquiry," a lower court "should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."[28] A sentencing court "must assess as best it can from available evidence the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses" using "discretion and sound judgment."[29] A precise mathematical inquiry or algorithm is "neither necessary nor appropriate."[30]

With the Court's holding, it endorsed an expansive range of losses for which a defendant can be held financially responsible. Now, courts can hold a defendant accountable for an "arbitrary" amount of losses dependent on whatever the judge determines to be a defendant's "relative culpability."[31] This is in addition to defendants already being ordered to pay criminal restitution for unproven allegations, costs borne by people who are only tangentially connected to crime victims, and consequences resulting from conduct for which a defendant has been affirmatively acquitted.[32]

Even with these fundamental changes to criminal restitution, the question remains whether this conceptual shift truly transforms restitution from a restorative remedy to a punitive one. After all, the fact that restitution

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property available for any of those purposes, she can be required to reimburse the owner of the property for any damage to the property, or value of the property, caused by the making or selling of drugs there. *See id.*; *see also* 21 U.S.C. § 856.

25. 18 U.S.C. § 3664(f)(1)(A). VAWA likewise has a similarly worded restitution statute. *See id.* § 1593(b)(1) ("The order of restitution under this section shall direct the defendant to pay the victim . . . the full amount of the victim's losses.").

26. *See In re* Amy Unknown, 701 F.3d 749, 752 (5th Cir. 2012) (en banc), *overruled by* Paroline v. United States, 134 S. Ct. 1710 (2014). The Supreme Court recently decided this narrow issue: "What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or victim establish in order to recover restitution under 18 U.S.C. § 2259." Paroline v. United States, 133 S. Ct. 2886 (2013) (mem.).

27. *Paroline*, 134 S. Ct. at 1727.

28. *Id.*

29. *Id.* at 1727–28.

30. *Id.* at 1728.

31. *Id.* at 1734 (Roberts, C.J., dissenting).

32. *See infra* Part III.B.1.

historically was concerned with disgorgement does not mean it cannot now be broadened to encompass compensation.[33]

B. PUNISHMENT DEFINED

In order to identify when and how restitution is operating as punishment, judges and practitioners need a common definition of what constitutes punishment. Although one might suppose punishment is something we know when we see it, punishment's legal boundaries remain elusive. Most can agree on a basic premise—punishment is suffering or pain, often in the form of deprivation, imposed on a person by a legal authority in response to an action she committed or failed to commit—but beyond this general starting point, views diverge.[34]

Many scholars have contemplated what constitutes punishment, but despite the emergence of numerous theories, consensus remains elusive. For example, do we defer to the legislature in deciding whether an offender's action is deemed a crime requiring punishment? Do we look to the degree of

33. The issue is not solely one of language. If one solely was concerned about word choice, given that "restitution" has a particular legal meaning historically, arguably we could simply change the terminology—stop calling the monetary penalty imposed as part of criminal sentencing "restitution" and call it "victim compensation" instead. Although this would be a start, the conceptual expansion from reimbursement to punishment goes beyond a simple change in terminology. Even if we were to start calling what judges impose in the criminal context "victim compensation," this verbal slight of hand does not change the fundamental nature of the practice from punitive to restorative. Thanks to Hillary Sale and Andrew Kull for, in different ways, identifying this issue.

34. *Compare* John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009) (discussing role in adaptation), John Bronsteen et al., *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463, 1464 (2010) (noting "adaptation is relevant to punishment"), Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141 (2013) (conceptualizing punishment as "harsh treatment" subjectively experienced), Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1594, 1606 (2009) (stating that punishment consists of "liberty deprivations" and "distressing experiences" and is largely "experiential" and subjective), *and* Adam J. Kolber, *The Subjective Experience of Punishment,* 109 COLUM. L. REV. 182, 184–87 (2009) (claiming punishment should "take subjective experiences into account"), *with* Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 578 n.1 (2012) (stating punishment includes "all legally facilitated responses driven by moral outrage"), Vincent Chiao, *Punishment and Permissibility in the Criminal Law*, 32 LAW & PHIL. 729, 732 (2013) (measuring punishment by the objective impact on fundamental interests), David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1664 (2010) ("[P]unishment is the objectively determined, logical consequence of a crime imposed upon an offender by the state."), Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2483 (1997) ("By selecting an affliction of the appropriate form and severity, the community expresses condemnation of the wrongdoer and reaffirms its commitment to the values that the wrongdoer's own act denies."), Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 911 (2010) (asserting that punishment is the "attempt to communicate to the offender society's condemnation by means of a deprivation of an objective good"), *and* Dan Markel et al., *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605, 612–13 (2011) (conceptualizing punishment as "the communication of censure to the offender . . . through coercive deprivations" that are "objectively viewed and understood as undesirable").

suffering and pain experienced by an offender at the hands of the state, regardless of legislative intent, in determining whether a sanction constitutes punishment? How do we decide what counts as "suffering" or "pain"? Should we change the punishment given to a particular offender based on how she experiences "pain" or "suffering" given her unique personal characteristics and circumstances, or should it be one size fits all? These questions continue to inspire debate. Courts usually defer to legislative intent to answer these questions, whereas legal scholars approach the answers to these questions in widely varying ways. Yet without some consensus as to what constitutes punishment, it is impossible to assess whether restitution is being utilized punitively.

This Article offers a new definition of punishment, one that acknowledges the increasingly punitive nature of many previously "neutral" criminal responses, of which restitution is but one.[35] The definition around which this discussion centers is a state action subsequent to a criminal allegation, resulting in a substantial deprivation and/or obligation, and imposed: (1) pursuant to a statute that reveals morally condemnatory intent; (2) pursuant to a statute with unclear intent, but applied in a consistently condemnatory manner; or (3) with the effect of substantially diminishing a person's well-being as a result of the vengeance and moral condemnation communicated by the state action. Relying on this definition, this Part will explain why criminal restitution is punishment.

1. Deprivations and Obligations

Most conceptualizations of punishment start with deprivation,[36] either of something specific—some "good," such as liberty or money—or of certain "rights," such as freedom of movement and earning ability. For example, John Rawls asserted, "a person is said to suffer punishment whenever he is legally

35. Although this Article is grounded in one particular definition of punishment, endorsement of this particular view of punishment is not essential to accepting the conclusion that restitution is being utilized as punishment. Even under other prevailing definitions of punishment, criminal restitution is punitive: Judges impose restitution in order to communicate both condemnation of the offender's action and acknowledgement of the harm experienced by the victim. *See, e.g.*, Kahan, *supra* note 34, at 2483, Markel et al., *supra* note 34, at 612–13. Criminal restitution is the "objectively determined, logical consequence of a crime imposed upon an offender by the state." *See, e.g.*, Gray, *supra* note 34, at 1664. Many people would experience a court ordering them to pay money, especially money they never unlawfully gained and may never have had, to another as a form of suffering, a subjectively distressing experience. *See, e.g.*, Kolber, *The Comparative Nature of Punishment*, *supra* note 34, at 1594, 1606. Under most prevailing conceptions of punishment, criminal restitution, as it has been applied in the past 30 years, constitutes punishment.

36. *See, e.g.*, Kolber, *The Comparative Nature of Punishment*, *supra* note 34, at 1585; *see also* Andrew von Hirsch, *Seriousness, Severity, and the Living Standard*, *in* PRINCIPLED SENTENCING 185, 189 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955).

deprived of some of the normal rights of a citizen."[37] Andrew von Hirsch conceptualized punishment as limiting a person's "freedom of movement, earning ability, and so forth."[38] J.D. Mabbott described punishment as depriving from the recipient "something desired" or "something they would like to retain."[39] According to Mabbott, punishment is "deprivation of a good . . . . Imprisonment and fine are deprivations of liberty and property. The death sentence is deprivation of life . . . ."[40]

Punishment, however, goes beyond tangible, corporeal deprivations. The stigma associated with having a criminal conviction is a punishment that usually lasts much longer than more palpable deprivations. Social scientists studying the effects of criminal convictions and incarceration consistently find that, for the average person, the "punishment" of a criminal conviction extends far beyond the official, court-imposed sentence.[41] Being branded a "criminal" carries broad, indefinite, and quantifiable ramifications.[42] Although judgment and commitment orders do not articulate this aspect of punishment in their official documentation of a person's criminal sentence, a person with a criminal conviction continues to be both legally and practically "deprived of some of the normal rights of citizens"[43] long after her criminal sentence ends. Those additional, often life-long deprivations may include tangible deprivations, such as continued disenfranchisement and the removal of employment opportunities otherwise available.[44] But they likely also encompass more intangible deprivations, such as denial of friendships and romantic relationships that otherwise might have been pursued but for the others' view of the defendant's criminal conviction,[45] diminishment of a

37. Rawls, *supra* note 36, at 10.

38. von Hirsch, *supra* note 36, at 189.

39. J.D. Mabbott, *Professor Flew on Punishment*, 30 PHIL. 256, 257–58 (1955).

40. *Id.* at 257.

41. The same can also be said of the ramifications from being civilly committed as a result of past behavior.

42. *See, e.g.*, Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996); *cf.* John Bronsteen et al., *Happiness and Punishment*, *supra* note 34, at 1049–55 (discussing long-term effects of prison on well-being).

43. *See* Rawls, *supra* note 36, at 10.

44. DEVAH PAGER, MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION 32–35 (2007); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 120–25 (2006); Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQ. 410, 412 (2001).

45. WESTERN, *supra* note 44, at 146–47; Beth M. Huebner, *The Effect of Incarceration on Marriage and Work over the Life Course*, 22 JUST. Q. 281, 296 (2005); Leonard M. Lopoo & Bruce Western, *Incarceration and the Formation and Stability of Marital Unions*, 67 J. MARRIAGE & FAM. 721, 721 (2005); Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 117 (2007); *see also* VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 30 (2011) ("[Punishment] destroys and hinders the development of relationships between the offender and his family and friends, many of whom will feel ashamed and distressed at the punishment of the offender.").

person's mental and physical health because of the emotional and physical toll of incarceration, and the stigma of having been identified and sanctioned as a "criminal."[46] For most, these life-long deprivations are every bit as real a part of the punishment as the technical sentence imposed by a judge in a criminal case.

Although these deprivations are rooted in the criminal conviction, they likewise attach to every requirement imposed on a defendant as part of her criminal sentence, including criminal restitution. A restitution debt imposed as part of a criminal sentence is visibly marked as a criminal punishment by its presence on a judge's Judgment and Commitment Order, and it, in turn, continues to mark the person owing restitution as a "criminal." A criminal restitution order can remain outstanding even after every other aspect of a criminal sentence has been completed, and it alone can be the source of a person's continued disenfranchisement or failure to obtain certain employment opportunities. Criminal restitution is a continuing, weighty consequence bearing down on the convicted defendant and depriving her of "some of the normal rights of citizens."[47]

Undisputedly, then, deprivation is at the heart of punishment. Punishment, however, can also involve obligations. Under the Law of Obligations in the civil law system, an obligation is a "legal tie which binds [a person] to the necessity of making some performance in accordance with the laws of our state."[48] In essence, an obligation is a personal duty created by an individual's wrongdoing.[49] Although the common law system has not adopted a similar formal legal structure, obligations are present here, too. For example, conditions of probation and supervised release imposed as a part of a criminal defendant's sentence often require defendants to *do* certain things, such as regularly meet with a probation or parole officer, participate in group counseling, submit to scheduled and random drug testing, complete community service, find and keep a job, among others.[50] Likewise, making restitution payments is another legally created personal duty, imposed by a

46. Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. HEALTH & SOC. BEHAV. 56, 57 (2008); Michael Massoglia, *Incarceration, Health and Racial Disparities in Health*, 42 L. & SOC'Y REV. 275, 296 (2008); Schnittker & John, *supra* note 45, at 125. The decline in physical health begins once someone serves a period of incarceration of 12 months, and continues beyond their release from prison. Massoglia, *Incarceration as Exposure*, *supra*, 60, 66–67.

47. *See* Rawls, *supra* note 36, at 10.

48. Peter Birks, *Definition and Division: A Meditation on* Institutes *3.13*, *in* THE CLASSIFICATION OF OBLIGATIONS 1, 6 (Peter Birks ed., 1997) (citing J. INST. 3.13).

49. *Id.* at 8.

50. In discussions about the ever-expanding reach of the carceral state, some scholars have classified what this author terms legal "obligations" as "burdens" imposed by society on a person recently released from jail, intended to "permanently exclude [them] from mainstream civil and political society" and subject them to perpetual "state control . . . achieved through probation, parole or other forms of monitoring." Dolovich, *supra* note 6, at 283.

judge at sentencing, and obligating a defendant to "perform," by coming up with the income and making the required payments.

In fact, the civil law system has long considered restitution, in its original guise, to be an obligation.[51] When a person's wrongdoing leads to her unjust enrichment, this unlawful gain creates the resulting monetary obligation of restitution.[52] As such, a party's unjust enrichment is a "right-generating" event, a wrongdoing that entitles the wronged party to seek restitution.[53]

Restitution under the Law of Obligations, however, is located in the realm of private law, where the obligations arise between two private parties, not in the public realm, where the obligation inures to the government.[54] Modern criminal restitution relocates this obligation, this personal duty, in the public realm of criminal law. A defendant's crime creates a restitution obligation she owes to the crime victim, but the state, during a criminal hearing, pursues payment and enforcement of this obligation, as part of the punishment imposed for the defendant's wrongdoing. In other words, the legal obligation—the victim compensation—the state seeks and the court orders at a criminal sentencing bind the defendant to the state or federal government. The displacement of this civil law obligation into the criminal process transforms criminal restitution into something more than just an obligation requiring the yield of unlawful gains to a different entity; rather, criminal restitution becomes a binding obligation between the defendant and the state intended to communicate moral condemnation, placing it squarely under the auspices of punishment.

As a result, punishment can involve either a legally imposed deprivation or a legally imposed obligation.

2. Presence in a Criminal Proceeding with Moral Judgment Attached

In every case of what this author considers punishment, the state at least alleges that the person being punished has committed a criminal act. In some cases, courts impose punishment directly in response to a conviction in a criminal case, or the violation of a criminal court's order of probation or supervised release. But in other cases, classified as civil, the allegation that someone has broken a criminal law always lingers. The example of civil commitment is fairly obvious: statutes authorizing the indefinite commitment of someone deemed sexually dangerous come with prior allegations of criminal conduct.[55] Pretrial detention only comes about because someone has

51. Peter Birks, *Misnomer*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 1, 2–5 (W.R. Cornish et al. eds., 1998).

52. *Id.* at 12, 15.

53. *See, e.g.*, William Swadling, *What is the Law of Restitution About? Four Categorical Errors*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 331, 331 (W.R. Cornish et al. eds., 1998).

54. Birks, *supra* note 51, at 9.

55. *See, e.g.*, FLA. STAT. ANN. § 394.913 (West 2012) (authorizing petition for civil commitment for a person who has been convicted of a sexually violent offense in Florida or

been arrested for and accused of committing a crime. Deportation often arises because someone has broken the law of entering the country without legal authorization, a federal crime.[56] And, of course, criminal restitution is only imposed subsequent to some type of criminal conviction.[57] Whether the allegation of criminal activity results in a criminal conviction is not the critical inquiry, nor is whether the allegation was recent or in the distant past. All that is required is the allegation of criminal conduct—the stigma of moral condemnation that, once attached, is almost impossible to shake off.

State action also remains a critical component of punishment. The role of the state is linked to—but distinct from—whether the penalty is imposed as part of a criminal proceeding. It is a basic tenet of criminal law that the state or federal government is the party bringing the action in a criminal case, and the offense for which one receives punishment is, at its core, an offense against the general public, as opposed to an action between private parties. Although crime victims are sometimes present and often represented by counsel,[58] the government is still the only party to the case, other than the defendant(s),[59] and, procedurally, the prosecutor requests restitution. Thus,

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another state); MINN. STAT. §§ 253D.09, 609.1351 (2013) (authorizing determination of whether civil commitment appropriate for those convicted of sexual offenses at time of sentencing hearing in criminal case or upon petition from commissioner of corrections); NEB. REV. STAT. § 83-174.02 (2006) (requiring evaluation for civil commitment of individuals convicted of committing certain sexual offenses); N.J. STAT. ANN. §§ 30:4-27.26, 30:4-82.4 (West 2014) (requiring evaluation for civil commitment of individuals convicted of committing, or being found not guilty by reason of insanity, certain sexual offenses); TEX. HEALTH & SAFETY CODE ANN. § 841.003 (West 2013) (authorizing civil commitment for those who have committed more than one sexually violent offense, as determined by a finding of guilt after trial or plea, or a finding of not guilty by reason of insanity).

56. *Compare* 8 U.S.C. § 1227 (2012) (declaring any person who violates the Immigration and Nationality Act deportable), *with id.* § 1325 (criminalizing unlawful entry to the United States at a time or place other than those designated by immigration officers), *and id.* § 1326 (criminalizing unlawful re-entry to the United States after prior denial of admission, deportation, exclusion or removal).

57. Although, criminal restitution is not always imposed for harms stemming from the offense of conviction. *See infra* Part III.B.1.

58. Those victims who end up appealing are among those who have actually retained their own counsel and therefore, are represented. Although it is probable that many crime victims are not represented by counsel, the laws that are being created with the assistance of crime victims' lawyers apply to and benefit all crime victims, represented or not.

59. Recently, attorneys for crime victims have been pushing courts to grant them standing to intervene in criminal cases. *See* United States v. Fast, 709 F.3d 712, 714 (8th Cir. 2013); *In re* Amy Unknown, 636 F.3d 190, 195 (5th Cir. 2011); United States v. Monzel, 641 F.3d 528, 540 (D.C. Cir. 2011). At least one circuit has found that, under the Crime Victims' Rights Act, victims may appeal the adjudication of petitions for rehearing and motions for reconsideration. *In re* Fisher, 649 F.3d 401, 404–05 (5th Cir. 2011); *see also* 18 U.S.C. § 3771 (enumerating certain rights crime victims possess). Another circuit has allowed victims to seek judgment liens based on restitution orders. *See* United States v. Perry, 360 F.3d 519, 524 (6th Cir. 2004) (citing 18 U.S.C. § 3664 (m)(1)(B)).

But, generally, victims still are not likely to be granted standing in criminal cases. *See* Marino v. Ortiz, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly

courts impose restitution as part of a criminal sentence due to state action. Punishment, including the imposition of criminal restitution, requires the deprivations and obligations to have been imposed subsequent to a defendant's criminal act and as the result of state action.

3. What Distinguishes Punishment from a Civil Remedy

Although state action is essential to criminal punishment, the presence of state action does not inherently make a proceeding criminal. State action resulting in legal deprivations and obligations also occurs in cases undisputedly civil in nature. In fact, one might easily argue that restitution imposed in a criminal sentencing hearing is still a civil proceeding simply transported into a criminal case, thereby taking it out of the realm of punishment and keeping it compensation. Judge Richard Posner, of the Seventh Circuit, has expressed this opinion. "Functionally, the Mandatory Victims Restitution Act is a tort statute," he wrote in a 1999 case.[60] "The Act enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution."[61] Thus there has to be something more than a state-sanctioned deprivation or obligation for a remedy to constitute punishment.

The scaffolding this Article utilizes to distinguish a civil sanction from criminal punishment expands on the framework the Supreme Court laid out in *Hudson v. United States*.[62] In *Hudson*, the Court instructed lower courts to inquire first as to whether the legislature "indicated either expressly or impliedly a preference for one label [criminal or civil] or the other."[63]

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become parties, may appeal an adverse judgment, is well settled."); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."); United States v. Slovacek, 699 F.3d 423, 427 (5th Cir. 2012) ("The question of who may appeal remains governed by the principle that nonparties generally lack the capacity to appeal."); United States v. Mindel, 80 F.3d 394, 397–98 (9th Cir. 1996) (finding that Congress did not intend to give victims a private right to sue or to appeal restitution decisions); United States v. Johnson, 983 F.2d 216, 217 (11th Cir. 1993) (holding that crime victims do not have standing to appeal a district court's recission of a criminal restitution order); United States v. Brown, 744 F.2d 905 (2d Cir. 1984) (noting that victims are not party to sentencing hearings). Precedent continues to be against permitting third parties to intervene in criminal cases. S*ee, e.g.*, United States v. Alcatel-Lucent France SA, 688 F.3d 1301, 1307 (11th Cir. 2012) (holding that a third party company does not have standing to appeal court's order denying victim status and restitution); United States v. Stoerr, 695 F.3d 271, 281 (3d Cir. 2012) (holding that a third party, the defendant's employer, does not have standing to appeal after voluntarily reimbursing victim for losses and being denied restitution from defendant on the grounds that third party is not a crime victim); *In re* Fisher, 649 F.3d 401, 405 (5th Cir. 2011) (denying a developer status as a victim and standing to pursue direct appeal under Crime Victims' Rights Act).

60. United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999).

61. *Id.*

62. Hudson v. United States, 522 U.S. 93 (1997).

63. *Id.* at 99 (quoting United States v. Ward, 448 U.S. 242, 248 (1980)).

According to the Court, "only the clearest proof" can override legislative intent.[64] In very rare instances, despite a legislative assertion of a penalty's civil character, courts still may deem a sanction to be punishment after analyzing the second prong: whether the statutory scheme is "so punitive either in purpose or effect" as to transform it into a criminal penalty.[65] To determine a statute's punitive "purpose or effect," the Court provides seven guideposts from a 1963 case, *Kennedy v. Mendoza-Martinez*:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[66]

Surprisingly, only one circuit court has employed the Court's test in considering whether criminal restitution falls on the criminal or civil side of the ledger.[67]

Although the *Hudson–Mendoza-Martinez* framework provides the starting point for the discussion in the next Subpart, the approach this Article advocates quickly diverges from the Supreme Court's. The Court's test gives incredible deference to legislative intent, as the "clearest proof" to override such intent indicates. As a result, after applying the *Mendoza-Martinez* test, the Supreme Court has never found a civil sanction sufficiently punitive in "purpose or effect" to be criminal punishment. The circuit courts have only rarely made such a finding.[68] Thus, the seven guideposts are a fairly ineffective

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64. *Id.* at 100 (quoting *Ward*, 448 U.S. at 249).

65. *Id.* at 99 (quoting *Ward*, 448 U.S. at 248–49).

66. *Id.* at 99–100 (alteration in original) (internal quotation marks omitted) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

67. United States v. Newman, 144 F.3d 531, 540 (7th Cir. 1998). *But see* United States v. Estate of Parsons, 367 F.3d 409, 424–25 (5th Cir. 2004) (Dennis, J., dissenting) (citing the *Mendoza-Martinez* test in support of finding criminal restitution under MVRA not punishment); United States v. Edwards, 162 F.3d 87, 90 n.5 (3d Cir. 1998) (noting the *Hudson* test, but relying on a different circuit-created test).

Likely this failure to apply the *Hudson* test is due to courts finding conclusive proof of the VWPA and MVRA's intended purpose, allowing them to avoid reaching the seven factors. *See Mendoza-Martinez*, 372 U.S. at 169 ("Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face."). Yet the fact that different circuits have reached different conclusions as to the statutes' intent suggests the inquiry is not so clear cut.

68. As of 1998, no circuit court had found a civil sanction sufficiently punitive in effect to render it punishment. *Cf.* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1282 (1998) (describing how the Supreme Court, as of

mechanism for challenging a legislature's determination of a statute's impact. Not only does the Court's framework make the effects inquiry inconsequential, it gives no consideration to how a statute might operate in application. The legislature might not have intended a statute to be punitive, but, as a separate question from the effects of a statute, if judges habitually *apply* the sanction as punishment, the law should allow for some consideration of that punitive application as well.

Rather than utilizing the guideposts laid out in *Hudson–Mendoza-Martinez*, the inquiry below weighs each of three attributes—intent, application, and effects—equally. Each of these attributes leads a remedy to be criminal punishment when combined with the other factors already delineated: a state action subsequent to a criminal allegation, resulting in a substantial deprivation and/or obligation.

a. Legislative Intent

Sometimes, legislative intent determines whether a remedy is punishment. In fact, as indicated, the Supreme Court has identified legislative intent as the key to determining whether a particular remedy should be considered punishment. The Court explained in *Trop v. Dulles*:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it

1998, "[had] yet to brand a nominally civil sanction as criminal pursuant to the *Mendoza-Martinez* factors"). In a review of several hundred cases published since that time, this author found only five instances where a circuit court concluded or even suggested that a statute is sufficiently punitive in effect to deem it criminal rather than civil. Of the five, the Supreme Court vacated two decisions, disagreeing with the results the circuit courts reached after applying *Hudson*, and two other decisions relied in large part on Supreme Court case law pre-dating *Hudson* and applicable only in the tax context. *See* Mont. Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 783 (1994) (finding a tax on seized illegal drugs to "depart[ ]so far from normal revenue laws as to become a form of punishment"); *see also* United States v. Juvenile Male, 590 F.3d 924, 941 (9th Cir. 2010) (determining that retroactive application of Montana's juvenile sex offender registry statute violated the Ex Post Facto Clause after finding "clearest proof" that the statute was punitive in effect), *vacated*, 131 S. Ct. 2860 (2011); Moyer v. Alameida, 184 F. App'x 633, 640 (9th Cir. 2006) (declining to ultimately decide the issue, the court found that imposition of a fee on prisoners whose prison wages and trust account deposits are garnished to pay off restitution fines might be punitive under the effects test); Dye v. Frank, 355 F.3d 1102, 1107 (7th Cir. 2004) (relying partly on *Kurth Ranch* in finding drug tax so punitive in purpose and effect that it violated Double Jeopardy Clause); Doe I v. Otte, 259 F.3d 979, 993–95 (9th Cir. 2001) (finding Alaska's Sex Offender Registration Act punitive in effect and its application a violation of the Ex Post Facto clause), *reversed sub nom.* Smith v. Doe, 538 U.S. 84 (2003); Lynn v. West, 134 F.3d 582, 592 (4th Cir. 1998) (relying partly on *Kurth Ranch* in finding drug tax so punitive in effect to be a criminal penalty).

> imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[69]

Punitive intent can be helpful in determining whether a court-ordered, state-sanctioned deprivation or obligation, such as restitution, amounts to criminal punishment. Most of the time, if a legislature clearly articulates that it intends a particular deprivation or obligation to be punitive in nature, there is little question that the resulting sanction is punishment. The expression of vengeance, condemnation, and moral blameworthiness in statutory language is specific to the realm of criminal law and signals that punishment will be the remedy for the action in question. Even when legislative history does not contain explicit reference to "punishment" or "retribution," it is often clear from the broader conversations leading to a statute's passage that a deprivation or obligation is being considered in order to communicate a strong message of vengeance, moral condemnation, and blameworthiness to the person who has committed a particularly heinous and offensive action. When coupled with the desire to impose some type of harm on a person to "make them pay" for the act, or omission, they have committed, this moral condemnation reveals an intent to punish the person found to have committed such offenses.

Legislatures crafted modern criminal restitution statutes with a punitive, as well as a compensatory, intent. In writing the law that first made restitution a regular aspect of federal criminal proceedings,[70] Congress made clear its intent for restitution to be a compensatory mechanism that allowed a defendant to "make personal recompense to his victim" while also being a punitive mechanism requiring him to "pay his debt to society."[71] Eight years later, then-Senator Joseph Biden introduced a bill—that later became the Violence Against Women Act of 1994 ("VAWA")—which included language mandating restitution for victims of sex-related and domestic violence crimes.[72] Reflecting on the dual purposes behind the inclusion of the criminal restitution provision, he offered this summary, "[T]here are two parts to this equation. One is get the bad guy and punish the bad guy. The second is take the victim and try to restore them."[73] Finally, with the passage of the MVRA in 1996, the Senate announced its aim "to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due," as well

69. Trop v. Dulles, 356 U.S. 86, 96 (1958).

70. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C. and FED. R. CRIM. P. 32(c)(2)).

71. B.S. Yamey, *Reports of Committees: Compensation for Victims of Crimes of Violence*, 24 MOD. L. REV. 744, 744 (1961).

72. *Domestic Violence Is Target of Bill*, N.Y. TIMES (Dec. 16, 1990), http://www.nytimes.com/1990/12/16/us/domestic-violence-is-target-of-bill.html (discussing Senator Biden's proposed Violence Against Women Act).

73. 140 CONG. REC. S121 (daily ed. Aug. 22, 1994) (statement of Sen. Joseph Biden).

as "to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society."[74]

Thus, from a legislative-intent perspective, modern restitution statutes reveal at least some morally condemnatory, punitive intent. The statutes aim to "punish the bad guy" and "ensure that the offender realizes the damage caused by the offense" through criminal restitution. Although Congress also expressed compensatory goals, punishing the offender for her actions was an essential aim of these statutes.

Yet the results of the legislative-intent inquiry are not always convincing, especially in light of the deference given to legislative labeling. Take, for example, the indefinite and involuntary commitment of individuals deemed sexually violent after their criminal sentences are complete. The Supreme Court has defined the commitment as a civil remedy, intended to protect the public from the potential future dangerousness of a "sexually violent predator." In making this determination, the Supreme Court looked to legislative intent.[75] According to the Court, the Kansas statute at issue in the seminal case, *Kansas v. Hendricks*, is aimed at those "who are unable to control their behavior and who thereby pose a danger to the public health and safety."[76] Because (1) the commitment "does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence;" (2) the statute does not have a "scienter requirement" marking it as a criminal statute;[77] and (3) the state "disavowed any punitive intent,"[78] the Court uncritically accepted the legislative labeling and concluded the state-sought deprivation is civil in nature. Although the Court noted that the individual must have "past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated,"[79] the Court concluded the statute's intent in indefinitely detaining someone classified as sexually dangerous is not punishment.[80] Many would challenge this conclusion, but looking solely to what is on record as to the legislative intent, the Court's finding seems inevitable. Thus, at times,

74. S. REP. NO. 104-179, at 12 (1995). Most state statutes also were created with dual purposes: compensation and punishment, sometimes with rehabilitation as an added goal. *See, e.g.*, Scott Peterson, *Court-Ordered Criminal Restitution in Washington*, 62 WASH. L. REV. 357, 359 & n.15 (1987); *see also* OKL. ST. tit. 22, § 991f(A)(1) (2014) (authorizing criminal restitution to "compensate [the] victim for up to three times the amount of the economic loss suffered as a direct result of the criminal act of the defendant").

75. Professor Wayne Logan has challenged the Court's approach to answering the "punishment" question in *Kansas v. Hendricks*, 521 U.S. 346 (1997), arguing it was inconsistent with the Court's other Ex Post Facto jurisprudence, precedent that was markedly absent from the Court's analysis. *See* Logan, *supra* note 68, at 1286–88.

76. *Hendricks*, 521 U.S. at 357.

77. *Id.* at 361–62.

78. *Id.* at 368–69.

79. *Id.* at 357–58.

80. *Id.* at 368–69.

Courts rely on fairly unconvincing assertions of legislative intent to determine whether a deprivation constitutes punishment or something else.

However, in the context of criminal restitution, legislative intent reveals it is punishment, under the first prong of the definition: a state action subsequent to a criminal allegation, resulting in a substantial deprivation and/or obligation, and imposed pursuant to a statute that reveals morally condemnatory intent.

b. Retributive Application

Even if a legislature does not affirmatively indicate its intent for a statute to be punitive, this silence should not end the punishment inquiry. Sometimes a statute with unclear intent still amounts to punishment when courts apply it in a consistently condemnatory manner. For those who might find the intent of the primary federal restitution statutes ambiguous, due to the dual purposes expressed, evaluating criminal restitution under the second approach might seem more appropriate. Despite what might be characterized as conflicting intents, the consistent application of criminal restitution statutes in a manner intended to communicate moral condemnation also marks restitution as punishment.

As previously discussed, when criminal restitution is measured by a victim's loss and expanded to compensate a broader range of harms, including emotional, psychological and hedonic harms, it becomes much more difficult to calculate the appropriate amount of restitution. The harms are less tangible and often the connection to the defendant less clear. As a result, instances reveal that courts calculate and impose restitution in a vengeful, morally condemnatory way.[81]

Assuming *arguendo* the legislature intended criminal restitution to be primarily compensatory, it would seem to be axiomatic, even under an approach that measures loss, not gain, that the judge imposing restitution know with some specificity for what losses a particular defendant is responsible, and therefore, what amount of money will reimburse the victim for those losses. In a criminal system, a concrete, reliable method should be required for determining the amount of harm a particular defendant caused, so the defendant will know in advance what amount she will need to pay to compensate the victim for the losses associated with that particular offense.[82]

81. *See infra* notes 83, 93 and accompanying text.

82. The recent proposal by Senators Orrin Hatch and Charles Schumer, although setting a consistent amount of "restitution" owed, does not actually accomplish this aim. *See* Amy and Vicky Child Pornography Victim Restitution Improvement Act of 2014, S. 2301, 113th Cong. (2d. Sess. 2014), *available at* http://www.hatch.senate.gov/public/_cache/files/010a57e1-b38f-485a-9c05-0a39fa03b69c/Amy%20and%20Vicky%20Act%20-%20circulation%20draft.pdf; 160 CONG. REC. S2798–99 (daily ed. May 7, 2014). Under the Senators' proposal, defendants convicted of a child pornography offense would be required to pay either the "full amount" of a victim's restitution, or a minimum of $25,000 to each victim of child pornography. *See* S. 2301, § 3. Although the amount would be the same in every case, there remains an absence of correlation between the harms caused

Otherwise, judges would seem to be arbitrarily imposing restitution with no correlation to the specific losses claimed or the particular defendant being sentenced. Yet a closer look at how criminal restitution is being imposed in at least one context reveals the lack of a concrete or consistent methodology for calculating restitution, and the subtle opening that arbitrariness provides for moral condemnation to slip in to criminal restitution decisions.

To date, the consistent application of criminal restitution statutes in a morally condemnatory manner has occurred primarily in the context of child pornography cases.[83] In 2008, victims of child pornography began to seek restitution from individuals convicted of viewing and trading their images. The defendants were not individuals with whom the victims ever had contact, and most of the time, the victims were not specifically aware that these offenders had viewed their images until the court system notified them. But because restitution is now being measured by a victim's loss rather than the defendant's gain, courts began granting child pornography victims' restitution requests for losses with an attenuated nexus to the defendant's conduct.

According to the restitution claims submitted, victims suffer new harm due to the continued circulation of their image on the Internet, and therefore, they seek restitution from all individuals who view the pornography in which they are depicted. The most prominent child pornography victim to seek compensation has sought upward of $3 million from hundreds of defendants convicted of possessing or receiving images of her. This $3 million amount consists of future lost wages to the age of 65 (she is in her early 20s now), mental health treatment to the age of 81, expert witness fees, and attorneys' fees. A second victim has sought a little over $1 million per case, to cover tuition payments, lost income for delayed entry into the work force, rehabilitation counseling for education and career planning, future lost earnings, future psychological counseling, and attorneys' fees.[84] Several other child pornography victims have begun to seek restitution as well.

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by a particular defendant and the amount this bill would require the defendant to pay. In essence, this bill simply allows for the imposition of a version of a pre-set, hefty criminal fine, paid to the victim rather than the government. *See* Cheryl Wetzstein, *Bill Would Address Supreme Court Ruling on Porn Victims*, WASH. TIMES (May 7, 2014), http://www.washingtontimes.com/news/2014/may/7/bill-would-address-supreme-court-ruling-porn-victi.

83. Other examples have begun to arise, especially in the securities fraud context. *See, e.g.*, Brief of Petitioner-Appellant at 8–9, Gushlak v. United States, No. 13-939 (2d Cir. Feb. 3, 2014) (noting district court ordered $17.5 million restitution to multimillionaire based on government regression model that, his lawyers argue, failed to take causative factors into account); Mitchel Maddux, *Con's 'Poor' Excuse*, N.Y. POST (Mar. 5, 2012, 5:00 AM), http://nypost.com/2012/03/05/cons-poor-excuse (discussing "disgraced" "con man" Myron Gushlak who "blew millions of dollars" and "stuck it to his victims one last time").

84. Brief of Appellant app. 2 at 143–44, United States v. Crawford, 2011 WL 6018374 (6th Cir. Aug. 23, 2011) (No. 11-5544).

In an approach now endorsed by the Supreme Court,[85] numerous judges in state and federal courts across the country have granted these restitution requests, using a range of approaches to determine the quantity of a victim's losses attributable to a particular defendant.[86] To determine the amount of a victim's loss, judges have engaged in a significant amount of "fudg[ing]," in the words of one government lawyer.[87] Most judges who have awarded restitution in possession and distribution of child pornography cases have authorized amounts ranging from $1000 to $6000—usually based on less-than-precise judicial calculations as to the intangible emotional harm a particular defendant has caused, and will cause, by his possession or distribution of the images, whether the victim knew this defendant possessed her image or not.[88]

Weighing in on this approach, the Supreme Court embraced the looseness in how lower courts determine restitution, declining to require trial judges to determine with any specificity the amount of restitution owed. Neither the criminal restitution statute nor any court has come up with an endorsable method of quantifying the amount of harm attributable to any given defendant. Some of the approaches adopted include determining the amount of restitution based on the number of images found, the number of defendants arrested (a number that continues to change), or whether the

85. United States v. Paroline, 134 S. Ct. 1710, 1728 (2014) ("There are a variety of factors district courts might consider in determining a proper amount of restitution, and it is neither necessary nor appropriate to prescribe a precise algorithm for determining the proper restitution amount at this point in the law's development. . . . [D]istrict courts might, as a starting point, determine the amount of the victim's losses . . . then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant's conduct in producing those losses. These could include the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved. . . . These factors need not be converted into a rigid formula . . . [but] should rather serve as rough guideposts for determining an amount that fits the offense.").

86. At least three district court judges simply ordered restitution in the full $3 million-plus amount requested by one victim, without attempting to parse out for what portion of harm or losses the particular defendant in that case might be responsible. United States v. McGarity, 669 F.3d 1218, 1270–71 (11th Cir. 2012) (vacating district judge's restitution order of $3,263,758); United States v. Staples, No. 09-14017-CR, 2009 WL 2827204(S.D. Fla. Sept. 2, 2009) (ordering defendant to pay restitution in full $3,680,153 amount); *see also* Mark Reagan, *Hedrick's Sentence: 30 Years in Prison*, BROWNSVILLE HERALD (Dec. 20, 2012, 10:43 AM), http://www.brownsvilleherald.com/news/local/article_63e7ea3a-4a5c-11e2-8370-001a4bcf6878.html (discussing Southern District of Texas's imposition of $3,388,417 order in Amy's favor in the case of *United States v. Hedrick*). However, the Supreme Court rejected this "all or nothing" approach in its recent *Paroline* decision. *Paroline*, 134 S. Ct. at 1721, 1726, 1727.

87. Transcript of Oral Argument at 32, *Paroline*, 134 S. Ct. at 1728 (No. 12-8561) (describing how one court employed a "fudge factor" in calculating restitution).

88. Tim McGlone, *Victim of Child Porn Wants Viewers to Pay*, VIRGINIAN-PILOT, Oct. 25, 2009, at A6; *see also* Lollar, *supra* note 17, at 365; *infra* Part III.B.2.

defendant has sold or otherwise distributed the images.[89] Courts are emboldened to guess at the amount of harm caused by a defendant's action, and order an amount of money that they deem appropriate. As a result of this ad hoc approach, the amount of criminal restitution courts impose is, in many cases, only tangentially related to specific, articulable losses the victims of crime claim. Certainly the assertion that courts are measuring restitution by "actual losses" is questionable at best. The harms are intangible and the number of potential viewers incredibly difficult to pin down.[90]

Beyond just being a sloppy approach, closer inspection of judicial opinions reveals courts have ordered viewers and traders of child pornography to pay restitution in order to punish them for the illicit pleasure they received at the expense of victims of child sexual abuse. As the Court noted in *Paroline*, "one reason to make restitution mandatory for crimes like this is to impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims."[91] Restitution punishes the defendant for the fact that child pornography continues to circulate against the victim's wishes, and on some level, for the fact that as a society, we want to

89. The difficulty in ascertaining how to best resolve this question was apparent during the oral argument before the Supreme Court in *Paroline*, Transcript of Oral Argument at 34, 45, *Paroline*, 134 S. Ct. 1710 (No. 12–8561), as well as in the Court's opinion, *Paroline*, 134 S. Ct. at 1728, 1729. A victim's lawyer was arguing that every defendant should be required to pay the entire full amount of losses requested by the victim. Transcript of Oral Argument at 34, 45, *Paroline*, 134 S. Ct. 1710 (No. 12-8561). Defense counsel argued that there was insufficient ability to ascertain the linkage between his client's conduct and the precise harm to the victim to order any restitution. *Id.* at 5. And the government, repeatedly pressed by the Court to give a workable formula for calculating criminal restitution in these cases, could only say it should be somewhere in between. *Id.* at 22–27, 29–30, 32–33.

Subsequent to the Court's recent decision in *Paroline*, most federal district courts have adopted an approach previously endorsed by several judges and prosecutors around the country. *See, e.g.*, United States v. Hagerman, No. 5:10-CR-0462 (GTS), 2011 WL 6096505, at *14 (N.D.N.Y. Nov. 30, 2011) (calculating that "approximately 146 defendants, including this Defendant, have been successfully prosecuted for unlawfully possessing or receiving the 'Vicky' series," and determining the defendant's restitution amount by dividing the total amount the victim requested by 146). This approach takes the number of defendants currently convicted of having possessed pornographic images featuring the victim and divides the amount the victim has requested by that number. *See* United States v. Galan, No. 6:11-CR-60148 (AA), 2014 WL 3474901, at *6–7 (D. Or. July 11, 2014); United States v. Hernandez, No. 2:11-CR-00026 (GEB), 2014 WL 2987665, at *8 (E.D. Ca. Jul. 1, 2014). In an effort to take into consideration the untold number of individuals who have viewed, possessed or distributed a victim's image but not yet been arrested or prosecuted, at least one judge has made the assumption that the number of people "caught, convicted, and ordered to contribute to the payment of her damages" could double, and has divided the requested restitution amount by that higher number. *See* United States v. Cirsostomi, No. 12-166-M, 2014 WL 3510215, at *3 (D.R.I. July 16, 2014).

90. According to the most prominent child pornography victim's attorney, at least 70,000 people have seen her image. Transcript of Oral Argument at 50, *Paroline*, 134 S. Ct. 1710 (No. 12-8561).

91. *Paroline*, 134 S. Ct. at 1727.

hold someone accountable for the awful abuse the victim experienced.[92] In other words, in the context of child pornography cases, restitution has become intertwined with retribution and moral vindication.

The application of criminal restitution statutes in child pornography cases illustrates how, even with a statute aimed either partially or wholly at compensation, the current method of measuring restitution leaves room for restitution to be consistently applied in a manner expressing moral condemnation. Restitution comes to achieve primarily retribution and punishment, perhaps in addition to reimbursement. Increasingly, federal and state restitution statutes are being applied in this retributive manner outside the child pornography context as well.[93] In light of the direction in which restitution is going, and the Court's recent confirmation of criminal restitution's punitive intent, it is likely that using restitution to express moral condemnation will become more and more common.

c. Punitive Effects

Finally, a statute that does not manifest punitive intent on its face or in application can still consistently result in effects that ultimately transform the statute into a mechanism for punishment. If a statutory remedy imposes a significant deprivation or obligation, pursuant to a criminal proceeding, and results in a significant diminution of a person's well-being, whether the legislature intends a statute to result in punishment seems a secondary consideration. To return to the example of civil commitment, it would seem incontrovertible to most that the indefinite detention of someone who has committed sexually violent acts in the past—and might do so again in the future—is sufficiently punitive in effect as to negate Congress' purported intent to deem it civil.[94] Despite the Court's finding to the contrary, a person who is held against their will in a locked facility for an indefinite period of time at the state's request, in large part for crimes previously committed, undoubtedly has his well-being diminished in a way most people associate with punishment.

As previously indicated, even the Supreme Court has recognized that intent is not always enough; courts also must consider the effects of a sanction.[95] At times, the punitive effects of a law leave no doubt that an

92. *See, e.g.*, Transcript of Oral Argument at 13, 44–45, *Paroline*, 134 S. Ct. 1710 (No. 12-8561) (discussing difficulties of how to calculate restitution in the face of the "terrible crime" of "viewing [a child's] rape").

93. *See infra* Part III.B.2.

94. *See* Kansas v. Hendricks, 521 U.S. 346, 361–68 (1997) (discussing the State's intent and purpose of the Sexually Violent Predator Act); *see also* United States v. Salerno, 481 U.S. 739, 746 (1987) ("[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.").

95. *Hendricks*, 521 U.S. at 361. For a more extended discussion of why the intent analysis should be limited and the inquiry should focus on effects instead, see Chiao, *supra* note 34.

offender is being punished for violating it, despite a legislature's clear intent otherwise.[96] Thus the Court allows the effect of a statute to trump legislative intent if the petitioner can show that the statutory scheme is "so punitive either in purpose or effect as to negate [Congress'] intention to deem it 'civil.'"[97] Although the Court has interpreted the effects inquiry very narrowly, the acknowledgment that effects can play a role is important.

The effects inquiry is especially important in the context of restitution, given restitution's presence in both civil and criminal proceedings. Some judges continue to reject both the notion that the statutory language reveals any punitive intent, as well as the evidence that criminal restitution statutes are now consistently applied in a punitive manner. In fact, two circuit courts, the Seventh Circuit and the Tenth Circuit, claim that restitution has no punitive function. These two circuits have unequivocally and repeatedly denounced any punitive purpose for criminal restitution.[98] The Seventh Circuit, led on this particular subject by Judge Richard Posner, readily admits that it conceptualizes criminal restitution as a "classic civil remedy,"[99] "administered for convenience by courts that have entered criminal convictions."[100] The Tenth Circuit likewise has acknowledged a view of restitution as a civil remedy imported into the criminal proceeding.[101]

However, despite the misgivings of a few circuit courts, the Supreme Court has continued to recognize that criminal restitution serves a different

96. *See, e.g.*, United States v. Ursery, 518 U.S. 267, 275 (1996) (drawing distinction between civil *in rem* forfeitures, which do not constitute punishment, and *in personam* civil penalties, which may be considered punishment); United States v. La Franca, 282 U.S. 568 (1931) (holding a civil action to recover taxes is punitive and barred by a prior conviction of the defendant for a criminal offense involving the same transactions).

97. Smith v. Doe, 538 U.S. 84, 92 (2003).

98. United States v. Newman, 144 F.3d 531, 538–42 (7th Cir. 1998). *But see* United States v. Fountain, 768 F.2d 790, 800–02 (7th Cir. 1985). Although Judge Posner embraces restitution as a punitive remedy in *Fountain*, 14 years later, in *United States v. Bach*, his position had evolved and he declared restitution "is not penal." United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999); *see also* United States v. Speakman, 594 F.3d 1165, 1177–78 (10th Cir. 2010); United States v. Visinaiz, 428 F.3d 1300, 1316 (10th Cir. 2005); United States v. Nichols, 169 F.3d 1255, 1278–80 (10th Cir. 1999).

99. United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000); *see also* United States v. Szarwark, 168 F.3d 993, 998 (7th Cir. 1999). *But see Fountain*, 768 F.2d at 800–02 (calling restitution a criminal remedy aimed at "forcing the criminal to yield up to his victim the fruits of the crime").

100. United States v. George, 403 F.3d 470, 473 (7th Cir. 2005); *see also Bach*, 172 F.3d at 523 (calling the imposition of restitution in criminal cases a "procedural innovation, a welcome streamlining of the cumbersome processes of our law").

101. United States v. Wilfong, 551 F.3d 1182, 1186–87 (10th Cir. 2008).

aim than civil restitution.[102] The Court recently reaffirmed criminal restitution's "penological purposes"[103]:

> [W]hile restitution . . . is paid to a victim, it is imposed by the Government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime. Thus, despite the differences between restitution and a traditional fine, restitution still implicates 'the prosecutorial powers of government.' The primary goal of restitution is remedial or compensatory, but it also serves punitive purposes.[104]

In other words, the state-ordered deprivation or obligation of a monetary payment based on the commission of a crime is punishment, especially to those who are returned to jail or prison, or prevented from voting or running for office solely based on the failure to pay it. In fact, the consequences of failing to comply with a criminal restitution order are no different from those that attach to any other traditionally recognized form of criminal punishment.[105]

As such, in determining whether a sanction is punishment, courts should take the retributive application and "effects" of a sanction into consideration. Although the Court takes a relatively narrow approach in looking at the punitive effects of a law, the application and effects of a statute should be given equal weight to its intent in determining whether a state-requested deprivation or obligation subsequent to a criminal proceeding is punishment. Otherwise, legislatures can always assert that a law is regulatory, rather than punitive, and thereby circumvent the protections afforded to criminal laws by the Constitution and statutes.[106] Stated legislative intent should never be the dispositive inquiry.

Ultimately, a reduction in well-being that can be traced to a state-ordered deprivation or obligation, imposed subsequent to a criminal proceeding in a manner that consistently has the effect of limiting some basic enjoyment of life, should be considered punishment.

III. CRIMINAL RESTITUTION AS PUNISHMENT

With this definition of punishment establishing the parameters, we return to why restitution, as courts impose it in the criminal context,

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102. Paroline, v. United States, 134 S. Ct. 1710, 1724; *see also* Pasquantino v. United States, 544 U.S. 349, 365 (2004) ("The purpose of awarding restitution . . . is . . . to mete out appropriate criminal punishment for that conduct."); Kelly v. Robinson, 479 U.S. 36, 49 n.10, 51–53 (1986) (describing restitution as a punishment, not compensation).

103. *Paroline*, 134 S. Ct. at 1726.

104. *Id.* at 1726 (citations omitted).

105. *See infra* Part III.A.

106. *Cf.* Harris v. United States, 536 U.S. 545, 576 (2002) (Thomas, J., dissenting) (discussing constitutional limits that exist irrespective of legislative definitions of crime).

constitutes punishment, thereby implicating the constitutional protections courts are reluctant to invoke. As previously discussed, criminal restitution is imposed pursuant to a state action; is subsequent to a criminal allegation; results in a substantial deprivation and/or obligation; and is imposed (1) pursuant to a statute—both the VAWA and the MVRA—that reveals retributive intent;[107] (2) in a consistently retributive manner; or (3) the effect is to substantially diminish the defendant's well-being, in a way consistent with other criminal punishments. Applying this definition, this Part examines how criminal restitution amounts to punishment on the ground. Part III specifically looks at effects and application, the second and third prongs discussed in the previous Part, and how they manifest in day-to-day application.

A. THE PUNITIVE EFFECTS OF FAILING TO PAY RESTITUTION

The most obvious illustration of how restitution is treated as a criminal punishment, and why criminal defendants ordered to pay restitution should receive constitutional protection, is found in the consequences of failing to pay it. The practical effects of failing to pay restitution are no different from the effects of failing to pay a criminal fine, an unmistakable method of punishment.[108] Failure to pay restitution results in a defendant's continued disenfranchisement, suspension of her driver's license, continued court supervision, and constant threat of re-incarceration.[109] Each of these is a consequence that typically results from a criminal conviction. The effects are no different with criminal restitution, again revealing the punitive nature of its current usage.

Restitution is treated as punishment when it comes to the most basic limitations that accompany a criminal sentence. Just as with any other criminal punishment, many states decline to allow offenders who have not paid their restitution to register to vote, participate on a jury, or run for office—based on a finding that a failure to pay equates to a failure to complete

107. *See supra* Parts II.A, II.B.3.a; *see also supra* notes 24–25.

108. To the extent there was any doubt about this, *Southern Union Co. v. United States* clarified those doubts, finding that a criminal fine is punishment. S. Union Co. v. United States, 132 S. Ct. 2344, 2349–50 (2012). The distinction between restitution and criminal fines comes down to the recipient: fines go to the state/government/court system, and restitution goes to crime victims.

109. Additionally, many states do not permit a convicted defendant to seek to seal or expunge her criminal record unless restitution has been paid. *See* COLO. REV. STAT. § 24-72-308.9(2)(a)(V) (2013); IND. CODE § 35-38-9-8(b)(11) (West 2014); IOWA CODE § 907.9(4)(b) (2014); MO. ANN. STAT. § 610.140(5)(3) (West 2012); N.C. GEN. STAT. § 15A-145.5(c) (2013); OKLA. STAT. tit. 22, § 991c(C) (2013); UTAH CODE ANN. § 77-40-105(3)(b) (LexisNexis 2013); VT. STAT. ANN. tit. 13, § 7602(b)(1)(C) (2012). Waiting periods for expungement or record sealing often do not begin to run until a person has paid their restitution in full. For example, in Wyoming, a person cannot petition for expungement of their record unless at least ten years have passed since restitution was paid in full. *See* WYO. STAT. ANN. § 7-13-1502(a)(i)(C) (West 2011).

the criminal sentence.[110] Likewise, courts have authority to revoke probation or supervised release and impose a prison sentence if the offender "willfully" refuses to pay restitution or fails to make "sufficient bona fide efforts legally to acquire the resources" to pay off the fine.[111] Although the inclusion of the "willfulness" requirement has been imposed ostensibly to prevent the reinstitution of debtors' prisons,[112] convicted defendants regularly have their probation or supervised release revoked, and their re-enfranchisement rights declined, due to their failure to pay a criminal fine or restitution.[113]

The failure to pay restitution also can result in significant, long-term consequences, as it does with other criminal punishments. In order to pay restitution, and successfully complete a criminal justice sentence, a probationer or person on supervised release needs income. Unsurprisingly, many individuals with criminal convictions have difficulty finding employment upon the termination of their incarceration.[114] It is not uncommon for criminal defendants to lose the jobs they have subsequent to their conviction and sentencing, even if they do not receive a sentence of jail time.[115] Although "maintaining" or "finding" employment is a condition of almost every sentence, meeting this requirement is one of the most difficult for most convicted defendants.[116] The burden is especially significant for those who have monetary obligations, such as restitution, as part of their

110. *See, e.g.*, Johnson v. Bredesen, 624 F.3d 742, 747 (6th Cir. 2010); *cf.* Harvey v. Brewer, 605 F.3d 1067, 1079–80 (9th Cir. 2010).

111. Bearden v. Georgia, 461 U.S. 660, 672 (1983); *see also* United States v. Montgomery, 532 F.3d 811, 813 (8th Cir. 2008); United States v. Reid, No. 07-14236, 2008 WL 1914337, at *1 (11th Cir. 2008).

112. *Bearden*, 461 U.S. at 667–68; *see also* U.S. CONST. amend. XIV.

113. *See, e.g.*, John Gibeaut, *Get Out of Jail—But Not Free: Courts Scramble to Fill Their Coffers by Billing Ex-Cons*, A.B.A. J. (July 1, 2012, 9:50 AM), http://www.abajournal.com/magazine/article/get_out_of_jailbut_not_free_courts_scramble_to_fill_their_coffers_by_billin/.

114. *See, e.g.*, Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1107 (2013) ("A criminal conviction often serves as a de facto informal basis for job denial.").

115. R. Boshier & Derek Johnson, *Does Conviction Affect Employment Opportunities?*, 14 BRIT. J. CRIMINOLOGY 264 (1974); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 942–43, 955–57, 959 (2003); Richard Schwartz & Jerome Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133 (1962); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 528 (2002) (noting men in trusted or high-income positions prior to conviction experience large earnings losses after release from prison, and that felony conviction can disqualify someone from employment in certain fields).

116. *See, e.g.*, Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1778, 1780–81 (2010) (noting that of those with felony convictions surveyed, 48% were employed at the time of the interview and 60% were under community supervision); Kent R. Kerley et al., *Race, Criminal Justice Contact, and Adult Position in the Social Stratification System*, 51 SOC. PROBS. 549, 550–53, 559 (2004); Lorelei Laird, *Doing Time Extended*, A.B.A. J., June 2013, at 50, 53; Pager, *supra* note 115, at 955–57, 959–60; Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195 (2009); Joel Waldfogel, *The Effect of Criminal Conviction on Income and the Trust "Reposed in the Workmen,"* 29 J. HUM. RESOURCES 62 (1994); Western, *supra* note 115, at 536, 538.

criminal sentence. As a result, paying off a restitution obligation, which often is all that remains for a convicted defendant to have completed her sentence, becomes an insurmountable hurdle.

Finding employers who will hire an individual with a criminal conviction and outstanding restitution obligation is challenging enough, especially with the new mandatory eVerify requirements Congress imposed on businesses—but it is not the only barrier to income for those seeking to pay off their restitution obligation. Although statistics confirm the vast majority of criminal defendants are indigent,[117] not much thought appears to go into how this lack of financial stability translates for someone post-conviction. For example, in order to work, one needs a way to get to work. Transportation is often a problem. Many offenders do not have cars and live in areas outside cities that do not have easy or reliable access to public transportation. Often the communities that offer cheaper rent come at the price of convenience. Additionally, available jobs are not always accessible by public transportation, even if one lives near a bus or train stop. The results can be: difficulty pounding the pavement to make connections and submit applications to a manager, difficulty getting to interviews for jobs located in other parts of town with openings posted online or in the newspaper, and difficulty getting to work every day in the event one is offered a job in a location not walking distance from home.

An additional complication for those with restitution obligations results from the reality that employers increasingly use credit reports in their hiring decisions.[118] Financial information tends to stay on a credit report for seven years.[119] Restitution obligations show up on a credit report, and any difficulties in keeping up with such payments can add another hurdle in securing employment, while also setting up the potential for disqualification from food stamps, low-income housing, housing assistance, federal Temporary Assistance to Needy Families ("TANF") funds, and other benefits.[120]

Finding and keeping a job is only part of the battle for most individuals serving a term of probation, parole or supervised release and trying to pay their restitution. Even with a job, many have trouble paying to keep a roof over their heads and food to eat, much less paying court costs—fees, fines, and restitution. Recent statistics show that the bottom 20% of the American workforce—some 28 million workers—earn less than $9.89 an hour, or

117. *See* CAROLINE WOLFE HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.

118. *See* ALICIA BANNON ET AL., BRENNAN CENTER FOR JUSTICE: CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 27 (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf; Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 85 (2013).

119. 15 U.S.C. § 1681c(a) (2012); Plunkett, *supra* note 118, at 85.

120. BANNON ET AL., *supra* note 118, at 28.

approximately $20,570 a year.[121] Many of those individuals rely on food stamps, housing assistance, and Medicaid in order to meet their basic needs.[122] Given the indigence statistics for criminal defendants prior to conviction, and the dim employment prospects afterward, the majority of employed individuals on probation, parole, and supervised release likely fall into this low-wage earning group.[123] In other words, even individuals under court supervision who manage to find employment may not be able to both sustain themselves and meet their court-ordered financial obligations.

Because of a change to the federal statute back in the mid-1990s, judges are no longer permitted to consider a convicted defendant's ability to pay when they impose restitution.[124] Whatever the court determines is the "full

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121. Steven Greenhouse, *Fighting Back Against Wretched Wages*, N.Y. TIMES (July 28, 2013), http://www.nytimes.com/2013/07/28/sunday-review/fighting-back-against-wretched-wages.html (citing study by Economic Policy Institute).

122. *See, e.g.*, Trip Gabriel, *Washington Push for Higher Minimum Wage for Workers Has Walmart Balking*, N.Y. TIMES (July 21, 2013), http://www.nytimes.com/2013/07/21/us/washington-push-on-wages-has-walmart-balking.html (discussing government subsidization of Walmart employees with food stamps, housing assistance, and Medicaid due to low wages); Greenhouse, *supra* note 121 (profiling ten-year veteran employee of McDonald's who subsidizes her income with food stamps and Medicaid in order to support herself and her family).

123. A majority of individuals sentenced on felony and misdemeanor charges receive monetary sanctions, with those defendants who receive probationary sentences more likely to receive such penalties at sentencing. Harris et al., *supra* note 116, at 1770–71, 1786. On average, formerly incarcerated white, Hispanic, and black men owe approximately 100%, 69% and 222% of their annual incomes to legal debt. *Id.* at 1776. "Felons who consistently pay $50 a month will still possess legal debt after 30 years of regular monthly payment." *Id.* Unfortunately, only a small percentage of federal and state parole and probation agencies report employment data, and those agencies that do report the data reveal a widely varying range of employment statistics. *See* John Rakis, *Improving the Rates of Ex-Prisoners on Parole*, 69 FED. PROBATION 1, http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2005-06/employment.html (last visited Oct. 1, 2014).

124. *See* Lollar, *supra* note 17, at 357. Prior to 1992, and the creation of a mandatory restitution requirement through VAWA, judges were able to take a defendant's ability to pay into consideration before determining how much restitution to order, and both offender compliance and victim satisfaction with restitution were higher than they are now. The requirement that restitution be mandatory and ordered in "the full amount" has had a negative impact across the board. The amount of restitution ordered regularly exceeds the defendant's financial capabilities, leaving many defendants with no ability to pay and "no reasonable prospect of paying." *People v. Kay*, 111 Cal. Rptr. 894, 896 (Cal. Ct. App. 1973); Dickman, *supra* note 5, at 1704–05.

In fact, restitution collection rates have dropped precipitously since restitution became mandatory. Prior to VAWA, debt collection rates from defendants ordered to pay restitution ranged from 13.3% to 34% and 54%. The 13.3% figure is the rate of collection in the federal system for fiscal year 1992, based on the collection amount divided by the total debt owed. U.S. ATTORNEYS' STATISTICAL REPORT: FISCAL YEAR 1992 tbl. 12 (1992), *available at* http://www.justice.gov/usao/reading_room/reports/1990s/STATISTICAL_REPORT_FISCAL_YEAR_1992.pdf. The 34–54% figure comes from state restitution programs, many of which consider an offender's ability to pay before ordering restitution. *See* Dickman, *supra* note 5, at 1694 n.53. Unsurprisingly, the rate of debt collection has dropped to a collection rate of 5% of restitution owed to non-government victims as of fiscal year 2011. U.S. ATTORNEYS' ANNUAL STATISTICAL

amount" of restitution, the defendant must pay, even if she has no income or ability to pay, and it takes her the remainder of her life to do so.[125] Rarely will courts agree to terminate a criminal sentence when a restitution obligation remains outstanding. Thus, even when someone is employed and slowly paying down the restitution, her civil rights will remain curtailed until she has made the final payment, which is the same as with any other criminal financial obligation.[126] A review of state laws reveals that, in most instances, unpaid criminal restitution means a convicted defendant cannot vote, serve on a jury, run for public office, or possess a firearm.[127]

REPORT: FISCAL YEAR 2011 tbl. 8 (2011), *available at* http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf (derived by dividing restitution payments received by total amount owed to third parties in restitution). The Department of Justice has repeatedly acknowledged that the reason for this decline is "the lack of relationship between the amount ordered and its corresponding collectability," attributable to VAWA and the MVRA's requirement that judges not consider the financial means of the offender when imposing restitution. Dickman, *supra* note 5, at 1694 (citing Letter from Mary Beth Buchanan, Dir. of Exec. Office for U.S. Attorneys, to Gary T. Engel, Dir. of Fin. Mgmt. & Assurance, *in* U.S. GOV. ACCOUNTABILITY OFFICE, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 20–22 (2005), *available at* http://www.gao.gov/assets/250/245227.pdf. The result of so much unpaid restitution is that many victims end up feeling more disempowered and disillusioned with the criminal justice system than they would if they were given a realistic sense of how restitution works in practice. *See* R. BARRY RUBACK ET AL., CRIME, LAW, & JUSTICE PROGRAM, PENN STATE UNIVERSITY, EVALUATION OF BEST PRACTICES IN RESTITUTION AND VICTIM COMPENSATION ORDERS AND PAYMENTS 123 (2006); Robert C. Davis et al., *Restitution: The Victim's Viewpoint*, 15 JUST. SYS. J. 746, 751–54 (1992).

Since the passage of MVRA, the outstanding federal criminal debt, which consists of unpaid fines, federal restitution, and non-federal restitution—restitution owed to victims of crime other than the federal government, but for which the government maintains collection responsibility—has grown from $6 billion to more than $64 billion, as of 2010. *Criminal Restitution Improvement Act of 2006: Hearing on H.R. 5673 Before the H. Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 1 (2006) (statement of Rep. Coble, Chairman, Subcomm. on Crime, Terrorism, & Homeland Sec.); U.S. GEN. ACCOUNTING OFFICE, GAO-04-388, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE'S COLLECTION PROCESSES 1, 7 (2004); U.S. GEN. ACCOUNTING OFFICE, GAO-01-664, CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 8 (2001); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010 tbl. 8c (2010), *available at* http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf (reporting $64,450,675,679.11 in outstanding criminal debt at the end of fiscal year 2010); Dickman, *supra* note 5, at 1692. Of that $64 billion in unpaid restitution and fines, close to $51.5 billion, or approximately 80%, is from unpaid restitution to non-government victims. U.S. DEP'T OF JUSTICE, *supra*, at tbl. 8b (reporting a principal balance of $51,554,408,626.74 in non-federal restitution at the end of fiscal year 2010); *see also* U.S. GENERAL ACCOUNTING OFFICE, GAO-04-388, *supra*, at 2–3 (revealing that, as of 2002, non-federal restitution accounted for 70% of federal criminal debt).

125. *See* Kelly v. Robinson, 479 U.S. 36, 53 (1986) (holding criminal restitution imposed by state courts cannot be discharged in bankruptcy proceedings).

126. Obligations to continue paying restitution even after the completion of all other aspects of a criminal sentence, including probation, parole or supervised release, can remain. *See, e.g.*, Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010); State v. Zaputil, 207 P.3d 678 (Ariz. Ct. App. 2008).

127. *See, e.g.*, ARIZ. REV. STAT. § 13-912 (2004) (same); TENN. CODE ANN. § 40-29-202(b)(1) (2013) (conditioning eligibility to vote on having paid restitution obligation); WASH. CODE ANN.

In addition to the civil collateral consequences that come with a failure to pay off one's criminal restitution debt, other criminal-punitive consequences also continue to linger as a result of the difficulties many convicted defendants have in making those payments. In the instances when a convicted defendant is not making notable payments toward the restitution balance, further incarceration continues to lurk. Although courts are not permitted to revoke someone's probation or supervised release just for a failure to pay a criminal fine, fees, or restitution, ample evidence from across the country documents that courts do just that on a regular basis.[128] At the very least, most courts employ a very loose interpretation of the "willfulness" requirement.[129] Despite the prohibition on incarcerating someone for being poor, a reinstitution of the forbidden debtors' prisons, in practice, many judges are not sympathetic to a convicted defendant's failure to find a job, and it is rare for a judge to not find a defendant's failure to pay "willful."[130] The result is that many individuals on court supervision end up back in jail or prison for failing to meet their restitution obligations.[131]

What may appear to the court as someone dragging their feet and not making an effort to seek or maintain employment is often the result of the overwhelming logistical challenges that must be overcome to even get one's

§ 29A.08.250 (West 2013) (conditioning right to vote on completing restitution obligations); *see also* Harvey v. Brewer, 605 F.3d 1067, 1080–81 (9th Cir. 2010) (finding constitutional Arizona law that prohibits convicted defendant from having voting rights restored while still owing restitution obligation).

128. *See* OFFICE OF JUDICIAL SERVS., SUPREME COURT OF OHIO, COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (2014), *available at* http://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf; Harris et al., *supra* note 116, at 1761 ("[W]arrants may be issued, and arrests and confinement may occur, solely due to nonpayment of legal debt."); Editorial, *Return of Debtors' Prisons*, N.Y. TIMES (July 14, 2012), http://www.nytimes.com/2012/07/14/opinion/return-of-debtors-prisons.html; *Ohio High Court Offers Judges Fines, Fees Guidance*, OHIO.COM (Feb. 6, 2014, 9:16 AM), http://www.ohio.com/news/break-news/ohio-high-court-offers-judges-fines-fees-guidance-1.464641?localLinksEnabled=false; *see also* RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS (2007), *available at* http://csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_summary.pdf; Harris et al., *supra* note 116, at 1782–83 (reporting "that nearly one in four of our respondents reported having served time in jail as a sanction for nonpayment"); Editorial, *The New Debtors' Prisons*, N.Y. TIMES (Apr. 5, 2009), http://www.nytimes.com/2009/04/06/opinion/06mon4.html.

129. This assertion is based partly on a review of case law (see United States v. Montgomery, 532 F.3d 811, 814–15 (8th Cir. 2008)), but more significantly on my personal observations in state and federal courtrooms.

130. Recently, after a publication by the Ohio chapter of the American Civil Liberties Union found that judges often deny defendants a hearing to determine if they are financially capable of paying what they owe, the Ohio Supreme Court issued a brochure, distributed to all state judges, reminding them under which conditions they can jail an offender for failure to pay fines, restitution and other court costs. *Ohio High Court Offers Judges Fines, Fees Guidance*, *supra* note 128; *see also* OFFICE OF JUDICIAL SERVS., *supra* note 128.

131. BANNON ET AL., *supra* note 118, at 21–22. Some judges do not even consider a defendant's ability to pay before revoking probation or parole for failure to pay criminal debt. *Id.* at 21.

foot in the door. Those who are able to meet those challenges are then confronted with the additional reality that, upon learning this potential employee has a criminal history, the employer no longer is interested in entertaining the application for employment. Although it is challenging for judges to distinguish between individuals who truly are making no effort to get a job and those who are genuinely making an effort but are prevented from employment by daily obstacles, too often courts are taking an offender's surface-level failure to maintain employment and concluding the result must be due to the defendant's willful behavior.

Each of the penalties for failing to pay restitution is an element of criminal punishment: the removal of the right to vote, serve on a jury, run for public office, and possess a firearm. The suspension of these civil rights is an action taken by the state subsequent to a criminal conviction, with the result being a substantial deprivation of her fundamental rights, imposed pursuant to a statute that reveals an intent to punish, and that also substantially diminishes a person's well-being by denying them the most basic functions of citizenship. Being able to participate in the vital roles imparted to us as members of a democracy—by exercising the right to choose who represents us in the state and federal legislatures, the presidency and, often, the judiciary, or by serving on a jury—is at the heart of citizenship.[132] As a result of an order of restitution, one is denied access to the basic components of citizenship as well as certain fundamental rights granted by the Constitution, such as being able to possess a firearm to defend one's person and property. Here, the denial of these rights is a part of the punishment imposed for a person's failure to pay restitution.

Similarly, the lingering possibility, or even probability, of renewed incarceration for the failure to pay a financial obligation imposed as part of a criminal sentence is punitive. The use of revocation hearings to send someone back to jail or prison for "willfully" failing to pay is intended to be a punishment. Even if a person is solely being continued on probation or supervised release due to a failure to pay, this continued court monitoring is also intended to punish. Continued court supervision keeps the threat of incarceration present, while simultaneously subjecting an individual to continued monitoring and court-imposed sanctions. Legislators and courts created this as a system of punishment: the threat of incarceration and close monitoring by an arm of the judiciary are meant to encourage the convicted defendant to "go straight" or else be punished, even if the defendant breaks no further laws.

Despite the fairly obvious and intended punitive consequences that attach to having a restitution obligation imposed as part of a criminal case,

132. *See generally* ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION (2012).

courts continue to avoid invoking the constitutional protections that generally come with criminal punishment.

B. CRIMINAL RESTITUTION AS PUNISHMENT IN APPLICATION

Beyond the fact that criminal restitution incurs the same consequences and effects as other criminal punishments, additional indicators also reveal it to be punishment. Criminal restitution is now being imposed for conduct a defendant has not been found to have committed beyond a reasonable doubt in a criminal proceeding. Specifically, defendants are regularly being required to pay restitution for acquitted, unproven, and "relevant" conduct, for indirect or secondary harms, and when there is no actual loss to a victim. Defendants are also being required to pay for the costs of their own prosecution as part of their criminal restitution obligations. This Subpart explores each of those scenarios in more detail.

1. Restitution for Acquitted and Unproven Conduct

Until the mid-1990s, restitution was permitted only for conduct that was part of the count(s) of conviction.[133] The Supreme Court established in 1990 "that the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order."[134] Later that year, in the wake of the highly-charged Savings and Loan scandal,[135] Congress changed the law to overrule the Supreme Court on the scope of restitution. The legislature amended the Victim Witness Protection Act ("VWPA") to allow courts to impose restitution for losses resulting from "the defendant's criminal conduct in the scheme, conspiracy, or pattern," when the crime of conviction "includes as an element a scheme, conspiracy, or pattern of criminal activity."[136] The MVRA solidified this change, tracking the amended VWPA verbatim.

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133. *See, e.g.*, Hughey v. United States, 495 U.S. 411 (1990); United States v. Streebing, 987 F.2d 368 (6th Cir. 1993), *cert. denied*, 508 U.S. 961 (1993). Shortly after the Supreme Court ruled, lower courts began to find exceptions to this rule. For example, the Ninth Circuit recognized an exception where the plea agreement specifies a defendant will pay restitution for offenses other than those for which there is a conviction. *See, e.g.*, United States v. Soderling, 970 F.2d 529, 532–33 (9th Cir. 1992).

134. *Hughey*, 495 U.S. at 420. Some courts interpreted this rule to limit restitution even where the offense of conviction involved a scheme as an element of the offense. United States v. Sharp, 941 F.2d 811, 814–15 (9th Cir. 1991).

135. As a result of *Pennsylvania Department of Public Welfare v. Davenport,* another Supreme Court decision around the same time as *Hughey*, which held restitution could be discharged in bankruptcy proceedings, the legislation was also aimed at not allowing restitution to be dischargeable. Penn. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990); *see also* 136 CONG. REC. H3098 (daily ed. June 5, 1990) (statement of Rep. George Gekas). Although *Davenport* was a welfare fraud case, emotional arguments were made in favor of these new restitution provisions by placing them in the context of the Savings and Loan crisis. *See id.*

136. 18 U.S.C. § 3663(a)(2) (2012); *cf.* 136 CONG. REC. S9055–62 (daily ed. June 28, 1990) (letter from National Victim Center to Sen. Don Nickles).

Congress intended the statutory change to allow restitution to be a major sentencing tool, a method of "making criminals pay," both literally and figuratively, "for their crimes."[137] As one senator explained, Congress intended the restitution requirement to "ensure that the criminal not only pays his debt to society, but he also pays his debt to this victim."[138]

Yet the statutory change was just the beginning. Although the statute authorized courts to expand the imposition of restitution to conduct that was part of scheme or conspiracy, courts went even further in interpreting the statutory language. Construing the VWPA and MVRA permissibly, lower courts have ordered defendants to pay restitution for "acts of related conduct for which the defendant was not convicted," such as uncharged, acquitted, or dismissed counts, justifying this accountability by claiming the conduct at issue in those counts is part of a "scheme, conspiracy, or pattern of criminal activity."[139]

Federal courts also have interpreted this language to mean that restitution can be ordered to a victim not named in the indictment,[140] for acts occurring during the same "course of conduct" as the counts of conviction—even if not close in time and not charged[141]—and for events occurring outside of the statute of limitations.[142] In short, as a result of Congress and judges working together, there is now little for which a criminal defendant cannot be ordered to pay restitution, so long as there is some link, even a highly attenuated one, to the charged conduct.

This far-reaching financial accountability reflects the general shift in the criminal justice system toward defendants being seen as individuals with immutable bad character who are likely guilty of something, even if not found guilty at a criminal trial. Subsequent to the introduction of the federal sentencing guidelines, which came into effect in 1987, "relevant conduct" has always been incorporated into calculations of a federal defendant's applicable sentencing guideline range.[143] Such "relevant conduct" includes "all acts and

137. 136 CONG. REC. S14,657 (daily ed. Oct. 5, 1990) (statement of Sen. Don Nickles).

138. *Id.*

139. *See, e.g.*, United States v. Boyd, 222 F.3d 47, 51 (2d Cir. 2000). *But see* United States v. Benns, 740 F.3d 370, 377–78 (5th Cir. 2014) (holding restitution cannot be ordered for relevant conduct, only for the offense of conviction); United States v. Freeman, 741 F.3d 426, 434–35 (4th Cir. 2014) (holding restitution must be for "victims of the offense of conviction" not "'relevant conduct,' 'a related offense,' or a 'factually relevant offense'").

140. *See, e.g.*, United States v. Henoud, 81 F.3d 484, 489 (4th Cir. 1996); United States v. Pepper, 51 F.3d 469, 473 (5th Cir. 1995); *cf.* United States v. Kones, 77 F.3d 66, 70 (3d Cir. 1996); United States v. Reed, 80 F.3d 1419, 1423 (9th Cir. 1996).

141. United States v. Wright, 496 F.3d 371, 380 (5th Cir. 2007) (determining that because one scheme was "practically identical" to scheme of conviction, other than identity of the victims, events were part of common scheme or plan and restitution to those victims appropriate).

142. United States v. Dickerson, 370 F.3d 1330, 1342–43 (11th Cir. 2004).

143. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (1987), *with* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2013).

omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction."[144] To be considered part of a "common scheme or plan," two offenses may be connected to one another by something so basic as a similar *modus operandi* or a common purpose.[145] "[S]cheme, conspiracy [and] pattern of conduct" are each modern concepts allowing for broader criminal liability than the actions committed by, or at the instruction of, an individual defendant. Conspiracy law is so wide it often eliminates the causal and agency links otherwise required. Defendants can be held accountable at sentencing for the actions of a co-conspirator, even those not committed by or foreseeable to the defendant in question.[146]

Although commentators and judges may disagree on the appropriateness of such wide-ranging accountability, the intent behind this expansion is plainly punitive. The goal is to punish "criminals" to the full extent possible, to "make them pay" for committing a crime, and to "make victims of crime whole."[147] The restitution portion of criminal sentences is a part of that broader retributive objective. Now that defendants are being required to compensate for any tangential loss—financial, physical, emotional, hedonic, or otherwise—that a victim can link back to an offender's behavior, the legislature and courts essentially hold criminal defendants accountable for the domino-effect of actions that may have stemmed from her behavior, whether she was legally held responsible for that behavior or not.

Some may argue that this is no different than what happens in civil proceedings, and thus, not a cause for concern.[148] Yet, criminal and civil proceedings are and, in this author's view, should remain fundamentally distinct. When civil damages become imputable to a criminal case through criminal restitution, the criminal justice system is used to mitigate what is, in essence, a dispute between two private parties—the defendant and the victim. Restitution, therefore, becomes a vehicle for settling a personal dispute, and thus, a mechanism for personal retribution rather than reparation. This is especially true when restitution amounts are no longer tied to specific,

144. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (2013).

145. *Id.* § 1B1.3 cmt. 9(A).

146. *See, e.g.*, United States v. Kluger, 722 F.3d 549, 558–59 (3d Cir. 2013) (holding defendant financially responsible for co-defendant's relevant conduct, even if not reasonably foreseeable to him); United States v. Thomas, 690 F.3d 358, 366–67, 375 (5th Cir. 2012) (finding defendant's knowledge of conspiracy and amount of drugs can be inferred from testimony, despite no specific evidence establishing either); United States v. Duncan, 639 F.3d 764, 768 (7th Cir. 2011) (stating in drug context, "reasonable foreseeability" refers to scope of agreement defendant entered into at beginning of agreement, not what quantity of drugs was specifically foreseeable to defendant). *But see* United States v. Figueroa-Labrada, 720 F.3d 1258, 1263–64 (10th Cir. 2013); United States v. Campbell, 279 F.3d 392, 400 (6th Cir. 2002) (vacating the district's court sentence for failure to make "particularized findings" relating the defendant's and co-conspirators' conduct).

147. *See, e.g.*, United States v. Brock-Davis, 504 F.3d 991, 998 (9th Cir. 2007).

148. *But see supra* note 19 and accompanying text.

calculable losses. Unlike the tort system, which aims to address personal wrongs, the criminal justice system aims to punish and deter conduct the law deems morally threatening to society as a whole.[149] Sanctioning personal vindication as a goal of a criminal sentencing hearing through restitution undermines this distinction, positioning the criminal justice system to become a tool for personal vengeance.[150]

Allowing a court to impose financial liabilities on a defendant as part of a criminal sentencing, on the basis of a criminal conviction for another crime, with the same collateral consequences that attach to any other criminal punishment, is punishment. As such, the increased scope of criminal restitution reveals again the punitiveness of courts' approach to this financial remedy.

2. Criminal Restitution for Secondary and Indirect Harms

Another variation on how courts are holding criminal defendants responsible during criminal sentencing proceedings for actions not necessarily attributable to them and in a manner amounting to punishment arises in the context of secondary harms. Prior to 2008, courts ordered restitution in criminal cases only when a defendant was the direct source of harm to the victim or the victim's property. In the past six years, this requirement has evolved.[151] As a result, courts are ordering defendants to pay restitution for conduct not directly attributable to them, because it is too difficult to parse out how much responsibility multiple defendants have for intangible emotional, psychological, and hedonic harms. After the Supreme Court's holding in *Paroline*, this "guesstimation" approach now has the Court's imprimatur.

As this Article alluded earlier,[152] in the context of cases involving possession and receipt of child pornography, courts are holding defendants responsible for harms for which they are only indirectly responsible. Both the parties and judges have trouble figuring out exactly how much harm an individual possessor of a child pornography image has caused the person depicted in that image, and thus, how much restitution the court should order

149. *See, e.g.*, John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1799 (1992); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 205–07 (1996).

150. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 42, 51 (2011) (stating that a restitutionary recovery should not have a punitive effect); *see also id.* § 51 cmt. k (stating that "disgorgement of wrongful gain is not a punitive remedy").

151. The Supreme Court recently re-affirmed the proximate cause requirement for orders of restitution. *See* Paroline v. United States, 134 S. Ct. 1710, 1730 (2014). However, as discussed *supra* Part II.B.3.b, the standard for determining a defendant's financial responsibility remains incredibly broad, allowing lower courts to determine restitution based on their assessment of a defendant's "relative culpability." *Paroline*, 134 S. Ct. at 1734 (Roberts, C.J., dissenting).

152. *See supra* Part II.B.3.b.

the defendant to pay. How much of a victim's financial losses and emotional, psychological, and hedonic harms are attributable to any one viewer or trader of child pornography? What harm does circulation of these images cause as opposed to the harm caused by the initial abuse? How should courts quantify that harm, either generally or in an individual case? Courts have run the gamut in their answers to these questions, yet no consistent methodology has emerged, nor has the Supreme Court required one. The lack of common logic, method or analysis used to calculate restitution challenges the assertion that restitution is being measured by "actual losses."

The consistent emerging theme is courts impose compensation in an attempt to punish defendants and remedy the ongoing harms to the victims depicted in child pornography, harms the courts attribute to defendants who view child pornography, even if the defendant was not legally responsible for the victim's abuse or the dissemination of her image for financial gain. For example, one court awarded $5000 as a "nominal" award to a defendant convicted of possessing and distributing child pornography despite the government's failure to submit "any evidence whatsoever" regarding the amount of victim losses attributable to that defendant, noting at the same time that it had "no doubt" that the award was "less than the actual harm" the defendant had caused.[153] Another court awarded $3000 each to two victims.[154] The court settled on this amount because "an amount less than $3000 [is] inconsistent with Congress' findings on the harm to children victims of child pornography," but "is a level of restitution that the court is confident is somewhat less than the actual harm this particular defendant caused each victim, resolving any due process concerns."[155]

Still another court reached $3000 because the amount was "more than fair and reasonable" as compensation for 18 therapy sessions, or one session a month for one-and-a-half years.[156] The court did not indicate why this particular defendant should be held responsible for that particular number of therapy sessions. At least two courts have ordered a "nominal" award—one court calling its $5000 amount "nominal damages,"[157] and the other calling $100 a "nominal figure of restitution."[158] In other words, without making

153. United States v. Monzel, 641 F.3d 528, 539 (D.C. Cir. 2011).

154. United States v. Mather, No. 1:09-CR-00412 AWI, 2010 WL 5173029, at *5 (E.D. Cal. 2010).

155. *Id.*

156. United States v. Baxter, 394 F. App'x 377, 379 (9th Cir. 2011).

157. United States v. Klein, 829 F. Supp. 2d 597, 607–09 (S.D. Ohio 2011) (declining to award restitution because the government did not establish this defendant was the proximate cause of Amy's harm, but finding mandatory nature of 18 U.S.C. § 2259 required the payment of nominal damages), *vacated*, 518 F. App'x 369 (9th Cir. 2013). Several courts use the terms "restitution" and "damages" interchangeably. *See id.*; United States v. Hardy, 707 F. Supp. 2d 597, 614 (W.D. Pa. 2010).

158. United States v. Church, 701 F. Supp. 2d 814, 834–35 (W.D. Va. 2010). The court stated that it was ordering a "nominal figure of restitution in the amount of one hundred dollars," but in support of its order, stated "the award of one hundred dollars in restitution comports with the

findings as to exactly what losses a particular defendant has caused, courts are concluding a defendant who possessed a child pornography image caused sufficient harm to be required to pay.

Underlying the scattershot approach to determining what portion of the harm caused by the circulation of child pornography images should be attributable to an individual defendant is the overwhelming sentiment that these are "bad" guys. Judges seem to want to hold these individuals responsible for the offensive and illicit pleasure they assumedly have experienced as a result of viewing child pornography. As Justice Scalia said during the *Paroline* oral argument concerning a defendant convicted of child pornography possession, "This is a bad guy, and . . . he ought to be punished, and he ought to give restitution."[159] Courts impose compensation in an attempt to punish defendants and remedy the ongoing harms to the victims depicted in child pornography. Courts attribute these ongoing harms to defendants who view child pornography, even if most of those defendants did not participate in the direct sexual abuse of the victim or disseminate images of that abuse for financial gain. In other words, in the context of child pornography cases, restitution has become intertwined with moral judgment and vengeance, quintessential characteristics of criminal punishment.

Undoubtedly, deterrence is also a factor. As a society, we want to try to prevent people from obtaining or passing along child pornography images, and prevent them from encouraging the market to find more children to abuse and film. Yet there is more than just deterrence at work when considering a subject like child pornography. Most people acknowledge an undeniable desire to punish anyone remotely associated with the sexual abuse of children, even if those individuals never had any direct unlawful or perverse contact with any child. In the child pornography context, restitution punishes the defendant for the fact that child pornography continues to circulate against the victim's wishes.

Rehabilitation, another characteristic linked to criminal punishment, also lingers as a goal of restitution.[160] The Supreme Court has referred to criminal restitution as "an effective rehabilitative penalty" on multiple occasions.[161] In fact, one of the critical penological purposes the Court attributes to criminal restitution is its ability to "force[] the defendant to

definition and purposes underlying 'nominal damages' in the context of restitution payments." *Id.* at 835, 835 n.10 (citations omitted).

159. Transcript of Oral Argument at 30, Paroline v. United States, 134 S. Ct. 1710 (2014) (No. 12-8561).

160. *See, e.g.*, United States v. Lemire, 720 F.2d 1327, 1353 (D.C. Cir. 1983) ("So long, then, as restitution in any particular case is designed to further rehabilitation of the defendant without overly sacrificing society's interests in deterrence, retribution and community safety, we should presumably uphold the order of the trial judge." (citations omitted)).

161. *See Paroline*, 134 S. Ct. at 1727 (citation omitted); Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986).

confront, in concrete terms, the harm his actions have caused."[162] Restitution allows courts to "impress upon offenders that their conduct produces concrete and devastating harms for real, identifiable victims."[163]

Although the criminal justice system purports to be concerned "not only with punishing the offender, but also with rehabilitating him,"[164] rehabilitation is a nominal goal rather than a true goal of criminal restitution.[165] This is especially true in the context of defendants convicted of any type of sex crime.[166] Legislators' and courts' general rejection of any concrete and effective efforts at rehabilitation belie the assertion that they intend restitution to serve a rehabilitative goal—to make the defendant come to terms with the harms she has caused. Rather, restitution is aimed at punishing "the bad guy."

Requiring defendants to pay restitution because courts find a particular criminal act deeply troubling and want to compensate the victim arises most commonly and visibly in the child pornography context. However, this expansion of restitution seems to be the beginning of a larger trend in which victims are pursuing compensation for more attenuated harms. Courts have

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162. *Robinson*, 479 U.S. at 49 n.10.

163. *Paroline*, 134 S. Ct. at 1727 (citation omitted).

164. *Robinson*, 479 U.S. at 52.

165. *See, e.g.*, Dolovich, *supra* note 6, at 275–83.

166. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 381 (1997) (Breyer, J., dissenting) (noting "treatment" was only required by the Kansas sex offender commitment statute *after* release from prison, undermining the claim that treatment is an important statutory goal); Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2108–22 (2010).

Although legislative language requires "treatment," the on-the-ground reality is very different. Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. 439 (2008). Only 53–78% of those civilly committed receive treatment. *Id.* at 447. According to 2008 data, only 28 of the 3200 civilly committed offenders (0.88%) from responding states had been discharged through treatment, with an additional two persons to be discharged by the end of the year; six states had not released a single individual. *See* Miller, *supra*, at 2117 n.144 (citing REBECCA JACKSON ET AL., SOCCPN ANNUAL SURVEY OF SEX OFFENDER CIVIL COMMITMENT PROGRAMS 32 (2008)). "According to a Washington State report, of the 4534 persons committed or held for evaluation as sexually violent predators nationwide, only 494 had been discharged or released, and only 188—or 4 percent—of those under program staff recommendation." *Id.* (citing WASH. STATE INST. FOR PUB. POLICY, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED 3–4 (2007), *available at* http://www.wsipp.wa.gov/ReportFile/989/Wsipp_Comparison-of-State-Laws-Authorizing-Involuntary-Commitment-of-Sexually-Violent-Predators-2006-Update-Revised_Full-Report.pdf. The *New York Times* reported that only 1.7% of committed sex offenders have been recommended for release:

> Nearly 3000 sex offenders have been committed since the first law passed in 1990. In 18 of the 19 states, about 50 have been released completely from commitment because clinicians or state-appointed evaluators deemed them ready. Some 115 other people have been sent home because of legal technicalities, court rulings, terminal illness or old age.

Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES (Mar. 4, 2007), http://www.nytimes.com/2007/03/04/us/04civil.html.

rejected most of these efforts so far, but they are arising with increasing frequency in corporate fraud and illegal kickback scheme cases.[167] It is easy to envision a scenario in the relatively near future when victims are regularly seeking compensation for harms the defendant did not proximately cause in that particular case. The Sixth Circuit recently upheld a restitution order in a prescription drug conspiracy case requiring a defendant to pay community restitution in the amount of $1 million based on the "amount of public harm caused by the offense."[168] In imposing this significant amount of community restitution, the trial court mirrored language in the child pornography possession cases, elaborating at length about how deeply troubling it found the distribution of illegal prescription drugs in the state generally, but giving no indication of the link between the defendant's conduct and the specific, quantifiable harms to the community attributed to him.[169] Even in a context less emotionally fraught than child pornography, the underlying punitive desire remains present.

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167. *See, e.g.*, *In re* Allen, No. 14-40505, 2014 WL 2017780, at *1 (5th Cir. May 19, 2014); United States v. Slovacek, 699 F.3d 423, 427 (5th Cir. 2012); United States v. Stoerr, 695 F.3d 271, 281 (3d Cir. 2012); United States v. Alcatel-Lucent France, SA, 688 F.3d 1301, 1307 (11th Cir. 2012), *cert. denied*, Instituto Costarricense de Electricidad v. United States, 133 S. Ct. 806, 806 (2012); *In re* Fisher, 649 F.3d 401, 405 (5th Cir. 2011).

168. 18 U.S.C. § 3663(c)(1), (2)(a) (2012); United States v. Leman, Nos. 12-5958, 13-6092, 2014 WL 3746542, at *8 (6th Cir. July 31, 2014). The MVRA allows for community restitution in drug cases "in which there is no identifiable victim." 18 U.S.C. § 3663(c)(1). Although this statutory provision has been in place for almost 20 years, only recently have courts begun to authorize restitution under its auspices. A fairly recent, prior effort by this author to find cases imposing restitution under this provision was unavailing.

169. The trial court did not order a criminal fine in the case. *Leman*, 2014 WL 3746542, at *8. The defendant argued on appeal that the $1 million restitution amount, which by statute, may not "exceed the amount of the fine which may be ordered for the offense charged in the case," *see* 18 U.S.C. § 3663(c)(2)(B), violated the statute on its face. *Leman*, 2014 WL 3746542, at *8. Applying a plain error analysis, the Court rejected the defense argument, as the statutory amount authorized was $1 million, even though the trial court did not impose that amount. *See id.* Rather, the trial judge indicated that because, "there's a whole community and culture that's been devastated by this criminal activity," and "a lot of pain that comes from the decisions [Mr. Leman] made," he would order community restitution. Transcript of Sentencing Hearing, at 87, 101, United States v. Leman, No. 7:10-CR-00010 (GFVT) (E.D. Ky. 2012). In authorizing its order, the trial court spoke at length about its motivations for the restitution portion:

> It is hard for me to overstate the devastation caused by the diversion of legal drugs for illegal purposes in our community. In the commonwealth of Kentucky, twice as many people die from drug overdoses as they do from car accidents. It's a stunning statistic. We're ravaged by it. It touches everyone in some form. People die because of this criminal activity. People's lives are ruined, and there's a generational impact where generations of Kentuckians are held in bondage to this addiction. . . . [You] owe us a debt.

Id. at 89, 91. The court ordered 65% of the $1 million to go to the Kentucky Crime Victims Compensation Board, and 35% to the Kentucky Department of Mental Health's Division of Substance Abuse. *Id.* at 105. Neither the government nor the court pointed to any specific harms attributable to the defendant resulting in the $1 million amount. *See, e.g.*, *id.* at 45–51, 87, 89–90, 91–92, 101. *But see id.* at 97 ("[P]eople got hurt because of the distribution, illegally, of these drugs.").

3. Restitution Required Even When No Actual Loss to Victim

Another marker of how courts and legislatures regularly apply criminal restitution as punishment occurs when restitution is ordered even though the victim has not claimed a loss. Often, these are cases in which the court orders restitution to a third party, such as an insurance company or state or federal agency, for coverage they provided to the victim as a result of the offender's crime. In these scenarios, the victim has no unmitigated losses to be covered. Normally, this type of reimbursement would be pursued through the civil system, but because the rules for criminal restitution are so loose, companies can pursue compensation through the criminal sentencing hearing, thereby engaging in an end-run around the civil system. Although the third party would certainly support an argument requiring convicted defendants to cover their costs, criminal court judges assumedly require a more compelling reason to order compensation to companies through a criminal sentencing process. The most logical reason to require criminal restitution payments to third parties is to require the offender to suffer an additional financial loss in order to right the moral imbalance her actions caused.

In a representative case out of Hawai'i, the defendant repeatedly stabbed his wife, an active-duty member of the United States Army, almost killing her.[170] She was treated at a civilian medical center, and then transferred to an army medical center, where she received further surgery, occupational therapy, and mental health treatment.[171] Because of her military service, she received her medical and mental health treatment free of charge. However, the army medical center sought, and the court ordered, payment for the costs of providing her medical care.

Upholding the restitution order, the Ninth Circuit relied on the fact that the victim would have been able to seek reimbursement had she been responsible to pay for her own care, even though she did not pay for her own care in this case.[172] According to the court, "a defendant must, in every case involving bodily injury, pay what it costs to care for the victim, whether or not the victim paid for the care or was obligated to do so."[173] Even though the victim in the case suffered no financial loss, "[h]er personal injuries generated the expenses," and thus, "[f]unctionally, under this statutory scheme, she thereby incurred those expenses as a loss and received compensation by way of the government's payments for her care."[174] As a result, "the court must require the defendant to 'pay an amount equal to the cost' of necessary

170. United States v. Cliatt, 338 F.3d 1089, 1090 (9th Cir. 2003).
171. *Id.*
172. *Id.* at 1091.
173. *Id.*
174. *Id.* at 1093.

medical and similar care rendered to the victim" when the victim suffers bodily injury.[175]

Requiring offenders to pay restitution despite an absence of actual loss to the direct victim does not only happen in the context of serious bodily injury. For example, in a 2002 case out of Washington State, the court ordered the defendant to pay restitution for property damage caused by a fire resulting from the operation of a methamphetamine laboratory.[176] Although he was one of three defendants participating in the manufacturing of methamphetamine at the home, leased by one of his co-defendants, the defendant was not present at the time the fire started and had no role in the fire, which began when a co-defendant placed a jar of chemicals on a hotplate.[177] As a result of the fire, an insurance company paid the owner of the house for the damage.[178] The district court ordered each defendant to pay restitution to the insurance company for the amount paid to the owner.[179] The circuit court affirmed.[180] The appellate court found the insurance company was a victim under the statute, and the defendant's conduct "created the circumstances under which the harm or loss occurred," even though he was not the direct cause of the fire.[181]

There are several issues in the aforementioned scenarios worth unpacking. The first is whether the third party—be it a hospital, insurance company, or other individual—should be considered a victim for purposes of criminal restitution statutes. It returns us to the fundamental question of what legislatures and courts intend restitution to do. Is restitution fundamentally a restorative mechanism, aimed at making victims whole, or a punitive one, aimed at making a defendant pay any party related to the victim for having committed the crime? If legislatures and courts intend restitution to disgorge the unlawful benefit a defendant received as a result of her criminal action, restitution to either the direct victim or the third party would not be appropriate here. If restitution is intended to "make a victim whole" by requiring a defendant to compensate the victim for harms and injuries directly resulting from her criminal action,[182] again, restitution would not be appropriate in either of these instances, as the defendant directly harmed neither the medical center nor the insurance company. Rather, the only rational reason to require a defendant to pay restitution to a third party is as a form of punishment.

175. *Id.* at 1091 (quoting 18 U.S.C. § 3663A(b)(2) (2012)).
176. United States v. Hackett, 311 F.3d 989, 993 (9th Cir. 2002).
177. *Id.* at 990–91.
178. *Id.* at 991.
179. *Id.*
180. *Id.* at 993.
181. *Id.* at 992–93 (quoting United States v. Spinney, 795 F.2d 1410, 1417 (9th Cir. 1986)).
182. *See supra* note 17 and accompanying text.

Restitution has never been intended to make any person or entity who helps the victim whole. If we are broadening "restitution" to compensate any agency, insurance company, family member, friend, or other entity who offers help to a victim of crime, even when the helper is contractually obligated to assist the victim, the term "restitution" begins to be so attenuated that it ceases to be restitution and starts to resemble a much broader version of civil damages.

The second issue worth interrogating is whether the hospital or insurance company should be able to seek reimbursement from the person responsible for the harms in the criminal system.[183] The critical question is not whether these institutions should be allowed to recover their costs, but whether the criminal process is the appropriate mechanism to use for such compensation. Ordinarily, a hospital or insurance company would seek damages through the civil system for expenses incurred in treating the woman. But in these instances, judges agree to circumvent that process and order reimbursement through the criminal sentencing process.

Incorporating civil proceedings into criminal sentencing hearings is not an unusual occurrence, but it is cause for concern. Increasingly, private parties are requesting, and judges are allowing, civil disputes to be brought under the auspices of the criminal justice system. The result is that civil damages have morphed into criminal punishment through restitution. Using restitution, third parties are seeking to intervene in a criminal case, and restitution has become a backdoor way of bringing a civil-damages proceeding between two private parties into a criminal sentencing.[184]

Different from the consequences of a civil proceeding, however, the results of a criminal restitution hearing are incorporated into a criminal judgment and commitment order. In criminal cases, courts impose restitution as part of a sentence pursuant to a prosecution brought by the people, the state, or the United States on behalf of society, and the end result is intended to benefit not just the victim or a third party, but all of us. In other words, the purpose of a court's action at a criminal sentencing is simply and

183. In its recent *Paroline* opinion, the Supreme Court rejected a parallel argument, finding that multiple defendants should not be required to seek contribution or reimbursement from one another in an instance where many people were convicted of contributing to the same harm: "[T]here is scant authority for [the] contention that offenders convicted in different proceedings in different jurisdictions and ordered to pay restitution to the same victim may seek contribution from one another. There is no general federal right to contribution. Nor does the victim point to any clear statutory basis for a right to contribution in these circumstances." Paroline v. United States, 134 S. Ct. 1710, 1725 (2014) (citations omitted).

184. In fact, crime victims have regularly sought to intervene and to be heard at a defendant's sentencing hearing and as part of the appellate process, but typically, those requests are denied. *See, e.g.*, United States v. Slovacek, 699 F.3d 423, 426–27 (5th Cir. 2012); United States v. Stoerr, 695 F.3d 271, 281 (3d Cir. 2012); United States v. Alcatel-Lucent France, SA, 688 F.3d 1301, 1307 (11th Cir. 2012); *In re* Andrich, 668 F.3d 1050, 1051 (9th Cir. 2011); *cf.* United States v. Perry, 360 F.3d 519, 539 (6th Cir. 2004).

fundamentally different than the goal in a civil case.[185] The goal of criminal restitution is some combination of retribution, moral condemnation, deterrence, and compensation, and the effects and consequences that attach to that restitution order are the same as they are for other criminal punishments. Thus, when the criminal court issues a criminal sentencing order requiring a criminal defendant to pay what amounts to civil damages to a third party, that criminal restitution order carries with it all the things that attach to a criminal conviction—moral condemnation, societal stigma, and the collateral consequences of criminal punishment.[186]

Because of the fundamentally different goals and consequences of criminal punishment and civil damages,[187] when civil damages become imputable to a criminal case, restitution is encouraged to become a vehicle for retribution rather than reparation. With restitution amounts being only loosely tied to the criminal actions of a criminal defendant and the losses of a crime victim, the motivation to impose financial remedies extends beyond simple compensation. Rather, the motivation for imposing restitution in these cases seems to be a desire to hold someone accountable for the harms a victim has experienced. Thus, even when the victim suffers no out-of-pocket expenses, a court can still order restitution to a third party.

In fact, it is not uncommon for a victim who has already received payment from the defendant in a civil suit or other settlement to obtain restitution in the criminal case from that same defendant, for that same amount. Because her losses have been reimbursed, she no longer has a financial loss at the time of the criminal sentencing. Yet courts regularly find that a private or civil settlement between "a criminal wrongdoer" and the victim "does not preclude a district court from imposing a restitution order for the same underlying wrong."[188]

If the goal of restitution is truly to compensate a victim's losses, no justification exists for requiring payment to a victim who has experienced no financial loss, or has already had that loss reimbursed by a third party. Instead, restitution is a financial penalty imposed in an effort to "make the defendant pay" for his actions by compensating either the victim or a third party. In this scenario, no other justification can explain the imposition of restitution. The defendant has already compensated the victim for her loss in a civil hearing,

185. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 42, 51 (2011) (stating that restitution should not have a punitive effect); *id.* § 51 cmt. k (stating that "[d]isgorgement of wrongful gain is not a punitive remedy").

186. *See, e.g.*, Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213 (2010).

187. *See, e.g.*, Coffee, *supra* note 149, at 1878; Mann, *supra* note 149, at 1799; Robinson, *supra* note 149, at 205–07.

188. United States v. Bearden, 274 F.3d 1031, 1041 (6th Cir. 2001); *see also* United States v. Gallant, 537 F.3d 1202, 1249–50 (10th Cir. 2008); United States v. Sheinbaum, 136 F.3d 443, 447–48 (5th Cir. 1998); Kiwanuka v. Bakilana, 844 F. Supp.2d 107, 115–16 (D.D.C. 2012).

yet she is being required to do so again through the criminal restitution process. These cases reveal the implausibility of claiming that restitution is a restorative mechanism. Restitution cannot credibly be a restorative mechanism aimed at repayment when the victim has not suffered any losses for which she is seeking reimbursement.

Courts are compelling defendants to answer for a much broader range of losses than those for which they are legally accountable, including those claimed by individuals and entities that did not suffer the experience of being mistreated by a criminal defendant, or who that defendant has already reimbursed for those losses. Disgorgement of unlawful gains no longer is anywhere in this restitution picture, and even compensation of losses aimed at aiding victims remains on the periphery of the new restitution landscape. The aim is moral condemnation and retribution, the principle that each defendant deserves to be punished because she is morally culpable for all the ramifications of her actions, no matter how far beyond the victim the vibrations of this tolling bell reach.

4. "Reimbursement" of State Investigations and Prosecutions

One other common scenario reveals how criminal restitution is being imposed in a manner that consistently results in punitive effects. In many states, legislatures have passed statutes allowing courts to order defendants to pay "restitution" to the state for the costs of investigating and prosecuting the crime(s) with which they are charged.[189] Applying the definition of punishment outlined earlier, this Subpart will show how restitution being imposed as reimbursement for prosecution and investigation costs constitutes punishment: it is a state action, subsequent to a criminal allegation, resulting in a substantial deprivation and/or obligation, and is imposed in a retributive manner.

Increasingly, in states across the country, criminal justice systems are charging criminal defendants for various costs associated with investigating, prosecuting, detaining, and releasing them.[190] Defendants are regularly

189. This is part of a larger trend toward imposing ever greater "legal financial obligations," or "LFOs," on criminal defendants. *See, e.g.*, Logan & Wright, *supra* note 13. This trend becomes especially troubling when criminal justice systems rely on the income from these financial penalties to meet their budgets for ordinary system operations. For a thoughtful, more in-depth discussion of the larger issues related to LFOs, see *id.*

190. *See, e.g.*, BANNON ET AL., *supra* note 118; Plunkett, *supra* note 118, at 59–60. This author is not advocating that every one of the costs associated with prosecuting, investigating, detaining and releasing a defendant should be subject to constitutional protections. Despite a few detractors, most recognize criminal restitution's fundamental nature as punishment. By way of contrast, most would likely contest that the costs highlighted here are punitive in intent. Additionally, the Supreme Court has permitted states to recoup from a defendant the costs of representation. *See* Fuller v. Oregon, 417 U.S. 40 (1974); *cf.* James v. Strange, 92 S. Ct. 2027, 2030 (1972) (rejecting Kansas' recoupment statute but declining to make "any broadside pronouncement on [the recoupment statute's] general validity"). Although this author takes issue with each of these and other types of "reimbursement," during the prosecution through

charged with prosecution "reimbursement" fees, costs of judicial proceedings, criminal defense, bail, booking, incarceration, probation supervision, and various other services.[191] These are costs that are incurred on top of any other financial sanctions imposed, such as criminal fines, forfeiture, restitution to crime victims, or other penalties. The justifications for such requirements often include the mounting costs of increasing criminalization and penalization policies our society has implemented, the limited budgets most jurisdictions experience, and the underlying belief "that it is unfair for criminals to get a free ride while blameless citizens may go without housing and food."[192]

Although many states and municipalities justify imposing restitution in this manner by noting the lean economic times and tightening budgets, upon closer inspection, this logic does not hold up. Given the indigence of most criminal defendants, the likelihood of collecting anything from current or prior inmates is relatively small.[193] These programs would not be part of any viable financial model. Rather, it is the particularly punitive and retributive sentiment of the "criminal" getting a "free ride" that allows such policies to be implemented.

Categorizing these court-imposed financial obligations as "restitution" also does not fit particularly well into the criminal justice framework. In typical cases of restitution, there is a prosecution brought by the state, and a third party who is a victim. Criminal restitution statutes always have focused on the victim, as prosecution costs are part of state and local budgets. Cases without harm to a third party are typically called "victimless crimes," because the government is not generally considered a "victim" according to the common understanding of the term. If we were to accept the premise that the government is a victim in every case they prosecute, then the government would be a victim in every single criminal case, a logic that simply does not work.[194]

North Carolina has made fairly prominent use of laws requiring defendants to pay "restitution" for the costs of investigating and prosecuting the crimes they are alleged to have committed. In any case involving the use of lab testing—drug testing, DNA testing, and blood alcohol content testing, for example—North Carolina requires a convicted defendant to pay the state

post-conviction supervision process, this Article is not advocating here the extension of constitutional protections to most of these other costs.

191. Plunkett, *supra* note 118, at 59.

192. *Id.* at 69.

193. *See* Desiree Evans, *Doing Time on Their Own Dime: More States Charge Inmates for Stays in Jail, Prison*, INST. FOR S. STUD. (May 19, 2009), http://www.southernstudies.org/2009/05/doing-time-on-their-own-dime-more-states-charge-inmates-for-stays-in-jail-prison.html; Nate Rawlings, *Welcome to Prison. Will You Be Paying Cash or Credit?*, TIME (Aug. 21, 2013), http://nation.time.com/2013/08/21/welcome-to-prison-will-you-be-paying-cash-or-credit.

194. Plunkett, *supra* note 118, at 91.

$600 for the costs of conducting lab tests that are a routine part of most criminal investigations.[195] On the surface, $600 is "reimbursement" not "punishment," as it is intended to "pay back" the state for the costs of the testing required for the state to prove its case. But local courts have declined to require the government to proffer evidence of the testing costs, claiming the statutory language allowing for $600 is sufficient "evidence" of the amount to be reimbursed.[196]

The unexamined acceptance of $600 as the actual cost of every single laboratory test—a simple blood alcohol test as well as the mass spectrometer and gas chromatograph test used to determine the content of drugs or a restriction fragment length polymorphism used to analyze DNA—seems a stretch, raising the issue of whether the $600 restitution ordered in criminal cases truly is reimbursement. It is quite unlikely that a blood alcohol test costs the same as highly advanced drug-testing technology. If the true aim of North Carolina's restitution provision were reimbursement, one would assume the state would make some effort to ascertain the actual costs of the testing. Against the backdrop of cash-strapped justice systems, high arrest rates, and retributive intent, the fact that a set amount is ordered every time, without any evidentiary proof to support it, suggests that the purpose of ordering restitution is something other than reimbursement of the cost of a procedure.

Statutory language supports the idea that the legislature is using restitution as punishment. This statute is located in a general "court costs" section. The imposition of court costs is considered part of the punishment imposed, and the money typically goes toward maintaining the court system

195. North Carolina courts have read two statutes in conjunction with one another to reach this conclusion. *See, e.g.*, State v. Fennell, No. COA11-1148, 2012 WL 698252, *3 (N.C. Ct. App. 2012); *see also* N.C. GEN. STAT. § 7A-304(a)(7) (2013) ("[I]n cases in which, as part of the investigation leading to the defendant's conviction, the [State Bureau of Investigation laboratory facilities] have performed DNA analysis of the crime, tests of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent . . . . the district or superior court judge shall, upon conviction, order payment of the sum of six hundred dollars to be remitted to the Department of Justice for support of the [State Bureau of Investigation]."); N.C. GEN. STAT. § 15A-1343(d) (requiring a defendant to "make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant . . . [where restitution means] restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant . . . [and] 'aggrieved party' includes individuals, firms, corporations, associations, other organizations, and agencies, whether federal, State or local"); State v. Stallings, 335 S.E.2d 344 (N.C. App. 1985) (holding that under N.C. GEN. STAT. § 15A-1343(d) damage or loss to government agencies must be "over and above its normal operating costs" (citations omitted)).

196. *See, e.g.*, *Fennell*, 2012 WL 698252, at *3 ("The trial court's restitution order . . . was supported by the following evidence presented at trial: . . . the Pender County Sheriff's Office sent the drugs purchased by the informant to the State Crime Laboratory for identification. This evidence was sufficient to support the trial court's order of restitution." (citing N.C. GEN. STAT. § 7A-304(a)(7) (2011); State v. Moore, 715 S.E.2d 847, 849 (N.C. 2011)).

and support of court personnel.[197] In most states, these miscellaneous court fees are not broken down, but lumped together into one payment ordered at sentencing, titled "court costs" or "fees." As such, the funds are not considered reimbursement. The presence of the statute ordering $600 to the State Bureau of Investigation for every case with testing in the "court costs" section belies the notion that it is intended to be reimbursement.

Law enforcement agencies, and the laboratories that operate under their aegis, are state agencies tasked with the job of investigating crimes. They are representatives of the state, the "public," paid by the state for the work they do, and the expenses associated with their work are paid for by state budgets. Their investigations are for the benefit of public safety and order, and as such, are paid for by state revenue.[198] Yet, in North Carolina, defendants, usually indigent defendants, are being required to cover these routine investigative costs, along with other costs to support the everyday operations of the criminal justice system, including a fee for "maintenance of misdemeanors in county jails."[199]

North Carolina is not the only place where restitution is being used to cover the costs of investigating and prosecuting a defendant's crime.[200] With little discussion, an Ohio state appellate court upheld a restitution order requiring the defendant to "pay back" the "buy money" used by a confidential informant to facilitate controlled purchases of drugs by the defendant.[201] In a

197. *See, e.g.*, Alkire v. Irving, 330 F.3d 802, 816–18 (6th Cir. 2003) (discussing imprisonment for failing to pay court costs, in addition to fines); *In re* Thompson, 16 F.3d 576, 579 (4th Cir. 1994) (finding court costs imposed as part of criminal sentence are not dischargeable in bankruptcy proceedings); United States v. Dyke, 901 F.2d 285, 287 (2d Cir. 1990) (holding assessment of court costs is part of criminal sentencing under the U.S. Sentencing Guidelines).

The other provisions of this particular statutory section also require convicted defendants to pay $12 for the use of the courtroom, $4 for the maintenance of the judicial and county courthouse phone systems, $6.25 for retirement and insurance benefits of state and local law enforcement officers, and $100 if the defendant is convicted of a second or subsequent crime, among other costs. *See* N.C. GEN. STAT. § 7A-304(a) (2013).

198. According to a 2010 study by the Tax Policy Center, the largest sources of state revenue come from transfers from the federal government and some local governments. *See* TAX POLICY CTR., URBAN INST. & BROOKINGS INST., THE TAX POLICY BOOK iv-1-1 (2012), *available at* http://www.taxpolicycenter.org/briefing-book/TPC_briefingbook_full.pdf. Sales and gross receipt taxes were the next biggest source, followed by individual and corporate income taxes. *See id.* The individual income tax and payroll taxes constitute the bulk of the federal government's revenue. *See id.* at I-1-1.

199. N.C. GEN. STAT. § 7A-304(a)(2b).

200. *See, e.g.*, People v. Palomo, 272 P.3d 1106 (Colo. App. 2011); Leyritz v. State, 93 So. 3d 1156 (Fla. Dist. Ct. App. 2012); Commonwealth v. Hernandez, 917 A.2d 332 (Pa. Super. Ct. 2007); Arnold v. State, 306 P.2d 368 (Wyo. 1957).

201. State v. Middlebrooks, No. 2010 AP 08 0026, 2011 WL 3930308, at *3 (Ohio Ct. App. 2011). *But see* State v. Frazier, No. 10CA15, 2011 WL 856964, at *1, *5–6 (Ohio Ct. App. 2011) (finding trial court committed plain error when it ordered defendant to pay restitution to compensate the police department for "money it voluntarily gave a confidential informant to purchase drugs" from the defendant because "a law enforcement agency is not a 'victim' [under state law] when it voluntarily spends its own funds to pursue a drug buy through an informant").

different type of case, the Eighth Circuit endorsed a restitution order in an anthrax-scare case out of Iowa. A defendant was convicted of sending an envelope containing white powder to a local police department, which threatening language indicated was anthrax.[202] The Iowa State Hygienic Lab tested the powder and determined it was baby powder and carpet cleaner.[203] The district judge ordered the defendant to pay $1401.44 to the lab for testing the powder.[204] In upholding the district court's order, the circuit observed, "it is now firmly established that a unit of government directly and proximately harmed by a qualifying offense can be awarded restitution under the MVRA."[205]

Thus, in numerous settings, criminal defendants are now being required to cover routine investigative costs under the guise of restitution orders.[206] Although states may claim a purely restorative, financial motivation, or even a deterrent one, on closer inspection, such assertions do not bear weight. Certainly the money benefits cash-strapped states, especially in difficult economic times, and helps them provide the services necessary for the implementation of the criminal justice system. But the motivation is certainly not, in the main, restorative. Rather, given the practical realities of how much

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202. United States v. Haileselassie, 668 F.3d 1033, 1034 (8th Cir. 2012).

203. *Id.*

204. *Id.* The Ninth Circuit has gone a step farther, requiring a defendant to pay restitution to the United States Postal Service, for lost employee work hours when the facility had to be evacuated due to the anthrax scare, and to the state Hazardous Materials Division team who responded to the scene, in addition to paying for the costs of testing the powder. United States v. De La Fuente, 353 F.3d 766, 768–69, 772–74 (9th Cir. 2003). The Third Circuit upheld a comparable restitution order. United States v. Quillen, 335 F.3d 219 (3d Cir. 2003).

205. *Haileselassie*, 668 F.3d at 1036. Interestingly, the federal appeals court went on to distinguish the circumstances of this particular case, purportedly involving an "imminent threat" to safety, from cases, such as those in North Carolina and Ohio, where a defendant pays restitution for the costs of investigating and prosecuting the offense. The Court noted, "[t]he cost of determining if an imminent threat to the safety of government workers or operations exists is a true involuntary victim cost directly and proximately caused by this type of offense." *Id.* In contrast, costs of investigating and prosecuting offenses are "voluntary cost[s] of criminal investigation for which restitution may not be ordered." *Id.* at 1036–37; *see also Frazier*, 2011 WL 856964, at *5–6.

In the context of determining whether restitution is punishment, the distinction between "voluntary" and "involuntary" costs is negligible. Under the definition of punishment relied on throughout, the sole issue raised by this distinction is the court's intent in ordering defendants to pay these costs. The court's distinction between voluntary and involuntary costs turns on whether a defendant's actions posed an unexpected threat to the safety of government workers and facilities, making them an "involuntary," instead of a "voluntary," victim. Ordering restitution solely in cases where state agencies are "involuntary" victims is unrelated to the issue of whether restitution should compensate state agencies for damages. Rather, such a distinction only further reveals punitive intent—courts are punishing defendants only when they are seen as creating an "imminent threat" of harm.

206. *See* Alexander v. United States, 509 U.S. 544, 548 (1993) (ordering the defendant in U.S. District Court for the District of Minnesota to pay costs of prosecution, incarceration and supervised release).

money states earn from indigent defendants, the punitive motivation for requiring a criminal defendant to pay for the costs of the investigation and prosecution of her own case is evident.

If we return to the definition of punishment outlined earlier, the imposition of restitution in this context falls within its ambit. Restitution is imposed pursuant to a state action, subsequent to a criminal conviction, resulting in a substantial deprivation and/or obligation for indigent defendants, pursuant to a statute that, although not clearly punitive on its face, is imposed in a manner intended to communicate retribution and moral condemnation.

One circuit court has acknowledged as much. In a case adjudicated prior to a change in North Carolina law allowing government entities to receive restitution, the Fourth Circuit agreed that imposing restitution for expenses incurred during the investigation of a case was punitive and imposing it would be a violation of the Fourteenth Amendment.[207] The Fourth Circuit not only declined to find the North Carolina Bureau of Investigation a "victim of crime," but found the imposition of restitution for "expenses in investigating [ ] drug offenses . . . among its normal operating costs" and therefore not imposed "for rehabilitative purposes" or "the compensation of victims of crime."[208]

State courts may continue to deny that the investigation and prosecution of a case are "normal operating costs,"[209] but that denial rings hollow, especially in light of statistics that reveal, for example, that 20% of arrests in

207. Evans v. Garrison, 657 F.2d 64 (4th Cir. 1981).

208. *Id.* at 66–67. The state courts' readings of the two North Carolina statutes currently in force seem to skirt around the Fourth Circuit's ruling by: (1) the legislature's inclusion of "government agencies" in the list of "aggrieved part[ies]" entitled to receive restitution, *see* N.C. GEN. STAT. § 15A-1343(d) (2013); and (2) statutory language holding that "no government agency shall benefit by way of restitution except for particular damage or loss to it *over and above its normal operating costs*," N.C. GEN. STAT. § 15A-1340.37 (emphasis added).

For example, in one case, the court upheld a restitution order requiring the defendant to pay the state Bureau of Investigation the amount of money the state used to purchase drugs from the defendant in an undercover buy. Finding this was "over and above" the SBI's "normal operating costs," the court elaborated, "[m]oney expended and not recovered by undercover SBI agents making a buy to obtain evidence necessary to an arrest for illicit drug operations is a 'particular damage or loss to it,' and not part of the agency's 'normal operating costs.'" State v. Stallings, 335 S.E.2d 344, 347 (N.C. App. 1985). The court continued, " '[n]ormal operating costs' would include the salaries and compensation of agents, acquisition and maintenance of vehicles and other equipment, and office and administrative expenses but not money used by undercover agents to purchase illicit drugs." *Id.*

209. *See, e.g.*, State v. Fennell, No. COA11-1148, 2012 WL 698252, at *3 (N.C. Ct. App. Mar. 6, 2012) (holding money used to buy drugs could be ordered as part of restitution); State v. Stallings, 335 S.E.2d 344, 347 (N.C. Ct. App. 1985) (holding that a restitution award may include "[m]oney expended and not recovered by undercover[]agents making a buy to obtain evidence necessary to an arrest for illicit drug operations").

North Carolina over the past year were for drug crimes.[210] Nationally, as of 2007, more arrests were made for drug crimes than any other type of crime.[211] Drug crimes are the bread and butter of most law enforcement agencies. Thus, there can be little question that, in many cases both in North Carolina and elsewhere, when restitution is being imposed to reimburse the costs of investigating and prosecuting a defendant's case, restitution is being imposed in a punitive manner.

Increasingly, states are implementing laws compelling criminal defendants to cover routine investigative and prosecution costs. Despite arguments made to the contrary, a closer look at the statutes directing restitution be imposed in this way, and court decisions upholding these laws and their execution, confirms the increasing use of restitution as punishment pursuant to a defendant's conviction.

IV. CRIMINAL RESTITUTION SHOULD BE AFFORDED CONSTITUTIONAL PROTECTIONS

Despite its increasingly punitive nature, criminal restitution has not been granted the constitutional protections normally afforded to criminal punishments. A review of judicial opinions reveal that judges remain conflicted as to what role restitution plays, and whether it *should* operate as punishment, reimbursement, or both. Marked resistance to embracing restitution's punitive role remains. Although the source of such reluctance is unclear, one possibility is that conceding restitution's role as punishment would mean acknowledging necessary constitutional protections are not in place. Employing constitutional protections for restitution would fundamentally change sentencing procedures and remove a level of judicial discretion in the sentencing decision. Given criminal restitution's regular use as punishment, however, such changes are now due.

Leadership from the Supreme Court on this issue is necessary, as the Supreme Court's precedent on the fundamental character of restitution is muddled. Over the past 25 years, the Supreme Court has set forth conflicting views on criminal restitution's fundamental purpose. On multiple occasions, the Court affirmatively embraced restitution's punitive role.[212] In other cases,

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210. According to the North Carolina Department of Corrections, of the 12,369 prison entries in the DOC system between June 1, 2012, and May 31, 2013, 4275 were for drug crimes. *See Automated System Query*, DPS RES. & PLANNING, http://webapps6.doc.state.nc.us/apps/asqExt/ASQ (last visited Sept. 30, 2014). Across the country, drug offenders comprised approximately 34% of all felony convictions in state courts, according to the Bureau of Justice Statistics. *See Drugs and Crime Facts*, BUREAU OF JUST. STAT., http://www.bjs.gov/content/dcf/ptrpa.cfm (last visited Sept. 21, 2014).

211. *See Drugs and Crime Facts*, *supra* note 210.

212. The Court declared in 2004 that the purpose of criminal restitution is to "mete out appropriate criminal punishment." Pasquantino v. United States, 544 U.S. 349, 365 (2005). This assertion was made in the context of the Court determining whether depriving a foreign government of tax revenue constitutes wire fraud. Likewise, in a 1986 case discussing whether restitution orders abate, the Court elaborated, "[t]he criminal justice system is not operated

the Court has asserted with equal force that criminal restitution's primary purpose is compensatory.[213] Thus, the Supreme Court appears conflicted in its view of restitution's purpose.

This tension in the Court's jurisprudence is not surprising in light of the significant evidence that criminal restitution was envisioned to serve dual purposes: compensation and punishment. In fact, recently, the Court seems to have explicitly acknowledged criminal restitution's twin aims. Although asserting that its "primary goal" is compensatory, the Court confirms that criminal restitution "serves a punitive purpose" as well.[214] The dual intent should not relieve the Court from acknowledging restitution's central role in punishment, however, or from applying the constitutional safeguards that accompany other forms of punishment.

Now that the Supreme Court again has acknowledged criminal restitution's role as punishment, it should take the next step and recognize the constitutional protections that must adhere to criminal restitution light of its punitive character.

A. THE SIXTH AMENDMENT APPLIES TO CRIMINAL RESTITUTION

Criminal restitution should be subject to the jury trial right of the Sixth Amendment, just as any other criminal punishment is. The Supreme Court's Sixth Amendment jurisprudence recognizes that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[215] In *Southern Union Co. v. United States*, one of the most recent cases to elucidate the contours of the jury trial right, the Court found Sixth Amendment protections applicable to criminal fines, because a fine is a criminal penalty.[216] As such, any fact that increases the maximum

primarily for the benefit of victims, but for the benefit of society as a whole. . . . [T]he decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant." Kelly v. Robinson, 479 U.S. 36, 52 (1986). As a result, "[b]ecause criminal proceedings focus on State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate 'for the benefit of' the State. Similarly, they are not assessed 'for . . . compensation' of the victim." *Id.* at 53.

213. In 1990, four years after declaring restitution a criminal punishment operated for the benefit of the state, and in the context of whether restitution could be ordered for losses other than those caused by the conduct underlying the offense of conviction, the Court found restitution's intent was to "restor[e] someone to a position he occupied before a particular event." Hughey v. United States, 495 U.S. 411, 416 (1990). In other words, restitution's aim was "to compensate victims." *Id.* Again in 2010, the Court declared of the Mandatory Victims Restitution Act: "[T]he statute seeks primarily to assure that victims of a crime receive full restitution. . . .[It] seeks speed primarily to help the victims of crime and only secondarily to help the defendant." Dolan v. United States, 560 U.S. 605, 613 (2010).

214. Paroline v. United States, 134 S. Ct. 1710, 1726 (2014).

215. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

216. S. Union Co. v. United States, 132 S. Ct. 2344 (2012).

amount of a criminal fine must be proven to a jury beyond a reasonable doubt.[217] Applying the same logic results in the undeniable conclusion that the Sixth Amendment should apply to restitution as well.

Yet, every circuit court to consider whether the Sixth Amendment applies to criminal restitution has declined to grant this constitutional protection.[218] That has remained true even in light of the Supreme Court's recent jurisprudence acknowledging that any finding that increases a defendant's punishment violates the Constitution.[219] As the Ninth Circuit acknowledged, only a decision by a higher court—either the Supreme Court or an *en banc* circuit court—seems likely to change that:

> Our precedents are clear that *Apprendi* [*v. New Jersey*] doesn't apply to restitution, but that doesn't mean our caselaw's well-harmonized with *Southern Union*. Had *Southern Union* come down before our cases, those cases might have come out differently. Nonetheless, our panel can't base its decision on what the law might have been. Such rewriting of doctrine is the sole province of the court sitting en banc.[220]

Prior to *Southern Union*, the critical issue for most courts was not restitution's fundamental character as criminal punishment or a civil sanction. In fact, a majority of circuits accept criminal restitution's punitive character.[221] Rather, courts' reluctance to extend *Apprendi*'s Sixth

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217. *Id.* at 2348. Ten circuits have rejected the Sixth Amendment's application to criminal restitution on the ground that it contains no statutory maximum sentence. *See* United States v. Leahy, 438 F.3d 328, 337–38 (3d Cir. 2006) (en banc); United States v. Milkiewicz, 470 F.3d 390 (1st Cir. 2006); United States v. Reifler, 446 F.3d 65, 118–20 (2d Cir. 2006); United States v. Williams, 445 F.3d 1302, 1310–11 (11th Cir. 2006); United States v. Bussell, 414 F.3d 1048, 1060 (9th Cir. 2005); United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005) (per curiam); United States v. George, 403 F.3d 470, 473 (7th Cir. 2005); United States v. Miller, 419 F.3d 791, 792–93 (8th Cir. 2005); United States v. Sosebee, 419 F.3d 451, 454, 461 (6th Cir. 2005); United States v. Wooten, 377 F.3d 1134, 1144–45 (10th Cir. 2004). Fundamentally, this approach fails to recognize that "restitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed." *Leahy*, 428 F.3d at 342–43 (McKee, J., dissenting). Under the current federal restitution statutes, a defendant is required to pay the crime victim back for "the full amount of each victim's losses—someone has to make a *factual* determination as to what the "full amount" is. *See id.*

218. *See* United States v. Jarjis, No. 13–1430, 2014 WL 260321, at *1–2 (6th Cir. Jan. 24, 2014) (per curiam); United States v. Green, 722 F.3d 1146, 1151 (9th Cir. 2013); United States v. Day, 700 F.3d 713, 716–17 (4th Cir. 2012); United States v. Wolfe, 701 F.3d 1206, 1217–18 (7th Cir. 2012).

219. *See* Alleyne v. United States, 133 S. Ct. 2151, 2163 (2013) (holding that the Sixth Amendment applies to any fact that increases the mandatory minimum sentence for a crime); *S. Union Co.*, 132 S. Ct. at 2348–49.

220. *Green*, 722 F.3d at 1151.

221. *See* United States v. Ziskind, 471 F.3d 266, 270 (1st Cir. 2006); United States v. Oladimeji, 463 F.3d 152, 156 (2d Cir. 2006); United States v. Vandeberg, 201 F.3d 805, 814 (6th Cir. 2000); United States v. Siegel, 153 F.3d 1256, 1259–61 (11th Cir. 1998); United States v. Ramilo, 986 F.2d 333, 336 (9th Cir. 1993); United States v. Rico Indus., Inc., 854 F.2d 710, 714

Amendment protections stemmed primarily from the question of whether restitution has a statutory maximum penalty. After *Apprendi*, ten circuits determined that the federal restitution statutes did not contain a maximum sentence, precluding the Sixth Amendment from applying to criminal restitution.[222] The Third Circuit sitting en banc articulated the courts' logic in the most detail:

> As we read the statute, once a defendant is convicted of an offense covered by the VWPA or the MVRA, a district court *must* (or in the case of the VWPA, unquestionably may) order restitution, and in order to fulfill this mandate, the court must determine the amount of loss pursuant to 18 U.S.C. [§] 3664(f)(1)(A).[223]. . . [W]e see the conviction as authorizing restitution of a specific sum, namely the "full amount of each victim's loss"; when the court determines the amount of loss, it is merely giving definite shape to the restitution penalty born out of the conviction. Thus, there is no restitution range under [the statute] that starts at zero and ends at "the full amount of each victim's losses"; rather, the single restitution amount triggered by the conviction . . . is the full amount of loss.[224]

As a result, the court concluded, a judge's calculation of the sum a defendant must pay in restitution does not "constitute[ ] an increase in punishment exceeding that authorized by plea or jury verdict, in violation of the Sixth Amendment."[225]

Fundamentally, this approach fails to recognize that "[r]estitution in any amount greater than zero clearly increases the punishment that could otherwise be imposed."[226] Despite what courts have held, *someone* has to make a factual determination as to what the "full amount" is, an inquiry that often is far from straightforward. For example, the question can arise as to how to calculate the loss amount—should it be based on current market value of the stock a person embezzled or the value on the date of loss?[227] Or, in the child pornography context, what is the economic quantity of harm a defendant who

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(5th Cir. 1988); United States v. Sleight, 808 F.2d 1012, 1020 (3d Cir. 1987); United States v. Bruchey, 810 F.2d 456, 461 (4th Cir. 1987). Given restitution's presence in both civil and criminal proceedings, *see supra* Part III.B.3.c, some judges continue to reject the notion that criminal restitution is punitive.

222. *See Milkiewicz*, 470 F.3d at 404; *Williams*, 445 F.3d at 1310–11; *Reifler*, 446 F.3d at 118–20; *Leahy*, 438 F.3d at 337–38; *Miller*, 419 F.3d at 792–93; *Sosebee*, 419 F.3d at 454, 461; *Garza*, 429 F.3d at 170; *Bussell*, 414 F.3d at 1060; *George*, 403 F.3d at 473; *Wooten*, 377 F.3d at 1144–45.

223. 18 U.S.C. § 3664(f)(1)(A) (2012) states: "In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant."

224. *Leahy*, 438 F.3d at 337–38.

225. *Id.* at 336–37.

226. *Id.* at 342–43 (McKee, J., concurring in part and dissenting in part).

227. *See, e.g.*, United States v. Gordon, 393 F.3d 1044, 1051–60 (9th Cir. 2004) (examining methods for determining the amount of loss).

views child pornography causes, but did not know or have direct sexual contact with the depicted victim? Do losses incurred by a third party count or not? The "full amount of a victim's loss" is often difficult to quantify, and almost always requires some type of factual inquiry to ascertain.[228]

After *Southern Union*, three of the four circuits to address this question have continued to reject the Sixth Amendment's application to criminal restitution on the grounds that "there is no prescribed statutory maximum in the restitution context."[229] Yet, as one dissenting judge noted, "no restitution can be imposed absent a judicial determination of the amount of loss."[230] For that reason, the conclusion reached by the majority of circuits is unavailing, and should not prevent the Supreme Court from providing criminal restitution with the constitutional protections provided to other forms of criminal punishment.

B. THE EXCESSIVE FINES CLAUSE APPLIES TO CRIMINAL RESTITUTION

Criminal restitution has fared better under the Eighth Amendment, but only slightly. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense."[231] Not many courts have squarely addressed the issue of whether the Excessive Fines Clause applies to criminal restitution.[232] Pre-*Southern Union*, three circuits acknowledged criminal restitution fell under the Eighth

228. In crafting its test for determining criminal restitution when multiple defendants in multiple cases are responsible for a single harm, and in recognizing the possible applicability of the Excessive Fines Clause to criminal restitution, the Supreme Court in *Paroline* further undermines the prevailing circuit view that restitution does not have a "prescribed maximum penalty." Paroline v. United States, 134 S. Ct. 1719, 1725–28 (2014); *see also supra* Part IV.B.

229. United States v. Day, 700 F.3d 713, 732 (4th Cir. 2012); *see also* United States v. Jarjis, No. 13-1430, 2014 WL 260321, at *1 (6th Cir. Jan. 24, 2014) (per curiam); United States v. Green, 722 F.3d 1146, 1150 (9th Cir. 2013) (acknowledging, additionally, the Ninth Circuit's own conflicting precedent as to whether restitution is punishment). The Fourth Circuit rejects *Apprendi*'s application to criminal restitution based on its longstanding precedent rejecting criminal restitution as punishment. United States v. Wolfe, 701 F.3d 1206, 1216–18 (7th Cir. 2012) (citing "well-established" and "long-standing" precedent that "restitution is not a criminal penalty").

230. *Leahy*, 438 F.3d at 342 (McKee, J., concurring in part and dissenting in part).

231. Austin v. United States, 509 U.S. 602, 609–10 (1993) (citations omitted).

232. Several circuits have skirted the issue. *See* United States v. Newell, 658 F.3d 1, 35 (1st Cir. 2011) ("Even assuming that restitution orders may be challenged under the Excessive Fines Clause, the restitution ordered in this case" did not violate it). The Third Circuit has avoided deciding the matter at least twice. First, in a footnote, the court rejected a defendant's claim that a restitution order was disproportionate to the gravity of his offense as "without merit." United States v. Graham, 72 F.3d 352, 358 n.7 (3d Cir. 1995). Then, a second time, the court stated, "[e]ven assuming that mandatory restitution implicates the Eighth Amendment," there was no violation. United States v. Lessner, 498 F.3d 185, 205 (3d Cir. 2007). The Eleventh Circuit seems to have endorsed the approach that if a restitution order is supported by factual findings made by the judge at sentencing, there is no analysis under the Excessive Fines Clause. United States v. Hasson, 333 F.3d 1264, 1280 (11th Cir. 2003); *see also* United States v. Suarez, 215 F. App'x 872, 879 (11th Cir. 2007). The Eighth Circuit found the issue "insufficiently briefed" to warrant review. United States v. Beckford, 545 F. App'x. 12, 16 (8th Cir. 2013).

Amendment's protections: the Fourth, Fifth and the Ninth Circuits.[233] Although the courts rejected the specific challenges to the restitution orders at issue in each case, each circuit seemed to accept the premise that restitution is subject to the Excessive Fines Clause.[234] Adopting the test laid out by the Supreme Court in *United States v. Bajakajian*,[235] a criminal forfeiture case, the circuits inquired as to whether the criminal restitution ordered was "grossly disproportional to the gravity of the offense."[236]

In its recent *Paroline* decision, the Supreme Court acknowledged that criminal restitution may be subject to the constitutional protections of the Excessive Fines Clause.[237] Noting that the clause's aim was to "limit only those fines directly imposed by, and payable to, the government," the Court nevertheless acknowledged that restitution, although paid to a victim, is "imposed by the Government at the culmination of a criminal proceeding and requires conviction of an underlying crime."[238] As a result, if a court were to impose an excessive amount of restitution, that restitution might be "within the purview of the Excessive Fines Clause."[239] It was this concern that led the Court to reject a child pornography victim's request to hold "a single possessor [of child pornography] liable for millions of dollars in losses collectively caused by thousands of independent actors."[240]

The increasingly expansive and amorphous scope of criminal restitution cries for constitutional limits on the amount of restitution imposed, as exemplified by the scenario addressed in *Paroline*. Because criminal restitution is now measured by a victim's losses, and includes compensation for a broad range of tangible and abstract losses, acquitted and unproven conduct, as well as losses requiring judges to determine a defendant's relative culpability, some kind of judicial check on the restitution awards imposed needs to be present. In fact, by adopting a standard for determining restitution that allows courts to use "estimation," "discretion[,] and sound

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

234. *Dighlawi*, 452 F. App'x. at 760; *Newsome*, 322 F.3d at 342. This test was established in the context of *in personam* forfeiture. United States v. Bajakajian. 524 U.S. 321, 344 (1998). The Fifth Circuit implied that the Excessive Fines Clause applied to criminal restitution, but in language similar to that used in the Sixth Amendment context, concluded that "so long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional." *Arledge*, 553 F.3d at 899.

235. *Bajakajian*, 524 U.S. at 324.

236. *Id.* at 334; *see also Dighlawi*, 452 F. App'x at 760; *Newsome*, 322 F.3d at 342.

237. Paroline v. United States, 134 S. Ct. 1719, 1726 (2014).

238. *Id.* at 1726.

239. *Id.* (quoting *Bajakajian*, 524 U.S. at 329 n.4) (internal quotation marks omitted).

240. *Id.*

judgment,"[241] in determining a "reasonable and circumscribed award"[242] that accounts for a defendant's "relative culpability,"[243] but discourages them from using a "precise algorithm,"[244] or "rigid formula,"[245] *Paroline* has given even greater weight to the argument that criminal restitution, in its current form, needs the protections offered by the Eighth Amendment's Excessive Fines Clause.

Consistent with a view of restitution as punishment, the courts should extend the constitutional protections that the Sixth and Eighth Amendments afford to criminal restitution.

V. CONCLUSION

It is time for both the Supreme Court and lower courts to acknowledge that, on both a theoretical and a practical level, criminal restitution has become a quintessential element of punishment, and as a result, defendants must be provided with the constitutional protections that attach to criminal punishments through the Sixth and Eighth Amendments. The Supreme Court and lower court rulings that say otherwise are ripe for reconsideration.

241. *Id.* at 1728–29.
242. *Id.* at 1727.
243. *Id.* at 1734.
244. *Id.* at 1728.
245. *Id.*