A Defendant's Ability to Pay: The Key to Unlocking the Door of Restitution Debt

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ABSTRACT: This Note argues that state legislatures should create statutory frameworks that permit judges to consider a defendant's ability to pay when determining the total amount of criminal restitution that should be ordered. Considering ability to pay before ordering restitution still accomplishes the goals of restitution while potentially increasing collection rates and managing victims' expectations. Further, this Note argues that judges should be able to consider a defendant's financial resources and ability to pay at subsequent proceedings in order to modify the defendant's restitution plan, or, alternatively, impose fair consequences based on the reason for their default on payment.

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I. INTRODUCTION

From 2014 to 2016, federal judges ordered criminal defendants to pay approximately $33.9 billion in restitution to their victims, yet only around $2.95 billion was collected.[1] For those doing the math at home, that is approximately a nine percent collection rate. And many states are not faring much better in their ability to collect restitution.[2] "Probation officials . . . interviewed stated that most outstanding restitution debt is identified as uncollectible and collection action is suspended because many offenders have little ability to pay the debt . . . ."[3] Additionally, inability to pay restitution or other court fees may be an increasing reason for incarceration and recidivism.[4] Scholars have even coined the phrase "modern-day debtors' prisons" to refer to punishments of defendants for inability to pay fines, fees, or restitution imposed upon them.[5]

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1. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 16, 22 (2018), https://www.gao.gov/assets/690/689830.pdf [https://perma.cc/JCN7-8T5S].

2. *See infra* Section III.A.

3. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 25–26.

4. *See* COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [https://perma.cc/UP96-Z5HC] ("The use of [fine and fee] practices has increased substantially over time; in 1986, 12 percent of those incarcerated were also fined, while in 2004 this number had increased to 37 percent.").

5. *See generally* Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016) (arguing modern-day debtors' prisons still exist and explaining the impact of criminal justice debt on indigent defendants).

Restitution is a criminal-law remedy with the effect of a civil judgment: An order of restitution directs a defendant to pay a victim in an amount which will compensate them for any losses. The word "restitution" may refer to civil-law remedies,[6] but this Note uses the term to refer exclusively to the criminal-law remedy. Restitution has existed for centuries,[7] justified by different purposes, including victim compensation,[8] deterrence,[9] prevention of retaliation[10] and community compensation.[11] Modern purposes of restitution include victim compensation, retribution, punishment, rehabilitation, and restorative justice.[12] In the United States, restitution resurfaced with the enaction of the Federal Probation Act in 1925,[13] followed by the Victim and Witness Protection Act ("VWPA") in 1982,[14] and most significantly, by the Mandatory Victim's Restitution Act ("MVRA") in 1996.[15]

Currently, federal law considers the defendant's "economic circumstances" as a factor in determining the amount of restitution, alongside other factors that focus on victims' losses.[16] Additionally, federal law and most states require courts to consider a defendant's ability to pay before revoking probation or parole to avoid incarcerating a defendant for their lack of wealth.[17] However, unlike federal courts, state courts have yet to arrive at a majority rule as to whether a defendant's financial circumstances or ability to pay should be

6. For example, restitution may refer to a remedy which restores the plaintiff to the position they would have been in had a contract breach or tort not occurred or give the plaintiff any benefits a defendant gained from their wrongful conduct. *See, e.g.*, Rome v. Mandel, 405 P.3d 387, 398 (Colo. App. 2016) ("Restitution is an equitable remedy that 'restores a party to his/her prior status' and may be used 'to deprive the defendant of benefits that in equity and good conscience he ought not to keep.'" (quoting Zeke Coffee, Inc. v. Pappas-Alstad P'ship, 370 P.3d 261, 265 (Colo. App. 2015))); Weltzin v. Nail, 618 N.W.2d 293, 300 (Iowa 2000) ("Restitution is defined as an '[a]ct of . . . restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury . . . .'" (alterations in original) (quoting *Restitution*, BLACK'S LAW DICTIONARY (rev. 4th ed. 1968))); *In re* Haller, 839 A.2d 18, 21 (N.H. 2003) ("Restitution is an equitable remedy typically applied to contracts implied in law to disgorge the benefit of unjust enrichment.").

7. Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71, 72 (1970) (comparing the Code of Hammurabi and the Torah's philosophies to the concept of restitution).

8. *Id.* at 72.

9. *Id.* at 78.

10. James S. Read, *Crime and Punishment in East Africa: The Twilight of Customary Law*, 10 HOW. L.J. 164, 169 (1964).

11. Laster, *supra* note 7, at 75.

12. *See infra* Section II.B.

13. Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259 (codified at 18 U.S.C. § 3651) (repealed 1984).

14. Victim and Witness Protection Act of 1982, 18 U.S.C. § 3663 (2018).

15. Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A.

16. 18 U.S.C. § 3664(a).

17. *See infra* notes 138–39 and accompanying text.

considered when ordering restitution, modifying restitution payment plans, or imposing fines or penalties for failure to pay restitution.[18]

This Note argues that state legislatures should look to the federal courts as a model and give courts the ability to consider a defendant's reasonable ability to pay, both when ordering the amount of restitution and before imposing fines, penalties, or incarceration when a defendant default on payment.[19] State courts should be able to determine a defendant's financial resources at the time of sentencing and a defendant's future earning capacity with reasonable certainty by evaluating their financial obligations, current income, and other employability factors such as experience, education level, and other skills.[20] Failure to consider a defendant's ability to pay wastes judicial resources and impedes rehabilitation by placing defendants in a cycle of incarceration and burdening them with debt that can never be repaid.[21] Part II offers background on the history on how the concept of restitution has evolved, the justifications behind restitution, and where the law stands today.[22] Part III identifies the problems present in systems that do not consider a defendant's reasonable ability to pay when ordering restitution, including failure to collect the majority of restitution orders.[23] Then, Part IV proposes that state legislatures should increase judicial discretion to consider a defendant's ability to pay at various stages of the restitutionary process.[24] And, finally, Part V briefly concludes that considering ability to pay will accomplish the goals of restitution and likely increase debt collection efforts.[25]

II. BACKGROUND

Criminal restitution is a criminal-law remedy that attempts to make the victim whole again or compensate them for any injuries resulting from the defendant's criminal conduct.[26] Restitution may refer to payment made to the victim by either the state or the defendant.[27] As used in the context of this Note, restitution refers to payment by a criminal defendant to his or her victim

18. *See infra* notes 116–17 and accompanying text.

19. *See infra* Part IV.

20. *See infra* Section IV.A.

21. *See infra* Section III.C.

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Part V.

26. *See* United States v. Thomas, 635 F.3d 13, 21 (1st Cir. 2011) ("Restitution is, essentially, compensation for losses suffered as a result of a crime.").

27. *See* Laster, *supra* note 7, at 80 (explaining that restitution paid by the state is focused on society's responsibility for the crime and restitution paid by the defendant attempts to heal the victim "and aid[] in the rehabilitation of the criminal").

for any injuries resulting from the crime. Traditionally, restitution is limited to a victim's actual losses stemming from the crime.[28]

Restitution has yet to be definitively placed in the category of either criminal or civil law.[29] Critics of restitution rely on the law's usual divide between civil and criminal law to support arguments against restitution. They see restitution as an extension of tort liability into criminal law because a victim is able to recover their damages alongside the criminal proceeding, rather than in a separate civil suit.[30] It is important to note that victims are not permitted to receive a double recovery if they have already been compensated by a separate civil suit or an insurance policy. In that case, restitution must be paid to whoever provided the victim with that compensation (i.e., the insurer or civil defendant).[31]

A. *HISTORY OF RESTITUTION*

The concept of requiring defendants to pay victims for injuries incurred as a result of the defendant's conduct existed even in ancient civilizations.[32] Restitution was usually considered an element of punishment.[33] Early societies viewed restitution first as a means of making the victim whole, and second, to deter the victim from retaliating against the original offender.[34] Early texts

28. *See, e.g.*, United States v. Hunter, 618 F.3d 1062, 1064 (9th Cir. 2010) ("The amount of restitution, therefore, 'is limited to the victim's *actual losses*.'" (quoting United States v. Bussell, 504 F.3d 956, 964 (9th Cir. 2007))); United States v. Rutigliano, 887 F.3d 98, 109 (2d Cir. 2018) ("[A] court's power to order restitution is 'limited to actual loss' and 'may be awarded only in the amount of losses directly and proximately caused by [a] defendant's conduct.'" (second alteration in original) (quoting United States v. Gushlak, 728 F.3d 184, 194–95 (2d Cir. 2013))); United States v. Hesser, 800 F.3d 1310, 1332 (11th Cir. 2015) ("[A] district court is only authorized to order restitution in the amount of the actual losses the defendant causes in committing a Title 18 offense . . . .").

29. Bridgett N. Shephard, Note, *Classifying Crime Victim Restitution: The Theoretical Arguments and Practical Consequences of Labeling Restitution as Either a Criminal or Civil Law Concept*, 18 LEWIS & CLARK L. REV. 801, 804 (2014) (explaining the legal concept of "[a] hybrid legal approach" for understanding restitution by "us[ing] civil remedies, either in whole or in part, to redress criminal behavior").

30. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 934–35 (1984) ("First, critics of restitution rely upon the traditional model of the legal system, which sharply distinguishes the objectives of criminal and civil law. . . . The critics thus argue that, because restitution is a form of compensation, it has no place in the criminal system." (footnote omitted)). Judge Richard Posner wrote in a Seventh Circuit opinion that restitution "enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution." United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999).

31. 18 U.S.C. § 3664(j)(1) (2018).

32. *See* WILLIAM TALLACK, REPARATION TO THE INJURED; AND THE RIGHTS OF THE VICTIMS OF CRIME TO COMPENSATION 6–7 (1900) ("[The Mosaic] Dispensation, in its penal department, took special and prominent cognisance [sic] of the rights and claims of the injured person, as against the offender.").

33. *Id.* at 7 (arguing punishment, with restitution as a principle element, was a better deterrent against crime and yielded more economic benefits for the community).

34. *See* Laster, *supra* note 7, at 73–74.

containing provisions for victim compensation include the Torah and the Code of Hammurabi.[35] Criminal codes in East Africa often preferred victim compensation over punishment due to a deep-rooted community fear of witchcraft-based retaliation.[36] The rise of monarchical societies shifted the focus of restitution from the victim to the state: A criminal's intentional wrongdoing injured the *state*, rather than each individual person.[37] This changed the focus of restitution from repairing the victim to deterrence and increasing the prosperity of the state.[38] Further, this shift may have been one of the reasons that criminal and civil law diverged: Criminal law became the remedy for harm done to the state, while civil law arose to remedy harm done to the individual.[39]

English common law originally included victim-restitution provisions.[40] Further, the common law originally recognized criminal restitution as an equitable remedy.[41] In English common law, victims were prevented from receiving restitution until they exhausted all opportunities to bring a criminal to justice.[42] In fact, it was a misdemeanor for a victim to agree not to report or prosecute in exchange for compensation.[43] Consequently, victims moved further away from the criminal justice system.[44] This removal from criminal proceedings became a central part of the American criminal justice system, in which the government can prosecute a defendant without victim consent or participation.[45] However, victim participation in *sentencing* is a highly-guarded right. For example, victim impact statements are often allowed, despite fears that they may prejudice defendants.[46]

In the United States, "[b]y the end of the colonial period," criminal law began to shift its focus back to the victim, and many jurisdictions started introducing victims' rights legislation.[47] The Federal Probation Act of 1925 originally made restitution available as a condition of probation upon

35. *Id.* at 72.

36. *See* Read, *supra* note 10, at 169 (discussing witchcraft as a matter of self-help and a "threat[] to the community at large").

37. Laster, *supra* note 7, at 75–76.

38. *Id.* at 74–76.

39. *See id.*

40. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *356.

41. *See* United States v. Agate, 613 F. Supp. 2d 315, 320 (E.D.N.Y. 2009).

42. Laster, *supra* note 7, at 76.

43. BLACKSTONE, *supra* note 40, at *133 (explaining the offense of "*theft-bote*," also known as "compounding of felony").

44. Laster, *supra* note 7, at 76–77.

45. *Id.*

46. *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611 (2009) (defending victim impact statements and claiming, "[t]he benefits are all obtained without unfairly prejudicing defendants in any tangible way").

47. 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE § 1.5(k) (4th ed. 2019).

commuting a criminal sentence.[48] Subsequently, VWPA gave federal district courts the ability to order restitution in federal criminal cases.[49] In 1994, criminal restitution became mandatory for sexual abuse crimes, regardless of the defendant's "economic circumstances" or the victim's ability "to . . . receive compensation for his or her injuries from the proceeds of insurance or any other source."[50]

Today, mandatory restitution is imposed for a wide variety of federal offenses under the MVRA.[51] Several states have followed various provisions of the MVRA when enacting their own guidelines on mandatory restitution.[52] Further, many American jurisdictions criminalize a victim's attempt to make an arrangement with the defendant wherein they would receive direct compensation from the offender in exchange for the victim's pledge not to report the offense, which is commonly known as "compounding a felony."[53]

B. PURPOSES OF RESTITUTION

Just as restitution has evolved over time, so too have various justifications underlying it. Specifically, contemporary justifications are rooted in restorative justice and the community. Although the offender is in some ways worse off due to restitution, punishment is usually not the primary intended outcome of restitution.[54] Retributive theories of punishment would argue

48. *See* Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259 (codified at 18 U.S.C. § 3651) (repealed 1984). The section covered the "[s]uspension of sentence and probation" and provided that "the defendant . . . [m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense." *Id.*

49. *See* 18 U.S.C. § 3663 (2018).

50. Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 2248.

51. 18 U.S.C. § 3663A; *see also* United States v. Agate, 613 F. Supp. 2d 315, 320–21 (E.D.N.Y. 2009) ("The MVRA now applies to convictions for crimes of violence and to 'offense[s] against property under [title eighteen] . . . including any offense committed by fraud or deceit,' so long as 'an identifiable victim or victims has suffered a physical injury or pecuniary loss.'" (alterations in original) (citations omitted)).

52. *See, e.g.*, State v. Foret, 188 So. 3d 154, 163 (La. 2016) (Guidry, J., concurring) ("The defendant entered a plea of guilty in federal court to one count of violating 18 U.S.C. § 1347, which triggered a mandatory restitution order pursuant to 18 U.S.C. § 3663A. The corresponding state insurance fraud provision has a similar mandatory restitution requirement . . . ."); State v. Demello, 361 P.3d 420, 427 (Haw. 2015) ("The Penal Code Review Committee report makes it clear that the amendments were intended to require 'full restitution for reasonable and verified losses,' and to 'create a restitution system similar to the federal Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A to 3664.'" (quoting PENAL CODE REV. COMM., FINAL REPORT 27j-k (2005))); *In re* Tyrell A., 112 A.3d 468, 482 (Md. 2015) ("Like the Maryland statute, the MVRA, on its face, does not except clearly co-participants in crimes from being 'victims' and thereby be eligible for restitution ordered in their favor. Interpretation of the federal statute is persuasive for interpretation of Maryland's restitution statute.").

53. Laster, *supra* note 7, at 76.

54. *See, e.g.*, United States v. Innarelli, 524 F.3d 286, 293 (1st Cir. 2008) ("Unlike the calculation of loss amount in sentencing, the purpose of restitution is not to punish the defendant . . . ."); United States v. Wilson, 350 F. Supp. 2d 910, 929 (D. Utah 2005) ("This conclusion rests on the recognition that restitution is primarily designed to compensate, not punish."); United

restitution is appropriate based on a defendant's duty to make right their wrong.[55] William Barnes, an early English scholar, commented on restitution in a similar way to a retributive theory, asking:

> "What shall we do with our criminals[?]" . . . Try to make them right their wrongs. I say, try to do it; do it as far as you can. I am quite aware it would be hard to make every criminal right every wrong. But the earnest thought of a whole nation would soon find ways of working out an end which may now seem unattainable.[56]

Although there are many benefits to the retributive concept of restitution, retribution cannot be entirely divorced from punishment. Some commonalities between restitution and punishment include "remedial, . . . deterrent, rehabilitative, and retributive purposes."[57] Further, at least one court has held that restitution constitutes a punishment for the purposes of the Eighth Amendment.[58] After all, restitution must have some punitive element because it exists within the criminal-law system rather than as a separate, civil cause of action.[59]

The main purposes behind restitution itself, however, stem from theories based in "restorative justice." Restorative justice focuses on making the victim whole while simultaneously rehabilitating the defendant.[60] This theory "emphasizes repairing the harm caused or revealed by criminal behavior."[61] This includes repairing both the victim's injuries and rehabilitating the offender's criminal intent, which motivated the offense in the first place.[62]

Within this restorative-justice framework, scholars have identified two major purposes of restitution. First, the most readily articulated purpose behind restitution is to help compensate an innocent victim for their

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States v. Arutunoff, 1 F.3d 1112, 1121 (10th Cir. 1993) ("The [Victim and Witness Protection Act's] purpose is not to punish defendants or to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses.").

55. *See Victim Restitution in the Criminal Process: A Procedural Analysis*, *supra* note 30, at 937.

56. WILLIAM BARNES, NOTES ON ANCIENT BRITAIN AND THE BRITONS 76 (1858).

57. *See* United States v. Dubose, 146 F.3d 1141, 1144 (9th Cir. 1998) (holding "restitution under the [Mandatory Victims Restitution Act] is punishment").

58. *Id.*

59. *See Victim Restitution in the Criminal Process: A Procedural Analysis*, *supra* note 30, at 937 ("Despite its value as a deterrent, the civil law is primarily designed to compensate victims of wrongful conduct. In contrast, the criminal law's main goals are rehabilitation, deterrence, and retribution; consequently, criminal law focuses on punishing and reforming persons who have committed morally culpable acts." (citations omitted)).

60. MODEL PENAL CODE § 6.04A cmt. e (AM. L. INST., Proposed Final Draft No. 4, 2017) ("While § 6.04A does not itself adopt a restorative justice approach, experience in that field supports the belief that an offender's payment of victim restitution can also facilitate rehabilitation and reduce recidivism.").

61. DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 44 (Pam Chester et al. eds., 5th ed. 2015).

62. *Id.* at 44–47.

injuries,[63] which is why restitution is typically limited to a victim's actual losses.[64] A strict view of restitution is similar to tort theories that place a plaintiff in the position he or she would have been "but for" the tortious conduct.[65] However, according to the restorative-justice theory, the victim is also made whole by the offender's admission of guilt and apology.[66] The second purpose of restitution focuses on the wrongdoer: By being forced to confront the negative consequences of their action(s), offenders hopefully will be more likely to "reintegrat[e] into the law-abiding community," as opposed to returning to committing crimes.[67]

Beyond the individualized focus on the victim and wrongdoer in any particular offense, restitution theory also accounts for the societal costs of crime. This macro theory of restitution focuses on the ways society bears the cost of crime.[68] To further this purpose, federal sentencing courts have discretion to designate the "community" as a victim, order "community restitution," and then calculate restitution based on the amount of "public harm" done.[69] A defendant's payment of criminal restitution helps "diffuse harms" and "collectively shared risks, where no easily identifiable victim exists."[70] The Seventh Circuit compared restitution to community service because both are effective ways of repaying communal losses: "The defendant's lawyer tells us that community service is 'making amends [to] the community he harmed. That's somewhat rehabilitative.' True—and repaying

63. *See* MODEL PENAL CODE § 6.04A cmt. b (AM. L. INST., Tentative Draft No. 3, 2014) ("Crime victims have an undeniable moral claim to compensation from those who brought about their injuries.").

64. Hughey v. United States, 495 U.S. 411, 411 (1990) (explaining in the syllabus that "restitution is intended to compensate victims *only* for losses *caused* by the conduct underlying the offense of conviction." (emphases added)).

65. *See* United States v. Bach, 172 F.3d 520, 523 (7th Cir. 1999) ("It is a detail from a defrauder's standpoint whether he is ordered to make good his victims' losses in a tort suit or in the sentencing phase of a criminal prosecution. It would be different if the order of restitution required the defendant to pay the victims' losses not to the victims but to the government for its own use and benefit; then it would be a fine, which is, of course, traditionally a criminal remedy." (citations omitted)).

66. *See* Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 293–94 (explaining how the expression of remorse by "the offender shows respect for the victim").

67. *See* MODEL PENAL CODE § 6.04A(2) (AM. L. INST., Proposed Final Draft 2017).

68. *See, e.g.*, Akins v. State, 39 N.E.3d 410, 412 (Ind. Ct. App. 2015) ("The primary purpose of restitution is to vindicate the rights of society and to impress upon the defendant the magnitude of the loss the crime has caused."); Huml v. Vlazny, 716 N.W.2d 807, 813 (Wis. 2006) ("The primary purpose of restitution, however, is to compensate the victim, thereby advancing society's interest in seeing victims made whole."); State v. Whetzel, 488 S.E.2d 45, 47 (W. Va. 1997) ("[T]he purpose and intent of the restitution statute was to require the convicted person to repay society and his victims for his criminal acts.").

69. 18 U.S.C. § 3663(c)(2)(A), (c)(2)(B)(6) (2018).

70. Adam S. Zimmerman, *The Corrective Justice State*, 5 J. TORT L. 189, 205–06 (2012) (discussing the purpose of criminal justice system is to diffuse risks and "community restitution" is a form of so doing).

buy money is also making amends, in this case to the community that the defendant harmed by selling guns illegally."[71]

C. FEDERAL PROCEDURE FOR DETERMINING RESTITUTION

The purpose of restitution is only accomplished if there is a procedure that ensures restitution is properly considered at the guilt and punishment phases of the criminal justice system. Federally, the procedure for determining restitution is codified in the MVRA statutes requiring mandatory or authorizing discretionary restitution. In general, mandatory restitution requires restitution be imposed for certain offenses, whereas discretionary restitution simply allows restitution to be an available punishment if the court deems it appropriate based on the victim's injuries or the defendant's circumstances.

The MVRA requires federal courts to order mandatory restitution when a defendant is convicted of specific types of offenses[72] that have an "identifiable victim . . . [who] has suffered a physical injury or pecuniary loss."[73] Federal courts must also order mandatory restitution for offenses involving sexual exploitation and child pornography.[74] Beyond these requirements, federal courts have discretion when deciding to order restitution for other applicable offenses.

Under the MVRA, the federal government bears "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense."[75] This means the government must prove three things: (1) there is a "victim" to whom restitution must be paid; (2) the victim sustained actual losses from the crime; and (3) the defendant's actions caused the victim's losses. The government's burden of proof to show the victim's actual losses for restitution is by a preponderance of the evidence.[76] In addition to proving that there is a victim who has suffered an actual loss, the government must prove a causal link between the defendant's wrongdoing and the victim's losses.[77] Losses can be far-reaching when the crime at issue was a large scheme or conspiracy which implicates many victims, resulting in large restitution orders, but the government is still required to prove causation from the defendant's conduct to the victims' losses.[78]

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71. United States v. Williams, 739 F.3d 1064, 1068 (7th Cir. 2014) (alteration in original).

72. Including violent offenses, property offenses (including violations of the Substance Abuse Act and "offense[s] committed by fraud or deceit"), tampering with consumer products, or theft of medical products. 18 U.S.C. § 3663A(c)(1)(A)(ii).

73. *Id.* § 3663A(c)(1)(B).

74. *Id.* § 2259.

75. *Id.* § 3664(e).

76. *Id.*

77. CATHARINE M. GOODWIN, FEDERAL CRIMINAL RESTITUTION § 10:11 (2020).

78. *See* 18 U.S.C. § 3663(a)(2); *see also* United States v. Essien, 530 F. App'x 291, 302 (5th Cir. 2013) ("Because a count of [defendant's] conviction, health care fraud, requires proof of a

Victims are encouraged to keep track of their losses to help the governments prove the victim's actual losses.[79] The prosecution is more likely to struggle proving victims' losses that are primarily non-pecuniary, for example, emotional distress or other trauma resulting from murder or rape.[80] However, victims can also prove losses from the criminal investigation and prosecution, including, "lost income and necessary child care, transportation, and other [related] expenses."[81] Once the government carries this burden of proof, the burden shifts to the defendant to refute the government's showing of either the calculation of losses or that the losses were caused by the defendant's conduct.[82]

Moreover, under the MVRA, restitution is usually only appropriate for offenses that have an identifiable "victim" who has been injured by the crime.[83] A "victim" is defined as someone who has been "directly and proximately harmed as a result of the commission of an offense."[84] However, when there is no identifiable victim, alternative solutions, such as "community restitution," are sometimes implemented as an exception to the victim requirement.[85] Although there is no expressly articulated purpose for "community restitution," courts have upheld these restitution orders,[86] provided that the defendant has first been ordered to pay a fine.[87]

Before a federal sentencing court calculates the amount of restitution to be ordered, it will order a presentence report (or other similar report), containing information including "a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant."[88] However, for mandatory restitution, the court must order restitution for the full amount of each victim's loss, without consideration of the defendant's financial circumstances.[89] Upon a defendant's challenge of the amount of a

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scheme as an element, her conviction can support a broad restitution award encompassing the additional losses that were apart of the scheme as indicted.").

79. *Understanding Restitution*, U.S. ATT'Y'S OFF. N. DIST. GA., https://www.justice.gov/usao-ndga/victim-witness-assistance/understanding-restitution [https://perma.cc/37V8-UZS9] (last updated Apr. 17, 2015).

80. *See Victim Restitution in the Criminal Process: A Procedural Analysis*, *supra* note 30, at 937.

81. *Understanding Restitution*, *supra* note 79.

82. *See* United States v. Gushlak, 728 F.3d 184, 202 n.15 (2d Cir. 2013).

83. *See* 18 U.S.C. § 3663A.

84. *Id.* § 3663(a)(2).

85. *See supra* notes 68–71 and accompanying text.

86. *See* United States v. Leman, 574 F. App'x 699, 707–08 (6th Cir. 2014) (upholding order for defendant in drug offense for which there was no identifiable victim to pay $1 million in community restitution).

87. *See* United States v. Mansoori, 304 F.3d 635, 677 (7th Cir. 2002) (vacating and remanding community restitution order where the defendants had not first been ordered to pay a fine).

88. 18 U.S.C. § 3664(a).

89. *Id.* § 3664(f)(1)(A).

restitution order, the appellate court's standard of review is for an abuse of discretion.[90] This typically involves asking whether the sentencing court had sufficient reasoning and an articulated explanation to support its calculation of the amount ordered.[91] Once restitution has been ordered, the U.S. Clerk of Court is responsible for keeping track of restitution payments and when restitution has been paid in full.[92]

For mandatory restitution, default is likely the first point at which the defendant's financial circumstances are considered during the restitution process.[93] If a federal defendant has defaulted on payment because they cannot pay some or all of the ordered restitution, the district court has several options.[94] It may

> revoke probation or a term of supervised release, modify the terms or conditions of probation or a term of supervised release, resentence a defendant . . . , hold the defendant in contempt of court, enter a restraining order or injunction, order the sale of property of the defendant, accept a performance bond, enter or adjust a payment schedule, or take any other action necessary to obtain compliance with the order of a fine or restitution.[95]

When deciding between these options the district court may "consider the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the fine or restitution order, and any other [relevant] circumstances."[96]

Critics of federal restitution point to potential unfairness in the restitution system's treatment of indigent defendants and the difficulty of reintegrating into society after imprisonment.[97] Often, restitution is a

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90. *See, e.g.*, United States v. Minneman, 143 F.3d 274, 285 (7th Cir. 1998) ("[I]f a district court does not provide detailed findings, it runs the risk that we may remand a restitution award based on 'inadequate explanation and insufficient reasoning.'" (quoting United States v. Menza, 137 F.3d 533, 538 (7th Cir. 1998))); United States v. Johnson, 440 F.3d 832, 849–50 (6th Cir. 2006) ("[T]he district court found by a preponderance of the evidence that Stone was 'actively involved' in all four predicate acts and therefore ordered restitution to each of the four victims . . . . The district court could therefore award restitution to any victim harmed by the defendant's criminal conduct . . . ."); United States v. Vitillo, 490 F.3d 314, 330 (3d Cir. 2007) ("[T]he District Court's determination of the amount of restitution to be $317,760 is well supported by a preponderance of the evidence.").

91. *Minneman*, 143 F.3d at 285.

92. *Id.*

93. *See* United States v. Puentes, 803 F.3d 597, 607 (11th Cir. 2015) ("In this case, the fact that Congress seems to have provided an exhaustive catalogue of the ways in which a mandatory restitution order can be modified suggests that no other ways exist.").

94. 18 U.S.C. § 3613A(a)(1).

95. *Id.*

96. *Id.* § 3613A(a)(2).

97. *See* Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL'Y 219, 225–26 (2006) (discussing failure to pay restitution as a common

condition of release or probation—indigent defendants therefore could become stuck in a continual cycle of debt and imprisonment.[98] This is an especially strong contention when the amount was ordered without consideration of the defendant's reasonable ability to pay.[99] The Supreme Court, in *Bearden v. Georgia*, ruled that sentencing courts may only impose imprisonment or revoke probation for failing to make restitution "[i]f the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay."[100] However, *Bearden* may do little in practice to prevent the cycle of debt and imprisonment, for reasons discussed in Section III.C.1.

D. Model Approaches for Ordering Restitution

There are two primary model codes that comment on the ideal procedure for determining restitution: the Model Penal Code and the American Bar Association ("ABA") Standard for Restitution or Reparation.[101] The Model Penal Code has presented two drafts of a restitution provision, one in 2014 and one in 2017. The 2014 Model Penal Code draft takes a middle-ground position between completely mandatory and discretionary orders by making restitution mandatory unless the defendant shows they could not sustain a reasonable livelihood under the mandatory order.[102] In that case, judges have discretion to modify the order according to the defendant's financial situation and obligations.[103] The 2014 provision also provided for situations where there was no identifiable victim of an offense; in such situations, the judge has discretion to order the offender to pay equivalent restitution to a "victims' compensation fund," which would in turn pay identifiable victims of unrelated crimes but whose offenders could not make full payments.[104]

On the other hand, the 2017 Model Penal Code provision favors an entirely discretionary approach, citing "[p]olicies of public safety, the avoidance of criminogenic applications of criminal penalties, and offender reintegration" as the reasons for the change.[105] The 2017 provision also requires judges to consider "the financial circumstances of the defendant"

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reason cited for revoking parole); *see also infra* Section III.C.2 (discussing increasing debt due to restitution and the burden it causes to rehabilitation).

98. *See infra* Section III.C.

99. *See infra* Section III.C.

100. Bearden v. Georgia, 461 U.S. 660, 672 (1983).

101. *See, e.g.*, MODEL PENAL CODE § 6.04A (AM. L. INST., Tentative Draft No. 3, 2014); MODEL PENAL CODE § 6.04A (AM. L. INST., Proposed Final Draft 2017); STANDARDS FOR CRIMINAL JUSTICE: SENTENCING STANDARDS § 18-3.15 (AM. BAR ASS'N 1994).

102. MODEL PENAL CODE § 6.04A cmt. a (AM. L. INST., Tentative Draft No. 3, 2014).

103. *Id.*

104. *Id.* § 6.04A cmt. c.

105. Model Penal Code § 6.04A cmt. c (AM. L. INST., Proposed Final Draft 2017).

and order full, partial, or no restitution accordingly.[106] One major difference in the 2017 draft is that it no longer expressly permits judges to order restitution when there is no identifiable victim, instead leaving any decision about who is a "victim" to the court.[107] This change appears to foreclose the option of ordering restitution payments towards a victims' compensation fund. Additionally, the 2017 draft gives sentencing judges guidelines on how to determine restitution when there are multiple victims or multiple defendants, including how to prioritize one victim's injuries over another victim.[108]

Like the model acts, the ABA's Standard for Restitution or Reparation provides suggestions to legislatures for how to introduce or change restitution legislation. The ABA suggests the legislature's role in sentencing, and therefore the restitution process, is to "determine the public policies of sentencing and enact the statutory framework for the sentencing system."[109] First, the ABA recommends that for offenses relating to "personal injury or loss of money or property," restitution may be ordered to compensate victims for those losses.[110] The ABA also provides a section that would authorize a judge to order restitution for losses in which "the [defendant] has special capacity to restore or repair."[111] The ABA has taken the approach that the defendant's financial circumstances should only be considered by the court when determining the schedule of payments (i.e., lump sum versus installments), but not in the total amount ordered.[112] The ABA's decision not to include the defendant's ability to pay is "[b]ased on the quasi-civil character of a restitution sanction."[113] Therefore, as in a civil action, the defendant's finances should not be considered. The ABA's belief that restitution is more civil in nature is exemplified by its suggestion that "[t]he legislature should enact appropriate provisions to *integrate* the criminal sanction of restitution or reparation with a victim's right of civil action against an offender."[114]

106. *Id.* § 6.04A(6).

107. *See id.* § 6.04A(3) cmt. f (defining who is a "victim" for the purposes of restitution and explaining the change to "a streamlined definition" from the previous version of the Model Code).

108. *Id.* § 6.04A(7)–(8).

109. STANDARDS FOR CRIMINAL JUSTICE: SENTENCING STANDARDS § 18-1.2(a) (AM. BAR. ASS'N 1994).

110. *Id.* § 18-3.15(a).

111. *Id.* § 18-3.15(b). This is a narrow provision, which would apply in situations where the offender has unique skills or resources to cure the injury or loss they created, such as "a government contractor, convicted of fraud in the supply of defective materials to the government, may be uniquely positioned to repair or cure the defect." *Id.* § 18-3.15 n.7.

112. *Id.* § 18-3.15.

113. *Id.* § 18-3.15 cmt.

114. *Id.* (emphasis added).

III. THE PROBLEMS WITH ORDERING RESTITUTION WITHOUT CONSIDERING A DEFENDANT'S REASONABLE ABILITY TO PAY

This Part analyzes problems associated with state-level restitution procedures that do not consider defendants' ability to pay during the early stages of sentencing. Section III.A discusses the rising inability of state courts to collect the majority of restitution that is ordered, arguing ability to pay is one aspect of restitution that impacts collection rates.[115] Section III.B examines states that have undergone restitution reform and successfully increased their rate of collection. Each of the states that have undergone reform have in some way improved the extent to which a defendant's financial circumstances are considered. Section III.C discusses the judicial resources that are wasted by pursuing defendants for unpaid restitution. Lastly, Section III.D addresses the ways in which unpaid restitution affects a defendant's ability to successfully rehabilitate in society. Inability to successfully rehabilitate is often due to a defendant's entrapment in a cycle of incarceration and the restraints that are placed on a defendant by criminal debt.

A. FAILURE TO COLLECT THE MAJORITY OF ORDERS FOR RESTITUTION

There is no central method that states use when ordering, calculating, or modifying restitution.[116] As of 2011, 23 states allow their judges to consider a defendant's financial circumstances when ordering restitution, six states prohibit judges from so considering, and 21 states do not have laws or guidelines for judges ordering restitution.[117] While all states will likely struggle to collect the full amount of restitution ordered and owed to victims, differences in the way restitution is ordered and enforced likely affect the amount a state is able to collect.[118] Several factors impact the amount of restitution that a state is able to collect; however, states may be able to lower their amount of unpaid restitution by considering a defendant's ability to pay when calculating the amount of restitution.

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115. For example, in 2007, 11 states had an average outstanding restitution debt of $178 million. BUREAU OF JUST. ASSISTANCE, REPAYING DEBTS 7 (2007), https://nrrc.csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_full_report-2.pdf [https://perma.cc/VML3-GMMF].

116. Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 134 (2014) [hereinafter Lollar, *What is Criminal Restitution?*] ("Courts have run the gamut in their answers to these questions [of how to calculate restitution], yet no consistent methodology has emerged, nor has the Supreme Court required one."); *see also* Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343, 365 (2013) ("After reviewing the decisions of courts in jurisdictions across the country, it becomes clear that there is little common logic, method, or analysis used to calculate restitution in non-contact child pornography cases.").

117. R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1793 (2015).

118. *See infra* Section III.B (discussing state restitution reform, each state which successfully increased its collection rate somehow considered a defendant's ability to pay, alongside other methods to increase compliance and collection).

There is a wide-spread restitution (and criminal debt in general) collection problem. Many states have millions of dollars that have gone uncollected for a number of years.[119] Some states, moreover, do not even keep track of the amount of restitution which has been ordered, the amount that is collected, or the amount that is distributed to victims.[120] In 2007, 11 states surveyed had "an average of $178 million per state in uncollected court costs, fines, fees, and restitution."[121] In Colorado, only 66 percent of restitution was paid in full between 1993 and 2018,[122] and Colorado law requires that a defendant's ability to pay be irrelevant when ordering restitution.[123] Additionally, in Colorado, "[m]ore than 86,000 people have been waiting for five years or longer for their restitution to be paid off."[124] South Dakota courts have ordered $10.4 million in restitution since 2016, yet they have only been able to collect around $2.1 million for victims.[125] South Dakota considers whether there is a "reasonable possibility" a defendant will be able to pay restitution during their probationary period.[126] California had a $9.1 billion delinquent restitution debt and was able to collect $3.9 billion.[127] California considers a "defendant's inability to pay" as a relevant factor when ordering the amount of restitution; however, it "shall not be considered a compelling and extraordinary reason not to impose a restitution fine."[128]

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119. *See* BUREAU OF JUST. ASSISTANCE, *supra* note 115, at 7.

120. *See* Douglass Dowty, *Fixing NY's Broken Restitution System: Other States Offer Solutions*, SYRACUSE.COM (Mar. 22, 2019), https://www.syracuse.com/crime/2015/09/fixing_nys_broken_restitution_system_other_states_offer_solutions.html [https://perma.cc/FSP8-GSWD] ("Unlike other states, New York does not track how much restitution is owed, or how successful authorities are at collecting delinquent payments from criminals.").

121. BUREAU OF JUST. ASSISTANCE, *supra* note 115, at 7.

122. *For Victims of Crime, Collecting Court-Ordered Restitution Can Be a Nightmare*, DENVER CHANNEL (Dec. 12, 2018, 11:28 AM), https://www.thedenverchannel.com/longform/for-victims-of-crime-collecting-court-ordered-restitution-can-be-a-nightmare [https://perma.cc/MCM4-WMBG].

123. People v. Stovall, 75 P.3d 1165, 1167 (Colo. App. 2003) ("[R]estitution [should] be ordered in every case in which the victim has suffered a pecuniary loss, regardless of the defendant's ability to pay restitution."); *see also* COLO. REV. STAT. ANN. § 18-1.3-601 (West 2002) (declining to include ability to pay as a consideration and indicating that offenders have "a moral and legal obligation to make full restitution to" victims).

124. *These 10 Convicted Criminals Owe Their Victims a Combined $194 Million Dollars*, DENVER CHANNEL (Nov. 8, 2017, 7:36 PM), https://www.thedenverchannel.com/news/investigations/these-10-convicted-criminals-owe-their-victims-a-combined-194-million-dollars.

125. Nick Lowrey, *Many Crime Victims in South Dakota Not Being Paid Restitution They Are Owed*, ARGUS LEADER (Sept. 24, 2019, 9:29 AM), https://www.argusleader.com/story/news/crime/2019/09/24/many-crime-victims-south-dakota-not-being-paid-restitution-they-owed/2427285001 [https://perma.cc/X86V-REUE].

126. *See* S.D. CODIFIED LAWS § 23A-28-3 (2020).

127. *See* Dowty, *supra* note 120.

128. CAL. PENAL CODE § 1202.4(c)–(d) (West 2019), *unconstitutional as applied by* People v. Cowan, 47 Cal. Rptr. 3d 505 (Ct. App.), *cert. granted*, 466 P.3d 843 (Cal. 2020).

B. *JUDICIAL TIME AND RESOURCES SPENT ATTEMPTING TO COLLECT RESTITUTION WITHOUT LIKELIHOOD OF COLLECTION*

Some may reasonably believe that a defendant's ability to pay should not be considered at any stage of the restitution process because restitution is essential to making victims whole and defendants deserve to "right their wrongs." Strict adherence to these ideas, however, will likely lead to extensive and often fruitless efforts to collect the full amount of restitution owed to victims. For example, some states resort to hiring private collection agencies to try to increase their collection rate.[129] Often, the agency's collection fee is added to the total amount the defendant must pay.[130] The defendant must pay this fee on top of their total amount of restitution, and it may go too far for defendants who have no reasonable ability to pay. Only for those who could pay, but simply refused, would the additional fee serve as meaningful punishment for disobedience. In at least one state, the collection fee gets deducted from the amount received by the victim.[131] Victims almost always have a civil remedy against a criminal defendant: They may pursue a cause of action to recover unpaid fees and deduct any restitution already paid from an entry of judgment.[132] Requiring victims to effectively pay the collection fees or, alternatively, to seek payment from a costly civil cause of action seems to defeat the central purpose of restitution—making the victim whole. Finally, states could also willingly absorb collection costs into the judiciary.[133] Notably,

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129. *See, e.g.*, ALA. CODE § 12-17-225.7 (2020); CAL. PENAL CODE § 3000.05; MISS. CODE ANN. § 99-37-13 (2019); MO. ANN. STAT. § 488.5030 (West 2019); NEV. REV. STAT. § 176.064 (2019); 42 PA. CONS. STAT. § 9730.1 (2019); VT. STAT. ANN. tit. 28, § 102(b)(12) (2019).

130. *See, e.g.*, ALA. CODE § 12-17-225.4 ("[A] court shall assess a collection fee of 30 percent of the funds due which shall be added to the amount of funds due."); MO. ANN. STAT. § 488.5030 (adding a fee up to but not exceeding 20 percent to the amount defendant must pay); NEV. REV. STAT. § 176.064(1) (imposing fines of $100, $500 or ten percent of the amount defendant must pay); 42 PA. CONS. STAT. § 9730.1(b)(2) (adding a 25 percent fee to the amount defendant must pay).

131. *See* VT. STAT. ANN. tit. 28, § 102(b)(12) ("The Commissioner may agree to pay collection agencies a fixed rate for services rendered or a percentage of the amount collected which shall be added to any amounts and may be recovered as an administrative cost of collection. Any such fixed rate or percentage may be deducted directly by the collection agency on a pro rata basis from any portion of the money so collected.").

132. *See, e.g.*, MISS. CODE ANN. § 99-37-17(1) ("Nothing in this chapter limits or impairs the right of a person injured by a defendant's criminal activities to sue and recover damages from the defendant in a civil action. . . . However, the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in such civil action."); NEB. REV. STAT. ANN. § 29-2287(3) (West 2020) ("Any restitution paid by the defendant to the victim shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution."); UTAH CODE ANN. § 77-38a-403(1) (West 2020) ("[T]he court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in the civil action.").

133. *See* MISS. CODE ANN. § 99-37-13; Miss. Att'y Gen. Op. No. 2003-0032 (Jan. 31, 2003) ("[I]t is the opinion of this office that a court may assign delinquent restitution payments to a

they will probably end up doing so anyway if a defendant fails to pay enough to cover collection costs.

Collection problems grow exponentially as the time between the adjudication of restitution and collection increases.[134] One reason is because "[o]nce offenders are released from probation, they are free to leave the state[,] [a]nd once offenders leave the state, the chances of . . . collecting restitution decrease dramatically."[135] Without knowing the defendant's financial situation before they leave, states are often left to decide whether it is worth it to bring the defendant back into the state's jurisdiction to enforce a restitution order.[136]

Ultimately, when restitution is not originally ordered in light of a defendant's ability to pay, courts often still have to determine a defendant's ability to pay down the line when they default on payment.[137] Many state[138] and federal laws[139] prohibit judges from incarcerating defendants or revoking probation for simple failure to pay restitution unless the court first finds that they have an ability to pay. Otherwise, states have been criticized for incarcerating people essentially based on their lack of wealth.[140] The time and

collection agency for the benefit of the victim along with the delinquent fines and court costs owed to the county (although the fee may not be added to the restitution).").

134. *See* Timothy P. Jensen & Michael J. Pendell, *Eyes Wide Shut: The Perils of Failing to Take Action to Undo Fraudulent Transfers Before Entry of a Restitution Order*, 44 CONN. L. REV. CONNTEMPLATIONS 33, 36 (2012) ("[C]ollecting on a criminal restitution order is difficult because of . . . the significant amount of time that passes between arrest and sentencing.").

135. NAT'L CTR. FOR VICTIMS OF CRIME, MAKING RESTITUTION REAL: FIVE CASE STUDIES ON IMPROVING RESTITUTION COLLECTION 45 (2011), http://www.ncdsv.org/images/NCVC_MakingRestitutionReal_2011.pdf [https://perma.cc/8DV9-RUJF].

136. *Id.*

137. *See* Sobol, *supra* note 5, at 505–07 (discussing case law and state statutory law which prohibits incarcerating defendants for failure to pay a fine without considering whether they have an ability to pay).

138. *See, e.g.*, State v. Dye, 715 S.W.2d 36, 40 (Tenn. 1986) (requiring a finding that "[the] defendant was 'somehow . . . at fault in failing to pay'" before incarceration, regardless of "the fact that defendant may have bargained for the imposition of restitution in lieu of incarceration" (quoting Bearden v. Georgia, 461 U.S. 660, 668 (1983))); Del Valle v. State, 80 So. 3d 999, 1002 (Fla. 2011) ("[B]efore a trial court may properly revoke probation and incarcerate a probationer for failure to pay, it must inquire into the probationer's ability to pay and determine whether the probationer had the ability to pay but willfully refused to do so."); Commonwealth v. Henry, 55 N.E.3d 943, 950 (Mass. 2016) ("A defendant can be found in violation of a probationary condition only where the violation was wilful, and the failure to make a restitution payment that the probationer is unable to pay is not a wilful violation of probation.").

139. *Bearden*, 461 U.S. at 671 ("[T]he State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty." (citation omitted)).

140. *See* Sobol, *supra* note 5, at 512 ("Failure to pay [legal financial obligations, including restitution] has resulted in 'a significant number of warrants, arrests, probation revocations, jail stays, and prison admissions in locales across the country.'" (quoting Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 512 (2011))).

court resources used just to determine whether a defendant has "willfully disregarded" a restitution order, or has no ability to pay at this point, are significant.[141] This includes the repeated efforts of probation officers to convince defendants to make payments, probation revocation hearings, and service of a warrant or summons.[142] Therefore, states that do not consider a defendant's ability to pay, yet require a "willful" violation of restitution to revoke probation or parole, will likely still be unable to enforce the court's ruling against an indigent or nearly-indigent defendant, despite significant efforts already wasted in attempting to coerce the defendant into compliance. Although there will still be time and money spent assessing the defendant's ability to pay before ordering restitution, part of the work may already be done depending on whether the indigent defendant qualified to be appointed a public defender.[143]

C. *RESTITUTION, INDIGENT DEFENDANTS, AND REHABILITATION*

Finally, restitution orders imposed against defendants who currently do not, and may never, have a reasonable ability to pay restitution impede rehabilitation efforts in the future. Defendants who have no ability to pay may be placed in a cycle of incarceration, perpetually increasing debt, or both.

1. Cycle of Incarceration

Some may say that *Bearden v. Georgia* and state laws that require courts to find a reasonable ability to pay before revoking parole or imposing incarceration[144] provide sufficient protection for indigent defendants from being punished merely for their lack of wealth. However, despite these protections, incarceration of indigent defendants because of their inability to pay restitution is increasing.[145] This increase could be because the "willful refusal to pay" requirement in practice may do little to nothing, simply because "judges sometimes 'don't believe' defendants who say they are indigent and have not been able to obtain the necessary funds."[146] In

141. *See* Linda F. Frank, *The Collection of Restitution: An Often Overlooked Service to Crime Victims*, 8 ST. JOHN'S J. LEGAL COMMENT. 107, 128–30 (1992) (discussing a common scenario and estimating that it costs "[a]pproximately fifty-five hours of the public's time, paid for by the state's taxpayers" to reach a court hearing as to whether the offenders probation should be revoked for failure to pay restitution).

142. *Id.*

143. Sobol, *supra* note 5, at 536 ("To help streamline and standardize the process, specific guidelines and forms should be developed to allow courts to address the inability-to-pay issue properly. Although this may seem like a heavy burden, courts routinely make assessments about an individual's need for a public defender." (footnote omitted)).

144. *See supra* text accompanying notes 117–18.

145. *See* Sobol, *supra* note 5, at 512 ("Despite the statutory and case law prohibitions, the incarceration of indigents for failure to pay has increased along with the growth of criminal justice debt.").

146. ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 34 (2010),

Maricopa County, Arizona[147] for example, a judge determined that the defendant had willfully refused to pay after she failed to make any restitution payments for a year, but appeared to be paying most of her bills on time.[148] The court made this determination despite the fact that she had no cell phone, had a high risk loan on her car that she needed to get to work, had a son who lived with her, and lived with her parents and paid their home expenses. The defendant stated, "I know I can't pay it at this time right now,"[149] to which the judge replied, "[Y]ou earned income in 2009[,] [y]our husband earned income in 2009[,] [y]ou're living with your parents[;] [s]o you're paying bills, but you *chose* not to pay your probation restitution."[150] Likewise, in *United States v. Montgomery*, the Eighth Circuit upheld a finding that the defendant "willful[ly] fail[ed] 'to acquire the resources to pay' her restitution obligation."[151] The defendant had introduced evidence of several attempts to obtain employment and testimony from the defendant's counselor that he had "concerns" about the defendant's employability due the defendant's physical and mental illnesses.[152]

2. Increasing Debt

Another problem with not considering ability to pay is that restitution may remain on a defendant's criminal record, continuing to mark them with the label as a "criminal" even after they have completed all of the other conditions of their sentence.[153] People with a criminal record already face significant challenges in obtaining employment after a conviction alone;[154]

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https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [https://perma.cc/KN38-BD6T]; *see also* Stevens H. Clarke, *What Is the Purpose of Probation and Why Do We Revoke It?*, 25 CRIME & DELINQ. 409, 419 (1979) ("Judges vary in their attitudes to such defenses [of inability to pay]. Some may be merciful and remit part of the restitution amount; others may be very skeptical of the probationer's testimony that he is unable to get a job or earn enough to pay the full amount. Some judges apparently feel that since the probationer has agreed to restitution, he should be imprisoned for failure to pay, whether or not he is able to earn the money.").

147. See *infra* notes 174–79 and accompanying text for a discussion of Maricopa County's restitution process.

148. NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 135, at 84–89.

149. *Id.* at 88.

150. *Id.* at 89 (emphasis added). The court proceeded to find the defendant in contempt and ordered her to pay a "purge" amount which must be paid before she could be released from prison, at $10,980. *Id.*

151. United States v. Montgomery, 532 F.3d 811, 813–14 (8th Cir. 2008) (quoting Bearden v. Georgia, 461 U.S. 660, 672 (1983)).

152. *Id.*

153. Lollar, *What is Criminal Restitution?*, *supra* note 116, at 108 (discussing the long-term implications of restitution on a defendant).

154. *See* Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 540 (1996) ("The private sector, however, unofficially punishes known criminals by stigmatizing them. Once the criminal's behavior becomes known, other individuals become more reluctant to interact with him.").

restitution in excess of ability to pay further burdens defendants' rehabilitation. Additionally, criminal debt "can impact everything from [a defendant's] employment and housing opportunities, to their financial stability, to their right to vote" to their right to serve on a jury, or their ability to run for office.[155] A defendant may also face liberty restrictions such as continued court supervision alongside the looming threat of incarceration if a judge finds they have could have paid but "willfully" refused.[156] Most significantly, several states permit reporting of restitution debt on defendants' credit histories.[157] People with criminal records and outstanding restitution debt may face a higher difficulty in obtaining employment, especially given employers' growing access to applicants' credit reports and court records.[158] If little to no determination of the offender's ability to pay has been determined, restitution debt can continue to hang over a defendant's head with little hope for change.

IV. SOLUTION

This Part argues that legislatures should generally give courts broad discretion and an array of options to consider the amount of restitution that should be ordered, alternative forms of restitution, and how to address delinquency. Although broad discretion does leave room for judicial abuse in the form of excessive restitution (based on either ability to pay or victims' actual losses), defendants are protected by their right to appellate review for abuse of discretion, the Eighth Amendment Excessive Fines Clause, or other relevant statutory grounds.[159] Section IV.A argues first that a defendant's

155. *See* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/42QS-DK76]; Lollar, *What is Criminal Restitution?*, *supra* note 116, at 123.

156. *See* Lollar, *What is Criminal Restitution?*, *supra* note 116, at 123–24 (comparing consequences of restitution to consequences already suffered due to criminal conviction).

157. BANNON ET AL., *supra* note 155, at 27 (reviewing several states' restitution procedures and finding, in all 15 states reviewed, criminal debt and collection costs could somehow show up on credit reports, based on each state's collection practices).

158. *See id.* (discussing the increasing level of employer access to records, including credit history which often contains outstanding restitution debt, which employers use to make hiring decisions).

159. *See* Paroline v. United States, 572 U.S. 434, 455–56 (2014) ("To be sure, this Court has said that 'the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.' But while restitution under § 2259 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.'" (citations omitted) (first quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989); then quoting United States v. Bajakajian, 524 U.S. 321, 328 (1998))); State v. Matthews, 434 P.3d 209, 211 (Idaho 2019) ("This Court uses an abuse-of-discretion standard of review to determine whether a sentence is excessive, as well as to evaluate a district court's decision regarding restitution." (citation omitted)); Commonwealth v. Whatley, 221 A.3d 651, 654 (Pa. Super. Ct.

reasonable ability to pay should be considered when ordering restitution. This approach wisely uses judicial resources, obtains a benefit for the offender's victim(s), and best rehabilitates the defendant. Then, Section IV.B argues more state courts should be allowed to modify restitution payment plans in the event of default, including avoiding imposing fines or other penalties, as long as the defendant is making attempts to comply with the restitution order.

A. RESTITUTION REFORM REGARDING DEFENDANT'S ABILITY TO PAY

Some states have set aside time and resources to attempt to reform their restitution systems due to their low level of collection. It is significant to note that each state that enacted a restitution reform program, discussed below, *did* consider a defendant's financial circumstances at some stage in the reform. A defendant's ability to pay is not the sole factor that impacts the success or failure of collection, but it is a key factor in fixing the restitution collection problem.

Virginia conducted a report on its restitution collection problems and found approximately $406 million in unpaid restitution in November 2016.[160] At that point, Virginia judges were not able to consider a defendant's ability to pay when ordering restitution; however, they allowed the defendant to present a "reasonable and practical" payment plan, and if the defendant failed to pay, the court had to determine whether the failure was "unreasonable" before revoking the defendant's probation.[161] The Virginia State Crime Commission, in its report, proceeded to "unanimously endorse[]" the recommendation that "Virginia Code § 19.2-305.1 should be amended to allow for both the defendant and the Commonwealth's Attorney to seek modification of the terms of payment of restitution in the event that a defendant's ability to pay changes."[162] However, the Virginia legislature has yet to adopt this recommendation.[163]

In 2004, Vermont reformed its criminal restitution system in a variety of ways, including establishing a procedure by which the court will best be able

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2019) ("We therefore conclude that by failing to consider Appellant's ability to pay prior to imposing restitution as a condition of his probation pursuant to section 9754(c)(8), the court exceeded its statutory authority. As a result, the restitution order imposed constitutes an illegal sentence, and we vacate the judgment of sentence.").

160. *See generally* VA. STATE CRIME COMM'N, 2016 ANNUAL REPORT: RESTITUTION: COLLECTION PRACTICES AND EXTENSION OF PROBATION (2016), http://vscc.virginia.gov/FINAL%20Restitution.pdf [https://perma.cc/8YPT-Q5CX] (detailing the findings of the report).

161. VA. CODE ANN. § 19.2-305.1(C), (G) (West 2020) ("The plan shall include the defendant's home address, place of employment and address, social security number and bank information. . . . Unreasonable failure to execute the plan by the defendant shall result in revocation of the probation or imposition of the suspended sentence.").

162. VA. STATE CRIME COMM'N, *supra* note 160, at 76.

163. *See generally* VA. CODE ANN. § 19.2-305.1 (noting the absence of any such amendment).

to determine a defendant's ability to pay.[164] Accordingly, the court can consider a defendant's

> current ability to pay restitution, based on all financial information available to the court, . . . [and, if] the offender is unable to pay . . . the court shall establish a restitution payment schedule . . . based upon the offender's current and reasonably foreseeable ability to pay.[165]

Vermont's reform increased the amount of restitution the state collected from "approximately $30,000 a year in restitution . . . to $90,000."[166] Although there are no statistics from Vermont regarding its overall restitution debt, this increase in the total amount collected presumably increased Vermont's collection rate.[167]

Michigan also reformed its restitution procedure in 2004 by adopting a detailed ten-component plan to increase collection.[168] Components one, four, and five contain provisions regarding a defendant's ability to pay.[169] Components one and four dedicate staff to reviewing a defendant's financial statements and establish a payment plan with "the highest payment amounts in the shortest period of time . . . considering the amount owed and the litigant's ability to pay."[170] Component five makes community service an alternative for defendants who have demonstrated to the court that they cannot reasonably pay.[171] Commenting on the impact of Michigan's reform, the National Center for Victims of Crime stated:

> Despite a worsening economy, courts have seen an increase in collections when they implement the collections tools that have proven to be effective. . . . Because collections enforcement is ultimately about compliance, holding offenders accountable also provides them with a sense of ownership, accomplishment, and responsibility. By facilitating compliance and providing payment alternatives (such as community service) for those that do not have the ability to pay, offenders feel they have accomplished something worthwhile when they satisfy their obligations by either paying or helping the community in which they committed their crime.[172]

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164. *See* NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 135, at 37–39.

165. VT. STAT. ANN. tit. 13, § 7043(d)(2), (e)(1) (West 2020).

166. NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 135, at 43.

167. *See id.* at 37–46 (describing the impact of Vermont's reformed restitution structure).

168. *Id.* at 9, 27–30.

169. *Id.* at 27–28.

170. *Id.*

171. *Id.* at 28 ("Payment alternatives such as community service are not considered unless the litigant is in jeopardy of failing to comply with the court order and has demonstrated that he or she has exercised due diligence in attempting to comply.").

172. *Id.* at 17–18.

However, Michigan's reform has also been criticized for its failure to consistently inform defendants of their right to a hearing regarding their ability to pay;[173] therefore, the state may not be fully reaping the intended benefits of its reform efforts.

Another significant reform effort was undertaken by Maricopa County, Arizona. In 2008, Maricopa County began increasing collection of delinquent payments by placing a significant amount of attention on a defendant's reasonable ability to pay.[174] The court conducts an in-depth hearing to determine whether a defendant has willingly refused to pay restitution, or whether they do not have an ability to pay.[175] At the hearing the court will ask the defendant questions about their current bills and subscription services, including questions such as, "Do you have cable or satellite? Does your service include the NFL, MLB, or Hockey Package?"[176] If the defendant is paying their bills, the court could presume they have a reasonable ability to pay or continue the hearing by reviewing other financial statements or the defendant's job search attempts.[177] However, questions such as these may go too far by prioritizing restitution payments above other debts or bills and thereby overestimating their ability to pay. If the court finds the defendant can pay, it will find the defendant guilty of contempt, order incarceration, and set a "purge" amount which must be paid before the defendant can be released.[178] In 18 months, the new program "collected approximately $200,000 in delinquent restitution payments."[179]

B. JUDGES SHOULD BE ABLE TO CONSIDER A DEFENDANT'S FINANCIAL CIRCUMSTANCES AND THEIR REASONABLE ABILITY TO PAY WHEN ORDERING RESTITUTION

When ordering mandatory or discretionary restitution, state legislatures should create a statutory framework that allows judges to consider the defendant's financial circumstances and their reasonable ability to pay when ordering the total amount owed (as required by the 2017 Model Penal Code)[180] and when creating a reasonable payment plan (as suggested by the

173. ACLU, *supra* note 146, at 38 (explaining that some rural courts send out letters to inform indigent defendants of their obligation to pay, but the "letters do not inform the defendants that they are entitled to a hearing on their ability to pay").

174. NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 135, at 64, 66. The court's scrutiny of a defendant's ability to pay is also subject to criticism, as it is based on an individual judges' potential disbelief of defendants' claims that they cannot pay. *See supra* Section III.C.2.

175. NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 135, at 64, 66.

176. *Id.* Some other questions include: "[D]o you have a cell phone?," "Do you have a car?," and "How many children do you have?" *Id.* at 86–87.

177. *Id.* at 66–67.

178. ARIZ. REV. STAT. ANN. § 13-810(E) (2019).

179. NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 135, at 69.

180. MODEL PENAL CODE § 6.04A(6) (AM. L. INST., Proposed Final Draft 2017).

ABA's Standard for Restitution or Reparation).[181] States should not waste valuable resources trying to shake down defendants who have no reasonable ability to pay the amount they have been ordered to pay.[182] If a defendant's restitution debt is too high, even with a reasonable payment plan, the likelihood of default increases compared to a "medium-size debt[]."[183] This increase in defaults could be due to feelings of hopelessness, or the offender's belief that they will never be able to pay off a large debt, so why bother trying?[184] Ordering an amount that is reasonable in light of the defendant's financial circumstances *and* placing a defendant on a reasonable payment plan should increase collection rates.

Ordering restitution in light of a defendant's ability to pay still accomplishes the goals of restitution. Defendants are more likely to be successfully rehabilitated into society if they are showing progress on their payments or community service.[185] Earlier awareness of a defendant's ability to pay may reduce the number of defaults and subsequent incarcerations. Considering a defendant's ability to pay and *then* expending resources to collect that amount still provides victims with much of the same benefits that they would receive anyway, especially considering that the majority of restitution in states which do not consider a defendant's ability to pay goes uncollected.[186]

Judges should also have the option to consider alternative forms of restitution for indigent defendants, such as community service.[187] Community service itself may be too time-consuming for defendants who currently have

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181. STANDARDS FOR CRIMINAL JUSTICE: SENTENCING STANDARDS § 18-3.15 (AM. BAR ASS'N 1994).

182. BANNON ET AL., *supra* note 155, at 13 ("Expending personnel and resources to collect debt from people who lack the ability to pay is a waste of scarce criminal justice funds. And as experts on child support compliance have argued, low-income debtors are far more likely to make payments when the payment amount is manageable.").

183. *See id.* at 14.

184. *See* Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 65–66 (2017) ("Proponents of graduation according to ability to pay have suggested that the practice will result in stable, or even increased, revenue intake as economic sanctions become more manageable for people of limited means. . . . The graduation of economic sanctions to a manageable amount, in contrast, should promote a belief that the debt is surmountable, leading to higher levels of self-efficacy and greater efforts at completing payment." (footnote omitted)).

185. *See generally* ARIZ. SUP. CT., JUSTICE FOR ALL: REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON FAIR JUSTICE FOR ALL: COURT-ORDERED FINES, PENALTIES, FEES, AND PRETRIAL RELEASE POLICIES 16 (2016), https://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%2012-final%20formatted%20versionRED%20(002).pdf?ver=2016-08-16-090815-647 [https://perma.cc/U6D9-KM5G] ("Many defendants who are exhibiting progress and have completed community restitution (service) may fall delinquent on financial payments because of high monthly payment amounts and an inability to pay. This makes them ineligible for [reduced probation], even though the primary goals of probation have been accomplished.").

186. *See supra* Section III.A.

187. *See* BANNON ET AL., *supra* note 155, at 15.

jobs or other significant obligations. Therefore, it should not automatically be imposed for all defendants who lack an ability to pay, but should be available as an option for defendants to request in lieu of paying a portion or all of restitution. Community service will also still indirectly benefit victims, identifiable or not, by improving the community.[188]

Critics of ordering restitution in light of an offender's financial circumstances might argue that a court's determination of a defendant's ability to pay is too speculative or that it cannot predict their future earning capacity. For example, an offender may be unemployed at time of sentencing, but later become solvent and subsequently have a reasonable ability to pay.[189] While this is a logical argument to raise, determination of a defendant's ability to pay is no more skeptical than other factual findings conducted by the court.[190] For example, deciding whether a defendant should be released on bail may require the court to determine the defendant's likelihood of appearance.[191] There are many ways in which courts may determine what a defendant is able to reasonably pay, including reviewing financial statements, defendant's health, education, employment history, financial obligations (including dependents), and social security benefits.[192] Additionally, courts can receive evidence based on a defendant's current income, which is predictive of future income, or make a determination of their future earning capacity, for example, based on experience, education level, or other skills.

Courts may also test creative methods for determining a reasonable amount for a defendant to pay. For example, a study in the 1980s tested the imposition of a "day-fine" process for economic sanctions. "First, criminal offenses were assigned a specific penalty unit or range of penalty units that

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188. Susan Sarnoff, *Restitution: Exploring Disparities and Potentials*, 13 CRIMINOLOGY & PUB. POL'Y 437, 439 (2014) ("To be effective, however, such a program must offer meaningful community work and reasonable pay (work that develops the skills of the offender and benefits the community) to unemployed offenders. . . . [I]t could be an additional way for offenders to 'pay' for their crimes, especially if their crimes affect communities as well as individuals, as they usually do.").

189. *See* Frank, *supra* note 141, at 128 (asking whether an "offender [should] be let off the hook just because he is unemployed at the time of sentencing").

190. For example, determining whether a defendant has financial need for a public defender. *See supra* note 143 and accompanying text.

191. *E.g.*, 18 U.S.C. § 3142(e) (2018) ("If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial."). And, regardless, the court will still often have to determine a defendant's ability to pay later on for those who default on payments because it must determine a defendant was willfully disregarding payments, and therefore had a reasonable ability to pay, before they can be incarcerated for failure to pay restitution. *See supra* notes 137–43 and accompanying text.

192. *See* Justice Steven H. David & Judge Cale J. Bradford, *Crime Does Not Pay: Understanding Criminal Debt*, 50 IND. L. REV. 1051, 1081 (2017) (explaining the factors used by Indiana courts to determine the amount a defendant can reasonably pay, with the burden placed on defendants to show an inability to pay).

increased with crime severity."[193] Then "the court would establish the defendant's adjusted daily income, in which income was adjusted downward to account for personal and familial living expenses."[194] And finally, "[t]he final day-fine amount was calculated by multiplying the penalty units by adjusted daily income."[195] Penalty units for restitution for certain crimes could be imposed statutorily or be determined by the court;[196] this approach may balance considerations of rehabilitation and retribution, by considering both the severity of the crime and the defendant's financial situation.

C. *JUDGES SHOULD RETAIN AUTHORITY TO MODIFY RESTITUTION OR A PAYMENT PLAN IF A DEFENDANT DEFAULTS ON PAYMENT*

Payment plans may subsequently become unreasonable for a defendant to pay, even though they were reasonable at the time they were ordered. In that case, restitution legislation should give judges or probation officers[197] the authority to reevaluate the plan when a defendant's financial circumstances change in a way that materially affects their ability to pay (e.g., losing a job, addition of a dependent, changing housing situation).[198] First considering adjusting a *payment plan* based on a defendant's ability to pay—and then moving to adjusting *the total amount of restitution* when a payment plan is unworkable—promotes discretion in considering a defendant's future financial earning capacity.[199] For example, a judge may lower a defendant's monthly restitution payments from $200 to $100 and advise the defendant they may make larger payments to fulfill the full amount sooner, especially if

193. Colgan, *supra* note 184, at 56 (citing Susan Turner & Judith Greene, *The FARE Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County*, 21 JUST. SYS. J. 1, 3 (1999)).

194. *Id.*

195. *Id.* at 56–57.

196. *Id.*

197. Whichever is the general practice in the jurisdiction. At least one circuit court has held that allowing a probation officer to set a payment plan does not abrogate judicial authority. Weinberger v. United States, 268 F.3d 346, 359–60 (6th Cir. 2001) ("[T]he district court acted properly by setting the total amount of restitution [the defendant] is required to pay and by delegating the schedule of payments to the Probation Office.").

198. Some may raise the point that modification of payment plans would also be appropriate or necessary when a defendant's financial circumstances *improve* such that they can pay more than they originally could. This is a good argument in an ideal world, however, in practice it would require creating a costly system of continually monitoring defendants after they have been released of their obligation to pay and essentially promotes increasing punishment for defendants who effectively rehabilitate, amongst other arguments which are outside the scope of this Note.

199. *See generally* 18 U.S.C. § 3613A(a) (2018) (giving judges broad discretion of how to hand a defendant's default on payment, including creating or adjusting a payment schedule, after "consider[ing] the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the fine or restitution order, and any other circumstances that may have a bearing on the defendant's ability or failure to comply with the order of a fine or restitution").

the judge believes the defendant will likely "get back on their feet" soon. Other strategies, such as notices of default and late penalties, should be used to try to coerce payment *before* the court turns to finding a defendant in contempt and subsequently ordering incarceration.[200] Further, late penalties should be assessed in light of a defendant's attempts to comply with the restitution order rather than being imposed automatically.[201]

Critics may argue that subsequent adjustments to a payment plan may place too high of a burden on the court to continually reevaluate a defendant's financial circumstances. However, this burden already exists because the court (or a delegated entity, such as the probation office) will already be required to consider a defendant's ability to pay when appointing a public defender, imposing additional fines, holding a contempt hearing, and before incarceration.[202] Additionally, courts could delegate authority to setting the payment plan to the probation office. Many states already do so because the probation office is likely to be in better place to determine offender's willingness to comply and their financial circumstances.[203]

V. CONCLUSION

Considering a defendant's ability to pay may not only increase the rate of unpaid restitution collection, but also improve the criminal justice system as a whole by protecting judicial resources and encouraging rehabilitation through a defendant's ability to "make amends." Courts should aim to reduce "debtors' prisons" by fairly considering a defendant's ability to pay at each step of the restitution process. States can also be creative by giving courts discretion to use alternative methods of calculating restitution and imposing non-financial methods of restitution, options which should remain at the heart of a court's restitution determinations.

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200. NAT'L CTR. FOR VICTIMS OF CRIME, *supra* note 135, at 14 ("[L]itigants are more likely to comply with orders when the trial court uses enabling (e.g., payment plans) or persuasive strategies (e.g., late penalty, delinquency notices) as opposed to coercive collection techniques. Coercive collection methods, such as contempt and jail, are more costly and, therefore, should be used as a last resort.").

201. Laurel I. Appelman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1513–14 (2016) ("When extended payment plans are an option, they come with high minimum payments and additional penalties if payments are late . . . . Adding to the burden, state statutes frequently forbid courts from taking an offender's indigent status into consideration when punitive fees, interest, and collection costs are imposed. Even when states or counties are permitted to consider financial ability [when imposing penalties], they often do not." (footnotes omitted)).

202. *See supra* notes 141–43 and accompanying text.

203. *See* Jacy Owens, Note, *A Progressive Response: Judicial Delegation of Authority to Federal Probation Officers*, 64 FLA. L. REV. 817, 838–39 (2012) (discussing state court approaches to probation officers setting payment schedules, including flexible approaches which give probation officers discretion to handle initial violations).